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Protecting the Penitent While Considering CAPTA

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Section I – An Introduction

The clergy privilege, or penitent privilege, protects communications between clergymen and the penitent. It is a privilege that is deeply rooted in the history of United States and has developed alongside other evidentiary privileges. However, the penitent privilege is not as cut and dry as the other categories of privilege communication. It is a staple of religious free exercise in this country.[1] The free exercise of religion is a protected right, guaranteed in the First Amendment of the United States Constitution.[2] Challenges to the privilege, and by extension free exercise, must contend with the Religious Freedom Restoration Act (RFRA) which was enacted to ensure religious freedoms and a strict scrutiny standard of review when such claims are raised.[3]

These religious guarantees are cast in a different light, however, when considering the Federal Child Abuse Prevention and Treatment Act (CAPTA). This Federal statute requires individuals to report known or suspected instances of child abuse or neglect.[4] Under CAPTA, each state, in its own individual action plans, must include provisions of state law "for mandatory reporting by individuals required to report such instances."[5]

With these various factors in mind, the primary issue is whether RFRA requires CAPTA to retain the privilege for religious communications from the mandatory reporting. A secondary issue is whether the privilege is a permissible accommodation, with or without RFRA, or whether that accommodation violates the Establishment Clause which expressly prohibits the endorsement or undue favoritism of religion. [6]

[1] See generally People v. Phillips, 1 Western L. J. 109 (N.Y. Ct. Gen. Sess. 1813).
[2] U.S. CONST. Amend. I, § 1.
[3] 42 U.S.C. § 2000bb.
[4] 42 U.S.C. § 5106a(b)(2)(B)(i)
[5] Id.
[6] U.S. CONST. Amend. I, § 1.

It can be argued that it is imperative that the penitent privilege coexist with the CAPTA. The protection of the penitent privilege is vital to the free exercise of religion in this country. The penitent privilege must be evaluated through the lens of RFRA, as RFRA reinstates strict scrutiny and a compelling interest test. The privilege promotes the search for spiritual guidance and communication with others in a private setting. Despite any government interest that would wish to repeal or diminish the privilege, maintaining the privilege is arguably the least restrictive alternative in furthering the government's interest.

The penitent privilege does not violate the Establishment Clause either. The privilege was not specifically created to promote participation in religion. The penitent privilege is just one of many recognized privileges and is not without its limits. It can be argued that the penitent privilege favors some religions over others because not all religious practice the rite of confession. However, the wording of the penitent privilege is neutral and permits the religions to benefit from the protection if they choose to utilize the religious ceremony of confession.

The repeal or abrogation of the penitent privilege would cause greater issues. The repeal of the penitent privilege would inhibit the free exercise of religion, and any facially neutral attempt to curtail privileges may raise concerns of unconstitutional legislative targeting of religions like in in Church of Lukumi Babalu Aye v. City of Hialeah.[7] The penitent privilege is deeply rooted in this country's jurisprudence and tradition.[8] The penitent privilege should not be repealed. There are alternate means of discovering evidence of child maltreatment that are not protected by the penitent privilege.

Section II – The Penitent Privilege and CAPTA

[7] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).
[8] See generally People v. Phillips, 1 Western L. J. 109 (N.Y. Ct. Gen. Sess. 1813).

The Clergy Privilege is a long-standing legal principle, dating back to the early nineteenth century.[9] All states have recognized some form of the priest-penitent privilege.[10] People v. Phillips is perhaps one of the earliest cases to recognize the privilege.[11] In Phillips, the state sought to compel the priest's testimony, but the priest refused to testify after a penitent parishioner confessed to him about an alleged theft.[12] The New York Court of General Sessions noted the importance of protecting religious communications during the Roman Catholic sacrament of confession.[13] The Court protected the communications between a priest and a member of the parish in the sacrament of confession, thus promoting free exercise of religion and christening the clergy privilege.[14] This privilege, like the attorney-client privilege and the physician-patient privilege, exists to advance the "development of confidential relationships that are socially desirable."[15] Ultimately, the priest in Phillips was able to ensure the return of the stolen property.[16] The penitent did the right thing, was taken back by the community and a socially desirable outcome was achieved.[17]

The actual scope of the privilege varies from state to state.[18] In Utah, for example, the communication does not necessarily need to be penitential, but must be made in confidence for the purpose of religious guidance.[19] However, the clergy-penitent privilege is not a carte blanche protection for all religious communications.[20] It generally requires communications made directly

[9] People v. Phillips, 1 Western L. J. 109 (N.Y. Ct. Gen. Sess. 1813).
[10] Nestle v. Commonwealth, 470 S.E.2d 133, 138 (Va. Ct. App. 1996).
[11] People v. Phillips, 1 Western L. J. 109 (N.Y. Ct. Gen. Sess. 1813).
[12] Id.
[13] Id.
[14] Id.
[15] In re Grand Jury Investigation, 918 F.2d 374, 383 (3d Cir. 1990).
[16] People v. Phillips, 1 Western L. J. 109 (N.Y. Ct. Gen. Sess. 1813).
[17] Id.
[18] Cox v. Miller, 296 F.3d 89, 102 (2d Cir. 2002).
[19] Scott v. Hammock, 870 P.2d 947, 956 (Utah Sup.Ct. 1994).
[20] Varner v. Stovall, 500 F.3d 491, 495-98 (6th Cir. 2007) (citing specifically the Michigan codification of the penitent privilege).

to a member of the clergy.[21] These statements must be made in confidence.[22] This does not include written communications.[23] Additionally, the oral statements must be made for the purposes of spiritual guidance.[24] In some instances the communications have been deemed privileged even when made as nonpenitential communication.[25] In that example the court has insisted that the other elements, confidential communication for spiritual guidance, be satisfied to consider the communication as privileged.[26] The intricacies of the privilege differ from state to state.

One significant point of distinction is the possessor of the privilege. States differ on whether the layperson or the clergyman holds the privilege.[27] This distinction sets the penitent privilege apart from other privileges, in which typically the layperson alone possesses the privilege.[28] The purpose of the privilege does not differ from state to state.

The protection of the clergy privilege is only one of many competing public policy concerns. Controversies, especially surrounding the Roman Catholic Church, have placed increased pressure on mandatory reporting.[29] Under CAPTA, a greater emphasis has been placed on assessing, screening, and investigating reports of child maltreatment.[30] CAPTA requires each state to have provisions in place requiring certain individuals to report this maltreatment.[31] Most

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[21] Id.
[22] People v. Compobello, 810 N.E.2d 307, 321 (Ill. App. Ct. 2004) (ruling that statements made in front of a third party will not be privileged unless that third party is vital to the act of confession).
[23] Id. at 497 (holding that statements in a journal entry to God would not be protected).
[24] Cox v. Miller, 296 F.3d 89, 110-11 (2d Cir. 2002) (holding that statements made to members of Alcoholics Anonymous were not protected because the statements in question were made to unburden and seek practical guidance).
[25] Scott v. Hammock, 870 P.2d 947, 954 (ruling that the "broad construction of the clergy-penitent privilege is consistent with the purpose of its secular analogue.").
[26] Id. at 956.
[27] Compare State v. J.G., 201 N.J. 369 (2010) (which states the privilege belongs to both the cleric and the penitent and neither may waive it alone) with Nestle v. Commonwealth, 470 S.E.2d 133, 137 (Va. Ct. App. 1996) (holding that the privilege belongs to the clergyman and not the layperson).
[28] Nestle v. Commonwealth, 470 S.E.2d 133, 137 (Va. Ct. App. 1996) (discussing a comparison with other privileges such as the physician-patient and the psychologist-client privileges).
[29] Liam Stack, *Colorado Report Accuses 43 Catholic Priests of Child Sex Abuse*, N.Y. Times (Oct. 23, 2019) https://www.nytimes.com/2019/10/23/us/colorado-catholic-church-abuse-investigation.html.
[30] See generally 42 U.S.C. § 5106a.
[31] Id.

states have designated certain professions whose members are legally required to file reports of child maltreatment.[32] Only approximately fifteen states list priest, rabbi, clergyman or another religious leader as reporters of child maltreatment.[33] Clergy are mandatory reporters in other states even though not specifically named. For instance, three states, Indiana, New Jersey and Wyoming do not enumerate specific professionals instead requiring all persons to report child maltreatment.[34] Approximately eighteen states and Puerto Rico require anyone who suspects child maltreatment to report such suspicions.[35]

Forty-seven states have addressed the issue of privilege in their reporting laws.[36] These states have either affirmed the privileges or denied use of the privilege as justification for failing to report.[37] While the clergyman privilege has been widely affirmed, six states have denied it exclusively in this context.[38] Some states, such as Washington, do not enumerate clergy as mandatory reporters, but the penitent privilege is reaffirmed within the reporting laws.[39] Other states do not address the issue, such as Hawaii and New York.[40] The states must balance the interest of reporting child maltreatment with the need to honor the First Amendment guarantees of the Free Exercise Clause and Establishment Clauses.[41]

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[32] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, 5-68 (2019).
[33] Id. at 3.
[34] Id.
[35] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, 3 (2019).
[36] Id. at 4 (excluding Connecticut, Mississippi, New Jersey and Puerto Rico).
[37] Id.
[38] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, 4 (2019) (Six states and one territory, New Hampshire North Carolina, Oklahoma, Rhode Island, Texas, West Virginia and Guam disallow the use of the penitent privilege as grounds for failure to report.).
[39] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES. CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, 2 (2019).
[40] Id. at 6-20.
[41] Cantwell v. Connecticut, 310 U.S. 296 (1940) (expressly incorporating the Free exercise clause of the First Amendment into the Fourteenth Amendment); Everson v. Board of Education, 330 U.S. 1 (1947) (incorporating the Establishment Clause of the First Amendment into the Fourteenth Amendment).

The need to report, as mandated by state statutes via CAPTA, has come in conflict with the clergy privilege in recent years.[42] In People v. Campobello, the Illinois Appellate Court had to consider its state CAPTA reporting statute when a Roman Catholic priest was charged with an alleged sexual assault of a young girl.[43] The Catholic Diocese conducted an internal investigation, but refused to turn over the results, arguing penitent privilege protection.[44] The Diocese argued that communications between the Bishop and the priest in a professional capacity or as a spiritual adviser was statutorily protected as privileged.[45]

The Campobello court had previously determined that a clergyman's professional capacity was not broader than his or her role as a spiritual advisor.[46] In People v. Bole, the minister testified that he told the penitent defendant he was ineligible for counseling after he had previously lied to the minister.[47] The court held that the defendant's admissions "were not obtained by the minister in his professional character or as a spiritual adviser."[48] The Campobello court determined that the pivotal phrase in the Illinois penitent privilege statute as "spiritual advisor in the course of the discipline."[49] The Appellate Court concluded that the Diocese must produce all internal reports to an *in camera* inspection to further evaluate the claim of privilege.[50]

The current Illinois state statute on mandatory reporting explicitly affirms the clergyman privilege, staying that "[a] member of the clergy may claim the privilege under §8-803 of the Code

[42] Mayeux v. Charlet, 203 So.3d 1030 (La. 2016); People v. Campobello, 810 N.E 2d 307 (Ill. App. Ct. 2004).
[43] People v. Campobello, 810 N.E. 2d 307 (Ill. App. Ct. 2004).
[44] Id. at 311 (arguing that the report contained "religious thoughts and ideas of members of the Church").
[45] Campobello, 810 N.E.2d at 319.
[46] Id. (citing People v. Bole, 585 N.E.2d 135, 147 (Ill. App. Ct. 1991)).
[47] People v. Bole, 585 N.E.2d 135, 147 (Ill. App. Ct. 1991).
[48] Id.
[49] Campobello, 810 N.E.2d at 320 (concluding that no "case or statute defines it").
[50] Id. at 322. (No subsequent procedural history exists to determine whether this communication was in fact protected by the penitent privilege or not).

of Civil Procedure."[51] It could be argued that the above communication, between members of the clergy, would not be protected by the privilege as it was in writing, and the privilege does not extend to written communications. If the communications were made orally between members of clergy for the purpose of spiritual guidance in a matter of discipline, it may be protected from discovery.[52] However, the communications must be turned over to the court to determine what is protected.[53]

Similar communications may continue to be classified as confidential under the penitent privilege. Unfortunately, this is not the only instance of conflict between the privilege and mandatory reporting statutes.

In Roman Catholic Diocese v. Morrison, the Roman Catholic Diocese claimed priest-penitent privilege in response to a child abuse scandal.[54] The Court noted that while the Diocese claims the privilege for most of its documents, it only applies to "communication [] made 'to a clergyman [or woman] in his [or her] professional character as spiritual adviser."[55] The Court concluded that several documents failed to qualify for this privilege because they "were clearly not directed to anyone in their 'professional character as spiritual adviser.'"[56] Similar to Campobello, the Mississippi State Supreme Court requires a review of all documents claimed to be confidential.[57]

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[51] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, 8 (2019) (quoting Comp. Stat. Ch. 325, §5/4).
[52] See generally People v. Campobello, 810 N.E.2d at 318-22.
[53] Id. at 322.
[54] Roman Catholic Diocese v. Morrison, 905 So. 2d 1213, 1222-23, 1245-46 (2005) (the penitent privilege being one of several privileges alleged by the Diocese).
[55] Roman Catholic Diocese v. Morrison, 90 So. 2d at 1246 (quoting Miss. R. Evid. 505(b)).
[56] Id. (quoting Miss. R. Evid. 505(b)).
[57] Id. at 1248.

The current Mississippi state CAPTA statute does not address the penitent privilege in its mandatory reporting statute.[58] However, it does state that any minister with reasonable cause to suspect maltreatment must orally report that suspicion immediately.[59]

More recently, in Mayeux v. Charlet, Rebecca Mayeux was allegedly sexually assaulted by long time parishioner and President of the Catholic funeral home.[60] The Mayeux family alleged that the Catholic Diocese of Baton Rouge failed to report the sexual abuse.[61] The family alleged that a friar had knowledge of inappropriate sexual contact between the daughter and a church official, but failed to report on it pursuant to the state's mandatory reporting statute.[62] The Diocese moved to exclude any confessions made by Rebecca to the friar because any and all confessions were made to the friar in his professional capacity and for spiritual guidance, entitling them to the penitent privilege.[63]

The Louisiana State Supreme Court concluded that priests are not mandatory reporters under either the former or current statute.[64] The Court looked to the former reporting statute which excludes members of clergy from reporting any confidential communication, especially when there is a duty to keep such communications confidential.[65] The Court concluded that, because the former statute had a carve out for clergymen, they were not mandatory reporters under the current statute either.[66] The current version of the Louisiana mandatory reporting statute states that:

> [a] member of the clergy is not required to report a confidential communication . . . from a person to a member of the clergy who in the course of the discipline or practice of that church . . . is authorized to hear and is accustomed to hearing

[58] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, 11 (2019) (quoting Ann. Code § 43-21-353(1)).
[59] Id. (quoting Ann. Code § 43-21-353(1)).
[60] Mayeux v. Charlet, 203 So.3d 1030, 1032 (La. 2016).
[61] Id.
[62] Id.
[63] Id. at 1033.
[64] Mayeux, 203 So.3d at 1038-40.
[65] Id. at 1036 (citing La. Child. Code art. 603(15)).
[66] Id. at 1038 (citing La. Child. Code art. 609).

> confidential communication and, under the discipline or tenets of that church . . . has a duty to keep such communications confidential.[67]

This statute was changed in light of CAPTA requirements but continues to utilize much of the language interpreted in Mayeux.[68] In both Mayeux and Morrison, the reporting statute has been usurped by the penitent privilege, which appear to protect the clergy. The Diocese in both cases interpreted the penitent privilege to include communications between members of the clergy because the communications were in the course of discipline.[69] The friar was protected by the privilege because he was a member of the clergy and communicated with administration for disciplinary purposes.[70] It is likely that the same outcome would be reached in a case today, as little of the statutory language has changed.[71]

These three decisions walk the tight line of public interests. On one hand, the courts must protect the public welfare and goals of the state CAPTA statutes, but on the other hand the states must ensure the free exercise of religion and respect the penitent privilege. While the evidentiary decisions of these cases may shock the public conscience, the information being excluded may not impede all investigations or proceedings. The privilege is designed to encourage spiritual communications and self-discipline through one's religious institutions.[72] The penitent privilege is not intended to frustrate the criminal justice system, and it cannot prevent the discovery of non-privileged information.[73]

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[67] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, 9 (2019) (quoting Children's Code Art. 603(17)(b)-(c)).
[68] Compare Children's Code Art. 603(17)(b)-(c) with Mayeux, 203 So.3d at 1038 (quoting then active La. Child. Code. art. 609).
[69] See generally Mayeux v. Charlet, 203 So.3d 1030 (La. 2016); People v. Campobello, 810 N.E 2d 307 (Ill. App. Ct. 2004).
[70] Mayeux, 203 So.3d at 1038-40.
[71] See generally Mayeux v. Charlet, 203 So.3d 1030 (La. 2016); People v. Campobello, 810 N.E 2d 307 (Ill. App. Ct. 2004).
[72] People v. Phillips, 1 Western L. J. 109 (N.Y. Ct. Gen. Sess. 1813).
[73] Id.

The frustration surrounding the penitent privilege stem from the sex abuse scandals and the clergy that have hid behind the privilege.[74] These cases differ from the original justification of the penitent privilege. Under Phillips, the privilege exists to protect the penitent and their search for spiritual absolution.[75] However, the penitent privilege in modern cases is wielded more by church administrators and priests than penitent laypeople.[76] The social good in these cases has shifted from protecting the penitent practitioner of religion to exposing the misdeeds of religious leaders who prey on vulnerable members of the community. The attempt to hide behind the penitent privilege has shifted public perception of this protection. However, the penitent privilege was not envisioned to protect the abuses committed by religious leaders. Despite these efforts, it is still possible to discover the concealed evidence.

It is important to note that evidence protected by the penitent privilege, like any other privilege, may still be admissible through another evidentiary avenue. The Supreme Court has held that confidential or privileged communications are admissible when they are acquired from an independent source, removed from the privileged conversation.[77] Under the independent source doctrine, statements by the penitent or statements that are not made in confidence are not protected by the penitent privilege and are completely discoverable.

Clergy must report these unprotected statements in states that classify them as mandatory reporters or mandatory reporters with reasonable suspicion of child mistreatment. Additionally, witnesses to acts of child maltreatment may safely report instances of child maltreatment because

[74] Liam Stack, *Colorado Report Accuses 43 Catholic Priests of Child Sex Abuse*, N.Y. Times (Oct. 23, 2019) https://www.nytimes.com/2019/10/23/us/colorado-catholic-church-abuse-investigation.html.
[75] People v. Phillips, 1 Western L. J. 109 (N.Y. Ct. Gen. Sess. 1813).
[76] Mayeux v. Charlet, 203 So.3d 1030 (La. 2016); People v. Campobello, 810 N.E. 2d 307, 318-22 (Ill. App. Ct. 2004).
[77] See Wong Sun v. United States, 371 U.S. 471, 485 (1963).

instances of abuse or neglect are not communications for the purpose of spiritual guidance and would not be protected by the penitent privilege.[78]

In addition to the independent source doctrine, the inevitable discovery exception has also been applied.[79] Either doctrine can be used to circumvent potential conflicts between penitent privilege and CAPTA. It is important to reemphasize that in most cases the penitent is the one that holds the privilege and may divulge the communications at their discretion.[80] The few exceptions, in which the clergyman holds the privilege entrust the power to the spiritual advisor to act in accord with his or her conscience.[81] In those instances the privilege could not "be affected by the communicant."[82] Based on this unique interpretation, it is unclear would may happen in the event of the death of a clergyman who possesses the penitent privilege. If the holder of the penitent privilege expresses intent to breach the privilege, that evidence may be discoverable, as well as the method of discovery discussed above. The exclusionary nature of the penitent privilege does not suppress all evidence and is not designed to. The privilege will only be used to exclude evidence to vindicate or protect the holder of the privilege.[83]

Despite the intricacies and differences, the penitent privilege functions like any other privilege. It bars evidences that was intended to be kept in confidence, for the purpose of seeking aid.[84] The states' CAPTA compliant statutes can do little to address the penitent privilege. Some have denied the privilege in instances of child maltreatment, but it appears those instances have

[78] See generally People v. Campobello, 810 N.E.2d at 318-22.
[79] See People v. Burnidge, 687 N.E.2d 813, 816-17 (Ill. 1997) (holding that evidence which will inevitably be discovered without error or misconduct may still be admitted) (citing Nix v. Williams, 467 U.S. 431 (1984)).
[80] Compare State v. J.G., 201 N.J. 369 (2010) (which states the privilege belongs to both the cleric and the penitent and neither may waive it alone) with Nestle v. Commonwealth, 470 S.E.2d 133, 137 (Va. Ct. App. 1996) (holding that the privilege belongs to the clergyman and not the layperson).
[81] Nestle v. Commonwealth, 470 S.E.2d 133, 137 (Va. Ct. App. 1996) (citing Seidman v. Fishburne-Hudgins Educ. Found., Inc., 724 F.2d 413 (4th Cir. 1984)).
[82] Id. at fn. 3 (discussing the omission of penitent's consent from this privilege alone).
[83] People v. Burnidge, 687 N.E.2d 813, 818 (Ill. 1997).
[84] Nestle v. Commonwealth, 470 S.E.2d 133, 137 (Va. Ct. App. 1996).

yet to be litigated in a significant capacity. It could be argued that limiting the penitent privilege in any context may carry free exercise implications, as it inhibits a religious practice that is fundamental to certain religious faiths.[85]

Section III – Free Exercise Clause Considerations

The penitent privilege supports the free exercise of religion, promoting spiritual guidance and communication.[86] Under the Free Exercise Clause, "Congress shall make no law . . . prohibiting the free exercise [of religion]."[87] This has been translated by the Supreme Court to mean a mandated noninterference with religion.[88] Free Exercise Clause jurisprudence was reinforced with the passing of RFRA which considers free exercise an "unalienable right" and requires laws affecting free exercise to be the least restrictive means to advancing a compelling government interest.[89]

It can be argued that the penitent privilege is necessary to the free exercise of religion in this country. The court in Phillips called religious rites, such as the sacrament of confession, essential to the free exercise of religion.[90] The court ruled that the ability to participate in religious rites is vital to the free exercise of religion.[91] There is an emphasis on the veil of secrecy, which the court finds vital to confession and the Catholic church as a whole.[92] The confidence is stated to be of theological importance, not political.[93] If the privilege were unnecessarily constricted or

[85] See People v. Phillips, 1 Western L. J. 109 (N.Y. Ct. Gen. Sess. 1813).
[86] People v. Phillips, 1 Western L. J. 109 (N.Y. Ct. Gen. Sess. 1813).
[87] U.S. CONST. Amend. I, § 1.
[88] Walz v. Tax Com. Of New York, 397 U.S. 664, 673 (1970).
[89] 42 U.S.C. § 2000bb(a).
[90] People v. Phillips, 1 Western L. J. 109 (N.Y. Ct. Gen. Sess. 1813).
[91] Id.
[92] Id.
[93] Id.

read too narrowly, it may inhibit the religious from seeking religious reconciliation.[94] The penitent privilege depends on a sense of complete confidentiality.[95]

It could be argued that the Free Exercise Clause and RFRA require the penitent privilege to continue to exist in its current state. It may not be possible to curtail the privilege without violating RFRA. Under RFRA, any substantial burden on the free exercise of religion must be justified by a compelling governmental interest that does not have a possibly less restrictive alternative.[96]

The burden on religious exercise would be substantial if the penitent privilege were eliminated or narrowed. If certain statements or methods of communication with clergy were no longer protected, the rite of confession and penance would be greatly inhibited.[97] The government would have to put forth a compelling government interest. The Supreme Court established a strict scrutiny standard of review because this is a "highly sensitive constitutional area."[98]

The government would have to show that it lacks other methods of achieving its goals without burdening religion.[99] Religious groups could argue that the privilege itself is the least restrictive alternative: it is very narrow and does not interfere with mandatory duties when confidential communications are not involved. This privilege, like all privileges has exceptions and ways to circumvent the privilege. The penitent privilege exists to advance spiritual communications and seek discipline through the exercise of religion.[100] It would be more restrictive on the free exercise of religion to restrict how the penitent may converse with their

[94] Scott v. Hammock, 870 P.2d 947, 954 (Utah 1994).
[95] Id.
[96] 42 U.S.C. § 2000bb(a); Sherbert v. Verner, 374 U.S. 398, 406-07 (1963).
[97] See generally Scott v. Hammock, 870 P.2d 947, 954 (Utah 1994); People v. Phillips, 1 Western L. J. 109 (N.Y. Ct. Gen. Sess. 1813).
[98] Thomas v. Collins, 323 U.S. 516, 530 (1944).
[99] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014).
[100] People v. Campobello, 810 N.E. 2d 307, 318-22 (Ill. App. Ct. 2004).

clergy and seek religious absolution. Restrictions on the sacrament of confession would not necessarily advance the interests set forth by the government. Holding priests in contempt for failure to disclose penitent communications, for example, would not advance the interests of the government, nor public policy in general.

The penitent privilege encourages the penitent to come forward and seek spiritual guidance from their religious leaders and request absolution.[101] The government could simply encourage the clergy to encourage the penitent to come forward and confess these statements to the police.[102] This would preserve the free exercise of religion through the ceremony of confession as well as encourage the reporting of allegations of child maltreatment by those seeking religious absolution.

As discussed above, information discovered outside of confidence is still discoverable and serves the government's compelling interest. Reports of child maltreatment can still come from clergy and those that witness child maltreatment or hear conversations of child maltreatment communicated outside of the context of confession or spiritual guidance. The clergy are still required to report witnessed incidents of child maltreatment, for example. Therefore, it can be argued that RFRA may require that the penitent privilege to persist because it is the less restrictive alternative available that serves the government's interest and promotes the free exercise of religion.

A repeal of the Clergy Privilege may seem similar to the legislature's action in Church of Lukumi Babalu Aye v. City of Hialeah, in which the city council attempted to curtail free exercise under the pretext of a generally applicable statute.[103] By repealing a religious privilege, religious

[101] See generally People v. Campobello, 810 N.E. 2d 307, 318-22 (Ill. App. Ct. 2004).
[102] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, 9 (2019) (quoting Children's Code Art. 603(17)(b)-(c) which states that "clergy shall encourage that person to report the allegations to the appropriate authorities.").
[103] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

organizations may argue that the government is attacking a religious practice through a supposed general statute.[104] It could be argued that since this privilege still exists for lawyers and therapists, religion alone is being targeted. Without a compelling interest, such targeting is unconstitutional.

A Lukumi analysis would be necessary in states such as New Hampshire and West Virginia, which under their respective CAPTA statutes, abrogated the clergy privilege.[105] The West Virginia statute, for example, abrogated all privileged communications except for attorney-client privilege in situations of known or suspected child maltreatment.[106] Additionally, the West Virginia statute mandates that any member of the clergy with reasonable suspicion of child maltreatment or whom has observed such maltreatment must immediately report the circumstances within twenty-four hours of the suspicion.[107]

A clergyperson could bring a challenge under Lukumi, arguing that the generally applicable law is unfairly targeting religion. This would be a relatively weak case however, as most other privileges are abrogated as well as the penitent privilege. This situation is unlike Lukumi, as there are not exceptions for the other privileges affected.[108] The only similarity to Lukumi in this instance is that not all privileges are abrogated, so the law is not generally applicable or facially neutral. [109] In that case, strict scrutiny applies to the government's action.[110] The state could argue that there is not a significant burden on religion, as the facially neutral abrogation only

[104] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).
[105] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, at 2 (2019).
[106] Id. at 19 (quoting Ann. Code § 49-2-811).
[107] Id. at 19 (quoting Ann. Code § 49-2-803).
[108] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 535-36 (1993) (in which food establishments and kosher killing of animals were excluded from the prohibition of ritualistic animal killing).
[109] Compare Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 535-36 (1993) with CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, 19 (2019) (quoting Ann. Code § 49-2-803, excluding the attorney-client privilege from the abrogation).
[110] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 535-36 (1993).

impact statements involving evidence or suspicion of child maltreatment. The West Virginia legislature could argue that there is a compelling government interest and that this is not a facially neutral attempt to restrict religious practice.

There is an important public policy concern at issue when the state legislature mandates the reporting of child maltreatment. The state intends to suspend husband-wife and professional-client privileges to ensure that anyone with evidence or suspicion of child maltreatment may come forward and that their evidence may be admissible in court.[111] The State may argue that attorney-client privilege must be preserved to ensure the confidentiality in preparation for litigation.

The state has only abrogated privileges that may directly concern an instance or suspicion of maltreatment that is not yet being litigated. The preservation of the attorney-client privilege is to ensure the privacy and honesty in the realm of litigation, which would certainly be applicable in child maltreatment cases. New Hampshire has taken similar language, only preserving the attorney-client privilege.[112] The statutes in both West Virginia and New Hampshire would most likely survive a Lukumi challenge, as there does not appear to be any legislative intent to target religion or provide exceptions to nonreligious privileges, except the attorney-client privilege.[113] It appears that the abrogation does not specifically burden religious exercise alone. The abrogation affects medical privilege as well. The abrogation would be an issue if it only burdened conduct motivated by religious belief.[114]

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[111] See CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, 19 (2019) (quoting Ann. Code. § 49-2-803).
[112] Id. at 13 (quoting Rev. Stat. § 169-C:32).
[113] Masterpiece Cakeshop, Ltd. V. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (holding the requirement for government neutrality and respect for religion in order to comply with the Free exercise Clause); Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017) (excluding religion form a benefit based on religious status violated the Free Exercise Clause).
[114] Church of Lukumi Babalu Aye, 508 U.S. at 542-43.

It may be argued that under the Free Exercise Clause the penitent privilege must persist in order to permit the uninhibited practice of a religious rite. The penitent privilege has been deeply rooted in American history as one of the oldest privileges and protections for religious practice. The need for the government to refrain from interreference is guaranteed by Free Exercise Clause, but the Free Exercise Clause often intersects with the issue of state accommodation under the Establishment Clause.[115]

Section IV – Establishment Clause Considerations

Challenges to the penitent privilege arise from Establishment Clause grounds. Under the Establishment Clause, "Congress shall make no law respecting the establishment of religion".[116] Critics of the privilege may argue that this privilege is an unconstitutional endorsement of religion.[117] However, the privilege is only one of several privileges that holds communications in confidence. It could be argued that the preservation of the penitent privilege is only another permissible accommodation under the Establishment Clause jurisprudence. The triumvirate of Walz v. Tax Com. Of New York, Lemon v. Kurtzman, and Corp. of Pres. Bishop v. Amos govern this discussion.

The government cannot become extensively involved with religion.[118] The penitent privilege, although protecting communications in a religious context, is not unlike other general exceptions afforded to religion. In Walz v. Tax Com. Of New York, the Supreme Court held that tax exemption status afforded to religious institutions did not violate the Establishment Clause because many other organizations were exempt as well.[119] Like the tax exemption, the penitent

[115] See Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970).
[116] U.S. CONST. Amend. I, § 1.
[117] Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J. concurring). Justice O'Connor announced an endorsement test which focuses "on institutional entanglement and on endorsement or disapproval of religion [to clarify] the Lemon test as an analytical device."
[118] Id. at 689-90.
[119] Id. at 676.

privilege is not an exclusive benefit awarded to the church alone. Privileges exist for all manner of communications with professionals, ranging from doctors and psychiatrists to attorneys and therapists.[120] The Supreme Court in Walz held that it was a permissible accommodation to grant an exemption to religion when other exemptions were already granted.[121] The penitent privilege is just one of many privileges, like the exemption granted in Walz.

Under Lemon v. Kurtzman, in order to satisfy the Establishment Clause, legislation must be secular in purpose, must not advance nor inhibit religion, and it must not create entanglement between the legislature and religion.[122] This is all done to ensure that the legislature does not establish, sponsor or support religion.[123]

An accommodation afforded for a religious institution or religious practice cannot delegate civic or political authority to a group chosen "according to a religious criterion."[124] The emphasis, in the eyes of the Supreme Court, should be on the neutrality of the accommodation.[125] Legislators must honor the neutrality between various religious institutions.[126]

Additionally, in Corp. of Pres. Bishop v. Amos, the Supreme Court held that, to be constitutional under the Establishment Clause, certain exemptions must promote free exercise.[127] Justice Brennan, in his concurrence, elaborates, saying that certain exceptions can promote the autonomy and free exercise of the church.[128]

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[120] See generally Nestle v. Commonwealth, 470 S.E.2d 133, 137 (Va. Ct. App. 1996).
[121] Walz, 397 U.S. at 689-90.
[122] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
[123] See Walz v. Tax Com. of New York, 397 U.S. 664, 674 (1970).
[124] Bd. Of Educ. V. Grumet, 512 U.S. 687, 698 (1994).
[125] Id. at 697.
[126] Id. at 706-707 (citing Larson v. Valente, 456 U.S. at 244-46).
[127] Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 333-35 (1987).
[128] Id. at 2871.

Courts would uphold the penitent privilege if they apply the jurisprudence discussed above. The CAPTA statutes are narrowly tailored to protect only what is necessary, the confidential communications of the clergy in a disciplinary, spiritual guidance context.

However, the Louisiana State Supreme Court has granted the penitent privilege, and the clergy in general, a wider breadth of protections than other states. According to the Louisiana's Supreme Court, the penitent privilege exempts members of the clergy from any mandatory reporting requirement.[129] Members of the clergy in Louisiana are not mandatory reporters in any context.[130] This interpretation deviates from other states. A minority of states, Indiana, New Jersey, and Wyoming, do not list specific occupations, but require that everyone is a mandatory reporter when there is reasonable suspicion.[131] However, Louisiana's State Supreme Court has interpreted the omission of clergy from the mandatory reporting statute as an intentional exclusion from the duty to report.[132]

The Louisiana Supreme Court gave a broad interpretation of a relatively narrow statute. This could arguably be an impermissible accommodation, as it gives greater latitude to religion. Other professionals, such as health practitioners, mental health practitioners or social workers are still mandatory reporters.[133] The Louisiana statute on privileged communications explicitly deals with the penitent privilege separately, addressing it in detail before covering other professional privileges.[134] The statute states that mental health or social service practitioners are excluded from the mandatory reporter law when professional legal representation is involved.[135] This restriction

[129] Mayeux, 203 So.3d at 1038-40.
[130] Id.
[131] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, 3 (2019).
[132] Mayeux, 203 So.3d at 1038-40.
[133] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, 28 (2019).
[134] Id. at 29 (quoting Children's Code Art. 603(17); 609).
[135] Id.

on secular privilege is more narrow than the ruling of the Louisiana Supreme Court which interpreted the legislative intent to exclude clergy from the list of mandatory reporters altogether.[136]

The interpretation of the Louisiana statute, and the statutes that do not list clergy as mandatory reporters, may run afoul of the Establishment Clause. It could be argued that these statutes are an impermissible accommodation of religion, incongruous with the Establishment Clause. The statutes on their face would satisfy the first prong of Lemon because they are secular in purpose.[137] The secular purpose is to require the reporting of actual or suspected child maltreatment from those who have witnessed or have reasonable suspicion of such conduct.[138] The statues pertaining to the statute of clergy may be at issue with the second prong of the Lemon test.

In addition to the secular purpose, the legislation must not advance or inhibit religion and must not lead to government entanglement.[139] It may be argued that the statutes that do not explicitly or implicitly mandate reporting are unfairly biased towards religion. In states such as Alaska and Washington, members of the clergy are not covered by an explicit section of the reporting law and not covered by an "any person" provision.[140] Instead, clergy in Washington are provided statutory immunity from liability if they elect to report.[141] This is to protect the clergy from the fear of the penitent raising breach of fiduciary duty claims against them. The Washington statute may unfairly favor religion, as many professions are required to report.[142] While this statute

[136] Mayeux, 203 So.3d at 1038-40.
[137] See generally CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2019).
[138] Id.
[139] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
[140] See CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, 3 (2019).
[141] Id. at fn. 6.
[142] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, 64 (2019) (quoting Rev. Code § 26.44.030 which includes required reporters such as law enforcement officers, professional school personnel, nurses, social workers, and psychologists).

does excuse all reporters from divulging privileged communications, it still requires secular reporters to remain vigilant while members of the clergy are now exempt.[143] The statute also provides protection for those with confidential communication who come forward, such as "clergy-penitent and physician-patient privilege."[144] This is the only explicit mention of clergy, however.[145]

By requiring fewer requirements on sectarian professions than secular professions, it could be argued that the Washington statute violates the Establishment Clause. The duty to report is a legal requirement set forth in statute that requires professionals to take an active role in reporting child maltreatment. If the clergy are not required to participate in this program, it protects them from the possibility of violating the statue.

It could be argued that these statutes do not involve entanglement between the government and religious institutions. The involvement with religious institutions is minimal. In the statutes that require it, the clergy must report instances or suspicion of child maltreatment, as with other secular professions.[146] These statutes do not regulate religious practices or the grant the religious institutions any legislative power.[147]

The penitent privilege would be an impermissible accommodation in the lens of the Establishment Clause if religious institutions alone had the power to take statements in confidence, excluding them from admissible discovery on their own terms.[148] When an exemption lacks sufficient breadth or is exclusive to religion, it will fail the Establishment Clause because it

[143] Id. (quoting Rev. Code §§ 26.44.030; 26.44.060).
[144] Id.
[145] Id.
[146] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, 5 (2019) (quoting California's Penal Code § 11166(d)).
[147] See generally CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2019).
[148] See generally Lemon v. Kurtzman, 403 U.S. 602 (1971).

impermissibly favors religion.[149] The Supreme Court has emphasized that breadth matters when holding that a particular exclusion does not promote a religion or religious practices over secular ones.[150] It can be argued that the standard of privileged communications, held in confidence is substantially broad as it is one privilege among many and is the only privilege to incorporate religious practices.[151]

While it is argued that the privilege does not discriminate against denominations, the act of secret communication is not universally shared between all religions.[152] Some cases reference the roots of confession and the Catholic church specifically in discussing the history of the privilege.[153] It can be argued that this causes the privilege to fail the Establishment Clause because one religion cannot be officially preferred over another.[154] This discrepancy may raise concerns about favoritism and the endorsement of specific religions. Such preference would run against the Establishment Clause of the First Amendment.

However, the privilege exists for any religious group that utilizes secretive, repentant dialogue with a spiritual guide for the purposes of spiritual guidance.[155] The privilege does not explicitly name a sect or denomination protected by this privilege. Therefore, it can be argued that

[149] Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 12 (1989).
[150] Id.
[151] N.J.S.A. §2A:84A-22 (discussing marital privilege); N.J.S.A. §2A:84A-22.2 (discussing patient-physician privilege); and N.J.S.A. §2A:84A-23 (discussing cleric-penitent privilege).
[152] See Larson v. Valente, 456 U.S. 228, 253-54 (1982) (holding that a Minnesota statute that required only certain religious sects to register and report was an impermissible and uneven accommodation of religion which could be seen as the exact favoritism the First Amendment forbids); Compare Varner v. Stovall, 500 F.3d at 499 (stating that there is no sectarian affiliation with the penitent privilege) with Quran 3:16 (which believes in confession of sins to Allah alone through the practice of Istighfar) and Repentance by Church of Jesus Christ of Latter-Day Saints President Marion G. Romney (10/05/80) (which states that confession of sins should also be made to those who have been affected by the sinner's misconduct).
[153] See Lightman v. Flaum, 761 N.E.2d 1027, 1030-31 (NY 2001); Nestle v. Commonwealth, 470 S.E.2d 133, 137 (Va. Ct. App. 1996) (stating that this was "established by the Roman Catholic Church as early as the Fifth Century"); People v. Phillips, 1 Western L. J. 109 (N.Y. Ct. Gen. Sess. 1813).
[154] Larson v. Valente, 456 U.S. 228, 244 (1982).
[155] People v. Phillips, 1 Western L. J. 109 (N.Y. Ct. Gen. Sess. 1813).

the privilege's existence does not favor one religion over another, so long as no group is explicitly included or excluded from the benefit of the privilege.

It could be argued that these statutes only protect those religions that utilize the penitent privilege and therefore advance some religions over others. Religions that do not incorporate private confession into their practices, such as Islam, may argue that their penitent practices are not protected from mandatory reporting laws. Muslims generally do not communicate their sins to anyone but Allah.[156] Practicing Muslims may argue that the penitent privilege establishes a preference for Christianity.

It may be argued that there is implicit bias in the penitent privilege. The penitent privilege in New Jersey, for example, protects confidential communications to a cleric in their "professional character" or to a spiritual advisor for disciplinary purposes or as a religious practice.[157] If a Muslim practitioner shares his or her penance with another member of their Mosque, it may not be protected because it may not be a religious practice of the church.

Additionally, members of the Church of the Latter-Day Saints would not be protected by this statute either, as confessing to another member of the congregation would not be to a cleric or spiritual advisor, despite being a religious practice for the purposes of spiritual guidance and discipline. These two faiths are only two examples of those that do not utilize the penitent privilege. Despite these arguments, it may be best from an Establishment Clause standpoint to leave the penitent privilege as it is.

The Establishment Clause prevents the explicit endorsement or inhibition of a religion.[158] However, the penitent privilege is still a permissible accommodation for religion. The penitent

[156] See Quran 3:16 (which professes the confession of sins to Allah alone through the practice of Istighfar).
[157] N.J.S.A. §24:84A-23.
[158] See generally Lemon v. Kurtzman, 403 U.S. 602 (1971).

privilege serves to protect all confidential communications in order to encourage the pursuit of spiritual guidance.[159] The penitent privilege exists to provide confidentiality to those religions that utilize a confidential rite of confession. It does not explicitly list or favor one religion over another. It does not actively exclude any specific religion from utilizing the privilege.

Those religions that do not utilizing confession naturally cannot benefit from the privileges surrounding confession. It would violate the Establishment Clause if the government created individual immunities for all religions, including those not covered by the penitent privilege. Under the Lemon test, legislation cannot create government entanglement with religion.[160] It would be excessive government entanglement for legislators to create privileges and protections for every specific religion to protect communications. This could arguably lead the government to regulate and protect certain religious practices to ensure equal protection of various religious groups. This line of accommodations would create a slippery slope as various religious communication protections would need to be evaluated to make sure that the statutes do not favor or inhibit religion. This would lead to impermissible accommodations.

It is safer for the states to maintain the penitent privilege, as it is the best option to maintain a facially neutral accommodation. Those religions that choose to incorporate an act of confession held in confidence can benefit from the act, while other religions handle their rites of penance differently. The penitent privilege is wide enough and sufficiently neutral to accommodate all religions. It protects religious, confidential communications with a spiritual leader, in their professional or spiritual capacity, in order to obtain guidance.[161] These factors, similar to the language in other state statutes, allow the religions to determine if the privilege protects them in

[159] See N.J.S.A. §24:84A-23.
[160] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
[161] See N.J.S.A. §24:84A-23.

their practices. This ensures that the government respects the free exercise of religion and does not endorse one religion over another.

The penitent privilege generally does not run afoul of the Establishment Clause. The issues arise when evaluating the state compliant CAPTA statutes. The statutes handle the penitent privilege differently depending on the positions of each state. States such as Louisiana and Washington are arguably overbroad in the leeway granted clergy. When the states do not qualify the clergy are mandatory reporters, it can be argued that the states are endorsing religion.

The CAPTA statutes may fail the Lemon test if they advance or inhibit certain religions or show excessive entanglement depending on how they handle the role of clergy in their reporting statutes. The privilege does not favor certain religions just because certain religions do not practice the act of confession. It would create greater Establishment Clause issues if independent caveats for religions that do not actively incorporate the rite of confidential confession into their religious practices. It would create greater challenges for religious groups and legislators if the penitent privilege were repealed or abrogated on Establishment Clause grounds.

Section V – Conclusion

The penitent privilege is one of the oldest privileges afforded to confidential communications. The privilege protects the communications of the clergyman and the penitent to further the free exercise of religion and encourage the religious sacrament of confession. While each state has drafted the privilege slightly differently, the privilege generally requires a confidential communication with a professional in their capacity as a spiritual leader for the purposes of spiritual guidance. This privilege is typically possessed by the penitent, though some states have vested the penitent privilege with the clergyman.

The penitent privilege comes into conflict with state compliant CAPTA statutes. The interest of protecting spiritual guidance is forced to compete with the state interest of preventing child maltreatment. However, many states have affirmed the penitent privilege within their CAPTA statutes. Only a handful of states have denied the use of the penitent privilege as grounds for refusing to report child maltreatment. In three cases, state courts have held that internal communications were protected by the penitent privilege because clergyman were communicating with church administration in a disciplinary context while in their professional capacity as spiritual advisors. The outcomes of these cases would not change when applying the respective states' current child reporting statutes.

The penitent privilege is closely protected by RFRA which ensures the free exercise of religion by reinstating the compelling interest test for free exercise claims. RFRA safeguards the free exercise of religion by requiring facially neutral statutes that affect religion to advance a compelling state interest without a less restrictive alternative. It may be argued that it is a less restrictive alternative to simply allow the penitent privilege to persist. The removal of the penitent privilege would inhibit the religious sacrament of confession.

The penitent privilege itself does not violate on the Establishment Clause. This is only one of many privileges protecting secretive communications, held in confidence. It is a permissible accommodation to permit the penitent privilege in addition to the other professional privileges. The Establishment Clause issues arise when the penitent privilege is applied to the state compliant CAPTA statutes. Different states handle the clergyman privilege differently in their reporting statutes. The ones that exclude the clergy from their language arguably violate the Establishment Clause by favoring religion. It may be argued that the penitent privilege itself favors certain religions over others, but it can also be argued that this supposed favoritism is the choice of the

religious institutions rather than the government. Overall, the penitent privilege should survive Establishment Clause challenges.

The penitent privilege's only differentiating factor from other state-recognized privileges is the involvement of religious institutions. The penitent privilege has a long running history in this country and has been vital to the free exercise of religious rites and practices. Some wish to curtail this specific privilege considering controversies in the Catholic Church and the rise of mandatory reporting statutes. However, privilege satisfies both the Free Exercise Clause and the Establishment Clause, and the clergy are still required to report information that is not obtained through the act of confession.

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