Is the Internal Forum under Attack? The Status of the Sacramental Seal and the Internal Forum in Church and State in the USA

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Introduction

Of the many casualties of the clerical sexual abuse crisis, one in particular appears to have few mourners: secrecy.[1] The very word can summon visions of nefarious conduct being committed in dark rooms and therefore hidden from view. Such images are particularly painful when linked to the sexual abuse of vulnerable people, which often depends in large measure on a culture of secrecy, silence, and fear.

For this reason, confidential communications of many types, including evidentiary rules or procedural norms under state law protecting the venerable clergy-penitent privilege, have lately been attacked on the grounds that keeping secrets is simply out of place in a culture that should be dedicated to detecting and preventing abusive

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1. The former promoter of justice at the Apostolic Signatura, Monsignor Gianpaolo Montini, has made a similar point about the related concept of "segreto" in his "La Chiesa tra l'impegno per la trasparenza e la tutela del segreto," *Periodica* 107 (2018) 537–543.

behavior.[2] In particular, it is argued that the mandatory reporting regimes now extant in many states regarding child abuse are limited in their effectiveness if members of the clergy can evade their duty to report abuse by "hiding behind" some kind of religious exemption.[3]

Similarly, in light of the greater focus in recent years on the human formation necessary for healthy and successful priests, some in the Church have called for a greater openness in seminary programs, ongoing formation, and the overall way in which priest personnel matters are handled in the days since the adoption of the Dallas Charter in 2002.[4] Echoing concerns from the civil sphere, such voices have expressed the thought that the canonical concept of the "internal forum"—a term used but not defined in the 1983 Code of Canon Law—may have very well outlived its usefulness in the modern environment, marked as it is by a culture of omnipresent media in which the notion of "transparency" appears to have been elevated to a supreme virtue.[5]

Nevertheless, respect for the contents of the internal forum—that is, confidential communications reflecting one's conscience and touching the very core of one's soul—is a long-established principle of canon law, and its importance in the life of the Church cannot be ignored. This article will first examine the *status quaestionis* in the area of civil law in the United States, and then will consider relevant moral and legal principles, including recent and important guidance from the Holy See on the matter. Finally, it concludes with some suggestions

2. See, e.g., Kevin J. Jones, "Seal of Confession Under Attack? Delaware, Vermont Bills Draw Catholic Criticism," *National Catholic Register*, March 9, 2023: https://www.ncregister.com/cna/seal-of-confession-under-attack-delaware-vermont-bills-draw-catholic-criticism.

3. See, e.g., Christine P. Bartholomew, "Exorcising the Clergy Privilege," *Virginia Law Review* 103 (2017) 1015–1075: https://virginialawreview.org/wp-content/uploads/2020/12/Bartholomew_Online.pdf; Caroline Donze, "Breaking the seal of confession: examining the constitutionality of the clergy-penitent privilege in mandatory reporting law," *Louisiana Law Review* 78 (2017) 267–310: https://digitalcommons.law.lsu.edu/lalrev/vol78/iss1/12.

4. See, e.g., Thomas V. Berg, "On Vulnerability and Self-Disclosure in Priestly Formation," *Homiletic & Pastoral Review*, November 6, 2017: https://www.hprweb.com/2017/11/on-vulnerability-and-self-disclosure-in-priestly-formation/#fnref-20509-2.

5. See generally Jordi Pujol Soler and Rolando Montes De Oca, *Trasparenza e segreto nella Chiesa Cattolica* (Milan: Marcianum Press, 2022).

for further consideration so as to strike a balance between the goods of sharing necessary information and protecting the internal forum.

1. Civil Law Considerations

1.1. Mandatory Reporting Statutes under State Law

The stated aims of mandatory reporting regimes under state law are clear: preventing child abuse by facilitating the airing of various sorts of accusations of serious wrongdoing against an inherently vulnerable population. State legislatures have employed different terms to describe the particular type of misconduct that triggers a reporting requirement, including everything from "abuse or neglect"[6] (the most common phrase) to maltreatment,[7] abandonment,[8] or exploitation.[9] Regardless of the particular term used, it is clear that the states' interest in reportable harms includes much more than just sexual abuse.

Most states impose a mandate on those who, by virtue of their profession or position, deal with children and are thus in a position to identify such harms. One-third of the fifty-one US jurisdictions reviewed for this article (i.e., the fifty states and the District of Columbia) require "any person" to report such harm,[10] despite the arguments of some advocates that such broad reporting regimes simply flood the system with many unreliable claims and are thus counter-productive.[11] A very small minority of states at present do not have any statute that *requires* such reporting.[12]

As evidenced in the first column of the chart in section 1.4 below, regardless of the specific reporting regime in place in a given state,

6. See, e.g., Ala. Code § 26-14-3(a); Col. Ann. Stat. §19-3-304; Haw. Rev. Stat. § 350-1.1.

7. See Ark. Ann. Code §12-18-402; Minn. Ann. Stat. § 260E.06.

8. See Fla. Ann. Stat. § 39.201.

9. See Miss. Ann. Code § 43-21-353.

10. See, e.g., 16 Del. Ann. Code §903. The other sixteen jurisdictions are listed in the chart in section 1.4 below.

11. See, e.g., Megan Clemency, "Criminal and Civil Liability for Failure to Report Suspected Child Abuse in South Carolina," *South Carolina Law Review* 68 (2017) 893–916, at 907.

12. The five jurisdictions at present that do not appear to mandate any clerical reporting of abuse are the District of Columbia, Iowa, Kansas, New York, and South Dakota. The citations to these statutes appear in the chart in section 1.4 below.

someone who is a "member of the clergy" is required by statute—whether explicitly, implicitly, or arguably—to report in about eighty percent of jurisdictions.[13] Some two-thirds of the jurisdictions also include some type of explicit reporting exception for members of the clergy who receive confidential communications in the course of their ministry. Another eleven jurisdictions do not address the issue directly in their reporting statutes, although the privileged nature of communications to clergy may be addressed in other statutes or by case law.[14]

While specific statutes may differ in ways ranging from small to significant across the country, it is clear that there is widespread, though not universal, recognition across the states of the importance of such communications, generally extending well beyond the sacramental seal. These laws demonstrate that states have an interest in fostering the relationship between members of the clergy and the people who come to them for spiritual help, or at least not actively undermining such efforts with overly intrusive and onerous reporting requirements. Similar principles are at stake with respect to the relationship between attorneys and their clients; several states, in fact, treat the clergy-penitent relationship on par with that of the well-established attorney-client privilege.[15]

1.2. State Law Protection for Confidential Clergy Communications

In addition to the many specific exemptions for clergy in the mandatory reporting statutes themselves, every state in the United States—as well as the federal government and the District of Columbia—has long recognized what is typically referred to as the "clergy-penitent privilege."[16] Such statutory protection most frequently

13. The forty-six jurisdictions are listed in the chart in section 1.4 below. Because this article specifically deals with the duties of *priests*, it is beyond its scope to discuss whether and to what extent mandatory reporting regimes apply to deacons, non-ordained religious, or lay people.

14. Those eleven jurisdictions are Alaska, Connecticut, the District of Columbia, Indiana, Iowa, Kansas, Mississippi, Nebraska, New Jersey, New York, and South Dakota. See section 1.4 below for details.

15. See, e.g., Fla. Ann. Stat. § 39.204; Mo. Rev. Stat. § 210.140.

16. See Michael J. Mazza, "Should Clergy Hold the Priest-Penitent Privilege?" *Marquette Law Review* 82 (1999) 171–204, at 178–182, https://scholarship.law.marquette.edu/mulr/vol82/iss1/5. See also Ronny Jenkins, "From Simple Beginnings to

appears in sections of a state's statutes dealing with rules of evidence or court procedures. This statutory protection is often clarified by case law—that is, judicial decisions interpreting what particular statutory terms mean or applying the law to individual cases. Two separate but related issues are whether a priest himself has a right to claim the privilege, regardless of whether any other party consents to the disclosure, and whether such a right is merely granted by statute or whether it is, in fact, a constitutional right. While neither of these important questions lies within the scope of this article,[17] it is vital to point out that the clergy-penitent privilege, like the many exceptions to mandatory reporting laws, includes much more than the sacramental seal, extending to what fairly can be called the internal forum.

In a few states, however, there appears to be direct conflict between the clergy-penitent privilege statute and a mandatory reporting statute that affords no exception for clergy. In such states,[18] such apparent conflict seems destined to be settled on a case-by-case basis in the state courts, where arguments in favor of religious liberty may be pitted against the ugly realities of abuse. Beyond that, arguments may be advanced that while a priest may not be called to *testify* in open court about a confidential communication, he may nevertheless be obliged to *report* something he learns from such a communication, notwithstanding what he sees as his moral obligations or his duties under canon law.

Signs of an obvious tension have become manifest in recent years between the long-standing recognition of the clergy-penitent privilege and the relatively newer state statutes demanding that members of the clergy report suspected child abuse.[19] Legislation has been

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Complex Ends: Legislative and Judicial Protection of the Sacramental Seal in the United States of America," *Ephemerides Iuris Canonici* 61 (2021) 609–648.

17. These two issues are explored in the just cited article by Mazza.

18. Namely, New Hampshire, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, and West Virginia. See the attached table for the relevant citations.

19. It is not surprising that this tension exists in countries other than the United States, including Italy, Spain, Germany, Australia, and others. See, e.g., Geraldina Boni, "La tutela del sigillo sacramentale e del segreto ministeriale in Italia," *Ephemerides Iuris Canonici* 61 (2021) 527–563; Rafael Palomino, "Legal Protection of the Seal of Confession in Spanish Law," ibid., 563–596; Helmuth Pree, "Tutela

introduced in several states that has explicitly sought to curtail or eliminate any privilege afforded to confidential communications to clergy, though these recent efforts have yet to succeed. In March 2021, for example, a legislative initiative in Arizona that would have limited the clergy-penitent privilege failed. Arizona State Senate Bill 1008 attempted to mandate reporting of cases involving suspected child sex abuse, even within sacramental confessions.[20] Efforts to remove exemptions for confessions to clergy were proposed in the Utah legislature as recently as 2022,[21] and in 2023 a legislator in the Kansas legislature introduced a bill (S.B. 87) seeking to punish ordained ministers who refused to report the contents of certain confidential clergy-penitent communications.[22] In addition, both the California and North Dakota legislatures have recently considered, but ultimately did not enact, statutes that would have curtailed the privilege.[23] It is difficult to predict with any degree of accuracy whether similar attempts will be made by future legislatures, let alone whether such attempts will ultimately be enacted as laws. To the extent the Catholic Church continues to articulate its public support for confidential communications to the clergy, such forays appear destined to confront significant resistance. If, however, the Church

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del sigillo confessionale e del segreto ministeriale in Germania," ibid., 597–608; Matteo Carnì, "Tutela del sigillo sacramentale e del segreto ministeriale in Australia," ibid., 649–678.

20. See Jerod MacDonald-Evoy, "Effort to eliminate clergy-penitent privilege dies amid anti-Catholic fears," *AZ Mirror*, March 24, 2021: https://azmirror.com/2021/03/24/effort-to-eliminate-clergy-penitent-privilege-dies-amid-anti-catholic-fears.

21. See Kim Bojórquez and Natasha Smith, "Abuse survivors, religious leaders call for end to Utah's 'clergy exception,'" *Axios*, August 22, 2022: https://www.axios.com/local/salt-lake-city/2022/08/22/survivors-religious-leaders-end-utahs-clergy-exception.

22. See Tim Carpenter, "Kansas Democrat introduces Senate bill making clergy mandatory reporters of suspected abuse," *Kansas Reflector*, January 26, 2023: https://kansasreflector.com/2023/01/26/kansas-democrat-introduces-senate-bill-making-clergy-mandatory-reporters-of-suspected-abuse.

23. See S.B. 360, 2019 Leg., Reg. Sess. (Cal. 2019); S.B. 2180, 67th Leg. Assemb., Reg. Sess. (N.D. 2021). See also "California confession law dropped," *Catholic News Agency*, July 9, 2019: https://www.catholicnewsagency.com/news/41735/california-confession-law-dropped.

limits its objections to matters touching only the sacramental seal, there may be few voices left capable or willing to defend the internal forum more generally. Not long ago, it may have been unthinkable that a state could have essentially eliminated statutes of limitation for civil claims for damages, yet in a significant number of US jurisdictions in recent years, that is exactly what has transpired. The resultant damage to the Catholic Church, of course, has been significant.[24]

1.3. Prefatory Comments Regarding the Comparison Chart

It is crucial to note at the outset of any examination of state statutes that the legal meaning of the terms used in many statutes may have yet to be determined by state courts. This means, among other things, that a casual reading of a given state statute on the internet site of a state legislature may not serve as a reliable guide for interpretation. Further, given the almost constant changes taking place in state legislatures and a given state's political environment, any prudent decision (regarding specific duties in a particular case or when drafting a code of conduct, to name just two examples) would need to be based on knowledgeable legal advice from competent local civil counsel, and could not simply be made in reliance on a chart, no matter how much effort goes into making any such chart up-to-date, accurate, and clear.

The chart in section 1.4 below displays each of the fifty-one jurisdictions in the United States. The first main column describes whether a state requires a member of the clergy to report, noting whether the statute specifically names members of the clergy as having such a duty, or whether clergy fall under the broader category of "any person." The trigger for reporting is low—generally consisting of some type of "reasonable cause" to suspect that a child has been or is being harmed[25]—evidently leaving to the authorities the

24. See, e.g., Nigel Duara, "Sex abuse suits pouring in as state's Catholic leaders seek relief from highest court," *Cal Matters*, May 23, 2022: https://calmatters.org/justice/2022/05/catholic-sex-abuse-claims; Bernard Condon and Jim Mustian, "Surge of new abuse claims threatens church like never before," *AP News*, December 1, 2019: https://apnews.com/article/new-york-ny-state-wire-sexual-abuse-sexual-abuse-by-clergy-lawsuits-621efb9528384f278c71a97308404531.

25. See, e.g., Wis. Ann. Stat. § 48.981(2)(a) ("reasonable cause to suspect"); Ky. Ann. Code § 620.030(1) ("reasonable cause to believe"); Col. Ann. Stat. § 19-3-304 (1)(a) ("reasonable cause to know or suspect").

decision to investigate and, if necessary, prosecute. The second column shows to what extent, if any, the mandatory reporting statute allows for some type of exception to the reporting requirement that would cover confidential communications made to priests. As is shown, a majority of state statutes offer at least some type of exemption, though the extent of the recognition of the special status of confidential communications made to members of the clergy varies in significant ways. It is important to emphasize that an *exception* to the mandatory reporting requirement may be treated differently than the evidentiary *privilege* afforded confidential clergy-penitent communications. The footnotes accompanying each line item contain various comments or other references intended to aid the understanding of the issues covered in the chart.

1.4. Required Clergy Reporting and Allowable Exceptions in US Jurisdictions

State	Are clergy required to report?	Does the state statute explicitly allow for an exception to the reporting requirement for clergy?
AL[26]	Yes.	Yes.
AK[27]	Possibly.	The reporting statute itself does not address clergy confidentiality.
AZ[28]	Yes.	Yes.

26. Alabama: see Ala. Code § 26-14-3(a) (reporting statute); Ala. Code § 26-14-3(f) (clergy reporting exception). The state Rule of Evidence 505, to which the exception statute refers, describes the relatively broad privilege attached to "communications to clergymen."

27. Alaska: see Alaska Stat. § 47.17.020 (reporting statute). The reporting statute lists various types of professionals and volunteers, which may include a priest. Although the child abuse mandatory reporting statute does not include a specific exception for members of the clergy, Alaska Rule of Evidence 506 describes a general evidentiary privilege afforded for "communications to clergymen."

28. Arizona: see Ariz. Rev. Stat. § 13-3620 (reporting statute). The exemption to the reporting requirement applies *only* to the communication or confession, and does *not* extend to the priest's "observations." The general clergy-penitent privilege under state law, Ariz. Rev. Stat. § 13-4062, provides that a priest cannot be called to testify regarding a confidential communication without the consent of the person who made the confession.

State	Are clergy required to report?	Does the state statute explicitly allow for an exception to the reporting requirement for clergy?
AR[29]	Yes.	Yes.
CA[30]	Yes.	Yes.
CO[31]	Yes.	Yes.
CT[32]	Yes.	The reporting statute itself does not address clergy confidentiality.
DE[33]	Yes.	Yes.

29. Arkansas: see Ark. Ann. Code § 12-18-402 (reporting statute); Ark. Ann. Code § 12-18-803(b) (clergy reporting exception). The exception to the reporting requirement covers knowledge gained "through communications required to be kept confidential pursuant to the religious denomination." Rule 505 of the Arkansas Rules of Evidence describes the more general "Religious Privilege."

30. California: see Cal. Penal Code § 11165.7(a)(32) (reporting statute); Cal. Penal Code § 11166(d) (clergy reporting exception). The exception to the reporting regime includes, but is not limited to, a sacramental confession, embracing "a communication intended to be in confidence." Cal. Evid. Code §§ 1030-1034 provides for the general clergy-penitent privilege, for which one of the requirements is that, under the "discipline or tenets" of the church to which the member of the clergy belongs, the clergy member has a duty to keep certain communications "secret."

31. Colorado: see Col. Ann. Stat. § 19-3-304 (reporting statute); Col. Ann. Stat. § 13-90-107(1)(c) (clergy-penitent privilege). The clergy-penitent privilege, to which the reporting statute refers, covers communications made to a priest or other member of the clergy in his "professional capacity in the course of discipline expected by the religious body" to which he belongs.

32. Connecticut: see Conn. Gen. Stat. § 17a-101(b). Although the child abuse mandatory reporting statute does not include a specific exception for members of the clergy, another state statute describes the statutory protection for "privileged communications made to clergymen." See Conn. Gen. Stat. § 52-146b. According to a 1994 Report from the Connecticut General Assembly's Office of Legislative Research, while there "may or may not be a conflict between the confidentiality and the reporting requirement" (depending on whether the evidentiary privilege applies to the reporting requirement), "there is, however, a conflict between the reporting requirement and the general philosophical concept of confidentiality for statements made to clergymen."

33. Delaware: see Del. Ann. Code tit. 16, § 903 (requiring "any person" to report); Del. Ann. Code tit. 16, § 909 (clergy reporting exception). The exception to the reporting statute allows *only* for the contents of a sacramental confession. Rule of Evidence 505, meanwhile, allows for a broader "Religious Privilege," covering confidential communications between an individual and his "spiritual adviser."

State	Are clergy required to report?	Does the state statute explicitly allow for an exception to the reporting requirement for clergy?
DC[34]	No.	The reporting statute itself does not address clergy confidentiality.
FL[35]	Yes.	Yes.
GA[36]	Yes.	Yes.
HI[37]	Yes.	Yes.
ID[38]	Yes.	Yes.

34. District of Columbia: see D.C. Ann. Code § 4-1321.02 (not listing clergy as mandatory reporters). In any event, the Code of the District of Columbia recognizes a clergy privilege in § 14-309.

35. Florida: see Fla. Ann. Stat. § 39.201 (requiring "any person" to report); Fla. Ann. Stat. § 39.204 (clergy reporting exception); § 90.505 (clergy-penitent privilege). The rule for privileged clergy-penitent communications, to which the reporting statute refers, covers communications made "privately for the purpose of seeking spiritual counsel and advice from the clergy member in the usual course of their practice or discipline. . . ."

36. Georgia: see Ga. Ann. Code § 19-7-5. The reporting exemption, included in the mandatory reporting statute, covers only communications made "solely within the context of confession." The state's general clergy-penitent privilege provides that "communications to a clergyman" in furtherance of "spiritual comfort or seeking counseling" are privileged. See Ga. Ann. Code § 24-5-502.

37. Hawaii: see Haw. Rev. Stat. § 350-1.1 (containing both the mandatory reporting statute and the clergy reporting exception). Clergy who receive reportable information from any source *other* than a "penitential communication" are required to report. A "penitential communication" includes, but is not limited to, a "sacramental confession" and a communication "intended to be kept confidential" to a member of the clergy who, in the course of the "discipline or practice" of the religion, is "authorized or accustomed to hear" such communications and who has a "duty to keep those communications secret." The state's broad clergy-penitent privilege is described in Rule 506 of the Hawaii Rules of Evidence.

38. Idaho: see Idaho Ann. Code § 16-1605 (containing both the mandatory reporting statute, requiring "any person" to report, and the clergy reporting exception). The exception to the otherwise mandatory reporting requirement in Idaho applies only to certain clergy. Specifically, they must be "duly ordained," they must belong to a church that qualifies as tax-exempt under federal law, and they must be bound "specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine." The general clergy-penitent privilege provides that a clergyman "cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs." See Idaho Code § 9-203(3).

State	Are clergy required to report?	Does the state statute explicitly allow for an exception to the reporting requirement for clergy?
IL[39]	Yes.	Yes.
IN[40]	Yes.	The reporting statute itself does not address clergy confidentiality.
IA[41]	No.	N/A
KS[42]	No.	The reporting statute itself does not address clergy confidentiality.
KY[43]	Yes.	Yes.
LA[44]	Yes.	Yes.

39. Illinois: see Ill. Comp. Stat. Ch. 325, § 5/4 (reporting statute). The Illinois reporting statute cites the general clergy-penitent privilege in the state code of civil procedure, Ill. Comp. Stat. Ch. 735, § 5/8-803, noting that clergy "shall not be compelled to disclose in any court, or to any administrative board or agency, or to any public officer" the confidential communications obtained by the cleric in his "professional character" or as a "spiritual advisor."

40. Indiana: see Ind. Ann. Code § 31-33-5-1 (requiring any "individual" to report). Ind. Ann. Code § 34-46-3-1(3) describes the statutory protection for confidential communications made to a "clergyman" in the "course of discipline enjoined by the clergyman's church" or one made to him "in the clergyman's professional character as a spiritual adviser or counselor." This exception, however, is prefaced by the words "except as otherwise provided by statute," meaning that an argument might be made that the reporting requirement trumps the exemption.

41. Iowa does not mandate reporting of child abuse. In any event, a clergy-penitent privilege exists. See Iowa Code Ann. § 622.10.

42. Kansas: see Kan. Ann. Stat. § 38-2223 (noting that anyone "may" report). The clergy-penitent privilege provides that a penitential communication is one that the penitent intends to "be kept secret and confidential and which pertains to advice or assistance in determining or discharging the penitent's moral obligations, or to obtaining God's mercy or forgiveness for past culpable conduct." Kansas Code Ann. § 60-429.

43. Kentucky: see Ky. Ann. Code § 620.030 (requiring "any person" to report). Kentucky's reporting statute contains a specific reference to the clergy-penitent privilege, which is the only privilege allowing for an exception to the reporting requirement (i.e., not even the attorney-client privilege is recognized as an exception to the reporting regime). Rule 505 of the Kentucky Rules of Evidence provides for the general "religious privilege."

44. Louisiana: see La. Children's Code art. 603(17) (reporting statute); La. Children's Code art. 603(17)(c) (clergy reporting exception). The Louisiana reporting statute contains a specific exception to the reporting requirement for members of the clergy, noting that in the event the privilege applies, the clergy member "shall

State	Are clergy required to report?	Does the state statute explicitly allow for an exception to the reporting requirement for clergy?
ME[45]	Yes.	Yes.
MD[46]	Yes.	Yes.
MA[47]	Yes.	Yes.

encourage" the penitent to report himself to the authorities. The state code of evidence contains the general "communications to clergy" privilege. La. Code Evid. Ann., art. 511. Of note is a recent case in the state dealing with a criminal defendant named Peggy Valentine, who was convicted after a confession she made to her church pastor was presented as evidence at trial. Her pastor was also a sheriff's deputy, and Valentine's attorney argued that the deputy did not make clear to Peggy that he was acting as a deputy and not as a pastor. Allison Childers, "Woman's confession to pastor used against her in court," *WAFB9 News*, October 31, 2023: https://www.wafb.com/2023/10/31/womans-confession-pastor-used-against-her-court.

45. Maine: see Me. Rev. Stat. Tit. 22, § 4011-A. Maine's reporting statute provides that a clergy member who acquires the pertinent information must report it if it is obtained as a result of "clerical professional work," but does not have to report if the information was received "during confidential communications." Rule 505 of the state's Rules of Evidence provides for the general "religious privilege," a comment for which notes that the privilege applies even if the penitent is not a member of the church to which the member of the clergy belongs.

46. Maryland: see Md. Code Ann. Fam. Law § 5-705(a)(1) (requiring "a person" to report); Md. Code Ann. Fam. Law § 5-705(a)(3) (clergy reporting exception). Maryland's reporting statute allows for an exception to the reporting requirement for "a minister of the gospel, clergy member, or priest of an established church" if the "notice would disclose matters in relation to any communication that is protected by the clergy-penitent privilege" and that either (i) the disclosure was made to the clergy member "in a professional character as part of the discipline enjoined by the church" to which the clergy member belongs or (ii) the minister "is bound to maintain the confidentiality of that communication under canon law, church doctrine, or practice." The state's general clergy-penitent privilege provides that such a clergy member "may not be compelled to testify on any matter in relation to any confession or communication made to him in confidence by a person seeking his spiritual advice or consolation." Md. Code Ann., Cts. & Jud. Proc. § 9-111.

47. Massachusetts: see Mass. Gen. Laws ch. 119, § 21 (reporting statute); Mass. Gen. Laws ch. 119, § 51A(j) (clergy reporting exception). Massachusetts' exception to the statutory mandatory reporting law makes specific reference to the state's general privilege for "communications with clergymen," found in Mass. Gen. Laws ch. 233, § 20A, stating that if a communication is privileged, the clergy member "need not report."

State	Are clergy required to report?	Does the state statute explicitly allow for an exception to the reporting requirement for clergy?
MI[48]	Yes.	Yes.
MN[49]	Yes.	Yes.
MS[50]	Yes.	The reporting statute itself does not address clergy confidentiality.
MO[51]	Yes.	Yes.
MT[52]	Yes.	Yes.

48. Michigan: see Mich. Comp. Laws § 722.623 (reporting statute); Mich. Comp. Laws § 722.631 (clergy reporting exception). The state's exception for reporting by members of the clergy points out, as do some other states, that it does not apply if the member of the clergy receives the pertinent information by means of one of the several other positions enumerated in the statute (e.g., as a teacher, social worker, etc.). The state's recognition of a clergy-penitent privilege can be found in Mich. Comp. Laws, § 600.2156, which notes that no priest or other minister of the gospel "shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice" of his denomination.

49. Minnesota: see Minn. Ann. Stat. § 260E.06 (reporting statute). Minnesota's exception to the reporting requirement for clergy specifically references the state's clergy-penitent privilege statute, Minn. Ann. Stat. § 595.02(1)(c).

50. Mississippi: see Miss. Ann. Code § 43-21-353 (reporting statute). Even though the reporting statute does not address confidential communications to clergy, Miss. Code Ann. § 13-1-22 describes the statutory protection for the "priest-penitent privilege," allowing for the penitent to "refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser." A 2005 decision from the Mississippi Supreme Court noted that the state's priest-penitent evidentiary privilege barred disclosure of "letters seeking spiritual guidance or intercessory prayer." *Roman Catholic Diocese of Jackson v. Morrison*, 905 So.2d 1213, 1246 (2005).

51. Missouri: see Mo. Rev. Stat. § 210.115; 352.400 (reporting statute); Mo. Rev. Stat. § 210.140 (clergy reporting exception). Missouri law also provides that certain members of the clergy are "incompetent" to testify concerning any "communication made to [them] in [their] professional capacity as a spiritual advisor, confessor, counselor or comforter." Mo. Rev. Stat. § 491.060(4).

52. Montana: see Mont. Code Ann. § 41-3-201(2)(h) (reporting statute); Mont. Code Ann. § 41-3-201(6)(b)(c) (clergy reporting exception). The exception provides that a "priest is not required to make a report under this section if the communication is required to be confidential by canon law, church doctrine, or established church practice." In addition, Montana law provides for an evidentiary privilege for "confessions made to a member of the clergy." See Mont. Code Ann. § 26-1-804.

State	Are clergy required to report?	Does the state statute explicitly allow for an exception to the reporting requirement for clergy?
NE[53]	Yes.	The reporting statute itself does not address clergy confidentiality.
NV[54]	Yes.	Yes.
NH[55]	Yes.	No.
NJ[56]	Yes.	The reporting statute itself does not address clergy confidentiality.

53. Nebraska: see Neb. Rev. Stat. § 28-711 (requiring "any person" to report). Although the child abuse mandatory reporting statute specifies that the physician-patient, counselor-client, and spousal privileges do not excuse non-reporting, the statute is silent on the clergy-penitent privilege. Nebraska Rule of Evidence 506 describes a general evidentiary privilege providing that a person may prevent disclosure of a confidential communication made by that person "to a clergyman in his professional character as spiritual advisor."

54. Nevada: see Nev. Rev. Stat. § 432B.220 (reporting statute). The exception for clergy described in the reporting statute itself provides that "the clergy-penitent privilege applies when the knowledge is gained during religious confession." The clergy-penitent privilege, contained in Nev. Rev. Stat. § 49.255, states that "a member of the clergy or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to the member of the clergy or priest in his or her professional character."

55. New Hampshire: see N.H. Rev. Stat. § 169-C:29 (reporting statute); N.H. Rev. Stat. § 169-C:32 (specifically *including* an exception to the reporting regime for attorneys, but specificaly *excluding* any privilege for communications to a "priest, minister, or rabbi"). The state's evidentiary rule protecting communications to "religious leaders" remains law. See N.H. Rev. Stat. § 516:35. In a 2013 decision, however, the state Supreme Court specifically rejected any special protection for confessional communications. *State v. Willis*, 75 A.3d 1068, 1074 (2013) (refusing to overturn a conviction of a man convicted of sexual assault after his Baptist minister reported him to authorities, as a "statement indicating child abuse cannot be a 'confidence' to which the religious privilege applies"). Interestingly, even though the Catholic Diocese of Manchester signed a non-prosecution agreement with the State's Attorney General in 2002 requiring "church personnel" to comply with the mandatory reporting regime, state authorities did not appear to object to a diocesan reporting policy that affirmed the absolute inviolability of the sacramental seal. See KPMG, *Assessment of Diocese of Manchester's Compliance Program for the New Hampshire Attorney General's Office*, December 11, 2008: https://www.doj.nh.gov/criminal/diocese-reports/documents/20090126-compliance-report.pdf.

56. New Jersey: see N.J. Rev. Stat. § 9:6-8.10 (requiring "any person" to report). Even though the reporting statute does not address confidential communications

State	Are clergy required to report?	Does the state statute explicitly allow for an exception to the reporting requirement for clergy?
NM[57]	Yes.	Yes.
NY[58]	No.	The reporting statute itself does not address clergy confidentiality.
NC[59]	Yes.	No.
ND[60]	Yes.	Yes.

to clergy, N.J. Rev. Stat. § 2A:84A-23 describes the statutory protection for the "clergy-penitent privilege," stating that privileged communications "shall include confessions and other communications made in confidence between and among the cleric and individuals, couples, families or groups in the exercise of the cleric's professional or spiritual counseling role." That same statute provides that in the event a communication pertains to a "future criminal act," the cleric may, but is not required to, "waive the privilege."

57. New Mexico: see N.M. Ann. Stat. § 32A-4-3 (reporting statute). The reporting statute itself provides that reporting is not required by a clergy member if the information is "privileged as a matter of law." The state's privilege concerning "communications to clergy" is contained in its rules of evidence. See N.M. R. Evid. 11-506.

58. New York: see N.Y. Soc. Serv. Law § 414 (noting that anyone "may" report). Rule 4505 of the Civil Practice Laws and Rules of New York provides that "unless the person confessing or confiding waives the privilege," a clergyman such as a priest "shall not be allowed to disclose a confession or confidence made to him in his professional character as spiritual advisor." See *Morales v. Portuondo*, 154 F.Supp.2d 706 (2001) (in a rare grant of a writ of habeas corpus, the court relied in part on the testimony of a Jesuit priest, Father Joseph Towle, who revealed the contents of a man's conversation, given that it was a "heart to heart talk" and not a "sacramental confession").

59. North Carolina: see N.C. Gen. Stat. § 7B-301 (requiring "any person or institution" to report); N.C. Gen. Stat. § 7B-310 (specifically recognizing the attorney-client privilege but specifically excluding any other privilege), notwithstanding the statute protecting communications between "clergymen and communicants," rendering "incompent to testify" any priest or other minister identified in the statute in "any action, suit or proceeding" concerning certain confidential communications. See N.C. Gen. Stat. §8-53.2.

60. North Dakota: see N.D. Cent. Code § 50-25.1-03 (reporting statute). The reporting statute itself provides that a clergy member "is not required to report" if "the knowledge or suspicion is derived from information received in the capacity of a spiritual advisor." The state's recognition of a "religious privilege" is contained in its rules of evidence. See N.D. R. Evid. 505.

State	Are clergy required to report?	Does the state statute explicitly allow for an exception to the reporting requirement for clergy?
OH[61]	Yes.	Yes.
OK[62]	Yes.	No.
OR[63]	Yes.	Yes.
PA[64]	Yes.	Yes.
RI[65]	Yes.	No.
SC[66]	Yes.	Yes.

61. Ohio: see Ohio Rev. Code § 2151.421(A)(4)(a) (clergy reporting statute); Ohio Rev. Code § 2151.421(A)(4)(b) (clergy reporting exception). The exception makes explicit reference to the state's codified clergy-penitent privilege in Ohio Rev. Code § 2317.02(C), which extends a privilege for communications made to a cleric in "sacred trust," defined as "a confession or confidential communication made to a cleric in the cleric's ecclesiastical capacity in the course of discipline enjoined by the church to which the cleric belongs, including, but not limited to, the Catholic Church," and if made directly to the cleric in a "manner and context that places the cleric specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine."

62. Oklahoma: see Okla. Ann. Stat. tit. 10A, §1-2-101 (requiring "every person" to report). The Oklahoma reporting statute specifically provides that "no privilege or contract shall relieve any person from the requirement of reporting pursuant to this section," even though a "religious privilege" covering confidential clergy-penitent communications appears in Okla. Ann. Stat. tit. 12, § 2505.

63. Oregon: see Or. Rev. Stat. § 419B.005(5)(h) (clergy reporting statute); Or. Rev. Stat. § 419B.010(1) (reporting exception). The exception makes specific reference to the state's statutes recognizing privileges, including the clergy-penitent privilege, Or. Rev. Stat. § 40.260).

64. Pennsylvania: see 23 Pa. Cons. Stat. § 6311(a)(6) (clergy reporting statute); 23 Pa. Cons. Stat. § 6311.1 (b) (clergy reporting exception). The exception makes specific reference to the state's statute protecting confidential communications made to a member of the clergy who, "while in the course of his duties has acquired information from any person secretly and in confidence." See 42 Pa. Cons. Stat. § 5943.

65. Rhode Island: see R.I. Gen. Laws § 40-11-3 (requiring "any person" to report); R.I. Gen. Laws § 40-11-11 (specifically recognizing the attorney-client privilege but specifically excluding any other privilege, notwithstanding the statute protecting "privileged communications to clergy," rendering as incompetent to testify any member of the clergy or priest as to the contents of any confession made to him in his "professional character in the course of discipline enjoined by the church" to which he belongs). See R.I. Gen. Laws § 9-17-23.

66. South Carolina: see S.C. Code Ann. § 63-7-310(A) (reporting statute); S.C. Code Ann. § 63-7-420 (clergy reporting exception). The exception adds that a

State	Are clergy required to report?	Does the state statute explicitly allow for an exception to the reporting requirement for clergy?
SD[67]	Possibly.	The reporting statute itself does not address clergy confidentiality.
TN[68]	Yes.	Yes, except in cases involving "child sexual abuse."
TX[69]	Yes.	No.
UT[70]	Yes.	Yes.

member of the clergy *is* required to report, "except when information is received from the alleged perpetrator of the abuse and neglect during a communication that is protected by the clergy and penitent privilege as provided for in Section 19-11-90" (the state's codified "priest-penitent privilege").

67. South Dakota: see S.D. Codified Laws §26-8A-3 (reporting statute). The reporting statute lists various types of professionals and volunteers, which may include a priest. South Dakota's clergy-penitent privilege appears in S.D. Codified Laws §19-19-505.

68. Tennessee: see Tenn. Code Ann. § 37-1-403(a) (requiring "any person" to report); Tenn. Code Ann. § 37-1-605(a) (requiring an "authority figure" at a church to report); Tenn. Code Ann. § 37-1-614 (disallowing any evidentiary privilege, other than the attorney-client privilege, for any situation involving known or suspected child sexual abuse). The state's statutory evidentiary privilege for clergy-communicant communications, Tenn. Code Ann. § 24-1-206, provides that ministers in possession of confidential information communicated to them by a person seeking "spiritual counsel and advice" are prevented from "giving testimony as a witness in any litigation," and that any minister violating this provision is to be charged with a Class C misdemeanor.

69. Texas: see Tex. Fam. Code § 261.101(a) (requiring "a person" to report); Tex. Fam. Code § 261.101(c) (specifically excluding any exception to the duty to report, including for attorneys, medical practitioners, or members of the clergy). An opinion from the Attorney General of Texas from August 1985 specifically held that a mandatory reporting law required a minister to report evidence of child abuse, even "when confidentially disclosed to him by a parishioner." Op. Tex. Att'y Gen. No. JM-342 (1985): https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/1985/jm0342.pdf. See also David T. Fenton, "Texas Clergyman-Penitent Privilege and the Duty to Report Suspected Child Abuse," *Baylor Law Review* 38 (1986) 231–248. In any event, Texas law still recognizes a "privilege for communications to a clergy member" in its rules of evidence. See Tex. R. Evid. 505.

70. Utah: see Utah Code Ann. § 80-2-602(1) (requiring "a person" to report); Utah Code Ann. § 80-2-602(3)(a) (excepting members of the clergy from reporting "with regard to any confession made to the member of the clergy while functioning in the ministerial capacity," provided the confession was made directly to the

State	Are clergy required to report?	Does the state statute explicitly allow for an exception to the reporting requirement for clergy?
VT[71]	Yes.	Yes.
VA[72]	Yes.	Yes.
WA[73]	Possibly.	Yes.
WV[74]	Yes.	No.

member of the clergy, and such member "is, under canon law or church doctrine or practice, bound to maintain the confidentiality of the confession"). Utah law also recognizes a clergy-penitent privilege, which prevents a priest, "without the consent of the person making the confession," from being "examined as to any confession" made to him in his "professional character in the course of discipline enjoined by the church" to which he belongs. See Utah Code Ann. § 78B-1-137(3).

71. Vermont: see 33 Vt. Stat. Ann. § 4913(a)(12) (clergy reporting statute); 33 Vt. Stat. Ann. § 4913(j) (excepting members of the clergy from reporting if a communication is (i) made to them while they are acting in a capacity as spiritual advisor, (ii) intended by the parties to be confidential at the time it is made, (iii) intended by the communicant to be an act of contrition or as a matter of conscience, and (iv) is required to be confidential by religious law, doctrine, or tenet). Vermont law provides that a "priest or minister of the gospel shall not be permitted to testify in court to statements made to him or her by a person under the sanctity of a religious confessional." See 12 Vt. Stat. Ann. § 1607. NB: In 2023 an effort was initiated in the Vermont legislature that would require priests to violate the sacramental seal by reporting to authorities what they heard while administering the sacrament. S.B. 16, 2023-2024 Reg. Sess. (Vt. 2023).

72. Virginia: see Va. Ann. Code § 63.2-1509(A)(19) (requiring certain clergy to report, unless the information supporting the suspicion of child abuse or neglect "is required by the doctrine of the religious organization or denomination to be kept in a confidential manner" or the information is subject to the state's clergy-penitent privilege, Va. Ann. Code § 8.01-400).

73. Washington: see Wash. Rev. Code § 26.44.030 (reporting statute listing broad categories of mandatory reporters); Wash. Rev. Code § 26.44.030 (1)(b) (reporting exception making specific reference to the state's privilege, in Wash. Rev. Code § 5.60.60, shielding communications between a member of the clergy and a "person making the confession or sacred confidence"). In 2023 two separate bills were considered in the Washington legislature regarding mandatory reporting by clergy; the state Senate version (S.B. 5280) preserved the clergy-penitent privilege while the version in the state House (H.B. 1098) did not.

74. West Virginia: see W. Va. Ann. Code § 49-2-803(a) (reporting statute); W. Va. Ann. Code § 49-2-811 (specifically abrogating any privilege except the attorney-client privilege for purposes of reporting child abuse or neglect). Nevertheless, West Virginia law still provides for the clergy-penitent privilege, which prevents any "priest,

State	Are clergy required to report?	Does the state statute explicitly allow for an exception to the reporting requirement for clergy?
WI[75]	Yes.	Yes.
WY[76]	Yes.	Yes.

1.5. Civil Law Conclusions

It is eminently reasonable to conclude from this overview that the civil laws of the vast majority of jurisdictions in the United States recognize the important role that Catholic clergy play in the larger society. There are sound reasons for this. First, there is an obvious recognition by many states that priests are among those trusted members of society who can assist in the important work of detecting and preventing the horrible scourge of child abuse, in all of its many forms. Statutes that specifically identify members of the clergy as mandatory reporters are evidence of this fact. Second, state laws also recognize the unique service that priests provide the faithful by offering them spiritual assistance. Clearly defined exceptions to mandatory reporting requirements and the consistent respect given the

nun, [or] rabbi" from testifying in "any criminal or grand jury proceedings or in any domestic relations action in any court of this state." See W. Va. Ann. Code § 57-3-9.

75. Wisconsin: see Wis. Ann. Stat. § 48.981 (reporting statute). Wisconsin's mandatory reporting statute contains a specific exemption, in Wis. Ann. Stat. § 48.981(2)(bm)3, for members of the "clergy" (broadly construed to include "brothers, ministers, monks, nuns, priests, rabbis, and sisters") who receive information "solely through confidential communications made to [them] privately or in a confessional setting," assuming they are either authorized or accustomed to hearing such communications and assuming their religion requires or expects those communications to be kept secret. The state's broad clergy-penitent privilege is contained in Wis. Stat. Ann. § 905.06, which specifically (and confusingly) notes in paragraph 4 ("exceptions") that the privilege does *not* apply to "observations or information" that a member of the clergy is "required to report" under the mandatory reporting statute.

76. Wyoming: see Wyo. Stat. Ann. § 14-3-205(a) (requiring "any person" to report); Wyo. Stat. Ann. § 14-3-210 (excepting from the reporting requirement confidential communications made to a clergy member or priest protected by the state's codified clergy-penitent privilege, Wyo. Stat. Ann. § 1-12-101, i.e., "concerning a confession made to him in his professional character if enjoined by the church to which he belongs").

clergy-penitent privilege under state law support this conclusion. This is a clear recognition that the US Supreme Court's view of the privilege, in its unanimous decision in *Trammel v. United States* (albeit in dicta), rings true: "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."[77]

Importantly, civil law respect for confidential communications made to priests in the course of their ministry extends *well beyond the sacramental seal of the confessional*. This reality cannot be explained merely on the basis of the obvious First Amendment objections that would be made if reporting exceptions were limited so narrowly.[78] Rather, it seems clear that the breadth of the statutory language reflects a reluctance to intrude on certain private communications between people of faith that, to be effective and valuable, must remain secret.

A profound reverence for what is often termed one's "private life" appears in a number of secular civil law contexts and this holds true not only within the United States. Most notably, perhaps, is the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on December 10, 1948. Art. 12 of the Declaration states that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[79]

77. *Trammel v. United States*, 445 U.S. 40, 51 (1980).

78. Another possible argument in favor of the confidentiality of certain religious communications might be made in light of the US Supreme Court's 2018 decision in *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ___ (2018) (ruling against a type of "compelled disclosure" violative of the First Amendment).

79. Universal Declaration of Human Rights, art. 12. It is not clear why this right is phrased in a negative way; i.e., "No one shall be. . . ." The political philosopher Johannes Morsink called it "surprising," since a majority of constitutional provisions in other countries which respected the right phrased it positively. Fewer than a dozen of those constitutional provisions familiar to the drafters were phrased negatively (including, e.g., Afghanistan, Colombia, Ethiopia, Iran, Liberia, Mexico, the Netherlands, Norway, and Sweden), but one was the very influential Constitution of the United States. Its Fourth Amendment famously states that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable

Similarly, some twenty years after the Universal Declaration had been adopted by the United Nations, a majority of the members of the Organization of American States (OAS) agreed on an "American Convention on Human Rights," which lists some two dozen rights, including the so-called "right to privacy." Art. 11 provides: "1. Everyone has the right to have his honor respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks."[80]

Such a right is not without limits, as was recognized by its phrasing in art. 8 of the 1950 European Convention on Human Rights, which declared not only that "everyone has the right to respect for his private and family life, his home and his correspondence," but that "there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[81]

2. Moral and Canonical Considerations

2.1. Applicable Moral Principles

The principle of safeguarding confidential communications touching on matters of conscience is neither novel nor unknown in Catholic circles. On the contrary, the Church has repeatedly emphasized the importance of the beauty and integrity of one's conscience: "Conscience is the most secret core and sanctuary of man. There he is

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searches and seizures, shall not be violated." See Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999) 134.

80. See Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2nd ed. (New York: Cambridge University Press, 2013) 336–344. The United States, along with Cuba and Canada, have yet to ratify the Convention (ibid., 3–4).

81. European Convention on Human Rights, art. 8.

alone with God, whose voice echoes in his depths."[82] The Fathers of the Second Vatican Council composed a list of "universal and inviolable" human rights enjoyed by man because of the "exalted dignity proper to the human person" as creatures made by God in his image and likeness. The list enumerated "everything necessary for leading a life truly human," including not only the physical necessities such as food, clothing, and shelter, but the right "to a good reputation, to respect, to appropriate information, to activity in accord with the upright norm of one's conscience, to protection of privacy and to rightful freedom, even in matters religious."[83]

While it is certainly true that a right to one's privacy is not absolute, neither is the right to information. The Council Fathers at Vatican II emphasized this truth in *Inter mirifica*, the decree on the media of social communications, which specifically referenced man's general "right to information, in accord with the circumstances in each case, about matters concerning individuals or the community."[84] The "proper exercise of this right" demands, however, that when sharing information, "there must be full respect for the laws of morality and for the legitimate rights and dignity of the individual."[85] Thus, the "right to information," no matter how important, may not be exercised in isolation, as if other rights did not exist. This principle, applicable to all basic human rights, holds true not only for Catholics, but for all people everywhere. As the *Catechism of the Catholic Church* affirms in its Part III, speaking about the Eighth Commandment: "Everyone should observe an appropriate reserve concerning persons' private lives. Those in charge of communications should maintain a fair balance between the requirements of the common good and respect for individual rights."[86]

82. Second Vatican Council, pastoral constitution *Gaudium et spes*, December 7, 1965: *AAS* 58 (1966) 1025–1115, at no. 16.

83. Ibid. 26.

84. Second Vatican Council, decree *Inter mirifica*, December 4, 1963: *AAS* 56 (1964) 145–157, at no. 5.

85. Ibid.

86. *Catechism of the Catholic Church*, 2nd ed. (Vatican City: Libreria Editrice Vaticana, 2012), no. 2492.

2.2. Canonical Discipline

The integrity of one's innermost thoughts is an individual right not only firmly rooted in the moral teachings of the Catholic Church, but also enshrined in its canon law, most explicitly in canon 220: "Nemini licet bonam famam, qua quis gaudet, illegitime laedere, nec ius cuiusque personae ad propriam intimitatem tuendam violare."[87] As Eduardo Baura points out, the ecclesiastical legislator prefers to speak more in this canon in terms of "intimacy" (*intimitas*) rather than merely "privacy,"[88] even though English translations of the Latin text use the latter term.[89]

Baura notes that the key term in the Latin text, "intimitatem," used in the objective case, comes from the superlative *intimus*, which connotes something even more inward than the comparative *interior*. As a result, he says, the term refers to the inner realm of man, that which concerns the core of a person's identity and touching his very dignity as a human being. In support of this proposition, Baura cites a 1958 address of Pope Pius XII to an international group of psychologists in which the pope described this area of a person's inner world as being "revealed only to a few trusted confidants," and which must be "defended against the intrusion of others."[90] This link between a person's human dignity and the protection of his or her inner life,

87. *CIC 1983* c. 220: "No one may unlawfully harm the good reputation which a person enjoys, or violate the right of every person to protect his or her privacy."

88. See Eduardo Baura, "Il diritto all'intimità nella Chiesa: bene giuridico e disponibilità del diritto," *Ephemerides Iuris Canonici* 61 (2021) 719–749, at 721.

89. E.g., the 2022 Wilson & Lafleur English translation renders the canon thus: "No one may unlawfully harm the good reputation which a person enjoys, or violate the right of every person to protect his or her privacy" (*Code of Canon Law Annotated: Latin-English Edition*, ed. Juan Ignacio Arrieta, 4th ed. [Montreal: Wilson and Lafleur, 2022] 179). The translations prepared by the Canon Law Society of Great Britain and Ireland and by the Canon Law Society of America also use the word "privacy." See *The Canon Law Letter and Spirit: A Practical Guide to the Code of Canon Law*, prepared by the Canon Law Society of Great Britain and Ireland, in association with The Canadian Canon Law Society (Collegeville, MN: The Liturgical Press, 1995) 124; John Beal, James Coriden, and Thomas Green, eds., *New Commentary on the Code of Canon Law: Study Edition* (New York: Paulist Press, 2000) 277.

90. Baura, 722 (quoting Pius XII, address to the 13th annual conference of the International Society of Applied Psychology, April 10, 1958: *AAS* 50 [1958] 268–282, 276). The text of the address was printed in French in the *AAS*.

Baura notes, was recognized in the precise formulation of the right to privacy as articulated in the American Convention on Human Rights.[91] Given that the notion of personal interiority, in order to have legal relevance, must be externalized in some form, Baura acknowledges that it is understandable how the notion of privacy can be confused with the more fundamental concept of intimacy. Nevertheless, he insists, the distinction between the two has been noted for some time in the canonical literature,[92] and a proper understanding of the juridical goods protected by canon 220 is essential.[93]

Beyond the recognition of the right to *intimitas* in canon 220, canon 983 of the code of 1983 contains the well-known provision regarding the sacramental seal, referring to it as "inviolable" in the English translation. "Accordingly," the canon continues, "it is absolutely wrong [*nefas est*] for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion." Further, the next canon adds: "§1. The confessor is wholly forbidden to use knowledge acquired in confession to the detriment of the penitent, even when all danger of disclosure is excluded. §2. A person who is in authority may not in any way, for the purpose of external governance, use knowledge about sins which has at any time come to him from the hearing of confession."[94]

The inviolability of the sacrament of penance is of divine law and, being rooted in the very nature of the sacrament, admits of no exception whatsoever, whether ecclesial or civil. A confessor who directly

91. Baura, 722.

92. See, e.g., Roberto Zavolloni, "Techniche d'investigazione e vita privata," *Antonianum* 52 (1977) 585–625, at 591; Alberto Perlasca, "La tutela giuridica del diritto all'intimità negli esami psicologici dei candidati al seminario e agli Ordini sacri," *Quaderni di Diritto Ecclesiale* 18 (2005) 417–441, at 434.

93. Other recent relevant scholarship on the topic exists. See, e.g., Beatrice Serra, *Intimum, privatum, secretum: Sul concetto di riservatezza nel diritto canonico* (Modena: Mucchi Editore, 2022); Paterne Koyassambia-Kozondo, *Le bien juridique naturel de l'intimité personnelle dans l'Église* (Rome: Pontificia Università della Santa Croce, 2020).

94. Canon 984 provides: "§ 1. Omnino confessario prohibetur scientiae ex confessione acquisitae usus cum paenitentis gravamine, etiam quovis revelationis periculo excluso. § 2. Qui in auctoritate est constitutus, notitia quam de peccatis in confessione quovis tempore excepta habuerit, ad exteriorem gubernationem nullo modo uti potest." See also c. 630, prohibiting religious superiors from inducing in any way the members "to make a manifestation of conscience to them."

violates the seal incurs, according to the 1983 Latin code, a *latae sententiae* excommunication reserved to the Holy See; an indirect violation is punished "according to the gravity of the offense" (c. 1386 §1). Both the direct and the indirect violation of the seal are considered reserved *graviora delicta* and fall under the exclusive jurisdiction of the Dicastery for the Doctrine of the Faith as provided in art. 4 of the most recent version (2021) of *Sacramentorum sanctitatis tutela*.[95]

In addition, canon law demonstrates respect for matters relating to the sacramental seal and the internal forum in several ways. First, spiritual directors of seminarians are prohibited from voting on either the admission to orders or on a dismissal from the seminary (cf. c. 240 §2). Similarly, superiors in religious communities are not to hear the confessions of their subjects unless the members spontaneously request them to do so (cf. c. 630 §4). A superior is also forbidden in any way to induce a member to make a manifestation of conscience to himself (cf. c. 630 §5).[96] In essence, knowledge of matters learned within the internal forum may not be used for the exercise of the power of governance in the external forum (cf. c. 130). Pope Francis, in a 2019 address, reiterated this point, stressing that the internal forum is "sacred" and that it is a "sin" against human dignity to blur the distinction between the internal and the external fora—that is, taking "from the internal forum to make decisions in the external one, and vice versa."[97]

Perhaps nowhere is the need for the balance between the "right to know" and the "right to one's intimacy" more apparent than within the modern seminary environment. It is instructive in this regard to review recent guidance from the Congregation for Catholic Education regarding the "Use of Psychology in the Admission and Formation of Candidates for the Priesthood," released on June 28, 2008 with the approval of Pope Benedict XVI:

95. Congregation for the Doctrine of the Faith, norms, October 11, 2021: *Communicationes* 53 (2021) 428–436.

96. On the role that manifestations of conscience have had in the life of the Jesuit order, see José Luis Sánchez-Girón Renedo, *La cuenta de consciencia al Superior en el Derecho de la Compañía de Jesús* (Rome: Editrice Pontificia Università Gregoriana, 2007).

97. Francis, address to participants at the course organized by the Apostolic Penitentiary, March 29, 2019: *AAS* 111 (2019) 568–570.

> The formational institution has the right and the duty to acquire the knowledge necessary for a prudentially certain judgement regarding the candidate's suitability. But this must not harm the candidate's right to a good reputation, which any person enjoys, nor the right to defend his own privacy, as prescribed in canon 220 of the Code of Canon Law. This means that the candidate's psychological consultation can only proceed with his previous, explicit, informed and free consent. . . . The candidate will be able freely to approach an expert who is either chosen from among those indicated by the formators, or chosen by the candidate himself and accepted by the formators. . . . If the candidate, faced with a motivated request by the formators, should refuse to undergo a psychological consultation, the formators *will not force his will in any way*. Instead, they will prudently proceed in the work of discernment with the knowledge they already have, bearing in mind the aforementioned canon 1052 § 1 [pertaining to a bishop's duty to have "moral certainty" regarding the suitability of the candidate for ordination].[98]

2.3. The 2019 *Nota* from the Apostolic Penitentiary

In 2019, the Apostolic Penitentiary published a *Nota* "On the Importance of the Internal Forum and the Inviolability of the Sacramental Seal."[99] The *Nota* was approved on June 21, 2019 by Pope Francis, who ordered its publication, and it was signed one week later by the Major Penitentiary, His Eminence Mauro Cardinal Piacenza on the feast of the Solemnity of Saints Peter and Paul. The *Nota* represents the considered opinion of the entity charged by the Holy Father with the administration of matters related to the internal forum and which is "competent in all matters regarding

98. Congregation for Catholic Education, "Guidelines for the Use of Psychology in the Admission and Formation of Candidates for the Priesthood," June 29, 2008: https://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con _ccatheduc_doc_20080628_orientamenti_en.html, at no. 12 (emphasis added).

99. Apostolic Penitentiary, "Nota de pondere Fori interni et inviolabilitatis sigilli sacramentalis," June 21, 2019: *AAS* 111 (2019) 1213–1221 (hereinafter "*Nota*"). The *Nota* was published in Italian in the *AAS*.

the internal forum,"[100] a task it has been entrusted with for some eight centuries.[101]

The *Nota* begins with a brief analysis of modernity's fascination with technology and information, acknowledging negative influences even within the ecclesial community, manifested particularly by an insatiable thirst for "news" and a morbid fascination with "scandals." In this context, the Apostolic Penitentiary, writing just months after the tumultuous "summer of shame" in 2018,[102] addresses the "negative prejudice" directed against the Church as well as the pressure for the Church to "conform" her juridical system to that of the civil systems of secular states as the "only possible 'guarantee of correctness and rectitude.'"[103] In light of this, the *Nota* explains, there is a need for a better understanding of three distinct concepts that have become somewhat foreign to public opinion and sometimes to the civil juridical systems themselves; namely, (i) the sacramental seal, (ii) the confidentiality inherent in the extra-sacramental internal forum, and (iii) professional secrecy.

The *Nota* continues with a vigorous justification of the sacramental seal, citing Pope Francis in support of the proposition that, even though the seal "is not always understood by the modern mentality," it is indispensable both for the sanctity of the sacrament and for the penitent's freedom of conscience.[104] After reviewing the theological basis of the seal, the *Nota* cites a text by a pair of noted canonists in emphasizing that the content of the seal includes "all the sins of both the penitent and others known from the penitent's confession, both mortal and venial, both occult and public, as manifested and ordered

100. Francis, apostolic constitution *Praedicate Evangelium*, March 19, 2022: *AAS* 114 (2022) 375–455, at art. 190.

101. Holy See Press Office, "Presentation of the Note of the Apostolic Penitentiary on the importance of the internal forum and the inviolability of the sacramental seal," July 1, 2019: https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/07/01/190701e.html.

102. See, e.g., Raymond de Souza, "The grace of penance in summer of shame," *National Catholic Register*, July 15, 2001: https://www.catholicregister.org/opinion/columnists/item/33320-fr-raymond-de-souza-the-grace-of-penance-in-summer-of-shame.

103. *Nota*, 1214.

104. Ibid., 1215.

to absolution and therefore known by the confessor by virtue of sacramental knowledge."[105] This is true, the *Nota* stresses, even if the confession is invalid or sacramental absolution is not given for some reason. In either case, the seal must be maintained.[106]

It is for this reason, the *Nota* explains, that a priest who hears a confession can honestly answer "I don't know" to a direct question about what was said to him in confession. The priest, *as a man*, does not know what he only knows *as a minister of God* in the sacrament. The seal belongs to the sacrament itself, surviving even the death of the penitent, as it exists beyond the control of the penitent. Contemporary scholarship maintains that penitents have no power to release the confessor from keeping the seal, as the obligation comes directly from God.[107] Holding otherwise might subject individual penitents to moral or social pressure to release the confessor from keeping the secret, contributing to the effective cancellation of the seal itself.[108] Honoring the seal also means, as Pope Saint John Paul II stated in an address to the Apostolic Penitentiary in March 1994, that priests are forbidden to mention the contents of a confession even to the penitent himself outside the sacrament, unless explicit consent is given by the penitent.[109] Likewise, the pope adds, there is a duty of equity on the part of the penitent to observe silence about what the confessor has manifested to him within sacramental confession. The priest is, after all, a "man without a defense," having been obliged by divine

105. Ibid., note 6 (citing Velasio De Paolis and Davide Cito, *Le sanzioni nella Chiesa. Commento al Codice di Diritto Canonico. Libro VI* [Vatican City: Urbaniana University Press, 2000] 345).

106. *Nota*, 1217.

107. See, e.g., Krzysztof Nykiel, "Il sigillo confessionale in prospettiva canonica," in *Il sigillo confessionale e la* privacy *pastorale*, ed. Krzysztof Nykiel, Paolo Carlotti, and Alessandro Saraco (Vatican City: Libreria Editrice Vaticana, 2015) 39–54, at 47.

108. Gianpaolo Montini, "La tutela penale del sacramento della penitenza: I delitti nella celebrazione del sacramento (Cann. 1378; 1387; 1388)," in *Le sanzioni nella Chiesa*, ed. Gruppo italiano docenti di diritto canonico (Milan: Glossa, 1997) 213–235, at 226–227.

109. John Paul II, "Discorso di Giovanni Paolo II ai membri della Penitenzieria Apostolica e ai padri penitenzieri delle basiliche Romane," March 12, 1994: *AAS* 87 (1995) 75–79, no. 4. (The original Italian version of the *Nota* in the *AAS* incorrectly cites Pope John Paul II's apostolic exhortation *Reconciliatio et paenitentia* 31 as the source of this quote.)

institution and the law of the Church to keep total silence, *usque ad sanguinis effusionem*.[110]

The *Nota* insists that defending the sacramental seal and the sanctity of the sacrament of penance must never be interpreted as some kind of tacit "connivance with evil."[111] Rather, protecting these spiritual goods is a recognition of their worth as "the only true antidote"[112] to the evil that threatens the human family and the entire world. When confronted by sins that involve criminal offenses, the *Nota* continues, "it is never permissible, as a condition for absolution, to impose upon the penitent the obligation to turn himself over to the civil authorities," which would be a violation of the venerable principle of natural law *nemo tenetur se detegere*, a principle present in virtually every legal system.[113] The same principle is specifically included in the oft-cited Fifth Amendment to the United States Constitution prohibiting self-incrimination as well as being implicit in the praxis of the Apostolic Penitentiary when it comes to certain crimes. For example, a priest who, post-ordination, voluntarily confesses to an act that would have rendered him irregular for the reception of orders (e.g., paying for an abortion during his college years) is not required to report himself to ecclesiastical authorities as a condition for receiving the necessary remedial penance from the Apostolic Penitentiary.

At the same time, the *Nota* explains, true repentance is a condition for the validity of the sacrament, as well as a firm intention not to sin again.[114] Further, if a victim of evil committed by others approaches the sacrament, the Apostolic Penitentiary's *Nota* provides

110. Ibid. 6.

111. *Nota*, 1217.

112. Ibid.

113. Ibid. The original Italian of the key phrase reads as follows: "Non è mai consentito porre al penitente, come condizione per l'assoluzione, l'obbligo di costituirsi alla giustizia civile. . . ." Nevertheless, and most unfortunately, at least one American bishop has stated the exact opposite, writing that "a priest hearing a confession of criminal wrongdoing may require the penitent to self-report to law enforcement." Most Rev. Oscar A. Solis, "Protecting Our Belief in the Seal of the Confessional," *Intermountain Catholic*, February 2, 2024: http://www.icatholic.org/article/protecting-our-belief-in-the-seal-of-the-confessional-88217950.

114. *Nota*, 1218. Wise counsel (i.e., "turn yourself in and get the help you need and in the interest of justice for those whom you have harmed") is not the same thing as a *sine qua non* condition.

that the confessor should instruct the victim on his rights as well as the practical avenues open to him under either civil or ecclesiastical law.[115] The *Nota* concludes the section on the sacramental seal with a sharp rebuke to those who would attempt to violate the seal's inviolability under the law. Any such action, it says, "would constitute an unacceptable offense against *libertas Ecclesiae*, which does not receive its legitimacy from individual States, but from God," as well as a clear violation of the freedom of conscience of individuals, including both penitents and confessors.[116]

It is axiomatic that the internal forum includes, but is not coextensive with, the sacramental seal. As we saw in the first part of this article, the civil laws of the United States protect communications well beyond what would be understood as falling under the seal of the confessional. The *Nota* explores this distinction in its second section, on the "extra-sacramental internal forum and spiritual direction," a sphere in which the Church also exercises both her mission and her saving power, not so much by the remission of sins but by the granting of graces, by lifting juridical constraints such as censures, and by doing all that is required for the salvation of souls. In particular, spiritual direction is a way in which an individual member of the faithful entrusts his own path of conversion and sanctification to a specific priest, consecrated person, or lay person, "freely revealing the secret of his own conscience to the director or spiritual guide."[117] The *Nota* emphasizes that spiritual direction demands "a certain degree of secrecy *ad extra*, inherent to the content of spiritual conversations and deriving from each person's right to the respect of his or her own intimacy (cf. c. 220)."[118] The relationship between confessor and penitent in the sacrament of penance is clearly distinct from the relationship between a spiritual director and his (or her) directee. Nevertheless, in an analogous way to what happens in the sacrament of confession, "the spiritual director is made aware of the conscience of the individual believer by virtue of his 'special' relationship with Christ, which derives from his (or

115. Ibid.
116. Ibid.
117. Ibid.
118. Ibid., 1219.

her) holiness of life and—if a cleric—by virtue of the sacrament of orders he has received."[119]

As evidence of the special confidentiality afforded spiritual direction, the *Nota* invites us to consider two juridic prohibitions. First, there is the ban (mentioned above) on seeking the opinion of not only the confessor *but also of the spiritual director* on the occasion of either admission to holy orders or when a candidate for the priesthood is to be dismissed from the seminary (c. 240 §2). Second, according to what is laid down in the 2007 instruction on causes of saints, it is forbidden to admit the testimony of both confessors (in defense of the sacramental seal) *and spiritual directors* of any Servant of God whose cause is under consideration, regarding anything that was learned in "the forum of conscience, outside of sacramental confession."[120]

The *Nota* concludes the section on the extra-sacramental internal forum with a brief reflection on this point for spiritual directors: "Such necessary confidentiality will be all the more 'natural' for the spiritual director, the more he (or she) learns to recognize and 'be moved' before the mystery of the freedom of the faithful who, through him, turns to Christ; the spiritual director must understand his own mission and his own life exclusively before God, in the service of his glory, for the good of the person, of the Church, and for the salvation of the whole world."[121]

In the third and final part of the *Nota*, the Apostolic Penitentiary turns its attention to professional secrets. Distinguishing them as different in nature from both the sacramental seal and the internal forum, professional secrets are known in both the civil and ecclesial structures.[122] Such secrets, the *Nota* explains, must always be preserved, by virtue of the natural law, "save in exceptional cases, where keeping the secret is bound to cause very grave harm to the one who

119. Ibid.

120. Ibid., note 9, citing Congregation for the Causes of Saints, instruction for conducting diocesan or eparchial inquiries in the causes of saints, May 17, 2007, *Sanctorum Mater* art. 101 §2.

121. *Nota*, 1219.

122. See, e.g., c. 1548 §2, providing that certain people are exempted from the obligation of replying to questions, including "clerics in those matters revealed to them by reason of their sacred ministry, civil officials, doctors, midwives, advocates, notaries and others who are bound by the secret of their office."

confided it, to the one who received it, or to a third party, and where the very grave harm can be avoided only by divulging the truth."[123]

2.4. Matters of Mental Health

We see that confidential communications, if made to confessors or spiritual directors, are clearly within the internal forum. But if confidences touching the most interior parts of someone's life are made to someone else (such as a mental health professional), how should those be treated?

The Church's moral and legal traditions have long held that mental health exams touch a person's inner world and thus merit a particular degree of caution and care. In April 1958, Pope Pius XII asserted to an international gathering in Rome of psychologists that "just as it is unlawful to appropriate someone else's property or to violate their bodily integrity without their consent, so it is unlawful to enter their inner world against their will, regardless of the techniques and methods employed."[124] The documented results of such exams also merit safeguarding. A decision dated June 8, 1998 from the Congregation for the Clergy pointed out that confidential medical records "are meant to be used for the good of the patient; other use of them violates the principle of confidentiality and of the doctor-patient privilege. What is provided in an extra-legal forum for the benefit of a patient, cannot be used in a legal forum against the patient's interests and rights (even if, under compulsion, he should have consented to such use)."[125]

Similarly, the same Congregation has held that a bishop cannot oblige a cleric to undergo therapy without the latter's consent. In a letter dated October 8, 1998, the Congregation for the Clergy wrote to a bishop: "Your Excellency cannot, in this case, under pain of obedience, oblige your priest, the Reverend A., to undergo psychological evaluation."[126] The letter cites the August 6, 1976 letter from the Secretariat of State at that time, Cardinal Jean-Marie Villot, which had

123. *Nota*, 1220 (quoting the *Catechism of the Catholic Church* 2491).

124. Pius XII, address, April 10, 1958: 276.

125. Quoted in William Woestman, *Ecclesiastical Sanctions and the Penal Process*, 2nd ed. (Ottawa: St. Paul University, 2003) 232.

126. Quoted in Gregory G. Ingels, "Protecting the Right to Privacy when Examining Issues Affecting the Life and Ministry of Clerics and Religious," *Studia canonica* 34 (2000) 439–466, at 460.

been sent to all the pontifical representatives stating that "it is the consistent teaching of the Magisterium that investigation of the intimate psychological and moral status of the interior life of any member of the Christian faithful can not be carried on except with the consent of the one to undergo such evaluation."[127]

In preparing this letter, the Secretariat of State had commissioned Father Vittorio Marcozzi, professor of Anthropological Psychology at the Pontifical Gregorian University, to outline the Church's teaching on the use of psychological testing. Marcozzi's article, published in *La Civiltà Cattolica*,[128] was sent to the papal nuncios along with the letter. The explanatory note accompanying the article pointed out that "the gravest abuses, often hidden," were then being committed "at all levels, social, business—and, it must be said, even painfully, religious." Abuses included obtaining manifestations of conscience by "projective psychological tests" and "correlative therapies," as well as demanding those being admitted to seminaries or religious life sign authorizations permitting, even after admission, "the use of intimate knowledge of the person gained before [admission]."[129]

Such principles apply even today, even in the United States, and even with respect to allegations of child sexual abuse. Indeed, the *Essential Norms* from the United States Conference of Catholic Bishops provide that even those accused of sexual abuse of a minor may only be "*requested* to seek, and may be urged *voluntarily* to comply with, an appropriate medical and psychological evaluation at a facility *mutually acceptable* to the diocese and to the accused."[130]

127. Secretariat of State, letter of August 6, 1976, prot. no. 311157, referenced in the October 8, 1998 letter from the Congregation for the Clergy, cited in Ingels, 460. Ingels draws attention to an essay by Rev. Frank Morrisey regarding the legislative impact of instructions and circular letters. See Francis G. Morrisey, *Papal and Curial Pronouncements: Their Canonical Significance in Light of the Code of Canon Law*, 2nd ed. (Ottawa: Saint Paul University, 1995).

128. Vittorio Marcozzi, "Indagini psicologiche e diritti della persona," *La Civiltà Cattolica* 127/3024 (1976) 541–551.

129. Secretariat of State, letter, quoted in Stuart MacDonald, "The Use of Psychological Testing in Light of *Graviora delicta* Cases," in *Advocacy Vademecum*, ed. Patricia M. Dugan (Montreal: Wilson & Lafleur, 2006) 23–31, at 26.

130. United States Council of Catholic Bishops, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons* (Washington, DC: USCCB, 2018), Norm 7 (emphasis added) (hereafter *Essential Norms*).

3. Issues for Further Consideration

Notwithstanding the wide latitude given confidential communications made to clergy in the civil law in the United States, and despite the clear moral and canonical principles related to the confidentiality required for matters touching the internal forum, a certain level of confusion appears to abide at present in the United States on the issue, even within ecclesial circles. As a result, certain policies and procedures exist which seem to put in jeopardy both the rights of the faithful and the financial position of US dioceses and religious orders. While each of the three issues mentioned below could benefit from further scholarly research and pastoral discussion, the third and final section of this article highlights the real world significance of matters related to the internal forum in the present environment.

3.1. Abuse Reporting Systems

One example can be seen in the matter of mandatory reporting regimes. Since the adoption of the Essential Norms in 2002 and their subsequent *recognitio* by the Holy See, particular law in the United States has provided for a form of mandatory reporting, insofar as dioceses and eparchies have been required to comply with "all applicable civil laws with respect to the reporting of allegations of sexual abuse to civil authorities."[131] As is well known, Pope Francis's 2019 motu proprio *Vos estis lux mundi* established a mandatory reporting structure for the entire Catholic Church, requiring clerics or members of an institute of consecrated life who learn or who have well-founded motives to believe that certain specific types of misconduct have been committed *must* report it "promptly" to the appropriate authorities.[132] A very important, and highly relevant (given the subject of this article) exception is carved out of this mandatory duty to report, however: "except for when a cleric learns of information during the exercise of ministry in the internal forum."[133]

131. Ibid. 11.

132. Francis, motu proprio *Vos estis lux mundi*, May 7, 2019: *Communicationes* 51 (2019) 23–33. After the expiration of a three-year period *ad experimentum*, the norms were renewed in March 2023.

133. Francis, motu proprio *Vos estis lux mundi*, March 25, 2023: *Communicationes* 55 (2023) 48–58, at art. 3 §1. The original version of *Vos estis* had included a

Such a distinction, however, appears to have been lost on the creators of the popular compliance program sold by Praesidium, Inc., a for-profit company based in Arlington, Texas. The Praesidium program is relied upon by many institutes of religious life in the United States given the company's close relationship with the Conference of Major Superiors of Men (CMSM), the "pontifically recognized national representative organization serving leaders of men's religious congregations, monastic communities, and religious institutes in the United States."[134] Among the standards used by Praesidium to ascertain whether an entity merits Praesidium's "accreditation" is "Standard 12," relating to whether an institution reports "known or suspected abuse of children who are still minors to authorities."[135] The first of four requirements is that the institute makes sure that all of its members "are educated in their obligations to report *all* allegations of known or suspected sexual abuse of a minor *regardless of the civil mandatory reporting laws of the jurisdiction*."[136] The "clarifications" attached to this requirement correctly note the inviolability of the sacramental seal under canon 983 but also make reference, somewhat curiously, to the confidentiality of "the manifestations of conscience," which the 1983 code categorically rejects as an instrument to be used by religious superiors, at least juridically (cf. cc. 630 §5; 983–984).[137] Aside from an invitation to see canon 220 "for further guidance," Standard 12 is completely silent as to the other applicable rights and obligations under the moral and canon law (such as preserving the integrity of the internal forum and the obligation to keep professional secrets).

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reference to canon 1548 §2 (and its corresponding canon in the Eastern code, c. 1229 §2) relating to the exemption from testifying for certain witnesses, including clerics "in those matters revealed to them by reason of their sacred ministry."

134. Conference of Major Superiors of Men website: https://www.cmsm.org/who-we-are. Praesidium is listed on the CMSM website as a regular sponsor of the CMSM's annual National Assembly and their annual Safeguarding Workshop & Retreat.

135. Praesidium, Inc., Accreditation Standards for Catholic Men's Religious Institutes, July 2020, 28: https://www.vincentian.org/wp-content/uploads/2023/05/Accreditation-Standards_Religious_0720docx.docx-Accreditation_Standards_for_Religious_Institutes_2020.pdf.

136. Ibid., at R1 (emphasis added).

137. Ibid., at C1-C2.

Standard 12 does include a prefatory comment in a section labeled "Rationale," asserting that, "in most circumstances, Members [i.e., of the religious institute] are mandated, as clergy or as professionals in a child-serving organization, to report sexual abuse or suspicion of sexual abuse of a minor. Reporting sexual abuse regardless of individual state statutes demonstrates the Institute's commitment to interrupt sexual abuse and to help seek justice for survivors."[138] The accompanying footnote, however, states that the assertion is *"from* the Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons, 2006 version."[139] This is simply inaccurate, as the *Essential Norms* do not say this. As was noted above, number 11 of the *Essential Norms* states simply in relevant part that dioceses and eparchies "will comply with all applicable civil laws with respect to the reporting of allegations of sexual abuse of minors to civil authorities and will cooperate in their investigation."[140]

Universal law also provides for cooperation with civil reporting statutes. Art. 20 of *Vos estis*, for example, provides that the norms contained therein "apply without prejudice to the rights and obligations established in each place by state laws, particularly those concerning any reporting obligations to the competent civil authorities." In light of the well-known principles relating to the "canonization" of civil laws, however, canon 22 states that civil laws cannot be applied within the ecclesial communion if they either contradict divine law or if canon law has otherwise stipulated.[141] As noted earlier, art. 3 §1 of the 2023 version of *Vos estis* clearly provides for an exception to mandatory reporting when a cleric "learns of information during the exercise of ministry in the internal forum." This exception encompasses, but is not limited to, the sacramental seal.

138. Ibid., 28.

139. Ibid. (emphasis added). It is not clear why the 2006 revision of the *Essential Norms* is referenced here, given that the Essential Norms were revised in 2011 and 2018 and that the Praesidium standards were most recently revised in July 2020.

140. *Essential Norms* 11.

141. Canon 22: "Leges civiles ad quas ius Ecclesiae remittit, in iure canonico iisdem cum effectibus serventur, quatenus iuri divino non sint contrariae et nisi aliud iure canonico caveatur."

Thus, any civil law requiring the violation of either the sacramental seal or the non-sacramental internal forum does not require the "cooperation" of church authorities. On the contrary, it seems clear that ecclesial leadership would need to insist upon their sacred duty to keep certain matters confidential.[142] Heeding this obligation seems especially important in those jurisdictions whose statutes explicitly state that clerics may keep confidential those matters that are required to be kept confidential under *ecclesial* law.[143]

Mention must surely be made here of Pope Francis's modifications to the pontifical secret in December 2019. Some seven months after the original promulgation of *Vos estis lux mundi* earlier that year, the Holy Father approved the issuance of an instruction "On the Confidentiality of Legal Proceedings," stating that the pontifical secret no longer applied to "accusations, trials, and decisions" involving the offenses referred to in art. 1 of *Vos estis*, art. 6 of the *Normae de gravioribus delictis* now reserved to the Dicastery for the Doctrine of the Faith, or when such offenses were "committed in conjunction with other offenses."[144] As a result, the usual canonical provisions related to "official secrecy" (cf. *CIC* c. 471, 2° and *CCEO* c. 244 §2, 2°)

142. See, e.g., c. 392 §1 (noting a bishop's duty "to foster the discipline which is common to the whole Church, and so press for the observance of all ecclesiastical laws"). Ronny Jenkins, in his 2021 article cited earlier, discusses the provision in the original (2019) version of *Vos estis* regarding cooperation with reporting obligations under the civil law. The corresponding article in the 2023 iteration of *Vos estis* is identical to the original version, save for its number (i.e., art. 20 rather than art. 19). As noted above, the language used in art. 3 §1 of *Vos estis* regarding exceptions to the reporting requirement originally made reference to "cases envisaged in canons 1548 §2 CIC and 1229 §2 CCEO," while the present version refers to situations in which the cleric learns of the information "in the exercise of his ministry in the internal forum." Commenting on the original 2019 language concerning civil mandatory reporting laws, Jenkins states that, "although it is not stated in the legislation, this provision of the Apostolic Letter would apply only when no violation of the sacramental internal forum would ensue from the reporting of what was learned during the celebration of the sacrament of penance. It goes without saying that the protections of divine and ecclesiastical law remain fully in force" (Jenkins, 630).

143. See, e.g., Arkansas, California, Colorado, Idaho, Maryland, Michigan, Montana, Ohio, Utah, Vermont, Virginia, Wisconsin. See the chart in section 1.4 above for citations.

144. Rescript *ex audientia Ss.mi*, December 6, 2019: *Communicationes* 51 (2019) 366–367.

were said to apply, but even observing those duties "shall not prevent the fulfillment of the obligations laid down in all places by civil laws, including any reporting obligations, and the execution of enforceable requests of civil judicial authorities."[145] In an interview with Vatican Radio-Vatican News that received widespread press coverage at that time, Archbishop Charles Scicluna from the CDF stated that this was an "epochal decision" of the Holy Father, meaning not only that "the question of transparency now is being implemented at the highest level," but that new "avenues of communication with victims, of collaboration with the state" would be opened as well.[146]

The instruction was accompanied by two important contributions discussing the intent and impact of the legislative change: one from Bishop Juan Ignacio Arrieta, secretary of the Pontifical Council for Legislative Texts, and the other from Professor Giuseppe Dalla Torre, former president of the Vatican City State Tribunal. The former statement, specifically noted as commenting upon the subjects of "confidentiality and the duty to report," emphasized that the instruction "does not in any way counter the absolute duty to observe the sacramental seal." Similarly, Bishop Arrieta pointed out that the instruction does not "touch upon the duty of strict reservation acquired possibly outside of confession, within the whole forum called 'extra-sacramental,'" or the "other possible moral duties of confidentiality on account of circumstances entrusted to the priest" covered in the second section of the Apostolic Penitentiary's 2019 *Nota*, which, as was noted in section 2.3 above, relates to both the internal extra-sacramental forum and spiritual direction.[147]

The risks of constructing reporting mechanisms outside either the civil or canon law should be obvious. First, there is a high degree of risk that fundamental rights and duties will be violated, such as

145. Ibid., no. 4.

146. Interview of the editorial director, Andrea Tornielli, with Archbishop Charles Scicluna, adjunct secretary of the Congregation for the Doctrine of the Faith on the occasion of the publication of the rescript just cited, December 17, 2019: https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/12/17/191217e.html.

147. Contribution of His Excellency, Bishop Juan Ignacio Arrieta, secretary of the Pontifical Council for Legislative Texts, December 17, 2019: https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/12/17/191217f.html.

those relating to confidential communications, one's internal forum, or reputation. Second, imprecision about what constitutes a "report," let alone if such a report is "mandatory," is bound to cause all manner of unnecessary reporting, angst, and (quite possibly) real tragedy should highly sensitive matters be revealed at an inopportune moment, in an inappropriate manner, or to the wrong people, even many years after the alleged abuse took place. If, for instance, a priest is told repeatedly in "safe environment workshops" that "the right thing to do is disclose," even upon the slightest suspicion that abuse has occurred, and excepting *only* "sacramental confession," it is likely that he could end up betraying the confidence of a spiritual directee, of a brother priest, or of someone simply seeking spiritual guidance outside of confession. Assuming the priest did not give a "Miranda warning"[148] to every person who came to him before they began to speak (an idea as impractical as it is ridiculous), and to the extent any revelations by the priest come as a most unwelcome surprise to the people who confided in him, the priest himself may be held accountable for the considerable damage that might result.

3.2. Confidentiality in Seminary Formation Programs

Directly related to the issue of mandatory reporting is the level of confidentiality applicable within seminaries. Specifically, what is the right balance between "knowing" the men to be ordained and respecting their basic human dignity? As Eduardo Baura notes, the young men receiving formation in seminaries retain their fundamental human and canonical rights. Thus, "the intimacy of conscience cannot be the right of another, not even of the hierarchy, even in the circumstances of a seminary."[149] This is not simply a logical application of the principle that no one can be compelled to reveal his conscience to another; rather, it is an eminently practical perspective given the seminary's mission of forming fundamentally and authentically free men. Baura, with years of experience in forming seminarians, sagely wonders whether

148. The well-known "Miranda warning," in which a person who is arrested is told that "anything you say can and will be used against you in a court of law," comes from a 1966 decision of the United States Supreme Court entitled *Miranda v. Arizona*, 384 U.S. 436 (1966).

149. Baura, 744.

a mechanistic view of seminary formation may actually lead some men to create a "double-life," thus exacerbating the very problem such intrusive techniques were supposed to prevent or avoid.[150]

In this regard one notes with a certain degree of anxiety a statement in the recently released sixth edition of the *Program for Priestly Formation* from the USCCB. In the section on spiritual direction, seminarians are encouraged to "confide their personal history, personal relationships, prayer experiences, their cultivation of virtues, their temptations, and other significant topics to their spiritual director."[151] This appears to be excellent advice, completely appropriate for men who are discerning God's call to serve the faithful as an ordained priest. A sincere desire to be transparent and open to direction is an important element in a seminarian's formation, and it is vital for the Church to ordain only those men who have the sufficient maturity to serve well. Nevertheless, the document continues: "Disclosures that a seminarian makes in the course of spiritual direction belong to the internal forum. Consequently, the spiritual director is held to the strictest confidentiality concerning information received in spiritual direction. He may neither reveal it nor use it. Although the civil legal requirements might vary from state to state, the only possible exception to this standard of confidentiality would be the case of grave, immediate, or mortal danger involving the directee or another person."[152]

The citation given at the end of the passage quoted above is to the *Charter for the Protection of Children and Young People*, art. 4. Beyond the fact that the *Charter* is not law (only the *Essential Norms* are particular law for the United States), nothing in art. 4 goes as far as what is contained in the paragraph 111 cited above.[153] Particularly concerning is

150. Ibid., note 40.

151. United States Conference of Catholic Bishops, *Program for Priestly Formation*, 6th ed. (Washington, DC: USCCB, 2022) 51, no. 105.

152. Ibid., 52, no. 111.

153. Art. 4 of the Charter essentially states that dioceses and eparchies are to report allegations of the sexual abuse of a minor to the public authorities "with due regard for the seal of the Sacrament of Penance," that they are to comply with all applicable civil reporting laws and to cooperate with civil investigations, and that they are to advise victims of their right to report directly to public authorities. There is nothing in art. 4 that speaks of exceptions to confidentiality, much less in situations involving "grave, immediate, or mortal danger."

the phrase "grave, immediate, or mortal danger" allowing for "exceptions" to confidentiality. No source is given for this phrase, and no authority is cited. The phrase is not found in the *Charter*, nor the *Essential Norms*, nor the *Ratio fundamentalis*, the December 2016 document from the Congregation for the Clergy articulating the guiding principles by which men are to be prepared for priestly ministry.[154] The phrase "immediate danger" seems vague, and the use of the conjunction "or" does not appear to provide much protection against arbitrary definition or application. While "mortal" danger seems clearer (one thinks of suicide or homicide risk), the word "grave" falls short of the "very grave harm" phrase used in the *Catechism of the Catholic Church*, cited by the *Nota* from the Apostolic Penitentiary described earlier in this article. Even more importantly, in discussing "very grave harm," both the *Catechism* and the *Nota* were treating of an exception to a *professional secret*, not an exception to the confidentiality owed to internal forum matters discussed in *spiritual direction*. As has been noted in the first part of this article, civil law protections for confidential communications made to clergy are, in general, rather broad and would certainly seem to include, in the vast majority of cases, spiritual direction within seminaries. So what is the rationale for the reference to "civil law requirements" in the first place?

Of course, in the wake of the clerical sexual abuse crisis, an understandable and laudable effort has been made to attend to the proper formation of future clerics, including not only the spiritual, intellectual, and pastoral dimensions of such formation, but also the human dimension. A greater focus on psychological testing and counseling has resulted. Such enhanced attention to the sensitive areas touching a man's soul must not permit, however, the establishment of a framework that will encourage the widespread violation of fundamental natural and canonical rights, in clear opposition to established Church teaching. Still less would it permit an undue reliance on non-infallible psychological tools (or an overly broad use of such tools for purposes for which they were never designed) either in a vain attempt to construct a Nietzschean *übermensch* somehow

154. Congregation for the Clergy, *Ratio fundamentalis institutionis sacerdotalis*, December 8, 2016 (Vatican City: *L'Osservatore Romano*, 2016).

perpetually impervious to concupiscence, or as a method to try to deflect blame years later, well after a man has left the seminary and once he encounters the ordinary problems of mid-life: fatigue, doubts, and temptations from the world, the flesh, or the devil.

3.3. Document Retention Policies and Practices

Beyond mandatory abuse reporting policies, another area of concern relates to document retention policies containing potentially sensitive information. In the current environment, accused priests in this country are largely unaware of their rights and are routinely required by their dioceses or religious orders to submit to extensive mental health evaluations and to sign HIPAA releases[155] authorizing the disclosure of their protected health information, either as a *de facto* component of the canon 1717 preliminary investigation or as a *sine qua non* condition for public ministry.[156] Detailed and lengthy reports are usually generated after the evaluation and/or period of therapy, which may (but not always) include a months-long stay at an expensive residential facility. The tools employed vary, but may include invasive and/or problematic testing such as penile plethysmographs, psychoanalysis, polygraphs, or the Abel Assessment for Sexual Interest (AASI).[157]

Even before ordination, men in seminaries are subjected to rigorous psychological evaluations, the results of which may (or may not) be known to the man in question, may (or may not) be kept confidential, and may (or may not) be maintained and/or destroyed in accord with the requirements of applicable law. Similarly, every dio-

155. The acronym HIPAA stands for the Health Insurance Portability and Accountability Act of 1996, which generally provides protection for certain kinds of private health information. 45 C.F.R. § 160.103 (2023).

156. The author has personally witnessed specific incidences of such problematic practices. Nevertheless, professional duties related to attorney-client confidentiality prevent full disclosure of the particulars of such situations.

157. See MacDonald. For a critical analysis of the AASI test, see Maurice Chammah, "The Sex-Offender Test," *The Atlantic*, July 9, 2015: https://www.theatlantic.com/politics/archive/2015/07/the-sex-offender-test/397850. See also Robert Enright, Ph.D., Department of Educational Psychology at the University of Wisconsin-Madison, "The Evaluation of Accusations and the Abel Assessment for Sexual Interest" (2012): https://anyflip.com/sbtw/ifdn/basic.

cese or religious order may possess other documents containing sensitive information touching the internal forum of other members of the faithful (e.g., records relating to marriage cases at the tribunal, notes from spiritual counseling, personnel files, or documents related to accusations involving alleged clerical misconduct).[158] One wonders whether in each and every case the requirements of responsible document retention policies are being observed, especially canon 489; namely, that a secret archive is being kept secure and that each year, documents relating to "criminal cases in matters of morals" are destroyed when the accused party has died or ten years have elapsed from the condemnatory sentence.

Beyond the moral and canonical implications of neglecting duties in this regard stand the very obvious risks under the civil law. While such risks may not be immediately apparent to canonists, they should be eminently clear to civil lawyers specifically trained to identify and reduce legal hazards that pose significant risk to the mission of the entities they serve.[159] In this instance, civil lawyers should guard against unwittingly gathering evidence of "other acts" under Federal Rule of Evidence 404(b) or its state-law equivalent. For example, in the event of litigation regarding an individual priest, if records exist showing any sign whatsoever that the diocese "knew or should have known" about a priest's predilection for misbehavior and "did nothing" about it, the diocese or religious order could be at risk for greatly increased damage awards, including even (potentially) punitive damages.

The issue here is most decidedly *not* about obstructing justice or somehow "hiding" evidence of actual misbehavior from the civil authorities (or others), much less allowing a negligent diocese or religious order to evade responsibility. Rather, the issue can be framed

158. The precise level of confidentiality for a marriage preparation session ought to be made clear at the outset of the meeting, perhaps by means of a statement on the questionnaire. Also relevant in this regard are group sessions (e.g., AA meetings), where the common phrase "what is said here, stays here" may not always be true, and may (or may not) prevent attendees from believing they have a duty to report what they hear.

159. The "mission" of the Church, of course, is serving the Lord faithfully as the *speculum iustitiae* and, as always, the *salus animarum*. See John Paul II, address to the Roman Rota, February 17, 1979: *AAS* 71 (1979) 422–427, at 423; c. 1752.

as follows. If the detailed psychological report of Father X—gathered when he was in seminary formation years ago or as a result of some *pro forma* (and overly detailed) psychological evaluation conducted after an allegation of misconduct was received—shows that during his adolescence he had struggled with certain issues (e.g., pornography, same-sex attraction, sexual promiscuity, alcohol or drug use, etc.), or that he faced some kind of challenge at any point in his adult life before or after ordination, such "evidence" may very well be used against the diocese or religious order on the grounds that it demonstrates prior knowledge of "other acts" by the accused man that should have led the defendant diocese or religious order to take certain actions which they "failed" to take.

As a result, it is clear that dioceses and religious orders have reasons under both canon and civil law to maintain and adhere to strong document retention and destruction policies, in accord with customary standards employed in the business world and in compliance with applicable civil law. Those in positions of leadership who routinely retain sensitive documents that should have been destroyed, or who casually turn them over in litigation or in state investigations, may very well be charged with abuse of office or negligence in office, the penalty for which may include being removed from such office, along with the obligation to repair any harm such abuse has caused (see c. 1378).

The challenges of serving in positions of ecclesial leadership in today's environment must be readily acknowledged. Negative publicity, litigation risk, and financial pressures might threaten to foster an attitude marked more by fear than by trust in the Lord, and could lead to a hyper-sensitivity to risk. This in turn might motivate a diocese or religious order to seek to remove *any* person from public ministry who poses even a *remote* risk of any subsequent claim. Liability insurance companies selling policies to dioceses and religious orders may very well encourage such an approach, given their duty to provide a return on the investment of their stockholders or owners rather than serve the *salus animarum*. One obvious counter-argument to this attitude, however, is that given there is simply no such thing as "zero-risk" in this world, it would be profoundly unfair and imprudent to allow into public ministry *only* those against whom nothing

negative at all could or would ever be said, particularly when those people have been entrusted with witnessing in word and deed to the decidedly counter-cultural Gospel of Jesus Christ.[160]

Conclusion

Strong arguments under both civil and canon law exist in favor of zealously guarding attacks on the internal forum, given its role in the life of individual members of the faithful and its importance in the life of the Church generally. At present, even the civil laws of the United States appear to afford it great weight, reflective of at least an historical appreciation of the role such a natural right plays in the life of human communities. Church teaching, including recent authoritative guidance from the Holy See, clearly articulates the need for those in both civil and ecclesial governance to respect the sanctity of the internal forum, even (or especially) with respect to heinous crimes. As Monsignor G. Paolo Montini has pointed out, a healthy dialogue is needed today between civil and ecclesial leaders on the proper role of law in general, and canon law in particular. Otherwise, the Church risks simply being ignored, assimilated, or silenced.[161] All the more reason for ecclesial decision-makers to be wary of taking steps that may appear positive in the often fickle eyes of the secular world, but do not comport with the rich patrimony of moral and canonical principles entrusted to the Church. Those in positions of ecclesial leadership should make use of all the tools available to them under the civil law to protect the fundamental juridical goods of the faithful.

The moral philosopher Sissela Bok has noted that "while all deception requires secrecy, all secrecy is not meant to deceive."[162] Such an aphorism might be important to keep in mind in the ongoing effort to balance the twin goals of disseminating information important for protecting vulnerable people on the one hand and, on the other, safeguarding the sanctuary of conscience.

160. See 1 John 3:13: "Do not be amazed, brothers, if the world hates you."

161. Montini, "La Chiesa tra l'impegno per la trasparenza e la tutela del segreto," 540.

162. Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (New York: Vintage, 2011) 7.

ABSTRACT

In recent years, the sacramental seal and the internal forum have been subjected to numerous attacks in both the mainstream media and in state legislatures. Arguments are made with increasing frequency that "secrecy" has no place in modern society, at least when respecting "confidential communications" means certain heinous crimes may go unreported. Nevertheless, respect for the contents of the internal forum is a long-established principle of morality and canon law, and its importance in the life of the Church cannot be ignored. This article begins with an examination of the current civil laws of the United States respecting confidential communications made to clergy. It then considers the relevant moral and legal principles, including recent and important relevant guidance from the Holy See. Finally, the article concludes with a review of three specific areas in which the balance between sharing necessary information and protecting the internal forum are especially imperative: abuse reporting systems, seminary formation programs, and document retention policies and practices.