TIGHTENING THE SEAL: PROTECTING THE CATHOLIC CONFESSIONAL FROM UNPROTECTIVE PRIEST-PENITENT PRIVILEGES

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If we acknowledge our sins, he is faithful and just and will forgive our sins and cleanse us from every wrongdoing.  

The confession is made in secret; remote from any human knowledge, it is confided to the memory of the priest and protected against all human knowledge by an inviolable seal . . .  

INTRODUCTION

For Roman Catholics, oral confession to a priest is one of the seven sacraments and a yearly obligation for the faithful. As early as the fourth century, the Church has imposed on priests the duty to remain absolutely silent as to matters heard in the confessional, a

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1 John 1:9.


doctrine known as the Seal of the Confessional. The confessional is sacrosanct; pursuant to Canon Law, the priest is absolutely prohibited from divulging information revealed in confession, lest he suffer excommunication by the Vatican. Even when served with a court order to testify in a criminal or civil proceeding, priests must remain silent.

Very often, priests can take advantage of the priest-penitent privilege statutes and evidentiary privileges in place in all fifty states to avoid the consequences of refusing to testify. In a majority of the states, however, these privileges are not co-extensive with the Seal of the Confessional. In states where the privilege belongs exclusively to the penitent and the penitent has the right to waive the privilege, legal protections for the Seal of the Confessional crumble because priests are unable to claim the privilege on behalf of themselves or the Church. Where the penitent has, for whatever reason, decided to waive the privilege, courts have held priests in contempt of court for not testifying and have been reluctant to rebuke other attempts by the government to exploit the secrecy of the confessional.

This Comment argues that where statutes and evidentiary rules fail to fully protect the Seal of the Confessional, the Free Exercise Clause of the United States Constitution exempts Catholic priests from the general obligation to provide relevant testimony in legal proceedings. Part I details the theology behind the Sacrament of Reconciliation and the Seal of the Confessional. In particular, it stresses the Sacrament's dual purpose that enables the penitent to obtain forgiveness and functions to cleanse the Church of the sins of its members, thereby allowing it to more effectively carry out the mission Christ entrusted to it. Part II explores how controversies over sacramental confession resulted in early cases extending constitutional protection to priests upholding the Seal and led to the enactment of priest-penitent privilege statutes in many states. This section also discusses the shortcomings of these statutes, especially with regard to waiver provisions and judicial reluctance to construe broadly the privileges in order to accommodate the absolute secrecy commanded by the Seal of the Confessional. Part III analyzes the Seal of the Confessional under modern Free Exercise Clause jurisprudence and contends that the dual nature of the Sacrament of

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4 1983 CODE c.983, § 1; KURTScheid, supra note 2, at 1 (discussing the origin of the term).
5 1983 CODE c.1388, § 1.
6 U.S. CONST. amend. 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").
Reconciliation and the importance of the Seal of the Confessional in protecting both the ministry of the Church and the individual penitent qualifies it for heightened constitutional protection under the hybrid-rights doctrine set forth in Employment Division, Department of Human Resources v. Smith. Finally, Part IV argues that under the compelling interest test, as applied by the Supreme Court in Wisconsin v. Yoder, the government does not have a strong enough interest in particular circumstances to pierce the Seal of the Confessional, such that it is entitled to absolute protection under the Free Exercise Clause.

I. BACKGROUND AND HISTORY OF THE SEAL OF THE CONFESSIONAL

A. Sacramental Confession—Theology and Doctrine

Among the many ancient and hallowed practices of the Roman Catholic Church are the seven sacraments: Baptism, Confirmation, Holy Communion, Reconciliation, Matrimony, Holy Orders, and the Anointing of the Sick. According to Catholic doctrine, these “seven sacraments are visible acts of worship established by Christ,” through which “Christ gives grace directly to the person receiving the sacrament.” Whether it is the purification from original sin accomplished by Baptism or the holy union of man and woman promised by Matrimony, these rites “are more than mere signs. What they signify, they actually accomplish.” The sacraments are not empty symbolic gestures; believers must be properly disposed to receive the particular gift promised by the sacrament and only individuals ordained by the Church—deacons, priests, and bishops—can administer the sacraments. Moreover, the power of the Church to administer the sacraments comes from God through Jesus Christ. Christ himself, for example, had commissioned his apostles to baptize, forgive sins, and instituted the sacrament of Holy

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8 406 U.S. 205 (1972).
9 Trent, Seventh Session, Decree on the Sacraments, Canon I (1547), reprinted in ND No. 1311, at 352 (DS, No. 1601, at 382); see also Kevin Orlin Johnson, Why Do Catholics Do That? 214-15 (1994).
10 Trent, Seventh Session, Decree on the Sacraments, Canon I (1547), Foreword, reprinted in ND, No. 1310, at 351 (DS, No. 1600, at 381); Canon VI, reprinted in ND, No. 1316, at 352 (DS, No. 1606, at 382); Canon VII, reprinted in ND, No. 1317, at 352 (DS, No. 1706, at 382); see also Johnson, supra note 9, at 214-15.
11 Knights of Columbus, Catholic Information Service, No. 50, This is the Catholic Church 10 (1955) [hereinafter Knights of Columbus].
12 See id.; see also Johnson, supra note 9, at 215.
Communion at the Last Supper, which he commanded the apostles to renew in his memory.\textsuperscript{13} The sacraments "produce grace in and of themselves,"\textsuperscript{14} and effectuate God's vision of a "Church in which the grace of salvation will be distributed by man to man."\textsuperscript{15}

The Sacrament of Reconciliation (otherwise known as Confession or the Sacrament of Penance)\textsuperscript{16} produces grace in the penitent by cleansing her from perilous mortal and venial sins and reconciling her with God.\textsuperscript{17} In order to receive this grace, Roman Catholics are obligated to confess fully serious sins at least once a year.\textsuperscript{18} To do so, penitents must orally confess their serious, or mortal, sins to a priest or bishop in confidence and express their


\textsuperscript{14} JOHNSON, supra note 9, at 215. As officially declared by the Council of Florence in 1439:

There are seven sacraments of the New Law . . . and they differ from the sacraments of the Old Law. For these did not cause grace but were only a figure of the grace that was to be given through the passion of Christ; but our sacraments both contain grace and confer it on those who receive them worthily.

\textsuperscript{15} KNIGHTS OF COLUMBUS, supra note 11, at 9. Pope Pius XII amplifies this point: In the first place, in virtue of the juridical mission by which the divine Redeemer sent forth His apostles into the world as He Himself had been sent by the Father (citation omitted) it is indeed He who baptizes through the Church, He who teaches, governs, absolves, binds, offers and makes sacrifice.

Pope Pius XII, ENCYClical LETTER, MYSTICI CORPUS (1943), reprinted in ND, No. 1330, at 357.

\textsuperscript{16} CATECHISM, supra note 3, Nos. 1423-1424, at 396-97.

\textsuperscript{17} The Council of Trent established: "As to the reality (res) and the effect of this sacrament, so far as concerns its power and efficacy, it consists of reconciliation with God." TRENT, FOURTEENTH SESSION, DOCTRINE ON THE SACRAMENT OF Penance, Chapter 5: Confession (1551), reprinted in ND, No. 1621, at 435 (DS, No. 1674, at 393). The Council of Trent goes on to explain "[t]hose who through sin have forfeited the grace of justification they have received, can be justified again . . . when, awakened by God, they make the effort to regain through the sacrament of penance and by the merits of Christ the grace they have lost . . . ." TRENT, SIXTH SESSION, DECRÉE ON JUSTIFICATION, Chapter XIV: Those Who Sin After Justification and Restoration to Grace (1547), reprinted in ND, No. 1943, at 528 (DS, No. 1542, at 375); see also Edward J. Hanna, The Sacrament of Penance, in XI The Catholic Encyclopedia (1911), available at www.newadvent.org/cathen/11618c/htm (last visited Nov. 6, 2001).

\textsuperscript{18} CATECHISM, supra note 3, No. 1457 at 406; see also THE FOURTH LATERAN COUNCIL (1215), reprinted in ND, No. 1608, at 428 (DS, No. 812, at 264) ("Every faithful of either sex who has reached the age of discretion should at least once a year faithfully confess all his sins in secret to his own priest.").
sorrow and desire for forgiveness. Once the confessor (the priest or bishop hearing the confession) is satisfied that the penitent is sorry for her sins and is committed to reform herself, he will absolve the penitent of all her sins. The effects of absolution on the penitent are twofold. Obtaining absolution restores the penitent to the state of grace sullied by mortal sin, reconciling her with God and sparing her the guilt inflicted by sin and any possible “eternal punishment” that her sin would invite. In addition, the forgiveness conferred by sacramental confession enables the penitent to once again merit a reward from God for good works, merits that are impossible to receive while doing those same deeds in a state of sinfulness. Confession is an extremely serious obligation because one who dies unrepentant and unabsolved forfeits eternal life and is condemned to perpetual suffering in Hell.

As with the other sacraments, this power to forgive sins was

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19 Certainly, by the time of the Council of Florence (1429), the elements of the Sacrament of Reconciliation were as follows:

   The fourth sacrament is penance. Its quasi-matter consists of the actions of the penitent [that] are divided into three parts. The first is contrition of the heart . . . . The second is oral confession which requires that the sinner confess to his priest in their integrity all the sins he remembers. The third is satisfaction for the sins according to the judgment of the priest[.]

Florence, reprinted in ND, No. 1612, at 430 (DS, No. 1323, at 335); Catechism, supra note 3, No. 1456 at 405; Edward J. Hanna, The Sacrament of Penance, in XI THE CATHOLIC ENCYCLOPEDIA (1911), available at www.newadvent.org/cathen/11618c/htm (last visited Nov. 6, 2001) (“Confession is avowal of one’s own sins made to a duly authorized priest for the purpose of obtaining their forgiveness.”).

20 Florence, reprinted in ND, No. 1612, at 430 (DS, No. 1323, at 335) (“The form of this sacrament is the words of absolution spoken by the priest when he says: ‘I absolve you.’”); see also Trent, FOURTEENTH SESSION, DOCTRINE ON THE SACRAMENT OF PENANCE, CHAPTER 5: CONFESSION (1551), reprinted in ND, No. 1620, at 435 (DS, No. 1673, at 393) (reaffirming this teaching); Thomas G. Doran, On the Sacrament of Reconciliation, at http://ewtn.com/library/BISHOPS/PENANCE.htm (last visited Nov. 6, 2001) (“It is rarely necessary [for the priest] to refuse absolution, but it can happen, for example when a penitent clearly lacks any intention of giving up a habit of mortal sin.”).


22 Id.

23 Johnson, supra note 9, at 51. “Thus it follows that all mortal sins of which penitents after a diligent self-examination are conscious must be recounted in confession . . . . But those who fail to do so and knowingly withhold some, place nothing before the divine goodness for remission, ‘for if the sick is ashamed to lay open his wound before the physician, the medicine does not heal what it does not know.’” Trent, FOURTEENTH SESSION, DOCTRINE ON THE SACRAMENT OF PENANCE, CHAPTER 5: CONFESSION (1551), reprinted in ND, No. 1626, at 437 (DS, No. 1680, at 394) (quoting St. Jerome, Comment. In Ecclesiasten, 10.11).
instituted by and bestowed upon the Church by Christ himself. According to Catholic doctrine, although God alone can forgive sins, Jesus Christ, the human embodiment of divine power, ceded this power to humans to "exercise in his name." In other words, "Christ expressly conferred on his Church the power of forgiving sins" and "granted [this power] to them in their official capacity and hence as a permanent institution in the Church—no less permanent than the mission to teach and baptize all nations." This teaching finds its origin in several places in the New Testament, notably where Christ said to Peter: "I will give you the keys to the kingdom of heaven. Whatever you bind on earth shall be bound in heaven; and whatever you loose on earth shall be loosed in heaven." In a post-Resurrection appearance in the Gospel of John, when He imparted the Holy Spirit to his disciples, Christ said, "Receive the Holy Spirit. Whose sins you forgive are forgiven them. Whose sins you retain are retained." Because Christ not only proclaimed forgiveness, but also in fact forgave sins, the apostles themselves, and their successors (the bishops and priests) also have the power to forgive sins.

In hearing confessions and granting absolution, Catholic priests thus occupy an extremely unique and sensitive position. By virtue of their ordination, priests are commissioned with the power to absolve

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24 CATECHISM, supra note 3, No. 1441, at 402.
25 Id.
26 KURTSCHEID, supra note 2, at 2.
29 John 20:22-23.
31 POPE LEO I, LETTER TO THEODORE, BISHOP OF FREJUS (452), reprinted in ND, No. 1605, at 426 (DS, No. 308, at 110) ("These remedies of the divine goodness have been so ordained that God's forgiveness cannot be obtained except through the supplications of the priests. For the 'the mediator between God and men, the man Jesus Christ,' gave to those who hold authority in the Church the power to grant the discipline of penance to those who confess and after they have been purified through salutary satisfaction, to admit them to the communion of the sacraments through the door of reconciliation.") (internal citation omitted); see also KURT STASIAK, O.S.B., A CONFESSION'S HANDBOOK 1 (1999) ("Celebrating the sacrament of reconciliation is among the most significant encounters priests have with their parishioners. It is certainly one of the most personal. Many priests would even say it is the most demanding.").
sins—a power flowing from Jesus Christ. Yet the priest “is not the master of God’s forgiveness, but its servant.” Put another way, the priest does not grant forgiveness arbitrarily or of his own accord; rather, forgiveness is the promise of God, and the priest is entrusted with the Christ-like responsibility of leading people to this promise by encouraging participation in the sacrament, listening with a compassionate ear, and finally imparting forgiveness to the penitent in the same way Christ brought forgiveness to the adulteress. Thus, the priest is not the source of absolution, but “the sign and instrument of God’s merciful love for the sinner.”

The role of the priest as a vehicle for reconciliation with God has important implications, not only for the sacrament but for the penitent and the Church as well. As discussed above, Christ conferred the power to forgive sins on the apostles in their institutional capacity, from this comes the long-standing precept that only bishops and priests may administer the Sacrament of Reconciliation. Neither the laity nor lower-ranking members of the Church hierarchy, such as deacons, can hear confessions or grant absolution. As a result, obstacles that prevent priests (or bishops)

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32 Trent, Twenty-Third Session, Doctrine on the Sacrament of Orders, Chapter 1: Institution of the Priesthood of the New Law (1563), reprinted in ND, No. 1707, at 467 (DS, No. 1764, 412); Catechism, supra note 3, No. 1461 at 408.
33 Catechism, supra note 3, No. 1466, at 409.
34 See Max Thurian, Confession 75 (Edwin Hudson trans., 1958) (“The Lord is faithful to the promise which [H]e made to his Apostles to remit the sins of those to whom the Church remits them.”); Doran, supra note 20 (“All repentance, all sorrow for sin, all desire to be reunited with God is a gift of God, whose infinite love and mercy is the source for all transformation of our hearts. Penance is a gift of God.”) (emphasis in original).
35 Catechism, supra note 3, Nos. 1464-1466, at 408-09; Stasiak, supra note 31, at 25-53 (setting forth guidelines to make confession spiritually beneficial for the penitent); see generally Thurian, supra note 34, at 100-15 (discussing the role and obligations of the confessor).
36 Catechism, supra note 3, No. 1465, at 409.
37 Fr. William Saunders, Why Go to Confession?, Arlington Catholic Herald, April 7, 1994, available at www.ewtn.com/library/ANSWERS/GOTOCON.htm (last visited Nov. 15, 2001) (“Clearly Jesus came to forgive sins. He wanted that reconciliation to continue and He gave the Church a sacrament which priests would continue to act as ministers of reconciliation.”).
38 Trent, Fourteenth Session, Doctrine on the Sacrament of Penance, Chapter 6: The Minister of the Sacrament and Absolution (1551), reprinted in ND, No. 1627, at 438 (DS, No. 1684, at 396) (“With regard to the minister of this sacrament the holy council declares: False and totally foreign to the truth of the Gospel are all doctrines which in a very destructive manner extend the ministry of the keys to all other men besides bishops and priests. They do so in the belief that the words of the Lord . . . (Matthew 18:18) . . . (John 20:23), were . . . addressed to all the faithful of Christ without difference or distinction, with the result that everyone has the power to forgive sins . . . .”).
from hearing confessions make the sacrament a nullity, because, without their services, it cannot be performed. Moreover, as will be discussed in greater detail below, the priest serves in a dual role as a minister to the penitent and as a minister of the Church. As a result, he is on the front lines of efforts to invade the confessional.

The priest’s dual role in the confessional is essentially an extension of the dual role played by the Sacrament of Reconciliation in the life of the Church. Typically, confession is viewed through the penitent’s eyes and the focus is on the way in which the penitent receives absolution. But this is only half of the story, because when the penitent obtains forgiveness for herself, the Church is correspondingly purified. Scripture teaches that all who are baptized are members of one body—the body of Christ, the Church. Thus just as a disease in one part of the human body can weaken the entire system, so when one member of the body of Christ commits a sin, the entire Church is damaged. The Sacrament of

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30 See 1983 Code c.965 (“A priest alone is the minister of the sacrament of penance.”).
31 Thuriyan, supra note 34, at 100 (“Thus the pastor, as the minister of confession, has authority effectively to announce the pardon and absolution of God in the name of the Christian community, the universal Church.”); Stasiak, supra note 31, at 10-13.
32 As Thomas G. Doran, D.D., J.C.D., Bishop of Rockford, describes the Sacrament of Reconciliation, although “[n]on-Catholics prefer to view repentance as a private matter, affecting only an individual’s relationship to God[,] . . . close study of God’s word shows that it is in the Church that Christ acts to restore sinners to union with God.” Thomas G. Doran, On the Sacrament of Penance or Reconciliation, at www.ewtn.com/library/BISHOPS/PENANCE.htm (last visited Nov. 6, 2001) (emphasis in original); see generally Anthony Cardinal Bevilacqua, Confidentiality Obligation of Clergy from the Perspective of Roman Catholic Priests, 29 Loy. L.A. L. Rev. 1793, 1736-38 (1996).
33 Catechism, supra note 3, No. 1462 at 408 (“Forgiveness of sins brings reconciliation with God, but also with the Church.”).
34 Id., Nos. 1267-1274, at 354-56; see also 1 Corinthians 12:12-13 (“As a body is one though it has many parts, and all the parts of the body, though many, are one body, so also Christ. For in one Spirit we were all baptized into one body, whether Jews or Greeks, slaves or free persons, and we were all given to drink of the one Spirit.”); 1 Corinthians 10:17; Romans 12:4-5; Ephesians 2:16; Colossians 3:15.
35 Pope Pius XII, Encyclical Letter, Mystici Corporis (1943), reprinted in ND, No. 1662, at 449 (“Let all men, therefore, abhor sin, which defiles the mystical members of the Redeemer; but should anyone have unhappily fallen . . . then let him be welcomed most lovingly, and let a practical charity see in him a frail member of Jesus Christ. For it is better, as St. Augustine says, ‘to be healed within the organism of the Church than to be cut off from its body as an incurable member.’ ‘So long as the member still adheres to the body, its cure is not beyond all hope, but if it has been cut off, it cannot be cured or made whole.’”) (quoting St. Augustine, Epistola 157, 3, 22; Sermo 137, 1); Catechism, supra note 3, No. 1440, at 401 (“Sin is before all else an offense against God, a rupture of communion with him. At the same time it damages communion with the Church.”).
Reconciliation repairs this breach because it serves to reconcile the individual with both God and the Church. \(^{45}\) Consequently, the healing power of the sacrament not only rejuvenates the penitent who is restored to full communion with God, but also has a "revitalizing effect on the life of the Church which suffered from the sin of one of her members." \(^{46}\)

B. The Seal of the Confessional

The communications that occur as part of the Sacrament of Reconciliation, therefore, are unlike any other in that they set in motion a transformative and restorative process \(^{47}\) that repairs the individual's relationship with God and the Church and reinvigorates the life of the Church itself. Confession is far more than a private counseling session. It is a sacred rite that gives nourishment to the Christian existence and reunites the sinner with Christ. \(^{48}\) In this way, confession stands as an integral part of the Church's mission on earth. \(^{49}\)

Because the sins confessed to a priest have such far-reaching implications for both the penitent and the Church, the Church has declared that the contents of the confessional must remain absolutely secret. Pursuant to the Code of Canon Law, the official law governing the Roman Catholic Church, the "sacramental seal is inviolable." \(^{50}\)

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\(^{45}\) Catechism, supra note 3, Nos. 1443-1445, at 402-03.

\(^{46}\) Id. at 51 (discussing that the power of absolution granted by Christ to the Church is a "special ministry" that is one important aspect of the Church's "task of setting men free").

\(^{47}\) Catechism, supra note 3, No. 1469, at 410; Vatican Council II, Dogmatic Constitution Lumen Gentium, No. 11 (1964), reprinted in ND, No. 1667, at 450 ("Those who approach the sacrament of penance obtain pardon from the mercy of God for their offenses committed against Him. They are, at the same time, reconciled with the Church whom they have wounded by their sin, and who, by her charity, her example, and her prayer, collaborates in their conversion.").

\(^{48}\) See Joseph Chapel, Why Confess Our Sins Out Loud? Some Possibilities Based on the Thought of Ferdinand Ebner and Louis-Marie Chausset, 66 Irish Theological Quarterly 141, 148-53 (discussing the importance of orally "naming" sins to engender the realization that there is a public aspect even to supposedly private sins and that "confession is a word-act" that "must be spoken to be effective"); Catechism, supra note 3, No. 1456, at 405 ("Confession to a priest is an essential part of the sacrament of Penance . . . .").

\(^{49}\) Id. at 51 (discussing that the power of absolution granted by Christ to the Church is a "special ministry" that is one important aspect of the Church's "task of setting men free").

\(^{50}\) 1983 Code c.983, § 1; Fourth Lateran Council (1215), reprinted in ND, No. 1609, at 429 (DS, No. 814, at 264) ("Let [the confessor] take absolute care not to betray the sinner through word or sign, or in any other way whatsoever. In case he needs expert advice he may seek it without, however, in any way indicating the person. For we decree that he who presumes to reveal a sin which has been manifested to him in the tribunal of penance is not only to be deposed from priestly office, but to be consigned to a closed monastery for perpetual penance.").
Without exception, the priest is prohibited from divulging what has been communicated to him in the confessional, even when confronted with dire circumstances.51 The penalties for violating the Seal of the Confessional are severe: When the priest deliberately breaks the sacramental seal, he is automatically excommunicated from the Church.52 The absolutism with which the Catholic Church protects communications between priests and penitents makes them much different from other types of communications—like those between attorneys and clients or doctors and patients, where the privileges will not attach under certain extreme circumstances.53 However, the Sacrament of Reconciliation creates a very “sacred trust” between priest and penitent which requires the priest to keep anything the penitent has revealed to him remain absolutely secret.54 Breach of this trust is a “sacrilege.”

As an indispensable component of the Sacrament, the Seal of the Confessional has been practiced in the Church for centuries. Although not recognized officially until the Fourth Lateran Council in 1215, the practice of secret confession had grown mightily since the fourth century when the practice of public penance waned56 because it had grown “harsh” and “legalistic.”57 Even before the Lateran Council, by the time Pope Leo the Great gave the first papal recognition to the Seal of the Confessional in 459, private confession had begun to coexist with public confession58 and, following the lead

51 1983 Code c.983, § 1 (forbidding “a confessor to betray in any way a penitent in words or in any manner and for any reason.”); Fr. William Saunders, The Seal of the Confessional, Arlington Catholic Herald, available at http://catholiceducation.org/articles/religion/re0059.html (last visited Nov. 13, 2001) (“A priest, therefore, cannot break the seal to save his own life, to protect his good name, to refute a false accusation, to save the life of another, to aid the course of justice . . . . or to avert a public calamity.”); see also EWTN News Brief, Priest Refuses to Name Knife-Wielding Man in Confession (May 9, 2000), available at http://www.ewtn.com/vnews/getstory.asp?number=2529.htm (last visited Nov. 6, 2001) (reporting about a priest who would not reveal the identity of the man who stabbed him after he heard his confession because doing so would violate the sacramental seal).

52 1983 Code c.1388, § 1 (prescribing excommunication to be the penalty for deliberate violation of the seal; lesser penalties, depending on the extent of the violation, are possible for indirect violations).

53 See, e.g., Model Rules of Prof. Conduct R. 1.6(c) (providing certain exceptions to the attorney/client privilege).

54 Saunders, The Seal of the Confessional, supra note 37.

55 J.L. McCarthy, Seal of Confession, in IV New Catholic Encyclopedia 133, 134 (1967 ed.).

56 Id. at 133.


58 In a letter to the Bishops of Roman Rural Districts, Pope Leo asserts:
of Irish monks who had developed the practice, overcame stiff official opposition and became a more popular and widely accepted means of obtaining forgiveness. 59 Although the Church has experienced vigorous debate on the subject of the sacramental seal through the centuries, the Fourth Lateran Council’s decree of inviolability formed the basis of the modern provisions in the Code of Canon Law. 60 Over the centuries, the Seal of the Confessional has been consistently “reaffirmed” and has permanently fortified the Sacrament of Reconciliation since at least the Middle Ages. 61

Nevertheless, although Catholic teaching concerning the inviolability of the confessional is clear and unchanging, as Anthony Cardinal Bevilacqua, Archbishop of Philadelphia and both a canon and a civil lawyer, points out, many in the law are mistaken about the true purposes of the sacramental seal. 62 It is common to think of the Seal of the Confessional as a sort of a prophylactic measure designed to preserve the penitent’s reputation and to save her from embarrassment or exploitation. 63 Protecting the penitent’s privacy, however, is only a secondary aim of the Seal of the Confessional. 64

For the Church, rigorous protection of the inviolability of the confessional operates not to safeguard any one penitent, but the

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59 Martos, supra note 57, at 772.
60 McCarthy, supra note 55, at 134.
62 See generally Bevilacqua, supra note 41.
64 Bevilacqua, supra note 41, at 1738.
sacredness of the sacrament and its unobstructed availability for the entire body of believers. Indeed, according to one scholar, the “seal obligates in virtue of divine law.” Recall that individual confession has a dual effect—at the same time the individual is reconciled with God, the Church itself is purged of the sins borne by one of its members. This comes about when the Church, through the priest, exercises its Christ-given power to forgive sins and thus breathe “recreative breath” into the Church, much as Christ did when he transmitted the Holy Spirit to the disciples and commissioned them with the lofty task of announcing the Good News to the rest of the world. This cathartic process can only occur when baptized Catholics fulfill their obligation. Yet one of the greatest potential obstacles to this duty is the penitent’s understandable worry that her private matters may be disclosed. To deal with this dilemma, the Church has, for centuries, commanded absolute secrecy to ensure that members have a clear path toward absolution. The Church instituted the Seal of the Confessional to remove any obstacle that would likely dissuade or discourage the repentant from receiving the Sacrament of Reconciliation.

Human beings have the natural tendency to conceal offenses or transgressions, lest they suffer shame, embarrassment, or loss of their station in life. This human tendency, however, is at odds with Church doctrine that teaches that sinners can only receive absolution when they explicitly verbalize their offenses to a priest. The Church, therefore, binds confessors to absolute secrecy so that sinners may be supremely confident to exhaustively divulge their deepest and darkest

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65 See id. at 1736 (“The reverence due the Sacrament of Penance, is by far a graver obligation . . . because of the overriding value of protecting the ability of individuals to freely confess occult sins to a priest.”).
66 KURTSCHBEID, supra note 2, at 1.
67 THURIAN, supra note 34, at 51.
68 Id. at 111-12.
69 KURTSCHBEID, supra note 2, at 42-50 (discussing that the Seal of the Confessional was a custom in the early church before it was strictly mandated and that, even in places where public confession was still the norm, a premium was still placed on secrecy, because revelation of sins was confined to the congregation); see also THURIAN, supra note 34, at 112 (“The sacramental seal, the need for absolute and inviolable secrecy imposed on every confessor with regard to everything he hears in confession, has been unequivocally stressed ever since the practice of private confession first began.”).
70 KURTSCHBEID, supra note 2, at 47, 265.
71 THURIAN, supra note 34, at 124; see also Chapel, supra note 47, at 149 (“When the sin revealed by an examination of conscience does not come into word, I am not yet freed of the burden.”).
In this way, the Church ensures not just that penitents are shielded from public humiliation, but that it may continue its ministry of forgiveness and simultaneously renew itself. In this light, the Seal of the Confessional may be seen to be absolutely essential and indispensable to the building up of the Body of Christ, the Church.

II. STATUTORY PROTECTIONS AND THE PRIEST-PENITENT PRIVILEGE

One cannot begin to assess the protection civil law provides to the Seal of the Confessional without first discussing People v. Phillips, the earliest known decision dealing with this very issue. In Phillips, the defendant, Daniel Phillips, was indicted for receiving stolen goods. Phillips, a Roman Catholic, had confessed this offense to his priest, Rev. Anthony Kohlmann, who retrieved the goods from Phillips and returned them to the aggrieved party. The prosecution, informed by this witness that he had received the goods from Rev. Kohlmann, issued a subpoena for Rev. Kohlmann to testify. Rev. Kohlmann petitioned the court for relief on the ground that the religious freedom provisions of the New York state constitution excused him from testifying because of his obligation to preserve the Seal of the Confessional.

In one of the only decisions extending constitutional protection to the Seal of the Confessional, the court agreed. Significantly, the court noted the centrality of the sacraments in the Catholic faith and concluded that compelling Rev. Kohlmann to testify would destroy the essential secrecy of the Sacrament of Reconciliation, and with it a vital part of the Catholic faith, in a complete affront to the

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72 THURIAN, supra note 34, at 112.
73 See id. at 51-53. The Church has experienced the detrimental effects of public humiliation on the sacrament. During the fourth century, when public confession was still the official practice, the number and type of sins that had to be publicly confessed grew and penances became increasingly severe. As a result, a process that was supposed to reunify and repair the Church actually served to alienate members who would “abstain from the Eucharist until very late in life . . . .” Martos, supra note 57, at 772.
75 1 W. L.J. at 109.
76 Id.
77 Id. at 109-10.
78 In 1855, a Virginia court reached the same result as Phillips. Nicholas P. Cafardi, Discovering the Secret Archives: Evidentiary Privileges for Church Records, 10 J.L. & RELIGION 95, 104 (1994).
constitutional free exercise of religion. The court took cognizance of the "dilemma" faced by the priest, who is forced to choose between either refusing to testify and facing possible criminal sanctions or obeying secular authorities and suffering excommunication by the Church and, perhaps, a "dreadful hereafter." In addition, the court viewed this case through a highly pluralistic lens, commenting that, while confession is not a central practice of the Protestant faith (the overwhelming majority of the country during the early 19th century), governmental intrusion into this sacred rite of Catholicism would open the door for similar intrusions on the two sacraments (Baptism and the Lord's Supper) celebrated by Protestants. In short, Phillips stood for the principle that, because of the obligations shouldered by Catholic priests in administering the Sacrament of Penance, the free exercise provisions of the state constitution excused them from the general obligation to testify in court as to matters heard in confession.

Nevertheless, Phillips seems to have marked the first and last attempt by any court to view the priest-penitent privilege in general, or the Seal of the Confessional in particular, as a matter of constitutional free exercise of religion. Although the Supreme Court has noted the importance of testimonial privileges at common law and as a policy matter, no case has held that the clergy-penitent privilege is constitutionally required under the Free Exercise Clause. In addition, efforts to make this claim at the state level have been largely unsuccessful.

79 Phillips, 1 W. L.J. at 112.
80 Id. (emphasis in original).
81 Id.
82 See generally Phillips, 1 W. L.J. 109.
83 Lori Lee Brocker, Note, Sacred Secrets: A Call for the Expansive Application of and Interpretation of the Clergy-Communicant Privilege, 36 N.Y.L. SCH. L. REV. 455, 480 (discussing the lack of constitutional litigation on the subject).
84 See id.; see also GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 9.12(2) (2d. ed. 1987) ("Note that this privilege has never been constitutionally required . . . ."); Trammel v. United States, 445 U.S. 40, 51 (1980) ("The privileges between priest and penitent . . . limit protections to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."); Tuten v. United States, 92 U.S. 105, 106 (1875). Some cases, however, expressly reject the idea that the Free Exercise Clause mandates the priest-penitent privilege. See In re Grand Jury Proceedings of John Doe v. United States, 842 F.2d 244, 248 (10th Cir. 1988).
85 See, e.g., State v. Martin, 975 P.2d 1020 (Wash. 1999) (avoiding the constitutional question); Commonwealth v. Stewart, 690 A.2d 195 (Pa. 1997) (holding that Free Exercise Clause does not exempt Catholic Church from
Shortly after Phillips a different New York court denied similar protections to a Protestant because the confidentiality of the confessional is not mandated in the Protestant Church as it is by Catholicism.\textsuperscript{86} In response, the New York legislature enacted the first priest-penitent privilege statute in the nation that extended the privilege broadly across denominations.\textsuperscript{87} Today, all fifty states have statutes or evidentiary rules that privilege certain conversations between clergy and penitents.

Ironically, while New York originally enacted its statute in order to expand the priest-penitent privilege by extending it to Protestants as well as Catholics,\textsuperscript{88} the modern view is that these statutes should, like other testimonial privileges, be narrowly construed. The Supreme Court has stated that the privilege should apply "only to complying with subpoena to turn over church documents that Canon Law orders sealed); Keenan v. Gigante, 390 N.E.2d 1151 (N.Y. 1979) (rejecting minister's contention that free exercise right to practice ministry excuses him from testifying as to conversations not protected by priest-penitent privilege statute); In re Rev. Frank Williams, 152 S.E.2d 317 (N.C. 1967) (holding that the Free Exercise Clause did not exempt minister from testifying when penitents waived statutory protection).

\textsuperscript{86} People v. Smith, N.Y. City Hall Rec. 77 (1817). This case was not officially reported, but an abstract is available in *Privileged Communications to Clergymen*, 1 CATH. LAW. 198 (1955); see also Yellin, supra note 74, at 106 n.54.

\textsuperscript{87} Yellin, supra note 74, at 106-107.

\textsuperscript{88} ALA. CODE § 12-21-166 (Michie 1995); ALASKA R. EVID. 506 (Michie 2001); ARIZ. REV. STAT. ANN. § 13-4062(3) (West 2001); ARK. R. EVID. 505 (Lexis 2001); CAL. EVID. CODE §§ 1030-34 (West 1995); COLO. REV. STAT. ANN. § 13-90-107(1)(c) (West 1997); CONN. GEN. STAT. ANN. § 52-146b (West 1991); DEL. R. EVID. 505 (Michie 2001); FLA. STAT. ANN. § 90.505 (West 1999); GA. CODE. ANN. § 24-9-22 (1995); HAW. R. EVID. 506 (2001); IDAHO CODE § 9-203(3) (1998); 735 ILL. COMP. STAT. ANN. 5/8-803 (West 1992); IND. CODE ANN. § 34-46-3-1(3) (West 1999); IOWA CODE ANN. § 622.10 (West 1999); KAN. STAT. ANN. § 60-429 (1983); KY. R. EVID. ANN. 505 (Michie 2002); LA. CODE EVID. ANN. art. 511 (West 1995); ME. R. EVID. 505 (West 2000); MD. CODE ANN., CTS. & JUD. PROCS., § 9-111 (1998); MASS. GEN. LAWS. ANN. ch. 233, § 20A (West 2000); MICH. COMP. LAWS ANN. § 600.2156 (West 2000); MINN. STAT. ANN. § 595.02(1)(c) (West 2000); MISS. CODE ANN. § 13-1-22 (Supp. 2001); MO. ANN. STAT. § 491.060(4) (West 1996); MONT. CODE ANN. § 26-1-804 (2001); NEB. REV. STAT. § 27-506 (2000); NEV. REV. STAT. ANN. § 49,255 (1995); N.H. REV. STAT. ANN. § 516:35 (1997); N.J. STAT. ANN. § 2A:84A-23 (West 1994); N.M. R. EVID. 506 (Michie 2002); N.Y. C.P.L.R. § 4505 (McKinney 1992); N.C. GEN. STAT. § 8-53.2 (1999); N.D. R. EVID. 505 (2001); OHIO REV. CODE ANN. § 2317.02(c) (Anderson 2001); OKLA. STAT. ANN. tit. 12, § 2505 (West 1993); OR. REV. STAT. § 40.260 (1999); 42 PA. CONS. STAT. ANN. § 5933 (West 2000); R.I. GEN. LAWS § 9-17-23 (1997); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1985); S.D. COMPIL. LAWS §§ 19-13-16 to 19-13-18 (Michie 1995); TENN. CODE. ANN. § 24-1-206 (2000); TEX. R. EVID. 505 (West 2001); UTAH CODE ANN. § 78-24-8(3) (1996); VT. STAT. ANN. tit. 12, § 1607 (1973); VA. CODE ANN. § 19.2-271.3 & § 8.01-400 (Michie 2000); WASH. REV. CODE ANN. § 5.60.060(3) (West 1995); W. VA. CODE ANN. § 57-3-9 (Michie 1997); WIS. STAT. ANN. § 905.06 (West 2000); WYO. STAT. ANN. § 1-12-101(a)(ii) (Michie 2001).

\textsuperscript{89} See generally Yellin, supra note 74, at 106-07; Brocker, supra note 83, at 459-60 (discussing Phillips and Smith).
the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." 90 So, although the trend is to extend the privilege itself to all religious denominations and some organizations that are tantamount to religion, 91 if the specific communication does not fall within the precise parameters of the statute or rule, then the protections will not apply. 92 Likewise, the privilege will not attach if the communication is not of a penitential nature; if the person to whom it is made does not fall within the statute’s definition of clergy; or if the clergyman is not acting in a professional or spiritual capacity. 93 The Sacrament of Reconciliation will always meet this test, because, by definition, confession in the Catholic tradition involves penitential communications, the priest is the only person who can grant absolution, and the Church mandates strict confidence. 94

Beyond these requirements, there is a significant area where priest-penitent privilege statutes and rules are not co-extensive with


91 See In re Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990) (recognizing privilege even when third parties are present, if the third parties are necessary to further the communication); Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958) (Fahy, J., concurring) (extending privilege to Lutheran minister); In re Verplank, 329 F. Supp. 433 (C.D. Cal. 1971) (extending privilege to clergy who performed draft counseling services and counseling staff members).

92 See Rev. Martin R. Bartel, O.S.B., Pennsylvania’s Clergy Communicant Privilege: For Everything there is. . . a Time to Keep Silent, 69 Temp. L. Rev. 817, 820 (1996) (“Most of these provisions protect communications to religious counselors from disclosure in court if 1) the statement was made with a confidential intent; 2) the clergy person was acting in a professional capacity at the time of the communication; and 3) the clergyperson received the communication while performing the duties envisioned by the rules or practice of the particular religious denomination.”); see also United States v. Gordon, 655 F.2d 478 (2d Cir. 1981); United States v. Wells, 446 F.2d 2 (2d Cir. 1971); Fernandez v. State, 730 So. 2d 277 (Fla. 1999) (holding that defendant’s statements were not protected by priest-penitent privilege because they were not “confidential”); State v. Mackinnon, 957 P.2d 23 (Mont. 1998) (holding that privilege did not attach where there was no evidence that clergy were acting in their ministerial capacity); Mullins v. State, 721 N.E.2d 335, 338 (Ind. App. 1999) (holding that conversation between priest and perpetrator of forgery and theft, which included an apology, “did not fall within the sanctity of confession”).

93 See, e.g., State v. Barber, 346 S.E.2d 441 (N.C. 1986) (privilege did not apply to statements made to individual who was not an ordained minister); Yellin, supra note 74, at 114-21.

94 See, e.g., Mullins v. State, 721 N.E.2d 335 (Ind. App. 1999) (agreeing that the Sacrament of Reconciliation “clearly falls within the strictures of the statute as confessions made to a clergyman in the course of discipline enjoined by clergyman’s church” but finding in the particular circumstances that the defendant’s apology to the priest did not constitute a sacramental confession).
the Seal of the Confessional. Even though all fifty states have some sort of priest-penitent privilege, the statutes vary considerably as to which party—the priest, penitent, or both—may claim the privilege. The majority of the statutes extend the privilege solely to the penitent, not to the clergy. In other states, the privilege belongs solely to the clergy, or to both the clergy and the communicant. Even in those states where the privilege belongs to both the clergy and the communicant, however, the clergy may only claim the privilege on behalf of the penitent, not for themselves or their religious institution. Further compounding this situation is the fact that in a large number of these states, the communicant may waive the privilege. As a result, in the vast majority of states where either the priest-penitent privilege belongs solely to the penitent, or statutes and rules allow the priest to claim the privilege only on behalf of the penitent, the Catholic confessional is inadequately protected because the priest is forbidden from divulging information learned in confession under any circumstances, even when the penitent opts to break the seal herself. Thus in a situation where a defendant who

95 Michael J. Mazza, Comment, Should the Clergy Hold the Priest-Penitent Privilege?, 82 MARQ. L. REV. 171, 178-180 (1998) (discussing the priest-penitent privilege in the United States); see also Julie Ann Sippel, Priest-Penitent Privilege Statutes: Dual Protection in the Confessional, 43 CATH. U. L. REV. 1127, 1133-37 (1994) (detailing the priest-penitent privilege statutes in every state). Examples of these statutes include: FLA. STAT. ANN. § 90.505(2)(d) (West 1999); NEB. REV. STAT. 27-506 (2000); WIS. STAT. ANN. § 906.06(3) (West 2000).

96 See VA. CODE ANN. § 19.2-271.3 (providing that the privilege belongs to clergy in criminal actions) and § 8.01-400 (providing that the privilege belongs to clergy in civil actions).

97 See, e.g., CONN. GEN. STAT. ANN. § 52-146b (West 1991); IOWA CODE ANN. § 622.10(2) (West 1999); MISS. CODE ANN. § 13-1-22(2) & (3) (Supp. 2001); Church of Jesus Christ of Latter Day Saints v. Superior Court of Maricopa County, 764 P.2d 759 (Ariz. Ct. App. 1988) (holding that privilege belongs to the penitent and that privilege does not apply if waived); People v. Lipsczinska, 180 N.W. 617 (Mich. 1920) (interpreting the state's priest-penitent privilege statute as belonging only to the penitent and holding that the privilege does not attach if the penitent waives its protections).


100 1983 Code c.983, § 1 and c.984 § 1; Bartel, supra note 92, at 830 ("The communicant's ability to waive the protection of the privilege, and thus compelling the clergy to testify, obviously creates a direct conflict with the Seal of the Confession
has previously confessed truly damaging information decides to waive her statutory privilege, courts could compel a priest to testify under penalty of contempt despite the fact that institutional maxims of the Catholic Church demand the priest’s silence.\footnote{\textit{Mockaitis v. Harclerode}, Father Timothy Mockaitis, a Catholic priest in Oregon, administered the Sacrament of Reconciliation to Conan Wayne Hale, an inmate at the Lane County Jail. At the time of the confession, and unbeknownst to Father Mockaitis, the police had been secretly taping most of Hale’s conversations because they had strong evidence indicating that Hale was the perpetrator of a triple murder. The confession was recorded and shortly thereafter the two district attorneys secured a warrant to listen to and transcribe the tape because they believed it to contain evidence of the murders Hale allegedly committed. Attempting to defend the Seal of the Confessional, Father Mockaitis and the local archdiocese filed suit seeking to have the tape destroyed and to permanently enjoin any publication of Hale’s confession. Hale, however, moved, along with the prosecution, to preserve the tape, claiming that it was essential to his defense against the murder charge. Although noting that the prosecution had taken advantage of an important religious rite in order to prove its case and that Father Mockaitis’s free exercise rights were “substantially burdened” when the police taped Hale’s confession, the Ninth Circuit nevertheless held that, because Hale had agreed to waive the privilege and desired to save the recording for his trial, the substantial burden on Fr. Mockaitis’s free exercise rights did not require the destruction of the tape. “There is no reason to protect
\begin{footnotes}
\footnotetext{101}{See Yellin, supra note 74, at 111 n.76 (“A minister may thus still be compelled to testify, through the waiver of the penitent, even if the former's religious scruples would forbid such testimony.”).}
\footnotetext{102}{104 F.3d 1522 (9th Cir. 1997).}
\footnotetext{103}{Id. at 1524-26.}
\footnotetext{104}{Id.}
\footnotetext{105}{Id. at 1525.}
\footnotetext{106}{Id. at 1525-26}
\footnotetext{107}{Id. at 1527. Hale claimed that he only confessed to burglary crimes, not murder, to Father Mockaitis, and that the confession was the only way to prove that given his poor recollection. \textit{Id.}}
\footnotetext{108}{\textit{Mockaitis}, 104 F.3d at 1531, 1533.}
\end{footnotes}
Hale’s confession from publication when he desires it,” the court wrote.\textsuperscript{109} For both Hale and the prosecution, having the tape was as good as having Father Mockaitis on the stand.\textsuperscript{110}

Similarly, in \textit{Commonwealth v. Kane},\textsuperscript{111} the Massachusetts Supreme Court ruled that the defendant was not entitled to a new trial, even though the prosecution questioned the defendant’s priest, Father William Costello, in the presence of the jury.\textsuperscript{112} The defendant had waived the protections of the priest penitent privilege and agreed to allow Father Costello to testify to what he had disclosed in confession.\textsuperscript{113} During \textit{voir dire} Father Costello, citing the Seal of the Confessional, refused to testify.\textsuperscript{114} At trial, the prosecution nevertheless called Father Costello to testify and questioned him as to the substance of what Kane disclosed in confession.\textsuperscript{115} Father Costello again refused to testify.\textsuperscript{116} Because Kane had waived the privilege, the trial “judge found Father Costello in contempt” and imposed a small fine.\textsuperscript{117} In denying Kane’s request for a new trial, the Massachusetts Supreme Court concluded that the prosecution did not “consciously [seek] to build its case out of the inferences arising from Father Costello’s silence[,]”\textsuperscript{118} even though the prosecution knew well before trial that Father Costello, in order to keep the confessional sacrosanct, would remain silent.\textsuperscript{119}

Both of these cases illustrate Cardinal Bevilacqua’s strident criticism of state statutes that fail to accommodate confessional inviolability. The Cardinal argues that these statutes ignore the dual nature of confessional inviolability, which not only guards against

\begin{footnotesize}
\begin{enumerate}
\item [109] \textit{Id.} at 1533.
\item [110] It should be noted, however, that the Ninth Circuit did rule that the secret tapings were unconstitutional and issued an injunction prohibiting the practice. \textit{Id.} at 1530-33. Given that the confessional secrecy is absolutely inviolate, this was a hollow victory for Father Mockaitis, who still had to endure the publication of Hale’s recorded confession. See Fr. Timothy Mockaitis, \textit{In Confidence, The Priest}, Aug. 1998, at 12-16. What is more, the Ninth Circuit’s ruling was based on the compelling interest test mandated by the Religious Freedom Restoration Act that was later in validated in \textit{City of Boerne v. Flores}, 521 U.S. 507 (1997). \textit{Mockaitis}, 104 F.3d at 1530. With the compelling interest test stripped away, the Supreme Court’s current free exercise jurisprudence does not necessarily compel the same result. \textit{See infra} Part III.
\item [112] \textit{Id.} at 602. Kane was convicted of second-degree murder. \textit{Id.}
\item [113] \textit{Id.}
\item [114] \textit{Id.}
\item [115] \textit{Id.}
\item [116] \textit{Id.}
\item [117] \textit{Kane}, 445 N.E.2d at 603.
\item [118] \textit{Id.} at 604.
\item [119] \textit{Id.} at 602-04.
\end{enumerate}
\end{footnotesize}
exposing the penitent, but also “protects the Sacrament of Penance itself.”\textsuperscript{120} In both cases, however, the Ninth Circuit and the Massachusetts Supreme Court allowed the state to exploit the confessional solely because the penitent decided that it was in his best interest to exercise his statutory right to waive the priest-penitent privilege. The Mockaitis court afforded little weight to the argument that the Church, including Father Mockaitis and the local archbishop, had a free exercise interest in the destruction of the taped confession, because Hale had asserted his statutory right and Father Mockaitis “knew that such voluntary disclosure was possible.”\textsuperscript{121} The Kane court failed to address the issue at all.\textsuperscript{122} By focusing exclusively on the penitent’s desire to break the Seal of the Confessional, these courts “totally ignor[ed] the religious dimension of these confidences [and posed] a grave threat to the freedom of practice of religion.”\textsuperscript{123} In states where the priest-penitent privilege is not co-extensive with the Seal of the Confessional, Catholic priests can thus be thrust into a precarious situation. Precluded by secular law from claiming the privilege on behalf of the Church, and forced by the Church to suffer imprisonment rather than break the Seal of the Confessional (or suffer excommunication for doing so), the Catholic priest is once again put into the untenable position of either violating his “judicial oath,” or violating his “ecclesiastical oath” and facing the “gloomy prospect of a dreadful hereafter.”\textsuperscript{124} Therefore, except in those states that have extended privilege statutes and rules to permit a priest to

\textsuperscript{120} Bevilacqua, supra note 41, at 1736.
\textsuperscript{121} Mockaitis, 104 F.3d at 1531.
\textsuperscript{122} Kane, 445 N.E.2d at 602-04. As one commentator correctly argues, although the Kane court “correctly construed the clergy-penitent privilege statute it was faced with, its decision makes clear the inadequacy of the privilege alone; under such a regime, clergy face court sanctions for adhering to the tenets of their faith.” Ronald J. Colombo, Note, \textit{Forgive Us Our Sins: The Inadequacies of the Priest-Penitent Privilege,} 73 N.Y.U. L. REV. 225, 226 (1998); \textit{see also} Commonwealth v. Musolino, 467 A.2d 605 (Pa. Super. 1983) (adopting the same holding as Kane on similar facts); Keenan v. Gigante, 390 N.E.2d 226, 230 (N.Y. 1979) (rejecting the claim that “right to practice . . . ministry bestows more extensive protection beyond the privilege accorded by the statute”).
\textsuperscript{123} Bevilacqua, supra note 41, at 1743.
\textsuperscript{124} Phillips, 1 W. L.J. at 112; \textit{see also} Brocker, supra note 83, at 482 (“All clergy could theoretically be placed in the position [of choosing] between their beliefs and jail. Such a choice is a clear burden on a clergyperson’s free exercise rights, with a concomitant burden on the rights of the communicant.”); Mazza, supra note 95, at 193; Hugh Schofield, \textit{Bishop Would Keep Silent Again on Priest’s Crimes, USA TODAY,} June 15, 2001, at 11A; Vivienne Walt, \textit{Priest, Confession’s Sanctity on Trial in France, USA TODAY,} June 14, 2001, at 14A.
claim the privilege on his own behalf or that of the Church, the non-existence of the privilege in situations where the penitent elects to waive it significantly affects Free Exercise rights.

To date, the Phillips court has provided the only adequate solution to this predicament—that as a matter of Free Exercise, Catholic priests have the constitutional right to preserve the sanctity of the Seal of the Confessional and refuse to testify concerning matters heard in confession, without being sanctioned or imprisoned for contempt of court. Although this concept fiercely collides with the "fundamental principle that 'the public . . . has a right to every man's evidence,'" in these particular cases the governmental requirement is so arduous, a correct reading of the Free Exercise Clause exempts Catholic priests from this civic duty.

III. THE SEAL OF THE CONFESSIONAL UNDER MODERN FREE EXERCISE JURISPRUDENCE

A. The Confessional Before Smith

Prior to the United States Supreme Court decision in Employment Division, Department of Human Resources of Oregon v. Smith, Roman

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125 See, e.g., MO. ANN. STAT. § 491.060(4) (West 1996) (declaring incompetent to testify members of the clergy who have heard confidential communications in their professional capacity); N.J. STAT. ANN. § 2A:84A-23 (West 1994) (allowing the privilege to be waived only with the consent of both the cleric and the penitent); OR. REV. STAT. § 40.260(3) (West 1999) ("Even though the person who made the communication has given consent to disclosure, a member of the clergy may not be examined as to any confidential communication made to the member . . . if, under the discipline or tenets of the member's church, denomination or organization, the member has an absolute duty to keep the communication confidential.").


127 Phillips, 1 W. L.J. at 112.


129 See, e.g., Whittaker, supra note 126, at 159 ("[T]he non-existence of the privilege opens the door for the claim that the privilege is necessary for the free exercise of religion."); Robert W. Webb, Note, Priest-Penitent Privilege, 46 CHI-KENT L. REV. 48, 48 (1969) ("[T]here is a basis for the priest-penitent privilege in the United States by way of the First Amendment to the United States Constitution."). See also Prabha Sipi Bhandari, The Failure of Equal Regard to Explain the Sherbert Quartet, 72 N.Y.U. L. REV. 97, 102 (1997) ("The Free Exercise Clause of the First Amendment provides religiously motivated individuals a constitutional sword with which to strike down laws restricting their religious activity.").

Catholic priests very likely would have prevailed on such claims. Indeed, until the mid-1980s, the Court’s Free Exercise jurisprudence favored religious claimants, and the Court was far more willing to carve out religious exemptions for individuals, even to otherwise nondiscriminatory, generally applicable laws. During this era, the Court required the government to justify laws that imposed a “substantial burden” on free exercise of religion with a “compelling” state interest; otherwise, the First Amendment mandated certain religious exemptions from these laws.

In Sherbert v. Verner, the Supreme Court ruled that the Free Exercise Clause required the State of South Carolina to extend unemployment benefits to Adell Sherbert, a member of the Seventh-day Adventist Church, who was prohibited by her religious beliefs from working on Saturday. Because of her refusal to work on Saturday, South Carolina determined that Ms. Sherbert was ineligible to receive unemployment benefits under a statutory provision disqualifying workers who “fail, without good cause, to accept suitable work when offered,” from receiving benefits. The Court found that South Carolina had severely burdened Ms. Sherbert’s free exercise rights by placing her in the impossible position of having to violate a “cardinal principle of her religious faith” in order to receive unemployment benefits. The Court found that South Carolina’s proffered compelling interest of avoiding a flood of fraudulent claims from people “feigning religious objections” was merely speculative and unsupported by the record. Moreover, the Court noted that even if South Carolina’s fears were legitimate, the state had nevertheless failed to demonstrate that denying religious exemptions was the least restrictive means of preventing the depletion of the unemployment compensation fund.

The Court’s broad interpretation of the Free Exercise Clause


132 Sherbert, 374 U.S. at 403.

133 Id. at 406-409; see also Yoder, 406 U.S. at 236.


135 Id. at 399-400.

136 Id. at 401.

137 Id. at 406.

138 Id. at 407-08.

139 Id. at 407.
reached its crescendo in Wisconsin v. Yoder. In Yoder, a group of Amish parents challenged Wisconsin’s compulsory public school attendance law, which required all children to attend “public or private school until reaching the age of [sixteen].” This group of parents allowed their children to attend public schools until the eighth grade. However, because they believed that secondary education inculcated values which conflicted with Amish mores and its distinctive way of life—which denounced “intellectual and scientific accomplishments, self-distinction, and competitiveness”—these parents removed their children from formal schooling to return to the farm, where they would learn the value of manual labor, communal living, and “be prepared to accept the heavy obligations imposed by adult baptism.” Persuaded by a substantial record which so clearly demonstrated the inextricable link between Amish religious belief and their bucolic and communal way of life, which had existed unaltered for over 200 years, the Court held that Wisconsin had violated the Free Exercise Clause by sanctioning Amish parents who refused to send their children to secondary schools. Although acknowledging Wisconsin’s interest in providing a solid education for all of its children, the Court cautioned that there are “areas of conduct protected by the Free Exercise Clause of the First Amendment and thus, beyond the power of the State to control, even under regulations of general applicability.” Thus, even though the Wisconsin statute applied to all children regardless of religious affiliation, the Court found that as applied to Amish families, it significantly interfered with a rustic way of life grounded in centuries-old religious beliefs.

Like South Carolina, Wisconsin failed to advance a sufficiently compelling justification to deny the Amish an exemption. The Court concluded that an “Amish exemption” would not critically undermine Wisconsin’s interest in compelling public education to “prepare citizens to participate effectively and intelligently” in society and to become “self-reliant and self-sufficient.” The Court recognized that, despite their aloofness, the Amish way of life still

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141 Id. at 207.
142 Id. at 207, 210.
143 Id. at 211-12.
144 Id. at 234.
145 Id. at 220-21.
146 Yoder, 406 U.S. at 224-28.
147 Id. at 221-22.
148 Id. at 221.
produced productive, law abiding, self-reliant individuals, such that their form of education, although different, still dovetailed with the state’s goals. The Court also noted that “accommodating the religious objections of the Amish by foregoing one, or at most two, additional years of compulsory education” would not adversely affect the health of the child or the “welfare of society.” Consequently, the Court ruled that the Free Exercise Clause mandated an exemption for Amish students.

In applying the compelling interest test, the Sherbert-Yoder Court also developed an easily overlooked analytical framework which itself bolstered free exercise claimants. In deciding that States did not have a compelling interest either in denying unemployment benefits or forcing attendance at secondary public schools by individuals who had legitimate religious objections, the Court took a very narrow view of the governmental interests at stake. For example, in Sherbert, South Carolina argued that granting an exemption to Ms. Sherbert would completely undermine the state’s fiscal integrity by forcing the state to grant religious exemptions liberally, thus potentially opening the floodgates for fraudulent claims and overwhelming the state’s unemployment compensation fund. The majority rejected this view, focusing instead on Ms. Sherbert’s particular circumstances: “The [state of South Carolina] suggest[ed] no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections . . . might . . . dilute the unemployment compensation fund[].” Similarly, in Yoder the Court “searchingly examine[d]” Wisconsin’s asserted interest in its compulsory education system. In both cases, the states failed to proffer solid evidence justifying these concerns. Moreover, the Court examined the competing governmental and individual free exercise interests on virtually the same focused level of specificity—not merely “look[ing] at such highly generalized secular values but at the more particular values served by the chosen regulation.” For instance, in Yoder, the

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149 Id. at 222, 235.
150 Id. at 234.
151 Id. at 235.
152 The implications of this framework are extremely important for the Seal of the Confessional and will be discussed infra Part IV.
154 Sherbert, 374 U.S. at 406-07.
155 Id. at 407 (emphasis added).
156 Yoder, 406 U.S. at 221.
157 Sherbert, 374 U.S. at 407-08; see also Yoder, 406 U.S. at 222-26.
158 J. Morris Clark, Guidelines for the Free Exercise Clause, 83 HARV. L. REV. 927, 331
Court looked for “specific evidence” that Amish children—not schoolchildren in general—“would become burdens on society because of educational shortcomings.” In addition, the Court failed to see how compulsory education in Wisconsin would be undercut by exempting Amish children “one, or at most two, additional years of compulsory education.” Essentially, in the Sherbert-Yoder line of cases, the Court did not balance the free exercise claims against the states’ “broad interest” in protecting public welfare funds or “speculative fears about public education in general. Instead, the majority honed in on what “concrete” state objectives would have been thwarted by granting an exemption in the particular circumstances directly before the Court.

By “properly narrow[ing]” the “focus of the inquiry,” and distilling the “competing interests to the same plane of generality,” the Sherbert-Yoder Court effectively tipped the scales in favor of the religious claimant. The impact of this methodology is significant, because in later cases where the Court abandoned this analysis and accepted a broader view of governmental interests, plaintiffs were far less successful in their Free Exercise Claims. For example, in Lyng v. Northwest Indian Cemetery Protective Association, the Court held that the Free Exercise Clause did not prohibit the federal government from building a road through and allowing timber harvesting on several tracts of federally owned land even though resident Native American tribes considered the land sacred. The respondents maintained that government-sponsored logging and road-building would defile these forests and render them unsuitable for religious ceremonies. Although conceding that there would be “devastating


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159 Yoder, 406 U.S. at 224.
160 Id. at 234.
161 Smith, 494 U.S. at 909 (Blackmun, J., dissenting).
162 Id. at 911 (Blackmun, J., dissenting).
163 Id.
164 Id. (explaining the Court’s Free Exercise Clause analysis in pre-Smith decisions and stressing that even generally applicable laws which burden free exercise rights must advance governmental interests that are more than “merely abstract or symbolic”).
166 Smith, 494 U.S. at 910 (Blackmun, J., dissenting).
167 Both Ms. Sherbert and the Amish parents were successful in their Free Exercise claims.
169 Id. at 441.
170 Id. at 451.
effects on traditional Indian religious practices,” Justice O’Connor, writing for the majority, concluded that the operations of the federal government would be completely stymied if it had to finely tailor its activities to accommodate the Free Exercise concerns of innumerable groups. The *Lynx* Court juxtaposed the Native Americans’ religious interest in a particular piece of land against the much broader ability of the federal government “to conduct its own internal’ affairs” and determined that mandating an exemption in this case would allow individuals to wield the Free Exercise Clause as a “veto over public programs.”

Two years earlier, the Court employed similar reasoning to uphold—also against religious objections of Native Americans—Pennsylvania’s use of social security numbers to administer social welfare programs. The respondents claimed that the very issuance of the number would rob their daughter’s spirit, and thus the Free Exercise Clause forbade the state from assigning her a social security number. The Supreme Court rejected the respondents’ claim, declaring that the “Free Exercise Clause cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.” In these cases, the Court compared the Free Exercise implications of the particular exemption against far more generalized notions of “public health and safety, public peace and order, defense, [and] revenue,” thus “inevitably mak[ing] the individual interest appear the less significant.” As a result, the Court made it far easier for states to come up with a compelling interest that justified the denial of certain religiously based exemptions.

Still further, the *Sherbert-Yoder* Court expressed the concern that when states refuse to grant religiously-based exemptions, individuals are saddled with the impossible choice of either obeying God or accepting the consequences imposed by secular civil or criminal law. In *Sherbert*, Justice Brennan denounced South Carolina for forcing Ms. Sherbert to choose between either adhering to her religious beliefs and sacrificing her livelihood or going to work and

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171 Id. at 452.
172 Id. at 448 (quoting Bowen v. Roy, 476 U.S. 693, 699-700 (1986)).
173 Id. at 452.
174 Bowen, 476 U.S. 693.
175 Id. at 696-97.
176 Id. at 699.
177 Clark, supra note 158, at 331.
178 See *Sherbert*, 474 U.S. at 404; see also *Yoder*, 406 U.S. at 218.
jeopardizing her soul.\textsuperscript{179} Similarly, in \textit{Yoder}, the Court was extremely cognizant of the pervasiveness of Amish religious beliefs and on the prospect of Amish families having to “abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.”\textsuperscript{180} Very often, the existence of such an impossible choice for individuals was fatal to governmental action.\textsuperscript{181}

While the ramifications of the \textit{Sherbert-Yoder} framework on the Seal of the Confessional are discussed in greater detail below, it appears at first glance that Catholic priests would likely prevail in a claim that the Free Exercise clause frees them from the obligation to testify about matters heard in the confessional. Because they must either accept civil or criminal sanctions for refusing to testify, or suffer excommunication, they are confronted with burdens even more onerous than Ms. Sherbert and the Amish plaintiffs in \textit{Yoder}. What is more, the Seal of the Confessional is so central to one’s priestly functions and such an important part of the Catholic Church’s view of eternal salvation, an exemption is required to preserve an essential part of the life and ministry of the Catholic Church. Of course, whether the Supreme Court would accept this characterization hinges on whether the Court views such an exemption as either undermining the entire judicial system by inhibiting the search for truth, or, more narrowly, simply removing one component of a single trial.

\textbf{B. Smith Alters the Dynamic}

In order to enjoy the more exacting standards set forth in the \textit{Sherbert-Yoder} line of cases, the Seal of the Confessional must scale the steep barriers erected by \textit{Smith}—a case that marked a complete shift in the Court’s Free Exercise jurisprudence.\textsuperscript{182} \textit{Smith} involved the use of peyote, a drug used sacramentally in the Native American Church.\textsuperscript{183} The use and possession of peyote, however, was prohibited under Oregon law.\textsuperscript{184} Respondents, members of the Native American Church, were terminated from their positions at a

\textsuperscript{179} \textit{Sherbert}, 374 U.S. at 404.
\textsuperscript{180} \textit{Yoder}, 406 U.S. at 218.
\textsuperscript{182} See McConnell, supra note 131, at 1111 (“The Smith decision is undoubtedly the most important development in the law of religious freedom in decades.”).
\textsuperscript{183} \textit{Smith}, 494 U.S. at 874
\textsuperscript{184} \textit{Id.}
drug rehabilitation center, because they had used the drug.\textsuperscript{185} After they were fired, Respondents applied for state unemployment benefits.\textsuperscript{186} Respondents were denied these benefits because "they had been discharged for work-related 'misconduct.'"\textsuperscript{187} Subsequently, Respondents filed suit claiming that, under \textit{Sherbert} and \textit{Thomas v. Review Board of Indiana Employment Security Division},\textsuperscript{188} Oregon's denial of unemployment benefits impermissibly burdened their religious practice without a compelling governmental interest in violation of the First Amendment.\textsuperscript{189}

Surprisingly, the \textit{Smith} Court swept away the compelling interest test that had previously governed Free Exercise cases since \textit{Sherbert}, and replaced it with a rational basis standard of review.\textsuperscript{190} Writing for the majority, Justice Scalia noted that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."\textsuperscript{191} Relying on the Court's earlier decisions in \textit{Minersville School District Board of Education v. Gobitis}\textsuperscript{192} and \textit{Reynolds v. United States},\textsuperscript{193} the majority concluded that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability,'" regardless of whether the law operates to prohibit conduct permitted or required by an individual's religion.\textsuperscript{194} In other words, under \textit{Smith}, laws which burden religious practices do not offend the Free Exercise Clause so long as such laws are within the state's power to enact, apply generally without regard

\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} 450 U.S. 707 (1981).
\textsuperscript{189} \textit{Smith}, 494 U.S. at 875.
\textsuperscript{190} Id. at 885; see also McConnell, \textit{supra} note 131, at 1113 (discussing the fact that neither party argued, either in their briefs or at oral argument, that the Court should scrap the compelling interest test and noting that Oregon had "expressly conceded" that strict scrutiny was the appropriate standard of review).
\textsuperscript{191} \textit{Smith}, 494 U.S. at 879-80.
\textsuperscript{192} 310 U.S. 586, 595-99 (1940) (upholding against a Free Exercise Clause challenge the expulsion of Jehovah's Witness students who refused, on religious grounds, to participate in the pledge of allegiance). Interestingly, the Court overruled this decision three years later in \textit{West Virginia Board of Education v. Barnette}, 319 U.S. 624 (1943). However, Justice Scalia attempted to reconcile this glaring inconsistency by characterizing \textit{Barnette} as a hybrid decision involving the Free Speech Clause and the Free Exercise Clause. \textit{Smith}, 494 U.S. at 882. The concept of hybrid-rights will be further discussed \textit{infra}, Part III.C.
\textsuperscript{193} 98 U.S. 145, 166-67 (1879) (holding that Free Exercise Clause did not exempt Mormons from compliance with laws criminalizing polygamy).
\textsuperscript{194} \textit{Smith}, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).
to religion, and are not enforced in a religiously discriminatory manner. Thus, because Oregon had the power to criminalize the use of peyote (as had other states as well as the federal government), and that law applied with equal force to individuals who used the drug for non-religious reasons, the Court ruled that the Free Exercise Clause did not compel Oregon to grant an exemption to Respondents.

Smith fundamentally changed the nature of the Free Exercise right. It relieved states from the burden of justifying the denial of a religiously-based exemption with a compelling state interest; now states need only satisfy a "bare requirement of formal neutrality." In doing so, Smith redefined the substantive guarantee and the philosophical underpinnings of the Free Exercise right itself.

Like Smith, Sherbert and Yoder involved generally applicable laws that operated in specific instances to restrict individuals' religious practices. By applying the compelling interest test, and ruling that the Free Exercise Clause mandates certain religious exemptions from general laws, the Supreme Court "reflected the view that individual rights" trump "any claims that society as a whole may make on individual conduct." In essence, the Court preserved the privileged status of the Free Exercise Clause as a substantive individual right, shielding religious practices from unwarranted governmental interference, and commanding certain religiously motivated exemptions that may "be needed by any person of religious convictions caught in conflict with . . . secular political culture." Sherbert and Yoder interpret the Free Exercise Clause as not concerned "with facial neutrality or general applicability," because it "singles out a particular category of human activities for particular

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195 Id. at 877-78 ("It is a permissible reading of [the Free Exercise Clause] . . . to say that if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."). Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533-47 (1993) (invalidating city ordinance prohibiting the ritual slaughter of animals because, given various exceptions and exemptions, effect of the law was to impermissibly target practice of the Santeria religion).

196 Smith, 494 U.S. at 878, 890.


198 McConnell, supra note 131, at 1153.

199 Id. at 1127-38, 1153.


201 McConnell, supra note 131, at 1152.
protection[]."

In Smith, however, the Court discarded the notion that the Free Exercise Clause privileges religiously motivated conduct and "places [it] beyond the reach of a criminal law that is not specifically directed at their religious practice." Whereas the Sherbert-Yoder Court was concerned mainly with the extent of the burden on and the centrality of the religious practice affected by a given statute, the constitutional touchstone after Smith is how the law is crafted and applied. In essence, the Smith Court recast the Free Exercise Clause in the mold of the Equal Protection Clause: So long as state laws do not create some sort of "suspect class" on the basis of religion—either by enacting laws specifically targeting, or arbitrarily enforcing existing laws against, certain religions or religious practices—the resulting burdens, no matter how substantial, are insufficient to violate the Free Exercise Clause. Justice Scalia concluded that such a recharacterization would produce an "equality of treatment" that served as the "constitutional norms" in other areas (e.g., race) rather than an anomalous "private right to ignore generally applicable laws."

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202 Id. Professor McConnell also stresses that the privileged status of religious practices under the Free Exercise Clause is essential for the protection of the rights of adherents of minority religions, who are at the mercy of supposedly neutral, generally applicable laws enacted by the political majority, and often the ones most in need of the courts to step in and mandate an exemption under the Free Exercise Clause. Id. at 1139-40, 1152. Significantly, in support of this proposition, he discusses the Phillips case and characterizes the New York court's protection of the Seal of the Confessional as "required in order to maintain neutrality between the Protestant majority and the Catholic minority." Id. at 1147-48.

203 Smith, 494 U.S. at 878.

204 See Sherbert, 374 U.S. at 403-04; Yoder, 406 U.S. at 220-21.

205 See McConnell, supra note 131, at 1153 ("For this protection, the Smith opinion substitutes a bare requirement of formal neutrality. Religious exercise is no longer . . . a preferred freedom[,] so long as it is treated no worse than commercial or other secular activity, religion can ask no more.").

206 U.S. CONST. amend. XIV.

207 See Smith, 494 U.S. at 878-79, 886-87; see also Bowen v. Roy, 476 U.S. 693, 707-08 ("Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."); Braunfield v. Brown, 366 U.S. 599, 607 (1961) ("[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance . . . ."); Peter M. Stein, Note, Smith v. Fair Employment Housing Commission: Does the Right to Exclude, Combined with Religious Freedom, Present a "Hybrid Situation" under Employment Division v. Smith, 4 GEO. MASON L. REV. 141, 177-78 (1995); see generally Gedicks, supra note 200, at 1250-52.

208 Smith, 494 U.S. at 886. But see McConnell, supra note 131 at 1139 (sharply
By so fundamentally altering the dynamic, the Court essentially took itself out of the business of directing exemptions under the Free Exercise Clause. In the first place, the Court declared that subjecting a state’s denial of a religious exemption to generally applicable state laws to strict scrutiny is ill-advised because “many laws will not meet the test[,]” thus “open[ing] the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.” More significantly for the Seal of the Confessional, the Court decided that religious exemptions from generally applicable laws are a matter of legislative grace, not constitutional mandate. The Court referred to several states that had exempted sacramental use of peyote from their drug laws, and admitted that just because such exemptions are “permitted” or “desirable,” they are not necessarily “constitutionally required.” The Court expressed its faith that the democratic process would fairly resolve the question of whether certain religious practices should be exempt from generally applicable laws and reasoned that any restrictions on such practices which result from the legislature’s unwillingness to do so merely constitute an “unavoidable” by-product of majoritarian democracy.

At first blush it appears that Smith forecloses any opportunity for Catholic priests to rely on the Free Exercise Clause to protect the secrecy of the confessional and avoid court orders to testify. Indeed, the system of state statutes and evidentiary rules protecting the confessional (as well as private clergy-penitent conversations in other denominations) under limited circumstances falls squarely within Justice Scalia’s ideal. These statutes are undoubtedly neutral and generally applicable, available to all religious denominations so long as the penitent’s conversation with clergy meets the statutory

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200 Smith, 494 U.S. at 888. Justice Scalia’s conclusion is not persuasive, however, given the Court’s tendency in pre-Smith cases to construe the governmental interest very broadly, making it much easier for the government to justify restrictions on individual religious freedom under the compelling interest test.

201 Id.

202 Id.; see also McConnell, Free Exercise, supra note 131, at 1130-31, 1138-40, 1147-49 (criticizing the Court’s characterization of religious exemptions as a “luxury” and the possible adverse impact on minority religions, which cannot necessarily take advantage of the political process).

specifications. More importantly, by enacting these statutes and rules, state legislatures have struck what they deem, as a matter of public policy, to be the appropriate balance between maintaining clergy-penitent confidentiality and upholding the state’s interest advancing the search for truth in its judicial system. Thus, according to Smith, in states where the priest-penitent privilege fails to fully protect the Seal of the Confessional, Catholic priests must seek relief from the legislature because the Free Exercise Clause should not interfere with such legislative judgments so long as the laws are uniform and non-discriminatory. Since no one argues that the shortcomings in these statutes are in any way designed or intended to disadvantage Catholicism, priests who find themselves burdened by these inadequate statutory protections suffer merely from an incidental and undesirable, but not constitutionally cognizable, imposition on their religious freedom. This is hardly comforting to a priest who must choose between either excommunication or imprisonment for contempt.

C. A Glimmer of Hope: The “Hybrid-Right” Exception

Thankfully, Smith has not totally unsealed the confessional. Although it scrapped the compelling interest test in the large

214 See Mullen v. United States, 263 F.2d 275, 277 (D.C. Cir. 1959) (Fahy, J., concurring) (noting that privilege should apply to Lutheran minister); In re Swenson, 237 N.W. 589, 590 (Minn. 1931) (extending privilege to Lutheran minister). Many commentators acknowledge, and advocate, broad application by states of the clergy-penitent privilege statutes. See Brocker, supra note 83, at 471-77 (calling for a more expansive application of the clergy-penitent privilege in circumstances not traditionally recognized as religious); Yellin, supra note 74, at 114-21 (discussing the trend among states to extend the clergy-penitent privilege to a broad range of denominations, even those for which confession is not mandatory, as it is in the Catholic faith).

215 According to Professor Yellin:
the privilege has the following policy justifications: 1) encouraging penitential communications is in society’s best interest; 2) in most cases, compelling a minister to testify will still not secure his testimony; 3) public displeasure of judicial punishment of a clergyman for his maintaining deeply held religious beliefs impels the legislature to allow him to avoid testimony; and 4) society’s interest in assuring the development of religious institutions would be damaged if the privacy of penitential communications were not respected.

Yellin, supra note 74, at 113-14.

216 See Smith, 494 U.S. at 884 (“The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development’.”) (quoting Lyng v. Northwest Indian Cemetery Protective Assoc., 485 U.S. 439, 451 (1988)).

217 See Smith, 494 U.S. at 890.
majority of cases, Smith acknowledged two small but significant groups of cases in which the Free Exercise Clause would exempt religiously motivated activity from generally applicable laws.\footnote{Fry, supra note 197, at 835 (discussing the hybrid-rights exception).} Although the seeds for the destruction of the compelling interest test had been sown in the years prior to Smith,\footnote{Jonathan B. Hensley, Note, Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases, 68 TENN. L. REV. 119, 125-26 (2000) (emphasizing that Smith was ultimately a product of the Supreme Court's reluctance to apply the compelling interest test in earlier cases such as United States v. Lee, 455 U.S. 252 (1982)).} in order to do away with the test entirely, the Smith Court had to reconcile this new interpretation with the Sherbert-Yoder line of cases.\footnote{William L. Esser, IV, Note, Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?, 74 NOTRE DAME L. REV. 211, 212-13 (1998).} To do so, the Court placed these cases into their own special categories. The Court concluded that Sherbert and the other unemployment cases,\footnote{Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987); see also Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707 (1981).} stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.\footnote{Smith, 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).} Similarly, Yoder fell into a new category of "hybrid-rights" claims, which consist of a Free Exercise claim spliced with another enumerated or unenumerated constitutional right, such as freedom of speech, freedom of the press, or parental rights to raise their children free from government interference.\footnote{Id. at 881 (citing Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. McCormick, 321 U.S. 573 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925)).} In cases where the Free Exercise Clause is augmented to another constitutional right, the First Amendment can prevent states from forcing religious groups to modify or abandon certain practices in order to comply with facially neutral, generally applicable laws.\footnote{Id. at 881-82.} At the same time, lower federal courts have

The hybrid-rights doctrine has been harshly criticized on several fronts. At least one current member of the Supreme Court and several commentators believe that it is constitutionally disingenuous because it saps the Free Exercise Clause of its independent force as a substantive right.\footnote{In his concurring opinion in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), Justice Souter was extremely critical of the hybrid-rights theory: The distinction Smith draws strikes me as ultimately untenable. If a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no
found it "difficult to delineate the exact contours of the hybrid-rights theory discussed in Smith," because the Court failed to both clearly define what level of scrutiny applies to hybrid cases and to determine how viable the component claims of a successful hybrid claim must be. Instead, federal courts have developed several methods of adjudicating this new constitutional animal: "the refusal to recognize hybrid rights claims at all; the ‘independently viable claim’ approach; and the ‘colorable claim’ approach." Despite the discord over whether and how to handle hybrid rights situations, courts and scholars do agree that a successful hybrid claim will trigger strict scrutiny.

What, then, is a successful hybrid rights claim? The degree of success under the hybrid rights doctrine greatly depends on the approach used and the quality of the conjoined constitutional right. Under the "colorable claim" approach, merely raising a hybrid claim does not automatically invoke strict scrutiny. Rather, plaintiffs must demonstrate a "colorable showing of infringement of recognized and

reason for the Court in what Smith calls the hybrid cases to have mentioned the Free Exercise Clause at all. Id. at 567 (Souter, J., concurring); see also Kissinger v. Bd. of Trustees, 5 F.3d 177, 180 (6th Cir. 1993) (calling the hybrid-rights doctrine "illogical" and refusing to apply it); Gedicks, supra note 200, at 1254 ("To say that the Free Exercise Clause mandates exemptions from generally applicable law only when another part of the constitutional text also mandates such an exemption is to say that the Free Exercise Clause does not mandate exemptions."); McConnell, supra note 131, at 1122 ("the Smith Court’s notion of ‘hybrid’ claims was not intended to be taken seriously.").

226 Swanson v. Gurthrie Indep. Sch. Dist., 135 F.3d 694, 699 (10th Cir. 1998); Axson-Flynn v. Johnson, 151 F. Supp. 2d 1326, 1336-37 (D. Utah 2001) ("The so-called ‘hybrid rights’ doctrine that has evolved as a result of the Smith decision has left many courts and scholars confused as to the precise contours of a proper hybrid rights claim . . . .").


228 Id. at 220.

229 Hensley, supra note 219, at 121, 128. Hensley discusses several examples of these approaches, including: Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 699 (10th Cir. 1998) (holding that hybrid rights claims require a "colorable showing of infringement of recognized and specific constitutional rights"); Brown v. Hot Sexy and Safer Productions, Inc., 68 F.3d 525, 539 (1st Cir. 1995), cert. denied, 516 U.S. 159 (1996) (requiring the free exercise claim to be joined with an "independently protected constitutional protection"); Kissinger v. Board of Trustees, 5 F.3d 177, 180 (6th Cir. 1993) (refusing to apply the hybrid rights doctrine).

230 Angela C. Carmella, State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence, 1998 BYU L. Rev. 275, 308 ("Hybrid cases continue to enjoy strict scrutiny review by the courts . . . ."); see also Fry, supra note 197, at 838-41; Stein, supra note 207, at 155-56.


specific constitutional rights. If after independently examining the additional claim (e.g., free speech) the court determines that the “claimed infringements are genuine,” then a hybrid has been successfully created. Typically, neither of the claims must stand by themselves, but if the conjoined claim fails then the free exercise claim will fail as well. “Put simply, two losers equal one winner.”

By contrast, under the “independently viable claim approach,” the hybrid-rights exception (and thus strict scrutiny) applies only in situations where a constitutional claim that can stand on its own is conjoined with a losing free exercise claim. This approach tends to make the free exercise claim mere surplusage because “if another constitutional claim is strong enough on its own to warrant strict scrutiny . . . there seems [to be] no need to throw in an additional Free Exercise claim.”

Regardless of the approach, certain claims fare better than others under hybrid-rights analysis. Free Exercise claims coupled with free speech claims have a higher success rate than those joined with parental rights claims, even though Smith implied that both of these cases would invite strict scrutiny. And although these two

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233 Id. at 700. A “colorable claim” is one “appearing to be true, valid, or right.” Axson-Flynn v. Johnson, 151 F. Supp. 2d 1326, 1338 (D. Utah 2001).

234 Swanson, 135 F.3d at 699.

235 See, e.g., Swanson, 151 F.3d at 700 (holding that free exercise failed because the counterpart claim of interference with parental rights also failed). See also Esser, supra note 220, at 218-27 (discussing cases).

236 Esser, supra note 220, at 219.


238 Hensley, supra note 219, at 139. This criticism seems logical since, very often, free exercise claims are combined with free speech claims, and “free speech claims are often subject to strict scrutiny when raised by themselves, particularly when they involve a form of content control.” Esser, supra note 220, at 221. However, if both the conjoined right and the free exercise right are subject to rational basis review, then linking them provides enhanced protection by invoking strict scrutiny. See Mark Tushnet, Public and Private Education: Is There a Constitutional Difference?, 1991 U. Chi. Legal F. 43, 71-72.

239 See Esser, supra note 220, at 214-29. Esser discusses numerous examples of these cases, including Swanson v. Garthrie Indep. Sch. Dist., 135 F.3d 694 (10th Cir. 1998) (rejecting the contention that free exercise claim linked to a parental rights claim created a hybrid situation to invalidate school district’s policy not to allow home-schooled student to attend on a part-time basis); Brown v. Hot Sexy and Safer Productions, Inc., 68 F.3d 525 (1st Cir. 1995), cert. denied 516 U.S. 159 (1996) (holding that free exercise claim coupled with right of parents to direct upbringing of
types of hybrids are the most common, several commentators have put forth innovative recipes for creating hybrid rights with various constitutional rights.\textsuperscript{240}

D. The Seal of the Confessional Falls Under the Hybrid-Rights Exception

Turning to the Seal of the Confessional, because the obligation to testify and the application of priest-penitent privilege statutes are concededly neutral and generally applicable, Catholic priests who defy this civic duty must demonstrate that their Free Exercise right to maintain the seal is allied with another constitutional right in order to invoke strict scrutiny. Two distinct but related claims exist to generate a hybrid that can preserve the inviolability of the confessional.

These claims involve the "excessive entanglement" hybrid recognized by the D.C. Circuit in \textit{Equal Employment Opportunity Commission v. Catholic University.}\textsuperscript{241} In \textit{Catholic University}, Sister Elizabeth McDonough, a nun and an associate professor of Canon Law, sued the university for sex discrimination under Title VII of the Civil Rights Act of 1964 because she was denied academic tenure.\textsuperscript{242} Ultimately, the court rejected Sister McDonough's claim, holding

\begin{footnotesize}
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  \item \textsuperscript{241} 83 F.3d 455 (D.C. Cir. 1996).
  \item \textsuperscript{242} \textit{Id.} at 459.
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\end{footnotesize}
that the university's decision to deny her tenure fell within the "ministerial exception" to Title VII, which protects "the authority of a church to select its own ministers free of governmental interference." Relying on a long line of Supreme Court decisions declaring that churches, as institutions, have a fundamental right to "decide for themselves, free from state interference, matters of church government[,] as well those of as faith and doctrine," the court upheld the university's decision. The court concluded that, as a Canon Law professor, Sister McDonough was a "member of an ecclesiastical faculty whose stated mission is to 'foster and teach sacred doctrine and the disciplines related to it,'" which the court believed it was constitutionally precluded from intruding upon.

Sister McDonough argued that the ministerial exception, which had been constitutionally mandated by many courts, did not survive the Smith decision because Title VII was a law of general applicability and Smith had virtually eradicated judicially created exemptions under the Free Exercise Clause. The court rejected this argument for two reasons. First, the court noted that the Free Exercise Clause, in addition to protecting an individual's religious beliefs and practices, also "guarantees a church's freedom to decide how it will govern itself, . . . and to whom it will entrust its ministerial responsibilities." According to the court, while Smith scaled back Free Exercise guarantees for individuals seeking exemptions from generally applicable laws, that case did not stand "for the proposition that a church may never be relieved from such an obligation." In other words, churches as institutions—wholly apart from the individual believer—may still claim exemptions under the Free Exercise Clause from otherwise generally applicable laws that encroach upon their autonomy, especially in matters of doctrine and church administration. Churches, therefore, have a fundamental

243 Id. at 462.
245 Catholic University, 83 F.3d at 462-66.
246 Id. at 463-64.
247 See, e.g., Young v. N. Illinois Conference of the United Methodist Church, 21 F.3d 184, 185-88 (7th Cir. 1994); Minker v. Baltimore Annual Conference of the United Methodist Church, 894 F.2d 1354, 1358 (D.C. Cir. 1990); McClure v. Salvation Army, 460 F.2d 555, 556-60 (5th Cir. 1972).
248 Catholic University, 83 F.3d at 461-62.
249 Id. at 463.
250 Id. at 462 (emphasis in original).
251 Id. at 462-64.
right to institutional autonomy.\footnote{252}

Second, drawing on the principle of institutional autonomy, the
court found that, even if the ministerial exception did not survive
\textit{Smith}, the entanglement resulting from the imposition of civil rights
laws on church authorities would violate the Establishment Clause
and thus create a hybrid situation that would invoke strict scrutiny.\footnote{253}
Because application of civil rights laws would necessitate
governmental investigation into churches' decisions concerning the
hiring and firing of clergy—which "in themselves [are] an extensive
inquiry into religious law and practice"—the court concluded such
excessive monitoring would foster the very entanglement the
Establishment Clause was designed to prevent.\footnote{254}

Although \textit{Catholic University} ultimately reaffirmed the ministerial
exception to Title VII of the Civil Rights Act, its dicta concerning the
hybrid-rights exception is significant because it demonstrates that it is
possible to engender a hybrid right within the Religion Clauses
themselves. Along with the rights of individuals to believe and
worship, the "right to church autonomy is a fundamental part of
religious liberty."\footnote{255} Whether through the Establishment Clause
prohibition on excessive entanglement,\footnote{256} or the institutional right of
churches under the Free Exercise Clause to stand free from
"governmental interference" in matters of church doctrine, the
selection of clergy, other administrative matters,\footnote{257} religious

\footnote{252} \textit{Id.} at 462 (citing Kedroff v. St. Nicholas Cathedral of the Russian Orthodox
Church in North America, 344 U.S. 94, 116 (1952)). This principle has been
consistently reaffirmed by the Supreme Court and other state and federal courts. \textit{See}
Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian
Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian
Church, 393 U.S. 440 (1969); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960);
Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929); Waton v.
Jones, 80 U.S. (13 Wall.) 679, 727 (1871); Church of God in Christ v. Graham, 54
F.3d 522 (8th Cir. 1995); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972);
Newport Church of the Nazarene v. Hensley, 983 P.2d 1072 (Or. App. 1999).

\footnote{253} \textit{Catholic University}, 83 F.3d at 467.

\footnote{254} \textit{Id.} at 466-67 (relying on National Labor Relations Bd. v. Catholic Bishop of
Chicago, 440 U.S. 490, 502 (1979)); \textit{see also} Agostini v. Felton, 521 U.S. 203, 233
(1997) (noting that "pervasive monitoring by public authorities" can result in
excessive entanglement); Lemon v. Kurtzman, 403 U.S. 602, 616-17 (1971) (noting
that unconstitutional excessive entanglement existed where state maintained
elaborate surveillance scheme to assure that state funds did not further religious
activities of parochial schools).

\footnote{255} Douglas Laycock & Susan E. Waelbroeck, \textit{Academic Freedom and the Free Exercise

\footnote{256} \textit{See} Agostini v. Felton, 521 U.S. 203 (1997); \textit{see also} Aguilar v. Felton, 473 U.S.

\footnote{257} Combs v. Central Texas Conf. of United Methodist Church, 173 F.3d 343, 350
(5th Cir. 1999).
institutions and organizations “have a constitutionally protected interest in managing their own institutions free of government interference.” Indeed, as the Supreme Court has pointed out, “[l]egislation that regulates church administration, the operation of churches, [and] the appointment of clergy . . . prohibits the free exercise of religion.” In short, because religious life “manifests itself on two conceptually distinct levels,” the individual and the communal, and “separating the individual elements of religious life from the communal elements is exceedingly difficult,” generally applicable, facially neutral laws can have a concomitant burden on institutional, as well as individual, religious freedom.

To be sure, courts tend to sidestep this aspect of religious freedom, and have been reluctant to decide cases from an organizational autonomy perspective. However, recall that in order to create a hybrid situation that will invoke strict scrutiny, depending on the approach used, neither the free exercise claim nor the allied claim must stand on its own. In fact, as discussed, many scholars believe that the hybrid-rights exception means that “two losers equal one winner.” Therefore, when seeking an exemption under the Free Exercise Clause from a facially neutral, generally applicable law, although the individual’s free exercise claim may fail under the Smith test, the challenger may still be able to invoke strict scrutiny by demonstrating that the law significantly burdens not only his own free exercise rights, but also the corresponding fundamental right of his church to institutional autonomy. To the extent that generally applicable laws that encumber individual free exercise correspondingly burden institutional religious freedom, the fusion of these two rights energizes the individual free exercise claim under

261 See, e.g., National Labor Relations Bd. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (relying on statutory interpretation rather than right of religious autonomy to hold that the NLRB does not have jurisdiction over Catholic school teachers); Laycock, supra note 258, at 1373 (arguing that “the right of church autonomy, tends to be overlooked”); see also Developments, supra note 260, at 1771 (“Most commentators have ignored the autonomy concerns that are present when courts consider organizational free exercise claims.”).
262 Developments, supra note 260, at 1743.
263 See supra notes 222-30 and accompanying text.
264 See supra note 236.
265 See Catholic University, 83 F.3d at 466-68.
the hybrid exception of Smith.  

Perhaps nowhere is this dual nature of religious freedom—individual free exercise wedded to institutional autonomy—more evident than in the Seal of the Confessional. As Cardinal Bevilacqua, Archbishop of Philadelphia, explains the doctrine of the Seal of the Confessional:

Crucial to an understanding of the effect of the relaxation of confessional secrecy in particular cases on the freedom to practice religion is the longstanding teaching of the Church that the primary purpose of the sacramental seal of confession is the protection of the religion itself, with the privacy of the individual penitent secondary to this.  

Consequently, the Cardinal explains, priest-penitent privilege statutes which do not allow the priest to claim the privilege—or do so only on behalf of the penitent—are seriously “flawed, because [these statutes are] centered entirely on this secondary purpose, to the exclusion of the more profound purpose of religious confidentiality[]”.  

Cardinal Bevilacqua is merely reaffirming a principle that is deeply-rooted in Catholic doctrine: The “sacrament belongs to the Church, not to any individual penitent. Therefore, it’s the church that seals the confession.” The sin confessed during sacramental confession has not only damaged the penitent’s relationship with God, but also her relationship with the Church as a whole. As a result, the sacrament accomplishes not only reconciliation with God, but also “forgiveness and reconciliation with the Church.” Put another way, through the admission of sins during confession, the penitent “looks squarely at the sins he is guilty of, takes responsibility for them, and thereby opens himself again to God and to the communion of the church[].” Further on, the Catechism explains that true contrition and sincere penance have a double effect—the restoration of individual penitents to “God’s grace” and “intimate friendship” and the revitalization of the “life of the Church which suffered from the sin of one of her members.” Sacramental

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266 See generally Esser, supra note 220, at 238 (“Plaintiffs and academics have . . . attempted to use the hybrid exception as a means to expand free exercise protection as much as possible.”).  

267 Bevilacqua, supra note 41, at 1741.  

268 Id. at 1742.  

269 BUSH & TIEMANN, supra note 61, at 28.  

270 CATECHISM, supra note 3, No. 1440, at 401.  

271 Id.  

272 Id., No. 1455, at 405.  

273 Id., No. 1469, at 410.
confession simultaneously relieves the burden of individual sinfulness and draws one closer to the life and mission of the Church—the mystical body of Christ.\textsuperscript{274}

To this end, the Church binds the priest who hears the confession to "absolute secrecy."\textsuperscript{275} Without exception, the priest cannot use the knowledge he has gained from a penitent's sacramental confession.\textsuperscript{276} Because the sacrament is so vital in bringing the sinner into full communion with Christ and the Church, since the Council of Trent, the acknowledged "purpose of the sacramental silence is none other than to avoid rendering the Sacrament of Penance more difficult for the faithful."\textsuperscript{277} Thus the function of the Seal of the Confessional is not just to protect the individual penitent from embarrassment or disrepute, nor is it designed to protect priestly duties, as such, because the priest (the "confessor") is "not the master of God's forgiveness, but its servant."\textsuperscript{278}

Far more important, the Seal of the Confessional effectuates the Church's authority and duty, conferred and commanded by Christ himself, to grant individual absolution that, in turn, purifies and invigorates the Church so that it may successfully carry on its mission of saving souls.\textsuperscript{279} And because this sacrament is so fundamental to the life of the Church, any effort to puncture the sacramental seal would seriously impair the religious freedom of the Catholic faithful.\textsuperscript{280}

In this way, a priest confronted with a court order to testify, under penalty of contempt, is at the forefront of this clash between church and state.\textsuperscript{281} That the obligation to testify is neutral and generally applicable is of no consolation because the commands of the church make no such distinctions—if the priest breaks the seal, he is subject to excommunication.\textsuperscript{282} Moreover, the priest is:

\textsuperscript{274} See Patricia Hampl, Penance, in SIGNATURES OF GRACE: CATHOLIC WRITERS ON THE SACRAMENTS 34, 58-59 (Thomas Grady & Paula Huston eds., 2000).
\textsuperscript{275} CATECHISM, supra note 3, No. 1467, at 409.
\textsuperscript{276} Id.
\textsuperscript{277} KURTSCHMID, supra note 2, at 265.
\textsuperscript{278} CATECHISM, supra note 3, No. 1466, at 409.
\textsuperscript{279} THURIAN, supra note 34, at 49-64.
\textsuperscript{280} Bevilacqua, supra note 41, at 1741.
\textsuperscript{281} In this vein he is not unlike the teachers involved in National Labor Relations Bd. v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979), where the Supreme Court noted that the "key role played by teachers in [parochial] school system has been the predicate for [its] conclusions that governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools."
\textsuperscript{282} 1983 CODE c.1388, § 1.
in every sacrament... first, a minister of the church. It is he who offers the requisite satisfaction and pronounces sacramental absolution...

The priest is also a minister to the Church... He is ministering to individual Christians who approach the sacrament for many reasons and from a broad spectrum of spiritual, psychological, and material situations. To be a minister of and to the church is a compelling challenge, one that Pope John Paul II has described as being the most demanding and rewarding of a priest's ministry[.]

The priest is not merely counseling or advising, he is administering a sacrament, through which the grace of Jesus Christ is imparted to the contrite believer. As Pope John Paul II has counseled, "the priest by virtue of his sacred office appears as the witness and representative of [the] ecclesial nature of the sacrament." The sins confessed—the essence of the sacrament, the penitential act that serves to elicit the promised forgiveness—are the very words that the government seeks to uncover. Clearly then, when priests act to keep such communications secret and preserve the inviolability of the confessional, they are not protecting the penitent or themselves,

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283 Stasiak, supra note 31, at 11-12 (emphasis in original).
284 Id. at 23 ("The primary, fundamental focus of the sacrament of reconciliation is the sacramental effecting and showing of God's word of pardon and peace, not an ecclesial support group or self-help session.").
285 See supra Part I.
287 Trent, Fourteenth Session, Doctrine on the Sacrament of Penance, Chapter 3: The Parts of Penance and Its Effect (1551), reprinted in ND, No. 1620, at 435 (DS, No. 1673, at 393) ("The quasi-matter (quasi materia) of this sacrament is the acts of the penitent itself, viz. contrition, confession, and satisfaction. Inasmuch as these acts are by divine institution, required in the penitent for the integrity of the sacrament, and for the full and complete forgiveness of sins, they are called parts of penance."). See also Thurian, supra note 34, at 124 ("Only frequent and detailed confession is able gradually to remove the mystery and diminish the taste for secrecy—that is to say that such confession alone can deliver us from the temptation of the sin and the anguish of unsatisfied desire."); Chapel, supra note 47, at 149 ("Where there is hurt, the desire for forgiveness must come to speech.").
288 See, e.g., Mockaitis v. Harclerode, 104 F.3d 1522, 1530 (9th Cir. 1997) ("[T]he search warrant sought to use the sacramental confession as a tool to establish [defendant's] guilt. Deliberately, the religious rite was focussed upon and preserved for exploitation as state's evidence.").
289 Scholars stress the fact that as minister of the Sacrament of Reconciliation, Catholic priests not only grant absolution but also experience, along with the penitent, a transformation, coming to a realization of their own sinfulness and "must pray God that the absolution which he addresses to the penitent may act not only upon the spiritual state [of the penitent], but also be equally as effective on his own
but defending the sacrament in their capacity as ministers of the Church. Furthermore, given that only priests administer the Sacrament of Reconciliation, and are bound to secrecy when they do so, they are the last and only line of defense for the sacrament.

For these reasons, when government authorities seek to intrude upon the Seal of the Confessional, they jeopardize one of the pillars of the Church’s existence. Even when the individual decides she no longer wants her confession sealed, unsealing her confession undercuts the “confidence with which communicants freely approach their ministers with confidential spiritual matters.” The matters explored in the confessional are not garden-variety “professional secrets,” they are an integral part of one of the seven foundational rites of the Catholic Church—through which the individual is disposed to sanctifying grace and the Church itself fulfills Christ’s command. What is more, should a priest be imprisoned for maintaining his silence, even for a short time, Church resources are diverted and the sacrament itself is hampered, not only because the priest is absent, but also because of the potential chilling effect on the desire of parishioners to go to confession, knowing that it could later be a source of friction.

Consequently efforts to invade the confessional impose significant burdens not only on the free exercise rights of the individual penitent—or the priest, if the penitent waives the privilege—but also on the Church itself. While not entanglement in the traditional sense of selection of clergy or monitoring church activities, punishing a priest for defending the Seal of the Confessional inflicts as painful a blow to Church autonomy by assaulting its sacraments, visible acts which are more than signs, but divinely instituted practices which “actually confer” sanctifying

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mind.” THURIAN, supra note 33, at 114-15; see also STASIak, supra note 31, at 1-24; Brocker, supra note 83, at 482 (discussing the burden disclosure places on both clergy and the communicant).

200 Bevilacqua, supra note 41, at 1741.

201 See id. at 1742.

202 See Mockaitis v. Harclerode, 104 F.3d 1522, 1530 (9th Cir. 1997) (noting that secret taping of sacramental confession by the prosecutor “threatens the security of any participation in the sacrament by penitents in jail” and “makes it impossible for [priests] to minister the sacrament to those who seek it in jail”); see also THURIAN, supra note 34, at 111-15 (discussing obstacles to confession); Catholic University, 83 F.3d at 467 (finding that application of civil rights laws to church hiring practices would create excessive entanglement by diverting resources to litigation expenses and causing the university to make all future decisions with an “eye to avoiding litigation”); Brocker, supra note 83, at 481-82 (discussing the “chilling effect on confidential communications”).
grace.  "Were the Sacrament rendered difficult or odious to the faithful they would be deterred from approaching it, thereby undermining the Sacrament itself to the great spiritual harm of the faithful, as well as to the entire Church." Through the sacraments the Church carries out its mission and when these avenues toward grace are closed off, the mission, in turn, is derailed. If church "autonomy interests are strongest in those activities in which act and belief are intertwined," then in no place could it be more evident that a hybrid right exists than with the Seal of the Confessional.

IV. APPLYING THE SHERBERT-YODER DOCTRINE TO CATHOLIC CONFESSION

Because the Seal of the Confessional falls within the hybrid-rights exception of Smith, the question then becomes whether it also survives under the compelling interest test reserved for these types of cases. Recall that under Sherbert, the government must justify any substantial burden on an individual's free exercise of religion—even if it arises indirectly from the operation of a facially neutral law—by a compelling state interest, advanced by the least restrictive means available.

Even in situations where the penitent has exercised his statutory right to waive the privilege, a substantial burden still remains on both the priest and the Church. As already discussed, a court order compelling a priest to testify, or otherwise to suffer civil or criminal sanctions, severely burdens the priest's free exercise rights by forcing him to choose between serving his religion and serving the state. The Sherbert Court sympathized with individuals thrust into such situations, concluding that there is no difference between having to make that choice or paying a "fine imposed against" the believer for the privilege of worshipping as he chooses. Indeed, parish priests face a dilemma parallel to that of Ms. Sherbert—the choice of either

293 KNIGHTS OF COLUMBUS, supra note 11, at 9-10.
294 Bevilacqua, supra note 41, at 1736-37.
295 See, e.g., THURIAN, supra note 34, at 57 ("This means that the ministry of healing, confession, and intercession calls for great vigilance and obedience to the part of the Church, by both clergy and laity . . . . God . . . requires of his Church the vigilance and obedience which must signify and fortify her faith.")
296 Developments, supra note 260, at 1775.
297 See Carmella, supra note 230, at 308 (explaining that strict scrutiny applies to hybrid-rights cases).
298 Sherbert, 374 U.S. at 403-07.
299 Id. at 404; see also Phillips, 1 W. L.J. at 112 (expressing the same concern specifically with respect to Catholic priests).
adhering to the central tenets of their faith or accepting a governmental benefit: the privilege not to testify in court.\textsuperscript{300} Moreover, because the Seal of the Confessional implicates a hybrid right of religious freedom, governmental compulsion to testify is even more hazardous to free exercise rights. Priests "who are expected by their faith communities to make themselves available for confidential colloquies might find it impossible to . . . exercise their ministry if it became known that clergy could be compelled by the government to assume the role of informants against members of a congregation."\textsuperscript{301} Individual Catholics would, in essence, be forced to choose between either participating in the Sacrament of Reconciliation or avoiding the sacrament altogether along with the government's prying ears. Should Catholics choose the latter, the sacrament itself is emasculated, and an essential part of the Church's mission is lost.\textsuperscript{302} Although an individual penitent may be unwilling to safeguard her own right to confidentiality, by unilaterally breaking the seal she in effect empowers the government to invade the inviolability of the confessional, with potentially disastrous consequences for the sacrament and the faithful. Without a doubt, then, a substantial burden exists.

The more important question is whether the governmental interest in obtaining the priest's testimony is compelling enough to outweigh the substantial burden that exists on the free exercise rights of the Church, the priest, and Catholics in general. The interest most often asserted by the state in these situations is, admittedly, a substantial one: The proper administration of justice hinges on a deliberate and accurate search for truth which can only be accomplished when all individuals who have such crucial information come forward or are ordered to disclose it.\textsuperscript{303} This principle has led courts to circumscribe testimonial and evidentiary privileges, including the priest-penitent privileges,\textsuperscript{304} and to conclude that—in

\textsuperscript{301} Mazza, supra note 95, at 193.
\textsuperscript{302} Id.
\textsuperscript{303} United States v. Bryan, 339 U.S. 323, 331 (1950); see also In re Grand Jury Proceedings, 842 F.2d 244, 246 (10th Cir. 1988); Jane E. Mayes, Note, Striking Down the Clergy-Communicant Privilege Statutes: Let Free Exercise of Religion Govern, 62 Ind. L.J. 397, 416 (1987) ("A more general state interest is that of assuring full admission of testimony for the administration of justice."); Whittaker, supra note 126, at 160 ("[T]he state could contend that the privilege exists at the cost of the general need for the truth before tribunals."); Yellin, supra note 74, at 108 ("The general legal notion is that, for the adversary process to be most effective, it is vital that the legal inquisitor have the right to obtain testimonial evidence from all sources.").
\textsuperscript{304} Trammel v. United States, 445 U.S. 40, 50 (1980).
those states where the privilege belongs solely to the penitent or to the clergy only on the penitent's behalf—the privilege no longer exists when the penitent has waived its protections. Yet the absolute inviolability of the Seal of the Confessional stands as a direct affront to governmental truth-seeking. The priest does not have the option to waive the protections of the seal; rather, he must keep silent and accept the consequences.

Whether the Church or the state prevails in this standoff greatly depends on the level of generality with which one analyzes the asserted state interest in upholding the truth-seeking mission of the court system. As discussed previously, in cases like *Sherbert* and *Yoder*, the Court required the government to come forward with a compelling justification that specifically addressed the religious practice and with which the religious practice allegedly interfered; "abstract" or "symbolic" claims that the government would be unable to exercise its police or *parens patriae* powers were insufficient. By contrast in later cases such as *Ray* and *Lyng*, the Supreme Court balanced the specific burden on Native American religious practices against more sweeping assertions that the particular religious ritual involved would ultimately thwart the government's ability to carry out a "broad range" of duties, effectively adopting the approach rejected in *Sherbert* and *Yoder*. This approach tips the scales decidedly in favor of the government, and, unfortunately, does not take account of the particular details and importance of long-standing religious practices which when juxtaposed against less

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306 See supra Part II.B.


309 Essentially this is the dispute between Justice O'Connor's concurrence and Justice Blackmun's dissent in *Smith*. Justice O'Connor did not agree with the majority's reformulation of the free exercise right; instead, Justice O'Connor concluded that the compelling interest test should apply, but that Oregon had such an interest in enforcing its drug laws. *Smith*, 494 U.S. at 905-906 (O'Connor, J., concurring). She essentially accepted the same notions of governmental interests as she did in her majority opinion in *Lyng*. See id. By contrast, Justice Blackmun dissented, arguing that the compelling interest test should apply and that Oregon did not advance "any concrete interest in enforcing its drug laws" specifically "against religious users of peyote." *Id.* at 911 (Blackmun, J., dissenting). Because the state had not presented any proof that its entire drug enforcement scheme would collapse by granting a specific exemption, Justice Blackmun concluded that no compelling governmental interest existed. *Id.*

310 Clark, supra note 158, at 331.
speculative and more realistic state goals may actually turn out to advance certain state interests\textsuperscript{311} or, at least, not be that much of a threat.\textsuperscript{312}

The Seal of the Confessional is more appropriately examined under the more searching analysis followed in \textit{Sherbert and Yoder}\textemdash an approach that will not reflexively assume that the entire criminal justice system will collapse if the substance of a particular confession from a particular penitent in a particular trial remains sealed by operation of the Free Exercise Clause.\textsuperscript{313} Indeed, as such a longstanding and central practice in the Catholic Church, the Seal of the Confessional fits squarely within the criteria identified by the \textit{Yoder} court that mandated a Free Exercise exemption for the Amish from compulsory secondary education.

One of the reasons the \textit{Yoder} court determined that the Free Exercise Clause prevented Wisconsin from enforcing its compulsory public education laws against Amish parents was that the education and values Amish children received at home as part of their rustic and deeply religious way of life did not contravene state interests in educating children to be self-reliant and productive adult members of society.\textsuperscript{314} In fact, the court agreed that "the Amish community has been a highly successful social unit within our society, even if apart from the 'mainstream.' Its members are productive and very law abiding[;] they reject public welfare in any of its usual modern forms."\textsuperscript{315} Still further, the Court concluded that, even without the additional two years of public education, there was no indication that "Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings."\textsuperscript{316} Despite living apart from modern society, the Amish children could still develop the skills and values to function effectively in society and to fulfill their obligations of citizenship.\textsuperscript{317}

\textsuperscript{311} See \textit{Yoder}, 406 U.S. at 222-25 (finding that Amish way of life with its strong work-ethic and family values serves to make Amish children productive members of society, furthering the same goal as the state's compulsory education laws); see also Yellin, supra note 74, at 113-14 (discussing policy bases for clergy-penitent privilege).

\textsuperscript{312} See \textit{Smith}, 494 U.S. at 913-15 (Blackmun, J., dissenting) (discussing that Native American Church carefully circumscribes and supervises the use of peyote, forbids other than sacramental use of the drug, and that church doctrine advocates personal responsibility).

\textsuperscript{313} See supra notes 152-80 and accompanying text.

\textsuperscript{314} \textit{Yoder}, 406 U.S. at 220-22.

\textsuperscript{315} Id. at 222.

\textsuperscript{316} Id. at 224.

\textsuperscript{317} Id. at 225.
Similarly, although the Seal of the Confessional withholds information that is important to the truth-seeking function of legal tribunals, this doctrine advances other key societal goals that are vital not only to the legal system, but also to the free exercise of religion. One of the reasons for recognizing the priest-penitent privilege in the first place is to encourage individuals to acknowledge their wrongdoing and to seek spiritual guidance regarding how they may atone for their misdeeds, not only to God, but to society as well. Legal assurances of priest-penitent confidentiality “facilitate socially desirable relationships,” without which “society as a whole would lose the benefits of spiritual confidence and counsel of the clergyman.”

This is certainly true with respect to sacramental confession. In addition to receiving absolution for her sins, the penitent is required to “do what is possible in order to repair the harm. . . . Simple justice requires as much.” These acts—which may include the “returning of stolen goods or compensation for injuries”—serve to mend the rift sinful individuals create between themselves and society. Priests are urged to “offer a penance that is both effective for the person here . . . as well as salutary for the world beyond.” In addition to allowing sinners to recover spiritually, the benefits of penance flow to society as sinners begin to repair the material wrongs they have committed. Moreover, this occurs as part of the Church’s ministry of healing as the sinner is moved to make restitution as a matter of conscience, not out of legal compulsion, thus potentially sparing the judicial system from expending resources to achieve these same results, while at the same time strengthening the penitent’s resolve to reform.

Therefore, as a means of ensuring unobstructed access to the

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318 See Yellin, supra note 74, at 109-10.
319 Id. at 109-110; see also Trammel v. United States, 445 U.S. 40, 51 (1980) (“[T]he priest penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.”); accord Griffin v. Coughlin, 743 F. Supp. 1006, 1027-28 (N.D.N.Y. 1990). One commentator has noted that “[m]ore than forty percent of Americans who seek counseling or guidance initially consult a clergyperson.” Brocker, supra note 88, at 455.
320 CATECHISM, supra note 9, No. 1459, at 407.
321 Id. The Church also mandates that the penance imposed “take into account the penitent’s personal situation and must seek his spiritual good. It must correspond as far as possible with the gravity and nature of the sins committed.” Id. No. 1460, at 407.
322 STASIAK, supra note 31, at 33.
323 Id.
Sacrament of Reconciliation, the Seal of the Confessional actually promotes the reparation and atonement the legal system seeks to achieve on behalf of society. By properly maintaining this sacred silence, the Church can assuage individual apprehension concerning confession and more effectively lend its moral authority toward reshaping the penitent into a spiritually strengthened and socially conscious individual. Viewed in this light, efforts to break the Seal in order to obtain information useful in one particular trial are potentially more destabilizing as they risk severely damaging what can be a potent moral force.

The Yoder Court was also strongly influenced by how pervasively religious precepts stringently governed every aspect of the Old Order Amish way of life. In addition, the Court agreed with the assertion that these practices, which remained essentially unaltered for over two centuries, were integral to their daily routine as well as to their spiritual life. The Old Order Amish were thus faced with an impossible choice: They had to either comply with compulsory

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325 See Bevilacqua, supra note 41, at 1741 ("From the perspective of Roman Catholic laity, any movement towards compelling a priest to reveal confessional secrets in some instances, also poses a threat to the freedom of religious practice. The confidence with which communicants freely approach their ministers with confidential spiritual matters would be undermined."); see also BUSH & TIEMANN, supra note 61, at 20 ("If pastors undertake their work with one eye focused on their legal liability, the result surely will be less rewarding and fulfilling both for the clergy and for those with whom they minister. If the pastor must devote energy and attention to self-defense, then less energy can be focused on meeting the needs of troubled souls.").

330 See Joseph Martos, Sacrament of Reconciliation, in THE MODERN CATHOLIC ENCYCLOPEDIA, 771, 774 (Michael Glazier & Monika K. Hellwig eds., 1994) ("Biblical repentance is not primarily a matter of inner remorse but a matter of changed behavior . . . . Moreover, when the conversion is solidified the individual and community have something to celebrate.").

327 As articulated by the Phillips court, when "a man under the agonies of an afflicted conscience . . . , applies to a minister of the almighty, lays bare his bosom filled with guilt, . . . and solicits advice and consolation," there comes about "the most salutary effects upon the religious principles and future conduct of the penitent, and may open him to prospects which may bless the remnant of his life, . . . without interfering with the interests of society." Yellin, supra note 74, at 110 n.74 (quoting Phillips) (internal quotation marks omitted). This case is not officially reported, but can be found in Privileged Communications, 1 CATH. LAW. 198, 204 (1955). See generally Thurian, supra note 34, at 118 ("Confession thus becomes a training in vigilance over sin and temptation . . . ."); Pope John Paul II, supra note 286 ("Every confessional is a special and blessed place from which, with divisions wiped away there is born new and uncontaminated a reconciled individual—a reconciled world!"); Yellin, supra note 74, at 113 ("It has also been asserted that denying the privilege would greatly hamper the activities of religious groups with deleterious effects on our society.").

328 Yoder, 406 U.S. at 216.

329 Id. at 217.
education laws and subject their children to the inculcation of modern values which directly clashed with their own simplistic, religiously-mandated lifestyle, or suffer criminal penalties for remaining true to their fundamental beliefs and practices. This, the Court believed, was just "the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent."  

One need not look too deeply to find that the Sacrament of Reconciliation and the Seal of the Confessional fall squarely within this paradigm. Just as the simple and dedicated Amish way of life is derived from "their literal interpretation" of certain Biblical commands, the Sacrament of Reconciliation—according to a long tradition of Catholic theology—has extensive scriptural origins, including Christ’s command to his followers to "Repent and believe in the gospel;" Christ’s conferring on Peter the power to "bind" and "loose" people’s sins; and, following his resurrection, when Christ "breathed on [his disciples] and said to them ‘Receive the holy spirit. Whose sins you forgive are forgiven them, and whose sins you retain are retained.’" From these and other passages emerges the Catholic teaching that Christ instituted the Sacrament of Reconciliation as a principal component of the Church’s earthly ministry. Stated differently, the “Church, the Body of Christ, which means today the humanity of Jesus at work in this world, retains this power of absolution . . . . This ministry of absolution forms part of the mission of the Apostles and the Church.” Perhaps nowhere is this more evident than in the prayer granting absolution, which the priest recites at the conclusion of sacramental confession:

God, the Father of mercies,
through the death and resurrection of his Son
has reconciled the world to himself
and sent the Holy Spirit among us
for the forgiveness of sins;
through the ministry of the Church
may God give you pardon and peace,
and I absolve you from your sins
in the name of the Father, and of the Son,
and of the Holy Spirit.\textsuperscript{339}

This prayer crystallizes all of Catholic belief concerning the
Sacrament of Reconciliation that occurs by way of, and with a view
toward, the \textit{whole} Church.\textsuperscript{340} Forgiveness flows from God to repentant
believers through the sacrament instituted and commanded by Christ
as part of the Church’s mission.\textsuperscript{341} With roots in the age of the
Apostles, the Sacrament of Reconciliation is characterized by the
permanence and centrality that the \textit{Yoder} court found persuasive in
determining that the Amish way of life was inextricably linked to their
religious beliefs and merited protection under the Free Exercise
Clause.\textsuperscript{342}

Beyond its historical longevity and ecclesiastical foundation,\textsuperscript{343}
the Seal of the Confessional, as a means of allowing sinners to
approach the Sacrament and receive God’s forgiveness without fear
of public shame or approbation,\textsuperscript{344} has deep doctrinal and theological
roots, in both “natural” and “divine positive law,”\textsuperscript{345} as the critical
safeguard of the sacredness of the Sacrament. Even though Christ
himself “gave no express command regarding the seal,” the Church

\textsuperscript{339} CATECHISM, supra note 3, No. 1449, at 404.
\textsuperscript{340} \textit{Id.}; see also Pope John Paul II, supra note 286 (“The forgiven penitent is
reconciled with himself in his inmost being, where he regains his own true identity.
He is reconciled with his brethren whom he has in some way attacked or wounded.
He is reconciled with the Church. He is reconciled with all creation.”).
\textsuperscript{341} THURIAN, supra note 34, at 50-57.
\textsuperscript{342} Although the Sacrament itself was instituted by Christ and practiced from the
early days of the Church, its form has changed; however this does not detract from its
centrality in Church life, for “the sacraments are immutable in their substance, for it
was Christ himself who fixed once and for all the central core. But the outer shell . . .
can vary according to the needs of time and place.” M.-B. Carra de Vaux Saint-Cyr,
\textit{The Sacrament of Penance: An Historical Outline, in THE MYSTERY OF SIN AND FORGIVENESS
116} (Michael J. Taylor, S.J. ed., 1971); see also \textit{Yoder, 406 U.S. at 217-19}.
\textsuperscript{343} McCarthy, supra note 55, at 134 (“The obligation of the seal is not based solely,
or indeed principally, ecclesiastical law.”).
\textsuperscript{344} KURTSCHIED, supra note 2, at 2-3.
\textsuperscript{345} McCarthy, supra note 55, at 134.
holds that the very essence of the Sacrament requires absolute secrecy so that people are not “deterred . . . from confessing and receiving the Sacrament of Penance” and the Sacrament is not a “constant source of scandals, enmities, and similar drawbacks.” Accordingly, the Seal operates in virtue of natural law to avoid “pain, offense, and perhaps loss to the penitent, who is the owner of the secret.”

Of far greater consequence, however, is the responsibility of the Seal and the priests bound by it to preserve and defend the transmission of divine grace that is the essence of the Sacrament. As described by Cardinal Bevilacqua, “confessional communications are “confidential relations of individuals with God, mediated through the priest in the Sacrament of Penance.” During confession, the priest acts in persona Christi and he gains sensitive knowledge by virtue of this “sacramental authority, which alone is indispensable for the proper exercise of the ministry of confession.” In actuality, then, the priest has no mortal remembrance of what has been confessed, but rather possesses knowledge meant solely for God’s ears. In maintaining sacred silence, the priest is concealing what was never meant for human knowledge: Once the penitent receives absolution, the sins confessed are erased by the power of God and are no longer of divine or earthly concern. The Seal of the Confessional thus furthers God’s will through the Sacrament by “mak[ing] possible the

346 Kurtscheid, supra note 2, at 3; see also Catechism, supra note 3, No. 1447, at 403 (explaining that the practice of secret confession “envisio[n]s the possibility of repetition and so opent[s] the way to a regular frequenting of the sacrament”).
347 McCarthy, supra note 55, at 134; see also Bevilacqua, supra note 41, at 1736 (noting that from sacramental confession arises “an implicit contract of silence between confessor and penitent not to expose the reputation of the penitent to detraction through the revelation of occult sins based on the virtue of justice”).
348 Bevilacqua, supra note 41, at 1737.
349 Thurian, supra note 34, 100-03; see also McCarthy, supra note 55, at 134 (“Moreover, the priest in the confessional takes the place of Christ. The revelations made by the penitent are not made to the confessor as man but in his vicarious capacity as the representative of Christ.”).
350 See Thurian, supra note 34, 115 (describing sacramental confession as “a real living dialogue between the penitent and God, in the presence of a minister of the Church”); see also Saunders, supra note 37 (“Each priest realizes that he is the ordained mediator of a very sacred and precious sacrament. He knows that in the confessional, the penitent speaks not so much to him, but through his to the Lord. Therefore, humbled by his position, the priest knows that whatever is said in confession must remain secret at all costs.”).
351 See Kurtscheid, supra note 2, at 283 (“[T]he strict silence of the confessor no doubt is in harmony with the intent of the Divine Lawgiver, since we cannot reasonably assume that Christ, by instituting Penance, wished to impose an insupportable burden.”).
covering of a ‘multitude of sins.’ In accordance with his promise, God consents to see no more and to blot out the confessed and forgiven wrongdoing.\textsuperscript{362} As a result, the Seal is “an integral part of the Sacrament—an outward sign of what is effected in the soul.”\textsuperscript{363} Stated differently,

In the Sacraments the external actions are the signs of what is going on interiorly. Now God covers up the sins of him who submits them to Him in the tribunal of penance. This fact must be expressed by a sign and therefore the Seal necessarily belongs to the Sacrament.\textsuperscript{364}

For these reasons, the inviolability of the confessional is more than symbol, practicality, or ritual. As discussed, confession itself is “in fact, an act, a sacrament,”\textsuperscript{365} one of seven liturgical rites which “are visible signs and seals instituted by God [so] that . . . [He] may make us . . . more clearly understand and seal us in the promise of the Gospel.”\textsuperscript{366} The Seal of the Confessional is inextricably linked with this vision, for it serves to encourage and protect the oral confession, the essential outward sign and external act which elicits the God’s power of forgiveness which He has “bound to the acts and words of the Church.”\textsuperscript{367}

By so advancing the Church’s mission and liturgy, the Seal of the Confessional is to the same or a greater degree intertwined with Catholic belief in repentance and forgiveness as is the Amish way of life with their religious beliefs. That alone should merit full protection under the Free Exercise Clause. But in this context, a single penitent’s waiver of secular legal protection for the confessional should not empower the government to expose what God has forever concealed from human knowledge and thereby subvert the Church’s ministry of reconciliation by erecting barriers the Seal of the Confessional has eliminated. If it has any force, the Free Exercise Clause certainly prohibits the government from standing between believers and the chance to obtain sanctifying grace. By attempting to unseal the confessional, the government does just that. Consequently, where the government seeks information revealed in the confessional, and the penitent is willing to comply, the Free Exercise Clause nonetheless demands that “the

\textsuperscript{362} THURIAN, \textit{supra} note 34, at 58-59.
\textsuperscript{363} \textit{Id.} at 275 (discussing the St. Thomas Aquinas’ position on the nature of the Seal of the Confessional).
\textsuperscript{364} \textit{Id.} at 274 (same).
\textsuperscript{365} THURIAN, \textit{supra} note 34, 122.
\textsuperscript{366} \textit{Id.} at 52.
\textsuperscript{367} \textit{Id.} at 122.
good of religion prevails over the good of justice, . . . even in a case where the good of the penitent has been protected."

CONCLUSION

Although priest-penitent privilege statutes and evidentiary rules purport to fully protect confidential communications between individuals and clergy, in states where the penitent can waive the privilege, and clergy are permitted to claim the privilege solely on the penitent’s behalf, the Catholic confessional is threatened. As the Mockaitis and Kane cases demonstrate, in these states Catholic priests confronted with a court order to testify can suffer significant adverse consequences for obeying the commands of Canon Law and preserving the sacred and inviolable silence essential to the Sacrament of Penance. In short, the Catholic Church defends sacramental confession with absolutism that is foreign to and in direct conflict with state laws that are quite stingy in privileging certain communications in order to further the truth-seeking function of legal tribunals. As a result, Catholic priests face the very real possibility of again being forced to choose between the commands of their faith and the requirements of secular law.

Despite the fact that, after Smith, it is nearly impossible to obtain an exemption under the Free Exercise Clause to generally applicable, facially neutral laws—such as the duty to testify and narrowly-drawn priest-penitent privilege statutes—the widely criticized hybrid-rights doctrine, when correctly applied, can enable Catholic priests to escape this predicament and vindicate their free exercise rights to keep the confessional sealed. Because governmental actions which threaten to break the Seal of the Confessional burden the institutional Church wholly apart from the individual priest or penitent, fundamental rights of Church autonomy to preserve sacred rites, including the rights of Catholics in general to unobstructed access to the sacrament, coalesce with free exercise rights of priests to perform their religious duties, to afford the Seal of the Confessional heightened constitutional protection. Furthermore, when viewed against the particular governmental interest in testimony for a particular trial, the irreparable damage to the Church’s ministry that would result from either breaking the seal, or more likely punishing a priest for defending it, is so great, that these circumstances call for an exemption under the Free Exercise Clause of the federal constitution.

358 Bevilacqua, supra note 41, at 1787.
Such constitutional protections will not enable Catholic priests to become laws unto themselves,\textsuperscript{359} but rather serve to protect, for the Church as a whole, the sanctity of the sacrament. Through the Sacrament of Reconciliation, the penitent is not only brought into reconciliation with God but also into full communion with the Church.\textsuperscript{360} At the same time, when the penitent receives forgiveness and absolution, the Church itself is simultaneously purified from the sins of one of its members.\textsuperscript{361} Thus, this sacrament has a purpose distinct, but certainly connected with, the benefit of the individual believer; yet this purpose can only be accomplished when individuals fulfill their yearly obligation to confess their sins. For centuries now, the Seal of the Confessional has operated to ensure that the repentant can approach the sacrament without fear of their intimate secrets being revealed and to keep secret what God intended for His scrutiny alone. Simply because a particular penitent has waived secular legal protection for the confessional, the government should not have license to tamper with it.

\textsuperscript{359} Smith, 494 U.S. at 886, 888.
\textsuperscript{360} CATECHISM, supra note 3, Nos. 1445 & 1444, at 402.
\textsuperscript{361} Id., No. 1469, at 410.