THE PRIESTHOOD OF ALL CITIZENS: ON THE PSEUDO-THEOLOGY OF PENITENT PRIVILEGE

Nathan J. Ristuccia[*]

INTRODUCTION

> *Modern nonreligious man . . . will not be truly free until he has killed the last god. . . . [W]hether he likes it or not, he is also the work of religious man; his formation begins with the situations assumed by his ancestors. In short, [modern man] is the result of a process of desacralization.*[1] — *Mircea Eliade*

[*] Judicial Law Clerk, United States Court of Federal Claims. J.D., Georgetown University Law Center, 2022; Ph.D., University of Notre Dame, 2013; M.A., University of Notre Dame, 2009; B.A., Princeton University, 2007. The author thanks Michael S. Pardo, Alexander Nowakowski, and the Hon. Victor J. Wolski for their help in the writing of this Article.

[1] MIRCEA ELIADE, THE SACRED AND THE PROFANE: THE NATURE OF RELIGION 203 (Williard R. Trask trans., Harcourt, Inc. 1959) (1957).

Just before dawn on October 27, 1816, a Staten Island farmer named Bornt Lake crawled through the panels of a fence and began stealing walnuts from a tree owned by his neighbor, Christian Smith, whose family had feuded with Lake's for over a decade.[2] Smith awoke at the noise, grabbed his musket, and chased the trespasser onto the public road, where a fistfight ensued.[3] Within a few minutes, Lake was dead—struck in the side with birdshot while he was running to escape.[4]

Smith admitted to the killing from the start.[5] The issue at trial was why Smith had shot: whether his fear of catching a known enemy committing a crime near his house at night justified deadly force. Smith's lawyers argued that the common law allowed force in this situation, citing a number of English cases, [6] but Hon. J. William Van Ness, the New York Supreme Court justice who headed the three-judge panel, told the jury that the law was the reverse. [7]

So many people gathered from all over Staten Island to watch the trial that the judges moved proceedings from the courthouse to

---

[2] People v. Smith, 2 N.Y. City-Hall Recorder 77, 77-78, 81 (Ct. Oyer & Term. 1817), *reproduced in* 1 AMERICAN STATE TRIALS 799 (John D. Lawson ed., 1914) [hereinafter *Smith*] (mentioning various lawsuits and petty crimes that had occurred between the two families over the prior sixteen years). Bornt Lake (1771-1816) was a member of a prominent family on Staten Island and the father of six children. *See* ARTHUR ADAMS & SARAH A. RISLEY, A GENEALOGY OF THE LAKE FAMILY OF GREAT EGG HARBOR, IN OLD GLOUCESTER COUNTY, IN NEW JERSEY, DESCENDED FROM JOHN LAKE OF GRAVESEND, LONG ISLAND 24 (1915). Smith, similarly, was "an old man" and the father of nine children, with an otherwise good reputation in the area. *See Smith*, *supra* note 2, at 81, 83.

[3] *Smith*, *supra* note 2, at 81.

[4] *Id.* at 79 (the coroner estimated the discharge at ten yards from the deceased, and the experienced gunner witness estimated that Smith shot Lake from roughly twenty yards away).

[5] *See id.* at 82 (describing how Smith willingly participated in the coroner's inquest); J.J. CLUTE, ANNALS OF STATEN ISLAND, FROM ITS DISCOVERY TO THE PRESENT TIME 134–35 (New York, Chas. Vogt 1877) (relating how Smith spoke of the killing to a neighbor immediately after it happened).

[6] *Smith*, *supra* note 2, at 82–83.

[7] *Id.* at 83. The three judges were J. William W. Van Ness of the N.Y. Sup. Ct. and J.J. John Garretson and John Van Pelt of the Ct. Com. Pl. for the Cnty. of Richmond. *Id.* at 77. J. Van Ness, who did all the speaking during trial, was a leader of New York's Federalist party. *See* ROBERT ERNST, RUFUS KING: AMERICAN FEDERALIST 347–48 (1968) (discussing how J. Van Ness nearly ran as the Federalist candidate for governor in 1816).

the larger Dutch Reformed Church next door to accommodate all the spectators.[8] According to one attendee, the milieu united "the divine solemnities of religion and the awful majesty of the law" and inspired "tears in every eye" and "feelings [in] every heart."[9] The prosecution's star witness was Peter Van Pelt, the pastor of the Dutch Reformed church, who heard Smith confess while jailed and awaiting trial.[10] The defense objected that Van Pelt could not be admitted, because "a minister of the gospel, or a counsellor at law" cannot divulge confidences a prisoner was "compelled to make" "for his temporal or eternal safety."[11] Just as a defendant must speak freely to his attorney to prepare a legal defense, so too must a sinner confide in his pastor to prepare his soul for judgment.

The defense, moreover, cited *People v. Philips*, an 1813 a case in which a four-judge panel led by DeWitt Clinton, the Mayor of New York, unanimously exempted a Jesuit priest from testifying about the contents of an auricular confession.[12] Dicta in *Philips* hinted that self-incrimination "compelled" by fear of eternal damnation "is not to be regarded as voluntary, and, therefore, is

---

[8] *Smith*, *supra* note 2, at 77, 82; *see also* C. G. Hine, *History – Story – Legend of the Old King's Highway now the Richmond Road Staten Island, N.Y.,* PUBL'N STATEN ISLAND ANTIQUARIAN SOC'Y, INC. at 20–21 (1916) (describing the location of buildings on Richmond Road in present day Staten Island at the time of the trial).

[9] So alleged the case's anonymous reporter, who was present. *See Smith*, *supra* note 2, at 82.

[10] *Smith*, *supra* note 2, at 80. Van Pelt is best known for a sermon he gave on July 4, 1812—just after the War of 1812 began—in which the pastor praised America's founders as divinely inspired. *See* Peter Van Pelt, A.M., A Discourse, Delivered on the Fourth of July in the North Brick Church, 9, 11 (New York, 1812) (revealing Van Pelt to be a Democratic-Republican who viewed Sen. DeWitt Clinton as "a great and enlightened statesman").

[11] *Smith*, *supra* note 2, at 80.

[12] *See* Philips' Case, William Sampson, Esq. (N.Y. Ct. Gen. Sess. Jun. 14, 1813) *reprinted in* THE CATHOLIC QUESTION IN AMERICA 5, at 8, 95-97 (New York, Edward Gillespy 1813) [hereinafter *Philips* (1813), *in* SAMPSON]. In *Philips*, a fence of stolen goods agreed during sacramental confession to allow his parish priest to return to the goods to their owner. When the priest was subpoenaed, he refused to name who the fence was. *See* PATRICK W. CAREY, CONFESSION: CATHOLICS, REPENTANCE, AND FORGIVENESS IN AMERICA 32–33, 37 (2018); A. KEITH THOMPSON, RELIGIOUS CONFESSION PRIVILEGE AND THE COMMON LAW 254 (2011); Walter J. Walsh, *The First Free Exercise Case*, 73 GEO. WASH. L. REV. 1, 20–21 (2004).

inadmissible."[13] Smith's lawyers "saw no distinction between" *Philips* and Smith's case, because "[t]here was no good reason for restricting such a rule to any particular sect or denomination. It had no relation to the character of the [cleric] in whom confidence is placed . . . ."[14]

The three judges disagreed.[15] Unlike the priest in *Philips*, Van Pelt was a willing witness, and the court saw a great disparity "between auricular confessions made to a priest in the course of discipline, according to the canons of the [Roman Catholic] church" and an admission to a Protestant minister.[16] Protestant and Catholic sacramentology differed. Repentance before a Reformed pastor was not involuntary self-incrimination. Although Van Pelt testified that he visited Smith in prison "as a minister of the gospel" "with a view of exhorting him to penitence," the court insisted that this purpose meant that the pastor spoke "in confidence, merely as a friend or adviser."[17] The confessional was privileged; spiritual advice was not.

In the end, the defense attorneys were probably thrilled they lost the objection, for Van Pelt's testimony strengthened Smith's plea of justifiable homicide so much that the defense later called witnesses "to corroborate" Van Pelt.[18] The jury voted to acquit, even

---

[13] *Smith*, *supra* note 2, at 80 (tendentiously characterizing the opinion in *Philips*). Probably, Smith's counsel had one passage in *Philips*—a passage tangential and unnecessary to the holding—in mind. *See Philips* (1813) *in* SAMPSON, *supra* note 12, at 105 (opining that self-incriminatory statements should be inadmissible whenever "a man under the agonies of an afflicted conscience and the disquietudes of a perturbed mind, applies to a minister of the Almighty, lays bare his bosom filled with guilt, and opens his heart black with crime"); *see also* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L. J. 393, 412–14 (1995) (arguing that the privilege against self-incrimination arose out of substantive concerns about freedom of speech and religion, such as revulsion at the use of *ex officio* oaths to trap Dissenters).

[14] *Smith*, *supra* note 2, at 80.

[15] As a politician, Van Ness was known for his use of anti-Catholic rhetoric in electioneering. *See* JASON K. DUNCAN, CITIZENS OR PAPISTS? THE POLITICS OF ANTI-CATHOLICISM IN NEW YORK, 1685-1821, at 125–27 (2005).

[16] *Smith*, *supra* note 2, at 80.

[17] *Id.* (noting that Smith had asked for Van Pelt to come to the prison, specifically so as to confess to a minister); *cf. Matthew* 25:37–40 ("Then shall the righteous answer him, saying, Lord . . . when saw we thee sick, or in prison, and came unto thee? And the King shall answer and say unto them, Verily I say unto you, Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.").

[18] *Smith*, *supra* note 2, at 82. Perhaps this is why Rev. Van Pelt was so willing to testify.

after Justice Van Ness instructed the jury that Smith was a "brutal and barbarous" man with "no chance of escape" under the law and facts.[19] Sympathy for the prisoner and dislike of the victim were likely the main reasons, though one pragmatic juror stated that the verdict also saved the expense of building gallows, feeding the prisoner for a few months, and paying for Smith's burial: "a hundred and fifty dollars, and all of which [would] have to be raised by taxation" on the people of Richmond county.[20] At the close of this Protestant trial, Van Ness warned Smith that "you have not yet escaped . . . you will shortly be compelled to appear before another court, where there is no jury but God himself—[u]nless you repent, and devote your future life to an humble atonement of your guilt, your condemnation there is certain."[21] Surely, repentance and atonement were the reasons Smith confessed![22]

If *Smith* occurred today, Rev. Van Pelt's testimony almost unquestionably would be inadmissible in every jurisdiction in America. All fifty states, as well as the District of Columbia, recognize a broad evidentiary privilege, prohibiting clerics from disclosing confidential communications made to them in their

---

[19] *Id.* at 83; *see also* CLUTE, *supra* note 5, at 135 (quoting the "indignant" head judge as accusing the jury of ignoring "the face of the law and the facts").

[20] CLUTE, *supra* note 5, at 135–36 (alleging that "people []everywhere [were] surprised at the result, and perhaps none more so than [Smith] himself" and ascribing the verdict to "sympathies for the prisoner"); *see also Smith*, *supra* note 2, at 81–82 (describing the deceased as "an ill-natured, quarrelsome man, of a bad temper" and speaking of the "peculiar sympathy in [Smith's] favour"). Two scholars have suggested that the jury freed Smith because they disagreed with the judge's decision to allow Pastor Van Pelt to testify, though this is unlikely, in light of the defense's choice to corroborate Van Pelt. *See* THOMPSON, *supra* note 12, at 261; Walsh, *supra* note 12, at 69.

[21] *Smith*, *supra* note 2, at 83. Given the defense counsel's concerns about self-incrimination "compelled" by fear of damnation, it is striking that Van Ness foretold of the defendant being "compelled" to stand before God after death. In the tribunal of the next life, all will self-incriminate. *See id.* at 80.

[22] Van Pelt's dismissive attitude towards Smith's remorse parallels some Supreme Court opinions. *See* Berghuis v. Thompkins, 560 U.S. 370, 386–87 (2010) (murderer's tearful admission that he prayed to God for forgiveness voluntary, despite "moral and psychological pressures to confess emanating from [theological] sources" such as police questioning on his beliefs) (quoting Colorado v. Connelly, 479 U.S. 170 (1986)); Colorado v. Connelly, 479 U.S. 157, 161, 170–71 (1986) (murderer's confession to the police after hearing a command from God deemed voluntary because a "'voice of God,' however important . . . in other disciplines [like theology], is a matter to which the United States Constitution does not speak").

professional character.[23] Penitent privilege spread slowly. Federal common law only formally adopted the privilege in 1958.[24] As late as 1950, only about half of American jurisdictions recognized penitent privilege, but a "sudden proliferation" of statutes brought the privilege to virtually all states by 1970.[25] The last holdouts were in New England and the Deep South: historically the most Protestant areas of the country.[26]

In contrast, Americans during the early republic rejected broad penitent privilege. DeWitt Clinton and the other three judges in *Philips*, for instance, suggested that no evidentiary privilege would exist if a Protestant parishioner confessed to a Protestant minister, unless the lack of a privilege somehow "should prevent the administration of one or both of these sacraments" that "[w]e have . . . in the Protestant Church—Baptism and the Lord's Supper . . . ."[27] Likewise, the judges in *Smith* acknowledged that a narrow privilege existed in the special case of sacramental confession to a

---

[23] *See, e.g.*, Hon. Michael James Callahan & Richard Mills, *Historical Inquiry Into the Priest-Penitent Privilege*, 81 U. DET. MERCY L. REV. 705, 707 n.11 (2004) (collecting statutes); Taylor L. Anderson, *The Priest-Penitent Privilege: A Mormon Perspective*, 41 IDAHO L. REV. 55, 58 n.12 (2004) (same); Chad Horner, *Beyond the Confines of the Confessional: The Priest-Penitent Privilege in a Diverse Society*, 45 DRAKE L. REV. 697, 703-04 n.48 (1997) (same). The prosecution in the *Smith* case did not dispute that the confession was a confidence communicated to Van Pelt in his role as a minister of the gospel. *See Smith*, *supra* note 2, at 80.

[24] Mullen v. United States, 263 F.2d 275, 278 (D.C. Cir. 1959) (refusing to allow a Lutheran minister to testify, even though the pastor was willing, and resting this position on Rule 26 of the Federal Rules of Criminal Procedure, rather than the Constitution); *cf. In re* Verplank, 329 F. Supp. 433, 435 (C.D. Cal. 1971) (using Proposed Rule of Evidence 506 to interpret Rule 26 of the Federal Rules of Criminal Procedure).

[25] CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5612, at 47–49 (1992); *see also* THOMPSON, *supra* note 12, at 268–69 (noting many states also amended pre-existing statutes to broaden the privilege during this same period); Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 107–08 (1983) (chronicling the spread of the privilege in the decades after World War II).

[26] *See* Walter J. Walsh, *The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence*, 80 IND. L.J. 1037, 1040 (2005). Today, New England is primarily Roman Catholic, but that was not the case in the nineteenth century.

[27] *Philips* (1813) *in* SAMPSON, *supra* note 12, at 105, 111. Clinton and the other three judges were all Protestants. *See id.* at 114 ("we differ from the witness and his brethren, in our religious creed, yet we have no reason to question the purity of their motives"). Implicitly, the judges thought the privilege might apply to the confession of a Protestant candidate for baptism or to confession during an excommunication hearing.

Catholic priest.[28] But they refused to extend the privilege to denominations and theological traditions far afield of Roman Catholicism.

This reluctance did not stem from enmity. In the nineteenth century, Christianity was "part of the common law."[29] In *Smith*, Judge Van Ness' words from the bench made his Protestantism clear, and Rev. Van Pelt was happy to testify.[30] Early Americans rejected broad penitent privilege because of their theology, not despite it.

This paper, therefore, examines the rise of penitent privilege in America and the changes that occurred in the scope of and rationale for this privilege. Part I discusses current scholarship criticizing the scope of and rationales for modern penitent privilege. Part II contrasts nineteenth- and twentieth-century versions of the privilege, in order to show how they rested on different conceptions of the nature and purpose of confession. Finally, Part III shows how nineteenth-century justifications for the privilege fail to authorize anything resembling the modern privilege.

As this paper demonstrates, nineteenth-century America saw the emergence and popularization of a narrow privilege—hereafter, "sacerdotal privilege"—unknown to the common law.[31] But during the twentieth century, a broader version of penitent privilege—hereafter, "spiritual privilege"—replaced the older sacerdotal privilege, so much so that most scholars no longer distinguish

---

[28] *Smith*, *supra* note 2, at 80.

[29] *See* James R. Stoner, Jr. *Was Justice Joseph Story a Christian Constitutionalist?*, *in* GREAT CHRISTIAN JURISTS IN AMERICAN HISTORY 146–48 (Daniel L. Dreisbach & Mark David Hall eds., 2019) (describing how Joseph Story defended this maxim); Stuart Banner, *When Christianity Was Part of the Common Law*, 16 L. & HIST. REV 27, 30–31 (1998) (quoting statements to this effect from early authorities such as William Blackstone, James Wilson, Zephaniah Swift, and James Kent); Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 400 (Pa. 1824); People v. Ruggles, 8 Johns. 290, 296–97 (N.Y. Sup. Ct. 1811).

[30] *Smith*, *supra* note 2, at 80, 83.

[31] For the nonexistence of the privilege in British common law, see, for instance, Callahan & Mills, *supra* note 23, at 708, 715–16 (discussing how William Sampson, Philip's lawyer, called the common law a "pagan idol" to which "ignorant and superstitious" American lawyers still worshiped, rather than embracing "self-government upon principles"); *see also* 48 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2394, at 3362–63 (1904-1905) [hereinafter WIGMORE ON EVIDENCE].

them.[32] Yet the two privileges have little in common. One focused on sacramental theology; the other on therapeutics. Because Protestant and Catholic doctrines differed, many early Americans believed that sacerdotal privilege was necessary to ensure the substantive equality of Roman Catholics. In contrast, the growth of broad spiritual privilege was part of the larger process of secularization, removing the church from the public sphere while translating theological doctrines into political ideals.[33]

Moreover, sacerdotal privilege, in its original form, avoided the theoretical and practical problems that have troubled spiritual privilege recently.[34] The nineteenth-century privilege avoided these troubles because it was not neutral, because it took the actual theologies of believers seriously and sought to craft targeted solutions to the problems pluralism brought. Denominational neutrality for its own sake harms believers and non-believers alike.

I. THE PROBLEMS OF PENITENT PRIVILEGE

Penitent privilege is rotting. Although the statute books in many common law and civil law countries contain penitent privilege, increasingly judges deem it "inconceivable that [the legislature] really intended to deny [them] access to confessional

---

[32] *See, e.g.*, Horner, *supra* note 23, at 732 (noting how the rationales for and scope of penitent privilege transformed between the early nineteenth century and the mid twentieth century); WRIGHT & GRAHAM, *supra* note 25, § 5612, at 27–29 (describing the changing names used for penitent privilege over the last century).

[33] For secularization, see, for example, CHARLES TAYLOR, THE SECULAR AGE 25, 43, 197–98, 447–48 (2009) (analyzing how "the dead metaphor[s] of our legal language"—including in America's founding documents—point to an earlier "enchanted" conception of the cosmos); CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5–7, 36 (George Schwab trans., 1985) ("All significant concepts of the modern theory of the state are secularized theological concepts"); NATHAN J. RISTUCCIA, CHRISTIANIZATION AND COMMONWEALTH IN EARLY MEDIEVAL EUROPE: A RITUAL INTERPRETATION 217–18 (2018) ("secularization [is] medieval Christianization in reverse. . . . secularization too needed its mandatory rituals, its liturgical calendar, its occasions on which all people must commune"); THOMPSON, *supra* note 12, at 341–42, 355.

[34] For these problems, see *infra* Part I.

confidence."[35] So far, international law has avoided recognizing any penitential privilege.[36] And over the last two decades, state and national legislatures have begun abrogating the privilege, at least in situations involving child abuse.[37] Indeed, much of the "extensive law review literature discussing the priest-penitent privilege" is "devoted to arguing for either abandoning the privilege or qualifying it in cases involving abuse and other forms of harmful conduct."[38]

A recent empirical study estimates that even in the United States—the birthplace for spiritual privilege—assertions of the privilege over the last two decades successfully suppressed evidence

---

[35] THOMPSON, *supra* note 12, at xxv, 181, 215 (describing the author's experience litigating in various Australian courts). For the privilege outside the United States, see, for instance, Christopher Grout, *The Seal of the Confessional and the Criminal Law of England and Wales*, 22 ECCLESIASTICAL L.J. 138, 153 (2020) (discussing the unclear state of English law on the privilege); Anthony Gray, *Is the Seal of the Confessional Protected by Constitutional or Common Law?*, 44 MONASH U. L. REV. 112 (2018) (examining the status of the privilege in Australia); Martin O'Dwyer, *A Matter of Evidence: Sacerdotal Privilege and the Seal of Confession in Ireland*, 13 U. C. DUBLIN L. REV. 103 (2013) (on the rise of the privilege in twentieth-century Ireland); Renae Mabey, *The Priest-Penitent Privilege in Australia and Its Consequences*, 13 ELAW J. 51, 53, 70 (2006) (discussing how the privilege in Australia is limited to sacramental confession and usually held by the priest—not the penitent—unlike in contemporary American law); Judge Rupert D. H. Bursell, Q.C. *The Seal of the Confessional*, 2 ECCLESIASTICAL L.J. 84, 109 (1990) (arguing that England's "ecclesiastical law is part of the general law of the land and must be applied in both the ecclesiastical and secular courts").

[36] *See, e.g.*, Robert John Araujo, S.J. *International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the "Priest-Penitent" Privilege under International Law*, 15 AM. U. INT'L L. REV. 639, 653–54, 662 (2000) (describing the privilege in common law and civil law jurisdictions and contending that the International Covenant on Civil and Political Rights ("ICCPR") implicitly necessitates such a privilege); THOMPSON, *supra* note 12, at 329–31 (doubting that the ICCPR supplies the grounds for more than a highly qualified privilege).

[37] *See, e.g.*, Gabriella DeRitis, *Forgive Me Father, For I Have Sinned: Explicitly Enumerating Clergy Members as Mandatory Reporters to Combat Child Sexual Abuse in New York*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 283, 294 (2020) (tabulating the status of clergy in mandatory reporter laws); James Grant Semonin, *"For the Forgiveness of Sins": A Comparative Constitutional Analysis and Defense of the Clergy-Penitent Privilege in the United States and Australia*, 47 J. LEGIS. 156, 178–79 (2021) (discussing efforts to abrogate the clergy-penitent privilege in Australia); Jude O. Ezeanokwasa, *The Priest-Penitent Privilege Revisited: A Reply to the Statutes of Abrogation*, 9 INTERCULTURAL HUM. RTS. L. REV. 41, 43, 64–65 (2014) (collecting abrogation statutes).

[38] Micah Schwartzman et al., *The Costs of Conscience*, 106 KY. L.J. 781, 802 & n.98 (2017) (surveying the priest-penitent privilege literature).

only twenty-six percent of the time.[39] For comparison, before 1950, approximately seventy-five percent of assertions succeeded.[40] Privilege assertion became ineffectual during almost the exact same period as the "sudden proliferation" of broad privilege statutes in the states.[41] A broad spiritual privilege creates so many problems for courts, that judges are quick to manipulate facts and allegedly imprecise statutory language to rationalize admitting evidence.[42]

Scholarship and judicial opinions alike have highlighted four basic problems with spiritual privilege, as it presently applies. First, there is no consensus on the reasons undergirding the privilege. By definition, privileges suppress evidence that is both relevant and reliable, to achieve some policy goal that the public considers more important than accuracy and truth.[43] Indeed, policy is so strong that privilege binds proceedings such as grand juries, sentencings, or *in limine* hearings, even though these are free to look at irrelevant and unreliable evidence.[44] The price of this policy

---

[39] Christine P. Bartholomew, *Exorcising the Clergy Privilege*, 103 VA. L. REV. 1015, 1027–29 (2017) (calculating these percentages based on a sample size of 324 published opinions).

[40] *Id.*

[41] *Cf.* THOMPSON, *supra* note 12, at 267–69; WRIGHT & GRAHAM, *supra* note 25, § 5612, at 47–49.

[42] For such judicial manipulation, see R. Michael Cassidy, *Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 WM. & MARY L. REV. 1627, 1644, 1658 (2003) (noting how courts often apply statutory requirements "with less rigor" so that the privilege only covers what the court "feels inclined to promote"); *see also* Bartholomew, *supra* note 39, at 1065 (supporting reducing the protection to a qualified privilege partly because it codifies what courts and pastors already do in practice).

[43] *See, e.g.*, Totten v. United States, 92 U.S. 105, 107 (1876) ("[A]s a general principle, [] public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional . . . .").

[44] *See, e.g.*, FED. R. EVID. 104(a), 1101(d). Unreliable or irrelevant evidence used during such proceedings will be inadmissible at trial on other evidentiary rules, without any need for privilege. *See, e.g.*, FED. R. EVID. 402, 403.

goal is "occasional injustice."[45] Yet legal writers disagree on what the supposedly vital goal of spiritual privilege is.[46] A recent monograph, for instance, demonstrates that seven competing rationales have been offered over the centuries—the social benefits of religion, freedom of religion, privacy, the futility of forcing believers to violate conscience, state legitimacy, Christian theology, and hostility to all compulsory testimony—and concludes that "[n]o one argument by itself adequately justifie[d]" the privilege.[47]

Insofar as any official justification exists, it is Chief Justice Burger's remark that spiritual privilege is "rooted in the imperative need for confidence and trust" and "recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."[48] Many courts have quoted Burger's dicta as authoritative.[49] Yet, if a universal need to

---

[45] Jaffee v. Redmond, 518 U.S. 1, 18–19 (1996) (Scalia, J., dissenting) (noting that, if a privilege protects communications with an adviser such as priest, psychoanalyst, or social worker, "the victim of the injustice is . . . likely to be some individual who is prevented from proving a valid claim—or (worse still) prevented from establishing a valid defense"); *see also* United States v. Nixon, 418 U.S. 683, 710 (1974) (stressing that privileges are "exceptions to the demand for every man's evidence [which] are not lightly created nor expansively construed, for they are in derogation of the search for truth").

[46] *See, e.g.*, Edward J. Imwinkelried, THE NEW WIGMORE: A TREATISE ON EVIDENCE, Evidentiary Privileges § 1.2.1 (Richard D. Friedman ed., 1st ed. 2002) (evaluating instrumental and humanistic rationales for the privilege and favoring the latter); Lennard K. Whittaker, *The Priest-Penitent Privilege: Its Constitutionality and Doctrine*, 13 REGENT U. L. REV. 145 (2000); WRIGHT & GRAHAM, *supra* note 25, § 5612, at 84–88 (assessing a similar list of historic rationales).

[47] THOMPSON, *supra* note 12, at 322–23, 350, 354 (listing these as the "only . . . possible policy justifications"). For another attempt to count all rationales, see Walsh, *supra* note 26, at 1080–82 (listing twelve rationales).

[48] Trammel v. United States, 445 U.S. 40, 51 (1980); *cf. Nixon*, 418 U.S. at 709 (Opinion of Burger, C.J.) (stating that, because of unspecified "weighty and legitimate competing interests," "a priest may not be required to disclose what has been revealed in professional confidence").

[49] *See, e.g.*, Vega v. Ryan, 757 F.3d 960, 973 (9th Cir. 2014) (citing *Trammel* to illustrate "the special relationship between priests and their parishioners" deriving from the "'urgent need of people to confide in . . . those entrusted with the pressing task of offering spiritual guidance'"); Varner v. Stovall, 500 F.3d 491, 496 (6th Cir. 2007) (quoting Burger as explaining the "function" and "objective" of the privilege); *In re* Grand Jury Investigation, 918 F.2d 374, 382–83 (3d Cir. 1990) (justifying the privilege on "a policy of preventing disclosures that would tend to inhibit the development of confidential relationships that are socially desirable"); State v. Willis, 75 A.3d 1068, 1073 (N.H. 2013) (locating in this dicta the "purpose of the religious privilege, as articulated by the United States Supreme Court").

repent before a spiritual guide without compulsion does in truth exist, it would not match the privilege under current doctrine.[50] For the privilege does not safeguard disclosures to all spiritual counselors (but only to certain professional clerics); it is not limited to words about flawed acts or thoughts (but covers a variety of topics); and it does not guarantee absolute confidence (for clergy regularly convince judges that the privilege should not apply under their church's theology).[51] Without consensus on rationale, no one can possibly scope the privilege to balance its goals against the injustices caused by its assertion.

Second, spiritual privilege may conflict with the Constitution.[52] Some authors have maintained that the First Amendment mandates penitent privilege.[53] Others insist that this

---

[50] *Cf.* Lawrence v. Texas, 539 U.S. 558, 574 (2003) (("the Constitution demands for the autonomy of the person in making [intimate] choices . . . At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.") (internal quotations omitted) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833851 (1992)); CARL R. TRUEMAN, THE RISE AND TRIUMPH OF THE MODERN SELF: CULTURAL AMNESIA, EXPRESSIVE INDIVIDUALISM, AND THE ROAD TO SEXUAL REVOLUTION 303–04 (2020) (noting how the Supreme Court's "mystical" approach to personhood gives "legal status to a subjective and plastic notion of what it means to be a human").

[51] For clerical resistance to the privilege, see Bartholomew, *supra* note 39, at 1060, 1062.

[52] The Supreme Court's doctrine on religious exemptions—indeed, on the Religion Clauses in general—is confused and transforming rapidly, so pronouncements on the constitutionality of the privilege may be obsolete within a few years. *See, e.g.*, Seattle's Union Gospel Mission v. Woods, 142 S. Ct. 1094, 1096 (2022) (mem.) (Alito, J., concurring in denial of certiorari) (hinting that the Court soon must determine if a state's "decision to narrowly construe [] religious exemption" can "create[] a conflict with the Federal Constitution"); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring) (finding "the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws").

[53] *See, e.g.*, Craig P. Cassagne, Jr., *What is a "Confession Per Se?": Parents of Minor Child v. Charlet Priest-Penitent Privilege and the Right of the Church to Interpret Its Own Doctrine*, 42 S.U. L. REV. 255 (2015); Ezeanokwasa, *supra* note 37; Walsh, *supra* note 12; Julie Ann Sippel, *Priest-Penitent Privilege Statutes: Dual Protection in the Confessional*, 43 CATH. U. L. REV. 1127 (1994). For arguments that the First Amendment permits the privilege, without necessarily requiring it, see for instance, Gene Schaerr & Michael Worley, *The "Third Party Harm" Rule: Law Or Wishful Thinking?*, 17 GEO. J.L. & PUB. POL'Y 629, 639–40 (2019); Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1827–29 (2006).

same amendment invalidates most or all such privilege.[54] This paper concentrates on early American history and largely ignores this unfruitful debate.[55] But serious people of good faith can offer plausible constitutional arguments on both sides, because the scope and purpose of spiritual privilege is so uncertain.

Third, spiritual privilege is unpredictable. Assertions of privilege force generalist judges and juries to answer complex theological questions which they are ill-equipped to answer. For instance, are Presbyterian ruling elders "ministers" or are only Presbyterian teaching elders covered in this term?[56] When are communications to a priest "confessions per se" occurring during the Roman Catholic sacrament, and when are they part of some preliminary ritual to the sacrament itself and thus unprotected.[57] Is Alcoholics Anonymous a church with a privileged clergy if its

---

[54] *See, e.g.*, Caroline Donze, *Breaking the Seal of Confession: Examining the Constitutionality of the Clergy-Penitent Privilege in Mandatory Reporting Law*, 78 LA. L. REV. 267, 296–97 (2017) (arguing that narrow penitent privileges "likely violate[] the Establishment Clause by giving preferential treatment" to "religions with established disciplines of confidentiality"); Caroline Incledon, *The Constitutionality of Broadening Clergy Penitent Privilege Statutes*, 53 AM. CRIM. L. REV. 515, 545 (2016) (contending that many states must alter parts of their privilege statutes in order to comply with the First Amendment); Rena Durrant, *Where There's Smoke, There's Fire (and Brimstone): Is It Time to Abandon the Clergy-Penitent Privilege?,* 39 LOY. L.A. L. REV. 1339, 1358, 1367 (2006) (maintaining that the privilege violates the Establishment Clause).

[55] *Cf.* WRIGHT & GRAHAM, *supra* note 25, § 5612, at 56–59 (noting that, in this hackneyed area of scholarship, some researchers have argued a broad privilege is unconstitutional, others that a narrow privilege is).

[56] *Compare* Reutkemeier v. Nolte, 161 N.W. 290, 292–93 (Iowa 1917) ("ruling elders are 'ministers of the gospel' within the meaning of the statute" because "they are such within the contemplation of the Presbyterian Confession of Faith") *and* Bandstra v. Covenant Reformed Church, 913 N.W.2d 19, 52 (Iowa 2018) (extending *Reutkemeier* to other Reformed denominations), *with* Ivy Hill Congregation of Jehovah's Witnesses v. Dep't of Hum. Servs., 258 A.3d 1162 (Pa. Commw. Ct. 2021) (rejecting summary judgment on whether elders of the Jehovah's Witnesses are ministers) *and* Knight v. Lee, 80 Ind. 201, 202–03 (1881) (holding that an elder-deacon is not acting "in the capacity of a clergyman" under the theology of the Disciples of Christ); *see also* Cassidy, *supra* note 42, at 1655–56; Anderson, *supra* note 23, at 74–75.

[57] *See* Estate of Toomes, 54 Cal. 509, 512, 516 (1880) (holding that a Catholic priest could testify about the preliminary examination he made of a parishioner to determine if the parishioner had the mental capacity to confess, if the contents of the confession itself remained sealed); *see also* Mayeux v. Charlet, 2016-1463 (La. 10/28/16); 203 So.3d 1030, 1034–35 (analyzing if a privileged communication occurred partly by considering if the penitent was physically inside a confessional booth at the time); Donze, *supra* note 54, at 301–02; Cassagne, *supra* note 53.

members must perform "a searching and fearless moral inventory" admitting "wrongs" before God and a human sponsor?[58]

With thousands of denominations in America today, "[i]t is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies . . . ."[59] During the first fifty years of the nineteenth century, when almost all Americans belonged to one of roughly a dozen denominations), judges often evaluated the genuineness of a witness' beliefs and the content of each denomination's doctrine on their own instead of deferring to theological experts.[60] But by the later nineteenth century, as America grew more pluralistic, this cheery confidence evaporated. Instead, the Supreme Court recognized an ecclesiastical abstention doctrine, holding that federal courts "must accept … as final, and as binding on them" the decisions of "the highest of [each denomination's] church judicatories" on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law . . . ."[61] That is, just as under the act-of-state doctrine[62], courts accept the public acts of a foreign sovereign in its territory as valid, so under ecclesiastical abstention doctrine, courts

---

[58] *See* Cox v. Miller, 296 F.3d 89, 94–95 (2d Cir. 2002) (holding that Alcoholics Anonymous ("AA") lacks a privileged clergy); *see generally* Ari J. Diaconis, Note, *The Religion of Alcoholics Anonymous (AA): Applying the Clergy Privilege to Certain AA Communications*, 99 CORNELL L. REV. 1185 (2014) (discussing various precedents stating that AA is a religion for First Amendment purposes).

[59] Watson v. Jones, 80 U.S. 679, 729 (1871); *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n., 565 U.S. 171, 186, 188 (2012) (laying down a rule of deference in ministerial exception cases); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 107 (1952) (recharacterizing *Watson* as constitutional law, rather than federal common law).

[60] *See* Wesley J. Campbell, Note, *A New Approach to Nineteenth-Century Religious Exemption Cases*, 63 STAN. L. REV. 973, 984, 992 (2011) [hereinafter *A New Approach*]; *see also* Jud Campbell, *Testimonial Exclusions and Religious Freedom in Early America*, 37 L. & HIST. REV. 431, 457–58, 462 & n.151 (2019) [hereinafter *Testimonial Exclusions*] (describing the criticism that Chancellor DeSaussure of South Carolina received for misrepresenting Catholic doctrine in one 1827 decision).

[61] *Watson*, 80 U.S. at 727. For the development of ecclesiastical abstention, see Victor E. Schwartz & Christopher E. Appel, *The Church Autonomy Doctrine: Where Tort Law Should Step Aside*, 80 U. CIN. L. REV. 431, 472–74 (2011) (noting that courts have used this abstention doctrine in assessing whether privilege imposes an enforceable confidentiality requirement on clergy).

[62] For a good introduction to the act of state doctrine, see generally John C. Harrison, *The American Act of State Doctrine*, 47 GEO. J. INT'L L. 507 (2016) (discussing act of state doctrine jurisprudence).

accept as valid the decision of church courts on their own doctrine or practice.

The tenet of rule of law that like cases be treated alike virtually necessitates such deference, for without it courts would have to guess at the sacramental and ecclesiological doctrines of the church at issue.[63] An empirical study indicates that courts usually defer to the individual cleric called as witness, rather than seeking information from church judicatories of that cleric's denomination, as abstention doctrine should require.[64] Both self-interest and partial knowledge render individual pastors an untrustworthy source for denominational theology.[65] Without consistent abstention, the results of penitent privilege cases will remain erratic.

Finally, spiritual privilege may have extreme breadth.[66] In theory, it could apply to almost any communication on spiritual matters to anyone. Church governance is theological. Many traditions, after all, lack ordained clergy—let alone discrete confessional rites such as the sacrament of penance or well-developed bodies of canon law laid down by church judicatories explaining clerical confidentiality.[67] The priesthood of all believers is foundational to Protestantism.[68] Under present First

---

[63] *Cf.* Andrea V. Timpa, Note, *In Re Orso: There Is No Need to Erie-Guess When the Law is Clear and Unambiguous*, 48 LOY. L. REV. 587 (2002) (disparaging "Erie-guessing": the attempt by circuit courts to predict state law without certifying questions to the highest state court).

[64] *See* Bartholomew, *supra* note 39, at 1051, 1057.

[65] *Cf.* Edward K. Cheng, *The Consensus Rule: A New Approach to Scientific Evidence*, 75 VAND. L. REV. 407 (2022) (contending that courts should end the *Daubert* approach and defer to the relevant scientific community, instead of to the individual expert).

[66] *See* Cassidy, *supra* note 42, at 1658.

[67] *See* Bartholomew, *supra* note 39, at 1063 (narrating how one pastor went to the internet—rather than to any church judicatory—to determine if he could reveal a confession); Sippel, *supra* note 53, at 1159–60 (noting that "[t]he objectivity of [a court's] analysis is obscured" when a denomination lacks written canons, thus increasing the scope of judicial discretion).

[68] Multiple courts have struggled to reconcile ministerial exemptions and similar rules with the priesthood of all believers. *See, e.g.*, Lynch v. Universal Life Church, 775 F.2d 576, 577 (4th Cir. 1985); United States v. Brown, 338 F. Supp. 409, 413 (N.D. Ill. 1972). For the priesthood of all believers, see, for instance, EUAN CAMERON, THE EUROPEAN REFORMATION 176, 405 (2nd ed., 2012); PHILIP BENEDICT, CHRIST'S CHURCHES PURELY REFORMED: A SOCIAL HISTORY OF CALVINISM 437, 452 (2002); JOHN C. BUSH & WILLIAM HAROLD TIEMANN, THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW 77–78, 99 (3d ed., 1989).

Amendment doctrine, a "personal religious faith is entitled to as much protection as one espoused by an organized group."[69] But if all believers are ministers, when does the privilege end?[70] Understandably, courts refuse to suppress so much evidence, but currently they have no principled way to justify their refusal.[71]

Spiritual privilege, as presently applied, is inconsistent on a logical and a practical level. No wonder that courts and legislatures, in America and elsewhere, seem intent on cutting the privilege back or outright eliminating it. But this sickness is not unto death. The problems surrounding spiritual privilege today are not endemic to all forms of penitent privilege. As this paper shows, when sacerdotal privilege first arose, it averted these problems.

II. THE TWO PRIVILEGES

Sacerdotal privilege and spiritual privilege are not the same.[72] Sacerdotal privilege is held by clerics (and not by all clerics either); spiritual privilege is held by anyone who seeks spiritual advice.[73] Sacerdotal privilege only covers confidences during a church

---

[69] Vinning-El v. Evans, 657 F.3d 591, 593 (7th Cir. 2011) (citing the Protestant doctrine of the priesthood of all believers as an example of the need to protect non-hierarchical faiths); *see also* Frazee v. Illinois Dep't. of Emp. Sec., 489 U.S. 829, 834 (1989) ("Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet . . . would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.").

[70] *See* Robertson v. United States, 417 F.2d 440, 447 & n.1 (5th Cir. 1969) (Brown, C.J., concurring) (stating that "[t]he law, because of the First Amendment, cannot look into or weigh what that faith believes, preaches or communicates" to determine who a "minister" is and citing the "Calvinist[]" doctrine of "the Priesthood of Believers" as an example of a dogma that the law must reject).

[71] In practice, courts usually accept a witness's claimed status as clergy and instead decide cases on other issues, such as whether that witness's denomination requires confidentiality. *See* Yellin, *supra* note 25, at 117; *see also* WRIGHT & GRAHAM, *supra* note 25, § 5613, at 107–110 (discussing the subtle and unsubtle bigotry that has been used to stop the privilege from applying to non-hierarchical groups like the Jehovah's Witnesses).

[72] Author Note: No more than, say, spousal testimonial privilege is the same as marital communication privilege.

[73] *See* Michael J. Mazza, *Should Clergy Hold the Priest-Penitent Privilege?*, 82 MARQ. L. REV. 171, 187, 203 (1998) (arguing that both cleric and penitent should hold the privilege—as true in a few states—but admitting that in most states, the penitent alone holds).

discipline; spiritual privilege can arise from a wide array of rituals or counseling contexts.[74] Most importantly, the rationales underlying sacerdotal privilege barely overlap with the justifications given for spiritual privilege.

A. The Deferential Logic of Sacerdotal Privilege

The difference between sacerdotal privilege and spiritual privilege emerges by comparing the two most influential pieces of legislation on these privileges: New York's 1828 statute and the federal Advisory Committee's 1972 Proposed Rule of Evidence 506.[75] During the 1820s, the New York legislature appointed a committee to rationalize and codify much of its common law of property.[76] On December 10, 1828, as part of this codification, the New York assembly passed a law establishing statutory privileges for both priest-penitent and doctor-physician communications: the first of its kind in America.[77]

New York's statute prohibited a "minister of the gospel, or priest of any denomination whatsoever" from disclosing "any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of [his] denomination."[78] The majority of states still partly model their penitent privilege statute on New York's 1828 law.[79] The earliest

---

[74] *See, e.g.*, Horner, *supra* note 23, at 706 (listing counseling contexts in which the privilege now applies); WRIGHT & GRAHAM, *supra* note 25, § 5615, at 135–38 (considering how non-penitential communications to clergy can be covered by spiritual privilege today); Yellin, *supra* note 25, at 124 (discussing privilege in marriage counseling).

[75] *Compare* 2 N.Y. REV. STAT. 1828, pt. 3, ch. 7, tit. 3, § 72 (1829) (since amended) *with* PROPOSED FED R. EVID. 506, 56 F.R.D. 183, 247 (1973) (protecting confidential communications to "an individual reasonably believed" to be "a minister, priest, rabbi, or other similar functionary of a religious organization" "if made privately and not intended for further disclosure" and "in [the cleric's] professional character as spiritual adviser" and expressly stating that the penitent, not the cleric, holds this privilege).

[76] *See* Walsh, *Privilege*, *supra* note 26, at 1053, 1055.

[77] *See* 3 REPORT OF THE COMMISSIONERS APPOINTED TO REVISE THE STATUTE LAWS OF THIS STATE 33–34 (Albany, Croswell & Van Benthuysen, 1828) [hereinafter REPORT OF THE COMMISSIONERS] (also amending interested witness rules).

[78] 2 N.Y. REV. STAT. 1828, pt. 3, ch. 7, tit. 3, § 72 (1829) ("No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination.").

[79] Bartholomew, *supra* note 39, at 1048; Walsh, *supra* note 26, at 1057; Callahan & Mills, *supra* note 23, at 716–17.

statutes, moreover, were the closest. By 1851, Missouri, Michigan, and Wisconsin possessed laws word-for-word identical to the 1828 law, while California and Iowa had altered New York's language only slightly.[80] California's statute, for instance—drafted by David Dudley Field as part of his influential code of civil procedure—contained small changes, such as replacing "minister of the gospel" with "clergyman" and "denomination" with "church."[81] David Field's younger brother, United States Supreme Court Justice Stephen J. Field, likely had this text in view when he wrote in his unanimous *Totten* opinion that "suits cannot be maintained which would require a disclosure of the confidences of the confessional."[82] Across the country, the text of statutory privileges did not deviate greatly from New York's original until the middle of the twentieth century.[83]

Despite its influence, legal scholars have found the 1828 law's theological terminology "imprecise" and "opaque," preferring instead those twentieth-century statutes that dropped these

---

[80] Walsh, *supra* note 26, at 1058–59 (describing the impact of the Field Code in spreading the 1828 language); *see also* WRIGHT & GRAHAM, *supra* note 25, § 5611, at 14–15 (noting that earlier in the 1820s Louisiana considered passing a penitent privilege—drafted by the former New Yorker Edward Livingston—that explicitly restricted the privilege to sacramental confession heard by Roman Catholic priests); 1 EDWARD LIVINGSTON, *Introductory Report to the Code of Evidence*, (1873), *reprinted in* COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 422, 467, 477 (Patterson Smith Publ'g 1968) (supporting an "exclusion of testimony" for "religious confessions, made to a priest of the Catholic religion" because disclosure "would be a tyrannical invasion of the rights of conscience; and . . . useless if it could be executed").

[81] 1851 Cal. Stat. 591, ch. 1, § 397 *in* COMPILED LAWS OF THE STATE OF CAL. 591 (1853) [hereinafter COMPILED LAWS] ("A clergyman or a priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.").

[82] Totten v. United States, 92 U.S. 105, 107 (1875) ("public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential"); *cf.* Powell v. Alabama, 287 U.S. 45, 61 (1932) (analogizing the attorney-client and priest-penitent relationships and speaking of "the inviolable character of the confessional").

[83] *See* Walsh, *supra* note 26, at 1072–73 (suggesting that the novel wording of the "cumbersome" privilege in the AFI's 1942 Model Code of Evidence marked the shift); WRIGHT & GRAHAM, *supra* note 25, § 5611, at 15–16 (tracing a "move in the direction [for a more] ecumenical penitent's privilege" to the 1942 Model Code).

terms.[84] The phrase "in the course of discipline enjoined" is the most divisive, although other words ("confession" and "minister of the gospel," for example) have also confused.[85] As a result, present-day academics sometimes misconstrue the text of the 1828 law, equating it to spiritual privilege. For instance, a few scholars—fooled by the law's reference to "any denomination whatsoever"—have alleged that the New York assembly enacted the 1828 statute to overturn the holding of *Smith* and extend the privilege to all clerics, regardless of their church's theology.[86] In truth, according to the report of the original committee, the law gave "the sanction of legislative authority" to Justice Van Ness' distinction "between such confessions as were made in the course of discipline, and such as were made to a clergyman as an adviser and friend."[87] The committee members viewed themselves, the *Philips* court, and the *Smith* court to all agree on the scope of the privilege.[88] The law's

---

[84] *See, e.g.*, Bartholomew, *supra* note 39, at 1048–50 (lamenting that the later state statutes did little to "decode" this bizarre 1828 language); Sippel, *supra* note 53, at 1133 n.36 (claiming the 1828 law "was not an ideal model"); Yellin, *supra* note 25, at 107, 149–50 (demeaning the 1828 statute as "poorly drafted" and praising more recent statutes as superior).

[85] *See* Cassidy, *supra* note 42, at 1639, 1642 n.75, 1642 n.77 (emphasizing that some courts have read the 1828 law's "discipline enjoined" requirement into state statutes that avoided this wording); *see also* Yellin, *supra* note 25, at 130, 134 (on expansive interpretations of "discipline enjoined"); *cf. In re* Swenson, 237 N.W. 589, 590–91 (Minn. 1931) (complaining that the word "discipline" "has no technical legal meaning" and virtually writing the "discipline" and "confession" requirements out of Minnesota's statute); Reutkemeier v. Nolte, 161 N.W. 290, 292 (Iowa 1917) ("What is a 'minister of the gospel' within the meaning of this statute? The law as such sets up no standard or criterion. That question is left wholly to the recognition of the 'denomination'.")

[86] For this interpretation, see, for instance, Incledon, *supra* note 54, at 523; Callahan & Mills, *supra* note 23, at 716–17; Cassidy, *supra* note 42, at 1638–39. For scholars acknowledging that the statute reaffirmed *Smith*, see, for instance, Mazza, *supra* note 73, at 181–82; Walsh, *supra* note 26, at 1056 n.104.

[87] 3 REPORT OF THE COMMISSIONERS, *supra* note 77, at 33–34 (stating that "[t]he rule" of *Smith* and *Philips* had "received general approbation in this country"). For approbation elsewhere in the country, see, for instance, Farnandis v. Henderson, 1 CAROLINA L.J. 202, 211–13 (S.C. 1831) (Opinion of Desaussure, Chancellor) (holding "on principle, as well as on the provisions of the [South Carolina] Constitution" that Universalists are competent witnesses exempt from a contrary state law and citing *Philips* as precedent).

[88] Walsh, *Privilege*, *supra* note 26, at 1056 (stressing this agreement).

drafters even borrowed language directly out of Van Ness' opinion.[89]

Most states today give the privilege exclusively to the penitent, but six states make both the cleric and the penitent holders.[90] Some scholars have misread a phrase in the 1828 statutes ("no minister . . . shall be allowed to disclose" a confession) as implying joint holdership.[91] Allegedly, clerics could not waive the privilege without the penitent's permission or vice versa.

More likely, the New York committee did not intend for either priest or penitent to hold the privilege. The 1828 statute never mentions waiver and operates more like an incompetence rule than a privilege.[92] By the second half of the nineteenth century, sacerdotal privilege could be waived,[93] but categorical distinctions between privilege, competency, and professional confidentiality

---

[89] Like the statute, *Smith* referred to a "minister of the gospel" or "a priest," to that cleric's "character," and to "confessions made . . . in the course of discipline" according to the canons of that cleric's church. *Smith*, *supra* note 2, at 80. Additionally, a footnote in the *Smith* case report, written by the reporter, refers to the "rules and ordinances of the church"—perhaps the source for the 1828 statute's phrase "rules or practice of the denomination." *Id.* at 80 n.1; *cf.* 2 N.Y. REV. STAT. 1828, pt. 3, ch. 7, tit. 3, § 72 (1829) (statutory text).

[90] Mazza, *supra* note 73, at 187–88.

[91] *See, e.g.*, Walsh, *Privilege*, *supra* note 26, at 1056 (claiming that the statute "specified that the penitent as well as the minister" held the privilege); Cassidy, *supra* note 42, at 1699 & n.335 (suggesting that contemporary statutes treating clergy as holders are similar to the original privilege in *Philips*).

[92] *See* Mazza, *supra* note 73, at 189 (mentioning that some state statutes facially "seem to be [] rules of witness competency" which "do not allow anyone to waive," even if courts have not construed them this way).

[93] California's statute two decades later, for instance, intentionally made cleric and penitent joint holders, but this should not be read into the 1828 statute. *See* Cal. Stat. ch. 1, § 397 *in* COMPILED LAWS, *supra* note 81, at 591 (removing language about "the rules and practice" of the church from the statute and stating that a cleric cannot "be examined as a witness" "without the consent of the person making the confession").

still were developing in the early nineteenth century.[94] One early treatise author, for instance, expressly interpreted the 1828 statute as an unwaivable incompetence rule that "utterly prohibits [] disclosure" even if the court receives the "assent of the party to be affected."[95]

Moreover, as noted, the New York committee claimed to be sanctioning the rule from *Philips* and *Smith*, which were "too important to be left in its present state" uncodified.[96] In those cases, judges treated the denomination to which the cleric belonged as the holder of the privilege.[97] If that denomination's canon law commanded confession, then the minister was incompetent to testify; if canon law lacked this sacrament, the minister was free.[98] New York's statute envisioned an objective test focused on the rules

---

[94] Evidence law only gradually distinguished these. Throughout the eighteenth and early nineteenth centuries, rules barring attorneys, priests, physicians, and the like from testifying were more often called "confidence" or "professional secrecy" than "privilege." *See* THOMPSON, *supra* note 12, at 34–35 (explaining that no sixteenth-century judge could have forced the disclosure of a confession due to reasons such as ecclesiastical jurisdiction and the benefit of clergy—not privilege—which "are difficult to frame without anachronism"); RONALD GOLDFARB, IN CONFIDENCE: WHEN TO PROTECT SECRECY AND WHEN TO REQUIRE DISCLOSURE 23–27 (2009) (on the slow development of sharp differences between confidentiality, witness incompetence, and privilege); WRIGHT & GRAHAM, *supra* note 25, § 5611, at 35–37 (1992) (maintaining that no privilege could exist until evidence law sufficiently distinguished these concepts, so attempts to discover penitent privilege before the eighteenth century are "an 'invention' of a tradition"); JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 61 (2004) ("The law of evidence was in its infancy" in the eighteenth century).

[95] JOHN ANTHON, THE LAW STUDENT, OR GUIDES TO THE STUDY OF THE LAW IN ITS PRINCIPLES 218 (N.Y., D. Appleton & Co. 1850) (stressing that "testimony [about a confession in the course of discipline] cannot be allowed" and "it is the duty of the Court to exclude it at all events"); *see also* Timothy Walker, *Editor's Note to Abbreviated Rep. of People v. Phillips*, 1 WESTERN L.J. 109, 113–14 (1844) (arguing that the "full significance" of the Ohio Bill of Rights invalidates "the incompetency of a witness for want of religious belief" and also places a "seal of inviolable secrecy" on the confessional).

[96] 3 REPORT OF THE COMMISSIONERS, *supra* note 77, at 34.

[97] *Smith*, *supra* note 2, at 80 (looking to Van Pelt's willingness to testify and to "the canons of the church" to see if a confession was admissible); *Philips* (1813), *in* SAMPSON, *supra* note 12, at 96–97 (stressing that that a Catholic priest who testifies about a confession is "in violation . . . of his clerical engagements, and of the canons of his church" and will be "stripped of his sacred functions" by the church).

[98] In addition to Roman Catholics, a number of other Christian groups mandate some form of confession, including Eastern Orthodox, Lutherans, and—increasingly over the course of the nineteenth century—Anglicans. *See, e.g.*, Araujo, *supra* note 36, at 645, 652; BUSH & TIEMANN, *supra* note 68, at 60–66.

and practice of the relevant church, not a subjective test resting on the desires of either cleric or penitent.

Theoretically, judges could answer this test's key factual question ("was there a confession under the rules and practice of the relevant church?") by the testimony of experts such as the cleric-witness, by certifying a question to a denominational tribunal, by examining learned treatises, or by judicial notice out of the judge's own theological knowledge. Ecclesiastical abstention doctrine indicates that certification is best, both constitutionally and pragmatically—for it minimizes the need for courts to decide what sacerdotal privilege covers on an unpredictable case-by-case basis. But, in the extant records, certification seems to be the one method no early American court tried.

Although judges relied on expert testimony (as they usually still do today), they often supplemented witnesses with written sources.[99] The panel in *Philips*, for instance, drew on Father Kohlmann's testimony, on documents from the theological faculty of six Catholic universities, and on various reference works.[100] A Virginia court in the 1850s similarly looked both to the cleric-witness and to the canons of the Council of Trent.[101] In its first published case interpreting the 1828 law, New York's highest court trusted a Dutch Reformed pastor that a communication about church finances was made to him in his capacity as president of the consistory, rather than "in his professional character . . . as a clergyman."[102] The pastor wanted to witness, and his testimony benefitted his congregation financially, so the court perhaps should have been more skeptical about this self-serving characterization.[103]

Judicial notice was also common, for early American judges often assumed they were able to determine theology.[104] With only a dozen or so major denominations, this was an easier task in

---

[99] *See* Bartholomew, *supra* note 39, at 1055–56 (observing that most penitent privilege cases have turned on clergy testimony from *Gates* to the present day); *see also* People v. Gates, 13 Wend. 311, 312, 323 (N.Y. 1835).

[100] *Philips* (1813), *in* SAMPSON, *supra* note 12, at 10-14, 34, 76, 86-7, cxiv.

[101] Commonwealth v. Cronin, 2 Va. Cir. 488, 490–91 (Va. Cir. Ct. 1855) (citing *Con Florent*, *in Decret's ad Armenos. Con. Trident.*, Sess.7, Can 1).

[102] *Gates*, 13 Wend. at 312, 323.

[103] *See id.* at 313–14.

[104] *See A New Approach*, *supra* note 60, at 984, 992.

antebellum America than today.[105] In a speech at Maine's 1819 constitutional convention, George Thacher—one of the judges on the Supreme Judicial Court of Massachusetts who, the year before, heard a case (discussed below) on sacerdotal privilege—argued that the new state should grant religious exemptions such as privileges only if a law conflicts with a denomination's tenets, not just with an individual's conscience.[106] Courts and legislators must demand "evidence from [a sect's] known principles and practice," lest "hypocritical conscience"—that is, insincere beliefs offered in bad faith—cause people to "mistake[] the nature and character of their own views" for the true "Christian Religion . . . . contained in the Bible—there, and there only."[107] A good Protestant, Thacher believed that judges were capable of theological fact-finding by scripture alone.[108]

Regardless of method, cases can resolve differently, when doctrine, not conscience, is the authority. At least, they can when a denomination's clergy disagree sharply, as Anglican clerics did throughout the nineteenth century, for example. From the 1830s, the Church of England and American Episcopalians split into three factions: high church supporters of the Oxford Tractarians who reinterpreted Anglican doctrine in a Catholic direction; low church evangelicals who defended the denomination's historic Protestantism; and broad-church latitudinarians who downplayed theological differences and were open to German biblical criticism.[109]

Because the Tractarians sought to revive the practice of confidential auricular confession, this ecclesiastical controversy shaped the debate on privilege.[110] Edward Badeley, an English

---

[105] For courts evaluating tenets on the judge's own theological expertise, see, for instance, Commonwealth v. Drake, 15 Mass. 161, 162 (1818); *Smith*, *supra* note 2, at 80.

[106] For this speech, see JEREMIAH PERLEY, THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS OF THE CONVENTION OF DELEGATES 189–90 (Portland, A. Shirley 1820); *A New Approach*, *supra* note 60, at 984–85, 988–89.

[107] PERLEY, *supra* note 106, at 191, 198.

[108] For *sola scriptura*, see, for instance, CAMERON, *supra* note 68, at 94, 166–71; BENEDICT, *supra* note 68, at 11–13, 24, 300.

[109] *See*, *e.g.*, PETER BENEDICT NOCKLES, THE OXFORD MOVEMENT IN CONTEXT: ANGLICAN HIGH CHURCHMANSHIP, 1760–1857, at 32–36 (1994).

[110] For the revival of confession, see GEORGE HERRING, THE OXFORD MOVEMENT IN PRACTICE: THE TRACTARIAN PAROCHIAL WORLD FROM THE 1830S TO THE 1870S, at 131–34 (2016).

lawyer and vocal member of the Oxford Movement, wrote the first legal treatise on penitent privilege.[111] Indeed, Badeley wrote in protest to *R v. Kent*, an 1865 a case in which a Tractarian priest was compelled to testify about the confession of a teenage parishioner.[112] Likewise, the most detailed article published in early America on the privilege devotes as much space to refuting the "deficiencies in faith" expressed in the sacramental theology of Tractarian leader Edward Pusey as it does to legal issues.[113] And the American evidence scholar Simon Greenleaf was a low church Episcopalian, who fought the growth of Anglo-Catholicism in his denomination and considered becoming a Baptist at the end of his life, out of anguish at the Tractarians' popularity.[114] When Greenleaf declares—decades after *Philips*—that "the Common Law of evidence" recognized neither "distinction between clergymen and laymen" nor privilege for "penitential confessions, made to [a

---

[111] *See* EDWARD BADELEY, THE PRIVILEGE OF RELIGIOUS CONFESSIONS IN ENGLISH COURTS OF JUSTICE CONSIDERED, IN A LETTER TO A FRIEND 33–35, 39 (London, 1865) (arguing that the Reformation did not abolish the seal of confession). Badeley also was counsel for Henry Phillpotts, the high church bishop of Exeter, in the Gorham case: an infamous decision that caused many clerics to abandon the Church of England. *See* S. M. WADDAMS, LAW, POLITICS AND THE CHURCH OF ENGLAND: THE CAREER OF STEPHEN LUSHINGTON, 1782–1873, at 273–78 (1992).

[112] THOMPSON, *supra* note 12, at 4. In the unreported case of *R v. Kent* (1865), a teenage girl confessed the murder of her younger brother to a Tractarian parson. *See id.* at 116–20, 176. After the parson refused to testify—asserting the seal of the confessional—he was held in contempt. *See id.* at 4, 116–20, 176.

[113] *See* Orestes Brownson, *The Confessional*, 3 BROWNSON'S Q. REV. 327, 328–33 (1846) (attacking the positions of "the Puseyite school" and the "Oxford brethren"—then names for the Oxford Tractarians).

[114] *See* Daniel David Blinka, *Harvard's Evangelist of Evidence: Simon Greenleaf's Christian Common Sense*, *in* GREAT CHRISTIAN JURISTS IN AMERICAN HISTORY 161–64 (2019).

Protestant] minister . . . nor secrets confided to a Roman Catholic priest," his theology was speaking as much as his scholarship.[115]

The nineteenth century, like the present day, was a time of rapid theological change. A case such as *R v. Kent* could turn out differently depending on whether a suspect confessed to a minister who happened to be high church, low church, or broad church—even though suspects were often unaware of their minister's factional loyalties. Thus, New York's solution of looking to church judicatories, rather than to conscience, ensured that like cases be treated alike.

B. The "Opaque" Language of Sacerdotal Privilege

Present-day legal scholars complain that the language of New York's 1828 statute is "imprecise" and "opaque," as discussed.[116] But this language only mystifies once torn out of the nineteenth-century context in which the law was written. "Confession," for instance, had well-established theological meaning: the act of verbally acknowledging sins, either privately to a priest or publicly

---

[115] 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 361 (3d ed., Boston, Little 1846) [herinafter GREENLEAF TREATISE] ("In the Common Law of evidence, there is no distinction between clergymen and laymen; but all confessions . . . must be disclosed, when required for the purposes of justice. Neither penitential confessions, made to the minister, or to members of the party's own church, nor secrets confided to a Roman Catholic priest in the course of confession, are regarded as privileged communications."); *cf.* SIMON GREENLEAF, AN EXAMINATION OF THE TESTIMONY OF THE FOUR EVANGELISTS, BY THE RULES OF EVIDENCE ADMINISTERED IN COURTS OF JUSTICE 252–53 (Boston, Little & Brown 1846) (praising "[t]he admission of Judas Iscariot into the domestic and confidential circle of our Lord" as an act of "divine wisdom," because it enabled Judas to "disclose[]" and "publicly confess[]" Christ's "secret actions, discourses, and views" to the Roman authorities, thus bringing about Christ's execution for the sins of humanity).

[116] *See, e.g.*, Bartholomew, *supra* note 39, at 1048–50; Sippel, *supra* note 53, at 1133 n.36; Yellin, *supra* note 25, at 107, 149–150.

during worship.[117] "Minister of the gospel," likewise, was a standard label for a Protestant pastor within the discourse of the era.[118] New York's 1828 state constitution, for instance, mandated that "no minister of the gospel, or priest of any denomination whatsoever, shall . . . be eligible to or capable of holding any civil or military office or place within this State." [119] The privilege statute seven years later copied this opening phrase exactly.[120] The privilege, then, covered Catholics and Protestants alike but not non-Christians.

Strikingly, the infamous phrase limiting the privilege to communications to a cleric "in his professional character in the course of discipline enjoined" borrows directly from nineteenth-

---

[117] *See, e.g.*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (Philadelphia 1805) (defining confession as "[t]he act of disburdening the conscience to a priest"); NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE (New Haven 1807) ("The act of disclosing sins or faults to a priest; the disburdening of the conscience privately to a confessor; sometimes called *auricular confession*"); CHARLES BUCK, THEOLOGICAL DICTIONARY (Philadelphia, Joseph J. Woodward 1826) (defining confession as "the verbal acknowledgment which a Christian makes of his sins" and going onto compare Catholic, Protestant, and Jewish versions of confession); *Conession*, OXFORD ENGLISH DICTIONARY (2d. ed., 1989) (defining confession as "[t]he acknowledging of sin or sinfulness; *esp.* such acknowledgement made in set form in public worship. The confessing of sins to a priest, as a religious duty").

[118] *See, e.g.*, *Benjamin Rush, Observations on the Fourth of July Procession in Philadelphia, Pennsylvania Mercury, 15 July*, *1788*, *in* 18 THE DOCUMENTARY HIST. OF THE RATIFICATION OF THE CONST. 265 (John P. Kaminski et al. eds., 1995) (narrating how a "Rabbi of the Jews" marched arm-in-arm with two "ministers of the gospel"); *A Connecticut Farmer, Conn. Courant, 28 Jan., 1788*, *in* 3 THE DOCUMENTARY HIST. OF THE RATIFICATION OF THE CONST. 586 (Merrill Jensen, eds.,1978) (noting that delegates to the Connecticut ratifying convention included two governors and eight generals but only "two ministers of the Gospel"); McInstry v. Tanner, 9 Johns. 135, 135 (N.Y. Sup. Ct. 1812) (holding that a justice of the peace was not "a priest, or minister of the gospel").

[119] N.Y. CONST. of 1821, art. VII, § 4, *in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2648 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS] (explaining this limitation because "the ministers of the gospel are, by their profession, dedicated to the service of God and the cure of souls, and ought not to be diverted from the great duties of their functions"). For similar provisions, see, for instance, N.Y. CONST. of 1777, art. XXXIX, *in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2637; S.C. CONST. of 1790, art. I, § 23, *in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3261; TENN. CONST. of 1796, art. VIII, § 1, *in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3420; VA. CONST. of 1830, art. III, § 7, *in* 7 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3824.

[120] 2 N.Y. REV. STAT. 1828, pt. 3, ch. 7, tit. 3, § 72 (1829) ("No minister of the gospel, or priest of any denomination whatsoever, shall . . .").

century defamation law.[121] Substantive law shaped the procedural rules of evidence.[122] New York, like many jurisdictions in early America, declared that otherwise slanderous words became nonactionable if those words were spoken in one of a number of adjudicatory contexts: such as by court reporter recording a case, by a complainant before a magistrate, or between members of the same church in the course of that church's discipline.[123] This exception—now a corollary of ecclesiastical abstention doctrine—ensured that such adjudications could function without themselves inciting future disputes.[124]

In the central case of *Jarvis v. Hatheway*, for instance, two quarrelling co-parishioners gathered before two leaders of their Protestant church as part of "the second step of labor in church discipline . . . under the rules of the church, and in pursuance of the precept or rule contained in the 18th chapter of the evangelist Matthew" in order to inquire if the quarrelers were "fit member[s]

---

[121] 2 N.Y. REV. STAT. 1828, pt. 3, ch. 7, tit. 3, § 72 (1829) (alternation in orginaal). The phrase "discipline enjoined" found within the statutory text is discussed more in *supra* text accompanying note 85.

[122] *Cf.* Christian Edmonds, *The Religious Underpinnings of the Fourth Amendment*, 25 TEX. REV. L. & POL. 473, 482–87 (2021) (discussing how the search of homes for nonconformist books inspired the Fourth Amendment); Stuntz, *supra* note 13, at 394 (on the rise of the privilege against self-incrimination out of substantive considerations about freedom of speech and religion).

[123] *See, e.g.*, Usher v. Severance, 20 Me. 9, 12 (1841); Smith v. Youmans, 21 S.C.L. 85, 88 (S.C. 1836); Remington v. Congdon, 19 Mass. 310, 333–34 (1824); Thorn v. Blanchard, 5 Johns. 508, 519 (N.Y. 1809); Lewis v. Few, 5 Johns. 1, 14 (N.Y. 1809); M'Millan v. Birch, 1 Binn. 178, 186–87 (Pa. 1806); Hopkins v. Beedle, 1 Cai. R. 347, 348 n.a (N.Y. Sup. Ct. 1803).

[124] *See* Reformed Protestant Albany Dutch Church of Albany v. Bradford, 8 Cow. 457, 509 (N.Y. 1826) (Opinion of Jones, Chancellor) ("Courts of law do not interfere with the discipline of the church, or the punishment of ministers, by the sentences of the ecclesiastical authorities"); *Thorn*, 5 Johns. at 529 ("an action of slander will not lie, because the [disciplinary] circumstances, under which [the words] are spoken, destroy the presumption of malice; and without malice there can be no slander."). On the relationship between this exception and ecclesiastical abstention, see Alexander J. Lindvall, *Forgive Me, Your Honor, for I Have Sinned: Limiting the Ecclesiastical Abstention Doctrine to Allow Suits for Defamation and Negligent Employment Practices*, 72 S.C. L. REV. 25, 27, 36 (2020).

of the church."[125] During this examination, the soon-to-be defendant accused his foe of forgery (the subject of their fight) and later was sued for defamation.[126] Both the trial court and the New York Supreme Court ruled for the defendant, holding that "whether such discipline was proper or not, is not a point for [secular courts] to determine" because "[e]very sect of Christians are at liberty to adopt such [disciplinary] proceedings" for their own members.[127] As a matter of law, words spoken honestly "in the course of church discipline" to enable this discipline could not be defamatory.[128] But the courts left a question of fact for the jury: whether the words sought to enable discipline or simply to injure the plaintiff.[129] The jury had to determine the purpose of the words, just as a couple of decades later judges ruling on the privilege would have to decide if a communication was a "confession[] . . . in [] professional character" or had some other purpose.[130]

The "course of discipline" exception in defamation law covered more than just speech during excommunication hearings. Other cases applied to the exception to falsehoods preached or read from the pulpit, to written evidence submitted to a church hearing, to a letter of grievance about a pastor sent to a supervising bishop, and to synods investigating a minister.[131] Over time, courts began

---

[125] Jarvis v. Hatheway, 3 Johns. 180, 180, 183 (N.Y. Sup. Ct. 1808) (emphasis omitted) (internal quotations omitted); *cf. Matthew* 18:15–17 ("if thy brother shall trespass against thee, go and tell him his fault between thee and him alone . . . But if he will not hear *thee*, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established. And if he shall neglect to hear them, tell *it* unto the church").

[126] *Jarvis*, 3 Johns. at 180. Presumably due to the scandalous nature of the case, the case reporter avoided naming the witnesses or the church, although the latter was evidently a revivalist congregation in the burnt-over district of central New York. *See id.*

[127] *Id.* at 183.

[128] *Id.* at 181, 183.

[129] *Id.* at 183.

[130] *Cf.* 2 N.Y. REV. STAT. 1828, pt. 3, ch. 7, tit. 3, § 72 (1829) ("No minister . . . shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined . . . ."). For early cases determining that communication to a clergyman was not a "confession[] . . . in his professional character" but had some other purpose, see, for instance, Estate of Toomes, 54 Cal. 509, 516 (1880); Gillooley v. State, 58 Ind. 182, 184 (1877); People v. Gates, 13 Wend. 311, 323 (N.Y. Sup. Ct. 1835).

[131] *See* O'Donaghue v. M'Govern, 23 Wend. 26, 33 (N.Y. Sup. Ct. 1840) (letter); Reformed Protestant Albany Dutch Church of Albany v. Bradford, 8 Cow. 457, 509 (N.Y. 1826) (synods); Remington v. Congdon, 19 Mass. 310, 331, 334 (1824) (written complaints); Thorn v. Blanchard, 5 Johns. 508, 529 (N.Y. 1809) (pulpits).

referring to communications protected by this defamation exception as "privileged," mirroring evidence law.[132]

Moreover, words that would not otherwise be defamatory could become actionable slander if spoken about a plaintiff's "professional character" as priest or minister—but only if the falsehood would especially injure a cleric.[133] Arguably, this rule was necessary because, in America, "clergymen of all denominations have the same right to protection as the established clergy in *England*."[134] In *Demarest v. Haring*, for instance, a Dutch Reformed pastor was wrongfully accused of impregnating his wife's sister and spiriting the girl away to New Jersey so she could give birth and hand the infant to a poor house without anyone learning of the adultery.[135] The court stated that an accusation of simple adultery would not be enough to slander the laity, but because of his "particular calling or profession," "a charge of incontinency against a clergyman [is] actionable" lest the pastor "be deprived of his preferment."[136] Adultery is not grave enough to get a layman fired. No more than revealing an admission of sin would be enough to get a lay citizen excommunicated—as it would for a priest divulging a sacramental confession.

As a final example, in the 1806 case of *McMillan v. Birch*, the defendant (a Presbyterian clergymen) declared the plaintiff (a fellow pastor) to be "a liar, a drunkard, and a preacher of the devil"

---

[132] *See, e.g.*, Streety v. Wood, 15 Barb. 105, 109 (N.Y. Gen. Term 1853); Chapman v. Calder, 14 Pa. 365, 366, 368 (1850); Coombs v. Rose, 8 Blackf. 155, 157 (Ind. 1846).

[133] *See, e.g.*, Coffee v. Cowley, 1 Cleve. L. Rep. 35, 35 (Ohio Com. Pl. 1878) ("[I]nasmuch as the words were spoken of the plaintiff in reference to his professional character [as a clergyman], they were *per se* actionable . . . ."); Skinner v. Grant, 12 Vt. 456, 458, 462 (1840) ("[I]t did not appear . . . that the words were spoken of the plaintiff in his professional character as a minister of the gospel."); Chaddock v. Briggs, 13 Mass. 248, 255 (1816) (considering if "the words were spoken of and concerning the plaintiff in his ministerial capacity").

[134] Demarest v. Haring, 6 Cow. 76, 85 (N.Y. Sup. Ct. 1826) (counsel for the defendant) (citing *McMillan* as precedent). In England, defamation claims were historically heard in Anglican ecclesiastical courts, using inquisitorial rules of evidence. Common law courts did not completely take over this legal area until the middle of the nineteenth century. *See* S. M. WADDAMS, SEXUAL SLANDER IN NINETEENTH-CENTURY ENGLAND: DEFAMATION IN THE ECCLESIASTICAL COURTS, 1815–1855, at 11–13 (2000); OLDHAM, *supra* note 94, at 231–34.

[135] *Demarest*, 6 Cow. at 77, 80. In truth, although the pastor was not the father, he did send the girl to New Jersey to save the family's reputation. *Id.* at 80.

[136] *Id.* at 80–90.

during an Ohio Presbytery meeting about whether the plaintiff should be authorized to preach in that presbytery.[137] The words, thus, were both about the plaintiff's professional character as a clergymen and during the course of a church discipline attended only by denominational elders: a clash between the two rules discussed above. The Supreme Court of Pennsylvania concluded "words spoken of him in his profession of a minister of the Presbyterian church" remained inactionable if said during a disciplinary proceeding. [138] According to Chief Justice William Tilghman, "freedom of speech in what is called a *course of justice*, is not confined to courts of *common law* . . . it is extended to proceedings in ecclesiastical courts" because "[n]o extensive church can preserve decency, good order, or purity of manners, without discipline."[139] Evidently, it was more important to keep church disciplines from provoking litigation than to specially protect clergymen from defamation.

New York's 1828 statutory privilege, therefore, drew on language common in clergy defamation cases. Understood within the discourse of the era, only a small number of communications could ever be "in [a cleric's] professional character, in the course of discipline enjoined" by his church.[140] Beyond sacramental confession itself, the privilege likely protected an acknowledgment of sin before an elder board, presbytery, synod, or canonical court—that is, at a formal and mandatory inquiry before a tribunal made up exclusively of clergy. In that context, a confession could be neither slander nor evidence. But words spoken during a marriage counseling session, for instance, or when sharing a prayer request would not be covered.[141] Those contexts are not "discipline" in the eyes of early American law.

---

[137] M'Millan v. Birch, 1 Binn. 178, 178-80 (Pa. 1806) (internal quotations omitted) (narrating how the plaintiff was denied admission by both the Ohio Presbytery and the General Assembly on appeal and thus no parish would hire him).

[138] *Id.* at 184, 186–87 (reversing the lower court's decision).

[139] *Id.* at 186.

[140] 2 N.Y. REV. STAT. 1828, pt. 3, ch. 7, tit. 3, § 72 (1829).

[141] *See* Sherman v. State, 279 S.W. 353, 354 (Ark. 1926) (prayer request not privileged); Hills v. State, 85 N.W. 836, 837 (Neb. 1901) (mediation between quarreling spouses not privileged); Alford v. Johnson, 146 S.W. 516, 517 (Ark. 1912) (interview for church membership not privileged); Knight v. Lee, 80 Ind. 201, 202 (1881) (investigation as part of pending canonical trial not privileged); Commonwealth v. Drake, 15 Mass. 161, 162 (1818) (membership inquiry into rumored sin not privileged).

C. The Therapeutic Language of Spiritual Privilege

As envisioned at the start of the nineteenth century, penitent privilege suppressed little evidence. It protected only confessions of sin, only during formal discipline, only before Christian clergy, and only if the relevant denomination mandated such discipline. Judges and scholars have found the privilege confusing—perhaps more because they disliked its extreme narrowness, than because they could not comprehend its language. And so, judges and legislators expanded the privilege over the course of a century, especially during the sudden proliferation of statutes after World War II.[142]

This expansion culminated in 1972, when the Supreme Court Advisory Committee submitted Proposed Federal Rule of Evidence 506.[143] Although Congress never adopted it, Proposed Rule 506 was among the least controversial of the proposed privileges, never challenged during the heated Congressional debate about the proposed rules.[144] Around thirty states have since enacted or rewritten their statutory privilege to parallel the Advisory Committee's language.[145] Indeed, one circuit court had declared that the "uncontroversial nature" of Proposed Rule 506 demonstrates that spiritual privilege in this broad modern form is "indelibly ensconced in the American common law."[146]

The Advisory Committee consciously repudiated nineteenth-century tradition. Proposed Rule 506 avoided all the distinctive language of New York's 1828 statute: "confessions," "discipline

---

[142] For this broadening, see, for instance, Incledon, *supra* note 54, at 520; Bartholomew, *supra* note 39, at 1021, 1027; Callahan & Mills, *supra* note 23, at 708, 710; Cassidy, *supra* note 42, at 1630–31; WRIGHT & GRAHAM, *supra* note 25, at 47–49.

[143] *See* Semonin, *supra* note 37, at 164, 174; Callahan & Mills, *supra* note 23, at 706–07.

[144] For the legislative history of Proposed Rule 506, see WRIGHT & GRAHAM, *supra* note 25, § 5611, at 11–14; *see also* Bartholomew, *supra* note 39, at 1021-22 n.25; Cassidy, *supra* note 42, at 1661–62.

[145] Cassidy, *supra* note 42, at 1640, 1647; Mazza, *supra* note 73, at 187, 187 n.110; WRIGHT & GRAHAM, *supra* note 25, § 5611, at 16–22.

[146] *In re* Grand Jury Investigation, 918 F.2d 374, 381, 384–85 (3d Cir. 1990) (internal quotations omitted) (quoting United States v. Gillock, 445 U.S. 360, 368 (1980)) (emphasizing that "American common law, viewed in the light of reason and experience and the 'conditions' properly set forth by Dean Wigmore . . . compels the recognition of a clergy-communicant privilege"); *see also* FED. R. EVID. 501 (stating that "[t]he common law" as interpreted "in the light of reason and experience" governs privilege claims in Federal Question cases); Callahan & Mills, *supra* note 23, at 707.

enjoined," "rules or practices of such denomination," and so forth.[147] Instead, the text safeguarded communications to "an individual reasonably believed" to be "a minister, priest, rabbi, or other similar functionary of a religious organization" as long as that communication is "made privately and not intended for further disclosure" and "in [the cleric's] professional character as spiritual adviser." [148] Moreover, the rule would have prevented the cleric or denomination from claiming the privilege, making the penitent the sole holder.[149]

In its advisory note, the Committee stressed that this privilege was not "narrowly restricted to doctrinally required confessions" but also sheltered "marriage counseling," "the handling of personality problems," and other reasonable forms of "spiritual advice" because "[m]atters of this kind fall readily into the realm of the spirit."[150] According to the Committee, "the same considerations which underlie the psychotherapist-patient privilege" justify broad spiritual privilege.[151] The privilege, thus, does not rest on humanistic rationales like the free exercise or inviolability of conscience, but on instrumental rationales such as religion's social

---

[147] *Cf.* 2 N.Y. REV. STAT. 1828, pt. 3, ch. 7, tit. 3, § 72 (1829) ("No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination."); Cal. Stat., tit. 9, ch. 1, § 397 (1851), *supra* note 81, at 591 ("A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.").

[148] PROPOSED FED R. EVID. 506(a)–(b), 56 F.R.D. 183, 247 (1973); *see also* WRIGHT & GRAHAM, *supra* note 25, § 5612, at 91 (noting that the proposed rule "went beyond the existing precedents to broaden the privilege" despite an earlier Congressional proposal for a narrow privilege).

[149] PROPOSED FED. R. EVID. 506(c) at 247 (allowing cleric to claim on behalf of a penitent in some circumstances but giving the cleric less power to do this than a guardian, conservator, or personal representative has); *see also* Callahan & Mills, *supra* note 23, at 712 (suggesting that Proposed Rule 506 violates the First Amendment by failing to make clergy into dual holders).

[150] Note to PROPOSED FED R. EVID. 506 at 248–49; *cf.* PLANS, Inc. v. Sacramento City Unified Sch. Dist., 752 F. Supp. 2d 1136, 1143 (E.D. Cal. 2010) (concluding that "reference to the 'spiritual'" or to a "non-physical" "realm of the spirit" is insufficient alone to make beliefs into a "religion" for Establishment Clause purposes).

[151] Note to PROPOSED FED R. EVID. 506 at 248.

benefit and the need for open communication to ensure "therapeutic effectiveness."[152]

A few years later, Chief Justice Burger expressed a similar view in his *Trammel* dicta about "the human need to disclose to a spiritual counselor" and receive "priestly consolation and guidance."[153] In his concurrence, Potter Stewart mocked Burger's opinion as "of greater interest to students of human psychology than to students of law."[154] Nonetheless, circuit courts have stressed this therapeutic objective, speaking of the "urgent need of people to confide" for the sake of "spiritual guidance"[155] and "the everlasting need of the individual to seek spiritual and worldly assistance."[156] For Burger, the Advisory Committee, and these federal courts, clergy are a type of therapist, whose expertise in a specialized area of universal human psychology ("the realm of the spirit," "the human need" for "consolation") enables them to guide troubled souls towards a healthier lifestyle.[157] Therapy was now

---

[152] Note to PROPOSED FED R. EVID. 504, 56 F.R.D. 183, 242–43 (1973) (likening "priest-penitent" and "psychotherapist-patient" relationships and explaining how these instrumental considerations "amply" satisfy Wigmore's four conditions for a privilege).

[153] Trammel v. United States, 445 U.S. 40, 51 (1980) ("The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.").

[154] *Id.* at 54 (Stewart, J., concurring).

[155] Vega v. Ryan, 757 F.3d 960, 973 (9th Cir. 2014) ((speaking of "urgent need of people to confide in" priests and in other counsellors "entrusted with the pressing task of offering spiritual guidance") (internal quotations omitted).

[156] Varner v. Stovall, 500 F.3d 491, 496 (6th Cir. 2007) (discovering a "common purpose" to fulfill this "everlasting need" in the privileges for clerics, attorneys, and physicians); *see also* Cox v. Miller, 296 F.3d 89, 111 (2d Cir. 2002) (contrasting "practical guidance " and "empathy and emotional support" with the "spiritual or religious guidance" that the privilege protects); *In re* Grand Jury Investigation, 918 F.2d 374, 383 (3d Cir. 1990) ("[T]he privilege protecting communications to members of the clergy . . . is grounded in a policy of preventing disclosures that would tend to inhibit the development of confidential relationships that are socially desirable.").

[157] PLANS, Inc. v. Sacramento City Unified Sch. Dist., 752 F. Supp. 2d 1136, 1143 (E.D. Cal. 2010); *compare* Incledon, *supra* note 54, at 534–35 (arguing that a therapeutic interpretation of penitent privilege is necessary for the privilege to survive constitutional scrutiny) *with* Cassidy, *supra* note 42, at 1700, 1720 (in favor of distinguishing between denominations based on their canon law, rather than equating all disciplines as forms of spiritual advice).

confession secularized.[158] The well-adjusted life had replaced repentance.[159]

Of course, "spiritual advice" was what nineteenth-century sacerdotal privilege did not cover. Van Ness and the other judges in *Smith* refused to extend the privilege to conversations "made to a minister of the gospel in confidence" "with a view of exhorting [] to penitence" as an "adviser."[160] In the *Drake* case, a year after, George Thacher and the other judges on the Supreme Judicial Court of Massachusetts echoed Van Ness's ruling and seemingly accepted that a Baptist defendant's repentance during a mandatory church disciplinary "inquiry" about "evil reports touching his character" was admissible because it "made to his friends and neighbors" "*pro salute animi*" (for the salvation of his soul) and was not "required by any known ecclesiastical rule."[161] Even though "ecclesiastical tribunals" had threatened to excommunicate Drake if he kept silent during the inquiry, the court permitted church members to testify

---

[158] TAYLOR, *supra* note 33, at 171–72 ("social imaginary is that common understanding which makes possible common practices, and a widely shared sense of legitimacy" "carried in images, stories, [and] legends" rather than "expressed in theoretical terms"); Nathan J. Ristuccia, *Rogationtide and the Secular Imaginary*, *in* FULL OF YOUR GLORY, LITURGY, COSMOS, CREATION 165, 185 (2019) ("Secularism too is a form of life" "embodied" in a modern "social imaginary").

[159] *Cf.* TRUEMAN, *supra* note 50, at 360 ("Where a sense of psychological well-being is the purpose of life, therapy supplants morality—or, perhaps better, therapy is morality"); CHRISTIAN SMITH & MELINA LUNDQUIST DENTON, SOUL SEARCHING: THE RELIGIOUS AND SPIRITUAL LIVES OF AMERICAN TEENAGERS 163–64, 171 (2006) (arguing on sociological data that much of American Christianity is "only tenuously Christian in any sense that is seriously connected to the actual historical Christian tradition" and is better categorized as a "Moralistic Therapeutic Deism" which is "not a religion of repentance from sin" but of "feeling good, happy, [and] secure").

[160] *Smith*, *supra* note 2, at 80 (noting that Smith had asked for Van Pelt to come to the prison, specifically so as to confess to a minister).

[161] Commonwealth v. Drake, 15 Mass. 161, 161–62 (1818). Although the original case report barely explained the holding, a court reporter later added a footnote suggesting that the judges depended on "*Smith's* case" and various English authorities for the rule that "[c]onfessions made to a clergyman or priest, for the sake of easing the culprit's conscience, may be given in evidence." *Id.* at 162 n.a (indicating this footnote was added approximately ten years later, as it refers to an 1828 case as "very lately" decided); *see also* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1910 (2021) (Alito, J., concurring) (analyzing *Drake* and concluding it "sheds no light on the understanding of the free-exercise right").

voluntarily against him.[162] Two decades later, another Massachusetts court clarified that Protestant confessions were not "matter[s] of conscience" and thus were unprivileged even if the pastor was an unwilling witness and even if the defendant spoke in confidence to the pastor alone.[163]

The Indiana Supreme Court, likewise, allowed a Catholic priest to testify about a spiritual conversation in "the confidence of the church" "admonish[ing] [the accused] against carrying out his threats" to kill the victim, because communication prior to the crime—no matter how spiritual in nature—could not be a "confession[] made to him in course of discipline" under the theology of the Catholic church.[164] Catholic doctrine about what constituted a confession, not the subject matter of the communication, was the decisive criterion.[165]

Sacramental theology, not spiritual advice, mattered to these judges. Allowing citizens to consult a religious functionary for advice about the realm of the spirit perhaps promotes mental health. But then, so likely would allowing them to "work[] out their difficulties by talking to . . . parents, siblings, best friends, and bartenders—none of whom was awarded a privilege against

---

[162] *Drake*, 15 Mass. At 161. Alpheus Drake (1782-1854), a member of the Baptist church in Minot, Maine (then in Massachusetts), had confessed before a church inquiry made up of both clergy and laity. Later, some members of this disciplinary inquiry volunteered to testify at Drake's criminal trial for "open and gross lewdness"—that is to say, public nudity. *See Drake*, 15 Mass. at 161; *see also* GEORGIA DREW MERRILL, HISTORY OF ANDROSCOGGIN COUNTY, MAINE (ILLUSTRATED) 512, 668 (Georgia Drew Merrill, ed., W. A. Ferguson & Co. 1891); BUSH & TIEMANN, *supra* note 68, at 80–82.

[163] *See* Walker, *supra* note 95, at 113 (approving of an unreported Boston case c. 1840 in which the Unitarian pastor William Ellery Channing was "compelled to testify" about a confession because penance is "a fundamental article of Catholic faith" while "the Protestant . . . does not regard confession to the priest as a matter of conscience").

[164] Gillooley v. State, 58 Ind. 182, 183–84 (1877) (never stating if Father Francis Lordeman was a willing or subpoenaed witness); *see also* 1 JACKSON MORROW, HISTORY OF HOWARD COUNTY, INDIANA 296 (B.F. Bowen & Company 1909) (describing the crime).

[165] *Gillooley*, 58 Ind. at 184. Because defense counsel did "not press this [privilege] point in their brief," the court dealt with the privilege issue briefly and never stated how it knew what Catholic theology of confession was. *Id.* Moreover, because the case was on review and the priest had revealed the disputed statements below, there was no *in camera* review (a theologically fraught process) to determine if privilege applied. *Id.*

testifying in court."[166] Unless theology supplies a foundational difference, therapy alone cannot explain why clergy deserve special status. Why are all citizens not priests?

III. JUSTIFYING PENITENT PRIVILEGE

Seven rationales have appeared for penitent privilege over the past two centuries: (1) the social benefits of religion; (2) freedom of religion; (3) privacy; (4) the futility of forcing believers to violate conscience; (5) state legitimacy; (6) Christian theology; and (7) hostility to compulsory testimony.[167] Although American jurists—as Burger and the Advisory Committee exemplify—concentrate on instrumental reasons focused on legitimacy and social benefits, many academics prefer humanistic rationales.[168] Humanistic reasons also predominated in the nineteenth century. This section, therefore, examines the arguments of three early texts arguing for the privilege—DeWitt Clinton's opinion in *Philips* (1813), John Meredith's opinion in *Cronin* (1855), and an 1846 article published by the Catholic Transcendentalist Orestes Brownson—to reveal why Americans chose to recognize a privilege that did not exist in English common law.[169]

A. Three American Voices

Antebellum America produced three prolonged apologetics in favor of sacerdotal privilege.[170] The first was Mayor DeWitt Clinton's opinion for the court in *Philips*, which was published immediately and excerpted throughout the nineteenth century.[171] The *Philips* decision was "[t]he most influential early case" on

---

[166] Jaffee v. Redmond, 518 U.S. 1, 22, 28 (1996) (Scalia, J., dissenting) (asking what rationale justifies treating counseling from "social workers" or "licensed psychiatrists and psychologists" differently from "counseling with one's rabbi, minister, family, or friends").

[167] THOMPSON, *supra* note 12, at 322–23, 350, 354.

[168] *See, e.g.*, IMWINKELRIED, *supra* note 46, at § 1.2.1.

[169] *See Philips* (1813), *in* SAMPSON, *supra* note 12, at 5, 8, 95; Commonwealth v. Cronin, 2 Va. Cir. 488 (1855); Brownson, *supra* note 113.

[170] For other antebellum texts that discuss the privilege at length, see Walker, *supra* note 95, at 113–14; LIVINGSTON, *supra* note 80, at 467, 477.

[171] For the reprints of *Philips*, some of which included various statutes, transcripts of the oral arguments, and theological writings, see Walsh, *supra* note 26, at 1046, 1057, 1059.

penitent privilege and the first to recognize this privilege in America.[172] The case concerned an Alsatian Jesuit, Anthony Kohlmann, who heard the confession of a fence of stolen property and ordered the property returned to its owner, as a condition of absolution.[173] When summoned, Father Kohlmann refused to divulge information about the confession itself or the factual circumstances surrounding it (such as the "sex or colour" of the penitent), even though he learned these facts prior to the sacramental ritual itself.[174] Originally, the district attorney planned to use prosecutorial discretion to keep the priest from testifying, but the trustees of Kohlmann's church convinced him to bring contempt charges as a test case.[175] Evidently, the local Catholic community trusted Clinton and the other judges to interpret New York's constitution to require a privilege.[176] They were rewarded for their faith with an opinion that remains the central precedent for religious exemptions in early America.[177]

The less renowned case of *Commonwealth v. Cronin* (1855) was the only other nineteenth-century example of an American court recognizing sacerdotal privilege on common law reasoning

---

[172] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1908–09 (2021) (Alito, J., concurring) (observing that "knowledge of the [*Philips*] decision appears to have spread widely" and discussing early cases that relied on *Philips*).

[173] *Philips* (1813), *in* SAMPSON, *supra* note 12, at 5; *see also* CAREY, supra note 12, at 32–33; Walsh, *supra* note 12, at 20. For Kohlmann's career, see JAMES EMMETT RYAN, FAITHFUL PASSAGES: AMERICAN CATHOLICISM IN LITERARY CULTURE, 1844–1931, at 6, 76 (2013) (describing Kohlmann as an "exemplary figure" among the missionary priests who were "the primary intellectual force" in early American Catholicism).

[174] *Philips* (1813), *in* SAMPSON, *supra* note 12, at 5, 9, 48, 53.

[175] *Id.*; *see also* CAREY, *supra* note 12, at 32–33. Kohlmann's church, St. Peter's, was then the only Catholic parish in the city. Walsh, *supra* note 12, at 10.

[176] Clinton was a known ally of New York's Catholic community and had worked to abolish the state's test oath. *See* Walsh, *supra* note 12, at 10–11, 19. Both Mayor Clinton and Recorder Hoffman sat on the *Philips* panel on account of the importance of the case, even though New York's laws at the time only required one of the two. *Philips* (1813), *in* SAMPSON, *supra* note 12, at 8.

[177] For *Philips* as a precedent in other early cases, see Walsh, *supra* note 12, at 40–44; CAREY, *supra* note 12, at 31, 38. The impact of *Philips* on nineteenth-century courts is hard to evaluate, because only seven decisions on penitent privilege were published between 1835 and 1900. For this count, see Bartholomew, *supra* note 39, at 1028 n.62; Yellin, *supra* note 25, at 107 n.65. For these seven cases, see Dehler v. State, 53 N.E. 850 (Ind. App. 1899); State v. Brown, 64 N.W. 277 (Iowa 1895); Knight v. Lee, 80 Ind. 201 (1881); Estate of Toomes, 54 Cal. 509 (1880); Gillooley v. State, 58 Ind. 182 (1877); Commonwealth v. Cronin, 2 Va. Cir. 488 (1855); People v. Gates, 13 Wend. 311 (N.Y. Sup. Ct. 1835).

only, without waiting for an authorizing statute.[178] In *Cronin*, an Irish immigrant fatally wounded his pregnant wife after catching her in the privy at midnight allegedly committing adultery.[179] For the sake of his heat of passion defense, the accused sought to disprove his wife's dying declaration that the man in the privy with her was a rapist, not her lover.[180] As a result, Rev. John Theeling, the parish priest who administered extreme unction to the dying wife, was called to testify about whether she confessed adultery as part of last rites.[181] Theeling refused to answer whether sacramental confession occurred, let alone what was said during it.[182] After Richmond circuit judge John Alexander Meredith equitably exempted Theeling from testifying—in an opinion drawing on Jeremy Bentham, Simon Greenleaf, and both the court opinion and counsel arguments from *Philips*—the jury deliberated on other evidence and found Cronin guilty of voluntary

---

[178] *Cronin*, 2 Va. Cir. at 505. After *Philips* but apparently before the passage of the 1828 statute, New York's Court of General Sessions decided a second unreported case on penitent privilege that repeated the holding in *Philips*. *See id.* at 498-99. However, since little is known about this case, it is not a useful third example. *See id.* For an early case rejecting common law privilege and encouraging the legislature to fix this problem via statute, see Philips v. Gratz, 2 Pen. & W. 412, 417 (Pa. 1831) (agreeing that "the benefit derived by society from the offices of the Catholic clergy" justifies sacerdotal privilege but believing that "considerations of policy" must be addressed to a legislature, not a court).

[179] *Cronin*, 2 Va. Cir. at 488–89; Walsh, *supra* note 12, at 42, 51.

[180] *Cronin*, 2 Va. Cir. at 488, 506.

[181] *Id.* at 489, 492. The privilege in *Cronin* threatened great third-party harm, for it almost stopped a criminal defendant from presenting his sole defense. *Cf.* Schaerr & Worley, *supra* note 53, at 639–40; Jaffee v. Redmond, 518 U.S. 1, 18–19 (1996) (Scalia, J., dissenting) ("[T]he purchase price" of privilege is "occasional injustice . . . some individual who is prevented from proving a valid claim—or (worse still) prevented from establishing a valid defense.").

[182] *Cronin*, 2 Va. Cir. at 489–90, 494 (highlighting that Keeling agreed to testify about facts he knew "as a private individual" rather than "in his ministerial character as a priest of the Roman Catholic church," such as that the Cronins were Catholic); *cf.* CAREY, *supra* note 12, at 58–59 (describing the willingness of Catholic clerics in an 1834 case to testify about the practice of confession, as long as the seal itself was not broken).

manslaughter, not murder.[183] The Court of Appeals unanimously declined review.[184] Evidently, Cronin's defense partly succeeded.

Finally, in 1846, Orestes Brownson—the leading Catholic intellectual of nineteenth-century America—published "The Confessional," a review of five recent books on the theology of penance.[185] Because this article is anonymous, scholars disagree whether Brownson or Bishop Francis Patrick Kenrick of Philadelphia was the author.[186] Regardless, Brownson edited and published the piece in the *Brownson's Quarterly Review* (his self-titled journal), so this paper refers to him as the author for convenience. Brownson sought to counter Protestant hostility towards auricular confession, which was increasing in the 1830s and 1840s from the comparatively irenic attitudes of the early republic.[187] The review primarily contrasted Catholic sacramentology with high church Anglican and other Protestant understandings of confession.[188] In the last few pages, however, Brownson focused on various cases—including *Philips*—and the legal issues surrounding sacerdotal privilege.[189] Together, these three works reveal why early Americans welcomed the privilege.

B. Renouncing English Common Law

There was "[n]o privilege at common law . . . either in England or in the United States[,]"[190] so Dean Wigmore proclaimed at the start of the passage on penitent privilege in his multivolume

---

[183] *Cronin*, 2 Va. Cir. at 505–06; Walsh, *supra* note 26, at 1060 (describing Judge Meredith's sources). For Cronin as an example of equitable exemption, see Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 105–06 (2020).

[184] *Cronin*, 2 Va. Cir. at 506 (noting that Meredith's ruling came before the appellate court on a writ of supersedeas).

[185] Brownson, *supra* note 113, at 327. For Brownson's career, see RYAN, *supra* note 173, at 13–14, 22.

[186] *See, e.g.*, Walsh, *supra* note 26, at 1050 (maintaining Brownson was the author); CAREY, *supra* note 12, at 87, 99, 101 (maintaining Kenrick was "more than likely" the author).

[187] Brownson's book review targeted Edmund Pusey's work along with a famous attack on confession, Jules Michelet's *Priests, Women, and Families* (1845). *See* Brownson, *supra* note 113, at 333, 337–38. For the rise in hostility towards confession, see CAREY, *supra* note 12, at 57–62.

[188] Brownson, *supra* note 112, at 328–33.

[189] *Id.* at 338–42.

[190] WIGMORE ON EVIDENCE, *supra* note 31, § 2394, at 3362–63.

treatise.[191] Although later scholars have undercut Wigmore's cursory analysis of medieval and early modern England, this proclamation stands true for the eighteenth century.[192] Whatever privilege once existed had disappeared by America's founding.[193] Ecclesiastical laws, spiritual consolation, and the burdens of a guilty conscience could not defeat the court's right to every person's evidence.[194]

American treatise authors knew this. William Blackstone and his American editor, St. George Tucker, for instance, mention no privilege beyond attorney-client secrecy.[195] This silence was not accidental. A century earlier, Edward Coke—one of Blackstone's main sources—had recognized a qualified "priviledge of confession."[196] Indeed, in the eighteenth century, excommunicants

---

[191] *See id.* at 3362 (dating the disappearance of sacramental privilege in England to the first half of the seventeenth century).

[192] *See, e.g.*, THOMPSON, *supra* note 12, at 1–4; Mazza, *supra* note 73, at 177–78; Yellin, *supra* note 25, at 100, 102; BUSH & TIEMANN, *supra* note 68, at 47–59.

[193] *But see* THOMPSON, *supra* note 12, at 96–97, 121, 377 (arguing that the medieval privilege was never repealed, even if English judges and treatise authors steadfastly assumed it had been); WRIGHT & GRAHAM, *supra* note 25, § 5612, at 39–41 (1992) (noting that high-level English courts avoided "solemnly decid[ing]" on privilege until unambiguously rejecting it in 1893).

[194] Lord Hardwicke announced that the law is entitled "to every man's evidence" in 1742, although the maxim has roots in seventeenth-century decisions. *See* GOLDFARB, *supra* note 94, at 24–25; *see also* Trump v. Vance, 140 S. Ct. 2412, 2420 (2020) ((quoting Hardwicke as saying "Since the earliest days of the Republic," "[i]n our judicial system, 'the public has a right to every man's evidence,'" (citing 12 PARLIAMENTARY HISTORY OF ENGLAND 693 (1812))).

[195] *See* 3 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 369–70 (Philadelphia, William Young Birch & Abraham Small 1803) ("All witnesses of whatever religion or country, that have the use of their reason, are to be received and examined . . . [but] no counsel, attorney, or other person, intrusted with the secrets of the cause by the party himself, shall be compelled, or perhaps allowed, to give evidence . . . .").

[196] *See* 2 EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND 628–29 (London, 1642) (insisting that "the priviledge of confession extendeth onely to felonies" because "by the common law, a man indited of high treason could not have the benefit of Clergy . . . nor any Clergy-man priviledge of confession to conceale high treason"). Coke discusses *R. v. Garnet* (1606), in which a Roman Catholic priest was executed for refusing to divulge a communication that was arguably a sacramental confession concerning the treasonous Gunpowder Plot. *See* 2 THOMAS JONES HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783 at 218, 246, 255 (London, T.C. Hansard 1818); *see also* THOMPSON, *supra* note 12, at 42–44, 58.

could not serve as jurors, witnesses, or plaintiffs in English court, because they could not swear oaths.[197] Theoretically, then, if a priest revealed the contents of a confession prior to trial (bringing about excommunication), the cleric would become incompetent to testify about the confession at trial.[198]

Blackstone, like other treatise writers of the later eighteenth century, left this historical privilege out.[199] The American evidence writer Samuel Bayard went further, declaring that a "professional man" such as a doctor or clergyman is obliged "to relate even facts communicated under a promise of secrecy, unless *attorney or counsel* to the party so communicating."[200] For decades after the *Philips* decision and after states began passing statutory privileges,

---

[197] *See* THOMPSON, *supra* note 12, at 33, 225.

[198] In practice, this Catch-22 did not occur, because only Anglican excommunication (not Catholic excommunication) left a witness incompetent, and the Church of England (despite Canon 113) made no attempt to deny the sacrament to its own parsons for testifying.

[199] *See, e.g.*, 1 JOHN MORGAN, ESSAYS UPON THE LAW OF EVIDENCE, NEW TRIALS, SPECIAL VERDICTS, TRIALS AT BAR, AND REPLEADERS 288 (London, J. Johnson, No. 72, St. Paul's Church-Yard 1788) (discussing other privileges, without mentioning any sacramental privilege); GEOFFREY GILBERT, THE LAW OF EVIDENCE 138–39 (London, W. Owen, between the Temple Gates, Fleetstreet 1769) (same).

[200] SAMUEL BAYARD, A DIGEST OF AMERICAN CASES ON THE LAW OF EVIDENCE: INTENDED AS NOTES TO PEAKE'S COMPENDIUM OF THE LAW OF EVIDENCE 120–21 (Philadelphia, William P. Farrand & Co. 1810). Bayard's text updates and Americanizes a prominent English treatise. *See* THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 121, 128 (London, E. & R. Brooke & J. Rider 1801) (maintaining that the "rule of professional secrecy extends only to the case of facts stated to a legal practitioner" and "a confession to a clergyman or priest" is "not within the protection of the law" because such confession is merely "for the purpose of easing the culprit's conscience" rather than "on account of higher duties, either domestic or public"); THOMPSON, *supra* note 12, at 13–21. Physician-patient privilege did not exist in England but—much like sacramental privilege—arose instead in early New York. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 102 (3d ed., 2005).

American treatise authors continued to repeat this refrain, citing British precedents as proof.[201]

As a result, American supporters of sacerdotal privilege emphasized the country's repudiation of Britain. They criticized two precedents.[202] First, in 1790 or 1791, Justice Buller while riding circuit heard a case (*R. v. Sparkes*) in which a Roman Catholic prisoner awaiting trial had confessed his crime to an Anglican parson "for ghostly comfort, and to ease his conscience oppressed with guilt."[203] These two motives—spiritual comfort and ease of conscience—were exactly the two that imposed clerical confidentiality under England's ecclesiastical laws at the time.[204]

---

[201] *See, e.g.*, GREENLEAF TREATISE, *supra* note 115, at 295 ("Neither penitential confessions, made to the minister, or to members of the party's own church, nor secrets confided to a Roman Catholic priest in the course of confession, are regarded as privileged communications."); 1 ZEPHANIAH SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 746–47 (New Haven, S. Converse 1822) (stating that evidentiary privilege "extends to no other persons" beyond an attorney, "not even to a Roman Catholic priest, who receives the secret confession of one of his charge"); 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 242, 400 (Windham, John Byrne 1795) ("Communications however confidential and under the promise of secrecy made to any persons but attornies, must be disclosed by witnesses . . . .").

[202] *Philips* (1813), *in* SAMPSON, *supra* note 12, at 55, 59 (speech of William Sampson for the defense) (noting that the only two British cases on point were both adjudged after American independence); *see also id.* at 17 (speech of Richard Rikers for the defense) (same).

[203] Du Barré v. Livette (1791) 170 Eng. Rep. (N.P.) 96, 97, Peake 108, 109–10 (describing the facts and holding of *Sparkes*: an unreported case occurring around a year earlier); *see also* R. v Gilham (1828) 168 Eng. Rep. (N.P.) 1235, 1239, 1 Mood. 186, 198 (citing *Sparkes* for the rule that "a minister is bound to disclose what has been revealed to him as matter of religious confession"); THOMAS CHISHOLME ANSTEY, A GUIDE TO THE LAWS OF ENGLAND AFFECTING ROMAN CATHOLICS 84 (London, V. & R. Stevens & G. S. Norton 1842) ("Disclosures made to clergymen in general for the mere purpose of obtaining spiritual advice and comfort, are not so far privileged . . . .").

[204] For Canon 113 of the Church of England's Code of 1603, see 1 EDWARD CARDWELL, SYNODALIA: A COLLECTION OF ARTICLES OF RELIGION, CANONS, AND PROCEEDINGS OF CONVOCATIONS IN THE PROVINCE OF CANTERBURY, FROM THE YEAR 1547 TO THE YEAR 1717, at 228, 310 (Oxford, Oxford University Press, 1842) (admonishing clerics to "not at any time reveal and make known to any person whatsoever any crime or offence so committed to his trust and secrecy" whenever "if any man confess his secret and hidden sins to the minister, for the unburdening of his conscience, and to receive spiritual consolation and ease of mind" except for various capital offenses); *see also* Richard Deadman, *Confession in the Anglican Church - Breaking the Seal?*, 189 LAW & JUST. – CHRISTIAN L. REV. 126, 128, 130 (2022); Grout, *supra* note 35, at 139–40, 153 (discussing the Canon 113 and noting that at least since the nineteenth century English priests "remain in an impossible situation with the canon law and the Church opining one position and the secular legislation and case law another"); Bursell, *supra* note 35, at 90.

Nonetheless, Buller admitted the parson as witness and executed the prisoner on this testimony.[205] When Chief Justice Lord Kenyon heard of this case, he noted that he "should have paused before [he] admitted the [parson's] evidence," but Kenyon gave "every attention" to the persuasive power of Buller's ruling because "[t]he Popish religion is now unknown to the law of this country, nor was it necessary for the prisoner to make that confession to aid him in his [legal] defence."[206] In *Wilson v. Rastall* a year later, Kenyon, Buller, and the rest of the King's Bench agreed that "privilege is only allowed in the case of attorney and client."[207] Kenyon had resolved whatever doubts he once had.

The second key precedent was the Irish decision of *Butler v. Moore* (1802).[208] The sister and intestate heir of John Butler, 12th Baron Dunboyne, challenged the validity of her dead brother's will, alleging that Dunboyne had secretly converted to Catholicism at the end of his life and thus lacked testamentary capacity under the governing laws.[209] William Gahan, the Augustinian friar rumored to be Dunboyne's confessor, refused to answer "[w]hat religion did . . . lord *Dunboyne* profess . . . at the time of his death," claiming that any knowledge he might possess "arose from a confidential

---

[205] *Du Barré*, 170 Eng. Rep. at 97, Peake at 110.

[206] *Id.* Some scholars assert that Kenyon disagreed with Buller, but that is an overly strong interpretation of his off-hand comment and hard to reconcile with his more considered decision in *Wilson* a year later. *See, e.g.*, THOMPSON, *supra* note 12, at 20, 28.

[207] Wilson v. Rastall (1792) 100 Eng. Rep. 1283, 1286 (KB), 4 T. R. 753, 759 (Opinion of Kenyon, C. J.) (citing the *Du Barré* decision as well as cases rejecting physician-patient privilege in support); *id.* at 1287; 4 T. R. at 759-61 (Opinion of Buller, J.) (lamenting that "privilege is confined to the cases of counsel, solicitor, and attorney" rather than extending to other professionals—especially to "a medical person"—but insisting that binding precedents had settled this point); *see also* FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 284–85 (2d ed., London, W. Strahan & M. Woodfall 1775) (discussing professional confidence only in respect to attorneys).

[208] No nominative report survives for Butler v. Moore (1802), but the case was described at length in 1 LEONARD MACNALLY, THE RULES OF EVIDENCE ON PLEAS OF THE CROWN 253–55 (Dublin, J. Butterworth & J. Cooke1802). Despite its Irish provenance, the first American treatise on evidence law treated *Butler* as authoritative. *See* ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE, IN CIVIL AND CRIMINAL CASES AND A TREATISE ON BILLS OF EXCHANGE, AND PROMISSORY NOTES 95 (Hartford, Oliver D. Cooke 1810) (citing MacNally's treatise and concluding that "[t]he privilege of secresy is strictly confined to persons acting as counsellors, solicitors, and attornies," and "[c]lergymen are not privileged from disclosing the confessions of culprits"); *see also* FRIEDMAN, *supra* note 200, at 245 (on Swift's treatise).

[209] *See, e.g.*, Bursell, *supra* note 35, at 96.

communication made to him in the exercise of his clerical functions" which church canons "forbid him to disclose."[210] Michael Smith, the Master of the Rolls, held the priest in contempt and noted that it is "the undoubted legal constitutional right of every subject" to compel witnesses to testify and that "every man is bound" by such a summons "unless specially exempted and protected by law."[211] According to Smith, *Butler* was an easy case with "no difficulty" legally, but the court had indulged a "great length of discussion" by ten different lawyers in order to satisfy "public feeling."[212] That is to say, Smith knew how he would rule from the start but allowed the hearing to appease the Irish mob.[213]

These two precedents did not impress DeWitt Clinton when the prosecutors in *Philips* pointed them out. *Sparkes*—Clinton insisted—was wrongly decided, unreported, from a low-level trial court, "virtually overturned" by Lord Kenyon's hesitance, and focused on a Protestant clergyman whose denomination imposed no "religious obligations of secrecy."[214] As for *Butler*, "the decisions of Irish courts, respecting Roman Catholics, can have little or no weight" because the persecutory laws of Ireland excluded Catholics "from the common rights of man."[215] Despite these cases, Clinton could not believe that "the mild and just principles of the common Law" would set a priest "in such an awful dilemma" "between Scylla and Charybdis," forcing him to either forswear his clerical oath and be cast out of the church for this misdeed, or to perjure himself in

---

[210] MACNALLY, *supra* note 208, at 254 (internal quotations omitted).

[211] *Id.* at 255. Even the priest's lawyers "candidly admitted" that no express privilege existed, citing only various "principles of policy" and supposedly "analogous cases" that failed to convince Master Smith. *See id.* at 254–55.

[212] *Id.* at 255; *cf. Philips* (1813), *in* SAMPSON, *supra* note 12, at 62–63 (speech of William Sampson for the defense) (stating that Gahan spend several weeks in the county jail, despite being over seventy years old).

[213] By 1825, even the Anglo-Irish authorities assumed penitent privilege existed in Ireland. In an unreported case, a Catholic priest refuses to testify about a murder he witnessed on a public road, claiming "the privilege of confession." STATE OF IRELAND: LETTERS FROM IRELAND, ON THE PRESENT POLITICAL, RELIGIOUS, & MORAL STATE OF THAT COUNTRY 31–33 (London, J. Hatchard & Son, Piccadilly, & R. Milliken 1825). But he heard the murderers confess well after he watched the killing. *Id.* Thus, the court compelled the priest to testify—over widespread Catholic objections—because the case was about observed events, not privileged "secrets disclosed in sacramental confession." *Id.*

[214] *Philips* (1813), *in* SAMPSON, *supra* note 12, at 104–05.

[215] *Id.* at 107–08.

court.[216] Such precedents are not the true position of the common law and "must be pronounced a heresy in our [American] legal code."[217]

Judge Meredith in *Cronin* doubted the English common law was as just and benevolent as Clinton thought. Indeed, Meredith emphasized that both the "rules of the common law" and all the "elementary writers" of legal treatises placed Catholic priests into precisely such an "exquisite dilemma, between perjury on the one hand" and excommunication—possibly damnation—on the other.[218] Scylla and Charybdis swam in the common law.

For Meredith, this dilemma just proved that the old precedents were bad. Buller's and Kenyon's opinions were "mere loose dicta . . . expressed in respect to protestant clergymen, who do not hold such confessions to be sacred."[219] As for *Butler*, Meredith claimed that Gahan had learned the information in a personal confidence "as a gentleman," rather than "in the confessional."[220] These are dubious interpretations of the facts. Buller's rejection of the privilege in *Sparkes* was holding, and Gahan implied that Lord Dunboyne had confessed.[221] But Meredith's creative misreading let him conclude

---

[216] *Philips* (1813), *in* SAMPSON, *supra* note 12, at 102–03; *cf.* Pennsylvania v. Muniz, 496 U.S. 582, 596 (1990) (noting that the Fifth Amendment privilege against self-incrimination responds to historic trials for heresy, in order to protect "a private inner sanctum of individual feeling and thought" and "prevent 'a recurrence of the Inquisition and the Star Chamber'" which subjected suspects to "the cruel trilemma of self-accusation, perjury or contempt"); United States v. Di Mauro, 441 F.2d 428, 436 (8th Cir. 1971) (noting that "the fundamental precepts of due process" guarantee defendants an opportunity to "steer[] themselves between the Scylla of possible self-incrimination and the Charybdis of a contempt conviction").

[217] *Philips* (1813), *in* SAMPSON, *supra* note 12, at 105; *cf.* ANTHON, *supra* note 95, at 217 (describing *Philips* as "a step in enlightened morals far in advance of our parent land").

[218] Commonwealth v. Cronin, 2 Va. Cir. 488, 494–96 (1855) ("[E]lementary writers state in the most unqualified terms that clergymen of no religious persuasion are exempt . . . .").

[219] *Id.* at 497–98.

[220] *Id.* at 497. Meredith adapted this interpretation from DeWitt Clinton, who also strained to read *Butler* as not concerning a sacramental confession. *See Philips* (1813), *in* SAMPSON, *supra* note 12, at 108.

[221] Unless the seal of the confessional applied, Gahan would not have claimed "the principles of his religion" forbid disclosure of this "confidential communication" made "in the exercise of his clerical functions." MACNALLY, *supra* note 208, at 254. Gahan's word as a gentleman was not the issue at all. *Id.*; *see also* Du Barré v. Livette (1791) 170 Eng. Rep. (N.P.) 96, 97; Peake 108, 109–10.

that "we must look to our own [American] laws"—to cases like *Philip*s and various statutory privileges—rather than to precedents from a country that subjected the Catholic church to "the sufferings of an intolerant persecution."[222] Clinton despised Irish law; for Meredith, English law too was irrelevant and barbaric.

Orestes Brownson never mentions *Sparkes*, but he praised Gahan for enduring prison and refusing to reveal not only the contents but even "the nature of the communication" which Lord Dunboyne made on his deathbed.[223] Indeed, Brownson mocked confession in the Church of England as a useless and rarely-performed discipline—"'the coquetry of religion'"—as long as "secrecy is no part of the observance" under the laws of that country.[224] The *Philips* case showed that, thanks to "the freedom of our institutions," American priests—unlike their English counterparts—had a "guaranty" of protection.[225]

Although some British judges at the turn of the nineteenth century (like Kenyon) hesitated on a personal level to force a cleric to witness, they agreed that precedents controlled.[226] Clinton, Meredith, and Brownson, in contrast, all thought that American courts and legislatures had shattered these British precedents. For these authors, the creation of penitent privilege marked the general growth of liberty in America: a manifestation of the Spirit of '76.

C. A Constitutional Right to Privilege?

For this vision to cohere, nineteenth-century Americans had to convince themselves that the country's founding principles required sacerdotal privilege. According to Brownson, for instance, courts violate "natural right" when they insist on "discover[ing] sacramental secrets."[227] The self-evidence truths that impelled

---

[222] *Cronin*, 2 Va. Cir. at 495–96, 498–99 (citing *Philips* as "persuasive" authority, along with another New York case and various statutes).

[223] Brownson, *supra* note 113, at 341.

[224] *Id.* at 332.

[225] *Id.* at 341.

[226] For hesitancy, see also Broad v. Pitt (1828), 172 Eng. Rep. (C.P.) 528, 528–29; 3 Car. & P. 518, 519 (Opinion of Best, C. J.) (noting that precedent made clear that "[t]he privilege does not apply to clergymen" but exclaiming that "I, for one, will never compel a clergyman to disclose communications . . . but if he chooses to disclose them, I shall receive them in evidence").

[227] Brownson, *supra* note 113, at 342.

rebellion against tyrannical monarchy demanded disobedience to unjust courts. Indeed, the priest-confessor is "the guardian[] of the rights of all," presiding over an alternative "judgment-seat where the culprit, acknowledging his guilt, escapes the penalties of the law, on conditions" of "reparation."[228] Brownson urged American priests in jurisdictions (unlike New York) that did not yet recognize sacerdotal privilege to piously perjure themselves in court.[229] A priest "may deny on oath all knowledge of facts known to him only on the confession of the penitent" for the court's action "is so unjust that a refusal to comply would be a vindication of natural right."[230]

Clinton and Meredith went further, basing sacerdotal privilege upon both enlightened governance in general and American constitutionalism in particular. For Clinton, the privilege rested "upon the ground of the constitution, of the social compact, and of civil and religious liberty," and upon "the benevolent principles of rational liberty" that "expel civil tyranny."[231] Clinton interpreted the thirty-eighth article of New York's 1777 constitution and the First Amendment to the federal Constitution as preventing testimony about auricular confession.[232] For Clinton, priestly exemption flowed not only out of the "free exercise" provisions in these two constitutions but also out of their ban on any "alliance between church and state" or "[e]stablished religion[]

---

[228] Brownson, *supra* note 113, at 339.

[229] *Id.* at 339, 342. Scholars sometimes justify the marital testimonial privilege and the privilege against self-incrimination as means to prevent rampant perjury and thereby enhance public acceptance of the law. *See, e.g.*, Emily Crawford Sheffield, Note, *Rationalizing a Spousal Confidential Communications Privilege Fit for the Twenty-First Century*, 74 VAND. L. REV. EN BANC 187, 204–05 (2021).

[230] Brownson, *supra* note 113, at 341–42 (saying that such pious perjury is not truly a falsehood and comparing it to a suspect pleading "not guilty" to a crime that the suspect committed).

[231] *Philips* (1813), *in* SAMPSON, *supra* note 12, at 109 ("[T]he history of the world, is a history of oppression and tyranny over the consciences of men.").

[232] *Id.* at 109–11 (quoting "the sages who formed our constitution"); *cf.* N.Y. CONST. of 1777, art. XXXVIII, *in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 118, at 2636–37 (guarding against "that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind" by ordaining that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed" provided that "liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State"); U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

. . . repugnant to the first principles of civil and political liberty."[233] It was "essential to . . . free exercise" that the ordinances and ceremonies of each denomination can be administered, and for the court system to hinder one of Roman Catholicism's "most important elements" would re-establish Protestantism as the state church.[234] Without sacerdotal privilege, Catholics would not be equal "citizens . . . protected by the laws and constitution of this country."[235]

Judge Meredith, likewise, believed that the framers of the federal and Virginia state constitutions originally intended a sacerdotal privilege for Roman Catholics alone.[236] "Religious toleration," Meredith insisted "was the great purpose their framers had in view," so if "the common law rule of evidence" infringed on "a fundamental tenet" of Catholicism, then the framers intentionally repealed this rule for civil and criminal cases alike.[237]

Meredith scoffed at people who demand formal legal equality between all sects. Formal equality is "more popular than logical,"

---

[233] *Philips* (1813), *in* SAMPSON, *supra* note 12, at 109, 111.

[234] *Id.* at 111; *cf.* Walker, *supra* note 95, at 113–14 (stressing that that Clinton's narrow holding was "confined to *Catholic priests* . . . upon constitutional grounds" because "destroy[ing] the efficiency of this sacrament" would assail "the religious liberty secured by the constitution"); Horner, *supra* note 23, at 702, 702 n.43.

[235] *Philips* (1813), *in* SAMPSON, *supra* note 12, at 114. According to Clinton, "the maxims of an enlightened policy" have now placed Catholics "on the same footing with his Protestant brethren . . . upon the broad pedestal of equal rights," so failing to recognize sacerdotal privilege would "rivet" again the "chains" around Catholics. *Id.* at 108; *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1504 (1990).

[236] *Cf.* VA. CONST. of 1850, art. IV, § 15, *in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 119, at 3839–40 ("No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever; nor shall any man be enforced, restrained, molested, or burdened in his body or goods, or otherwise suffer, on account of his religious opinions or belief; but all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and the same shall in no wise affect, diminish, or enlarge their civil capacities."). Before becoming a judge, Meredith served as a delegate to Virginia's state constitutional convention of 1850. *See Hon. John A. Meredith*, 6 VA. L. J. 250, 250–51 (1882); *cf.* WRIGHT & GRAHAM, *supra* note 25, § 5612, at 56 (wrongly asserting that *Philips* was the only case to derive penitent privilege from the First Amendment).

[237] Commonwealth v. Cronin, 2 Va. Cir. 488, 500–02 (1855). For early civil cases turning on the privilege, see, for instance, Martin v. Bowdern, 59 S.W. 227, 231 (Mo. 1900) (undue testamentary influence); Dehler v. State, 53 N.E. 850, 853 (Ind. App. 1899) (paternity for child support); Knight v. Lee, 80 Ind. 201, 202 (1881) (defamation per se); Estate of Toomes, 54 Cal. 509, 516 (1880) (testamentary capacity).

invoked only to "excite prejudice."[238] Because Catholic and Protestant sacramentology differed, a privilege only for Catholic priests does not favor Catholics.[239] It made Catholics equal, for the country could hardly claim Catholics were free while jailing their priests and desecrating their rituals. Protestants repudiate penance. But if some "rule of evidence, or any other principal of law" should "deprive Protestants of one of the sacraments of their Church," that rule too would be void.[240] For Meredith, formal inequality in the rules of evidence serves to guarantee substantive equality—to secure for every "class of our people" that "great constitutional boon of religious toleration."[241]

In the nineteenth century, then, influential Americans believed that the country's founding ideals entailed privilege for Roman Catholic priests. This perspective never appears, however, in eighteenth-century sources. The silence is striking because Americans knew that constitutional religious liberties potentially transformed the common law of evidence.

Eighteenth-century Americans worried about changes in two areas of evidence law. The first was witness competency.[242] During the ratification debates, Anti-Federalists often objected that the 1788 Constitution's sixth article contradicted itself by mandating that all federal officers take an "Oath or Affirmation, to support this Constitution" but banning any "religious Test" as qualification for

---

[238] *Cronin*, 2 Va. Cir. at 504 ("[T]here is no analogy between Protestants and Catholics on this question . . . ."). Many contemporary commentators, in comparison, view formal equality between all denominations as beneficiary or even constitutionally necessary. *See, e.g.*, Sippel, *supra* note 53, at 1162.

[239] *See Cronin*, 2 Va. Cir. at 504.

[240] *Id.* at 503–04.

[241] *Id.* at 505; *cf.* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting) ("[A] society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job.").

[242] *See, e.g.*, *Testimonial Exclusions*, *supra* note 60, at 434 ("Disputes over religion-based competency rules" were "the first widespread reassessment of the foundational premises of American evidence law."); McConnell, *supra* note 235, at 1466–68 (noting that "[b]y 1789, virtually all of the states had enacted oath exemptions" suggesting that "exemptions were seen as a natural and legitimate response to the tension between law and religious convictions"); *see also* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 at 35, 99 (2010) (describing conflicts around state and federal loyalty oaths).

office.[243] A delegate at South Carolina's ratifying convention, for instance, warned that the ban on religious tests could undermine "every judicature civil or ecclesiastic" if interpreted to deny "the sacred force of an oath legally administered" and to treat "an oath at a bar [as] no more than a political contrivance" which cannot guarantee "the sincerity and integrity of the deponent's heart, and of the truth of the fact or testimony."[244] Could common law rules requiring witnesses to swear in the name of a god and rendering universalists, excommunicants, and atheists incompetent survive the Constitution?[245]

---

[243] U.S. CONST. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."). Oliver Ellsworth, a delegate to the Philadelphia Convention and future Supreme Court justice, defined a religious test as:

> an act to be done, or profession to be made, relating to religion (such as partaking of the Sacrament according to certain rites and forms, or declaring one's belief of certain doctrines), for the purpose of determining whether his religious opinions are such that he is admissible to a public office.

Oliver Ellsworth: Landholder VII, Connecticut Courant, 17 December, 1787, *in* 3 THE DOCUMENTARY HIST. OF THE RATIFICATION OF THE CONST. 499–500 (Merrill Jensen, eds., 1978).

[244] *Convention Speech of Francis Cummins, 20 May 1788*, *in* 27 THE DOCUMENTARY HIST. OF THE RATIFICATION OF THE CONST. 360–61 (2016).

[245] *See e.g.*, *New Hampshire Mercury, 27 February 1788*, *in* 28 THE DOCUMENTARY HIST. OF THE RATIFICATION OF THE CONST. 257 (2017) (urging that if a "testimony in a court of justice cannot be relied on" due to the absence of a test, "reject [the testimony] then, and be the stigma on him"); *A Friend to the Rights of the People: Anti-Federalist, No 1*, *Exeter Freeman's Oracle, 8 February 1788*, *in* 28 THE DOCUMENTARY HIST. OF THE RATIFICATION OF THE CONST. 117 (2017) (warning that without a religious test, men "will have little regard to the laws of men, or to the [most?] solemn oaths or affirmations"); *Fryeburg, York County, 6 December Moses Ames (N)*, *in* 5 THE DOCUMENTARY HIST. OF THE RATIFICATION OF THE CONST. 955 (1998) (claiming it is "absurd" to require an oath or affirmation while banning religious tests); *North Carolina Convention Debates, July 30, 1788*, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 191–92 (Jonathan Elliot ed., Philadelphia, J. B. Lippincott Co. 1836) [hereinafter ELLIOT'S DEBATES] (speech of Henry Abbot) (suggesting that the Senate's authority to make treaties gave it the power of establishment and asking "how and by whom [officers] are to swear, since no religious tests are required . . . by Jupiter, Juno, Minerva, Proserpine, or Pluto"); *Id.* at 196–97 (speech of James Iredell) (contending that up-to-date common law allowed witnesses to swear whatever "solemn appeal to the Supreme Being" they chose "according to that form which will bind his conscience most"); *Id.* at 215 (speech of William Lancaster) (asserting that the Religious Test Clause implied the power of establishment).

Evidence law also collided with religious liberty in another ratification debate: whether the federal government could create ecclesiastical courts.[246] In 1788, England entrusted many legal areas (for instance, probate, marriage law, and—importantly—defamation) to ecclesiastical courts using different evidence rules than the common law.[247] Prior to the 1791 amendments, the federal Constitution never mentioned "the common law" and secured neither oral testimony with confrontation and compulsory process in criminal trials nor juries in civil trials.[248] As a result, many Anti-Federalists believed that Article III endowed the federal government with the authority to set up ecclesiastical courts or to employ procedure and rules of evidence used in such courts in all

---

[246] *See, e.g.*, Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 253, 274–75 (1967) (noting that, due to the lack of ecclesiastical courts in America, colonial governors handled matters entrusted to ecclesiastical courts in England); Lloyd Bonfield, *Canon Law in Colonial America: Some Evidence of the Transmission of English Ecclesiastical Court Law and Practice to the American Colonies*, 11 COMP. STUD. CONT'L & ANGLO-AM. LEGAL HIST. 253, 264, 270 (1992) (observing that parties to probate cases in colonial America could demand a jury, unlike in English ecclesiastical courts); THOMPSON, *supra* note 12, at 32–33; FRIEDMAN, *supra* note 200, at 21, 29, 142.

[247] Ecclesiastical courts, for instance, lacked a jury, used written affidavits rather than oral testimony, required corroboration for witnesses, and prevented both plaintiffs and defendants from testifying in many cases. *See* 3 TUCKER, *supra* note 195, at 99, 372–73; HENRY KHA, A HISTORY OF DIVORCE LAW: REFORM IN ENGLAND FROM THE VICTORIAN TO INTERWAR YEARS 31–32, 114 (2021); *see also* Godwin v. Lunan, Jeff. 96 (Va. Gen. Ct. 1771) (holding that civil colonial courts had all the authority of English ecclesiastical tribunals); 1 R. H. HELMHOLZ, THE OXFORD HISTORY OF THE LAWS OF ENGLAND, THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 597 TO THE 1640S, at 312–353 (Oxford University Press 2004).

[248] *See* U.S. CONST. art. III, § 2, cl. 3 (guaranteeing jury trials only for "all Crimes"); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . ."); U.S. CONST. amend. VII ("In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."). One of George Mason's primary objections to the 1788 Constitution was that it failed to secure for the people "the enjoyment of the benefit of the common law," except in so far as the common law "ha[s] been adopted by the respective acts . . . of the several States." *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 637 (Max Farrand ed., Yale University Press 1911, 1923, 1927, 1934, & 1987) [hereinafter FARRAND'S RECORDS]; *cf. James Madison to George Washington, Oct. 18, 1787*, *in* 3 FARRAND'S RECORDS, *supra*, at 130 (complaining that Mason's objection could only be answered by writing a "digest of laws, instead of a Constitution" because if the Constitution "had in general terms declared the Common law to be in force, [it] would have broken in upon the legal Code of every State in the most material points").

civil cases.[249] A newspaper article by one New York Anti-Federalist, for instance, praised common law procedures such as "open examination of witnesses viva voce, in the presence of all" as "much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts."[250] According to the author,

[249] *See, e.g.*, *A Real Federalist, Albany Register, 5 Jan., 1789 (Supp.)*, *in* 23 THE DOCUMENTARY HIST. OF THE RATIFICATION OF THE CONST. 2553–54 (2009) (wishing that Article III had secured "trial by jury" and stated whether courts would operate "according to the common, the civil, the Jewish or the Turkish law" because without common law protections "our political creeds, which have been handed down to us by our forefathers, as sacredly as our bibles . . . are all nonsense"); *Federal Farmer: An Additional Number of Letters to the Republican New York, 2 May, 1788*, *in* 20 THE DOCUMENTARY HIST. OF THE RATIFICATION OF THE CONST. 1049–50 (2004) (arguing that Article III implicitly uses not the common law, "the best mode of trial ever invented," but instead the unreliable "civil law proceedings" used "in maritime, ecclesiastical, and military courts" due to "the popish clergy"); *Samuel Holden Parsons to William Cushing, 11 Jan., 1788*, *in* 3 THE DOCUMENTARY HIST. OF THE RATIFICATION OF THE CONST. 572 (Merrill Jensen, eds., 1978) (arguing against Anti-Federalist claims that Article III took away civil juries and instituted the procedures used in ecclesiastical courts instead); *A Democratic Federalist, Pennsylvania Herald, 17 Oct., 1787*, *in* 2 THE DOCUMENTARY HIST. OF THE RATIFICATION OF THE CONST. 195 (arguing that the language of Article III indicates that federal courts will lack civil juries and follow the procedures used "in those courts which are governed by the civil or ecclesiastical law of the *Romans*"); *Massachusetts Convention Debates, 30 Jan., 1788*, *in* 6 THE DOCUMENTARY HIST. OF THE RATIFICATION OF THE CONST. 1367–68 (speech of Abraham Holmes) (arguing that the Constitution left the "mode of trial is altogether indetermined" and gave Congress the power to set evidence law, with the result that "Congress possessed of powers enabling them to institute judicatories, little less inauspicious than . . . that diabolical institution the INQUISITION").

[250] *Cincinnatus III: To James Wilson, Esquire*, *New York Journal, 15 Nov., 1787*, *in* 19 THE DOCUMENTARY HIST. OF THE RATIFICATION OF THE CONST. 258–60 (2003) (quoting Blackstone and viewing the Constitution's ban on religious tests as confirmation *sub silentio* of Congress' "general power" to legislate about religious matters such ecclesiastical courts).

inquisitorial procedures are "a remnant of ecclesiastical tyranny," which the Constitution of 1788 "seems to favor" restoring.[251]

The American ratifiers, then, recognized that the religious freedoms enshrined—or left out—of the Constitution could shape evidence law away from common law traditions. The First, Sixth, and Seventh Amendments partly countered these Anti-Federalist fears. But, as these debates around oaths and ecclesiastical court procedures demonstrate, eighteenth-century Americans wanted to protect common law rules and saw the federal Constitution as endangering the liberties that the common law had protected. By the nineteenth century, in contrast, Clinton, Meredith, and Brownson supported a privilege that defied common law precedent. Meredith embraced the position that American constitutions intentionally repealed common law evidence rules. And around the same time, in 1844, one treatise writer emphasized that the *Philips* precedent unavoidably invalidated religious incompetency rules and mandated privilege.[252] The Anti-Federalists' fears had come true.

---

[251] *Id.* at 259-60. The North Carolina ratification convention debated these issues at length before voting to reject the 1788 Constitution. *See, e.g.*, *North Carolina Convention Debates*, July 30, 1788, *in* 4 ELLIOT'S DEBATES, *supra* note 245, at 202–03 (speech of William Lenoir) (insisting that the 1788 Constitution was "a scheme to reduce this government to an aristocracy" that gave Congress the power to "prohibit the trial by jury," "infringe[] on the rights of conscience," set up "[e]cclesiastical courts," and "make any establishment they think proper"); *Id.* at 208 (speech of Richard Spaight) ("I do not know what part of the Constitution" permits it to "establish ecclesiastical courts" for "[n]o test is required" and "[n]o power is given to the general government to interfere with [religion] at all."); *Id.* at 193 (speech of James Iredell) (extrapolating an "intention of those who formed this system to establish a general religious liberty in America" from the Religious Test Clause).

[252] Walker, *supra* note 95, at 113–14 (quoting from his home state of Ohio's 1802 constitution to make this point). Walker also noted that "[a]ll the text-books"—including his own earlier treatise—reject penitent privilege, yet he now believed this traditional position was unconstitutional. *Id.* at 113; *cf.* TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 544 (Philadelphia, P.H. Nicklin & T. Johnson, Law Booksellers 1837) (claiming that "the only persons who are *privileged* from testifying, are attorneys . . . [e]fforts have sometimes been made to obtain this privilege for clergymen" but these efforts have been "without success"); *see also* Antony Barone Kolenc, *"No Help You God": Religion, the Courtroom, and a Proposal to Amend the Federal Rules of Evidence*, 91 MISS. L.J. 1, 10–11 (2022) (discussing the disappearance of religious incompetency rules); Walsh, *supra* note 12, at 84–85.

D. The Insufficiency of Spiritual Advice

The writings of Clinton, Meredith, and Brownson indicate that Americans invented penitent privilege for humanistic—not instrumental—reasons. They believed that the privilege was part of the religious liberty hallowed in enlightened political thought and in state and federal constitutions. Without such an evidentiary rule, Roman Catholics could not participate as full and equal citizens in republican government. These three authors envisioned a privilege that would be predictable because it was narrow and formally unequal—limited to confessions of sin during formal disciplines mandated under the canonical laws of each denomination.[253]

Clinton, Meredith, and Brownson, however, also proposed instrumental rationales for the privilege. But even then, their policy arguments rejected any privilege for mere "spiritual advice." Clinton and the other judges in *Philips*, for instance, insisted that auricular confession is an "instrument of great good . . . convert[ing the sinner] from the evil of his ways."[254] Confession, thus, did not fall into an exception in New York's constitution that allowed the state to prohibit "*acts of licentiousness*, [and] . . . *practices inconsistent* with the *tranquility and safety of the state*."[255] (Half a century later, a major Supreme Court decision on the First

---

[253] In practice, the nineteenth-century privilege only protected Catholic priests. For early cases not extending the privilege to Protestant clergymen, see, for instance, State v. Morgan, 95 S.W. 402, 404 (Mo. 1906); State v. Brown, 64 N.W. 277, 278 (Iowa 1895); Knight v. Lee, 80 Ind. 201, 204 (1881); People v. Gates, 13 Wend. 311, 312, 323 (N.Y. Sup. Ct. 1835); Commonwealth v. Drake, 15 Mass. 161, 162 (1818); *Smith*, *supra* note 2, at 83. For cases holding the privilege protected Catholic confession, see, for instance, Dehler v. State, 53 N.E. 850, 853 (Ind. App. 1899); Estate of Toomes, 54 Cal. 509, 516 (1880).

[254] *Philips* (1813), *in* SAMPSON, *supra* note 12, at 112–13.

[255] *Id.* at 113; *see also* N.Y. CONST. of 1777, art. XXXVIII, *in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 119, at 2637 ("[T]he liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.").

Amendment likely borrowed from this part of Clinton's opinion.)[256] Besides, Clinton doubted that any evidence would be gained, as no Catholic priest would endure social shunning, loss of job, and eternal damnation just to avoid contempt of court.[257] Due to Catholic theology in particular—not everlasting human spiritual needs in general—it was futile to deny the privilege.[258]

Meredith agreed that sacerdotal privilege cannot violate "any principle of public policy" because only on "rare occurrence" would sacramental confession supply any evidence useful to "the ends of criminal justice."[259] The privilege itself brought the weighty "temporal advantages" of "repentance and consequent abstinence from future misdeeds . . . followed by satisfaction more or less adequate for the past."[260] And, because Meredith insisted that merely "seek[ing] the aid of spiritual advisers" was insufficient for

---

[256] *Compare* Reynolds v. United States, 98 U.S. 145, 166 (1878) (stating that governments constitutionally can ban "plural marriages," widow burning "upon the funeral pile of her dead husband," and "human sacrifices" even if these "practices" are "a necessary part of religious worship") *with Philips* (1813), *in* SAMPSON, *supra* note 12, at 113, 114 (listing "rites, in a state of nakedness," "incest," "community of wives," "plurality of wives," "the burning of widows on the funeral piles of their deceased husbands," "bacchanalian orgies," "human sacrifices," and "the inquisition" as examples of practices that constitutionally can be banned as contrary to "the fundamental principles of morality," with groups like the Anabaptist Kingdom of Münster in view); *see also Reynolds*, 98 U.S. at 168 (Field, J., concurring) (agreeing with the majority about the limits on free exercise while rejecting the majority's understanding of the confrontation clause); Totten v. United States, 92 U.S. 105, 107 (1875) (presuming that penitent privilege existed in the federal common law); Walsh, *supra* note 12, at 52 (on *Totten* and *Reynolds*).

[257] *Philips* (1813), *in* SAMPSON, *supra* note 12, at 102–03.

[258] *Cf.* WRIGHT & GRAHAM, *supra* note 25, § 5612, at 63 n.256, 85 (wondering if "the occasional jailing of a priest" would burden Catholicism because "an occasional martyr [might] strengthen rather than weaken the institution").

[259] Commonwealth v. Cronin, 2 Va. Cir. 488, 503 (1855) (quoting from Clinton's *Philips* opinion in support). Meredith never clarified why "such instances are rare"—as he repeatedly insisted—but he likely meant that only a small number of communications would be covered and that these few would usually irrelevant or unreliable as evidence (and thus inadmissible) even without the privilege. *Id.*

[260] *Id.* at 505. Meredith also suggested that denying the privilege would "destroy the source itself of all such evidence" by scaring people from confessing in the first place, but this collides with Clinton's and Brownson's views that priests would perjure themselves or endure prison rather than divulge. *See id.* at 503. Moreover, many early cases—including *Cronin* itself—focused on a death bed confession so the penitent was unlikely to be dissuaded from confessing by fear of prison. *See id.* at 488.

the privilege, it would cover only a small number of communications in the context of the essential tenets of each "religious creed."[261]

Strikingly, Brownson viewed the privileged confessional to be such a central institution of enlightened political order that he maintained that non-Christian thinkers such as Voltaire and Rousseau acknowledged the need for the confessional.[262] But Brownson also jeered at the "so-called confessions" of high church Anglicans, during which pseudo-penitents under the "guise of soliciting instruction and obtaining comfort . . . ask advice which they probably do not intend to follow."[263] In order to have social value worth keeping confidential, confession must be "something more than a desire of counsel or of sympathy"—something more than therapy; it must be an alternative form of dispute resolution that assists the court system by pressing sinners to make "restitution" that "anticipate[s] the rigor of the law."[264] Only mandatory church discipline could meet this standard; voluntary spiritual advice could not.

All three writers, therefore, thought that sacerdotal privilege had social benefits, which they mentioned in passing in the course of more extensive arguments based on humanistic rationales. But they believed these social benefits existed because Roman Catholic confession was not just spiritual advice. The creeds and canons of actual Christian denominations—not universal human desires for consolation—created the policies in favor of privilege.

CONCLUSION

Sacerdotal privilege, as it arose in the early nineteenth century, was not modern spiritual privilege. The policies and legal doctrines supporting sacerdotal privilege cannot justify anything like the broad secularized privilege of present-day courts. Because it looked to the actual contents of Catholic and Protestant

---

[261] *See id.* at 504–05 (contrasting spiritual advice alone—as a Protestant might seek—from communications to which a "religious creed attaches essential importance": that is, Catholic auricular confession).

[262] *See* Brownson, *supra* note 113, at 339.

[263] *Id.* at 332 (quoting the low church Anglican writer Hannah More); *cf.* Deadman, *supra* note 204, at 130 ("[T]he exhortation to confession in the 1662 Book of Common Prayer was for the purposes of receiving advice rather than [sacramental] absolution.").

[264] Brownson, *supra* note 113, at 332, 339 (describing worthwhile confession as the "strictest duty," rather than a mere unburdening of the conscience).

theologies, sacerdotal privilege ensured substantive equality and natural rights; it deferred to church tribunals, not individual consciences, to hold and set the scope of the privilege; it looked to faith, not therapeutics; and it avoided the problems of breadth and unpredictably that scholars discover in spiritual privilege. Resolving the problems in the privilege today requires returning to this substantive vision of equality.

Law needs theology. Although present-day scholars and judges wish to pretend otherwise, courts—in the act of settling practical disputes in ordinary life—cannot avoid taking positions on the nature of God, absolute moral truths, and humanity's purpose within the universe—positions that are irreducibly theological. Modern allegedly secular courts are not truly free of the creeds of the past.[265] When Chief Justice Burger and the Advisory Committee grounded penitent privilege in the everlasting human desire for spiritual guidance, they behaved little differently than Clinton, Van Ness, Thacher, and the other early judges who confidently evaluated denominational dogmas and weighed the sincerity of each soul. The early judges were just more open about it. They examined actual theological beliefs, not pseudo-doctrines costumed in the language of therapy. Sacerdotal privilege was a deliberate decision by early American Protestants to make space for Roman Catholics within the law without unduly restricting the amount of evidence available to courts. It began by remembering that, for Catholics, priests are not just citizens.

---

[265] *Cf.* ELIADE, *supra* note 1, at 203.