

SACRED SECRETS ENABLING CHILD SEX ABUSE

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Abstract

In this Article, we examine the harm caused by the clergy-penitent privilege. In doing so, we are not “religion bashers” nor are we interested in castigating either the institution of religion or people of faith. That is neither interesting nor constructive. What does serve as our primary focal point is an inquiry into the privilege through the lens of enabling harm. In doing so, we do not minimize the importance of confession but suggest inquiring whether the privilege is appropriate when the penitent confesses either to a past or future crime.

The age-old adage says there are three things not to discuss in polite company: sex, religion, and politics. We ignore that advice, for in this Article, we directly confront two of the three: religion and sex. The order of the two words is relevant for we make the argument that one of the principle tenets of two faiths – the Catholic Church and the Church of Jesus Christ of Latter-day Saints– enables sexual attacks on vulnerable children. While that is, we are convinced, not the desired goal of a critical aspect of both faiths, it is a reality. Perhaps an uncomfortable reality; nevertheless, it is an issue that demands addressing.

For that reason, we propose measures to alleviate the risks faced by victims and potential victims. In that sense, this Article is admittedly victim centric. The

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reason for that must be stated upfront: even a casual glance at the daily news confirms concerns regarding the risks posed by the clergy-penitent privilege. In a nutshell: what clergy hears in confession cannot be shared, regardless of whether the penitent's confession references a past crime or the intention to commit a future crime.

We argue the clergy-penitent privilege has the unintended consequence of enabling harm in general, child sex abuse in specific. In making this argument, we do not intend disrespect to faith or to people of faith. We do, however, posit that an important aspect of the two religions we address – the Catholic Church and the Church of Jesus Christ of Latter-day Saints – endangers vulnerable members of their respective communities. We choose to focus on the Catholic Church and the Church of Jesus Christ of Latter-day Saints because the prohibition on violating the privilege is most clearly articulated, and implemented, in these two faiths.

In 2013, a former Boise, Idaho, police officer turned himself in for abusing children, something he had reported to 15 members of the Mormon church, none of whom notified authorities. But prosecutors declined to file charges against the church because of Idaho's clergy-penitent privilege law.¹

We might think we're protecting the reputation of a religious community we love. Really, we're just signaling to everyone out there that we don't take abuse seriously.²

¹ See Jason Dearen & Michael Rezendes, *Churches Defend Clergy Loophole in Child Sex Abuse Reporting*, USNEWS (Sept. 28, 2022), <https://www.usnews.com/news/politics/articles/2022-09-28/churches-defend-clergy-loophole-in-child-sex-abuse-reporting>.

² Kristy Burmeister, *5 Ways You Might Be Enabling Abuse in the Church*, PATHEOS (Aug. 2, 2018), <https://www.patheos.com/blogs/waystationinthewilderness/2018/08/5-ways-you-might-be-enabling-abuse-in-the-church/>.

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INTRODUCTION

MJ was only five years old when her father, Paul Douglas Adams, confessed to his bishop that he sexually abuses her.³ The father, a member of the Church of Jesus Christ of Latter-day Saints (hereinafter the “Church of Jesus Christ”)⁴ was at a counseling session with his bishop when he admitted his addiction to pornography and the sexual exploitation of his daughter.⁵ The bishop, following the Church of Jesus Christ protocol, contacted the Church’s abuse help-line⁶ which

³ See *supra* note 1; Michael Rezendes, *7 Years of Sex Abuse: How Mormon Leaders Learned Arizona Man was Abusing his Kids and Let it Continue*, AZCENTRAL (Aug. 4, 2022), <https://www.azcentral.com/story/news/local/arizona/2022/08/04/mormon-church-sexual-abuse-help-line-paul-adams/10234183002/>.

⁴ We have shortened the name “The Church of Jesus Christ of Latter-day Saints” to the “Church of Jesus Christ,” as encouraged by the Church. See *Style Guide – The Name of the Church*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://newsroom.churchofjesuschrist.org/style-guide#:~:text=In%20the%20first%20reference%2C%20the,is%20also%20accurate%20and%20encouraged> (last visited Sept. 25, 2023).

⁵ See *supra* note 3.

⁶ During the course of our research, we called the Church of Jesus Christ’s help line to ask whether the Church’s help line and law firm, Kirton McConkie is one entity. We received a call back from Kirton McConkie but no information was provided.

notified him that he can do “absolutely nothing” to disclose the conversation, as it was considered privileged communication protected by Arizona’s clergy-penitent privilege.⁷ As a result, Adams continued to rape MJ for “as many as seven years,” and later, began sexually abusing her infant sister.⁸

Throughout the years of sexual abuse, Adams continued to be counseled by his bishop at the Church of Jesus Christ.⁹ In search of more guidance, the bishop told a second bishop, who also kept the matter confidential.¹⁰ During this time, Adams was “excommunicated”¹¹ from the Church of Jesus Christ.¹² Although the records from the excommunication hearing remain confidential, other members of the Church of Jesus Christ, as well as a state hearing clerk, knew of the abuse through the hearing but did not report to state authorities.¹³

The Adams sisters continued suffering through the abuse, until finally, the Department of Homeland Security arrested Adams in 2017.¹⁴ Because Adams had posted videos of the abuse online, bragging about his “perfect lifestyle” in which he could have “sex with his daughters whenever he pleased,” law enforcement officials in New Zealand came across the videos and notified the U.S. Department of Homeland Security of the abuse.¹⁵ Adams died by suicide before his trial could begin, while his wife was found guilty for failing to report child abuse and served two-and-a-half years in state prison.¹⁶ The Adams’ children have filed suit against a former Utah-state legislator and the Church’s abuse help-line law firm, Kirton McConkie, for conspiring with the Church of Jesus Christ and failing to report the

⁷ *Id.*

⁸ *Id.*; Michael Rezendes, *Judge Limits Clergy ‘Privilege’ Defense in Arizona LDS Sex Abuse Case*, THE SALT LAKE TRIBUNE (Aug. 18, 2022), <https://www.sltrib.com/religion/2022/08/18/judge-limits-clergy-privilege/#:~:text=%7C%20Aug.,%E2%80%9Cclergy%2Dpenitent%20privilege.%E2%80%9D>.

⁹ *Id.* (discussing how the bishop brought in Adams’ wife “in hopes she would do something to protect the children.”)

¹⁰ *Id.*

¹¹ The term “excommunication” has been replaced in the Church of Jesus Christ to “withdrawal of membership.” See Sydney Walker, *Why Some Words and Phrases are no Longer used in the Church’s General Handbook*, THE CHURCH NEWS (Sept. 29, 2021), <https://www.thechurchnews.com/2021/9/29/23216849/general-handbook-terms-no-longer-used#:~:text=%E2%80%9CDisfellowship%E2%80%9D%20has%20been%20changed%20to,to%20%E2%80%9Cwithdrawal%20of%20membership.%E2%80%9D>. However, at the time of Adams membership withdrawal, it was still referred to as “excommunication.”

¹² See Michael Rezendes, *Judge Limits Privilege Defense in Bisbee Mormon Sex Abuse Case*, AZCENTRAL (Aug. 19, 2022), <https://www.azcentral.com/story/news/local/arizona/2022/08/19/judge-limits-privilege-defense-paul-adams-sex-abuse-case-church-jesus-christ-latter-day-saints/7847578001/>.

¹³ *Id.*

¹⁴ See *supra* note 3.

¹⁵ *Id.*

¹⁶ *Id.*

abuse, thereby enabling it to go on for years.¹⁷ Although the Church had knowledge of only one child being abused at the time, the lawsuit involves all the Adams' children.

In this Article, we also address the clergy-penitent privilege in the Catholic Church. We do so because of the extraordinary importance the Church attaches to the privilege, which is deeply rooted in Church theology. Given the absoluteness of the privilege, a Catholic priest who violates confidentiality in the context of the confessional is considered to commit the "greatest ecclesiastical crime."¹⁸ After committing such a "crime", the priest is defrocked and no longer allowed to hear confession nor continue his priestly duties.¹⁹ While the severity of that sanction is not a matter for debate, what must be asked is whether the absolute ban withstands scrutiny predicated on the consequences of the privilege.

Similarly, the Arizona case is illustrative of the harm that results when abuse goes unreported under the protection of the privilege. In focusing on the harm resulting from the privilege, our primary goal is to recommend a legislative proposal whereby the privilege can be modified to protect vulnerable individuals, primarily children. We understand that this theory may cause anger, if not offense, for those identified with either faith. Perhaps people of faith belonging to other religions will be similarly dismayed by our proposal. While we respect, and understand such reactions, we believe limiting the privilege is justified, thereby outweighing the traditional way the privilege is understood.

In asking this question we have interacted with a broad range of individuals, including subject-matter experts and people of faith. In some instances, an individual was both an expert and a person of faith. While the trigger for our undertaking was the Arizona case, we came to learn that examples of harm are not limited to that tragic matter. It would, accordingly, be incorrect to view this case as an outlier or "one-off."

As we came to learn, the privilege, notwithstanding its sanctity, is not cost-free. While doctrine is dogmatic regarding the privilege, we believe that core belief must be re-examined given the harm it causes. It is irrelevant that harm is an unintended consequence; the critical reality is that harm is caused. For that reason, there is a need for balancing doctrine with the consequences of rigid adherence to

¹⁷ See Michael Rezendes & Jason Dearen, *Lawsuit in Arizona says Utah Firm and Lawmaker Helped Mormons Hide Abuse*, PBS (Oct. 12, 2022), <https://www.pbs.org/newshour/nation/lawsuit-in-arizona-says-utah-firm-and-lawmaker-helped-mormons-hide-abuse>. See also Lyda Longa, *Attorney Sues Mormon Church, Others in Horrific Child Abuse Case*, HERALD REVIEW (Jan. 13, 2022), https://www.myheraldreview.com/news/bisbee/attorney-sues-mormon-church-others-in-horrific-child-abuse-case/article_6d70f0aa-38cf-11eb-b39a-b737843b46d2.html.

¹⁸ See Jack Jenkins, *Unholy Secrets: The Legal Loophole that Allows Clergy to Hide Child Sexual Abuse*, THINKPROGRESS, <https://archive.thinkprogress.org/unholy-secrets-the-legal-loophole-that-allows-clergy-to-hide-child-sexual-abuse-9a6899029eb5/> (last visited Sept. 25, 2023).

¹⁹ *Id.*

beliefs and practices. If the practice enables harm, then moderating its application would represent a means to protect those most at risk from rigid doctrine.

Enablers are essential to perpetrators as they provide protection, whereby the primary actor can act with impunity and immunity. The term “enabling” has generally been associated with individuals who “enable” harm by failing to act on behalf of vulnerable individuals when a risk is known and preventable. Examples include “enablers” at Michigan State University and USA Gymnastics who facilitated Larry Nassar;²⁰ Dr. Richard Strauss at The Ohio State University;²¹ Dr. Robert Anderson at the University of Michigan;²² abusive priests in the Catholic Church;²³ and Coach Jerry Sandusky at Penn State University.²⁴

These are but examples of a seemingly endless litany of individuals who chose to protect the institution directly and the perpetrator indirectly, while contributing to the harm of thousands.²⁵ We are confronted daily with similar stories of individuals making such decisions, notwithstanding their ability to prevent harm to present and future victims-survivors alike.

In the Arizona case, the decision to prevent the bishop from reporting what was learned in the confessional directly led to additional harm to young, vulnerable children. That was both predictable and preventable; to expect any other result would be unreasonable given the documented rates of recidivism and the unlimited access to young bodies the privilege grants a predator who has confessed, whether past or future sin. The combination of known risk-preventable harm is the essence of the enabling culture that has been widely documented. Without those who made the decision to protect the institution-predator, the unlimited reach of predators would be significantly limited.

That same analysis applies to the determined decision to protect the privilege. While church doctrine is sacred for members of a faith, the question is whether a principle should continue to take precedence over an individual. The question is not posed abstractly, but rather concretely with recognition that limiting the privilege violates established doctrine at the core of religious belief and institutions for millions of believers.

However, as we argue in this Article, there are larger interests at stake that demand our attention. The fact that harm may befall a vulnerable child must give pause even to those wedded to religious doctrine and orthodoxy.

That, more than anything, is the reality as the privilege is currently understood and practiced. While proponents of an absolutist approach to the privilege point to its historical underpinnings and importance to the confessing

²⁰ See generally AMOS N. GUIORA, *ARMIES OF ENABLERS – SURVIVOR STORIES OF COMPLICITY AND BETRAYAL IN SEXUAL ASSAULTS* (2020).

²¹ *Id.* at 83–96.

²² *Id.* at 65–69.

²³ *Id.* at 74–83.

²⁴ *Id.* at 72–73.

²⁵ It is for that reason, in separate undertakings, recommendations have been put forth for criminalizing enablers; see Amos N. Guiora, *Failing to Protect the Vulnerable: The Dangers of Institutional Complicity and Enablers*, UTAH L. SCHOLARSHIP (2021).

penitent, the voices of the abused are equally important, demanding our attention. Perhaps, we must prioritize their call for help, or, at the very least, re-structure the privilege so that equal weight is given to two powerful competing interests.

The instinctual phrase, “that’s the way it is” must be re-examined as it is an open question whether it stands rigorous scrutiny when considered from an enabling perspective after a penitent has harmed the vulnerable. To address this issue, the Article will be structured as follows: Section I: The Historical Background of the Clergy-Penitent Privilege; Section II: The Clergy-Penitent Privilege in the Law; Section III: What is Enabling?; Section IV: What is Institutional Complicity?; Section V: The Clergy-Penitent Privilege as an Enabler of Child Sex Abuse; Section VI: Legislative Proposals; Section VII: Moving Forward.

I. THE HISTORICAL BACKGROUND OF THE CLERGY-PENITENT PRIVILEGE

A. *The Catholic Church*

In the Catholic Church, the practice of confessing ones’ sins is attributable to the New Testament of the Bible in which Jesus Christ teaches his Apostles to “Receive the Holy Spirit. If you forgive anyone’s sins, their sins are forgiven; if you do not forgive them, they are not forgiven.”²⁶ In the beginning of the Catholic Church’s history, confessions and penance were public events, at least in regard to four particular sins: murder, blasphemy, adultery, and fornication.²⁷ This shameful and often embarrassing practice led the Church to amend its confessional procedures and make the confessional a private event, in the presence of a priest.²⁸ The role of the priest is to listen to the confession and determine whether to grant the penitent absolution.²⁹ Initially, absolution was granted only once during a person’s lifetime to “prevent abuse of the sacrament” and ensure that the penitent would not commit the same sin and seek absolution for it every time.³⁰ In

²⁶ See John 20:22-23 (King James). It is important to note that confession is also mentioned in other parts of the New Testament.

²⁷ See Mike Aquilina, *A Hushed History of Catholic Confessions*, ANGELUS (May 15, 2019), <https://angelusnews.com/voices/a-hushed-history-of-catholic-confessions/>; *Confession of Sins*, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/entry/Confession_of_Sins#:~:text=Mortal%20sin%2C%20according%20to%20Roman,at%20least%20once%20a%20year (last visited Sept. 20, 2023).

²⁸ *Id.*; see also DYAN ELLIOTT, *THE CORRUPTER OF THE BOYS* at 26 (2020).

²⁹ See Brendan Daly, *Seal of Confession: A Strict Obligation for Priests*, 90 THE AUSTRALASIAN CATHOLIC RECORD at 174, 180 (2013) (“Priest can delay or even deny absolution . . .”).

³⁰ See Chris Antenucci, *A History of the Use of the Sacrament of Reconciliation in the Early Church*, MEDIUM (Mar. 27, 2018), <https://medium.com/@chrisantenucci/a-history-of-the-use-of-the-sacrament-of-reconciliation-in-the-early-church-8d0eaf275faf> (“[A]bsolution after confession was only given once during a person’s life . . .” to prevent the abuse of the sacrament and ensure that people were truly repentant).

absolving an individual of their sins, the priest acts as a representative of the Trinity, granting absolution in God's name.³¹

Church doctrine requires Catholics to go to confession at least once a year if they are aware they have committed a "serious sin."³² Serious sins, also known as "mortal sins", are defined as those sins that are committed "in full knowledge of its gravity and with the full consent of the sinner's will."³³ These sins cover a wide range of actions, from masturbation and rape, to suicide and abortion.³⁴ If an individual fails to confess to a mortal sin, that individual is not allowed to partake in Holy Communion.³⁵ More importantly, an individual who fails to repent for such sin before death, is considered to go to hell upon death.³⁶ In contrast, venial sin is considered to be "less serious" than mortal sin.³⁷ Examples of such sin include hatred of one's neighbor or abusive language (to a certain extent).³⁸ The Catholic Church "strongly recommend[s]" people to confess these smaller, everyday sins.³⁹

The clergy-penitent privilege, otherwise known as the Seal of Confession in the Catholic Church stems back to the Fourth Lateran Council in 1215.⁴⁰ Canon 21 specifically addresses the privilege and the duty of the priest:

Let him take the utmost care, however, not to betray the sinner at all by word or sign or in any other way. If the priest needs wise advice, let him seek it cautiously without any mention of the person concerned. For if anyone presumes to reveal a sin disclosed to him in confession, we

³¹ See Genevieve Netherton, *Who Do Catholics Confess To A Priest?*, GOOD CATHOLIC (Feb. 8, 2022), <https://www.goodcatholic.com/why-do-catholics-confess-to-a-priest/> (last visited Oct. 13, 2023).

³² See Jim Blackburn, *What is the Requirement Regarding Yearly Confession?*, CATHOLIC ANSWERS, <https://www.catholic.com/qa/what-is-the-requirement-regarding-yearly-confession> (last visited Sept. 20, 2023) (citing CODE OF CANNON LAW 1457).

³³ See *Mortal Sin*, BRITANNICA, <https://www.britannica.com/topic/cardinal-sin> (last visited Sept. 20, 2023).

³⁴ *Id.*

³⁵ See *The 'Who Can Receive Holy Communion?' Ultimate Explainer*, THE PILLAR (Mar. 20, 2022), <https://www.pillarcatholic.com/p/the-who-can-receive-holy-communion> ("Anyone who is aware of having committed a mortal sin must not receive Holy Communion, even if he experiences deep contrition, without having first received sacramental absolution, unless he has a grave reason for receiving Communion and there is no possibility of going to confession.") (quoting Catechism).

³⁶ *Id.*

³⁷ See Jim Blackburn, *What Are Some Examples of Venial Sins?*, CATHOLIC ANSWERS, <https://www.catholic.com/qa/what-are-some-examples-of-venial-sins> (last visited Sept. 20, 2023).

³⁸ *Id.*

³⁹ See *Should We Confess Venial Sin?*, CATHOLIC ANSWERS, <https://www.catholic.com/qa/should-we-confess-venial-sin> (last visited Sept. 20, 2023).

⁴⁰ See *supra* note 29.

decree that he is not only to be deposed from his priestly office but also to be confined to a strict monastery to do perpetual penance.⁴¹

There are two ways for a priest to violate the seal of confession: indirect violation and direct violation.⁴² Specifically, indirect violation occurs when a priest reveals the confession by “words, gestures, deeds, or omissions of the confessor.”⁴³ On the other hand, a direct violation involves a priest openly sharing the penitent’s confession with others.⁴⁴ Canon 983 § 1 states, “The sacramental seal is inviolable; therefore it is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason.”⁴⁵ If a priest is to violate the seal of confidentiality, directly or indirectly, for any reason, the priest “would not be allowed to act as a priest,” and “would be charged with canonical crime.”⁴⁶

The only time a priest is allowed to reveal any information bound by the seal of confession is when the penitent grants express permission for the priest to do so.⁴⁷ Further, the priest cannot be coerced into sharing any information learned in the confessional.⁴⁸ The privilege within the Catholic Church is characterized by some as “absolute”⁴⁹ for these reasons. Most canonists agree that the goal of the privilege is to protect the penitent, whether it be from reputational or legal harm.⁵⁰

As illustrated, the practice of confession has been deeply rooted within the Catholic Church for centuries, and it is not likely to change in the foreseeable future. In 2019, Pope Francis stated, “The sacramental seal is indispensable and no human power has jurisdiction over it, nor can lay any claim to it.”⁵¹ The Pope’s statement suggests that if a law requires the revelation of certain confessions to authorities, the laws of the Catholic Church would prevail over the laws of secondary institutions.

Although the Catholic Church continues to recommend people to attend confessions on a regular basis, a study in 2012 indicated that the “number of

⁴¹ *Id.* (citing CODE OF CANNON LAW 21).

⁴² *Id.* at 176.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 175 (noting that interpreters present at a confession are also bound by the seal of confession).

⁴⁶ *See supra* note 18 (“It is the greatest ecclesiastical crime [the priest] could commit”).

⁴⁷ *See* Thomas P. Doyle, *Revelation of Confessional Matter with Permission*, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://archives.weirdload.com/docs/doyle-revelation-conf.pdf (last visited Sept. 25, 2023).

⁴⁸ *Id.*

⁴⁹ *See* F. Robert Radel, II, & Andrew A. Labbe, *The Clergy Penitent Privilege: An Overview*, 64 FED’N DEF & CORP. COUNS. 385, 395 (2015).

⁵⁰ *See supra* note 18.

⁵¹ *See* Cassidy Vavra, *Vatican, Pope Francis Say Seal of Confession Must Always Be Upheld as Lawmakers Try to Mandate Priests Report Sex Abuse Revealed in Confession*, NY DAILY NEWS, <https://www.nydailynews.com/2019/07/02/vatican-pope-francis-say-seal-of-confession-must-always-be-upheld-as-lawmakers-try-to-mandate-priests-report-sex-abuse-revealed-in-confession/> (last visited Sept. 25, 2023).

Catholics going to confession dropped from 38% to 17% in the past ten years.”⁵² However, some argue that properly understood, confession has the power of relieving one of their guilt, something that clinical psychology is often unable to do.⁵³ In other words, confession “frees the patient from guilt”⁵⁴ and moves the penitent closer to God.

B. The Church of Jesus Christ

The Church of Jesus Christ, like the Catholic Church, maintains the belief that “all are sinners.”⁵⁵ Because of this predicament, repentance is “one of the first principles of the gospel” and has been an integral part of the religion since its leader, Joseph Smith, founded the religion in 1830.⁵⁶ The Church of Jesus Christ attributes the practice of confession and repentance to the New Testament of the Bible.⁵⁷ Although confession is not a “mechanical requirement” within the Church, confession does result in reconciliation with God, and therefore, is highly encouraged by the Church.⁵⁸ Because scripture remains silent to the question of who and what to confess to, the Church of Jesus Christ allows a penitent to confess to God (in prayer), to individuals they have hurt, and to their ward bishop.⁵⁹ The process of confession in the Church of Jesus Christ is usually considered to be more informal than in the Catholic Church.⁶⁰

⁵² See Amber Martinez-Pilkington, *Shame and Guilt: The Psychology of Sacramental Confession*, 35 THE HUMANISTIC PSYCH 203, 204 (2007) (citing McLaughlin 2012). For more statistics on confession participation, see *Participation in Catholic Rites and Observances*, PEW RESEARCH CENTER, [https://www.pewresearch.org/religion/2015/09/02/chapter-2-participation-in-catholic-rites-and-observances/#:~:text=Mass%20\(35%25\).- ,Confession%2C%20Lenten%20Observances%20and%20Anointing%20of%20the%20Sick,the%20go%20once%20a%20year](https://www.pewresearch.org/religion/2015/09/02/chapter-2-participation-in-catholic-rites-and-observances/#:~:text=Mass%20(35%25).- ,Confession%2C%20Lenten%20Observances%20and%20Anointing%20of%20the%20Sick,the%20go%20once%20a%20year) (last visited Sept. 25, 2023).

⁵³ *Id.*

⁵⁴ *Id.* at 212.

⁵⁵ See Edward L. Kimball, *Confession in LDS Doctrine and Practice*, 36 BYU STUDIES 7, 7 (1996-1997) (citing Rom. 3:23; Gal. 3:22).

⁵⁶ *Id.*; for a history of the Church of Jesus Christ, see also *History of The Church of Jesus Christ of Latter-day Saints*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://newsroom.churchofjesuschrist.org/article/history-of-the-church-of-jesus-christ-of-latter-day-saints#:~:text=Ten%20years%20later%2C%20after%20a,%2C%20in%20Fayette%2C%20New%20York> (last visited Sept. 28, 2023).

⁵⁷ *Id.* (“But this ye may know if a man repenteth of his sins – behold, he will confess them and forsake them”) (quoting D&C 58:43).

⁵⁸ *Id.* (discussing how confession, unlike baptism, is not a “mechanical requirement, nor is it an ordinance . . .”).

⁵⁹ *Id.* at 8.

⁶⁰ See *supra* note 55 (“Unlike the Catholic tradition of making confession in a confessional booth, and using formulaic words, the LDS tradition is wholly informal and face-to-face

A member of the Church of Jesus Christ must “confess to God all failings, admit to other individuals the ways in which the member’s conduct has injured them, and reveal spontaneously or disclose voluntarily to the bishop anything that might justify Church discipline.”⁶¹ The category of sins that may require Church discipline includes “any sexual relations outside marriage, involvement with abortions . . . and any deliberate and major offense against the law.”⁶² However, confession is not limited to these “serious” sins and confession is encouraged even if one contemplates wrongdoing but has yet to commit the wrongdoing.⁶³ Unlike the power of priests in the Catholic Church to absolve sins, stake presidents and bishops do not have the power to do so.⁶⁴ Instead, the bishop’s role within the context of confession is to help the individual turn away from sin and toward God.⁶⁵

The privilege within the Church of Jesus Christ is “more of a matter of Church policy and practice than of doctrine . . .”⁶⁶ Although the bishop is required to maintain strict confidentiality, a bishop is expected to comply with the law of a state if it requires disclosure of, for example, child sex abuse.⁶⁷ Complying with the law would require a bishop to disclose instances of child sex abuse learned within the context of the confessional if the state requires disclosure and does not afford a privilege.⁶⁸

Bishops are allowed to disclose information without first consulting with the church help-line if, and only if, the disclosure is necessary to prevent life-threatening harm or serious injury and there is not enough time to seek guidance from the help-line.⁶⁹ However, when it comes to child sex abuse, bishops must first seek counsel from the Church’s help-line to determine if they are required to report abuse to abide by a state’s laws.⁷⁰

with the bishop. The confession is conducted in a private setting so that discussion can be confidential.”).

⁶¹ *Id.* at 13 (citing S. Kimball, *Miracle of Forgiveness*, 185).

⁶² *Id.* at 14.

⁶³ *Id.*

⁶⁴ *Id.* at 19 – 21 (discussing how the power to absolve pertains specifically to apostles).

⁶⁵ See Elder C. Scott Grow, *Why and What do I Need to Confess to my Bishop?*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.churchofjesuschrist.org/study/new-era/2013/10/why-and-what-do-i-need-to-confess-to-my-bishop?lang=eng> (last visited Oct. 2, 2023).

⁶⁶ *Id.* at 21.

⁶⁷ *Id.*; See *Repentance and Church Membership Councils*, GENERAL HANDBOOK: SERVING IN THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS at 32.4.4.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 32.4.5.

In contrast to the practice of confession in the Catholic Church,⁷¹ the Church of Jesus Christ can excommunicate, or withdraw one's membership, for breaking "the promises they have made to God through baptism or other promises they have made in the temple . . ." upon learning about this information *from* confession.⁷² A bishop can take the information learned from the penitent's confession and relay that information to the high council or counselors to determine whether the individual needs to have their membership withdrawn.⁷³ There are three primary purposes for the practice of membership withdrawal: (1) help protect others, (2) help a person access the redeeming power of Jesus Christ through repentance, and (3) protect the integrity of the Church.⁷⁴

Membership withdrawal can be thought of as a "private trial" of an individual and church leaders.⁷⁵ This "trial" generally consists of twelve members of the Stake High Council – "six are assigned to represent the member in question while the other six are asked to represent the Church as a whole to 'prevent insult or injustice.'"⁷⁶ After deliberating and praying to seek guidance on the decision that should be made, the member is informed of the Church's decision.⁷⁷ An individual who has their membership withdrawn is allowed to attend church meetings but cannot participate in certain activities.⁷⁸

Membership withdrawal within the Church of Jesus Christ is a restriction that is "ecclesiastical, not civil or criminal . . . [it] affect[s] only a person's standing in the Church."⁷⁹ Therefore, the proceedings taking place for the purpose of membership withdrawal generally remain confidential unless the Church needs to prevent others "from being harmed through misinformation."⁸⁰

Unlike the general "passive" role of the Catholic priest during confession, the Church of Jesus Christ bishops partake in a more "active" role of counseling and interviewing. During confession, bishops generally ask follow-up questions to

⁷¹ It is important to note that although the Catholic Church also has the process of excommunication for serious sins, information learned within the bounds of confession remains confidential at all times and cannot be shared with anyone else, even for the purpose of excommunication. See Charles Grondin, *Why and How One Is Excommunicated*, Catholic Answers, <https://www.catholic.com/qa/why-and-how-one-is-excommunicated> (last visited Sept. 27, 2023).

⁷² See *supra* note 55.

⁷³ *Id.*

⁷⁴ See *supra* note 67 at 32.2.

⁷⁵ See *supra* note 55.

⁷⁶ See Keith L. Brown, *Excommunication in Mormonism*, MORMON BELIEFS, https://mormonbeliefs.org/mormon_beliefs/mormon-beliefs-culture/excommunication-in-mormonism/ (last visited Sept. 28, 2023).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See *supra* note 67 at 32.2.

⁸⁰ See *Church Discipline*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://newsroom.churchofjesuschrist.org/article/church-discipline> (last visited Sept. 29, 2023).

ensure that the penitent is truly repentant.⁸¹ Recently, the Church of Jesus Christ has been under public pressure to create more boundaries for the questions that bishops may ask individuals – particularly children – within the context of the confessional.⁸²

The Church of Jesus Christ allows certain exceptions to the privilege to stand. In contrast to the strict seal of confession embedded within the Catholic Church, the Church of Jesus Christ allows bishops to share information learned from the confessional for purposes of determining membership withdrawal or compliance with state law. Complying with state law precedes maintaining confidentiality in the context of the confessional.

II. THE CLERGY-PENITENT PRIVILEGE IN THE LAW

A. The Clergy-Penitent Privilege and State Reporting Requirements

U.S. laws have a set of privileges protected by the shield of confidentiality according to the rules of evidence.⁸³ These privileges prevent an individual from disclosing information or providing evidence in a judicial proceeding.⁸⁴ There are nine rules defined as “specific nonconstitutional privileges” that the Federal courts must recognize.⁸⁵ Those nine privileges include: required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer.⁸⁶ Some argue that the clergy-penitent privilege is “entitled to greater deference than other privileges, such as the attorney-client privilege or the psychotherapist-patient privilege,” noting that these two privileges “are subject to various exceptions, while the clergy-penitent privilege is generally deemed ‘absolute.’”⁸⁷

⁸¹ See *supra* note 67 at 32.8.

⁸² See Sam Young, *29 Questions*, INVISIBLESCUBIT (Aug. 8, 2018) <https://invisiblescubit.com/2018/08/08/29-questions/> (noting how some questions asked by bishops included “Do you masturbate?”, “How many fingers do you use?”, “Have you tasted your own ejaculate?”, and others). For more information on sexually explicit questions asked by bishops and survivor statements, see <https://protectldschildren.org/>.

⁸³ See *Rule 501. Privilege in General*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/rules/fre/rule_501#:~:text=Nine%20of%20those%20rules%20defined%20specific%20nonconstitutional%20privileges%20which%20the,%2C%20and%20identity%20of%20informer. (last visited Oct. 25, 2023).

⁸⁴ See *Privilege*, LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/privilege> (last visited Oct. 25, 2023).

⁸⁵ See *supra* note 83.

⁸⁶ *Id.*

⁸⁷ See *supra* note 49, at 395; see generally Lynn McLain, *Privileges: Spousal, Attorney-Client, and Priest-Penitent*, UNIV. BALTIMORE LAW (Feb. 26, 2004). See also Shawn P. Bailey, *How Secrets are Kept: Viewing the Current Clergy-Penitent Privilege Through a*

As noted, in states that protect the clergy-penitent privilege and do not grant an exception regarding mandatory reporting, clergy is protected for failure to report to law enforcement the abuse they learned in the confession.⁸⁸

Currently, all 50 states and the District of Columbia have a clergy-penitent privilege codified in their law.⁸⁹ Of those 50 states, only six states deny the clergy-penitent privilege in cases of suspected child abuse or neglect, while 10 states and the District of Columbia do not address the question of whether the privilege shields clergy from mandatory reporting.⁹⁰

Comparison with the Attorney-Client Privilege, 2002 BYU L. REV. 489, 491 (2002) (“Drawing a comparison between the clergy-penitent and attorney-client privileges, this Comment will demonstrate that if anything, the clergy-penitent privilege merits more protection from abrogation than the attorney-client privilege.”); Ronald J. Colombo, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 NYU L. REV. 225, 228–49 (1998).

⁸⁸ *Id.*

⁸⁹ See John R. Vile, *Priest-Penitent Privilege*, FREESPEECHCENTER (Jan. 1, 2009), [https://firstamendment.mtsu.edu/article/priest-penitent-privilege/#:~:text=Perry%2C%20public%20domain\),All%20U.S.%20states%20have%20laws%20protecting%20the%20confidentiality%20of%20certain,basis%20of%20such%20a%20privilege](https://firstamendment.mtsu.edu/article/priest-penitent-privilege/#:~:text=Perry%2C%20public%20domain),All%20U.S.%20states%20have%20laws%20protecting%20the%20confidentiality%20of%20certain,basis%20of%20such%20a%20privilege). For specific statutes granting the clergy-penitent privilege see ALA. CODE § 12-21-166 (1979); ALASKA COMM. R. EVID. 506 (2023); ARIZ. REV. STAT. ANN. § 12-2233 (2023); ARK. R. EVID. 505 (2023); CAL. EVID. CODE § 1034 (West 2003); COLO. REV. STAT. ANN. § 13-90-107 (West 2022); CONN. GEN. STAT. ANN. § 52-146b (West 1967); DEL. R. EVID. 505 (2023); D.C. CODE § 14-309 (2006); FLA. STAT. ANN. § 90.505 (West); GA. CODE ANN. § 24-5-502 (West); HAW. REV. STAT. ANN. § 626-1, Rule 506 (West 1980); I.R.E. 505 (2018); 735 ILL. COMP. STAT. ANN. 5/8-803; IND. CODE ANN. § 34-46-3-1 (West 1998); IOWA CODE ANN. § 622.10 (West 2023); KAN. STAT. ANN. § 60-429 (West 1963); KAN. R. EVID. 505 (West 1992); LA. CODE EVID. ANN. art. 511 (West 1992); ME. R. EVID. 505 (West 2015); MD. CODE ANN. § 9-111 (Westlaw 1973); MASS. GEN. LAWS ANN. ch. 233, § 20A (West 1962); MICH. COMP. LAWS ANN. § 767.5a (West 1986); MINN. STAT. ANN. § 595.02 (West 1967); MISS. R. EVID. 505 (West 2016); MO. ANN. STAT. § 491.060 (West 1985); MONT. CODE ANN. § 26-1-804 (West 2009); NEB. REV. STAT. ANN. § 27-506 (West 1975); NEV. REV. STAT. ANN. § 49.255 (1971); N.H. REV. STAT. ANN. § 516:35 (West 1979); N.J. R. EVID. 511 (West 1994); N.M. R. EVID. 11-506 (West 1993); N.Y. C.P.L.R. 4505 (McKinney 1965); N.C. GEN. STAT. ANN. § 8-53.2 (West 1959); N.D. R. EVID. 505 (West 2014); OHIO REV. CODE ANN. § 2317.02 (West 2017); OKLA. STAT. ANN. tit. 12, § 2505 (West 1978); OR. REV. STAT. ANN. § 40.260 (West 1981); 42 PA. STAT. AND CONS. STAT. ANN. § 5493 (West 1976); 9 R.I. GEN. LAWS ANN. § 9-17-23 (West 1960); S.C. CODE ANN. § 19-11-90 (West 1962); S.D. CODIFIED LAWS § 19-19-505 (West 1979); TENN. CODE ANN. § 24-1-206 (West 2017); TX R. EVID. 505 (West 1998); UTAH R. EVID. 503 (West 2011); VT. R. EVID. 505 (West 2003); VA. CODE ANN. § 8.01-400 (West 1977); WASH. CONST. art. I, § 11 (West 1903); W. VA. CODE ANN. § 57-3-9 (West 1990); WIS. STAT. ANN. § 905.06 (West 2018); WY. STAT. § 1-12-101 (2011).

⁹⁰ See *Clergy as Mandatory Reporters of Child Abuse and Neglect*, CHILDREN’S BUREAU (April 2019), <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.childwelfare.gov/pubpdfs/cler>

According to the U.S. Department of Health and Human Services, as of 2019 all 50 states have some form of mandatory reporting laws for suspected child abuse and neglect.⁹¹ Mandatory reporting laws require “institutional actors to report harm to an individual when it is shared with them.”⁹² Failing to report the harm is not a matter of discretion and may be punished with criminal ramifications.⁹³ Of the 50 states that have mandatory reporting laws, approximately 28 states include clergy as mandatory reporters “mandated by law to report known or suspected instances of child abuse or neglect.”⁹⁴ However, within the context of the confessional, the mandatory reporting requirement only applies to the states that deny the privilege in cases of suspected child abuse.⁹⁵

The Children’s Bureau has published a table summarizing the mandatory reporting requirements for clergy:⁹⁶

	Privilege granted but limited to the context of confessions	Privilege denied in cases of suspected child abuse	Privilege not addressed in the reporting laws
Clergy enumerated as mandated reporters	Alabama, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Maine, Massachusetts, Michigan, Minnesota,	New Hampshire, West Virginia	Connecticut, Mississippi

gymandated.pdf (noting that other states do not enumerate clergy as mandated reporters but may include them with the “any person” designation). To see exact mandatory reporting requirements in each state, see *Mandatory Reporting Laws by State 2023*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/state-rankings/mandatory-reporting-laws-by-state> (last visited Oct. 10, 2023).

⁹¹ See *Mandatory Reporters of Child Abuse and Neglect*, CHILDREN’S BUREAU (July 2019), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/manda/>.

⁹² See Amos N. Guiora, Valeri Craigle, Aya Hibben, & Henry F. Fradella, *Holding Enablers of Child Sex Abuse Accountable: The Case of Jeremy Bell*, 59 CRIM. LAW BULLETIN ART. 3 at 19 (Feb. 21, 2023).

⁹³ *Id.*

⁹⁴ See *Clergy as Mandatory Reporters of Child Abuse and Neglect*, CHILDREN’S BUREAU (April 2019), [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.childwelfare.gov/pubpdfs/clergy-mandatory-reporting-laws-by-state](https://www.childwelfare.gov/pubpdfs/clergy-mandatory-reporting-laws-by-state) (noting that other states do not enumerate clergy as mandated reporters but may include them with the “any person” designation). To see exact mandatory reporting requirements in each state, see *Mandatory Reporting Laws by State 2023*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/state-rankings/mandatory-reporting-laws-by-state> (last visited Oct. 10, 2023).

⁹⁵ *Id.*

⁹⁶ *Id.*

	Missouri, Montana, Nevada, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, Wisconsin		
Clergy not enumerated as mandated reporters but may be included with “any person” designation	Delaware, Florida, Idaho, Kentucky, Maryland, Utah, Wyoming	North Carolina, Oklahoma, Rhode Island, Texas	Indiana, Nebraska, New Jersey, Tennessee, Puerto Rico
Neither clergy nor “any person” enumerated as mandated reporters	Alaska, Washington	N/A	American Samoa, District of Columbia, Hawaii, Iowa, Kansas, New York, Northern Mariana Islands, South Dakota, Virgin Islands

B. Court Rulings on Child Sex Abuse Cases and the Privilege

In recent years, courts have grappled with the issue of reconciling mandatory reporting laws with the clergy-penitent privilege. As this Section indicates – courts are generally more likely to affirm the privilege, even in situations where it is not entirely clear whether the statement was made in a confessional. The following Section will analyze case law relevant to the clergy-penitent privilege.

In 2008, Rebecca Mayeux, at the age of 14, contacted Father Jeff Bayhi – a priest in the Diocese of Baton Rouge, Louisiana – to report in confession that Father Charlet, a 64-year-old parishioner had sexually abused her for several years.⁹⁷ Rebecca confessed the abuse to Father Bayhi on three separate occasions, stating that Charlet had “inappropriately touched her, kissed her, and told her that

⁹⁷ See Julie Love Taylor, *Parents of Minor Child v. Charlet: A Threat to the Sanctity of Catholic Confession?*, LA L. REV. (Oct. 22, 2014), <https://lawreview.law.lsu.edu/2014/10/22/parents-of-minor-child-v-charlet-a-threat-to-the-sanctity-of-catholic-confession/>; see also *supra* note 46, at 391.

he wanted to make love to her.⁹⁸” After her confessions, Father Bayhi told Rebecca to “sweep it under the floor and get rid of it.”⁹⁹ Rebecca continued to suffer at the hands of the abuser because no report was made by Father Bayhi neither to the authorities nor her parents.¹⁰⁰

After Rebecca finally informed her parents of the abuse, the family filed a lawsuit in 2009 that implicated both Father Bayhi and the Diocese of Baton Rouge.¹⁰¹ They claimed that Father Bayhi had failed to inform authorities of the abuse, as members of the clergy were listed as mandatory reporters in the state of Louisiana.¹⁰² The case went all the way to the Louisiana Supreme Court, which ruled that the privilege belonged to the penitent, not the priest; “[t]hus, the court determined that the penitent was free to testify as to her own confession.”¹⁰³ However, upon remand to the district court, the district court granted the Church’s request to declare Louisiana’s mandatory reporting statute unconstitutional.¹⁰⁴ The Louisiana Supreme Court, once again, struck down the decision of the district court.¹⁰⁵ The entire matter was dismissed in 2019 without a trial or further decision on the issue.¹⁰⁶ This case illustrates the difficulty courts have had with reconciling mandatory reporting statutes with the clergy-penitent privilege, as the case continued to bounce around from district court to supreme court for clarity.

The California Court of Appeals has taken a step further in determining that the state’s clergy-penitent privilege does not apply to certain subpoenaed documents.¹⁰⁷ In this case – two priests sexually assaulted children while they worked for the Roman Catholic Archbishop of Los Angeles.¹⁰⁸ The court of appeals stated “[w]hile it is true the right to religious freedom holds a special place in our history and culture, there also must be an accommodation by religious believers and institutions to the rules of civil society, particularly when the state’s compelling interest in protecting children is in question.”¹⁰⁹ Here, the Los Angeles County Grand Jury subpoenaed various documents from the Archdiocese which would help the grand jury determine whether to indict the priests.¹¹⁰

The diocese argued that the clergy-penitent privilege applies to the documents because they constituted “privileged penitential communications within the

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See supra* note 18.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See supra* note 49, at 392; *Parents of Minor Child v. Charlet*, 135 So. 3d 1177, 1179–80 (2013).

¹⁰⁴ *See Mayeux v. Charlet*, 203 So. 3d 1030, 1040 (La. 2016).

¹⁰⁵ *Id.*

¹⁰⁶ *See J. of Dismissal with Prejudice*.

¹⁰⁷ *See Roman Cath. Archbishop of Los Angeles v. Superior Ct.*, 131 Cal. App. 4th 417 (2005).

¹⁰⁸ *Id.* at 424.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 441.

meaning of Evidence Code section 1032 because they were generated in the course of the formation of clergy process during the Archdiocese's interventions to help troubled priests."¹¹¹ The court, however, refused to accept the argument on the grounds that the communications were not "made in confidence, in the presence of no third person so far as the penitent is aware . . ."¹¹² Because the information contained within the documents were shared with third parties, the court held that the clergy-penitent privilege did not apply to the subpoenaed documents.¹¹³

In Utah, however, the Utah Supreme Court expanded the clergy-penitent privilege by applying it to any communications that are deemed confidential by the clergy, including documents.¹¹⁴ Here, Michelle Scott filed a complaint against her adoptive father, Steven Hammock, alleging that he had physically and sexually abused her for more than ten years, beginning the abuse when she was five years old.¹¹⁵ While the criminal charges were pending against Hammock, he had three conversations with his Church of Jesus Christ bishop.¹¹⁶ One of the conversations took place in the bishop's church office with no one present, while the other two conversations took place in Hammock's home with his wife present during one of the communications.¹¹⁷ Scott subpoenaed documents from the Church of Jesus Christ relating to Hammock's excommunication proceeding and communications referring to the abuse of the children that Hammock had with his bishop.¹¹⁸ The Utah Supreme Court applied the clergy-penitent privilege to all the conversations – even one where Hammock's wife was present during the confession.¹¹⁹

Meanwhile, in Arizona, the children of Paul Adams filed a motion challenging the constitutionality of the three Arizona statutes that establish the clergy-penitent privilege.¹²⁰ These three statutes were utilized by the Church of Jesus Christ to argue that Adam's bishop had not acted unlawfully by failing to report the child abuse.¹²¹ The Adams children argue that the existence of these statutes violates five constitutional provisions addressing religion – two regarding the United States Constitution and three regarding the Arizona

¹¹¹ *Id.* at 440.

¹¹² *Id.* at 444–45 (“The record demonstrates the participants in the Archdiocese's troubled-priest interventions knew any communications likely were to be shared with more than one person. According to the Archdiocese's declared policy, priests experiencing psychological and sexual problems were encouraged to discuss those problems with the archbishop and the Vicar for Clergy. Furthermore, the subpoenaed documents themselves amply demonstrate that communications to and from the individual priests were routinely shared . . .”).

¹¹³ *Id.* at 463.

¹¹⁴ *Scott v. Hammock*, 870 P.2d 947, 956 (Utah 1994).

¹¹⁵ *Id.* at 949.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 956.

¹²⁰ *See* First Am. Mot. for Ruling on Constitutionality on Certain Statutes and Notice of Claim of Unconstitutionality Under A.R.S. § 12-1841.

¹²¹ *Id.* at 2–3.

Constitution.¹²² They assert that the “compelling state interest in protecting children outweighs the narrow infringement upon the religious rights of the clergy.”¹²³

The motion claims that the statutes “undeniably foster and advance religion” rather than maintaining neutrality and general applicability.¹²⁴ The statutes are in direct conflict with the general mandatory reporting requirement which specifies that “any person” must report child abuse if they have such knowledge.¹²⁵ Further, the statutes are said to favor religions that recognize and utilize confidential communications such as confession, granting them an exception to the rule of law and hindering the functions of law enforcement and the judiciary.¹²⁶

The Cochise County Superior Court for the State of Arizona denied the motion for ruling on unconstitutionality in July of 2023.¹²⁷ The court addressed each constitutional provision cited by the Adams children and determined that the clergy-penitent exemption is constitutional.¹²⁸ In reference to the Establishment Clause of the First Amendment, the court stated that because the privilege is deeply rooted in our nation’s history, it does not violate the Establishment Clause.¹²⁹ Further, because the privilege does not specifically apply to a single church but rather to all clergy, the court finds the statutes to be general to a given class.¹³⁰ Finally, the court states, “The fact that the Legislature created the clergy-penitent exceptions is sufficient for this Court to find that the exceptions are not “inconsistent with the reach and safety of the state.””¹³¹ The court leaves it up to the state legislature to enact change in law if they deem it necessary.¹³² In response to the Superior Court’s decision, the Adams children filed a petition for special action to the Arizona Court of Appeals, but that too, was dismissed by the court.¹³³

Courts continue to struggle with the scope of the clergy-penitent privilege. Specifically, courts have a difficult time in answering pertinent questions on the boundaries of the privilege. Who does the privilege belong to, the priest or the penitent? Are there exceptions to the privilege when an individual’s life is in

¹²² *Id.* at 2.

¹²³ *Id.* at 4.

¹²⁴ *Id.* at 7.

¹²⁵ *Id.*

¹²⁶ *Id.* at 8.

¹²⁷ See Under Advisement Ruling Pls.’ Mot. For Ruling on Constitutionality of Certain Statutes and Notice of Claim of Unconstitutionality Under ARS §12-1841.

¹²⁸ *Id.* at 5.

¹²⁹ *Id.* at 2–4.

¹³⁰ *Id.*

¹³¹ *Id.* at 3.

¹³² *Id.*

¹³³ See Pet. For Special Action; see also Howard Fischer, *Judge Tosses Out Bid by Family Sexual Abuse Survivors to Sue Church for Failing to Report to Police*, ARIZONA CAPITOL TIMES (Nov. 8, 2023) (stating that the court found that the Church of Jesus Christ and its clergy handled the matter consistent with Arizona law).

danger? What are ways to reconcile mandatory reporting requirements with the privilege? Does the privilege apply to documents?

III. WHAT IS ENABLING?

An enabler is an individual who knows, or should know, that another individual has been harmed and makes the decision to not act to either minimize harm to that individual and/or to other potential victims. The enabler – distinct from the bystander – is not present when the harm is caused but fails to act in a substantial manner when information regarding harm is brought to their attention. The enabler is aware of the abuse or misconduct, and has the power to act, but chooses not to. That decision demands to be understood as criminal, given its direct impact on vulnerable individuals harmed by perpetrators.

Enabling can be understood as protecting the perpetrator who feels emboldened to act with impunity and immunity – confident that his/her actions will not be reported to law enforcement or relevant disciplinary authorities. The wide latitude enablers provide perpetrators amplifies the vulnerability of the at-risk individual, for not only are they harmed by the physical (or emotional) actions of the perpetrator, but also by the individual who was positioned to protect them but failed to do so. Interactions with survivors shed light on a painful reality: while the harm caused by the perpetrator was harmful, to say the least, the realization that those positioned to protect them (enablers) chose not to do so was even more harmful. That is a theme consistently expressed by survivors.

It is what Tiffany Thomas Lopez – sexually violated by Larry Nassar 150 times while a student-athlete at Michigan State University (“MSU”) – described as, “they super fucked me” when referencing Nassar’s enablers. In the same vein, Lindsay Lemke, the captain of MSU’s women’s gymnastics team, referred to enablers as “armies” in describing what she encountered whilst assaulted by Nassar. Mattie Larson was assaulted by Nassar 750 times while competing as an elite gymnast for USA Gymnastics (“USAG”). In Mattie’s words, “Who the fuck lets a 13-year-old girl go alone to a man’s hotel room at night?” in referencing how Nassar had unfettered access to the athletes under the guise of medical treatment.

The enablers who protected Nassar were individuals acting at their own behest, not directed by superior authorities, making decisions for which they bear individual responsibility. While they may have believed they were protecting MSU and USAG, there is no evidence they were ordered to do so. That applies to enablers at The Ohio State University (“OSU”), University of Michigan (“UM”), Penn State, and the Catholic Church.

One of us (Guiora) has documented the enabling at these institutions and has not found any indication that those who enabled Richard Strauss (OSU), Bob Anderson (UM), Jerry Sandusky (Pennsylvania State University, “PSU”), or abusive priests were acting in concert with the relevant institution or in conjunction with other individuals.

When Lemke’s coach, Cathy Klages, threatened to withdraw her scholarship if she were to file a complaint against Nassar with law enforcement, Klages was,

purportedly, acting on her own. When Thomas-Lopez's trainer and coach manipulated her off the softball team, they were not ordered to do so. That applies to the actions of senior officials at PSU, OSU, and UM. That, however, is very different from what Adams' children faced after he confessed to the bishop.

The paradigm we are exploring, rather than focusing on the individual enabler whose actions were essential to the criminal actions of the perpetrator, examines enabling based on religious doctrine and the conduct it demands. Accordingly, our examination extends beyond the acts of an individual protecting another individual. The enabling that directly contributed to Adams' continued criminal behavior is based on a strict reading of religious doctrine and the way it is practiced. In that sense, it is more layered.

The enabling examined within the context of the Catholic Church is doctrine-predicated. However, the enabling examined within the Church of Jesus Christ occurred on two distinct levels – doctrine-predicated and individual; the former reflecting adherence to religious principles that endanger the vulnerable, and the latter reflecting individual decisions that have similar consequences. As the Arizona case makes clear, the combination is tragic from the perspective of the impacted individual. While there is no intention to minimize the importance and value of religious practices, there is a need to examine the harm they cause. That similarly applies to individuals whose decision-making, in the spirit of the relevant religious practice, enables the harm.

There is no basis for assuming enablers intend for harm to result; however, intentions notwithstanding, that is the direct result. As discussed in Section I, the privilege of confession in Catholicism is different than in the Church of Jesus Christ; in the former it is rigid, devoid of nuance whereas in the latter, as we have learned, the privilege is seemingly subject to interpretation by individual bishops and stake presidents.

The complicating factor in assessing the enabling question in the Church of Jesus Christ is the role assigned to the help-line and perhaps more importantly, the law firm that represents the Church. While the bishop received Adams' confession, the decision not to report Adams' crimes was made by the law firm and communicated through the helpline. The law firm was acting in its capacity as counsel for the Church of Jesus Christ and the helpline was the conduit regarding the firm's decision prohibiting the bishop from reporting the crime to law enforcement.

While the firm's direction was communicated to the bishop, we have learned during our research, that the lack of consistent application of doctrine – which admittedly surprised us – grants bishops wide latitude in their application of religious teachings. The decision to protect the institution, and thereby enable the continued harm to the vulnerable children, was a direct consequence of distinct actors who chose to abide by doctrine, notwithstanding seeming flexibility in its interpretation and application.

Distinct from the Catholic Church's thousand-year-old well-established hierarchy, the Church of Jesus Christ is a more linear, flat-line structure, seemingly tolerant of flexibility in the interpretation of Church doctrine. Nevertheless, leaders

in both faiths, as we have come to see, prioritize the welfare and tradition of the institution over the wellbeing of its members. There is no other explanation for the decisions we have encountered in this Article; protection of the institution was the primary concern of those whose actions could have prevented further harm. While it was the individuals who made the decision not to report, the rationale reflected absolute devotion and dedication to religious doctrine. There is, seemingly, no other explanation for the conduct of those involved in this process, whereby those who could prevent harm made the conscious decision not to do so.

While religious belief is protected by the First Amendment, that constitutional right does not include the right to harm. As seen, the conscious decision not to report to local law enforcement enabled harm to vulnerable children. This is particularly egregious because those who enabled knew that Adams had harmed his daughter in the past and continued to do so during the counseling sessions with the bishop. There was no reason for the lawyers and those manning the helpline to doubt what would happen to the children once the bishop was instructed that the confession was privileged.

IV. WHAT IS INSTITUTIONAL COMPLICITY

A. The Essence of Institutional Complicity and Its Costs

In examining the question of the impact of the clergy-penitent privilege there is an additional issue that demands our attention. As we have come to see, the decision to protect the privilege, regardless of the tragic consequences, also protects the institution. In abandoning the victim and shielding the predator, whether from a past, present, or future harm – the institution is also protecting itself. That is the essence of institutional complicity which occurs when an individual, acting on behalf of an institution, turns a blind eye to abuse out of a sense of duty to the institution. The combination of the clergy-penitent privilege and institutional complicity significantly endangers the individual the penitent has confessed to have harmed, is presently harming, or intends to harm.

The protection of the privilege, regardless of its historical and theological roots and rationale, leaves an individual in harm's way. More than anything, the fate of Adams' daughters is directly related to that. While the children were harmed by their father, the insistence regarding the confession's sanctity, is but a manifestation of institutional complicity. Protecting the privilege of the confession ensures sins committed by church members are not reported to the authorities. This is essential from the perspective of an institution seeking to protect itself. By protecting the confession, the institution is protecting itself. In the case at the heart of this Article, the actions of the helpline at the behest of the law firm are the clearest reflection of a determined effort to circle the wagons around the penitent directly and the institution indirectly.

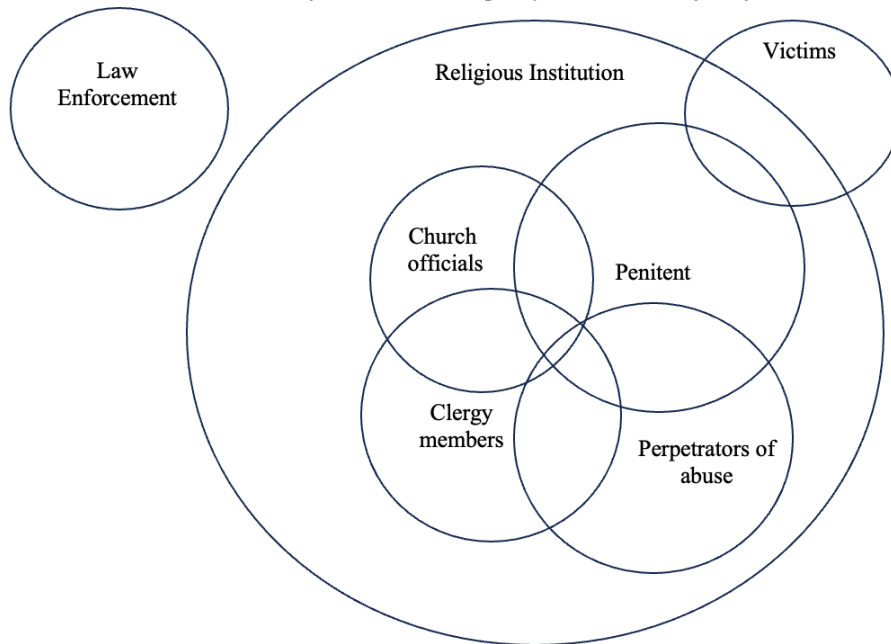
In viewing this action through the lens of complicity, the privilege is viewed as a mechanism to isolate the institution from repercussions for the actions of a penitent of which institutional actors had knowledge. The confession is made to a

faith leader authorized by the institution to receive the confession on its behalf, in accordance with established doctrine.

Without debating the sanctity of the confession, a topic beyond our scope, the more pressing inquiry is the institutionalized refusal to provide information to the authorities best positioned to protect a vulnerable individual. At its core, that is the most pressing consequence of institutional complicity in the confession paradigm. That, more than anything, is the primary lesson learned from the Adams case. It is the reason we propose the recipient of the confession *must* – not may – waive the privilege if the information provided relates to sexual assault or abuse of a child regardless of when committed or the number of times. That is the most effective manner to directly address the negative consequences of protecting the privilege which reflects institutional complicity and results in harm.

When examining institutional complicity in the context of the confession related to a crime there are five distinct actors: the penitent; the clergy; the institution; state authorities; and the past/present/future victim(s). The order in which the actors are referenced is deliberate, as the privilege protects the penitent and the institution the most and the vulnerable the least. In the name of protecting the institution, the law firm that represents the Church gave a specific order to a bishop who *knew* that a child was directly, assuredly, and consistently in harm's way.

Chart 1
Model of Institutional Complicity in the Context of Confession



Caption: The penitent is typically either the victim of abuse or the perpetrator. The perpetrator of abuse is typically a member of the church, if not a clergy member. In cases where the clergy-penitent privilege directly enables sexual abuse, the abuse is revealed by the penitent to a clergy member. The clergy member, in the Church of Jesus Christ, would call the church helpline. In the Catholic Church, the clergy member typically consults a higher church official about the abuse. In either case, the information stays within the control of the religious institution and affiliated organizations but is not reported to the proper law enforcement officials. The priority is to keep the information confidential which directly accentuates the harm to the victim(s), hence their placement on the outskirts of the religious circle.

The order given to the bishop was not to report to the authorities what Adams had confessed. While the “directive” was in accordance with Church doctrine, it reflects an institution protecting itself at the expense of a known victim. The child, in this case Adams’s eldest daughter – and later, infant daughter – were abused by their father and abandoned by an institution that failed to see them as the individuals most in need of protection. Rather than protecting them from a known abuser, one who had confessed his crimes and future intentions, the Church and those entrusted with protecting its interests, abandoned vulnerable children directly in harm’s way. That decision is a prime example of institutional complicity.

Such institutional complicity can also be seen through many cases of abuse in the Catholic Church. In Sioux City, Iowa, Father Murphy abused then-eleven-year-old Timothy Lennon.¹³⁴ See *Chart 1*. Prior to Lennon’s abuse, Murphy had been

¹³⁴ Zoom Interview with Timothy Lennon, President Emeritus, Survivors Network of those Abused by Priests (June 28, 2023; Nov. 7, 2023).

transferred from a different parish following allegations of abuse.¹³⁵ Murphy abused Lennon for several months and was only stopped after another boy's parent reported him.¹³⁶ During his abuse of Lennon, Murphy forced Lennon to go to confession to confess his "sins" multiple times.¹³⁷ As a young boy, Lennon was unsure of what exactly he was meant to confess to during those sessions.¹³⁸ He told at least two priests in confession, about Father Murphy's abuse.¹³⁹ While it is unclear whether either of these two priests ever reported Murphy to higher church officials, it is certain that Lennon's abuse continued following these confessions.¹⁴⁰

While bishops in the Church of Jesus Christ receive little to no formal training,¹⁴¹ priests in the Catholic Church dedicate their entire lives to the Catholic Church. As part of their training, they must first go to seminary for four years to study theology.¹⁴² It is clear to Catholic priests from the beginning of their training that they cannot break the seal of confession under any circumstances.¹⁴³ In Lennon's case, the second priest who Lennon informed of the abuse actually confronted Father Murphy.¹⁴⁴ Although the priest was angered with the knowledge of the abuse, he knew that he could not report the crime.¹⁴⁵ Lennon believes that the privilege is an example of institutional complicity, but even more, it is an example of institutionalized complicity.¹⁴⁶

By making the conscious decision to protect the privilege, the Church was ensuring that its reputation and interests would not be injured by a church representative who had committed crimes that only law enforcement was best equipped to address. Agencies trained to engage with vulnerable children were never contacted or warned. In failing to take action, church officials ensured harm to the child and protection of its own interests.

While the Church would rely on the privilege in defending its decision, it was complicit in the ensuing, and inevitable, harm. Notwithstanding the importance ascribed to theological values and principles, the needs of an individual, particularly, a vulnerable child, should be prioritized over doctrine. While church doctrine reflects core beliefs and values, serving as a "guide" for how its followers conduct their daily and spiritual lives, the absolutism that dictated the instructions given to the bishop reflects institutional complicity.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Zoom Interview with Sam Young, Founder of Protect LDS Children (Sept. 19, 2023).

¹⁴² Canon Law Can. 235 §§ 1 and 236; *see also How to Become a Priest*, BRESCIA UNIV. (Sept. 11, 2013), <https://www.brescia.edu/2013/09/how-to-become-a-priest/>.

¹⁴³ Zoom Interview with Father Diaz, Catholic Church Priest (July 5, 2023).

¹⁴⁴ *See supra* note 134.

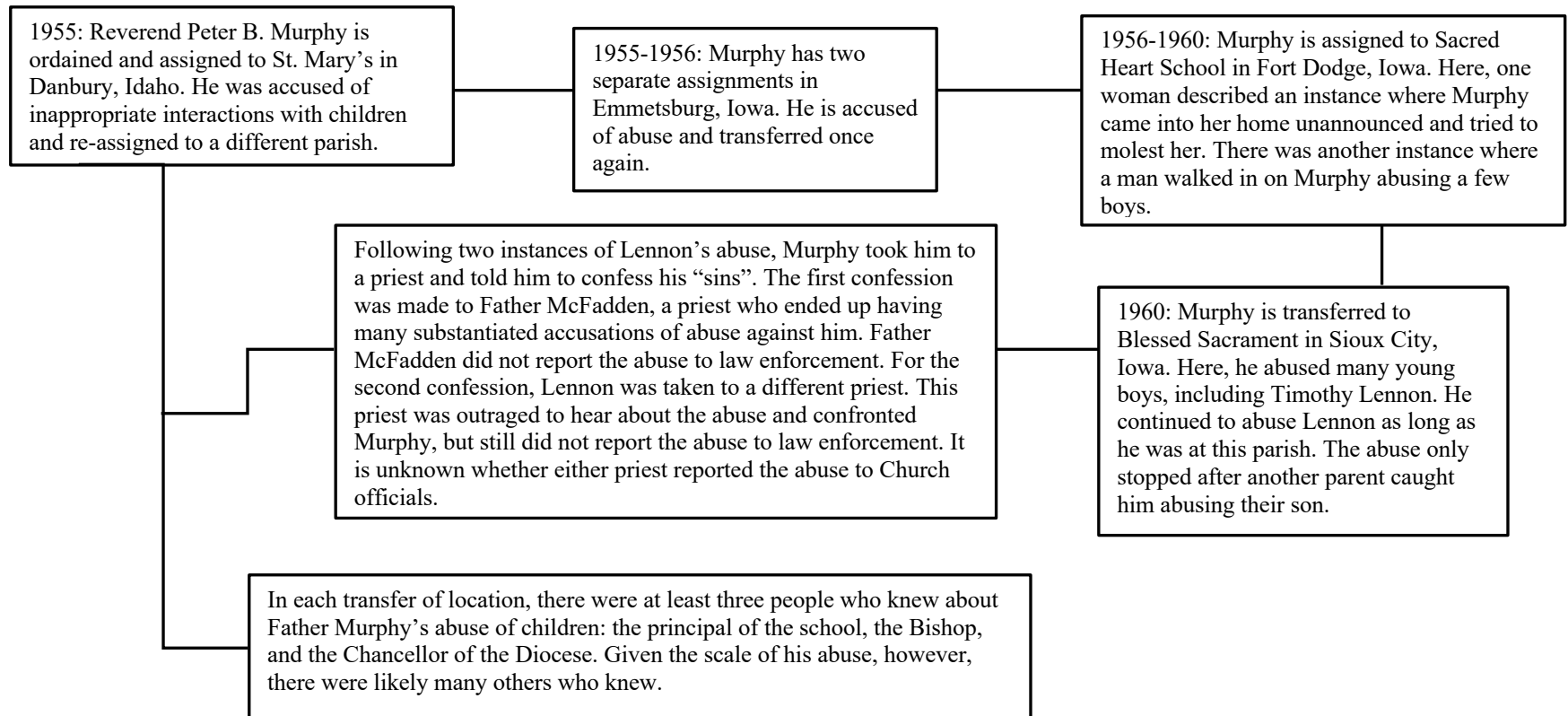
¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

Institutional complicity reflects placing the institution above all other considerations, notwithstanding the harm resulting from the decision. Prioritizing the institution over the individual results from a myriad of factors, some specific to a particular paradigm, others universal. Regardless of which model it is – universal or specific – the results are the same, resulting in individual harm. The protection of the institution, consequences notwithstanding, is seemingly a repetitive behavioral model that is, as we have come to see, instinctual and seemingly inevitable. The reasons for this vary as the rationalizations range from self-serving to sanctimonious. Regardless of the motivation, institutional complicity directly impacts those abandoned by the institution.

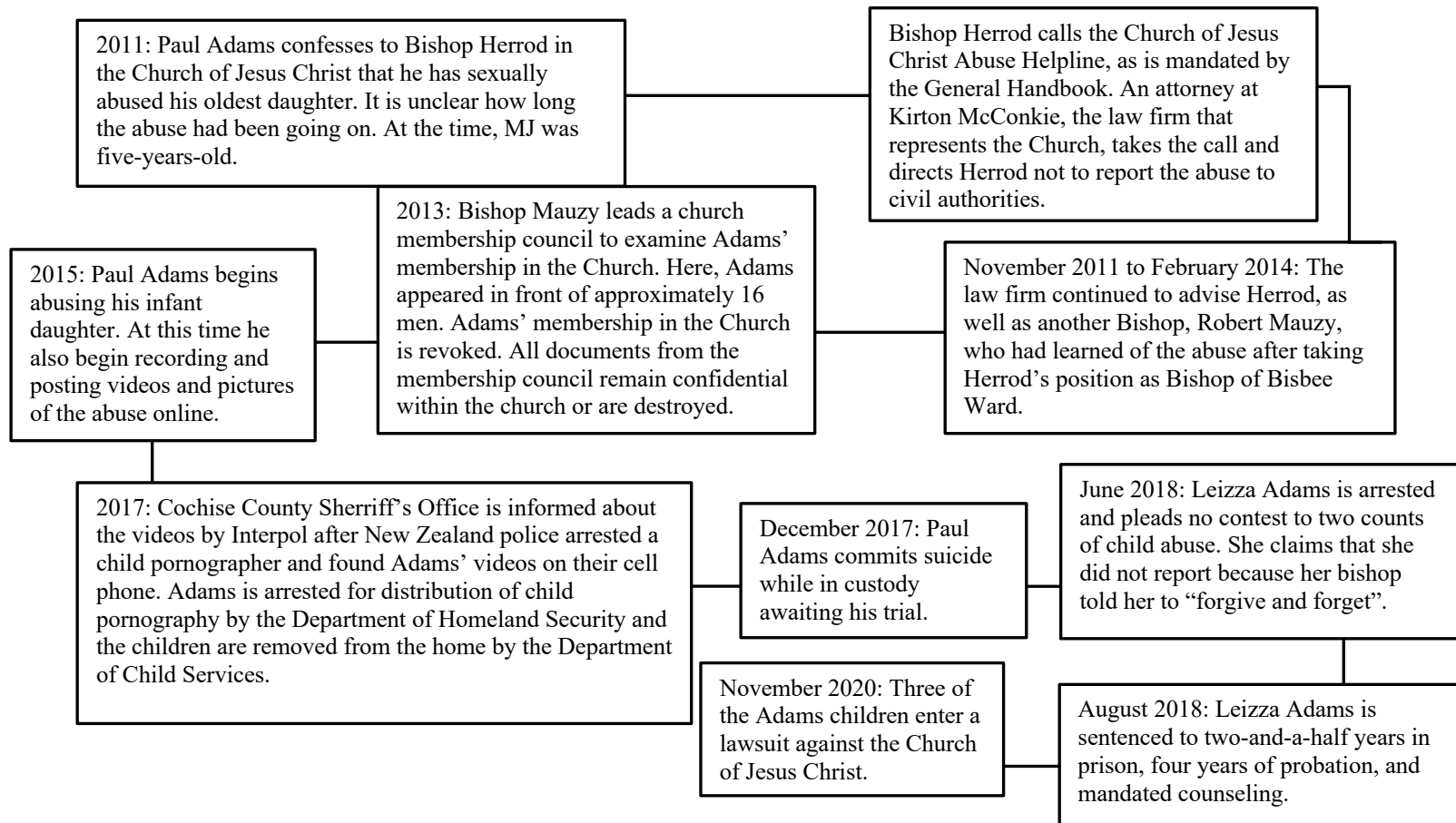
The two charts below outline two separate instances of institutional complicity, the first in the Catholic Church and the second in the Church of Jesus Christ. The first follows the timeline of Father Murphy as he was moved from church to church following allegations of child sex abuse. It portrays the enabling that led to Murphy's abuse of Timothy Lennon. The second chart lays out the timeline of Adams' abuse of his daughters. Through each chart we aim to make clear how easily an abuser can be enabled as a result of the clergy-penitent privilege, in spite of the intentions of the religions. We feel it is important to illustrate how many people were aware of or involved in the web of complicity. Although the enabling in each instance occurred in different manners and likely for different reasons, the result was the same: children were harmed.

Chart 2
*Tracing the Abuse of Timothy Lennon by a Catholic Church Priest*¹⁴⁷



¹⁴⁷ See *supra* note 134.

Chart 3
*Tracing the Abuse of the Adams Children*¹⁴⁸



¹⁴⁸ Cochise County Sheriff's Office Report for Incident 17-03768; *see also* Dearen & Rezendes *supra* note 3.

B. *Banality of Evil*

While Hannah Arendt's "banality of evil"¹⁴⁹ in describing the role of Adolf Eichmann in the Holocaust, missed the mark regarding his responsibility, the phrase is relevant when considering institutional complicity. There is no intent to draw parallels between Nazi leadership responsible for the murder of 6,000,000 Jews and church doctrine, its implantation, and consequences. Nevertheless, the impact on the vulnerable individual bears disturbing similarity, albeit profound differences.

Drawing on the Holocaust – particularly at a time when Holocaust denial is seemingly in vogue – is both controversial and appropriate. One of us (Guiora) is the only child of two Holocaust survivors. In referencing the Holocaust in the context of institutional complicity, the analogy is the price of obedience, complicity, and silence. That three-fold combination directly contributes to a culture where the needs of the organization are primary, with no room for questioning or doubt regarding the consequences of that damnable approach. That is very clear when considering the fate of Adams' children or Timothy Lennon.

To fully appreciate the "banality of evil" requires acknowledging that both cases were preventable, or at the very least mitigatable, if doctrine and protecting the institution had taken a back seat to what should have been the priority: the fate of children whose vulnerability was known to church officials. There can be no denying, nor has there been any effort, to gainsay what was clear regarding the danger under which the children lived. Nevertheless, in protecting the institution, church officials – in relying on doctrine – ignored harm.

The individual and group lock-step protection of the institution, marching in unison, creates an insurmountable wall. Blind loyalty, even when harm is evident, has resulted in terrible human tragedy throughout history. Distinct from Hitler whose Final Solution¹⁵⁰ intended to destroy European Jewry, church leaders did not intend for the harm to occur. That is a significant, and obvious, distinction. However, they took no steps to protect the children though they did not wish the harm on them. The lack of intent must not be offered either as mitigating their responsibility or a panacea regarding the consequences of the privilege.

By making the decision to protect the privilege, notwithstanding the consequences, the Church of Jesus Christ was ensuring its reputation and interests would not be injured, whether directly or indirectly, by a church member who had committed serious crimes law enforcement was best equipped to address. More than that, by refusing the bishop permission to contact state agents, not only was Adams not held accountable, but agencies trained to engage with vulnerable children were never contacted or warned. In doing so, church officials ensured harm to the child and protection of its own interests.

¹⁴⁹ HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963).

¹⁵⁰ *Id.*

While the Church of Jesus Christ would rely on the privilege in defending its decision, it was complicit in the ensuing, and inevitable, harm to the children. The protection of the institution, consequences notwithstanding, is seemingly a repetitive behavioral model that is, as have come to see, instinctual and seemingly inevitable. That is the essence of the banality of evil.

V. THE CLERGY-PENITENT PRIVILEGE AS AN ENABLER OF CHILD SEX ABUSE

While we understand, and respect, the importance of confession, we are deeply concerned regarding the unintended consequences of the privilege protecting the confession. We also understand the importance and rationale for the insistence on the privilege. That has been repeatedly emphasized by people of faith with whom we have spoken who argue the privilege is essential for penitent and institution alike; the former to ensure the ability to confess candidly, the latter to ensure it fulfills its duty and purpose.

Notwithstanding the arguments presented to us regarding the “need” for the privilege, the evidence we have examined suggests the privilege, regardless of its doctrinal basis, imposes significant costs, primarily with respect to the “subject” of the confession. As we have noted throughout the Article, our perspective is admittedly victim centric; the discussion in this Section reflects that approach. This perspective is not made in a vacuum, as the adamant advocacy seeking to protect the privilege is what facilitated the continuation of Adam’s criminal behavior. Of that, there must be no doubt.

In our interactions with people of faith, religious leaders, and scholars of religion, we have sought to better understand the essence of confession and its intended goal. While we understand the five steps for a good confession include the need to “examine your conscience, be sincerely sorry for your sins, confess your sins to a priest, resolve to amend your life, after your confession, do the penance the priest assigns,”¹⁵¹ the larger question is *who* does the privilege protect. That is a critical inquiry; how it is resolved either protects victims of sexual crimes or the perpetrators. This must be understood as an “either-or” paradigm, where nuance is, ultimately, harmful to the victim.

We shared an earlier draft of this section with a faith leader (neither a Catholic priest nor Church of Jesus Christ bishop); in doing so, we requested both his articulation of the confession and commentary regarding what we wrote. In guaranteeing anonymity, we wanted to ensure the reader would have an objective (meaning from neither of two faiths addressed in this Article) assessment. In that spirit, we share his response:

The confessional is a place where a person who feels burdened by the weight of sin comes to tell the truth of his/her sin (wrongdoing) . . . Only by telling the truth can you begin the path to restoration. This is the theological explanation.

¹⁵¹ Email from faith leader (in our records)

Absolution often requires penitent action – it is an ancient religious practice before there were secular law courts. Hence, the priest had immense power to forgive – but also to punish. Think of the witch trials, trials for heresy – throughout history those who confess still were punished.

Absolution might mean that God forgives you but it also probably meant that you had to face the consequences today . . . The priest does listen in confidence but it is NOT without judgement and it is not without punishment (retribution – your word). For minor things, the priest can assign acts of penance (might be prayers or an act of restitution – like going to the person wronged and asking for their forgiveness). For more (mortal) sins (murder or abuse) priests often direct the person to turn themselves in.

Furthermore, it is too simplistic, to write: the penitent is assured the only accountability is before the divine, devoid of actual, societal consequences. Accountability before the divine has never meant there are no societal consequences. In the Judeo-Christian tradition God demands societal justice! Priests and Bishops and pastors all support secular law.¹⁵²

We respectfully disagree with this important sentence: “[a]ccountability before the divine has never meant there are no societal consequences.” Our disagreement is predicated on the essence of the privilege; whether the absolute confidentiality guaranteed in the Catholic Church or the “wobble room” (for there is no better description) ascribed to the privilege in the Church of Jesus Christ. The Adams case highlights the tragic conclusion that the helpline/law firm directive to the bishop guaranteed Adams’ daughter would continue to be unprotected.

It is for that reason, as discussed in Section VI, that the privilege must be understood as protecting the institution-penitent, while abandoning the vulnerable individual. We have repeatedly been told that a “must” report obligation, rather than a “may” report discretion-based approach, will discourage parishioners from coming to confession. This argument has been made by Catholic priests and people of faith alike who were absolute in their conviction. When discussing this with members of the Church of Jesus Christ, the response was less absolute, perhaps a reflection of two disparate, yet related, issues: the confession “process” is less structured than in the Catholic Church and the reliance on the helpline/law firm as final word.

This is distinct from the Catholic Church whereby the priest’s role is specifically defined – perhaps limited is a more accurate word – to hearing the confession and then granting absolution. To the best of our understanding, the help-line/law firm structure does not exist in the Catholic Church because the priest, as has been explained to us, is the intermediary-courier between the penitent and the divine.

¹⁵² Email from faith leader (in our records)

As we have come to learn, issues germane to this Article are clearer in the Catholic Church than the Church of Jesus Christ. That is not intended as criticism of the latter. We have spoken to bishops, past and present, seeking to best understand how critical questions relevant to confession and the privilege are addressed. The manner of interaction between a bishop, the helpline, and the law firm representing the Church of Jesus Christ, is a matter of interpretation depending, to a certain degree, with whom we have spoken. This lack of clarity is particularly important with respect to confession and the role of the faith leader who hears the confession.

More than anything, we have been struck by two powerful impressions: a lack of uniformity in how “problematic” confessions are “handled” and concern regarding the active engagement of a law firm representing the Church in determining whether the content of the confession may be reported to law enforcement. That, as we have come to learn, is one of the most important functions of the helpline. The direct role of the law firm in making such a decision suggests institutional interests outweigh the needs of the vulnerable individual. We have shared that impression, if not concern, with our interlocutors. In one of our interactions with a former bishop we used the phrase, “circling the wagons” in describing the role of the law firm in articulating church policy.

The former bishop suggested that there is, at the least, an unintended conflict of interest when the law firm that represents the institution clearly weighs in on ecclesiastical matters when the advice – whether legal or religious or a combination – directly harms the vulnerable while protecting the institution (the client), the penitent, and the confession. When examined from the perspective of conflict of interest, the former bishop suggested considering fiduciary duty obligations. While those two suggestions resonate with our recommendation, the current “may report” standard, particularly when reflecting legal advice from the law firm that represents the Church of Jesus Christ leaves little doubt how questions regarding the privilege will be resolved.

It is for that reason we advocate for legislation that imposes a “must” report to law enforcement obligation on a bishop or priest who has received a confession of sexual abuse/harm to a child. Otherwise, the vulnerable child will continue to be at risk. The difference between “may” report and “must” report is, from the perspective of the vulnerable child, essential to preventing future harm, or at the very least, directly contributing to an effort to minimize harm. There is, from a victim-centric perspective, nothing more important than protecting the vulnerable. That is society’s most basic duty; it is the primary obligation of the state, particularly when there is a clear and imminent danger to a vulnerable member of a community.

That, however, is clearly at odds with church doctrine. Herein lies the tension at the crux of the critical question: to whom the duty is owed. The “must” report, as we advocate, provides a clear answer: the child; the “may” report standard, while leaving wiggle room, does not offer the same degree of protection to a present victim, much less future victims. “May” report suggests a compromise between protecting the child and protecting the institution. Ultimately, such an

approach leaves the discretion in the hands of church officials whose instinct, as we have come to see, is to protect the institution, rather than the vulnerable.

By adamantly insisting the confession be protected, religious leaders are ultimately protecting the institution by shielding it – and the penitent – from the stain of conduct that demands involvement, if not intervention, by state officials. That concern, the metaphoric “scarlet letter”, is understandable from an institutional perspective, both practically and theologically. The privilege ensures that a penitent can meet with a priest/bishop with absolute confidence the confession will never be “used” against the penitent and can achieve the five important goals referenced above. If viewed from the perspective of attaining the laudable purpose of enabling an individual to account for their sins and improve their conduct, the argument favoring protecting the confession is understandable, from both an institutional and societal perspective.

However, that presumed benefit notwithstanding the privilege must be viewed from the perspective of accountability in accordance with the criminal justice system. As the Adams case tragically highlights, the direction given by the law firm ensured there would be no “day in court”, rather emphasizing, actually limiting, the accountability demanded of Adams to the divine and spiritual.

While Adams confession was “used” against him within the parameters of the Church of Jesus Christ, no consequence was imposed by society. The reason for that is clear: the law firm made the conscious decision to protect its client (the Church) and Adams. The continued harm to the child was all but inevitable as the confession could not be “used” beyond the narrow walls of the Church. The title of Amos Guiora’s book, “Armies of Enablers,”¹⁵³ is appropriately applied to the insistence on the privilege; the decision conveyed to the bishop, which he accepted-adopted, ensured Adam’s daughter was confronted, like Nassar’s victims, by armies of enablers.

In understanding the intersection between the confession and privilege the word “used” is of particular importance; while Adams was punished by the Church as it “used” the confession as justification, societal accountability predicated on his confession did not occur because that application of “use” was denied. In this context, the word “used” is intended in the spirit of the Miranda warning: “anything you say can and will be used against you.”¹⁵⁴ However, distinct from the Miranda warning applicable to the criminal law process, the penitent is held accountable for the confession exclusively within the boundary of the Church. While that is, theologically, beneficial to the individual and the institution, it exacerbates the harm to the vulnerable who is unprotected given the privilege.

The dogmatic insistence on the religiously ordained privilege is, in its purest form, intended to offer spiritual refuge for the penitent. From the perspective of institution and penitent, that paradigm reflects an understanding of the need for safe space for the confessor who has, by his/her actions, committed a transgression. In protecting the penitent, for that is the consequence of protecting

¹⁵³ See *supra* note 20.

¹⁵⁴ *Miranda v Arizona*, 384 U.S. 436 (1966)

the privilege, religious doctrine ensures the penitent, through the bishop or priest, is communicating exclusively with the divine.

The doctrine of absolute privilege reflects a core belief penitents will only confess with the understanding, and confidence, the confession will never be “betrayed.” The word betrayed is used deliberately; from their perspective, were the religious leader to report the confession that would be tantamount to a betrayal of the sanctity of the absolute confidence the penitent placed in the religious leader.

Absent that confidence, according to proponents of the privilege, a penitent would not come to confession and the path to absolution and redemption would be foreclosed to them. More than that, were penitents to be concerned, uncertain is another word, whether their confession is protected they would be less than forthcoming. From the penitent-institution perspective, this would be akin to depriving the confessor a “safe” environment to confess their sins. Given the emphasis placed on confession as the mechanism for a penitent to “cleanse their soul”, to mitigate the protection provided by the privilege would be at odds with its intended purpose from a theological, redemption-based perspective.

The sacred relationship between penitent-priest/bishop is predicated on the confidence that the confession is heard without criminal judgment and without criminal retribution. This is distinct from confession before law enforcement which implies guilt with consequences of accountability before a court of law. In protecting the confession, the essence of the privilege, the penitent is assured the only accountability is before the divine, devoid of actual, societal consequences.

This is understandable from a faith perspective, intent on creating a mechanism whereby the penitent can “come clean” without repercussion and the religious institution is protected, ostensibly “off limits.” The privilege, then must be understood as protecting the penitent and institution alike; there is a confluence of interests tying the two together in a powerful symbiotic relationship. It is for that reason, as discussed in the Section below, that we argue for the proposed legislative change at the heart of this Article.

VI. LEGISLATIVE RECOMMENDATIONS

New Hampshire and West Virginia are among the states that explicitly deny the clergy-penitent privilege in the case of suspected child abuse in the context of confession.¹⁵⁵ In New Hampshire, a priest, minister, or rabbi, or any other person having reason to suspect that a child has been abused or neglected *shall* (in other words, *must*) report the abuse to state authorities.¹⁵⁶ Although New Hampshire does, as do all 50 states, have a clergy-penitent privilege,¹⁵⁷ there is a carving within the privilege that does not apply to suspected child abuse or neglect.¹⁵⁸ New

¹⁵⁵ See *supra* note 95.

¹⁵⁶ See N.H. REV STAT. § 169-C:29 (2022).

¹⁵⁷ See N.H. R. EVID. Rule 505.

¹⁵⁸ See *supra* note 153.

Hampshire's mandatory reporting law explains that failure to report child abuse or neglect cannot be protected by the clergy-penitent privilege, even in the context of confession.¹⁵⁹ West Virginia has a similar exception to the privilege, as it clearly states that:

When any member of the clergy has reasonable cause to suspect that a child is neglected or abused, or observes the child being subjected to conditions that are likely to result in abuse or neglect, such person shall immediately, and not more than 48 hours after suspecting this abuse, report the circumstances or cause a report to be made to the Department of Health and Human Resources.¹⁶⁰

This requirement to report suspected child abuse or neglect applies within the context of the confessional as well as information learned of outside the confession. It is exactly the type of legislation that would save the Adams' children from abuse that spanned over seven years after the issue was brought up to the bishop during Adam's first confession. It is also the type of legislation that would spare individuals like Timothy Lennon from further abuse, and allow appropriate action to be taken to reprimand the abuser and save the vulnerable child. The requirement to report within 48 hours leaves no ambiguity in the timing of the report, and is crucial to ensure that vulnerable individuals are given aid as soon as possible.

From a certain standpoint, failing to provide an exception to the clergy-penitent privilege harms not only vulnerable children but also members of the clergy who want to report abuse but are not able to. It is likely that the bishop in the Adams' case wanted to report the abuse to ensure the safety of the Adams children; however, the Church's helpline gave clear directions that the privilege protected the confession in Arizona. Legislation requiring members of the clergy to report of suspected child abuse would have created a duty to report abuse and prevent seven years of sexual abuse and rape.

The costs – both emotional and physical – of child abuse are immeasurable. Child abuse scars children and destroys families for generations. It also imposes long term consequences for society, such as teen pregnancy, cost of mental health services, over-sexualized behavior in children, risk of sexually-transmitted diseases, and many, many more.¹⁶¹ Failing to report child abuse, within any context, enables the predator to continue harming vulnerable individuals.

¹⁵⁹ See *supra* note 93 at 11.

¹⁶⁰ See W. VA. CODE ANN. § 49-2-803; see also *supra* note 94 at 16.

¹⁶¹ See *Child Sexual Abuse Facts & Resources*, THE CHILDREN'S ASSESSMENT CENTER, <https://cachouston.org/prevention/child-sexual-abuse-facts/#:~:text=Child%20sexual%20abuse%20is%20an,abuse%20and%20cripple%20future%20generations> (last visited Jan. 2, 2024).

For purposes of protecting vulnerable children, whose lives and wellbeing are in the hands of the state, it is crucial to require members of the clergy to report child abuse to state authorities. Conversations with people of faith who are in favor of protecting the privilege have shed light on a concern that if a member of the clergy is required to report suspected child abuse, individuals will stop confessing to the abuse of children. They argued that having a member of the clergy guide an individual through their confession is better than having no one know of the abuse in the first place. However, as the cases referenced in this Article suggest, no good results when a predator confesses child abuse to a bishop/priest unable or not required to report the abuse.

In the Adam's case, Adams continued to abuse children after his confession and later guidance meetings with his bishop. Timothy Lennon's predator continued to abuse him after Timothy had confessed to the abuse, believing it was his fault the abuse had occurred. The appropriate action in each of these cases to prevent further abuse from occurring would have been to require the bishop or priest to report the abuse to the state.

The following paragraph includes legislation we believe will provide protection to vulnerable children and hold perpetrators of child abuse accountable in the eyes of the law:

If a member of the clergy learns of child abuse or neglect – whether currently ongoing or committed in the past regardless of the present age of the victim and of the years since the abuse occurred – the clergy must report to the appropriate state authorities no later than 48 hours after suspecting or being notified of the abuse or if the penitent has indicated an intention to engage in future abuse. The clergy-penitent privilege does not protect a member of the clergy from failing to report in accordance with the state's mandatory reporting laws of suspected child abuse or neglect.

It may be argued that the parameters of this proposed legislation overstep the boundary and purpose of the confession, particularly by requiring clergy to report intent to engage in child abuse. However, we view each specification as a necessary level of protection for the child.

The language of majority of states' mandatory reporting laws indicate that adults must report if they "suspect" or have "reason to believe" that a child is in danger.¹⁶² This language suggests that certainty of abuse is not a requirement in many states. Further, a few states explicitly state that future or likely abuse must be reported as well.¹⁶³ Requiring clergy members to report

¹⁶² See *Mandatory Reporting Laws by State 2024*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/mandatory-reporting-laws-by-state> (last visited Jan. 2, 2024).

¹⁶³ *Id.*

future abuse can help prevent a traumatic experience for a child and can assure that the clergy member is not solely responsible for preventing the abuse.

VII. MOVING FORWARD

We have, in the words of the great Beatles song, travelled a long and winding road in this Article. John Lennon and Paul McCartney's lyrics ring true in what we have discussed in the preceding pages:

The long and winding road
That leads to your door
Will never disappear
I've seen that road before
It always leads me here
Lead me to your door
The wild and windy night
That the rain washed away
Has left a pool of tears
Crying for the day
Why leave me standing here?
Let me know the way
Many times I've been alone
And many times I've cried
Anyway, you'll never know
The many ways I've tried
And still they lead me back
To the long winding road
You left me standing here
A long, long time ago
Don't leave me waiting here
Lead me to your door
But still they lead me back
To the long winding road
You left me standing here
A long, long time ago
Don't keep me waiting here
Lead me to your door
Yeah, yeah, yeah, yeah¹⁶⁴

The essence of the clergy-penitent privilege, undoubtedly unintended, enhances the vulnerability of the individual at the focus of the confession. When the penitent

¹⁶⁴ THE BEATLES, THE LONG AND WINDING ROAD (Apple 1970).

meets with the faith leader and shares their past, present, or future actions or intentions they are confident the content of the confession will be protected by the privilege. This is the justification we have heard from people of faith regarding the need to protect the privilege.

We stated at the outset that our perspective is admittedly victim-centric; that reflects our core belief that failure to acknowledge the harm caused by the privilege inevitably ensures its protection. In adopting the victim-centric approach we acknowledge that the consequences of imposing significant limits on the privilege goes to the core beliefs in the two faiths examined in the Article. Our recommendation that clergy *must* report a confession addressing sexual assault is based on our conviction that the privilege engenders harm. We understand this is at odds with how the confession-privilege intersection is traditionally understood and defended. Notwithstanding that argument, regardless of its historical context and basis, there is a larger issue that must be understood as more compelling and, clearly, far more urgent.

As we have learned, Bishop Herrod, the bishop who had initially learned of Adam’s abuse, recognized the harm being done to MJ and stated “I doubt [she] will ever do well,” in a recorded interview with Homeland Security agents.¹⁶⁵ The bishop later said that he knew from the start that Leizza Adams, the wife of Paul Adams, was unlikely to stop her husband after he had called her into counseling sessions.¹⁶⁶ “The bishop, who was also Leizza’s personal physician, said she seemed “pretty emotionally dead” when her husband recounted his abuse of their daughter.”¹⁶⁷

As the Adams case makes abundantly clear, the actions of the helpline-law firm had one goal in mind: protect the privilege and protect the institution. Otherwise, how does one explain the instructions given to the bishop when he called. There is, frankly, no other rational explanation for what is, clearly, unconscionable. To be blunt: a child was in harm’s way and the decision – rational from the law firm’s perspective – was to abandon the child. That is the cold reality.

While writing this Article we interacted with a wide range of people; of the innumerable conversations and exchanges, amongst the poignant was an email we received from a faith leader who is also a scholar.

I hope you know I admire the work you’re doing. I come from the perspective of an “insider” which allows me to see some things but can blind me to others. It is incredibly helpful to have individuals like you who are pushing on the system, trying to see if it really is oriented to help those who most need it. If in your findings you determine that things are

¹⁶⁵ See Michael Rezendes, *Seven Years of Sex Abuse: How Mormon Officials Let It Happen*, AP NEWS (Aug. 4, 2022), <https://apnews.com/article/mormon-church-sexual-abuse-investigation-e0e39cf9aa4fbe0d8c1442033b894660>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

being done incorrectly, to me, that's a good thing. Blind spots need to be checked.¹⁶⁸

We include this not for purposes of “self-congratulations”, but rather, to highlight the clear tension between traditionally accepted and understood practices and their unintended harmful consequences. While the theme of tradition was at the core of the great musical, *Fiddler on the Roof*,¹⁶⁹ there is clearly a price paid for blind, unquestioning, commitment to tradition, regardless of its history or basis.

The fundamental question is to whom a duty is owed; for state actors, the answer must be clear: to the vulnerable members of society, regardless of the consequences on other interests, tensions, beliefs, and yes, traditions. The decision by the helpline, or at least as articulated by whoever spoke with the bishop, literally makes our case for us. It is a classic example of *res ipsa loquitur*.

Is there a cost for our recommendation that clergy *must* report abuse to state authorities? As has been forcefully argued to us, the answer is unequivocally affirmative. We have faithfully shared with the reader those deep concerns, if not profound anxieties, were the confession not to benefit from the privilege as presently understood and practiced. While that concern is understandable from the perspective of the faith and its believers, there are more compelling rationalizations that justify adopting our recommendation.

In the context of compelling state interest analysis, the duty to protect must outweigh other explanations and arguments. A basic cost-benefit analysis, at the core of any question regarding competing rights, firmly weighs in favor of any effort that enhances protection of the vulnerable. However, as we have come to learn, the opposition to our recommendation is significant, if not very significant. We acknowledge that and respect the faith-based argument.

However, in viewing this question from the perspective of a five-year-old girl it is, frankly, an obvious and ready solution, particularly when the penitent shares with the faith leader what his future intentions are. Absent this change, five-year-old children, whether in Arizona, Utah, or any other state that favors protecting the privilege rather than protecting the child, face exactly this:

The long and winding road
That leads to your door
Will never disappear
I've seen that road before
It always leads me here
Lead me to your door

By adopting our recommendation, regardless of political and other pressures and challenges, legislators can take a firm stand on behalf of the vulnerable. That is the

¹⁶⁸ With the permission of the sender we are sharing the text; we have decided to ensure anonymity; the full exchange is in our records as the senders identity.

¹⁶⁹ FIDDLER ON THE ROOF (1964).

essence of the social contract Locke, Hobbes, and Rousseau wrote of; that is the primary duty society owes. Otherwise, this is exactly the fate that awaits victims of sexual abuse, known to clergy, barred from reporting to state authorities:

Has left a pool of tears
Crying for the day.

That is a fate no child deserves. No tradition or faith can, or must, tolerate that. Failure to address this issue ensures the privilege continues to enable harm, whose egregiousness is magnified when actor and victim are known to clergy, who enable the penitent to hide behind the privilege.

The time to act is now as the fate of another five-year-old child hangs in the balance awaiting constructive action on their behalf by legislators, faith leaders, and the public.