

APPENDIX 2

PACIFIC JUSTICE INSTITUTE —
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Gerald A. Hill, Senator
State Capitol, Room 5035
Sacramento, CA 95814

Re: Senate Bill 360 – Oppose

Dear Senator Hill,

Pacific Justice Institute – Center for Public Policy¹ submits this letter to address Senate Bill 360. Because the proposed law seeks to criminalize a centuries-old religious practice, regretfully we must oppose the Bill.

SUMMARY OF THE BILL

The Bill removes the clergy-penitent privilege in communications involving suspicion of abuse or neglect of a minor.² This results in making all ministers mandatory reporters of abuse or neglect.³ Though engaged in a purely religious function of hearing a confidential communication from a penitent, a cleric who fails to report the contents of the communication immediately by telephone and file a written report within 36-hours⁴ faces prosecution with penalties including six months of incarceration, or a fine of \$1,000 or both.⁵

EXPLANATION OF CLERGY/PENITENT PRIVILEGE

Historically, the disclosure of sins stands as a practice dating back two millennia. The confession of sins frees the individual and facilitates reconciliation with others.⁶ “Through such an admission, man looks squarely at the sins he is guilty of, takes responsibility for them, and thereby opens himself again to God and to the communion of the Church in order to make a new future possible.”⁷ Sitting as one of the seven sacraments, the Roman Catholic Church refers to this as the sacrament of *Penance and Reconciliation*.⁸ The penitent makes the disclosure to a priest⁹ (hence the common name *Confession*). Confession involves initial conversion seen as “the first step in returning to the Father from whom one has strayed by sin.”¹⁰ Further, confession sits as part of the necessary ongoing part of the Christian life for sins committed and a reconciliation to others and the

¹ This organization is established pursuant to section 501(c)(4) of the Internal Revenue Code.

² Penal Code § 11166(d).

³ Penal Code § 11165.7(a)(32).

⁴ Penal Code § 11166(a).

⁵ Penal Code § 11166(c).

⁶ Code of Canon Law of the Roman Catholic Church, Canon 1455.

⁷ Id.

⁸ The sacraments stand as Baptism, Confirmation, Eucharist, Penance, Anointing of the Sick, Holy Orders, and Matrimony. Code of Canon Law of the Roman Catholic Church, Canon 1113.

⁹ Code of Canon Law of the Roman Catholic Church, Canon 1456.

¹⁰ Code of Canon Law of the Roman Catholic Church, Canon 1423.

reintegration of “forgiven sinners into the community of the People of God from which sin alienated or even excluded them.”¹¹ In the early centuries of Christendom, the custom was for public penance of certain grave sins.¹² However, during the seventh century “Irish missionaries, inspired by the Eastern monastic tradition, took to continental Europe the ‘private’ practice of penance.”¹³

This private practice is central to confession since that time. Communications made to a priest during confession cannot be subject to disclosure. “The sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason.”¹⁴ The penalty for violating the confessional is excommunication.¹⁵

The Roman Catholic Church is not an outlier with regards to private disclosure of wrongdoing. Similarly, the Orthodox Church also practices the *Sacrament of Holy Confession*.¹⁶ The Church of England recognizes the inviolability of an act of confession by a penitent to a priest and the profound obligation of confidentiality. “Let the priest who dares to make known the sins of his penitent be deposed.”¹⁷ Likewise, the Church of Jesus Christ of Latter-Day Saints views confidential admissions of wrongdoing as an essential part of the repentance process.¹⁸ Moreover, the American Baptist Churches USA produced a position paper that reads in part, “The effective pastoral counseling of the ministry depends upon the assurance of those who seek it that the information they reveal in confidence to their pastoral counselor may be given with full freedom.”¹⁹ In a 1987 report the Presbyterian Church USA reaffirmed the historic position of the denomination “that it is a spiritual and professional duty of clergy to hold in confidence matters revealed to them in their counseling, caring and confessional ministries, and that being called to testify in a court of law does not negate this sacred obligation, the law of God being prior to the laws of human courts.”²⁰ Although Lutherans are not a homogenous group, on this issue they stand in one accord. The Augsburg Confession reads, “Of confession they teach that Private Absolution ought to be retained in the churches, although in confession an enumeration of all sins is not necessary.”²¹

Of course, this is a very compressed summary of Christian religious practices involving confidential confessions. The undersigned practice in the area of church law and can relate anecdotally that besides the denominations described above, about half of the Evangelical, Fundamentalist and Pentecostal churches for which he provides legal counsel related to this issue hold some form of confidentiality in pastoral counseling.

¹¹ Code of Canon Law of the Roman Catholic Church, Canon 1443.

¹² Such sins were committed after Baptism and included things such as idolatry, adultery, and murder. Code of Canon Law of the Roman Catholic Church, Canon 1447.

¹³ Id.

¹⁴ Code of Canon Law of the Roman Catholic Church, Canon 983 § 1.

¹⁵ Code of Canon Law of the Roman Catholic Church, Canon 1388.1.

¹⁶ *Apostolic Constitutions* 8, 8-9; Gregory of Neocaesarea, *Canon XII*. For confession before a spiritual father, cf. Socrates, *Ecclesiastical History* 5, 19 and 7, 16; John Chrysostom, *Sermon 4 on Lazarus* PG 48:1012.

¹⁷ “Let the priest who dares to make known the sins of his penitent be deposed.” *Decretum, Secunda pars, dist. VI, c. II* (1151). See also, The Episcopal Church’s *The Book of Common Prayer* rite, “The Reconciliation of a Penitent.”

¹⁸ Mosiah 26:29 and Doctrine and Covenants 59:12. See also, the discussion in *Scott v. Hammock*, 870 P.2d 947 (Utah 1994).

¹⁹ *American Baptist Policy Statement on Privileged Communications*, American Baptist Churches, U.S.A. (June 19, 1978)

²⁰ Report of the Advisory Council on Church and Society, A Resolution on Clergy Confidentiality, Minutes of the 199th General Assembly 344 (1987).

²¹ *The Book of Concord – The Confessions of the Lutheran Church*, Augsburg Confession Article XI (1530). Fifty years ago the American Lutheran Church issued a statement which reads, “The Church Council recognizes and reaffirms that it is a part of the traditional discipline and practice of the Lutheran church that the pastor hold inviolate and disclose to no one the confessions and communications made to him as a pastor without the specific consent of the person making the communication.” Minutes of the Church Council of the American Lutheran Church 16 (1960). The Missouri Synod also holds to the Seal of Confession. *The Pastor-Penitent Relationship - A Report of the Commission on Theology and Church Relations of The Lutheran Church—Missouri Synod* (September 1999).

Although these newer protestant denominations or independent churches do not have a well-developed theology on this issue as their counterparts, the nature of that practice is such that the ministers hold in confidence confessions of crimes. Further, these clerics decline to give testimony in a legal proceeding which solicits disclosure of confidential information revealed in pastoral counseling.

LEGAL DISCUSSION

More than a century ago the U.S. Supreme Court opined that “suits cannot be maintained which would require the disclosure of the confidences of a confessional.”²² The reason rests in the nature of privileged communications. In a case dating back to the Civil War involving breach of contract between the country’s Commander in Chief (President Lincoln) and a spy, the *Totten* court explained that the evidence necessary to prosecute such a case requires the parties to reveal national secrets. The high court explained that such a case cannot proceed under the same principle that protects the communications between an attorney and client, a physician and a patient, a husband and wife, and as quoted above, a priest and penitent. That precept has not gone out of legal fashion. In the modern era the Court wrote, “The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust.”²³

By long tradition and public policy, statements made by and between these parties stand as outside of the reach of the judiciary. If the courts will not give ear to privileged statements, surely law enforcement possesses no greater right to access such communications.

Some protest that the right lies only in legislative grace. In other words, a statute provides the only basis for the privilege. If such were the case, then there is no principled reason why Senate Bill 360 could not be amended to make attorneys mandated reporters. But of course, conscripting lawyers into the ranks of law enforcement would turn the right to zealous and effective assistance of counsel on its head. The legal system, rooted in the constitutionally-based rule of law, would cease to exist as we know it.

Similarly, the clergy-penitent privilege rests in the right to the free exercise of religion. The First Amendment compels the privilege, regardless of the existence of a delineating statute. In a case in which a prosecutor relied on an Oregon statute to record a confession by a jailed suspect to a Catholic priest, the Ninth Circuit Court of Appeals found the argument that a state statute can override the free exercise of religion clause unconvincing. The Ninth Circuit explained that if the government could record such confessions, it would invade the religious rights of the inmates and make it impossible for clerics to administer this sacrament.²⁴ The appellate panel quoted at length from an 1813 case in which a court issued a subpoena for a minister to testify in a criminal trial. In that case, the defendant confessed to the receipt of stolen goods to a Reverend Anthony Kohlmann. Rev. Kohlmann refused to testify, citing “the law of God and his church [that] whatever is declared in confession, can never be discovered,” but must “remain an eternal secret between God and the penitent soul—of which the confessor cannot, even to save his own life, make any use at all to the penitent’s discredit, disadvantage, or any other grievance whatsoever.”²⁵ The court ruled in favor of Rev. Kohlmann stating,

The sacraments of a religion are its most important elements. We have but two in the Protestant Church – Baptism and the Lord’s Supper – and they are considered the seals of the covenant of

²² *Totten v. U.S.*, 92 U.S. 105, 107 (1875).

²³ *Trammel v. U.S.*, 445 U.S. 40, 51 (1980).

²⁴ *Mockaitis v. Harclerod*, 104 F.3d 1522, 1530 (9th Cir. 1997).

²⁵ *Cox v. Miller*, 296 F.3d 89 (2nd Cir. 2002) quoting *People v. Phillips* (N.Y. Ct. Gen. Sess. 1813), excerpted in *Privileged Communications to Clergymen*, 1 Cath. Law. 199, 200 (1955).

grace. Suppose that a decision of this court, or a law of the state should prevent the administration of one or both of these sacraments, would not the constitution be violated, and the freedom of religion be infringed?²⁶

Two things from the passage above demand notice. First, the New York Court of General Sessions centered its analysis on the First Amendment's free exercise of religion clause. Second, the court handed down the decision fifteen years prior to the codification of the clergy-penitent privilege, i.e., the New York Legislature enacted the privilege in 1828²⁷ whereas the New York Court of General Sessions handed down the decision in 1813. Therefore, the notion that the clergy-penitent privilege rests at the sole discretion of the legislature exercising its police powers is not tenable.

The removal of the clergy-penitent privilege under Senate Bill 360 violates religious liberties and thus falls short of the powers reserved to the States. As explained above, the Bill explicitly revokes an age-old Christian practice and, for some denominations, an actual sacrament. What is more, the revocation criminalizes this rite.²⁸ When lawmakers pass a law they know to breach the wall separating church and state erected through the First Amendment, such stands not as a legitimate exercise of the state's police powers but as an act of lawlessness.

The intrusion into religious liberties is exacerbated in light of the trajectory of what can trigger the reporting requirements. Consider this. Government entities and officials define *abuse* and *neglect* with such breadth that the ordinary turbulence of family struggles comes under the Child Abuse and Neglect Reporting Act.²⁹ The Legislative Analyst's Office wrote that under California law, "*Emotional abuse* is nonphysical mistreatment, resulting in disturbed behavior by the child, such as severe withdrawal or hyperactivity. Emotional abuse includes willfully causing any child to suffer, inflicting mental suffering, or endangering a child's emotional well-being."³⁰ The Los Angeles Department of Children and Family Services defines *emotional abuse* as "failure to provide warmth, attention, supervision, normal living experiences."³¹ The definition from the Humboldt County Department of Social Services defines *emotional abuse* as "non-physical mistreatment that endangers a child's emotional health."³²

Ordained youth pastors frequently counsel teenagers, or their parents, who seek help to navigate family conflicts. This could include a mother and 13-year-old daughter in a fiery argument over the amount of makeup or length of a skirt. Or the young teenage boy who finds himself distraught because his parents will not support his decision to come out as gay. Ordinarily, a pastor listens to confession of sin, explains the application of religious texts, provides counsel and comfort, and gives direction on how to make amends. Should the clergy-penitent privilege disappear from the legal landscape, young ministers must "immediately" determine if the level of family tension falls within the government's broad and amorphous meaning of *emotional abuse*.³³ But if instead of bringing in the police and child protective services, he hangs on to his religious duties of providing

²⁶ *Mockaitis*, 104 F.3d at 1532 quoting *People v. Phillips* (N.Y. Ct. Gen. Sess. 1813), 1 Cath. Law. at 207.

²⁷ N.Y. Rev. Stat. 1828, Pt. 3, ch. 7, tit. 3, § 72.

²⁸ Penal Code § 11166(c).

²⁹ Penal Code §§ 11164, et seq.

³⁰ *Child Abuse and Neglect in California – Part 1*, Legislative Analyst's Office, January 1996.

https://lao.ca.gov/1996/010596_child_abuse/cw11096a.html (accessed March 20, 2019). See also, "Child Abuse and Reporting Guidelines," California Department of Education <https://www.cde.ca.gov/lr/ss/ap/childabusereportingguide.asp> (accessed March 20, 2019).

³¹ *Frequently Asked Questions*. <http://dcfs.lacounty.gov/faq.html> (accessed March 20, 2019).

³² County of Humboldt, *Reporting Child Abuse*, <https://humboldt.gov.org/533/Reporting-Child-Abuse> (accessed March 20, 2019).

See also, Kern County Department of Human Services, *Child Abuse Reporting*, https://www.kerncounty.com/dhs/ChildWelfareServices/child_abuse_reporting.html (accessed March 20, 2019).

³³ Penal Code § 11166(a).

confidential spiritual counsel, the minister stands as subject to prosecution. In removing the clergy-penitent privilege, the Bill mandates a betrayal of confidence in violation of a traditional religious duty held by clergy. In order to protect themselves, parishioners, and the penitent, preachers will say, “Don’t come to us with your family problems.” In sum, the proposed Bill serves to drive a wedge of distrust between the faithful and their ministers.

CONCLUSION

The list of categories of mandated reporters now stands at forty-six (46).³⁴ This includes dog catchers³⁵ and computer technicians.³⁶ Needless to say, California has enlisted a sufficient host of vocations to adequately bring suspicions of child abuse and neglect to the attention of law enforcement. But unlike other professionals, Senate Bill 360 places California’s clergy in peril of violating the sacred trust that their faith requires or face prosecution. A tragic irony arises when ministers find themselves in a position of damned if they do and damned if they don’t. In sum, the Bill cannot be reconciled with the First Amendment, for the guarantee of the free exercise of religion will not allow clerics to be gored by one or the other horns of that dilemma. Therefore, Pacific Justice Institute – Center for Public Policy feels compelled to register our opposition to the Bill.

Very truly yours,



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³⁴ Penal Code Section 11165.7.

³⁵ Penal Code Section 11165.7(a)(31).

³⁶ Penal Code Section 11165.7(a)(43).