

# REMEDYING MISUSE OF PENITENTIAL COMMUNICATIONS

## A Bill Proposal to the California State Legislature

2019-2020 Session

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### ISSUE

Religious entities are afforded privilege (clergy-penitent privilege) in communications between a penitent member of that entity and member of that entity's clergy. The privilege is often misused or abused to the effect, whether negligent or intentional, to silence victims, protect abusers, and conduct internal investigations in preparation for litigation. This poses an obvious threat to public safety as abusers are enabled to continue their criminal conduct, while victims and their families are discouraged from seeking help from qualified counselors or the appropriate law enforcement authorities.

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### BACKGROUND

The purpose of the clergy-penitent privilege is to fulfill “the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.”<sup>1</sup> This privilege should be protected but not to an unlimited degree. It is therefore interesting to note that the privilege in the United States did not exist at common law but was rather the product of statutes enacted by state legislatures that was intended to be narrowly construed.<sup>2</sup> Some organizations conduct disciplinary investigations of violations of their own rules and beliefs, including criminal conduct, in order to render church discipline and prepare for litigation.<sup>3</sup> And documented cases reveal that such communications are freely discussed, documented, and distributed among church leadership, in which clergy-penitent is often invoked.<sup>4</sup> In other cases, priests have admonished victims to remain silent about abuse and “‘sweep it under the floor and get of rid it’ because ‘too many people would be hurt’ if the victim were to disclose the abuse to others.”<sup>5</sup> “According to the Catholic Catechism, the act of confession is an intrinsically private communion between God and the sinner, with the priest as mediator.”<sup>6</sup> But it is clear that religious entities have failed to uphold their own principle—a principle protected under California law.

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### SUMMARY OF PROPOSED BILL

The current bill draft proposed by both Stop Child Abuse—Advocates for Reform and Safety (SCAARS)

and the California Civil Liberties Advocacy (CCLA), would enhance protections for the penitent member while limiting the extent of the religious entity's right to invoke the privilege. If enacted, the proposed bill would define penitential communications as only those initiated voluntarily by the penitent member to only one authorized clergy member. The bill would also require the clergy member who claims the privilege to take reasonable actions to prevent additional abuse by encouraging the abuser to seek professional help or contact law enforcement. The bill would also prohibit a member of the clergy from admonishing a victim to keep the matter a secret and would instead require the clergy member to encourage the victim to seek help and to provide a list of community resources, including the contact information of local law enforcement agencies, upon the request of the victim.

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### FOR MORE INFORMATION

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### REFERENCES

- <sup>1</sup> *Trammel v. U.S.* (1980) 445 U.S. 40, 51.
- <sup>2</sup> Pudelski, *The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-Communicant Privilege in a Post-Smith World* (2004) 98 N.W.U L. Rev. 703, 708.
- <sup>3</sup> Gledhill, Judge questions whether confession privilege should extend to Jehovah's Witnesses (Nov. 10, 2015) Christian Today.
- <sup>4</sup> Recent Clergy Privilege Case Serves as a Tale of Caution (Nov. 16, 2016) TeliosLaw.)
- <sup>5</sup> Jenkins, Unholy Secrets: The legal loophole that allows clergy to hide child sexual abuse (Aug. 8, 2016) ThinkProgress.)
- <sup>6</sup> Deagon, Religious freedom, the confessional and the Royal Commission (Sep. 27, 2017) Asia & The Pacific Policy Society.