

Priest-Penitent Privilege: In Defense of Confidential Death Row Spiritual Counsel

Jeff Hood

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PRIEST-PENITENT PRIVILEGE: IN DEFENSE OF
CONFIDENTIAL DEATH ROW SPIRITUAL COUNSEL

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Written by Jeff Hood.

Table of Contents

Publisher's Note	1
Introduction	5
Chapter 1 Historical Foundations.....	7
Chapter 2 Theological Foundations.....	11
Chapter 3 Ethical and Human Rights Foundations	17
Chapter 4 The Spiritual Advisor's Vocation	23
Chapter 5 Practical Ministry on Death Row	27
Chapter 6 Legal Foundations	33
Chapter 7 Legal Precedent	39
Chapter 8 Contemporary Challenges and Threats	47
Chapter 9 Recommendations for Practice.....	51
Conclusion The Sacredness of Confession and the Dignity of Death	55
Bibliography	57

Publisher's Note

Imagine a man on death row, after decades of appeals, finally begins meeting with a prison chaplain. For the first time, he can speak honestly. He expresses genuine remorse for his crime. He acknowledges harm he's never publicly admitted. He wrestles with questions about forgiveness, redemption, and what happens after death.

This is possible with priest-penitent privilege: the legal and ethical protection that allows these conversations to remain private. Without it, the prisoner's words could be subpoenaed, used in clemency proceedings, leaked to the media covering his case, or even twisted to undermine his remaining legal claims.

Priest-penitent privilege functions much in the way that HIPAA guards our conversations with our doctors and therapists. Would you want details about your health conditions, your weight, your marriage, or your mental state broadcast to the public?

Priest-penitent privilege is a legal and ethical right that all prisoners should have, including those on death row. Considering most death rows are solitary, these people spend years not just with a chronic uncertainty of when and how they will be killed by the state, but in extreme isolation. A spiritual advisor can serve as one of the few, possibly the only, trusted and stabilizing presences they have. Confidential spiritual counsel can result in genuine moral reckoning, psychological stability, and peace before execution.

The privilege also protects attorneys trying to represent death row clients. These attorneys have to balance legal strategy with their clients' desperate need for spiritual support. If clergy can be compelled to testify, attorneys would need to encourage their clients to avoid spiritual counseling for fear that their client might inadvertently reveal something that complicates their legal narrative, undermines their appeals, or gets weaponized by prosecutors.

Three phenomena currently eroding the integrity of priest-penitent privilege make this book essential and necessary for publication:

Surveillance culture. Prisons have become total surveillance environments. Every phone call recorded. Every email scanned. Every video visit archived. Physical mail gets digitized. The cultural assumption is that nothing is private anymore; everything is monitored, stored and potentially accessed. Death row prisoners absorb this reality. They assume, reasonably, that even conversations with clergy might be recorded or scrutinized. The psychological impact is immediate and devastating. People censor their most intimate thoughts. They avoid real confession. They withdraw from the one relationship that might stabilize them.

Political pressure. Capital punishment is back at the center of intense debate. Executions are increasing. Media attention is high. And when that happens, there's heightened pressure to access any information that might influence outcomes or shape public narratives. Privileges that limit what the state can know get questioned, narrowed, challenged in court. This matters because capital cases are irreversible. Once someone is executed, rights violations can't be remedied.

Documentation culture in legal practice. Everything in death penalty appeals gets documented, analyzed and weaponized. Attorneys have to be vigilant about every word their clients say. The separation between spiritual dialogue and legal evidence has never been more important—and never more fragile. Without clear protection, clients face an impossible binary: Get spiritual support or protect your appeals.

These aren't hypothetical concerns. Right now, legislators in multiple states are considering mandatory reporting requirements that would pierce confessional confidentiality. Prison officials are implementing surveillance policies with no exemptions for clergy communications. Courts are hearing cases that challenge aspects of the privilege previous generations assumed were settled law.

This book argues that priest-penitent privilege is not merely beneficial but essential on death row. By integrating moral, theological and legal reasoning with the lived experience of death row ministry, it demonstrates that confidentiality in spiritual counseling preserves human dignity, moral agency and religious liberty. If the sacred space of confession isn't protected for those facing execution, we've effectively conceded that religious liberty is conditional, human dignity is optional, and the state's power extends even into the most intimate parts of the human experience.

Kat Bodrie
Complicit Press
February 13, 2026

Introduction

I have stood in execution chambers across five states and witnessed eleven human beings take their final breaths. I have held the hands of men as the poison entered their veins, as the nitrogen filled their lungs, as the life slowly drained from their bodies while the state exacted its ultimate penalty. In those final moments, I have heard confessions that will never leave me—confessions of profound remorse, of desperate longing for forgiveness, of the kind of raw spiritual honesty that only emerges when eternity is seconds away.

These confessions were possible with priest-penitent privilege: the inviolable protection of confidential communications between a priest or spiritual advisor and the penitent who seeks guidance, absolution and reconciliation with God. For those condemned to die, such interactions are not peripheral religious activities that might be accommodated if administratively convenient. They are essential encounters through which moral reflection becomes possible, reconciliation with God and others can be pursued, and preparation for death takes its proper spiritual form.

Priest-penitent privilege sits at the intersection of theology, morality, practicality, ethics and law. It draws upon ancient religious traditions that understood confession as a sacred encounter with divine mercy. It reflects ethical principles that recognize human dignity as inherent and inalienable regardless of what crimes a person may have committed. It serves practical purposes in facilitating genuine moral reckoning and psychological preparation for death. And it finds expression in legal frameworks that have evolved over centuries to protect religious liberty even in the most restrictive institutional settings.

The men I have accompanied to their deaths were not abstractions. They were human beings created in the image of God, bearing all the complexity, brokenness and capacity for redemption that such an origin implies. Many had committed terrible acts—acts that caused

immeasurable suffering to victims and families whose pain I do not minimize or dismiss. Yet even in the shadow of such acts, the human soul retains its capacity for genuine repentance, for moral reckoning, for reconciliation with the divine. This capacity is not extinguished by crime, however grave. It is not negated by conviction. It persists until the very moment of death.

Priest-penitent privilege protects this sacred space. Without the absolute assurance of confidentiality, the condemned cannot speak with full honesty about the moral weight they carry. Without the certainty that their confessions will never be disclosed, penitents will hold back precisely those truths most essential to their spiritual healing. The seal of confession is not a legal technicality; it is the foundation upon which genuine moral transformation becomes possible. My hope is that this work will serve clergy who minister in carceral settings, attorneys who advocate for the religious rights of the incarcerated, prison officials seeking to understand their obligations, and anyone who believes that human dignity persists even unto death.

I write this book as a Catholic priest in the Old Catholic tradition, formed by Roman Catholic theology, Eastern Orthodox spirituality and the historic witness of the undivided Church. I write as someone who has seen what happens when a human being finally and fully confronts the truth of their life in the presence of God. I write as a witness to the power of absolution spoken over men who had spent decades believing themselves beyond redemption. And I write as someone convinced that if we cannot protect the sacred space of confession on death row—at the very threshold of eternity—then we have abandoned the most fundamental claims of religious liberty.

The Rev. Dr. Jeff Hood
January 3, 2026

Chapter 1

Historical Foundations

The Ancient Origins of Sacramental Confession

The practice of confessing sins to a religious authority extends to the earliest documented periods of human civilization. In ancient Mesopotamia, penitential rites included verbal acknowledgment of wrongdoing before priests who served as intermediaries with the divine. The Hebrew scriptures record practices of confession and atonement, particularly in connection with the Day of Atonement rituals described in Leviticus. The prophet Nathan's confrontation with King David following his adultery with Bathsheba and murder of Uriah represents a paradigmatic instance of prophetic accountability that leads to confession and repentance.

Within the Christian tradition, the practice of confession developed from the apostolic period forward. *The Didache*, a first-century text providing instruction for Christian communities, instructs believers to confess transgressions before gathering for worship. The Letter of James explicitly directs Christians to confess sins to one another and to pray for one another so that they may be healed. Throughout the patristic era, various forms of penance and confession emerged, ranging from public acknowledgment of grave sins before the entire community to private confession before bishops and priests.

The development of private auricular confession as the normative form reached its definitive expression in the medieval Western Church. The Fourth Lateran Council in 1215 mandated annual confession to one's own priest for all Christians who had reached the age of discretion. This canonical requirement both reflected and reinforced the understanding that sacramental confession was essential to Christian

life—not an optional devotional practice, but a necessary means of reconciliation with God and the Church.

Crucially, the development of confession as a formal sacramental practice was accompanied by an increasingly rigorous understanding of the seal of confession. As early as the sixth century, ecclesiastical councils addressed the obligation of confessors to maintain absolute silence regarding what they heard in confession. The Decretum of Gratian compiled in the twelfth century included provisions addressing confessional secrecy. By the time of the Fourth Lateran Council, the inviolability of the seal was firmly established in canon law with severe penalties prescribed for any confessor who violated it.

The theological rationale for this absolute confidentiality emerged from the understanding of confession as an encounter with Christ himself. The priest in confession acts in persona Christi (in the person of Christ), serving as the instrument through which divine mercy is mediated to the penitent. The confession is, therefore, not primarily a communication between two human beings, but a dialogue between the sinner and God with the priest serving as a necessary but essentially transparent medium. What the penitent speaks, Christ hears. What the priest pronounces in absolution, Christ effects. The seal protects not merely human conversation, but divine encounter.

The Seal Under Persecution and Challenge

Throughout history, the inviolability of the confessional seal has been tested by civil authorities seeking to compel disclosure for political or judicial purposes. The most dramatic instances involve priests who accepted martyrdom rather than reveal confessional secrets. St. John Nepomucene, a fourteenth-century Bohemian priest, was tortured and drowned by order of King Wenceslaus IV for refusing to disclose the confessions of the queen. His martyrdom became paradigmatic for the absolute nature of the seal: Priests were expected to accept death rather than betray a penitent.

In England, the Reformation and subsequent establishment of the Church of England created a complex situation regarding confessional privilege. While the Church of England retained forms of private confession, the theological and legal status of the seal became contested. During periods of religious persecution, Catholic priests faced execution for the mere fact of being priests, and the confessional was sometimes targeted as a potential source of intelligence regarding Catholic recusants and political conspiracies. The willingness of priests to die rather than reveal confessions became part of the broader Catholic narrative of martyrdom under Protestant persecution.

In the American colonial and early national periods, the legal status of priest-penitent privilege remained uncertain in many jurisdictions. The predominantly Protestant character of colonial law meant that Catholic sacramental practices lacked explicit legal protection. It was only with the emergence of constitutional religious liberty protections and the development of common law privilege that confessional confidentiality began to receive systematic legal recognition in the United States.

American Legal Development

The foundational American case regarding priest-penitent privilege is *People v. Philips*, decided by the Court of General Sessions in New York City in 1813. Father Anthony Kohlmann, a Jesuit priest, had received stolen goods from a penitent in the course of arranging their return to the rightful owner. When called to testify regarding the identity of the thief, Father Kohlmann refused, invoking the absolute inviolability of the sacramental seal as recognized in Catholic canon law.

The court carefully analyzed the nature of confession, emphasizing that it is a sacred encounter between penitent and priest, not merely a private conversation. Mayor DeWitt Clinton, presiding over the court, recognized that compelling testimony would chill penitential practice, undermining both individual moral development and broader societal

interests in ethical accountability. The decision highlighted the importance of protecting religious conscience, establishing that certain communications cannot be subordinated to procedural demands even in criminal proceedings.

Four years later, *People v. Smith* reaffirmed and extended these principles. The court emphasized that the privilege belonged not merely to the priest, but to the penitent, whose spiritual welfare required confidentiality. The priest served as guardian of the penitent's secrets, bound by religious duty never to disclose them. Civil law, the court concluded, should recognize and enforce this religious obligation rather than creating impossible conflicts between legal duty and sacred trust.

Throughout the nineteenth and twentieth centuries, most American states enacted statutory protections for priest-penitent communications. These statutes varied in their precise scope—some protected only Catholic sacramental confession while others extended to confidential religious communications more broadly—but they reflected a general legislative consensus that clergy privilege deserved legal recognition. In 1828, New York became the first state to enact a statutory priest-penitent privilege, providing that no minister or priest shall be allowed to disclose any confessions made to him in his professional character. Federal Rule of Evidence 501, enacted in 1975, confirmed that federal courts would recognize privileges established by common law principles interpreted in light of reason and experience, providing a framework for continued protection of confessional confidentiality in federal proceedings.

Chapter 2

Theological Foundations

Roman Catholic Perspective

In Roman Catholic theology, confession is not merely a helpful spiritual practice but a sacramental encounter by which the penitent is reconciled with God. The Catechism of the Catholic Church, promulgated in 1992, teaches that through the sacrament of reconciliation, the faithful obtain pardon from God for the offense committed against him and are, at the same time, reconciled with the Church which they have wounded by their sins. The priest in confession acts in persona Christi (in the person of Christ himself), facilitating repentance and mediating the divine mercy that alone can heal the wounds of sin.

Canon 983 §1 of the 1983 Code of Canon Law states with absolute clarity: "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." This prohibition admits of no exceptions. The confessor may not reveal confessional content to save his own life, to prevent grave harm to others, to assist civil authorities in prosecuting crimes or for any other purpose whatsoever. The seal binds the confessor absolutely and permanently, extending even beyond the death of the penitent. Canon 1388 provides that a confessor who directly violates the sacramental seal incurs an automatic excommunication reserved to the Apostolic See.

The theological rationale for this absolute confidentiality flows from the nature of the sacrament itself. Because the priest acts in the person of Christ, what is spoken in confession is spoken to Christ. The human priest has no independent knowledge of confessional content. He knows what he knows solely as Christ's instrument, and such knowledge cannot be used for any purpose outside the sacramental encounter. To violate the

seal would be to usurp Christ's role, treating as human knowledge what properly belongs to the divine-human encounter of the sacrament.

Breaking the seal would not only violate canon law, but would deprive the penitent of moral agency and the opportunity for genuine repentance. Confession requires absolute honesty; the penitent must acknowledge sins fully without concealment or minimization. Such honesty is possible only when the penitent knows with certainty that nothing disclosed will ever be revealed. Any doubt about confidentiality corrupts the sacrament, leading penitents to withhold precisely those matters most in need of confession and absolution.

The Catholic theological framework thus asserts that sacramental confession is an encounter with divine mercy in which the priest serves as a conduit of grace. The penitent's honest articulation of sin, paired with the priest's authoritative guidance and pronouncement of absolution, allows for both moral and spiritual restoration. On death row, where the stakes are ultimate and the outcomes irreversible, the sacramental encounter provides a critical avenue for facing past wrongdoing, confronting mortality with integrity, and receiving the grace that prepares the soul for its final judgment.

Old Catholic Perspective

The Old Catholic Church, while maintaining substantially the same sacramental theology as Rome regarding confession, places particular emphasis on freedom of conscience in the approach to the sacrament. The Utrecht Declaration of 1889, which established the principles governing the Union of Utrecht churches, affirms the ancient faith while rejecting certain developments in Roman Catholic teaching and governance that Old Catholics viewed as innovations departing from authentic tradition.

Old Catholic theology emphasizes that confession must be approached freely without coercion from either ecclesiastical or civil authority. This emphasis aligns with both moral and legal reasoning.

The state cannot impose on the penitent's religious exercise without violating conscience, ethical integrity and statutory protections designed to preserve religious liberty. The seal of confession in Old Catholic practice maintains the same absolute character as in Roman Catholic teaching, but the pastoral approach emphasizes the voluntary nature of the penitent's engagement with the sacrament.

For death row inmates, Old Catholic priests provide a confidential space in which repentance is free from fear of civil or institutional reprisal. The ethical guidance offered in confession is paired with the assurance of complete confidentiality, enabling penitents to engage in honest self-reflection and moral reckoning without external pressure. The Old Catholic perspective complements Roman practice by highlighting conscience as a moral touchstone, ensuring that penitents' engagement with God remains uncompromised by the demands of state power or institutional convenience.

Old Catholic theology is also significantly informed by Eastern Orthodox tradition, particularly in its understanding of priests as moral and spiritual guides who accompany the faithful through life's most difficult passages. This pastoral emphasis proves especially significant in death row ministry, where the priest's role extends beyond the formal administration of sacraments to encompass ongoing spiritual accompaniment through the prolonged process of waiting for execution.

Eastern Orthodox Perspective

Eastern Orthodox theology portrays confession as spiritual therapy, a healing encounter in which the wounded soul finds restoration through contact with divine mercy, mediated by the priest. St. John Chrysostom, the fourth-century Archbishop of Constantinople whose treatise *On the Priesthood* remains foundational for Orthodox understanding of pastoral ministry, stressed that the priest receives power from God to bind and loose sins, a power given neither to angels nor to archangels. The priest in confession serves as a physician of souls, and just as medical

confidentiality protects the patient's willingness to disclose symptoms fully, confessional confidentiality enables the spiritual patient to reveal the full extent of soul-sickness.

Orthodox canon law emphasizes confidentiality as a mechanism for moral and spiritual healing. The Guidelines for Clergy issued by the Orthodox Church in America and the Statute of the Russian Orthodox Church both address the obligation of confessors to maintain absolute silence regarding confessional content. The therapeutic understanding of confession implies that the priest must create conditions in which genuine healing becomes possible—and such conditions necessarily include the certainty that disclosed matter will never be revealed.

Consider a death row inmate who reveals decades of violent conduct and expresses deep remorse for the harm caused to victims and their families. Such an inmate relies on confidential guidance to achieve moral clarity and spiritual reconciliation. Breach of this confidentiality would cause profound moral harm, undermining the very therapeutic purpose that confession is meant to serve. The Orthodox tradition thus demonstrates the convergence of ethical, theological and ultimately legal imperatives in protecting the confessional encounter.

Orthodox teaching also emphasizes the therapeutic aspect of confession in guiding penitents toward ethical realignment, preparation for death, and restoration of spiritual balance. These outcomes are critical for those facing execution, who must come to terms with their past, reconcile with their conscience, and prepare spiritually for the transition from temporal to eternal life. The priest as spiritual physician provides not merely absolution, but ongoing treatment for the soul's ailments, a process that requires the absolute confidentiality that only the seal can provide.

Protestant and Other Traditions

While the focus of this work is on the Catholic and Orthodox traditions that maintain formal sacramental confession, it is important to recognize

that confidential pastoral communication exists across nearly all religious traditions. Lutheran churches retained forms of private confession following the Reformation, and the Lutheran Confessions affirm the value of individual absolution. The Anglican tradition includes provision for private confession in the Book of Common Prayer, following the principle that "all may, none must, some should" make use of sacramental reconciliation.

Even traditions that do not practice formal confession recognize the importance of confidential pastoral communication. Baptist, Methodist, Presbyterian and other Protestant traditions understand that ministers frequently receive sensitive disclosures in the course of pastoral care and that the effectiveness of such care depends on the counselee's confidence in confidentiality. Jewish tradition includes practices of confession and repentance, particularly in connection with the High Holy Days, and rabbis serving as pastoral counselors maintain confidentiality regarding sensitive disclosures.

Muslim tradition includes practices of repentance, and seeking counsel from religious scholars though the direct confession of sins to another human being is theologically complex in Islam given the emphasis on direct relationship with Allah. Buddhist traditions include practices of confession before monastic communities or teachers, and the confidentiality of such disclosures is generally expected. Hindu traditions vary significantly, but gurus and spiritual teachers often receive confidential disclosures from disciples.

The near-universal presence of confidential religious communication across traditions suggests that such practices serve deep human needs that transcend particular theological frameworks. Human beings facing moral crisis, existential anxiety or the approach of death seek confidential spaces in which they can speak honestly about their lives. Religious traditions have universally recognized and sought to protect such spaces. Legal recognition of priest-penitent privilege thus serves

not merely particular denominations, but the broader human need for confidential spiritual encounter.

Chapter 3

Ethical and Human Rights Foundations

Human Dignity and Moral Agency

Denying priest-penitent privilege fundamentally undermines human dignity, moral agency and the ability of condemned inmates to engage in genuine reconciliation. Even individuals facing execution retain fundamental human rights under both domestic and international law. The First Amendment guarantees freedom of religion, and the Equal Protection Clause of the Fourteenth Amendment ensures that all inmates are treated equitably under the law. These constitutional protections have been consistently applied to prisoners as the Supreme Court recognized in *Cruz v. Beto* and *Turner v. Safley*.

These domestic protections are complemented by international standards, particularly Article 18 of the Universal Declaration of Human Rights, which affirms the right to freedom of thought, conscience and religion, including the right to practice one's faith both publicly and privately through worship, observance and teaching. The United Nations Standard Minimum Rules for the Treatment of Prisoners similarly affirm that prisoners shall be allowed to satisfy the needs of their religious life, including receiving visits from qualified representatives of their religion and having access to religious services.

Compelling spiritual advisors to disclose confessions or limiting confidential spiritual counseling reduces inmates to mere objects of punishment, depriving them of the moral agency that underpins repentance and reconciliation. The Supreme Court's decision in *Ramirez v. Collier* recognized this principle, affirming that even in the execution chamber the condemned retain the right to spiritual guidance and sacramental encounter. To deny this right is to treat human beings as less

than human, as objects to be processed and disposed of rather than moral agents capable of genuine transformation.

Moral agency—the capacity to make meaningful moral choices—is central to what distinguishes persons from things. A person is not merely a physical organism, but a subject of experience, a center of consciousness capable of reflection, evaluation and decision. Even persons who have made gravely wrong choices in the past retain this capacity for moral reflection and potential transformation. Priest-penitent privilege protects the space in which such transformation becomes possible, ensuring that the condemned can engage in genuine moral reckoning rather than mere behavioral compliance with institutional expectations.

Conscience and Authentic Moral Reflection

Priest-penitent privilege fosters authentic moral reflection. Inmates assured of confidentiality are far more likely to fully disclose past wrongs, confront the consequences of their actions, and articulate genuine remorse. Without such assurance, the natural human tendency toward self-protection and face-saving will inevitably distort the confessional encounter. Penitents will omit the most shameful details, minimize their responsibility, and present themselves in the most favorable light possible—precisely the opposite of what authentic confession requires.

Confession provides a structured framework for ethical introspection, enabling penitents to align conscience with both divine moral law and societal ethical norms. The examination of conscience that precedes confession requires systematic review of one's actions, motivations and their effects on others. The articulation of sins in confession forces the penitent to acknowledge wrongdoing explicitly, rather than allowing it to remain vague and unconfronted. The penance assigned by the confessor provides concrete means of making amends. And the absolution pronounced at the conclusion offers the assurance of divine forgiveness that enables the penitent to move forward without being paralyzed by guilt.

Confidentiality ensures that this process is unhindered by fear of state intrusion. If the penitent knows that confessional content might be disclosed to prosecutors, parole boards or prison officials, the entire structure of authentic confession collapses. The examination of conscience becomes strategic rather than honest: What can I safely admit? The articulation of sins becomes carefully edited: What won't come back to harm me? The result is not genuine moral reflection, but a performance of repentance that leaves the soul untouched.

Clergy Responsibility and Moral Integrity

Clergy, too, bear ethical responsibilities that are protected by privilege. Without legal recognition of the seal, priests risk profound moral compromise if compelled to violate confessional confidentiality. They face an impossible choice between obedience to civil authority and fidelity to sacred duty, a choice that no legal system should force upon anyone, but especially not upon those whose vocation is defined by service to God and care for souls.

Protecting confidentiality allows clergy to provide spiritual guidance faithfully and to uphold moral integrity even under the pressures inherent in death row contexts. The priest who knows that confessional content is legally protected can offer the assurance of confidentiality with complete honesty. The priest forced to choose between disclosure and contempt of court faces a situation in which either choice involves moral compromise. The Utrecht Declaration's emphasis on freedom of conscience and Chrysostom's teaching on priestly responsibility both underscore that safeguarding the seal protects not only the conscience of the penitent, but also the integrity of the confessor.

Here ethical, legal and theological reasoning converge. The seal protects the penitent's ability to confess honestly, the priest's ability to minister faithfully, and the sacrament's ability to function as a genuine encounter with divine mercy. Undermining any of these interconnected elements damages all of them.

Societal Interest in Moral Rehabilitation

The ethical imperative extends beyond individual penitents and priests to society as a whole. Confidential sacramental reconciliation encourages acknowledgment of wrongdoing, moral reflection and contrition even among those condemned for the most serious crimes. By facilitating genuine ethical engagement, society indirectly fosters moral rehabilitation and reinforces recognition of human dignity.

Some might argue that society's interest in punishment and deterrence outweighs any benefits of confidential confession for the condemned. But this argument misunderstands both the nature of punishment and the function of confession. Punishment serves its proper purposes—retribution, deterrence, incapacitation and rehabilitation—through the mechanisms established by law. The fact of imprisonment, the conditions of confinement and, ultimately, the execution itself constitute the punishment imposed by society. Confession does not interfere with these mechanisms; it addresses a different dimension of the human person altogether.

Indeed, society benefits when even the condemned engage in genuine moral reckoning. Such engagement reinforces broader societal norms around accountability, forgiveness and ethical responsibility. It demonstrates that the moral order is not suspended even for those who have most grievously violated it. It offers a witness to the possibility of transformation that serves the common good. And it treats even the condemned as moral agents rather than objects of punishment, an affirmation of human dignity that reflects well on a society that maintains it.

International Human Rights Standards

Legal recognition of priest-penitent privilege aligns domestic practice with international human rights standards. Article 18 of the Universal Declaration of Human Rights, Article 18 of the International Covenant

on Civil and Political Rights, and various regional human rights instruments all affirm freedom of religion as a fundamental right that includes the freedom to manifest religion in practice and observance. Confidential confession is precisely such a manifestation of religious practice, and its protection follows directly from these international commitments.

The European Court of Human Rights has recognized in various contexts that states must respect the internal autonomy of religious communities and the practices essential to religious life. While the specific question of priest-penitent privilege in capital cases has not been directly addressed by international tribunals, the principles underlying international religious freedom protections clearly support such privilege. A state that compels disclosure of confessional content substantially burdens religious exercise in a manner that requires compelling justification under international human rights law.

By protecting priest-penitent privilege, society demonstrates respect for conscience, religious freedom and universal human dignity. Such protection aligns domestic legal frameworks with international commitments, affirming that the United States takes seriously its obligations under human rights law. This alignment is particularly important in the context of capital punishment, where international scrutiny of American practice is most intense and where demonstrating commitment to human rights principles becomes most consequential.

Chapter 4

The Spiritual Advisor's Vocation

Called to the Margins

Ministry on death row represents a particular vocation within the broader calling of ordained ministry. It requires not only theological formation and pastoral skill, but a willingness to accompany human beings through the most extreme circumstances imaginable. The death row chaplain or spiritual advisor enters a world defined by violence: both the violence that brought inmates to death row and the violence that the state will eventually inflict upon them. The spiritual advisor must be present to all of this without flinching, offering the consolations of faith without minimizing the gravity of what has occurred or what will occur.

This vocation draws on the deepest traditions of Christian ministry, which has always found special significance in service to those whom society marginalizes and condemns. Jesus himself was executed as a criminal, and the early Church remembered that one of those crucified alongside him received the promise of paradise. The tradition of prison ministry extends through the centuries, including figures like St. Vincent de Paul, who ministered to galley slaves, and St. Maximilian Kolbe, who offered his life for a fellow prisoner at Auschwitz. Death row ministry stands within this tradition, bringing the presence of Christ to those whom society has condemned to death.

The spiritual advisor on death row must be prepared to hear confessions of grave crimes: murder, sexual violence, cruelty beyond ordinary imagination. This requires not detachment, but a particular kind of engaged presence that holds space for both the horror of what has been done and the possibility of genuine transformation. The confessor cannot simply absorb such disclosures; they must be metabolized spiritually, brought to prayer, and placed within the larger

context of divine mercy and human redemption. Supervision, spiritual direction and care for the caregiver become essential elements of sustainable death row ministry.

Presence in the Execution Chamber

The Supreme Court's decision in *Ramirez v. Collier* affirmed the right of condemned inmates to have their spiritual advisor present in the execution chamber, including the right to receive spiritual ministrations such as laying on of hands and audible prayer during the execution itself. This legal recognition reflects a theological truth: the moment of death is precisely when spiritual presence matters most. The condemned person transitioning from temporal to eternal life deserves accompaniment by one who can speak words of faith and offer the sacramental assurance of God's mercy.

Being present in the execution chamber places extraordinary demands on the spiritual advisor. One must witness the deliberate killing of a person with whom one has formed a pastoral relationship, often over years of ministry. One must maintain composure sufficient to offer prayers, pronounce blessing, and provide spiritual comfort, even as the state carries out its sentence. And one must do all of this while managing one's own emotional and spiritual response to what is occurring.

I have stood in this position eleven times, and each time carries its own weight. The nitrogen execution of Kenneth Smith in Alabama, the lethal injections in Texas and Oklahoma, the electric chair and firing squad that remain available in some jurisdictions—each method of execution creates its own particular horror, and the spiritual advisor must be present to all of it. The commitment to accompany the condemned through death itself represents the ultimate expression of pastoral presence.

Boundaries and Self-Care

Effective death row ministry requires attention to boundaries and self-care. The intensity of relationships with the condemned, the trauma of witnessing executions, and the weight of confessional knowledge create conditions that can lead to burnout, secondary traumatization and spiritual depletion. The spiritual advisor must develop practices of self-care, maintain connections with peers who can provide support, and remain attentive to signs of compassion fatigue.

The seal of confession creates particular challenges in this regard. The confessor cannot process confessional content through ordinary means of pastoral supervision or peer support. What is heard in confession must remain absolutely confidential, even from spiritual directors or therapists who might otherwise help the confessor metabolize difficult material. This limitation requires the development of alternative coping strategies that maintain confidentiality while still providing for the confessor's spiritual and emotional health.

Prayer becomes essential. The confessor who cannot speak to anyone about confessional content can bring it to God, who already knows everything that was disclosed. Liturgical prayer, particularly the Eucharist, provides a context in which the weight of ministry can be offered and transformed. Retreats and times of extended silence allow for the kind of deep processing that cannot occur in the midst of active ministry. And ongoing spiritual direction—addressing the confessor's own spiritual life rather than the content of confessions received—provides structure for growth and accountability.

Formation for Death Row Ministry

Those called to death row ministry require particular formation beyond standard seminary education. They need exposure to the realities of capital punishment, including its history, its legal frameworks, and the conditions of death row confinement. They need training in

trauma-informed pastoral care, recognizing that virtually all death row inmates carry significant trauma histories themselves. They need guidance in navigating institutional settings, building relationships with prison officials, and understanding the particular constraints and possibilities of ministry in carceral contexts.

Most importantly, they need theological formation that can hold together apparently contradictory realities: the gravity of crimes committed by death row inmates, the genuine possibility of repentance and transformation, the horror of state execution, and the hope of resurrection. Death row ministry occurs in the tension between human sin and divine mercy, between temporal judgment and eternal redemption. The spiritual advisor must learn to inhabit this tension without resolving it prematurely in either direction.

Such formation should include supervised experience in prison ministry more broadly before undertaking death row work specifically. It should include processing of one's own attitudes toward crime, punishment and the death penalty. It should include exposure to victims' perspectives and the recognition that ministry to the condemned does not diminish care for those they harmed. And it should include ongoing formation throughout one's ministry, as the challenges of death row work evolve and intensify over time.

Chapter 5

Practical Ministry on Death Row

Confidential spiritual guidance is critical for death row inmates who confront fear, guilt and existential despair on a daily basis. The prolonged waiting that characterizes American death row, often extending for decades, creates particular pastoral challenges. Inmates live in a state of suspended execution, knowing that death is coming but uncertain of when or how it will arrive. This liminal existence intensifies the need for spiritual resources that can address mortality, conscience and hope.

Priest-penitent interactions allow condemned inmates to confront these realities and move toward moral closure. The regularity of pastoral visits provides structure in an otherwise monotonous existence. The confidentiality of these encounters creates space for honesty that may be impossible in relationships with family members, attorneys or prison officials, who have their own interests and expectations. The sacramental framework of confession provides a means of addressing guilt that no secular counseling can replicate.

The following examples illustrate the varied ways in which priest-penitent privilege enables essential spiritual work on death row. While details have been altered to protect confidentiality, these narratives reflect the reality of what confidential confession makes possible for those facing execution.

Reconciliation with Family

A condemned inmate estranged from his adult children sought moral reconciliation before his execution. The crimes that brought him to death row had devastated his family, and subsequent years of separation had added layers of unaddressed hurt. In private confession, he recounted not only the capital offense but the broader pattern of neglect,

emotional abuse and abandonment that had characterized his relationship with his children throughout their lives.

The priest provided absolution, declaring that God forgives sins through the sacrament of reconciliation when the penitent demonstrates sincere contrition and resolution to amend their life. Over several sessions, the priest guided him to articulate specific expressions of remorse and to prepare letters of apology to each of his children. Though he was ultimately prohibited from sending the letters by his attorneys, who feared that the admissions might influence his final appeals, the sacramental act of confession allowed the inmate to confront his guilt fully and achieve internal peace.

Confidentiality was essential to this process. Without it, the inmate would have withheld the most painful truths—the specific instances of harm, the full extent of his failures as a father—and denied himself the grace of complete spiritual reconciliation. The confession had to be safe in order to be honest, and it had to be honest in order to be healing.

Confronting Past Violence

Another inmate guilty of multiple violent crimes extending beyond the capital offense for which he was condemned faced overwhelming fear of divine judgment. His violence had not been impulsive but calculated, extending over years and causing immeasurable suffering to numerous victims. The weight of this history pressed upon him as execution approached, creating spiritual paralysis that threatened to prevent any meaningful engagement with his final days.

Through confession, he recounted each act of violence and its moral consequences. This was not a single session but a process extending over months, as memories surfaced and the full scope of his wrongdoing came into focus. The priest listened without judgment but without minimization, acknowledging the gravity of what was being disclosed while directing the penitent toward the possibility of divine mercy.

The priest instructed him in penance appropriate to his circumstances: prayer for his victims, the discipline of accepting his punishment without bitterness, and the cultivation of genuine contrition that went beyond fear of consequences to recognition of the harm he had caused. Finally, the priest granted absolution, pronouncing the forgiveness that God offers to those who repent sincerely.

The sacramental experience allowed this inmate to feel morally reconciled and spiritually prepared for death. Without the inviolability of the confessional seal, he might have concealed the full truth of his violence, fearing that disclosure to his confessor might somehow reach victims' families or prison officials. Such concealment would have deprived him of moral and spiritual restoration at the moment when he most needed it.

Emotional Healing and Moral Preparation

An inmate experiencing severe anxiety about his scheduled execution engaged in repeated sessions of confession and spiritual reflection during his final months. The anxiety manifested physically—sleeplessness, loss of appetite, trembling—and threatened to overwhelm his capacity for any meaningful engagement with his remaining time. Standard mental health interventions had proven inadequate to address what was fundamentally a spiritual crisis.

Each confessional session involved examining conscience, confessing sins, performing penance and receiving absolution. The structure provided by this sacramental rhythm offered something that no medication or therapy could provide: a framework for addressing guilt and mortality within a context of meaning and hope. The anxiety did not disappear entirely, but it became manageable as the inmate developed spiritual resources for confronting what lay ahead.

The priest guided him to reconcile with his conscience, accept responsibility for his actions, and achieve spiritual readiness for death. Confidentiality allowed full honesty about the fears that plagued

him—fear of death itself, fear of divine judgment, fear that he was beyond redemption—without concern that such disclosures might be used against him or communicated to others. This freedom enabled genuine ethical growth and reconciliation with both God and self.

Reconciliation with Victims' Families

A condemned inmate sought to reconcile spiritually with the families of his victims. The nature of his crime made any direct contact impossible. Legal restrictions and the wishes of the families themselves prohibited communication, but the need for reconciliation remained acute. He could not undo what he had done, but he longed to express genuine remorse in some meaningful way.

Through confession, he admitted his wrongdoing with full specificity and expressed remorse that went beyond regret at being caught or punished to genuine sorrow for the suffering he had caused. The priest guided him in spiritual penance that included regular prayer for his victims and their families, acceptance of his punishment as a form of accountability, and cultivation of a disposition that would not reoffend even if release were possible.

The priest pronounced forgiveness, affirming that God's mercy extends even to those who have committed grave offenses when they repent sincerely. Even though the inmate could not communicate directly with victims' families, the sacramental encounter allowed him to experience profound moral and spiritual closure without causing additional harm to those he had already injured. The confession was an internal reconciliation that prepared him to face death with peace rather than the torment of unaddressed guilt.

Spiritual Guidance at Execution

In situations parallel to *Ramirez v. Collier*, condemned inmates have requested their spiritual advisor's presence during execution. One such

inmate received final confession and absolution in the hours before execution, verbally recounting his sins, acknowledging remorse, and accepting responsibility before God. As the execution proceeded, the priest prayed aloud, laid hands on him as permitted, and pronounced final blessing.

The Supreme Court recognized in *Ramirez* that such spiritual guidance is protected under RLUIPA and the First Amendment, highlighting that confidential sacramental acts are legally safeguarded and morally necessary even in the execution chamber. The presence of the spiritual advisor transforms the execution from a purely mechanical procedure into a moment that retains spiritual significance for the condemned.

I have provided this ministry at multiple executions, and the privilege of doing so represents the ultimate expression of death row chaplaincy. To speak words of faith as someone takes their last breaths, to assure them of God's mercy as the state carries out its sentence, to be present at the threshold between temporal and eternal life—this is what priest-penitent privilege ultimately protects. Not merely the confidentiality of past conversations, but the sacred presence of spiritual accompaniment at the moment of death.

The examples are countless. Confidentiality and spirituality are, by their nature, intimately intertwined. Priest-penitent privilege is necessary for the function of any society that takes religious liberty seriously.

Chapter 6

Legal Foundations

Constitutional Protections

The protection of priest-penitent privilege on death row is deeply rooted in constitutional principles, particularly the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, and is further reinforced by statutory safeguards such as RLUIPA. For incarcerated individuals, including those facing execution, these protections ensure that religious exercise is not subordinated to administrative convenience or penal objectives. The Constitution does not suspend operation at the prison gate, and fundamental rights persist even in the most restrictive circumstances.

First Amendment Protections

The First Amendment guarantees the free exercise of religion, prohibiting the government from interfering with an individual's right to practice faith. For prisoners, this includes access to religious counsel and confidential communication with clergy as the Supreme Court established in *Cruz v. Beto*. Incarceration does not eliminate the fundamental right to religious exercise even under highly controlled or security-sensitive conditions. Confidential spiritual communication is an integral part of faith practice. Confession, absolution and pastoral counseling are not merely symbolic acts but essential encounters for moral and spiritual reconciliation, especially for inmates confronting death.

Requiring priests to disclose confessions or limiting access to private spiritual counseling constitutes a substantial burden on religious exercise. Such requirements undermine the inmate's ability to practice faith according to conscience, disrupting the moral and ethical dimensions

of religious practice. In capital cases where the opportunity for genuine repentance and spiritual reconciliation may be the condemned person's last chance before facing eternal judgment, the burden is particularly severe.

Courts have repeatedly recognized that even in high-security environments, inmates retain a protected right to confidential interaction with clergy. The constitutional understanding that faith and conscience are not suspended behind prison walls applies with particular force on death row, where spiritual concerns intensify as execution approaches. *Ramirez v. Collier* confirmed that these protections extend into the execution chamber itself.

The First Amendment also safeguards clergy as intermediaries of moral and spiritual guidance. Forcing a priest to violate the sacramental seal infringes not only on the inmate's rights, but also on the ministerial freedom of religious advisors, creating an intolerable conflict between conscience and state authority. By protecting priest-penitent communications, the law ensures that faith practices are respected and clergy are empowered to provide guidance without fear of legal compulsion to violate sacred duties.

Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment complements First Amendment protections by guaranteeing that all inmates, regardless of faith tradition, have equal access to confidential clergy counseling. This clause prevents arbitrary distinctions that would allow one inmate to receive sacramental guidance while denying it to another based solely on denomination, administrative policy or institutional discretion.

Denying access to priest-penitent communications disproportionately affects faith traditions that rely heavily on sacramental practice, including Catholic, Old Catholic, and Orthodox Christians, as well as other faiths with confidential spiritual guidance

rituals. The Equal Protection Clause ensures that institutional rules do not privilege or disadvantage any religious group. On death row, where unequal access to spiritual guidance can mean the difference between moral reconciliation and existential despair, equal protection takes on particular urgency.

Courts have recognized that failure to provide equitable access to clergy counseling violates both legal and moral imperatives. *Turner v. Safley* established that prison regulations affecting constitutional rights must be reasonably related to legitimate penological interests, and mere administrative convenience cannot justify unequal treatment. A Catholic inmate must have the same access to confidential spiritual advisement and sacramental guidance as an inmate from any other faith tradition. Ensuring equal access protects both conscience and spiritual integrity, which is especially consequential for inmates confronting the finality of execution.

RLUIPA Protections

The Religious Land Use and Institutionalized Persons Act of 2000 further strengthens these protections, explicitly forbidding any substantial burden on religious exercise of institutionalized persons unless justified by a compelling government interest applied in the least restrictive manner. On death row, RLUIPA ensures that inmates' access to confession and sacramental guidance cannot be denied due to administrative convenience or institutional policy. The statute codifies the principle that religious exercise, including priest-penitent communication, is a fundamental human and legal right that persists even under the most controlled circumstances.

RLUIPA highlights the cumulative importance of constitutional and statutory protections. It integrates First Amendment safeguards with practical prison administration by requiring courts to scrutinize any policies that substantially burden religious exercise. In capital cases where the ability to confess, receive absolution and engage in penance

may be the inmate's last opportunity for moral reconciliation, RLUIPA reinforces both the ethical necessity and legal entitlement of priest-penitent privilege.

The Supreme Court's application of RLUIPA in *Ramirez v. Collier* demonstrated that the statute has real teeth in the death penalty context. Texas's denial of Ramirez's request for his pastor to lay hands on him during execution was found to substantially burden his religious exercise without adequate justification. This ruling confirmed that RLUIPA provides meaningful protection for religious practice even in the most extreme circumstances.

Synthesis of Constitutional and Statutory Framework

Together, the First Amendment, Equal Protection Clause, and RLUIPA create a robust legal framework ensuring that priest-penitent privilege on death row is protected. The First Amendment guarantees the freedom to practice religion, including confidential spiritual guidance. The Equal Protection Clause ensures that all inmates are treated equally, preventing arbitrary discrimination based on faith. RLUIPA codifies these protections into enforceable statutory law, prohibiting substantial burdens unless absolutely necessary to serve a compelling governmental interest through the least restrictive means.

In practice, this triad of protections ensures that death row inmates can confess sins and receive forgiveness without fear that their communications will be disclosed. It guarantees that clergy can minister without compromising conscience, preserving the moral and theological integrity of the sacramental encounter. These protections demonstrate that religious liberty and human dignity are paramount even in the context of the state's legitimate interests in security, order, and the execution of criminal sentences.

Denial of priest-penitent privilege would violate the First Amendment by substantially burdening religious exercise without adequate justification. It would undermine the Equal Protection Clause by creating distinctions between inmates based on the nature of their religious practices. And it would contravene RLUIPA by imposing substantial burdens without demonstrating compelling necessity or least restrictive means. Protecting these rights ensures that faith, conscience and moral agency remain inviolate even in the shadow of execution.

Chapter 7

Legal Precedent

Priest-penitent privilege occupies a unique space in American law, offering protection to communications made during confession. Across centuries and jurisdictions, courts have consistently recognized that these communications are not ordinary speech but sacred encounters, essential to moral reflection, spiritual reconciliation and ethical accountability. For death row inmates, the privilege takes on heightened significance: It safeguards their ability to confront guilt, perform penance and seek absolution without fear of secular reprisal. From early American cases to modern Supreme Court rulings, the legal system has affirmed that confession is protected by law, morality and religious principle.

People v. Philips (1813)

In *People v. Philips*, the New York Court of General Sessions considered whether a Catholic priest could be compelled to testify regarding a confession made by a defendant accused of theft. The prosecution subpoenaed Father Anthony Kohlmann, a Jesuit priest, to disclose statements made during confession, aiming to use them as evidence. The priest refused, invoking the absolute inviolability of the sacramental seal as recognized in Catholic canon law.

The court carefully analyzed the nature of confession, emphasizing that it is a sacred encounter between penitent and priest, not merely a private conversation. Mayor DeWitt Clinton, presiding over the court, recognized that compelling testimony would chill penitential practice, undermining both individual moral development and broader societal interests in ethical accountability. Clinton reasoned that if witnesses could not be forced to confess to crimes that stained their reputations,

then surely the law would not require them to violate their consciences. The court recognized that to require priests to disclose confessions would be to declare that there shall be no penance—and this important branch of the Roman Catholic religion would be thus annihilated.

Philips demonstrated an early recognition of the unique moral and theological significance of confession. The court noted that requiring disclosure would discourage penitents from fully confronting wrongdoing, compromising opportunities for repentance and moral restoration. For death row inmates who confront ultimate accountability, this principle proves especially vital. The seal allows them to confront crimes honestly without fear that candid admissions will be used against them, reinforcing the notion that religious liberty intersects directly with moral rehabilitation. The case has been described by scholars as a constitutional landmark: the first free exercise case, the origin of the evidentiary priest-penitent privilege in American law, and, perhaps, the earliest instance of group impact litigation.

***People v. Smith* (1817)**

People v. Smith built on the foundation laid in *Philips*, distinguishing the case on the grounds that the defendant had approached the minister as a friend or adviser rather than in his capacity as a professional or spiritual advisor. The court emphasized that the privilege applied specifically to communications made within the context of religious confession rather than ordinary pastoral conversation.

The distinction drawn in *Smith* prompted New York to enact the first statutory priest-penitent privilege in 1828, providing that no minister or priest shall be allowed to disclose any confessions made to him in his professional character. Similar legislation was subsequently adopted in Missouri, Michigan, Wisconsin, California and Iowa in the 1840s and 1850s. By 1963, forty-four states had adopted such legislation, and today, all fifty states have some form of statutory protection for clergy-penitent communications.

***Cruz v. Beto* (1972)**

The Supreme Court's decision in *Cruz v. Beto* is a landmark case for religious freedom in prisons. A Buddhist inmate in Texas was denied access to worship facilities and prohibited from sharing religious literature, even as Christian inmates enjoyed full access to chapels and ministers. The Court held that First Amendment guarantees of religious freedom apply within prisons and that inmates must be given reasonable opportunities to exercise their faith comparable to those afforded adherents of other religions.

The significance of *Cruz* for priest-penitent privilege lies in its affirmation that incarceration does not extinguish constitutional rights, particularly those rooted in free exercise. Just as Buddhist inmates must be afforded opportunity to practice their faith on equal footing with Christians, so too must all inmates be ensured confidential access to clergy for confession and spiritual counsel. The Court's reasoning underscores that religious practice is not a privilege granted at the discretion of prison authorities, but a fundamental right protected by the Constitution.

Applied to the death penalty context, *Cruz* reinforces that condemned inmates retain the right to sacramental practices, including confession. Denying access to confidential clergy-penitent communication would replicate the constitutional violation at issue in *Cruz*, favoring state authority over free exercise rights. The case strengthens the claim that priest-penitent privilege must remain inviolate even on death row.

Federal Rule of Evidence 501 (1975)

Federal Rule of Evidence 501 provides the modern statutory framework for recognizing privileges like clergy-penitent privilege in federal courts. The Rule codifies that privileges are governed by common law interpreted by courts in light of reason and experience. This allows courts

to adapt longstanding protections to contemporary legal challenges, including those involving death row inmates.

The rule emerged to reconcile competing interests: the need for reliable evidence in criminal proceedings and the moral, ethical and religious imperatives underlying confidential communications. Courts interpreting Rule 501 have emphasized that clergy-penitent communications are fundamentally different from ordinary conversations: They are made for spiritual formation, repentance and moral realignment rather than social convenience or personal benefit.

For death row inmates, Rule 501 serves as a crucial safeguard. Confidential confession allows inmates to articulate past wrongs, experience genuine contrition, and receive absolution without fear of secular repercussions. The Rule affirms that these communications are legally protected and that compelling disclosure would constitute a substantial burden on religious exercise.

Turner v. Safley (1987)

The Supreme Court's decision in *Turner v. Safley* established the standard for evaluating prison regulations that burden constitutional rights. While addressing correspondence restrictions and marriage prohibitions rather than religious practice directly, *Turner* created the framework courts use to assess whether regulations reasonably relate to legitimate penological interests.

Turner means that restrictions on confidential access to clergy must withstand scrutiny. A prison cannot deny sacramental confession or compromise its confidentiality simply for administrative ease or speculative security concerns. Prison authorities must show that restrictions are narrowly tailored and truly necessary for safety or order. In practice, this standard has bolstered judicial recognition that confidentiality in confession is constitutionally protected against unwarranted intrusion.

***Mockaitis v. Harclerod* (1997)**

Mockaitis v. Harclerod involved a case in Oregon in which the Lane County District Attorney secretly recorded a sacramental confession between Father Timothy Mockaitis and jail inmate Conan Wayne Hale. Hale was a murder suspect, and the district attorney sought to use the confession as evidence. Father Mockaitis and Archbishop Francis George sued, asserting that the secret taping violated their constitutional rights and the Religious Freedom Restoration Act.

The Ninth Circuit Court of Appeals ruled in favor of the plaintiffs, finding that the district attorney had substantially burdened Father Mockaitis's exercise of religion as understood in the First Amendment. The court emphasized that no case in the United States had ever given approval to the invasion of the Catholic rite of confession by an agency of government. The court recognized that Father Mockaitis was reasonable in relying on the Oregon law of evidence and on the nation's history of respect for religion in general and for the sanctity of the secrets of confession in particular.

Mockaitis demonstrates that even indirect attempts to obtain confessional content, such as secret recording, violate constitutional protections. The case reinforced that the seal of confession is not merely a Catholic ecclesiastical rule, but a principle recognized and protected by American law. For death row inmates, *Mockaitis* provides assurance that their confessions cannot be surreptitiously captured and used against them by state authorities.

***Cutter v. Wilkinson* (2005)**

In *Cutter v. Wilkinson*, the Supreme Court addressed RLUIPA's scope regarding inmates' religious rights. Ohio prisoners practicing minority religions claimed they were denied access to religious materials and worship opportunities afforded to more conventional faiths. The State

argued that enforcing RLUIPA violated the Establishment Clause by advancing religion.

The Court unanimously rejected this argument, holding that RLUIPA permissibly accommodates religious exercise in institutional settings. Protecting inmates' rights to practice their faith is consistent with the First Amendment and does not improperly privilege religion. Instead, it ensures that religious freedom is meaningfully preserved behind prison walls.

For priest-penitent privilege, *Cutter* demonstrates that constitutional and statutory protections extend to encompass the deeply personal and sacramental needs of all faith traditions. Prisons must actively accommodate religious exercise rather than avoid overt discrimination. On death row, this precedent underscores that absolute confidentiality in sacramental confession is a protected form of religious exercise.

***Ramirez v. Collier* (2022)**

Ramirez v. Collier represents one of the most significant modern affirmations of religious liberty for death row inmates. John Henry Ramirez, a Texas death row inmate, requested that his pastor Dana Moore from Second Baptist Church in Corpus Christi be allowed to lay hands on him and pray aloud during his execution. The State denied this request, citing security concerns. Ramirez argued that such denial imposed a substantial burden on his religious exercise under RLUIPA and violated First Amendment protections.

The Supreme Court's analysis was meticulous. Chief Justice John Roberts delivered the majority opinion in an 8-1 decision, with Justice Clarence Thomas dissenting. The Court recognized that the requested pastoral acts—laying on of hands, audible prayer and final confession—were central to Ramirez's faith as a Baptist Christian and his preparation for death. Preventing these acts would undermine the very core of his religious practice. The Court acknowledged the moral

and theological significance of these practices, noting that it is part of Ramirez's faith to have his spiritual advisor lay hands on him anytime he is sick or dying.

The Court found that Texas's categorical ban on audible prayer and touch was not the least restrictive means of furthering the state's compelling interests in security and order, especially given Texas's past practice of allowing such spiritual ministrations in its 572 executions prior to 2019. The Court noted that other jurisdictions continue to allow touch and audible prayer during executions without incident.

The Court granted relief, permitting Ramirez's pastor to perform the requested sacramental acts. On October 5, 2022, Ramirez was executed with Pastor Moore present, able to pray and touch him as the Court had ordered. The ruling highlighted that RLUIPA, the First Amendment, and centuries of moral and theological tradition converge to protect spiritual guidance at the moment of death. *Ramirez* establishes a binding standard for the treatment of all death row inmates seeking priestly guidance, ensuring that their final sacramental encounters are legally protected, morally affirmed and spiritually respected.

Synthesis of Precedent

The jurisprudence surrounding priest-penitent privilege illustrates a consistent commitment to preserving the moral and spiritual integrity of confession. Cases like *Philips* and *Smith* establish foundational protections, affirming that compelling disclosure undermines both personal moral development and societal ethical interests. Federal Rule of Evidence 501 and decisions such as *Mockaitis* further codify these protections, emphasizing that clergy privilege is absolute even when state authorities attempt to circumvent it through indirect means. *Ramirez* demonstrates that modern courts continue to uphold these principles, recognizing the profound significance of sacramental acts for death row inmates.

Collectively, these cases underscore that priest-penitent privilege is not merely a procedural formality, but a critical safeguard of conscience, religious liberty and human dignity. For inmates facing execution, it ensures that their final opportunities for confession, absolution and reconciliation remain fully protected, honoring both the letter of the law and the deepest moral imperatives of justice.

Chapter 8

Contemporary Challenges and Threats

Legislative Challenges to the Seal

In recent years, the absolute character of priest-penitent privilege has faced legislative challenges in various jurisdictions, primarily in response to the sexual abuse crisis in Catholic and other religious institutions. Some legislators have proposed mandatory reporting requirements that would compel clergy to disclose confessional content involving child abuse, arguing that child protection must take precedence over religious confidentiality. In 2025, the state of Washington adopted a law requiring clergy to report child abuse or neglect, even if they gained this knowledge through the confessional.

These proposals raise profound questions about the relationship between religious liberty and other compelling social interests. The Catholic Church and other traditions with sacramental confession have consistently maintained that the seal admits of no exceptions: A confessor may not disclose confessional content even to prevent ongoing abuse. This position has generated significant controversy and moral criticism, with some arguing that absolute confidentiality enables perpetrators to confess without accountability and return to offending.

The debate illuminates the deeper theological and ethical principles at stake. From the perspective of traditions maintaining the seal, confession serves purposes that mandatory reporting cannot replicate. A perpetrator who confesses may be directed to turn himself in to authorities, to remove himself from situations of access to potential victims, and to undertake genuine repentance and amendment of life. If confession becomes another mandatory reporting context, perpetrators will simply not confess, eliminating whatever influence the confessional might have on their behavior.

For death row ministry, these debates remain relevant because they reflect broader societal attitudes toward confessional confidentiality. If society increasingly views the seal as an obstacle to justice rather than a protection of religious liberty, the legal framework supporting priest-penitent privilege may erode. Those who minister on death row must be prepared to articulate why the seal matters—not only for the condemned, but for the integrity of religious practice.

Institutional Resistance

Prison systems have sometimes resisted providing conditions necessary for genuine confidential confession. Security concerns, staffing limitations, and institutional inertia can all create barriers to meaningful priest-penitent communication. Some facilities lack appropriate private spaces for confession. Others require that conversations with inmates be monitored or recorded, effectively eliminating any confidentiality. Still others impose scheduling restrictions that make regular pastoral visits impossible.

Spiritual advisors on death row must navigate these institutional barriers while advocating for the conditions necessary to fulfill their ministry. This may require persistent communication with prison administrators, appeals to legal protections under RLUIPA and the Constitution, and willingness to challenge policies that substantially burden religious exercise. The goal is not confrontation for its own sake but creating the conditions in which genuine confession and spiritual guidance become possible.

Ramirez v. Collier provides important support for such advocacy. By affirming that spiritual accompaniment at execution is constitutionally protected, the Supreme Court signaled that institutional convenience cannot override inmates' religious rights. Spiritual advisors can invoke *Ramirez* when challenging policies that prevent meaningful confidential communication, arguing that restrictions must serve compelling interests through least restrictive means.

Cultural Misunderstanding

American culture increasingly lacks familiarity with sacramental confession as a religious practice. While Catholic, Orthodox, and some other traditions maintain active confessional practice, many Americans have no personal experience with confession and may view it as an antiquated or foreign ritual. This cultural distance can make it difficult to convey why priest-penitent privilege matters.

Media portrayals of confession often emphasize dramatic plot elements—the murderer confessing to a priest who cannot report to police—while obscuring the ordinary pastoral reality of the sacrament. These portrayals can create the impression that confession primarily serves to protect criminals rather than to facilitate genuine spiritual transformation. Such impressions undermine public support for confessional confidentiality.

Those who advocate for priest-penitent privilege must be prepared to explain the sacrament's actual purpose and function. Confession is not about evading accountability, but about confronting it at the deepest level. The penitent who confesses fully acknowledges wrongdoing in a way that secular legal processes often do not require. The absolution pronounced is not a license to continue offending, but a call to genuine amendment of life. Understanding these realities is essential to grasping why the seal matters.

The Digital Age

Modern technology creates new challenges for confessional confidentiality. The COVID-19 pandemic prompted questions about whether confession could be validly and safely conducted via video conference and what privacy implications such digital confession might have. Prisons increasingly use electronic monitoring and recording of communications, creating risks that confessional content could be captured and disclosed.

Spiritual advisors must be attentive to these technological dimensions of confidentiality. They should verify that communication channels are genuinely private, resist institutional pressures to use monitored lines for pastoral conversations, and advocate for policies that protect digital confessional communication as thoroughly as in-person encounters. The seal extends to all forms of confessional communication, and technological changes do not alter the fundamental obligation of confidentiality.

Chapter 9

Recommendations for Practice

For Clergy and Spiritual Advisors

Clergy ministering on death row should approach this work with clear understanding of both the privilege that protects their communications and the responsibilities it entails. Before beginning death row ministry, they should ensure thorough formation in the theology and practice of confession, the legal framework protecting confidential communication, and the particular challenges of carceral ministry. They should establish clear protocols with prison administrators regarding the conditions necessary for confidential pastoral visits.

In their direct ministry, spiritual advisors should communicate clearly to inmates the absolute nature of confessional confidentiality. Many inmates, even those raised in confessing traditions, may be uncertain whether they can trust a prison chaplain with full disclosure. The spiritual advisor should explain that nothing disclosed in confession will ever be revealed—not to prison officials, not to attorneys, not to family members, not to anyone under any circumstances. This assurance creates the conditions for honest engagement with conscience.

Spiritual advisors should maintain careful attention to the boundaries between confessional and non-confessional communication. Some conversations with inmates are pastoral but not sacramental: discussing family concerns, offering encouragement, providing spiritual reading materials. These conversations may not carry the same absolute privilege as sacramental confession. The spiritual advisor should be clear about when confession is occurring and ensure that genuinely confessional content receives the full protection of the seal.

Finally, spiritual advisors should attend carefully to their own spiritual health. Death row ministry carries significant burdens that can

lead to burnout, secondary trauma and spiritual depletion. Regular retreat, spiritual direction and peer support within the bounds of confidentiality are essential to sustainable ministry. The spiritual advisor cannot pour from an empty cup, and self-care is not self-indulgence but necessary stewardship of one's capacity to serve.

For Attorneys

Attorneys representing death row inmates should understand priest-penitent privilege as a resource for their clients' wellbeing even when it may seem to conflict with legal strategy. Inmates who have access to confidential spiritual guidance may be better equipped to cope with the stresses of capital litigation, make difficult decisions about their cases, and maintain psychological stability through prolonged proceedings. Supporting access to spiritual care serves clients' interests broadly conceived.

Attorneys should also be prepared to advocate for their clients' religious rights when institutions fail to respect them. This may include filing motions to ensure access to spiritual advisors, challenging policies that substantially burden religious exercise, and invoking RLUIPA and constitutional protections when necessary. *Ramirez v. Collier* provides precedent that courts will enforce these protections even in the execution context.

At the same time, attorneys should respect the boundaries of priest-penitent privilege. They should not attempt to obtain information from spiritual advisors about confessional content, even if such information might be strategically useful. They should not pressure clients to disclose what they have told their confessors. The privilege belongs to the client, but it serves purposes that transcend legal strategy, and attorneys should support rather than undermine its proper function.

For Prison Officials

Prison administrators bear responsibility for creating conditions in which priest-penitent communications can occur with genuine confidentiality. This requires providing appropriate private spaces for pastoral visits, establishing policies that protect the confidentiality of such visits, and training staff to respect religious communications. Administrators should recognize that facilitating religious exercise is not a discretionary accommodation but a legal obligation under RLUIPA and the Constitution.

Security concerns, while legitimate, cannot justify blanket policies that eliminate confessional confidentiality. Prison officials must conduct individualized assessments of whether particular restrictions serve compelling interests through least restrictive means. In most cases, spiritual advisors with proper credentials and vetting pose minimal security risk, and visual supervision without audio monitoring can address reasonable concerns while preserving confessional privacy.

Officials should also ensure equitable access to spiritual care across faith traditions. Catholic inmates should not receive better access to confession than Protestant inmates receive to pastoral counseling, or vice versa. The Equal Protection Clause requires that religious accommodations be made available without discrimination, and prison policies should reflect this constitutional requirement.

For Policymakers

Legislators and policymakers considering changes to priest-penitent privilege should carefully weigh the competing interests at stake. While concerns about accountability and child protection are legitimate, eliminating or undermining confessional confidentiality carries significant costs that may not be immediately apparent. If penitents cannot trust that their confessions will remain confidential, they will simply not confess, eliminating whatever positive influence the

confessional might have on behavior while providing no actual benefit to potential victims.

Policymakers should also consider the constitutional dimensions of proposed changes. Mandatory reporting requirements that apply to confessional content likely impose substantial burdens on religious exercise that must satisfy heightened scrutiny under RLUIPA and the First Amendment. Courts may strike down such requirements as unconstitutional, resulting in litigation costs and uncertain legal outcomes. A more productive approach may focus on addressing underlying problems—inadequate oversight, insufficient accountability mechanisms, cultural factors that enabled abuse—rather than targeting confessional confidentiality specifically.

Conclusion

The Sacredness of Confession and the Dignity of Death

Priest-penitent privilege on death row is morally, theologically and legally indispensable. Catholic, Old Catholic and Eastern Orthodox traditions converge on the inviolability of confession. Ethical reasoning emphasizes human dignity, moral agency and clergy responsibility. Practical experience demonstrates that confidential spiritual guidance facilitates repentance, reconciliation and emotional preparation for death. Legal precedent from *People v. Philips* in 1813 to *Ramirez v. Collier* in 2022, alongside Federal Rule of Evidence 501 and RLUIPA, gives evidence of protection for this privilege across centuries and jurisdictions.

First Amendment protections and the Equal Protection Clause further bolster claims that all inmates, regardless of denomination or circumstance, should be able to access confidential clergy guidance. Together, these constitutional and statutory provisions create a robust framework ensuring that death row inmates can confess sins and receive forgiveness without fear of disclosure and that clergy can minister without compromising conscience or sacred duty.

To deny priest-penitent privilege would subordinate conscience to procedure, strip the condemned of essential spiritual guidance, and diminish human dignity at life's end. Upholding it affirms that faith, conscience and moral agency remain inviolable even in the shadow of execution.

Religious liberty is not an abstract concept; it is the very lifeline of the soul. On death row, where fear, guilt and mortality converge, the freedom to confess, receive absolution, and reconcile with God must be protected. If it is not protected there—at the very threshold of eternity—then it is not genuinely protected anywhere. The measure of

our commitment to religious freedom is not how we treat it in comfortable circumstances, but how we maintain it in the most extreme situations.

I have witnessed what happens when a condemned person finally and fully confronts the truth of their life in the presence of God. I have seen the transformation that absolution can work even in the final hours before execution. I have accompanied men to their deaths knowing that they went reconciled with their conscience, at peace with their Creator, prepared for whatever awaits beyond the veil of mortality. This is what priest-penitent privilege protects: not merely confidential conversation, but the sacred encounter that makes genuine transformation possible.

Protecting priest-penitent privilege is, therefore, not merely legal compliance. It is a profound affirmation that even at the edge of death, the religious practice of every person is sacred, untouchable and inviolable. It is an acknowledgment that human dignity persists until the very last breath, that moral agency endures even under sentence of death, that the possibility of redemption is never extinguished as long as life remains.

May this work serve all who minister to the condemned, advocate for their rights, and seek to understand why these matters are so consequential. May it contribute to a society that takes religious liberty seriously, even for those it has condemned to death. And may it honor those I have accompanied to their executions, whose confessions I will carry in silence until I join them in eternity.

Bibliography

Canon Law Society of America. *Code of Canon Law, Latin-English Edition*. Washington, D.C.: CLSA, 1983.

Catechism of the Catholic Church. Vatican: Libreria Editrice Vaticana, 1992.

Chrysostom, John. *On the Priesthood*. Translated by Graham Neville. Crestwood, NY: St. Vladimir's Seminary Press, 1984.

Cruz v. Beto, 405 U.S. 319 (1972).

Cutter v. Wilkinson, 544 U.S. 709 (2005).

Declaration of Utrecht. Old Catholic Churches of the Union of Utrecht, 1889.

The Didache. First century CE.

Federal Rule of Evidence 501. Pub. L. 93-595, 88 Stat. 1926 (1975).

Fourth Lateran Council. Canon 21 (*Omnis utriusque sexus*). 1215.

Guidelines for Clergy. Orthodox Church in America, 1998.

Horner, Chad. "Beyond the Confines of the Confessional: The Priest Penitent Privilege in a Diverse Society." *Drake Law Review* 45 (1997): 697–732.

International Covenant on Civil and Political Rights. Adopted by the United Nations General Assembly, December 16, 1966.

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

People v. Philips, N.Y. Ct. Gen. Sess. 1813.

People v. Smith, 2 City Hall Recorder 77 (N.Y. Ct. Gen. Sess. 1817).

Ramirez v. Collier, 595 U.S. 411 (2022).

Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). Pub. L. No. 106-274, 114 Stat. 803, codified at 42 U.S.C. §§ 2000cc et seq.

Sampson, William. *The Catholic Question in America*. New York: Edward Gillespy, 1813.

Statute of the Russian Orthodox Church. Adopted by the Jubilee Bishops' Council of the Russian Orthodox Church, August 2000.

Turner v. Safley, 482 U.S. 78 (1987).

United Nations. Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules). Adopted 2015.

Universal Declaration of Human Rights. G.A. Res. 217 A (III), U.N. Doc. A/810 (1948).

Walsh, Walter J. "The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence." *Indiana Law Journal* 80 (2005): 1037–1089.

—. "The First Free Exercise Case." *George Washington Law Review* 73 (2004): 1–100.

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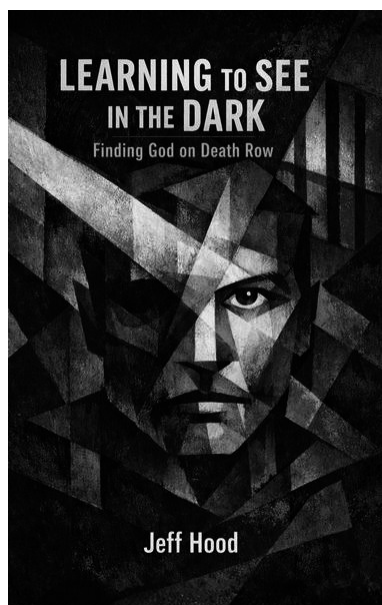
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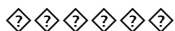
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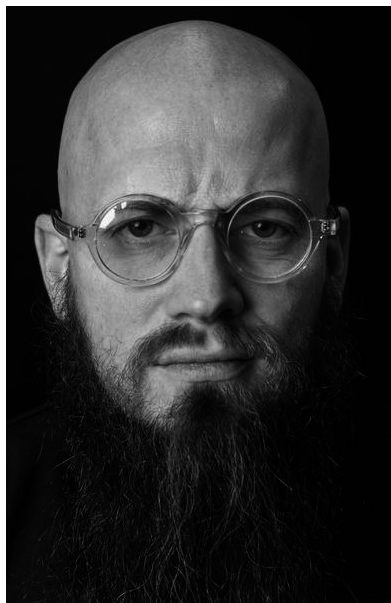
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About the Author

The Rev. Dr. Jeff Hood is a theologian and spiritual advisor to death row inmates nationwide. He has accompanied over a dozen men to their executions and was the first spiritual advisor to be present for a nitrogen hypoxia execution. Rev. Hood has been profiled widely, including in the Rolling Stone documentary *The Spiritual Advisor*. He is the Founder of the Execution Intervention Project.

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