

# Safeguarding the Seal of Confession

*Anthony Fisher\**

In 1834 convicts of the Norfolk Island penal colony conspired to overpower the troops and take possession of the island. A gang on its way to work turned on their guards. Others, having feigned illness and been transferred to hospital, broke their chains and came to their assistance. But the third wave, of farm workers with farm implements, arrived too late to be of any help. In the fiasco that followed several were killed and after a trial in Sydney thirty-one men were sentenced to death.

Both Anglican and Catholic chaplains were sent to the island to attend the condemned men. The Anglican regaled those at the commandant's table with stories of what the men at the gallows had confessed to him before they died. 'This surprised people very much and made ... the Attorney-General [John Kinchela], who was so good a Catholic, very indignant.' The result was that no-one was willing thereafter to have a 'conversation' with the Anglican clergyman before receiving Holy Communion or being executed.<sup>1</sup>

The Catholic chaplain was William Bernard Ullathorne, a Benedictine monk, later Archbishop of Birmingham, and at that time Vicar General for New South Wales while it awaited the arrival of the first Catholic bishop, John Bede Polding. Ullathorne's approach to the confessions of the men was very different.

Before the executions the Commandant [James Anderson] asked me privately if I had any reason to believe that there was a conspiracy to escape from the prison. I replied: 'My dear Major, of what I know of those men, I know less than of that of which I know nothing.' He

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1. Leo Madigan, ed., *The Devil Is a Jackass: Being the Dying Words of the Autobiographer William Bernard Ullathorne* (Leominster, UK: Gracewing, 1995), 116–25.

apologised with the remark that he had for the moment forgotten the rigid secrecy of the Confessional.<sup>2</sup>

Even the Protestant establishment in colonial times recognised that whatever Ullathorne had learnt when hearing a man's confession was sacrosanct and would never be revealed.

More recently, however, the Royal Commission into Institutional Responses to Child Sexual Abuse (Australia, 2013–17) recommended in its *Criminal Justice Report* (August 2017) and its *Final Report* (December 2017) that Australian law should no longer recognise priest–penitent or confessional privilege, at least with respect to confessions of perpetrators or victims of child sexual abuse. It is proposed that mandatory reporting of knowledge or suspicions in this area should apply to confessors as much as to anyone else, and that there should be a new criminal offence of not reporting such matters in an institutional context.

In the July 2017 number of this journal Fr Ian Waters published an 'authoritative' article about the nature and extent of the seal or secret (hereafter 'the seal of confession') of the sacrament of confession, penance or reconciliation ('the sacrament of reconciliation').<sup>3</sup> He prefaced his commentary by noting that 'whatever is written or explained in connection with this matter will never be accepted or appreciated by all Catholics because of ingrained prejudice or ignorance'. And he concluded that those who claim that whatever a penitent reveals in confession is protected by the seal are being canonically 'imprecise' and 'quite incorrect'. It is to be hoped that the present article, which offers a different account of the theology, practice and law of the sacrament from that of Fr Waters, does so without prejudice, ignorance or imprecision.

### ***History of the Seal of Confession***

Fr Waters treats the seal of confession from a purely canonical point of view and so takes as his starting point the canons of the Fourth Lateran Council (1215). This council, he explains, was the first to legislate the seal and limited what was protected to the sins of the penitent; anything else mentioned by a penitent, such as the sins of others, was not covered; and as the first and last church council to pronounce on the matter, its understanding must be regarded as decisive.<sup>4</sup>

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2. *Ibid.*, 124.

3. Ian Waters, 'The Seal of Confession', *Australasian Catholic Record* 94, no. 3 (July 2017): 330–43.

4. Fuller histories of the sacrament of reconciliation and of the seal of confession include: Peter Biller and A.J. Minns, *Handling Sin: Confession in the Middle Ages* (York, UK: York Medieval Press, 1998); Adrienne Connaghan, 'The Seal of Confession and Issues of the Civil Law', *Canonist* 2, no. 2 (2011): 143–66; Brendan Daly, 'Seal of Confession: A Strict Obligation for Priests', *Australasian Catholic Record* 90, no. 1 (Jan 2013): 3–21; Edward Hannah, 'The Sacrament of Penance', *Catholic Encyclopedia*, vol. 11 (New York: Robert Appleton, 1911); Kevin Irwin, *The Sacraments: Historical Foundations and Liturgical Theology* (New York: Paulist, 2016); Bertrand Kurtzschid, *A History of the Seal of Confession*, trans. F. Marks (St

But it is to the Scriptures that we must turn for the origins of the practice of confession of sins,<sup>5</sup> for lessons about God's readiness to forgive sins especially in response to Christ's self-sacrifice,<sup>6</sup> for testimony to Christ himself absolving sins,<sup>7</sup> and for the crucial texts in which he confers authority on the church to absolve in his stead.<sup>8</sup> Confessing and forgiving sins was already practised in the New Testament period.<sup>9</sup> There is evidence of this practice also in the following centuries, sometimes publicly during the divine liturgy, sometimes more privately. St Augustine tried to 'heal secret sins in secret, without exposing them' and already by the fifth century public confession was in decline.<sup>10</sup> In 459 Pope Leo the Great wrote to the bishops of Campania, Samnium and Picenum to abrogate any surviving practice of public confession and direct that thereafter confession always be secret.<sup>11</sup> He explained that some people would not bring certain sins to confession if there was a risk of publicity and he wanted there to be no deterrent to receiving this sacrament. 'During the seventh century Irish missionaries, inspired by the Eastern monastic tradition, took to continental Europe the "private" practice of penance.'<sup>12</sup> Thus long before it was a matter for the canonists, secret confession was recognised in the faith and pastoral practice of Christians.

Dogmatic definitions, canonical legislation and civil law then followed suit. By the time of the Council of Douzy (874), Gratian (1151), Lateran IV (1215) and Pope Martin V's bull *Inter Cunctas* (1417), total secrecy regarding the sacrament of reconciliation was expected and this was thought to be of apostolic origin and of the very logic of the sacrament. Those who broke the seal were deposed from priestly office, excommunicated and further punished (e.g., with lifelong banishment or penance in a monastery). Some theologians, such as St Thomas Aquinas, thought that a penitent might in certain circumstances release his confessor from the seal; or that a penitent might, outside of the sacrament, repeat

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Louis, MO: Herder, 1927), 5–6; E.F. Latko, 'Auricular Confession', *New Catholic Encyclopedia*, vol. 4 (New York: McGraw-Hill, 1967), 131; Joseph Martos, *Doors to the Sacred: A Historical Introduction to Sacraments in the Catholic Church* (Liguori, MO: Liguori, 2014); John McCarthy, 'Seal of Confession', *New Catholic Encyclopedia*, vol. 4 (New York: McGraw Hill, 1967), 134; J.T. McNeill, *A History of the Cure of Souls* (New York: Harper and Row, 1951); R. Nolan, 'The Law of the Seal of Confession', *Catholic Encyclopedia*, vol. 13 (New York: Robert Appleton, 1912); Ladislav Orsy, *The Evolving Church and the Sacrament of Penance* (Denville, NJ: Dimension Books, 1978); C.M. Roberts, *A Treatise on the History of Confession* (1901; repr., Cambridge: Cambridge University Press, 2013); J.R. Roos, *The Seal of Confession* (Washington, DC: Catholic University of America, 1960); Cyrille Vogel, *Le pécheur et la pénitence dans l'Église ancienne* (Paris: Cerf, 1982) and *Le pécheur et la pénitence au moyen-âge* (Paris: Cerf, 1982).

5. Lev 5:5-6; 16:21; Num 5:6-7; 1 Sam 7:6; Neh chap. 9; Ps 32:5; 51; etc.

6. Num 14:19-21; Neh 9:17; Ps 86:5; 103:12; Dan 9:9; Isa 1:18; 43:25-26; 55:7; Jer 31:34; Mic 7:18-19; Acts 3:19; Eph 1:7; Col 1:13-14; 1 John 1:9; Heb 10:17; etc.

7. Mark 2:1-12; Matt 9:1-8; Luke 5:20; 7:48; etc.

8. Matt 16:18-19; 18:15-20; John 20:19-23; etc.

9. E.g. Matt 3:6; Luke 17:3-4; Acts 24:16; Eph 4:31-32; Jas 5:16; 1 John 1:9.

10. Orsy, *Evolving Church*; Connaghan, 'Seal of Confession and Issues of Law', 145.

11. Leo the Great, *Magna indignatio*, 6 March 459. DS 323.

12. *Catechism of the Catholic Church*, rev. edn (Strathfield, NSW: St Pauls, 1997), n. 1447. Henceforth CCC.

matters previously reported within confession; or that a priest might come to learn outside of confession something also reported to him within. Only in these circumstances, the Angelic Doctor thought, might a priest make use of knowledge from confession, and even then he should take all reasonable measures to avoid scandal. Others such as St Robert Bellarmine allowed more exceptions.<sup>13</sup>

Fr Waters says that church councils before and since Lateran IV had nothing to say about the seal of confession, but it is certainly presumed in talk of the ‘secrecy’ of confession in, for example, the Council of Trent and the catechisms that came after Trent and Vatican II. Thus penitents were exhorted, at least from the Middle Ages, to bring to the secrecy of the sacrament all sins of which they were aware: mortal sins of necessity and at least annually; but venial sins also, if they were conscious of them.

In addition to reporting matters that both the penitent and confessor regarded as sins, penitents have sometimes spoken of other matters:

- matters that the penitent regards as sins but the confessor does not
- matters the sinfulness of which is unclear to the confessor, whether for lack of information or due to moral or psychological complexity
- allegations of and allusions to facts regarding the penitent or others
- allegations of sins committed by other people
- plans for future sins
- habits, dispositions, fantasies, temptations, secrets and relationships of the penitent
- incomplete confessions.

These ‘other matters’ may or may not bear upon the sinfulness of the penitent’s acts or appropriate remedies and spiritual counsel, but experienced confessors recognise that much is said in confession that is not precisely or only confession of sin. In the confidentiality of the sacrament of reconciliation, all manner of things may ‘tumble out’, as the penitent manifests his or her conscience to God.

Does the seal of confession cover everything revealed in the circumstances (what might be called ‘the broad view’) or only the sins of the penitent (what might be called ‘the narrow view’)? This requires examination not just of canon law, but of sacramental and moral theology, pastoral practice, canon law and even civil law around the sacrament of reconciliation. Only then can the question be answered of whether the seal should be circumvented, circumscribed or broken, as some have suggested.

### ***Theology of the Seal of Confession***

What is the faith of Christians regarding the sacrament of reconciliation and what might this say to the question of the nature and scope of the seal of confession? The *Catechism of the Catholic Church* describes it as the sacrament

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13. Kurtscheid, *History of the Seal*, 286; Connaghan, ‘Seal of Confession and Issues of Law’, 146–7.

of conversion, penance, confession, forgiveness and reconciliation.<sup>14</sup> ‘Christ instituted the sacrament of Penance for all sinful members of his Church: above all for those who, since Baptism, have fallen into grave sin ... Individual and integral confession of grave sins followed by absolution remains the only ordinary means of reconciliation with God and with the Church.’<sup>15</sup> At the heart of this spiritual resurrection from the death of sin to the new life of grace is contrition–confession–satisfaction on the part of the penitent and absolution on the part of the priest standing in the person of Christ.<sup>16</sup> This makes confession a precious ministry of mercy. Genuinely contrite penitents who confess and agree to make reasonable satisfaction must be granted absolution; while they can be required to make restitution or reparation where appropriate, they cannot be required to fulfil an overly burdensome act of satisfaction (or ‘penance’).

That the sacrament is focused on the forgiveness of sin is clear from the church’s teaching that only those who are conscious of serious sin are bound to receive it and that children under the age of reason may not.<sup>17</sup> It can be a misunderstanding, even abuse, of the sacrament of reconciliation to see it primarily as a site for spiritual or psychological counselling etc., even if some of this unavoidably occurs there. And this would seem to support the view that the seal of confession applies to only the sins of the penitent. Thus the Tridentine Catechism taught that:

Secrecy as regards confession should be strictly observed, as well by the penitent as by the priest. Hence, no one can, on any account, confess by messenger or letter, because in those cases secrecy would not be possible ... The laws of the Church threaten the severest penalties

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14. See part 2, chap. 2, art. 4, q. 1 (CCC, nn. 1422–4). For authoritative Catholic teaching on this sacrament, see, in addition to the Catechism, John Paul II, *Reconciliatio et Paenitentia*: Apostolic Exhortation on Reconciliation and Penance in the Mission of the Church Today (1984); Address to the Apostolic Penitentiary, Confessors, and Priests and Seminarians, 12 March 1994; *Sacramentorum Sanctitatis Tutela*: Apostolic Letter with Accompanying Norms, 30 April 2001; *Misericordia Dei*: Apostolic Letter on the Celebration of the Sacrament of Penance (2002); Benedict XVI, *Revised Norms on More Serious Delicts*, 21 May 2010; Canadian Conference of Bishops, *The Beauty of Mercy: Pope Francis on Confession* (2016).

Theologies of the sacrament of reconciliation and of the seal of confession include: Chris Aridas, *Reconciliation: Celebrating God’s Healing Forgiveness* (Galilee Trade, 1987); Louis Bouyer, *The Word, Church and Sacraments in Protestantism and Catholicism* (San Francisco: Ignatius, 2004); Arthur Chappell, *Regular Confession: An Exercise in Sacramental Spirituality* (New York: Peter Lang, 1992); Vinny Flynn, *7 Secrets of Confession* (San Francisco: Ignatius, 2013); Frank O’Loughlin, *The Future of the Sacrament of Penance* (Mahwah, NJ: Paulist, 2009); Bernhard Poschmann, *Penance and the Anointing of the Sick*, trans. F. Courtney (Freiburg, Germany: Herder, 1964); James Schall, *A Line Through the Human Heart: On Sinning and Being Forgiven* (Kettering, OH: Angelico, 2016); Kurt Stasiak, *From Sinners to Saints: A Guide to Understanding the Sacrament of Reconciliation* (Mahwah, NJ: Paulist, 2014).

15. CCC, nn. 1446, 1497; cf. nn. 1486–9.

16. CCC, nn. 1448, 1450–68.

17. CCC, nn. 1456–7.

against any priests who would fail to observe *a perpetual and religious silence concerning all the sins* confessed to them.<sup>18</sup>

So, too, the Vatican II Catechism teaches that:

Given the delicacy and greatness of this ministry and the respect due to persons, the Church declares that every priest who hears confessions is bound under very severe penalties to keep *absolute secrecy regarding the sins that his penitents have confessed* to him.<sup>19</sup>

But there are other aspects of the sacrament of reconciliation alongside the forgiveness of particular personal sins. Ongoing conversion is emphasised in the spiritual tradition and contemporary theology, such that the sacrament is both a moment of grace in which particular sins are absolved and a part of a lifelong trajectory. ‘The frailty and weakness of human nature ... [and] the inclination to sin that tradition calls *concupiscence*’ are addressed in ‘the struggle of conversion directed toward holiness and eternal life to which the Lord never ceases to call us’.<sup>20</sup> Hence the church’s exhortation to regular confession, even of everyday faults that are not serious sins, and its situating of sacramental penance within a program of visible signs and causes of interior conversion, including fasting and mortification, reading Sacred Scripture, prayer and Eucharist, almsgiving to the poor and gestures of reconciliation with others, pilgrimages and other penances, and examination of conscience, fraternal correction and spiritual direction.<sup>21</sup> In the prayer of absolution priest and penitent pray for *pardon*—but also for *peace*. As ministers of mercy priests are encouraged not only to absolve sins in this sacrament but to give wise spiritual counsel and other assistance promoting Christian maturity.<sup>22</sup>

There is clearly much more going on in the sacrament of reconciliation than the remedy for particular past personal sins, even if this is its heart. Penitents often reveal many secrets about themselves and seek counsel, not just about sins committed but temptations suffered, temperamental and relationship difficulties etc., assuming that the whole spiritual conversation is ‘covered’ by the seal of confession. Indeed, the priest is presented in the tradition as a mere mediator or conduit in this sacrament for a conversation between the penitent and God, someone ‘overhearing’ that conversation or with a privileged window into a person’s conscience; he is there only ‘on behalf of Christ’.<sup>23</sup> Martin Luther, who might be said to have been somewhat ‘conflicted’ about this sacrament,

18. *The Catechism of the Council of Trent*, trans. John McHugh and Charles Callan, <http://www.saintsbooks.net/books/The%20Roman%20Catechism.pdf> 183; my emphasis.

19. CCC, n. 1467; my emphasis.

20. CCC, nn. 1425–33.

21. CCC, nn. 1430, 1434–9, 1447, 1458, 1493.

22. CCC, nn. 1460, 1466.

23. CCC, nn. 1441–2.

nonetheless gave witness to Christian faith up to the Reformation when he was asked about an alleged child murderer. He responded, ‘She did not confess to me, but to the Lord Jesus Christ; since Christ keeps the secret, I also must keep it and unhesitatingly say: I did not hear it, Christ heard it, so only He may reveal it’.<sup>24</sup>

Thus where the post-Trent *Roman Catechism* declared that sins must be confessed personally and that priests who revealed their penitents’ sins be severely punished, it also provided assurance that everything made known in the sacrament of reconciliation would be protected:

the faithful are to be admonished that there is no reason whatever to apprehend that *what is made known in confession* will ever be revealed by the priest to anyone, or that by it the penitent can at any time be brought into danger of any sort ... Let the priest, says the great Council of Lateran, take special care, neither by word or sign, nor by any means whatever, to betray the sinner in the least degree.<sup>25</sup>

The post-Vatican II Catechism likewise says that priests are bound to absolute secrecy regarding the sins confessed by their penitents, but it goes on immediately to suggest that the whole conversation is ‘sealed’:

He can make no use of *knowledge that confession gives him* about penitents’ lives. This secret, which admits of *no exceptions*, is called the ‘sacramental seal’, because what the penitent has made known to the priest remains ‘sealed’ by the sacrament.<sup>26</sup>

### ***Pastoral Practice of the Seal of Confession***

What has been the pastoral practice of Christians regarding the sacrament of reconciliation, and what might this say to the question of the nature and scope of the seal of confession? Historians note that the manner of celebrating this sacrament has varied a great deal over the centuries.<sup>27</sup> Most readers of this article will have grown up associating the sacrament with the confessional, a particular space and type of furniture for celebrating it that evolved in recent centuries. Fr Waters helpfully explores legislation and practice around ‘confessionals’, noting that the seal of confession is commonly misconceived as ‘the seal of the

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24. Paul Keller, *101 Question and Answers on the Sacraments of Healing* (Mahwah, NJ: Paulist, 2010), 71–2.

25. *Catechism of the Council of Trent*, 183; my emphasis.

26. CCC, n. 1467; my emphasis.

27. On the pastoral practice of the sacrament of reconciliation, see John Baldovin and David Turnbloom, eds, *Catholic Sacraments: A Rich Source of Blessings* (New York: Paulist, 2015); Scott Hahn, *Swear to God: The Promise and Power of the Sacraments* (New York: Doubleday, 2004); Patrick Hannon, *Sacrament: Personal Encounters with Memories, Wounds, Dreams and Unruly Hearts* (Notre Dame, IN: Ave Maria, 2014); Donncha Ó hAodha, *The Beauty of Confession with Pope Francis: Discovering God’s Mercy* (London: Catholic Truth Society, 2016); Bill Huebsch, *Living the Sacraments* (New London, CT: Twenty-Third, 2016); Bob Schuchts, *Be Transformed: The Healing Power of the Sacraments* (Notre Dame, IN: Ave Maria, 2017).

confessional', as if anything said in that space were under some sacred 'cone of silence'. Longstanding church legislation insisting that there be no physical contact between confessor and penitent, and that penitents be given the choice of remaining anonymous, remains in place and may be more relevant than ever after the clergy child-abuse crisis. But the seal of confession has nothing to do with where the confession is heard and the sacrament celebrated. Some things that go on in confessionals (e.g., cleaning) are clearly not confessions and not covered by the seal. Some sacramental confessions may occur within a dedicated 'confessional', or outside a confessional but still in a sacred space (e.g., the sanctuary of a church), or even outside a sacred place (e.g., a prison, a campsite, a train). But, wherever they occur, they are subject to the seal of confession.

The 'confessional' with its grille and soundproofing, however inadequate in some places, does however highlight the importance of secrecy in the sacrament of reconciliation. When confessions are held 'out in the open', for example, in the sanctuary of a church, music is often used to help shield the conversations. Young priests are taught never to leave their portable microphones on, if hearing confessions before or after Mass. The new *Rite of Penance* (1973) also reminds the priest: 'As the minister of God the confessor comes to know the secrets of another's conscience, and he is bound to keep the sacramental seal of confession absolutely inviolate'. Some proposals to abrogate the seal and impose mandatory reporting on confessors seem unaware that confessors often do not know who is confessing to them. But contemporary pastoral practice continues to insist that all 'secrets of another's conscience' revealed in the sacrament of reconciliation be kept absolutely secret.

What do confessors do when penitents wander into the territory of 'other matters', listed above, that may be pressing upon their minds but are not, strictly speaking, matter for confession? Some will gently move penitents forward to completing their confessions. Some will let them 'pour out their souls' and find some matter about which they might offer some counsel. But no confessor would think himself free to repeat to third parties whatever was said that was not strictly a penitent's sin. The penitent's personal habits, fantasies, temptations, relationships and the rest are safe with the confessor.

But might breaking the seal of confession sometimes be pastorally useful? Might making an exception for the sacramental confessions of paedophile clergy enable church and state to collaborate in keeping children safe? Bishop Geoffrey Robinson, a canonist who has devoted much of his life to these matters and to promoting justice for victims and safety for all children, observes:

Concerning the confessional, the first point to make is that paedophile priests simply do not go to confession. Partly this is because of the distorted thinking that is commonly part of their offence, that they have convinced themselves that what they are doing is not wrong. Partly, it is due to a fear that any priest they approach would not give them an

easy absolution, but instead be very demanding indeed in terms of a ‘purpose of amendment’. If any ever did go to confession, they’d make sure it was in circumstances where they would not be recognised. The priest hearing the confession would probably not know of the identity of the offender or of the victim, and so would have no specific crime to report. Furthermore, if a single priest broke the seal of confession and reported the matter to the police, that would be the last time any paedophile priest confessed to anything anywhere.<sup>28</sup>

Bishop Robinson suggests that the best pastoral approach to a paedophile in the sacrament of reconciliation is for the confessor to remind him<sup>29</sup> of the high probability of recidivism and press him to take adequate steps to ensure he will not reoffend. But he does not condone breaking the seal. ‘The seal of the confessional is a very high value. If one priest started breaking it, we would enter a subjective world in which different priests used different criteria and in which no one would ever confess, not just to sexual abuse, but to anything at all that anyone might consider a crime. We would then lose the opportunity for change and healing that the confessional can provide.’<sup>30</sup>

The wisdom of such experienced pastors is important here. So, too, is the testimony of holy confessors who down the ages have resigned themselves to punishment, even martyrdom, rather than break the seal of confession. For refusing to break the seal of confession: St John Nepomucene was tortured and drowned in 1393 in Bohemia; Jesuit Father Henry Garnet was tortured and then hanged, drawn and quartered in 1606 in London; St Jan Sarkander was racked, burned and left to die in 1620 in Moravia; Fr Andreas Faulhaber was hanged by Frederick II in 1757 in Prussia; and Camillian Father Peter Marielux was shot in 1825 in Callao, Peru. In 1802 in Ireland, Sir Michael Smith MR imprisoned Fr William Gahan for refusing to confirm that the apostate Bishop of Cork and Ross, Baron Dunboyne, had returned to the Catholic faith and made confession before he died.

The twentieth century also had its martyrs for the seal. During the Cristero War in Mexico, St Mateo Correa Magalles was killed (in 1927) for refusing to reveal what prisoners awaiting execution had told him in confession. During the Spanish Civil War, the Capuchin Franciscan Blessed Fernando Olmedo Reguera and the Valencian diocesan Blessed Felipe Císcar Puig were both shot (in 1936)

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28. Geoffrey Robinson, ‘On Breaking the Seal of Confession’, *Eureka Street* 22, no. 23, 22 November 2012. Here Bishop Robinson corrected some earlier remarks in which he intimated that the seal was not absolute. Likewise: Frank Brennan, ‘Why I Will Break the Law Rather than the Seal of Confession’, *Sydney Morning Herald*, 15 August 2017; Helen Costigane, ‘When Priests Hear about Sex Abuse in Confession, Should They Be Forced to Report It?’, *America*, 30 July 2013; Greg Craven, ‘The Seal is Sacrosanct’ *The Australian*, 19 November 2012; Bill Uren, ‘Seal of Confession Should Remain Inviolable’, *Eureka Street*, 6 December 2017.
29. As the overwhelming majority of proven paedophiles are men, I will use the masculine pronoun, but the same principles would apply to female paedophiles and penitents also.
30. Robinson, ‘On Breaking the Seal’.

for refusing to reveal confessions. In Soviet Russia and many other dictatorships, Orthodox and Catholic priests have been interrogated, tortured and killed for non-disclosure of matters learnt in confession. In 1943 a New Zealand Columban, Father Francis Douglas, was beaten, water tortured and killed by the Japanese in Paete, Laguna, for refusing to divulge what Filipino guerrillas had confessed to him. No doubt there are many more ...

In several of these cases priests died rather than reveal the actual sins of their penitents. But in other cases the authorities were seeking information about some crime supposedly committed by the penitent that was no sin (such as attending Mass), or about some activity of the penitent's associates (again, no sin of the penitent). The confessors regarded everything they had heard as covered by the seal, and are celebrated for suffering punishment, even death, rather than betraying these secrets. To take the narrow view of the seal, however, is to suggest that they died heroically, but not truly for the seal of confession.

### ***Canon Law of the Seal of Confession***

What has been and is the canon law regarding the sacrament of reconciliation, and what might this say to the question of the nature and scope of the seal of confession? Much of the evolving law around the sacrament noted above emphasised the discretion required of a confessor, the penalties to which he would be subject should he reveal a penitent's sins, and a broader prohibition on betraying the penitent 'by word or sign or by any manner whatever'. Even the narrowest readings of those canons would seem to forbid not only revealing penitents' sins, but also revealing that they have made confession at all. Thus what it was to 'betray' a penitent was about more than revealing their sins: there was clearly a sphere of 'sacred confidentiality' surrounding the sacramental conversation that also protected the penitent's identity and perhaps other matters. The question is: What more might be covered?

The 1917 *Code of Canon Law* left that undetermined. It only said that:

The sacramental seal is inviolable, and the confessor must therefore carefully beware of betraying a penitent by words or signs, or in any other way, for any reason whatsoever. The obligation of keeping the sacramental seal also binds the interpreter and all others to whom knowledge of the confession has in any way come.<sup>31</sup>

This might seem to cover more than just specified sins. Commenting on this text, Stanislaus Woywod observed that 'It is always offensive to Catholics to hear a priest say that someone told this or that in confession'.<sup>32</sup> Though such

31. *The 1917 or Pio-Benedictine Code of Canon Law in English Translation*, trans. Edward Peters (San Francisco: Ignatius, 2001), canons 889 §1 and 889 §2.

32. Stanislaus Woywod, *A Practical Commentary on the Code of Canon Law*, rev. edn. by Callistus Smith (New York: Joseph F. Wagner, 1957), 497; Connaghan, 'Seal of Confession and Issues of Law', 148.

Catholics might be ‘ignorant’ or ‘prejudiced’, they might also be reacting quite naturally to what seems a breach of trust and to contradict the priest’s vocation to die rather than betray his penitent in any way.

Fr Waters makes an important distinction between confessional secrets and other matters entrusted with a high degree of confidentiality to priests and other ministers of religion, lawyers, doctors and psychologists. These secrets, too, must be taken seriously, but they do not come under the seal of confession. He then examines the canons of the 1983 Code.<sup>33</sup> As with some of the other texts examined above, some of these seem to limit the seal of confession to the sins of the penitent: canon 983 §2 says interpreters and others who in any way come to a knowledge of sins from a confession are bound by the seal, and canon 984 §2 says persons in authority may not use knowledge of a person’s sins in governance. But most of the current canons bearing upon the seal would seem to have broader application to everything heard in confession:

983 §1 The sacramental seal is inviolable. Accordingly, it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion.

984 §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.

Most authoritative clarifications of the scope of the seal of confession would also seem to favour the more expansive understanding of the seal. In 1682 the Holy Office (under Innocent XI) published a decree prohibiting the use of information gained in the course of confession, even to prevent some great evil and even when there is no danger of exposing the penitent or his or her activities.<sup>34</sup> Fr Waters gives as an example a confessor voting against a penitent in an election because of what he knows from the penitent’s confession. This would seem to include what he has learnt about the person’s sins, but also what he has learnt about his or her temptations and tendencies to future sinning, and other things about his or her personality, relationships and views: none of these should be taken into account when the confessor comes to vote on the penitent taking vows or receiving some office or benefit.

St Alphonsus Liguori, commenting on penitents who mention other people’s sins in the sacrament of reconciliation, noted that these matters were also covered by the seal of confession:

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33. *Code of Canon Law* (Washington, DC: Canon Law Society of America, 1998), canons 983 §§1, 2; 984 §§1, 2; 985; 1388 §§1, 2. The equivalent canons in the *Code of Canons of the Eastern Churches* are canons 728, 733, 734, 1456.

34. Innocent XI, *Decree of the Holy Office on the Seal of Confession*, 18 November 1682. DS 2195.

If a penitent confesses that he fostered hatred towards his mother because she was guilty of adultery, or that he failed to correct his brother who had committed a theft, the adultery of the mother and the theft of the brother would fall under the seal as objects of the sins confessed.<sup>35</sup>

In 1915 the Holy Office forbade priests referring even in a very general way to what they had heard in confessions when giving public talks or private exhortations; this was echoed in national legislation for Australia.<sup>36</sup> Once again, more seems to have been at issue here than the risk of revealing an identified penitent's particular sins: reverence for the sacrament demanded grave discretion. The 1917 Code disqualified priests from acting as witnesses in a church trial or beatification or canonisation process if they had gained knowledge of the case from a sacramental confession.<sup>37</sup> The Roman Rota explained that sacramental confession is made to God, not men, and so even if the penitent purported to release the confessor from the seal he could not break it.<sup>38</sup> In the century since, canonical processes for judging delicts against the sacrament have become stricter and focused on the integrity of the sacrament, not just secrecy about the sins confessed.<sup>39</sup> The 1983 Code made similar provisions, but even more explicitly referred to 'everything which has become known to them in sacramental confession'.<sup>40</sup> The 1988 prohibition of bugging or recording 'what either the confessor or the penitent says'<sup>41</sup> is likewise clearly intended to cover more than just sins of the penitent. Almost every priest or penitent today believes that the faith, pastoral practice and law of the church require priests to keep 'absolutely secret' everything they have learnt from a penitent in the sacrament of reconciliation.

### ***Rationale for the Seal of Confession***

So far the beliefs, practices and canons of Catholics regarding the sacrament of reconciliation—which have parallels amongst Orthodox and some other Christians—have been considered, along with the implications for the nature and scope of the seal of confession. The principal rationale for the seal would

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35. St Alphonsus, *De Sacramento Poenitentiae*, cap. 3, dub. 1, n. 641.

36. Holy Office, *Instruction to Ordinaries and General Superiors*, 9 June 1915; Plenary Council of Australia and New Zealand (Sydney, 1937), *Decree*, 414.

37. *Code of Canon Law* (1917), canons 1757 §3 2° and 3°. Connaghan, 'Seal of Confession and Issues of Law', 150–4 has a very interesting treatment of the controversy over whether and when a penitent might release a confessor from the seal of confession.

38. Carolus Holböck, *Tractatus de Jurisprudentia Sacrae Romanae Rotae* (Graz, Austria: Libreria Styria, 1947), 320; Connaghan, 'Seal of Confession and Issues of Law', 151.

39. Ronny Jenkins, 'Canonical Exclusionary Rules and the Just Adjudication of Delicts Against the Sacrament of Penance' (Washington, DC: Catholic University of America, 2017).

40. *Code of Canon Law* (1983), canon 1550 §2 2°.

41. Congregation for the Doctrine of the Faith, *Decree regarding the Excommunication of Those Who Divulge Confessions*, 23 September 1988.

seem to be protecting people's privacy regarding sins they have committed and thus minimising any disincentive to receiving this important sacrament. But more seems to be at issue in these various texts and practices than keeping the penitent's sins confidential. The seal is also said to:

- honour church teaching that the sacrament of reconciliation is a privileged encounter between the penitent and God, where the penitent is free to 'pour out his or her soul' and the priest acts *in persona Christi* principally as mediator or conduit for that encounter<sup>42</sup>
- honour the natural right of persons to freedom of conscience, religious belief and practice: it would be a grave abuse of these rights were the confessional effectively to be 'bugged' even by the confessor or the civil authorities
- promote confidence in the integrity of the sacrament and regular recourse to it, by enabling people to freely share whatever weighs upon their hearts, whether sins or not, and without having to distinguish strictly confessional from other matters<sup>43</sup>
- avoid scandal to the faithful and any disincentive to receiving the sacrament<sup>44</sup>
- encourage priests to be generous in making the sacrament available and allow them to hear whatever the penitent reveals, without having to make judgements about which parts of the confession are 'under the seal' and which are not
- protect the confessor from being pressured by civil authorities or others to make 'exceptions' to the seal of confession and repeat part or all of a confession
- honour the many holy priests who have resigned themselves to punishment, even martyrdom, for refusing to break the seal of confession

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42. Holy Office, *Instruction*: 'That the natural and divine law of the sacramental seal has always and everywhere in the Church of Christ been most faithfully kept, not even the bitterest enemies of sacramental confession have ever been able seriously to question. And beyond a doubt this is to be attributed to the most provident design of the Almighty, who, in mercifully offering sacramental confession to men as a "second plank after the shipwreck of the loss of grace", has deigned to keep far from it every ground of offense'.

43. Connaghan, 'Seal of Confession and Issues of Law', 153 notes: 'Those who hold that the penitent can release the confessor from the seal of confession should always be mindful that the value behind the seal of confession, namely the integrity of the sacrament in the eyes of the faithful, must be respected. The recurring value has been the Church's assurance to the faithful that they can freely avail themselves of the Sacrament of Penance, in the knowledge that whatever is communicated to their confessor will not be revealed in any way'.

44. Holy Office, *Instruction*: 'even if it be done without substantial violation of the sacramental secret, it cannot fail to offend the ears of pious listeners and to produce in their hearts uneasiness and diminished confidence—a thing which is surely entirely foreign to the nature of this sacrament, through which the most merciful Lord, by the pardon of His loving mercy, entirely wipes away and quite forgets the sins which through human weakness we have committed'.

- resist the intrusion of civil authorities or other strangers into the most sacred domains of personal conscience and religious practice.

These rationales for the seal of confession do not justify restricting its scope to sins of the penitent only; they support the broader view that the whole confessional encounter is protected by the seal.

***Circumventing the Seal: May a Confessor Refuse Absolution until a Paedophile Reports Himself to the Police?***

Some people (including, it seems, Fr Waters<sup>45</sup>) have suggested that a penitent who confesses paedophilia might or should be refused absolution until he has turned himself in to the police. In this way the issue of the seal of confession is circumvented. But what might a confessor reasonably require as a condition precedent to absolution or as satisfaction ('penance') for the sin? In Catholic teaching and practice, absolution is only rightly withheld or postponed if there is real doubt that the penitent is contrite—that is, not sorry for his sin, not resolved to try to sin no more, not willing to make restitution for harm caused or to perform reasonable satisfaction for the sin.<sup>46</sup>

Of course, a confessor might exhort, cajole and reason with the penitent about his need to get help, from the police, a psychiatrist or others, so the penitent himself can be confident he will not reoffend. The confessor might suggest that this was the clearest way of demonstrating to God, his victim(s) and himself the sincerity of his shame for his sins and his resolve not to reoffend. The confessor might even invite the penitent to repeat outside the sacramental context what he has reported within confession, so the priest would be free to accompany him to the police or go in his stead. But in the end this is a matter for the penitent, and the confessor cannot require self-incrimination. The 'tribunal' of reconciliation is, after all, one of mercy and not of civil governance or penalty. And penitents' apparent cowardice in facing up to the legal consequences of their actions, or their lack of confidence in the fairness of the trial and punishment process, or their other motives for not self-incriminating, are not in themselves proof that penitents are not truly contrite and should be denied absolution.

The canonist Edward Peters observes that:

45. This seems to be implied in his treatment of 'Denial or Deferral of Absolution': Waters, 'Seal of Confession', 340–1.

46. See *Code of Canon Law* (1983), canons 980, 987. There are other rarer situations in which absolution might be withheld or postponed: if the sin is one 'reserved' to a higher authority to absolve (e.g., canons 1367, 1370, 1378); if the penitent is not free to approach confession (e.g., if unbaptised); if the priest and penitent are partners in a sin against the sixth commandment (canon 977); or if the penitent has falsely denounced a confessor for solicitation (canon 982). In this last case absolution is denied until the penitent 'has first formally withdrawn the false denunciation and is prepared to make good whatever harm may have been done'. While this is not a case of requiring self-reporting to the civil authorities, it might be thought to be some precedent for the church (not the confessor) legislating some condition precedent to the absolution of a particular sin.

Penitents confessing sins enjoy the presumption of being sincerely sorry for their sins. McAreavey, *Great Britain & Ireland Comm* (1985) 538: ‘The very fact of approaching this sacrament implies sorrow for sin and so a penitent should always be presumed to be in good faith’; McManus, *CLSA New Comm* (2000) 1161: ‘Canon 980 affirms the presumption that the penitent has confessed his or her sins in good faith and has the requisite disposition’; and Dom Augustine, *Commentary* (1920) IV: 295: ‘No one who gives signs of repentance should be refused absolution.’

This presumption of being sorry for one’s sins and, in that respect, of being eligible for absolution, yields only in the face of ‘positive and serious doubt regarding the required dispositions’—those requisite dispositions being: sorrow for sin with a firm purpose of amendment, self-accusation before a confessor, and acceptance of a lawful penance, per CCC 1451, 1459–1460—all the while bearing in mind that ‘the refusal of absolution is an extreme and odious measure ...’ per Loza, *Exegetical Comm* (2004) III/1: 807 ... Again, ‘Though the priest may think that a delay of absolution would be of greater benefit to the penitent, he may not for that reason delay absolution without the free consent of the penitent.’ Woywod, *Practical Comm* (1948) I: 495.

Further, the few commentators who discuss the possibility of absolution being conditioned upon a future event (such as a later self-reporting of one’s crimes) reject that theory. Davis, *Moral & Pastoral Theo* (1945) III: 256: ‘The Sacrament of Penance cannot be given conditionally on some future event for the absolution cannot be suspended in its effect.’ Cappello, *De Sacramentis* (1953) II, n. 77: ‘The sacrament [attempted] on a future condition is certainly rendered invalid, especially under the tradition and practice of the Church which has never administered this sacrament with this condition.’

In short, I see no canonical or sacramental support for the claim that a public self-disclosure of a penitent’s sins, at the time of or following confession, can be required for absolution.<sup>47</sup>

It is the clear teaching of the church that if a penitent refuses to self-report to the police, or even to repeat to his or her confessor outside the sacrament of reconciliation what he or she has already confessed within the sacrament, the confessor may make no use of what he has learnt whatsoever, let alone report the penitent to the civil authorities.

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47. Edward Peters, ‘Restrictions on Absolution Are Not So Easily Placed’, *In the Light of the Law*, 9 February 2017, <https://canonlawblog.wordpress.com/2017/02/09/restrictions-on-absolution-are-not-so-easily-placed/>.

***Circumscribing the Seal: May a Priest Report What He Has Learnt in Confession from a Young Victim of Sexual Abuse?***

Some people (including, it seems, Fr Waters<sup>48</sup>) have suggested that a child penitent who in the course of the sacrament of reconciliation reports that he or she has been sexually abused would not be reporting any sin of his or her own and so that matter would not be covered by the seal of confession, narrowly understood. The priest would then be free to repeat to the police what the child had reported to him.

In Baton Rouge, Louisiana, Rebecca Mayeux claims that when she was aged fourteen she told Fr Jeff Bayhi, in confession, that she had been fondled by a parishioner. She alleges that rather than reporting the matter to the police, as she thinks he should have done, the priest told her to ‘sweep it under the floor’. While refusing to discuss this case, the priest insists he has never given such advice to any penitent. Without admitting he ever heard the girl’s confession, Fr Bayhi and his diocese insist he had no right, let alone duty, to report what he learnt in the sacrament of reconciliation to civil authorities. Were the church to acquiesce to some ‘exception’ to the seal in such circumstances, it would be open to all sorts of claims about what was or wasn’t said by both penitents and confessors in confession, whether particular matters were or were not sins of the penitent, and which might rightly be repeated and to whom. As the diocese successfully argued, however, this would undermine the freedom of the faithful to practise their religion: they could no longer go to the sacrament of reconciliation confident about the integrity of the sacrament.

Even young people have spiritual rights: those between the ages of seven and eighteen who go to the sacrament of reconciliation are as entitled to secrecy as are older penitents. Furthermore, few young penitents would have the training and experience to filter their confessions carefully so as to confess only sin—their own sins. As with adults, young penitents often allow whatever is in their heart to ‘tumble out’ before the Lord. Were the church to circumscribe the seal of confession in the way proposed, it would contradict its own teaching about the whole confessional conversation being between the penitent and God, and it would undermine the confidence of young people in their priests (and perhaps all adults). A sacrament already underutilised in many places, especially amongst the young, would likely then be shunned.

Again, on a number of occasions it has been reported to me that certain confessors off-handedly dismiss certain matters confessed by good-willed penitents with ‘That’s not a sin’, ‘Don’t waste my time with such trivia’ and so on. Were the church to accept the proposition that any matter not regarded by the confessor as a true sin of the penitent was not protected by the seal of confession, good-willed penitents, whether young or old, would have to approach the sacrament with the greatest caution, fearing that if what they have in their hearts

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48. Waters, ‘Seal of Confession’, 333–4, 342.

is not grave enough, it might be repeated by the confessor. A sacrament already too little availed of in many places would then be further spurned.

It is the clear teaching and practice of the church that if a penitent confesses matters that the confessor judges not to be sinful, or confesses matters that suggest some other person has committed a sin, or makes an incomplete confession, the confessor may make no use of what he has learnt whatsoever, let alone repeat it to the civil authorities. But a confessor may well, in such a situation, strongly counsel the young penitent to repeat what he or she has said to a parent, guardian, teacher or to police, or to the priest himself outside the sacrament of reconciliation, with a view to pursuing justice and ensuring the child's safety going forward. Many young people in such a situation would heed such advice; but a young person who was determined to keep the conversation between him- or herself and God must be respected.

***Breaking the Seal: May a Priest Report the Confession of a Paedophile to the Civil Authorities?***

Some people (*not* including Fr Waters<sup>49</sup>) have suggested that a confessor may or should report to the civil authorities penitents who have confessed sins of paedophilia, in the sacrament of reconciliation, whether or not those penitents agree, and that the civil authorities may reasonably require this of priests under pain of criminal sanction. But the clear teaching of the church is that no priest may report to the civil authorities or anyone else what he has learnt from a penitent in confession. Any priest who did so would automatically be excommunicated and subject to further ecclesiastical penalties.

Any civil law requiring confessors to breach the seal of confession would be unjust, ineffectual and self-defeating: unjust because it is contrary to divine law and freedom of religion; ineffective because priests are willing to suffer civil sanctions rather than breach the seal of confession, and courts and the general population may well sympathise; self-defeating because it will ensure paedophiles never confess such matters and thus the (very rare) opportunity to counsel them to seek help from police, psychiatrists or others would be lost.

Because current Catholic canon law requires 'all others who in any way whatever have come to a knowledge of sins from a confession' to observe the seal of confession, Catholic judges and jurors who learnt of confessional matter in court would be as bound as priests not to repeat it; indeed, they may well be precluded from taking such testimony into account when coming to judgement.<sup>50</sup>

In 'Why I Will Break the Law Rather Than the Seal of Confession' Fr Frank Brennan SJ wrote:

If the seal of the confessional were maintained, there is a chance, just a chance, that a child sex abuser might be convinced by the priest to turn

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49. Fr Waters would not allow this: see *ibid.*, 336, 341–3.

50. *Code of Canon Law* (1983), canons 983 §2, 984 §2.

himself in. Take away the seal, and that ever so slim chance will be snuffed out ... Those who advocate the abolition of the seal of the confessional have a mistaken understanding of how confession is actually practised ... If the law is changed, abolishing the seal of the confessional, I will conscientiously refuse to comply with the law because in good faith I will be able to claim that it is a bad law which does nothing to protect children and which may take away the one possibility that a sex offender will repent and turn himself in, making the world that little bit safer for vulnerable children. I will console myself with the thought that if police learn of my ‘wrongdoing’, it will be because the confessing abuser has voluntarily turned himself in.<sup>51</sup>

### ***Civil Law regarding the Seal of Confession***

Following the child sexual abuse crisis in many countries, people have asked whether the legal recognition of priest–penitent or confessional privilege should be abrogated so as better to protect children going forward. What should the civil law say about such matters, if anything?

In their important treatments of the seal of confession in law, Brian Lucas, Adrienne Connaghan and Keith Thompson have shown that confessional privilege has been commonly, if inconsistently, recognised in the common law and civil legislation.<sup>52</sup> At least up to the Reformation it was recognised in the laws of England, and according to Lord Coke not abrogated thereafter. In *R. v Redford* (1823) a Church of England clergyman was about to give evidence of a prisoner’s confession, when Best CJ indignantly expressed his opinion that this was improper for any clergyman, not just papists—but in *Broad v Pitt* (1828) he said he would allow but not compel such testimony. In 1827 the jurist Jeremy Bentham argued strongly in favour of the recognition of the seal of confession in the civil law even of Protestant nations.<sup>53</sup> In *R. v Griffin* (1853) a Church of England workhouse chaplain was protected by Alderson J from being required to answer questions regarding ‘spiritual conversations’ with an alleged child-murderer. In *R. v Hay* (1860) Hill J also intimated that he would not require a Catholic priest, Fr Kelly, who had been called to give evidence, to reveal anything learnt in confession. Other cases went differently. It was thus unclear what precisely the Australian colonies inherited from England into their common law with respect to confessional privilege. In many other countries, for

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51. Brennan, ‘Break the Law Rather Than the Seal’.

52. See Brian Lucas, ‘Resolving a Conflict of Moral Duty: The Secrecy of the Confessional and Civil Law’ (STL thesis, Catholic Institute of Sydney, 2000); Connaghan, ‘Seal of Confession and Issues of Law’, 154–7; A.K. Thompson, *Religious Confession Privilege at Common Law* (Leiden, Netherlands: Martinus Nijhoff, 2011). See also Michael Quinlan, ‘Submission to the Department of Justice Inquiry into Strengthening Child Sexual Abuse Laws in NSW’ (2017); Catholic Dioceses of New South Wales, ‘Response to the Royal Commission’s Criminal Justice Report’ (6 October 2017).

53. Jeremy Bentham, *Rationale of Judicial Evidence*, vol. 4 (New York: Garland, 1978), 588.

example, in all the states of the United States of America, the privilege was codified.<sup>54</sup>

Eventually this happened in Australasia also. Confessional privilege was recognised from the early twentieth century in Victoria, Tasmania, the Northern Territory and New Zealand, but it was not until 1989 that it was formally incorporated into the Evidence Act of New South Wales and 1995 that of the Commonwealth of Australia.<sup>55</sup> But where it has been recognised in common law or codified in Evidence Acts, confessional privilege has never been limited to the penitent's sins (which civil judges might find hard to assess): the whole conversation is held to be privileged and no pastor can be required to give evidence of such matters.

Amongst the arguments commonly put for recognising confessional privilege in law are that:

- cultures and polities like Australia's rightly recognise clear distinctions between the fields of operation (and goals, methods, leaders) of 'church' and 'state'; while the two necessarily intersect at various points, even collaborate, they rightly give each other a wide berth at other times; to require priests to break the seal of confession would be overreach by the state into the domain of the 'sacred'<sup>56</sup>
- a wide range of citizens practise sacramental confession, including Western Catholics, Eastern Catholics, Orthodox Christians, some Anglicans and Lutherans; some other believers have parallel forms of confidential spiritual counsel; in pluralist societies such as Australia, individual flourishing and social harmony are best served by giving believers the 'space' to practise their sacraments unimpeded
- freedoms of conscience, thought, speech, assembly, religious belief and practice are natural rights, long recognised in international law, to some extent in Australian domestic law, and more broadly in Australian culture; not to recognise confessional privilege would go against these longstanding philosophical, legal and cultural commitments<sup>57</sup>
- many people left totalitarian regimes and came to Australia or remain here precisely because of Australia's record of respecting such

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54. Nolan, 'Law of the Seal'; Robert Kennedy, *State Protection of Confessional Secrecy in the United States of America* (Rome: Pontifical Lateran University, 1975).

55. In the Australian states: *Evidence Act (Victoria) 1890*, s. 55 (preserved in the *Evidence Act (Victoria) 2008*, s. 127); *Evidence Act (Tasmania) 1910*, s. 96(1) (preserved in the *Evidence Act (Tasmania) 2001*, s. 127); *Evidence Act (Northern Territory) 1939*, s. 12(1); *Evidence Act (New Zealand) 1908*, s. 8 (preserved in *Evidence Act (New Zealand) 2006*, s. 69); *Evidence Act (New South Wales) 1898*, s. 10 (preserved in *Evidence Act (New South Wales) 1995*, s. 127); *Evidence Act (Commonwealth of Australia) 1995*, s. 127.

56. Noel Debien, 'Breaking the Seal of Confession Could Pit Church Against State', *ABC News*, 14 August 2017, <http://www.abc.net.au/news/2017-08-14/breaking-the-seal-of-confession-could-pit-church-against-state/8805126>.

57. Tess Livingstone, 'Breaking the Inviolable Seal of Confession Would Be Intolerable', *Australian*, 30 November 2016.

freedoms; to deny confessional privilege would leave them in fear of surveillance and prosecution for their religion

- the spectacle of arresting and trying priests for acting in accordance with their faith would be grotesque, socially divisive and bring the law into disrepute
- there is substantial social value in candid disclosures in lawyer–client, psychiatrist–patient and priest–penitent relationships; this might be undermined were these communications not legally privileged
- abrogating confessional privilege is unlikely to result in any increase in reports to the police of child sexual abuse: perpetrators, already very unlikely to confess, would probably desist from ever doing so.

There are solid arguments to be made for civil societies respecting religious practice in this area and maintaining confessional privilege.

### **Conclusion**

The child sexual abuse crisis in the Catholic Church in Australia (as in other institutions and in other parts of the world) terribly harmed the victims and their families, disgraced the clerical and other perpetrators, and damaged the credibility of the church, especially its bishops and clergy. Church leaders in Australia and elsewhere have now instituted major reforms to address this, even if there is still more to be done. Various civil jurisdictions are also seeking to tackle these issues in law and policy. This has occasioned some public attention to the practice of confession and proposals to abrogate the confessional privilege long recognised in civil law.

This article has argued that the common view of priests and people—that confessors must keep ‘absolutely secret’ everything they learn from a penitent in the sacrament of reconciliation—is the correct one. Some (including Fr Waters) allow or even require confessors to *circumvent* the seal of confession by refusing absolution to a paedophile until he self-reports to the authorities; some (including Fr Waters) would allow or even require confessors to *circumscribe* the seal so it does not apply to young penitents who report being victims of this sin; and some (*not* including Fr Waters) would allow or even require confessors to *break* the seal by reporting the confessions of paedophiles to the police or courts. The present article has suggested that all three proposals would be contrary to divine and natural law, at odds with sound theology, pastoral practice and canon law, and contrary also to human rights and good government.

The seal of confession covers the whole conversation that the penitent has with God via the confessor; it includes the penitent’s sins but also whatever else emerges as he or she ‘pours out his or her soul’; and it equally protects sinners and those sinned against, the young and the more mature. Even were circumventing, circumscribing or breaking the seal in the ways proposed permissible, this would not serve to protect a single child: rather, it would help

to ensure that such matters were never raised in confession. An opportunity would then be lost to counsel perpetrator or victim to do what is necessary to prevent recurrence. Without the seal, children would be less safe, the integrity of the precious sacrament of reconciliation undermined, and religious liberty dealt a lethal blow.

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