

# The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence

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[T]he [Irish] Catholics, now ground into dust, deprived of education and property, and every means of acquiring either, became null in their native country. They had no part in the framing or execution of the laws, being excluded from the parliament and the bench, and from juries, and from the bar. Their only duty was to bear with patience the penalties inflicted on them, and be spectators of the ludicrous, though interested, quarrels of their oppressors. When any question under the penal laws was tried against them, it was by a Protestant judge, a Protestant jury; and as they had a Protestant prosecutor, so they must have a Protestant advocate. What justice they could look for, Heaven knows; they were shut out from all corporations and offices and every privilege belonging to freemen. . . . in short, they were humbled below the beasts of the field.<sup>1</sup>

William Sampson

These words were written by the banished human rights advocate William Sampson just a few years before he won the first ever constitutional triumph for religious freedom and equality. In his famous test case of *People v. Philips*,<sup>2</sup> Sampson established the priest-penitent evidentiary privilege for the thousands of exotic Irish Catholic refugees who had recently landed in New York City. *Philips* was decided by Mayor De Witt Clinton in New York City's Court of General Sessions in June 1813. A pioneering court reporter and radical cause lawyer, the Irish Protestant Sampson ideologically secured their shared courtroom victory with his hefty report of *Philips*,

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1. MEMOIRS 252 (New York 1807).

2. *People v. Philips* (N.Y. Ct. Gen. Sess. 1813), reported in WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA: WHETHER A ROMAN CATHOLIC CLERGYMAN CAN BE IN ANY CASE COMPELLABLE TO DISCLOSE THE SECRETS OF AURICULAR CONFESSION (photo. reprint 1974) (New York, Edward Gillespy 1813).

published later that year as *The Catholic Question in America*.<sup>3</sup> This Article chronicles the subversive but powerful influence of *Philips* in transforming the law of evidence.

As I have recently argued, today William Sampson's rare, but lately reprinted, law report of *Philips* remains a wonderful early classic of hibernocentric postcolonial jurisprudence.<sup>4</sup> I define those terms as follows: First, a postcolonial perspective is one that identifies and rejects those political, aesthetic, and intellectual structures and canons that are imperialist in origin and form. Although not the culturally dominant vision, this postcolonial perception is at least comprehensible to the majority of the world's population. By definition, colonizers exert power far beyond their numbers.

Second, hibernocentric means seen from an Irish standpoint. While this may initially seem quaint to many readers, recall that the culturally dominant North American and English perspectives are also quaint, at least when viewed by an outsider. In other words, every voice, including your own, is culturally specific. Hibernia, the land of winter, was the Roman name for that far-flung Celtic island in the Atlantic Ocean, where the Roman writ never ran, on the seeming edge of the world. Of alternative voices the postcolonial Irish perspective is among the most interesting, coming from both the earliest of England's overseas prizes and from the first indigenous population to regain independence from British colonial rule and establish a democratic republican regime.<sup>5</sup>

Finally, jurisprudence is an effort to understand the meaning, the significance, and the workings of law. A postcolonial jurisprudence is, therefore, an approach to these questions that explores the relationship between law and imperialist origins. Postcolonial thinkers perceive much dominant law as the product of imperialism and thus inherently questionable. More particularly, an hibernocentric postcolonial jurisprudence perceives many dominant legal rules as historically anglocentric and for that reason suspect.

This study in postcolonial jurisprudence traces the history of the Irish-American priest-penitent privilege from its radical inception in *Philips*. In recent years, that once-controversial, later-forgotten decision has suddenly returned to the historical center of judicial and scholarly discourse.<sup>6</sup> From the perspective of legal doctrine, *Philips* is the historical foundation of two important principles. One part of its jurisprudential legacy

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3. SAMPSON, *supra* note 2. In addition to the facsimile reprint of Sampson's 1813 edition by Da Capo Press in 1974, other substantially complete reprints include an edition revised to avoid seditious libel prosecution (Dublin, 1814), and an edition that was printed but not published (New York, 1871). Also, incomplete extracts and abstracts have frequently been culled from Sampson's original 1813 report, but these should not be relied upon by serious scholars.

4. My article *The First Free Exercise Case*, 73 GEO. WASH. L. REV. 1 (2004), shows the jurisprudential influence of *Philips* in introducing the judicial free exercise exemption into American constitutional thought. The present Article shows the jurisprudential legacy of *Philips* in introducing the priest-penitent privilege into American evidentiary theory, where it has appeared in constitutional, common-law, and statutory forms. In *Cutter v. Wilkinson*, No. 03-9877, 2005 WL 1262549 (U.S. May 31, 2005), the United States Supreme Court unanimously rejected an Establishment Clause challenge to legislative (as opposed to judicial) free exercise exemption, which includes the now-ubiquitous statutory codifications of the *Philips* priest-penitent privilege.

5. See generally, ROBERT KEE, *THE GREEN FLAG* (1972).

6. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 543 (1997) (Scalia, J., concurring).

is a broad constitutional principle. *Philips*, the first constitutional victory for religious freedom and equality, established the postcolonial rule that government must sometimes accommodate free religious exercise by recognizing individual exemptions from burdensome laws. In such cases, government may not enforce the challenged law unless it establishes some pressing social interest that outweighs religious freedom. In another article, *The First Free Exercise Case*, I follow the turbulent history of that still controversial constitutional axiom.<sup>7</sup>

In addition to its broader constitutional implications for religious exemptions, *Philips* is the source of the postcolonial Irish-American clergy privilege—a guarantee that a religious minister may not be forced to reveal confidences received in the course of spiritual counseling. In this Article, my specific historical focus is that evidentiary principle—the priest-penitent privilege against compelled testimony. I will examine the evidentiary evolution of the American priest-penitent privilege beyond its hibernocentric, postcolonial constitutional origin in *Philips*. After its radical inception in that Jeffersonian courtroom, by the late nineteenth and early twentieth centuries the constitutional basis of the priest-penitent privilege had been obscured by its widespread codification, so that the exemption was commonly viewed as a legislative phenomenon. In addition to its constitutional and statutory manifestations, the priest-penitent privilege has also been justified as an extension of sound common-law reasoning.

Upon closer inspection, it will become apparent that the doctrinal history of the priest-penitent rule is indeed one of shadows, illusions, and myth. It was only after the Second World War that William Sampson's original constitutional theory of the priest-penitent privilege regained its antebellum dominance. In the 1950s, David Louisell expressed his belief that the historic evidentiary privileges of confidential communication, including the priest-penitent privilege, protect significant human values that are deeply rooted in our political and social fabric.

They are, or rather by the chance of litigation may become, exclusionary rules; but this is incidental and secondary. Primarily they are a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state's coercive or supervisory powers and from the nuisance of its eavesdropping.<sup>8</sup>

Professor Louisell attributed widespread confusion to a prevalent tendency to view evidentiary privileges merely as barriers to the truth in litigation, while deprecating their social and moral significance. Treating *Philips* as a prime example of this original inspiration, Louisell described Father Anthony Kohlmann's 1813 explanation for his silence as "a cogent statement of the moral, theological, ecclesiastical and secular sanctions considered to require confidentiality of penitent-confessor communications."<sup>9</sup>

Louisell regarded evidentiary privileges as positive articulations of basic human rights. He found support for this position in the widespread acceptance of similar privileges in Western society and perhaps in Eastern legal traditions. Louisell called for extensive and thorough work in comparative law to learn both the extent to which

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7. Walsh, *supra* note 4.

8. David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110-11 (1956).

9. *Id.* at 113 n.58.

evidentiary privileges are recognized in each country and to uncover their "ultimate historical roots and precise rationale[s]." <sup>10</sup> Louisell noted that such historical work "ha[d] not yet been adequately performed even in our own common law area." <sup>11</sup>

At least with regard to the Irish-American priest-penitent privilege, Louisell's complaint remains true today. Although much has been written on the history of the priest-penitent privilege, this Article will show that such writing tends toward an unconscious, but strong, anglocentric tilt. It seems that no scholar has tried to locate and interpret all the Irish and American sources that inspired this initially hibernocentric, later more generally American, postcolonial deviation from the English common law. Since the Second World War, the significance of *Philips* and its 1828 New York codification <sup>12</sup> have gained widespread recognition, but the scholarly inquiry has never advanced in any truly historical fashion. <sup>13</sup> This article is thus the first history of the Irish-American priest-penitent privilege to identify its primary ideological impulses and to explain its fascinating postcolonial deviation from the English common law. Empirically, this history of the priest-penitent privilege seems to confirm Louisell's hunch that evidentiary privilege law developed as a necessary recognition of fundamental human rights; going further, this history also reveals the startling role of American postcolonial codification in advancing republican and democratic principles in place of anglocentric common-law reasoning.

Curiously, after *Philips* was carried from multicultural New York, along the Overland Trail, to the Western frontier during the California gold rush, its codified influence ricocheted back eastward. <sup>14</sup> By the 1960s, through this gradual geographic embrace of fundamental human rights, the radical alternative of *Philips* had challenged and ultimately overthrown nationwide the archaic legal principles inherited from the colonial regime. The last holdouts were in the Northeast (Connecticut, Maine, and New Hampshire), in the South (Alabama and Mississippi), and in Texas. <sup>15</sup> Today, the ascendancy of the American priest-penitent privilege marks the completion of a quiet, jurisprudential revolution. It is not my claim that this process was uniform or inevitable. Rather, the story you are about to read exposes the conflicting jurisprudential values of America's emerging republican democracy.

That internal jurisprudential conflict persists today. In *Cutter v. Wilkinson*, <sup>16</sup> the United States Supreme Court confronted and unanimously rejected the constitutional argument suggested long ago by District Attorney Barent Gardinier in *Philips*, the

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10. *Id.* at 101.

11. *Id.* at 101; see generally Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631 (1984).

12. 2 N.Y. REV. STAT. 1828, pt. 3, ch. 7, tit. 3, § 72 (1828).

13. Interestingly, the most impressive history is contained in a multivolume treatise, 26 CHARLES ALLEN WRIGHT & KENNETH J. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5612 (1992). Other honorable mentions might better be described as historiographical signposts rather than histories as such. See generally, Michael James Callahan, *Historical Inquiry into the Priest-Penitent Privilege*, 36 JURIST 328, 336-37 (1976). Although primarily devoted to the physician's privilege, another useful recent work is David W. Shuman, *The Origins of the Physician-Patient Privilege and Professional Secret*, 39 SW. L.J. 661 (1985).

14. See *infra* text accompanying notes 116-18, 131, 210.

15. See *infra* text accompanying note 212; see also Appendix.

16. *Cutter v. Wilkinson*, No. 03-9877, 2005 WL 1262549 (U.S. May 31, 2005).

claim that any recognition of a religious exemption from a neutral law must necessarily amount to an Establishment Clause violation because it favors the members of the particular sect who receive the benefit. Applied to the priest-penitent privilege, now codified in all fifty states, this reading would threaten or invalidate those legislative measures adopted nationwide.

Rejecting the anglocentric premises of dominant American evidentiary theory, this is an essay in critical jurisprudence. More specifically, borrowing from the subversive Sampsonian legal method of *Philips* itself, this history of the Irish-American priest-penitent privilege captures in fits and starts the ultimate triumph of his radical hibernocentric postcolonial jurisprudence. In the early American republic, inherited imperialist and anglocentric antecedent legal principles struggled for authority against the rival postcolonial impulse that had already inspired the constitutional remaking of political institutions. As I have previously noted, the colonial legacy bequeathed a strong continuing tendency to reproduce imperial legal ideology, by definition the antithesis of postcolonial thought. Imperial anglocentric jurisprudence rejected the constitutional possibility of a priest-penitent privilege. Then, as now, *Philips* confronted those early American republicans with a stark choice between clinging to an imperialist past and imagining their postcolonial future.

Yet most evidentiary historians of the priest-penitent privilege have remained under the thrall of anglocentric jurisprudence. Such writers, most conspicuously John Henry Wigmore, have completely overlooked the ultimately dominant countertheory, drawn from the radical tenets of United Irish republicanism, that inspired postcolonial America to deviate from English legal influence.<sup>17</sup> The nineteenth century Irish-American priest-penitent privilege was, and is, a startling postcolonial recognition of minority religious and cultural freedom and equality. By privileging the anglocentric, evidentiary scholars typically undervalue multiple rival sources of American law, including this influential hibernocentric legal theory and many other contributions. As one expression of critical race theory, hibernocentric postcolonial jurisprudence reveals hidden influences and exposes unresolved problems in modern law. This Article about hibernocentric postcolonial jurisprudence resists the imperial, anglocentric ideological hegemony that still pervades American legal scholarship.

This history of the Irish-American priest-penitent privilege is also an essay on legal causation. More specifically, it is a classic case study of human agency, impact litigation, and human rights lawyering. Through the constitutional test case of *Philips*, New York City's refugee Gaelic Catholic minority, represented by their banished Irish Protestant human rights lawyer William Sampson, won a victory for religious, racial, and cultural equality for themselves and for all mankind. In its day, almost unthinkable early, *Philips* was threatening and controversial to much of the majority population, just as civil rights lawyering would be a century and a half later.

I begin this Article on the Irish-American priest-penitent privilege by briefly recounting the story of *People v. Philips* and describing more fully the nature and influence of William Sampson's neglected pamphlet law report of this historic human rights decision. This Article then illustrates how *Philips* quickly established a postcolonial antebellum American priest-penitent privilege, especially in the codified

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17. 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 2285-87 (1923).

states of the Western frontier. Next, this Article describes the priest-penitent privilege's deepening American roots as it worked back eastward following the Civil War. This Article then narrates the history of the early twentieth-century priest-penitent privilege, greatly distorted by the extraordinary influence of the evidentiary scholar Dean Wigmore—a weak historian and worse constitutionalist—who did support the clergy privilege on policy grounds, but who spread the prevalent misconception that the privilege rested only on legislative benevolence. This Article then proceeds to relate the constitutional revival of the postcolonial priest-penitent privilege after the Second World War, a jurisprudential phenomenon that rested squarely on the belated rediscovery of Sampson's successful argument in *Philips*. Finally, this Article draws from *Philips* some modern lessons about the nature, essence, and consequences of a Sampsonian postcolonial jurisprudence at the outset of a new millennium.

### I. SAMPSON'S REPORT OF PHILIPS

In another article, *The First Free Exercise Case*, I describe in some detail the constitutional background of *Philips* and the holding of the court.<sup>18</sup> Here, that historic case is summarized only briefly so that we can turn more quickly to its subsequent, transformative influence upon the American law of evidence.

*Philips* was brought as a constitutional test case by the exiled William Sampson, an Irish Protestant dissident who broke ranks from the colonial ascendancy into which he was born. In the 1790s, inspired by the ideals of the French Revolution, Sampson joined the United Irish movement, a radical antisectarian alliance comprised of established high-church Anglicans, freethinking Scotch-Irish Presbyterians, and the oppressed indigenous Gaelic Catholic Irish masses, all committed to dismantling the divisive system of religious apartheid that still governed colonized Ireland.<sup>19</sup> As tensions mounted, the colonial powers responded in the courts with a crackdown on political dissent.<sup>20</sup> As a member of the United Irish legal defense team, Sampson honed his skills as perhaps the first known cause lawyer, defending numerous trials for treason, sedition, and seditious libel.<sup>21</sup> At stake was the ideal of an antisectarian, postcolonial Irish republic, founded on democratic and egalitarian principles. In 1798, a bloody United Irish rebellion broke out and was suppressed at the cost of 30,000 lives. Along with other United Irish leaders, Sampson was imprisoned, disbarred, and ultimately banished by act of attainder from his native land for his provocative writings and his activist lawyering.<sup>22</sup>

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18. Walsh, *supra* note 4. In shorter form, I also describe the circumstances surrounding the constitutional test case of *Philips* in my essay *Religion, Ethnicity, and History—Clues to the Cultural Construction of Law*, in THE NEW YORK IRISH 48, 53–61 (Ronald H. Bayor & Timothy J. Meagher eds., 1996).

19. Maxwell Bloomfield, *William Sampson and the Codification Movement*, in AMERICAN LAWYERS IN A CHANGING SOCIETY 1776–1876, at 63–64 (1976).

20. *Id.* at 65–66.

21. *Id.* at 64.

22. See Walter J. Walsh, *Redefining Radicalism: A Historical Perspective*, 59 GEO. WASH. L. REV. 636 (1991). For further information regarding Sampson and the United Irish movement, see DAVID A. WILSON, UNITED IRISHMEN, UNITED STATES: IMMIGRANT RADICALS IN

After another period of confinement in a Portuguese dungeon, Sampson made his way to Paris, where he witnessed the adoption of the Napoleonic code and came to know its primary drafters.<sup>23</sup> As revolutionary France began to adopt its own imperialist ambitions, Sampson resolved to make a new start in the United States, his sole remaining hope for the construction of a postcolonial egalitarian, democratic society in keeping with United Irish republican ideology. On Independence Day in 1806, after a six-week voyage, Sampson landed in New York City.<sup>24</sup> The following year, he published his *Memoirs*,<sup>25</sup> covering the turbulent years from his imprisonment shortly before the outbreak of the 1798 Rebellion in Ireland to his arrival in America. Resuming his radical cause lawyering, the exiled Sampson represented numerous underrepresented groups in American courtrooms. For example, in 1810–11, in one of America's earliest and most famous labor trials, Sampson defended striking New York shoemakers charged with a common-law conspiracy to raise their wages.<sup>26</sup>

In colonized Ireland, Sampson had already mastered the subversive political power of radical legal discourse. Usually anonymously, Sampson had published at least five politically explosive pamphlet reports of major Irish political trials (in most of which he also participated).<sup>27</sup> In the turbulent 1790s, the United Irish advocates consistently defended political dissidents by arguing that their actions were entirely justified by democratic and republican principles, that despotic English law should be overturned, and that it was a tyrannical colonial government that had forfeited its claim to legal authority.<sup>28</sup>

*The Catholic Question in America* must therefore be understood as part of Sampson's lifelong anticolonial effort to portray Irish history from the perspective of the vanquished. A tireless and skillful pamphleteer, underground historian,<sup>29</sup>

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THE EARLY REPUBLIC (1998); MICHAEL DUREY, *TRANSATLANTIC RADICALS AND THE EARLY AMERICAN REPUBLIC* (1997).

23. See Bloomfield, *supra* note 19, at 67–70.

24. *Id.* at 70.

25. WILLIAM SAMPSON, *MEMOIRS OF WILLIAM SAMPSON* (New York 1807).

26. WILLIAM SAMPSON, *TRIAL OF THE JOURNEYMAN CORDWAINERS OF THE CITY OF NEW YORK, FOR A CONSPIRACY TO RAISE THEIR WAGES* (New York 1810).

27. His reports include WILLIAM SAMPSON, *THE TRIAL OF THE REV. WILLIAM JACKSON AT THE BAR OF THE COURT OF KING'S BENCH IN IRELAND, FOR HIGH TREASON* (Dublin 1795). Other reports attributed to Sampson but not signed by him include *A BRIEF ACCOUNT OF THE TRIAL OF WILLIAM ORR* (Dublin 1797); *A FAITHFUL REPORT OF THE TRIAL OF THE PROPRIETORS OF THE NORTHERN STAR AT THE BAR OF THE COURT OF KING'S BENCH, ON THE TWENTY-EIGHTH OF MAY, 1794, ON AN INFORMATION, FILED EX-OFFICIO, BY THE ATTORNEY GENERAL: FOR THE INSERTION OF A PUBLICATION BY THE IRISH JACOBINS OF BELFAST ON THE FIFTEENTH OF DECEMBER, 1792* (Belfast 1794); *FAITHFUL REPORT OF THE SECOND TRIAL OF THE PROPRIETORS OF THE NORTHERN STAR AT THE BAR OF THE COURT OF KING'S BENCH, ON THE 17TH OF NOVEMBER, 1794, ON AN INFORMATION, FILED EX-OFFICIO, BY THE ATTORNEY GENERAL: FOR THE INSERTION OF THE SOCIETY OF UNITED IRISHMEN'S ADDRESS TO THE VOLUNTEERS OF IRELAND ON THE 19TH OF DECEMBER, 1792* (Belfast 1795). An additional report attributed to William Ridgeway and William Sampson is *REPORT OF THE TRIAL OF ARCHIBOLD HAMILTON ROWAN ON AN INFORMATION, FILED EX-OFFICIO, BY THE ATTORNEY GENERAL, FOR THE DISTRIBUTION OF A LIBEL* (Archibold Hamilton Rowan ed., Dublin 1794).

28. Walsh, *supra* note 22.

29. His views on the place of the 1798 Rebellion in Irish history emerge most directly from WILLIAM SAMPSON, *ADVICE TO THE RICH* (Belfast 1796; Dublin 1796); WILLIAM SAMPSON,

jurisprudential satirist,<sup>30</sup> and reporter of political trials,<sup>31</sup> Sampson was banished solely for his radical ideas.<sup>32</sup> From exile, in his *Memoirs*,<sup>33</sup> his expanded edition of William Cooke Taylor's *History of Ireland*,<sup>34</sup> and his other writings, Sampson constructed a revisionist United Irish account of the events that led to 1798. In America, Sampson gradually sought to extend the implications of the new United Irish historiography into every possible area of postcolonial republican political theory and practice.<sup>35</sup> Most of all, he turned his mind to the inherently antidemocratic colonial nature of the English common law that he so frequently battled against.<sup>36</sup>

In perhaps the tour-de-force of his radical lawyering, William Sampson argued *People v. Philips* in a crowded New York City courtroom in the summer of 1813. Sampson, the banished United Irish human rights lawyer, had intervened as amicus curiae to represent Anthony Kohlmann, an Alsatian Jesuit and the pastor of New York

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AN APPEAL FROM WILLIAM SAMPSON (Dublin 1798); SAMPSON, *supra* note 2; William Sampson, *Conclusion* to WILLIAM COOKE TAYLOR & WILLIAM SAMPSON, *HISTORY OF IRELAND* (New York 1833); SAMPSON, *supra* note 1; and William Sampson, *Introduction* to WILLIAM HENRY CURRAN, *THE LIFE OF THE RIGHT HONOURABLE JOHN PHILPOT CURRAN, LATE MASTER OF THE ROLLS IN IRELAND* (New York 1820).

30. Sampson also expressed his thoughts on law and politics in several outwardly whimsical but deeply serious satires. These include *REVIEW OF THE LION OF OLD ENGLAND; OR THE DEMOCRACY CONFOUNDED* (Belfast 1794) (attributed to Thomas Russell and William Sampson); WILLIAM SAMPSON, *A FAITHFUL REPORT OF THE TRIAL OF HURDY GURDY* (Belfast 1794); *TRIAL OF CAPT. HENRY WHITBY FOR THE MURDER OF JOHN PIERCE, WITH HIS DYING DECLARATION. ALSO THE TRIAL OF CAPT. GEORGE CRIMP, FOR PIRACY AND MANSTEALING* (New York 1812) (attributed to William Sampson).

31. CHARLES CURRIER BEALE, *WILLIAM SAMPSON—LAWYER AND STENOGRAPHER* 19–29 (1906); Callahan, *supra* note 13, at 336. *See, e.g.*, SAMPSON, *supra* note 2; WILLIAM SAMPSON, *COMMISSIONERS OF THE ALMS-HOUSE VS. ALEXANDER WHISTELO, A BLACK MAN* (New York 1808); SAMPSON, *CORDWAINERS*, *supra* note 26; WILLIAM SAMPSON, *IS A WHALE A FISH? AN ACCURATE REPORT OF THE CASE OF JAMES MAURICE AGAINST SAMUEL JUDD* (New York 1819); *THE TRIAL OF AMOS BROAD AND HIS WIFE* (New York 1809); WILLIAM SAMPSON, *THE TRIAL OF THE REV. WILLIAM JACKSON AT THE BAR OF THE COURT OF KING'S BENCH IN IRELAND, FOR HIGH TREASON* (Dublin 1795).

32. Sampson ranked with William Drennan as the penman of the United Irishmen. He published almost forty books and pamphlets, including many radical political tracts, political satires, and reports of political trials, as well as frequent contributions to the periodical press, including the United Irish newspapers the *Northern Star* and the *Press*, both of which he defended after their suppression.

33. SAMPSON, *supra* note 1.

34. TAYLOR & SAMPSON, *supra* note 29.

35. For instance, Sampson published his correspondence with James Fenimore Cooper's uncle, who settled much of upstate New York. *See* WILLIAM COOPER, *A GUIDE IN THE WILDERNESS OR THE HISTORY OF THE FIRST SETTLEMENTS IN THE WESTERN COUNTIES OF NEW YORK WITH USEFUL INSTRUCTIONS TO FUTURE SETTLERS* (William Sampson ed., Dublin 1810).

36. Sampson's radical codification argument is contained in his *TRIAL OF THE JOURNEYMEN CORDWAINERS*, *supra* note 26, at 32, 45–46, and WILLIAM SAMPSON, *AN ANNIVERSARY DISCOURSE DELIVERED BEFORE THE HISTORICAL SOCIETY OF NEW-YORK, ON SATURDAY, DECEMBER 6, 1823; SHOWING THE ORIGIN, PROGRESS, ANTIQUITIES, CURIOSITIES, AND NATURE OF THE COMMON LAW* (New York 1824); SAMPSON'S *DISCOURSE, AND CORRESPONDENCE WITH VARIOUS LEARNED JURISTS, UPON THE HISTORY OF THE LAW* (Pishey Thompson ed., Washington, D.C. 1826).



City's only Roman Catholic Church. Father Kohlmann had been subpoenaed to reveal the identity of a remorseful parishioner whom he had instructed to return stolen goods to their rightful owner.<sup>37</sup> At that time, English common law inherited from the colonial regime apparently did not recognize a priest-penitent privilege.<sup>38</sup> When Father Kohlmann respectfully declined to testify on the ground that he would "prefer instantaneous death" rather than break the sacramental seal of the confessional, Sampson argued and won *Philips* as a test case to secure the religious freedom and equality of all mankind.<sup>39</sup>

In *Philips*, the arguments on both sides were complex and elaborate, and luckily for posterity Sampson transcribed them in full. Together with his fellow lawyers for Father Kohlmann, Counselors Riker and Blake, Sampson advanced the novel postcolonial contention that recognition of a priest-penitent evidentiary privilege was necessary to honor American constitutional guarantees of religious freedom and equality. To demonstrate this point, Sampson explicitly contrasted these guarantees of religious freedom with the repressive Irish penal laws that had been employed to subject the indigenous Catholic masses in his native land. In response, District Attorney Gardinier maintained that recognition of an evidentiary privilege protecting Roman Catholics would confer upon adherents to that religion "a privilege enjoyed by none other."<sup>40</sup> Sampson's postcolonial, United Irish rhetoric persuaded the Jeffersonian American court headed by Mayor De Witt Clinton, who wrote that the Irish Catholics "are protected by the laws and constitution of this country, in the full and free exercise of their religion, and this court can never countenance or authorize the application of insult to their faith, or of torture to their consciences."<sup>41</sup>

In my article on the *First Free Exercise Case*, I discuss in some detail the background, arguments, decision, and the later constitutional implications of *Philips*; the curious reader will find much of interest there.<sup>42</sup> In tracing the influence of *Philips* upon the law of evidence, this Article now turns directly to the quirky jurisprudence of legal bibliography. Uncovered, the legacy of *Philips* is as much a product of its peculiar bibliographic history as its essential holding. Despite his rhetorical victory in *Philips*, William Sampson's work was not done. As Michael James Callahan has pointed out, "[w]hile the influence of William Sampson and his place in [American legal] history are lasting because of his association with the codifiers, [he also] possessed a more arcane talent which helped insure the spread of his legal outlook."<sup>43</sup>

37. See SAMPSON, *supra* note 2, at 5, 11.

38. *Butler v. Moore* (Ire. Ch. 1802), referenced in SAMPSON, *supra* note 2, at 19–21 (citing 1 LEONARD MACNALLY, *THE RULES OF EVIDENCE ON PLEAS OF THE CROWN* 253–55 (Dublin, J. Cooke 1802)), further proceedings *Butler v. Moore* (Ir. H. Ct. Ch. 1805), reported in 2 JOHN SCHOALES & THOMAS LEFROY, *REPORT OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF CHANCERY IN IRELAND DURING THE TIME OF LORD REDESDALE* 249; THOMAS PEAKE, *A COMPENDIUM OF THE LAW OF EVIDENCE* 128 (1801); Walsh, *supra* note 4, at 21. See also TRIAL OF JOHN URY, 1 AM. STATE TRIALS 114 (John Lawson ed., 1914).

39. For an in-depth discussion of the arguments and decision in *Philips*, see Walsh, *supra* note 4, at 20–38.

40. SAMPSON, *supra* note 2, at 42–51.

41. *Id.* at 114.

42. Walsh, *supra* note 4.

43. See Callahan, *supra* note 13, at 336.

Callahan referred to Sampson's command of shorthand and his practice of publishing accurate reports of the trials he transformed into high politics.<sup>44</sup> He had begun this practice in Ireland, where he sought to expose the politically corrupt and indefensible nature of the imposed English common law. Serving as understudy to John Philpott Curran, the undisputed Demosthenes of the tactically innovative and rhetorically acute United Irish legal defense team, Sampson developed his skill as a stenographer to combat the government's control over legal ideology.<sup>45</sup>

Without delay, Sampson published his comprehensive record of the first successful free exercise case under the name *The Catholic Question in America*. As Callahan notes, in the early American republic there were substantial legal barriers to the recognition of the priest-penitent privilege. "Yet those same authorities had to bow to the arguments and to the pen of William Sampson, who not only argued for the recognition of this privilege in 1813 but also published a report of the otherwise obscure case."<sup>46</sup> Sampson's 1813 work is the original and authentic report of *Philips*, now readily accessible since its facsimile reprint in 1974, and it should invariably be relied on by serious researchers. It is a remarkable historical record of a major constitutional event: Sampson's original 1813 report includes in full the proceedings (12 pages), the arguments of counsel (83 pages), Mayor Clinton's opinion (19 pages), several lengthy appendices (156 pages, in reduced typeface), and much surrounding detail, all making up a hefty tome of over 260 pages in all.

Due to inadequate attribution by one later editor and misreading of another, modern legal writers, most conspicuously Justice Antonin Scalia in *City of Boerne v. Flores*,<sup>47</sup> have almost invariably relied on incomplete derivatives dating from the 1840s. Several scholars have also sought to marginalize *Philips* with the throwaway remark that it was "not officially reported," "unreported," or "unpublished."<sup>48</sup> Such inaccurate characterization betrays critical ignorance of the central role of private law reporting in early legal culture. In the postcolonial United States, although "official" reporters were first appointed for some courts about the turn of the century, they did not actually become commonplace until the 1820s. Indeed, several early "official" reporters, including the first two United States Supreme Court reporters, were not in fact compensated from public funds and had to depend entirely on private subscriptions.<sup>49</sup>

Law abhors a vacuum, and respected private law reporters including William Sampson ably filled the needs of lawyers and the public. During those years, the legal profession relied heavily upon pamphlet law reports for accounts of important cases, including the impassioned human rights orations of Sampson himself. Until the close of the Civil War, as John Lawson wrote:

When Rufus Choate or Daniel Webster spoke in Massachusetts or Prentiss or Marshall in Kentucky or Wright in Missouri or Sampson or Brady in New York,

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44. See *id.* at 336-37.

45. See BEALE, *supra* note 31, at 19-20.

46. Callahan, *supra* note 13, at 337.

47. 521 U.S. 507, 543 (1997) (Scalia, J., concurring).

48. See, e.g., Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117, 125 (1993).

49. Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1300-07 (1985).

they spoke not only to the crowd in the courtroom but to the American public. Their orations appeared almost verbatim in the press and were later reported in pamphlet form and were as eagerly purchased in the book-stores as the best selling works of fiction are today.<sup>50</sup>

Prior to the development of recognizably modern publishing houses, pamphlet literature occupied a central place in popular culture. According to Bernard Bailyn, pamphlets may have sparked off the American Revolution.<sup>51</sup>

For its advocate and reporter, the banished human right lawyer William Sampson, *The Catholic Question in America's* political ambition was greatly enhanced by its legal setting and its stenographic completeness; Sampson's subversive political aims are also readily apparent from the several appendices he included. The first was Sampson's own *Irish Penal Code Abridged*, a carefully documented historical demonstration of legal oppression by colonial Protestant rulers against the Gaelic Catholic masses, interlaced with Sampson's own scathing commentary:

To pursue a tragedy of seven centuries, is not the purpose of this publication; but it is due to the cause, to the court, and above all, to that magistrate who manfully assumed the responsibility of the reasons accompanying its unanimous decision, to shew how malignant the system was, upon which he passed a wise and deliberate animadversion.<sup>52</sup>

Sampson's second appendix to his report of *Philips* was an equally scholarly theological dissertation prepared by Father Anthony Kohlmann entitled *A True Exposition of the Doctrine of the Catholic Church Touching the Sacrament of Penance, with the Grounds on Which this Doctrine is Founded*.<sup>53</sup> According to Wilfred Parsons, "[i]t is a complete theological treatise on the sacrament, and is in high regard for its clearness and completeness."<sup>54</sup> With a view towards combating persistent Protestant prejudices, Sampson also appended extracts from the theological responses of six European Roman Catholic universities to various political queries posed by William Pitt in 1789 concerning relations between church and state.<sup>55</sup> According to Anson Phelps Stokes, Sampson's use of this material during the trial was quoted with great effect, and the report was widely circulated by later writers.<sup>56</sup> Finally, in like vein, Sampson added a revisionist historical note and even a poem on the history of the much-traduced Jesuit order (unfortunately omitted from the 1974 facsimile edited by Leonard Levy).

50. John D. Lawson, *Preface* to 10 AMERICAN STATE TRIALS, at v (John D. Lawson ed.; 1914); see also 1 *id.* at x–xi (1914).

51. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 1–21 (1967).

52. William Sampson, *Irish Penal Code Abridged*, in SAMPSON, *supra* note 2, at 115.

53. Anthony Kohlmann, S.J., *A True Exposition of the Doctrine of the Catholic Church Touching the Sacrament of Penance*, in SAMPSON, *supra* note 2, at iii–cxii.

54. J. Wilfrid Parsons, *Reverend Anthony Kohlmann, S.J. (1771–1824)*, in 4 CATH. HIST. REV. 38, 47 (1918).

55. SAMPSON, *supra* note 2, at cxiii–cxvii.

56. 1 ANSON P. STOKES, *CHURCH AND STATE IN THE UNITED STATES* 789 (1950).

After presenting a detailed abstract of the case, a reviewer in *Port Folio* magazine complained that Sampson had swelled out his report of *Philips* by means of "a formidable appendix."<sup>57</sup>

Most of the matter is, so far as regards its bearing on the question in this country, perfectly irrelevant. But it has now become unfortunately, too much the fashion to annex by way of note or appendix topics which have very little connexion with the subject matter of the volume, and answer the double purpose of embarrassing the reader and enhancing the price of the publication.<sup>58</sup>

The *Port Folio* reviewer's irritation notwithstanding, we are today fortunate that Sampson's *The Catholic Question in America* makes up a remarkably comprehensive record of this unusually early test case. Like Sampson's other pamphlet reports, it contains a complete transcript of the proceedings, including counsels' arguments. The book's printer was Edward Gillespy, another Irish immigrant and publisher of *The Shamrock*, New York's earliest Irish ethnic newspaper, which often carried Sampson's arguments.<sup>59</sup>

William Sampson expressed his pride in making the report public. "The general satisfaction given to every religious denomination by the decision of this interesting question," he hoped, "is well calculated to dissipate antiquated prejudices, and religious jealousies . . . ."<sup>60</sup> He extolled the *Philips* decision as representing an emerging postcolonial jurisprudence in republican America. "When this adjudication shall be compared with the baneful statutes and judgments in Europe, upon similar subjects," he claimed, "the superior equity and wisdom of American jurisprudence and civil probity will be felt . . . ."<sup>61</sup> Sampson rightly predicted that his 1813 report of *Philips* would "constitute a document of history, precious and instructive to the present and future generations."<sup>62</sup> Stokes calls Sampson's work "a widely circulated book."<sup>63</sup>

Sampson's report of *Philips* brought a simmering public controversy to the boil. Its controversial reception reminds us that by the standards of antebellum America, in which Irish Catholics constituted both a racial and religious minority, *Philips* was a landmark judicial equality ruling. By today's standards of religious equality, Father Kohlmann's lengthy theological dissertation on the Roman Catholic doctrine of penance, prepared for inclusion in Sampson's report, seems uncontroversial and even turgid.<sup>64</sup> At the time, however, *Philips* directly fanned Protestant fears that were buried deep in American colonial history.<sup>65</sup> As the debates over *Ury's Trial* and New York's constitutional guarantee of religious freedom illustrated, the sacrament of penance

57. *The Catholic Question in America*, 2 PORT FOLIO 599, 604 (1813).

58. *Id.*

59. John P. O'Connor, *The Shamrock of New York, The First Irish-American Newspaper*, in 4 N.Y. IRISH HIST. 4 (1989).

60. SAMPSON, *supra* note 2.

61. *Id.*

62. *Id.*

63. I STOKES, *supra* note 56, at 789.

64. Kohlmann, *supra* note 53.

65. I STOKES, *supra* note 56, at 788-90.

seemed to many not a spiritual act, but rather a "dangerous and damnable" element of unthinking and subversive Catholic submission to foreign priestly domination.<sup>66</sup>

In the words of Leo Raymond Ryan, the historian of St. Peter's Church, "public attention had been attracted, a great crowd attended court and heard the priest's explanations of his position; several ministers raised a hue and cry over his conduct, and signs of religious dissension began to multiply."<sup>67</sup> *Philips* squarely raised the question how far the young American republic would break from its bigoted colonial traditions to accommodate the increasingly visible influx of mostly Irish Catholic immigrants. In such circumstances, Father Kohlmann's theological arguments assumed immediate political relevance.

According to Ryan, "[t]he sensation that the case created, the wide implications that were involved could not help stir up warm discussion."<sup>68</sup> A principal antagonist was Charles Henry Wharton, a former Catholic priest who had converted to Protestantism and emerged as a highly articulate and effective critic of the Roman church. In 1815, Reverend Wharton published his *Short Response* to Father Kohlmann's theological appeal to Protestant sympathy.<sup>69</sup> Although attacks on the tenets of Roman Catholicism were old hat in America, seldom had the heavily outnumbered and legally vulnerable Catholics so brazenly taken the offensive. After *Philips*, Catholic propagandists felt no need to hide their colors.<sup>70</sup> Their new assertiveness posed a major threat to assumed Protestant cultural dominance in the United States. With his *Brief Reply*, Father Simon F. O'Gallagher of Charlestown, South Carolina, immediately joined Father Kohlmann in defending the confessional against Reverend Wharton's assault.<sup>71</sup> The polite and restrained Father Kohlmann waited for several years before reentering the fray in typically polite, restrained, and erudite fashion.<sup>72</sup>

The controversy ignited by *Philips* over the seal of the confessional marked the opening shots of an increasingly heated Protestant campaign against Catholic beliefs, to which the immigrant church rejoined in kind. With each contribution, the issues were subdivided once again, so that the later debates very nearly argued how many angels could dance on the head of a pin. Stripped of their underlying political

66. Walsh, *supra* note 4.

67. LEO RAYMOND RYAN, OLD ST. PETER'S 112 (1935).

68. *Id.* at 115.

69. CHARLES HENRY WHARTON, A SHORT ANSWER TO A TRUE EXPOSITION OF THE DOCTRINE OF THE CATHOLIC CHURCH TOUCHING THE SACRAMENT OF PENANCE WITH THE GROUNDS ON WHICH THIS DOCTRINE IS FOUNDED (Philadelphia, Moses Thomas 1814); *see also* CHARLES HENRY WHARTON ET AL., A CONCISE VIEW OF THE PRINCIPAL POINTS OF CONTROVERSY BETWEEN THE PROTESTANT AND ROMAN CHURCHES (New York, David Longworth 1817).

70. *See generally* JOSEPH M. FINOTTI, BIBLIOGRAPHIA CATHOLICA AMERICANA 232-34 (New York, Burt Franklin 1872).

71. SIMON F. O'GALLAGHER, A BRIEF REPLY TO A SHORT ANSWER TO A TRUE EXPOSITION OF THE DOCTRINE OF THE CATHOLIC CHURCH TOUCHING THE SACRAMENT OF PENANCE (New York 1815); *see generally* 3 JOHN GILMARY SHEA, HISTORY OF THE CATHOLIC CHURCH 167 (Akron, OH, D.H. McBride & Co. 1890). Father O'Gallagher's work was reprinted in *The Catholic Question in America and Surrounding Materials*, in 1 MANAHAN'S AMERICAN CATHOLIC MUSEUM, bk. 1-3, (Ambrose Manahan ed., New York 1867), but unfortunately only one copy of this volume survives.

72. ANTHONY KOHLMANN, S.J., UNITARIANISM, THEOLOGICALLY AND PHILOSOPHICALLY CONSIDERED (Washington D.C., H. Guegan, 3d ed. 1821).

ramifications, these early nineteenth-century theological wars today seem unintelligible. The most original contribution came from the pen of Father John Hughes, who pseudonymously faked a particularly scurrilous anti-Catholic diatribe to widespread applause before revealing his own authorship. After the passing of the United Irish influence in New York politics, Hughes rose to archbishop during the massive mid-century migration of the Great Famine, and led the Irish Catholics' fight against the use of nativist texts and compulsory reading of the Protestant bible in the public schools.<sup>73</sup>

Historians of American Catholicism have consistently treated *Philips* as a signal victory for religious, ethnic, and cultural equality. After the Great Famine in Ireland, one out of every four New Yorkers was an Irish immigrant. For decades, the mass migration of Irish Catholics to the United States had spurred the rise of nativist parties such as the Know-Nothings, whose hostile, racist attitude towards Irish Catholic immigrants overshadowed urban politics in Northern cities through much of the nineteenth century. To some, William Sampson's postcolonial arguments for religious freedom and equality gained in urgency as migration took its multicultural toll. In mid-century, the well-known Catholic propagandist Orestes Brownson quoted at length from Sampson's argument for Father Kohlmann. "As might have been anticipated from this eloquent appeal," he continued, "but still more from the freedom of our institutions, the court held the priest exempt from answering the questions proposed to him. It was gratifying to Catholic feeling, that a guaranty was thus solemnly given to so sacred a trust."<sup>74</sup>

## II. THE ANTEBELLUM PRIEST-PENITENT PRIVILEGE

Turning now to the history of formal legal doctrine, let us try to trace more carefully the precedential influence of *Philips* in establishing the postcolonial priest-penitent privilege. We are hoping to identify some causal jurisprudential influence.

Just four years after *Philips*, the first tribunal to revisit this newly-minted priest-penitent evidentiary privilege was another New York court, the Court of Oyer and Terminer, presided over by Justice William W. Van Ness, and Judges John Garretson and John Van Pelt. In *People v. Smith* (1817),<sup>75</sup> the defendant Christian Smith had been embroiled for sixteen years in a family feud with a difficult neighbor, Bornt Lake. Smith accused Lake of releasing his swine and they quarrelled also over cattle and fowl. After numerous lawsuits, mostly initiated by Lake, a prosecution witness recounted that Smith complained he "could not bear with the night-walking of the deceased, and intended to fix him."<sup>76</sup> One restless night, Smith heard noises and caught Lake red-handed filling a large basket under his black walnut tree. Smith pursued Lake,

73. RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE 1800-1860*, at 41-68 (1938).

74. *The Confessional*, 3 BROWNSON'S Q. REV. 327, 341 (1846). Other popular and scholarly reactions to *Philips* are recorded in Walsh, *supra* note 4, at 64-74.

75. 2 Rogers' N.Y. City-Hall Recorder 77 (Ct. Oyer & Term. 1817), reproduced in 1 AMERICAN STATE TRIALS 779 (John D. Lawson ed., 1914). I also describe *Smith* in my article Walsh, *supra* note 4, at 40-41; see also RYAN, *supra* note 67, at 115; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV L. REV. 1409, 1506 (1990).

76. 1 AMERICAN STATE TRIALS, *supra* note 75, at 781.

"demanding his nuts, which the other refused to deliver."<sup>77</sup> During this confrontation, Smith shot and killed Lake with an unusual mixture of goose, duck, and pigeon shot, matching that later found in his home.

While Smith was in the local jail awaiting trial, he sent for Reverend Peter J. Van Pelt, his Protestant pastor. Reverend Van Pelt visited Smith and had "several conversations with him, with a view of exhorting him to penitence and preparation for his great trial hereafter."<sup>78</sup> To prove the substance of these confessions, the prosecution called Reverend Van Pelt to the witness stand. The clergyman made no conscientious objection. When defense counsel Price demanded to know in what capacity the minister was acting in hearing Smith's confession, the Protestant Reverend Van Pelt responded that anything he knew had been communicated to him as "a minister of the gospel."<sup>79</sup>

At that point, Price strongly protested against Reverend Van Pelt's testimony being received in evidence. Price thought it "dangerous in the extreme to permit a witness, in the relation of the one offered, to divulge a communication which must, undoubtedly, have been made, and ought to have been received, in the strictest confidence."<sup>80</sup> In support of this argument, counselor Price cited Mayor Clinton's recent *Philips* decision. He could see no distinction between the two cases.

There was no good reason for restricting such a rule to any particular sect or denomination. It had no relation to the character of the person in whom confidence is placed; and whether made to a minister of the gospel, or a counselor at law, is perfectly immaterial. It arises, altogether, from the presumption, that a prisoner, for his temporal or eternal safety, considers himself compelled to make the confession. In this view, it is not to be regarded as voluntary, and, therefore, is inadmissible.<sup>81</sup>

It is unclear whether defense counsel Price explicitly invoked New York's religion clause in addition to *Philips*.

In response to a direct question from the court, Reverend Van Pelt then sharply distinguished himself from Father Kohlmann in the first free exercise case by declaring that he had no conscientious objection to revealing Smith's communications. After hearing Reverend Van Pelt's religious position, the court ruled Reverend Van Pelt's voluntary testimony admissible. Conceding the authority of *Philips*, the bench took an explicit "distinction between auricular confessions made to a priest in the course of discipline, according to the canons of the church, and those made to a minister of the gospel in confidence, merely as a friend or adviser."<sup>82</sup>

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77. *Id.* at 784.

78. *Id.*

79. *Id.* at 783.

80. *Id.*

81. *Id.* at 784.

82. *Id.* John Lawson's version in his *American State Trials*, published in 1914, quotes Justice Van Ness as saying "I think there is a *grave* distinction between auricular confessions made to a priest . . ." (emphasis added). The word "grave" does not appear in Daniel Rogers' original report. It seems to have been inserted by Lawson when he converted the statements of the court, counsel, and the witnesses from the third person to the first person. Wigmore relies on Lawson rather than the original report by Rogers.

However, as it emerged on the witness stand, Reverend Van Pelt's account of Smith's prison confessions was quite sympathetic. Smith's story, told by Reverend Van Pelt, raised some possibility of self-defense. This may have offset the insistence of other prosecution witnesses, who had examined Lake's wounds, that Smith had fired his musket from a distance of ten to twenty yards.

The drama of the case was heightened by the remarkable theater in which it was played out. Because a great crowd of people had converged on the courthouse from all over Staten Island, the trial was moved to a nearby church. According to the reporter, "[t]he solemnity of the place, the awful occasion on which the auditory had assembled, the situation of the prisoner and his weeping relatives who were present, all combined, were calculated to excite a peculiar sympathy in his favor . . ."<sup>83</sup> On such an audience, defense counsel's eloquent appeals to the jury produced an "indescribable" effect. "Suffice it to say," noted the reporter, "that on the occasion, the divine solemnities of religion and the awful majesty of the law, in the imagination seemed to have united, and the tears in every eye, demonstrated the feelings of every heart."<sup>84</sup>

Not quite. The court was unmoved. It advised the jury that the evidence afforded Smith "no chance of escape; his conduct before and after the commission of the crime had been brutal and barbarous in the extreme; and he was not a safe member of society."<sup>85</sup> Nevertheless, following the legal practice of the day, the court charged the jury that they were judges of both law and fact. Seven hours later, Justice Van Ness made no effort to hide his outrage when the jury returned with a verdict of "not guilty."

With a candid display of his own religious convictions, Justice Van Ness addressed the lucky defendant in these words:

Christian Smith, you have been tried and acquitted by a jury of your country, for having taken away the life of one of your fellow creatures. I mean not to censure the jury who acquitted you, it is not my province so to do; I hope they will be able, upon future consideration, to reconcile their verdict to their consciences. But I should feel myself wanting in my duty as a man, if I did not express my opinion that, notwithstanding their verdict, I consider you a guilty, a very guilty man. Upon an ancient grudge, you considered yourself justified in doing what you have done; and the jury have, I fear, confirmed your false and fatal judgment. But, beware, you have not yet escaped. Believe me, your most awful trial is yet to come. You are now an old man, and your days may be few in this world, and you will shortly be compelled to appear before another court, where there is no jury but God himself. Unless you repent, and devote your future life to an humble atonement of your guilt, your condemnation there is certain. I am thus plain with you, in order that those who have listened to your trial, may learn that *whatever may be considered to be the law of Staten Island*, your conduct is unjustifiable in the sight of God and man.<sup>86</sup>

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83. 2 Rogers' N.Y. City-Hall Recorder 77, 82 (Ct. Oyer & Term. 1817). These observations by Rogers are omitted from Lawson's *American State Trials*. Lawson also slightly edits counsels' arguments.

84. *Id.* at 81.

85. 1 AMERICAN STATE TRIALS, *supra* note 75, at 787-88.

86. *Id.* at 788 (emphasis added).



Because the jury was empowered to determine the law as well as the facts, Smith's acquittal might suggest a populist legal principle favoring extension of *Philips*, a precedent which the court also approved; the jury may have felt that Reverend Van Pelt's testimony should have been excluded. However, other influences were also clearly at work.

The following year, in *Commonwealth v. Drake*,<sup>87</sup> the Supreme Judicial Court of Massachusetts upheld Alpheas Drake's criminal conviction. Drake had confessed his crime to fellow members of his Baptist congregation, none of whom expressed any conscientious objection to testifying. On appeal, without recorded citation to *Philips*, defense counsel maintained that it would be "in some shape an infringement of the rights of conscience, to make use of confessions, made under these circumstances . . . [where] in a theological view, he is obliged in conscience to perform it."<sup>88</sup> As in *Smith*, the prosecution countered that Drake's confession was "purely voluntary" and not "required by any known ecclesiastical rule."<sup>89</sup> *Drake* may therefore have followed *Smith* in protecting only mandatory religious confessions. Because the Massachusetts court stated no reasons for upholding Drake's conviction, it is impossible to tell whether his evidentiary argument failed on the facts or on legal grounds. Perhaps significantly, the prosecution did not challenge defense counsel's legal argument, but merely its applicability to the circumstances of the case. After *Drake*, the existence of any clergy privilege in Massachusetts remained in doubt.<sup>90</sup>

In the 1820s, William Sampson played a leading role in two separate movements that converged to consolidate the American clergy privilege—the antebellum codification movement, and the Irish campaign for Catholic Emancipation. Launching his antebellum codification movement in December of 1823, Sampson delivered his explosive *Discourse on the Common Law* to the New-York Historical Society, attacking the hierarchical origins of the common law and arguing that only a national code was compatible with the theories of democracy and republicanism. The address was published the following month with an "electrifying" effect. Over the next couple of years, Sampson followed it up with a barrage of articles and letters to numerous correspondents which spilled over from law journals into literary periodicals and the popular press. Following the War of 1812, Sampson's trenchant assault on the unrestrained legislative power held by unrepresentative common-law judges appealed to America's newly nationalist spirit. As a direct result of Sampson's efforts, in 1825 John Duer, Benjamin F. Butler, and John C. Spencer were appointed by the state assembly to rationalize and codify New York's statutes.<sup>91</sup>

While the New York codifiers worked, the issue of religious freedom in Ireland came to the fore. In 1824, Sampson was joined by Thomas Addis Emmet in arguing for

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87. 15 Mass. 161 (1818); see also Walsh, *supra* note 4, at 47.

88. *Drake*, 15 Mass 161 (1818).

89 *Id.* at 162.

90. Greenleaf and Wigmore have caused considerable confusion with their inaccurate assertion that Drake "denied" the existence of the clergy privilege. See *infra* Part IV.

91. Bloomfield, *supra* note 19; CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT (1981); PERRY MILLER, THE LIFE OF THE MIND IN AMERICA (1965); MAURICE EUGENE LANG, CODIFICATION IN THE BRITISH EMPIRE AND AMERICA (1924); Maxwell Bloomfield, *William Sampson and the Codifiers: The Roots of American Legal Reform*, 11 AM. J. LEGAL HIST. 234 (1967); Walsh, *supra* note 22.

New York City's Irish Catholic immigrants after a riot with Irish Protestants in Greenwich Village on July 12, the anniversary of the Battle of the Boyne. As he had in *Philips*, Sampson took the opportunity to put English policy in Ireland on public trial.<sup>92</sup>

The following year, the New York Irish held a meeting at which they passed a series of resolutions drafted by William James MacNeven which embodied the United Irish critique of continuing religious repression in their homeland. This resulted in the formation of the Friends of Ireland, an organization of Irish exiles which spread throughout the United States and Mexico, and which provided political and financial support for the cause of Catholic Emancipation. According to the movement's first historian, a well-placed contemporary, the New York resolutions rekindled a fierce and militant Irish republican nationalism fired by United Irish ideals. In 1829, this threat from the left flank forced the normally conciliatory Daniel O'Connell to adopt the uncompromising tactics which won Catholic Emancipation, allowing Catholics to sit in parliament.

In New York, Sampson and MacNeven also reached beyond their immigrant community by forming the Friends of Civil and Religious Liberty, a coalition of Irish exiles and liberal American sympathisers committed to religious freedom in Ireland. As MacNeven explained at one sumptuous banquet for 300 people, "[t]he cause which convenes us is essentially the same as that which, a few years ago, assembled good men of all nations and creeds, even at public dinners, for the purpose of giving their voice against the enslavement of the Africans."<sup>93</sup> The meeting was attended by the mayor, several judges and lawyers including the recorder and the chief justice, several aldermen, and ministers of all religious persuasions. "Behold those native Americans around you, among the first for worth and station, and lead in our city," said MacNeven.

They enrol themselves as friends of Ireland, for the spirit of liberty within them rises indignant against oppression, and a community of sentiment will ever produce unity of action among congenial minds, all the world over. Gentlemen! We may reasonably flatter ourselves that the proceedings of this assembly will prove favourable to a strong and general assertion of the principles of civil and religious liberty throughout this great country, and that they will have a beneficial influence on the same cause in the British Isles, where the voice of America reverberates like the echo . . . .<sup>94</sup>

During the 1820s, the cause of Catholic Emancipation in Ireland attracted international support.

High feelings on the issue of Irish Catholic Emancipation were not confined to New York City. In South Carolina, Chancellor Desaussure praised *Philips* for its inclusive philosophy. Construing constitutional language directly borrowed from New York's Article 38, he rejected the prevailing rule that disqualified Universalists as witnesses because of their disbelief in divine retribution after death. In *Farnandis v.*

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92. *People v. Moore*, 3 Wheeler's 82, 89-97 (N.Y. Cty. Ct. Gen. Sess., Sept. 13, 1824); *People v. M'Evoy*, 3 Wheeler's 414, 425-28 (N.Y. Cty. Ct. Gen. Sess., Oct. 13, 1824).

93. *Grand Celebration of St. Patrick's Day: By the Friends of Civil and Religious Liberty in this City*, 1 THE IRISH SHIELD & MONTHLY MILESIAN No. 3, Mar. 1829, at 101.

94. *Id.* at 104.

Henderson,<sup>95</sup> the chancellor declared himself unable to conceive the limits of such an objection. "It may exclude Roman Catholics, who believe that punishments in another world may be avoided altogether by absolution, or diminished by masses and prayers."<sup>96</sup> Evidently persuaded by William Sampson's hibernocentric postcolonial argument for religious freedom in *Philips*, Chancellor Desaussure continued:

If men may be excluded for their religious opinions, from being witnesses, they may be excluded from being Jurors or Judges; and the Legislature might enact a law excluding such persons from holding any other office, or serving in the Legislature, or becoming teachers of schools, or professors of colleges. In my judgment this would be in the very teeth of the Constitution, and would violate the spirit of all our institutions. I do not know in what that state of things would differ from the galling restraints on the Irish Roman Catholics, which have so long kept that beautiful country and that high spirited people, in a state of degradation and misery, of discontent and rebellion.<sup>97</sup>

Chancellor Desaussure explicitly invoked the authority of Mayor Clinton's "learned and elegant" opinion in *Philips*.<sup>98</sup> Chancellor Desaussure was upheld on appeal.<sup>99</sup>

In Louisiana, Edward Livingston, an avowed Benthamite who ranks with Sampson as America's leading early codifier, proposed the priest-penitent privilege in the Code of Evidence he unsuccessfully submitted to the Louisiana state legislature: "A priest of the Catholic religion shall not be forced to reveal any thing which he knows only by its being confided to him in religious confession by his penitent."<sup>100</sup> It was during these concurrent storms over codification in the United States and religious freedom in Ireland that the New York codifiers issued their 1828 report. Although charged with statutory revision, the New York codifiers interpreted their mandate broadly and incorporated the recently recognized clergy privilege into the revised statutes of New York State. They also undertook an ambitious reform of property law.<sup>101</sup>

Mistakenly, it has been said that the New York codifiers wanted to resolve issues raised by Protestant criticism of *Philips*, which had been compounded by the admission of a Protestant clergyman's willing testimony in *Smith*. This assertion is not borne out

95. *Farnandis v. Henderson* (Union Dist. S.C. 1827), reported in 1 CAROLINA L.J. 202, 211-13 (1831). I also discuss *Farnandis* in my article Walsh, *supra* note 4, at 41.

96. *Farnandis*, 1 CAROLINA L.J. at 211.

97. *Id.* at 212.

98. *Id.* at 213.

99. *Id.* at 214.

100. EDWARD LIVINGSTON, A CODE OF EVIDENCE (1822), reprinted in 2 COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 455, 466 art. 33(2) (Broadway, New York, Nat'l Prison Ass'n of the U.S. 1873). For Livingston's reflections on his code, see Edward Livingston, *Introductory Report to the Code of Evidence*, reprinted in 1 LIVINGSTON, *supra* at 411-504. For commentary on the impact of Livingston's code, see WILLIAM B. HATCHER, EDWARD LIVINGSTON 275-76 (1940); and 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE 5005 (1977).

101. See generally WILLIAM ALLEN BUTLER, THE REVISION OF THE STATUTES OF THE STATE OF NEW YORK AND THE REVISERS (1889); CHARLES P. DALY, THE COMMON LAW 55-59 (1894); CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 525 (1911).

by the historical record. Significantly, in their report to the legislature, the New York revisers included the following note:

In a case [*Philips*] which occurred some years since in the Court of Sessions, New York, at which DeWitt Clinton presided it was held that auricular confessions made to a Catholic priest were not to be divulged. Although contrary to the principle of the English decisions . . . this decision is believed to have received general approbation in this country. It was admitted and recognized by Justice Van Ness in the case of *Christian Smith*, reported in 2 City Hall Recorder, 80, and a distinction taken between such confessions as were made in the course of discipline and such as were made to a clergyman as an adviser and friend. The rule is too important to be left in its present state and it is therefore proposed to give it the sanction of legislative authority.<sup>102</sup>

This account plainly sets out the New York evidentiary revisers' contemporary understanding, namely that in *Smith*, Judge Van Ness had approved the priest-penitent privilege announced in *Philips*.

On December 10, 1828, the New York State Assembly passed the revisers' bill codifying *Philips*' priest-penitent privilege. As interpreted by the New York codifiers, *Philips* covered spiritual communications to clergy of all denominations that required confidential confessions. The New York codifiers also specified that the penitent as well as the minister held the privilege. At the time, the governor's mansion was occupied by none other than De Witt Clinton, author of the court's unanimous opinion in *Philips*. In 1817, Mayor Clinton had succeeded Daniel Tompkins, the former judge, who was elected Vice-President under Monroe. Both New York State governors had benefited from the political support of the Irish immigrants. It would certainly have been poetic had Governor De Witt Clinton given final legislative authority to the very priest-penitent privilege he had recognized as a constitutional imperative while on the bench! But Governor Clinton's death earlier that year meant that the priest-penitent privilege was instead signed into law by his lieutenant governor.<sup>103</sup>

Hugely influential, New York's early statutory codification of *Philips* read as follows:

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.<sup>104</sup>

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102. JOHN DUER, BENJAMIN F. BUTLER & JOHN C. SPENCER, THE REVISED STATUTES OF THE STATE OF NEW YORK (1828); see also Edward J. McGuire, *William Sampson*, 15 J. AM. IRISH HIST. SOC. 342-43 (1916); *Extracts from the Original Reports of the Revisers*, in REVISED STATUTES OF THE STATE OF NEW YORK (1836).

103. J. R. BAYLEY, A BRIEF SKETCH OF THE EARLY HISTORY OF THE CATHOLIC CHURCH ON THE ISLAND OF NEW YORK 77-82 (1870).

104. 2 N.Y. REV. STAT. 1828, pt. 3, ch. 7, tit. 3, 72 (1828). Despite assertions to the contrary, for example *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1556 (1985), it does not appear from the wording of their committee report that the revisers objected to the application of the privilege in *Smith*.

According to Callahan (who overlooks the simultaneous influence of the swirling public controversy over Catholic Emancipation in Ireland), "[t]he legislators in 1828 were more interested in the value the privilege had as a break with English law than they were in its theological and constitutional implications. Nor was its promoter [Sampson] likely to allow them to forget the fiercely anti-British sentiment on which the privilege rested."<sup>105</sup>

Through its New York codification, *Philips* prompted the nationwide statutory adoption of the clergy privilege over the next century and a half. It tipped off a domino effect that ultimately rippled through all the state legislatures. Today, the clergy privilege is recognized in every state, in the federal courts, and in many foreign jurisdictions. Roughly half of the American statutory drafters plundered New York's 1828 codification almost word for word.<sup>106</sup> During the same period, the *Philips* holding was also disseminated through heavily edited reprints of Mayor Clinton's decision,<sup>107</sup> judicial citation,<sup>108</sup> and increasing scholarly recognition in various nineteenth- and twentieth-century legal commentary.<sup>109</sup>

In 1844, in another curious twist in the bibliographic history of *Philips*, Mayor Clinton's opinion reached the Western frontier when it was abstracted in the first volume of Timothy Walker's *Western Law Journal*, published in Cincinnati. After lately reading Sampson's report of *Philips* in *The Catholic Question in America*, the law professor and former judge requested an unidentified P. McGroarty to prepare the abstract. The result was a competent, but highly compressed, 5-page summary of William Sampson's original 265-page pamphlet law report written in 1813. McGroarty's 1844 abstract of Sampson's *The Catholic Question in America* necessarily includes only brief summaries of the proceedings, of counsel's arguments, and of Mayor Clinton's opinion. It omits much important detail from the original 1813 report and makes no reference whatsoever to Sampson's appendices. Because Walker, the law journal editor, attributed his source only to "Mr. Sampson's published Report"—critically omitting title, date, and place of publication—McGroarty's modest

105. Callahan, *supra* note 13, at 355.

106. Callahan, *supra* note 13, at 335, 337; Fred L. Kuhlmann, *Communications to Clergymen—When Are they Privileged?*, 2 VAL. U. L. REV. 265, 268–69 (1968); Seward Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55, 57, 61–62 (1963); Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 107–08, 135 & n.180.

107. See *infra* text accompanying notes 119, 188–90.

108. *People v. Smith*, 2 Rogers' N.Y. City-Hall Recorder 77 (Ct. Oyer & Term. 1817), reproduced in 1 AMERICAN STATE TRIALS 779 (John D. Lawson ed., 1914); *Farnandis v. Henderson* (Union Dist. S.C. 1827), reported in 1 CAROLINA L.J. 202, 211–13 (1831); *Simon's Executors v. Gratz*, 2 Pen. & W. 412 (Pa. 1831); *Commonwealth v. Cronin*, 1 QUARTERLY L.J. 128 (Va. Richmond Cir. Ct. 1855); *Mullen v. U.S.*, 263 F.2d 275 (D.C. Cir. 1959) (Fahy, J.); *Georgetown Rights Coalition of Georgetown Univ. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (en banc); *Scott v. Hammock*, 870 P.2d 947 (Utah 1994); *Simpson v. Tennant*, 871 S.W.2d 301 (Tex. Ct. App. 1994); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 1995 WL 348181 (Conn. Super. Ct., May 31, 1995); *Nestle v. Commonwealth*, 470 S.E.2d 133 (Va. Ct. App. 1996); *Mockaitis v. Harclerod*, 104 F.3d 1522 (9th Cir. 1997); *Cox v. Miller*, 296 F.3d 89, 103 (2d Cir. 2002); *City of Boerne v. Flores*, 521 U.S. 507 (1997). Writing in 1968, Kuhlmann discovered only one of these thirteen cases, of the five then decided.

109. See *infra* at Part IV.

1844 abstract of *Philips* has routinely, but mistakenly, been treated as the original report by most later legal scholars, significantly including the influential, but unreliable, Wigmore. To McGroarty's abstract, Walker added an interesting Editor's Note approving the decision on constitutional free exercise grounds.<sup>110</sup> From 1860, the decision also appeared as a footnote in the fourth edition of Walker's popular *Introduction to American Law*. In Walker's work of nationalist jurisprudence, designed to combat American reliance on English precedents, *Philips* remained through the tenth edition of 1895.<sup>111</sup>

Just a year after Walker published his abstract of *Philips*, on the western frontier, pioneer state legislatures took up the codification of Sampson's postcolonial priest-penitent privilege. New York's 1828 codification of *Philips* was adopted word for word by Missouri in 1845, Michigan in 1846, and Wisconsin in 1849. With slight but influential alterations in the wording, which can be attributed to the Field brothers, the clergy privilege was recognized by California and then Iowa in 1851.<sup>112</sup>

In the larger codification movement, with the exception of the priest-penitent privilege, Sampson played the part of a jurisprudential guerrilla, not that of a legal technician. In the 1820s, Sampson's *Discourse on the Common Law* resulted in the appointment of the New York codifiers Duer, Butler, and Spencer. In 1836, Sampson's *Discourse* also inspired David Dudley Field, a legal apprentice whose teacher, Henry Sedgwick, had joined Sampson's attack on the English common law.<sup>113</sup> Between 1848 and 1852, the New York state assembly adopted Field's code of civil procedure, leaving substantially intact the earlier codification of *Philips*.<sup>114</sup> Field also inserted the 1828 language adopting the clergy privilege into his proposed wholesale codification of the law of evidence. David Field's evidence code was never adopted in New York, but it nevertheless exerted a powerful influence when carried to the western frontier by his brother, Stephen.<sup>115</sup>

Stephen J. Field, David's law partner at the height of his codifying zeal, left the practice in 1848 to settle in California. He was appointed to the House judiciary committee during the California legislature's second session in early 1851. In that capacity, Stephen took it upon himself to revise and remodel his elder brother David's draft Code of Civil Procedure and secure its passage. Stephen selectively included that part of the draft evidence code which had already been adopted in New York, including the priest-penitent privilege, but omitted David's other evidentiary proposals. Slightly reworded, New York's 1828 clergy privilege statute, as incorporated into

110. McGroarty's abstract is published as *People v. Phillips*, 1 WEST. L.J. 109 (1844). Timothy Walker's commentary is contained in his Editor's Note. *Id.* at 113-14.

111. TIMOTHY WALKER, *INTRODUCTION TO AMERICAN LAW* 611 n.(a) (4th ed. 1860). See also Callahan, *supra* note 13, at 333-37.

112. SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* 335 n.5 (5th ed. 1850).

113. Bloomfield, *supra* note 19, at 90.

114. See generally *Introduction to THE CODE OF PROCEDURE OF THE STATE OF NEW YORK, AS AMENDED APRIL 16, 1852* (2d ed. 1852).

115. The New York Commissioners on Practice and Pleading (the Field Commission) final draft, as "reported complete" by the New York Commissioners, included Field's evidence code in Part IV, and was published in 1850. *THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK* (1850). See generally Mildred V. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238 (1942).

Field's proposed evidence code, was thus enacted in California in 1851.<sup>116</sup> Soon afterwards, Stephen J. Field was appointed to the state's highest court and later to the federal Supreme Court. With the support of Walker and others influenced by the nationalist jurisprudence urged by Sampson, Iowa and several other states west of the Rockies followed California's lead in enacting the Field codes including the postcolonial priest-penitent privilege.<sup>117</sup>

An even more highly abbreviated report of *Philips* was reprinted in the first volume of the *South-western Law Journal*.<sup>118</sup> This abstract was read by Simon Greenleaf, a professor at Harvard Law School and at the time America's leading writer on the law of evidence. In 1850, Greenleaf revised the fifth edition of his *A Treatise on the Law of Evidence*, which he had first published eight years previously. He discussed the priest-penitent privilege, concluding unpersuasively from the dubious *Drake* "decision" from Massachusetts, various English and Irish authorities, and obviously anglocentric rather than revolutionary American legal principles, that the priest-penitent evidentiary privilege was not part of American law. However, Greenleaf acknowledged in considerable detail that Roman law and French law held otherwise. Although he dutifully cited *Philips* as the American authority for recognition of the privilege, Greenleaf failed to note that Mayor Clinton's 1813 opinion was actually the only American decision on point, so that its reasoning stood uncontested. Greenleaf's anglocentric treatment presages that of other American evidentiary writers who seem baffled by the priest-penitent privilege, unable to explain it historically, and unwilling to confront its radical constitutional justifications. In a footnote, Greenleaf also set forth in full New York's 1828 codification of that decision and noted that New York's lead had already been followed by other states.<sup>119</sup>

In the same year that Greenleaf wrote *A Treatise on the Law of Evidence*, the New York legal writer John Anthon was much less deferential to English authorities. Anthon joined the Cincinnati jurist Timothy Walker in extolling *Philips*' departure from colonial jurisprudence. Employing the postcolonial, nationalist legal rhetoric of William Sampson, Anthon described *Philips* as "taking a step in enlightened morals far in advance of our parent land," and he urged every state in the Union to follow the

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116. Title XI of "An act to regulate proceedings in civil cases, in the Courts of Justice of this State" (Apr. 29, 1851) provided:

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.

An act to regulate proceedings in civil cases, in the Courts of Justice of this State, CAL. STAT. ch. 1, 357 (1851) (codified at COMPILED LAWS OF THE STATE OF CALIFORNIA 590 (1853)).

117. Lang, *supra* note 91, at 99–106, 115; 21 WRIGHT & GRAHAM, *supra* note 13, at 71–74; William Wirt Blume, *Adoption in California of the Field Code of Civil Procedure: A Chapter in American Legal History*, 17 HASTINGS L.J. 701 (1966); *Developments in the Law: Privileged Communications*, *supra* note 104, at 1458–60. See generally DAVID DUDLEY FIELD, CENTENARY ESSAYS (Alison Reppy ed., 1949); WARREN, *supra* note 101, at 508–39.

118. *People v. Phillips*, 1 Sw. L.J. & REP. 90 (1844).

119. GREENLEAF, *supra* note 112, at 335 n.5.

example set by it and New York's resulting 1828 statute.<sup>120</sup> Warmly, Anthon's casebook on legal method warned the law student that, in the 30 states, American law was being subjected to "an elaboration of a most expansive character, arising from new social positions, under novel forms of government, demanding equally novel applications of established rules and principles."<sup>121</sup>

In the East, the priest-penitent privilege was contested in antebellum courtrooms, rather than in legislative chambers. Unreported cases with novel applications of rules and principles included those of Father Hickey in Baltimore in 1847; Father O'Neil (who was fined by Judge Waldo) in New Haven, Connecticut in 1855; and Father L. Young of Frankfort, Kentucky in 1868.<sup>122</sup> In the only reported mid-century decision, a Virginia court closely followed *Philips* in holding that the postcolonial priest-penitent privilege was required by the state and federal constitutions.<sup>123</sup>

In *Commonwealth v. Cronin* (1855),<sup>124</sup> Judge Meredith distinguished the Irish case of *Butler v. Moore* (1802) on the ground that there the issue concerned a "confidential communication" rather than a sacramental confession.<sup>125</sup> He found no English decision actually on point. Judge Meredith relied heavily on *Philips*, which would not be judicially cited again for another century, and he quoted in full its 1828 New York codification. Much of Judge Meredith's opinion is a well-constructed collage, with lengthy passages lifted directly from Mayor Clinton, Father Kohlmann's counsel, and Jeremy Bentham. Evidently relying on Greenleaf, Judge Meredith noted that the New York statute had been followed by other states of the Union and also that the clergy privilege was recognized in Scotland.<sup>126</sup>

### III. THE PRIEST-PENITENT PRIVILEGE AFTER THE CIVIL WAR

After the American Civil War, Sampson's *The Catholic Question in America* was closely read by Ambrose Manahan, a Roman Catholic priest with a literary eye. I made my acquaintance with the long-deceased Father Manahan by pure chance on a visit to the rare books room in the library at Notre Dame University in South Bend, Indiana. An entry in the catalogue suggested a strangely unfamiliar source. Closer investigation revealed a beautifully typeset, printed and bound annotated 1867 reprint of Sampson's

120. JOHN ANTHON, *THE LAW STUDENT, OR GUIDES TO THE STUDY OF THE LAW IN ITS PRINCIPLES* 217-18 (1850).

121. *Id.* at 5-6.

122. 1 FRANCIS WHARTON, *A COMMENTARY ON THE LAW OF EVIDENCE IN CIVIL ISSUES* 580 (3d ed. 1888).

123. *Id.*

124. *Cronin*, 1 *QUARTERLY L.J.* at 135. I also discuss *Cronin* in Walsh, *supra* note 4, at 42-43.

125. *Id.* at 135; see also *Butler v. Moore* (Ire. Ch. 1802), reported in 2 JOHN SCHOALES & THOMAS LEFROY, *REPORT OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF CHANCERY IN IRELAND DURING THE TIME OF LORD REDESDALE* 249.

126. *Id.* at 137. "By a writer on Scotch Criminal Law it is remarked: 'But our law utterly disowns and attempt to make a clergyman of any religious persuasion whatever divulge any confessions made to him in the course of religious visits, or for the sake of spiritual consolation, as subversive of the great object of punishment, the reformation and improvement of the offender.'" R.S. Nolan, *Seal of Confession*, in 13 *CATHOLIC ENCYCLOPEDIA* 649, 660 (1912) (quoting ARCHIBALD ALISON, *PRACTICE OF THE CRIMINAL LAW OF SCOTLAND* (1833)).



1813 postcolonial classic report of *Philips*, *The Catholic Question in America*. As well as Sampson's appendices, and some of the subsequent controversial literature that *Philips* inspired, this impressive and apparently unread volume includes extensive editorial annotations by Father Manahan such as a biography of Father Kohlmann. This edited collection of materials on *Philips* is clearly a labor of love. The entire opening volume of Father Manahan's announced new publishing venture *Manahan's American Catholic Museum* (New York 1867), consists of this expanded reprint of *Philips*.<sup>127</sup>

Here's the curious bibliographical twist. Inscribed in pencil on the flyleaf is the following poignant note:

This book was never published, and there were but six copies struck off, of which this is the only one, I believe that was preserved. The author, Rev. Dr. Manahan, died just as the book was being stereotyped, and as none of his relations saw fit to pay the printer Mr. [illegible], for his work, he struck off six copies, one of which was sent to me to see if I would purchase the plates. Not choosing to invest, the plates were melted up by the printer. So this is a printed book that was never published.

Nov. 1872

L. Kehoe

The publication of Father Manahan's 1867 annotated reprint might have rescued Sampson's United Irish jurisprudential classic, *The Catholic Question in America*, from falling into near total obscurity between the Civil War and the Second World War. Nevertheless, the influence of *Philips* would still be quietly felt. Laying aside Father Manahan's unpublished work, and although partial extracts or summaries appeared in 1814, 1844, 1950, and 1955, it would not be until a 1974 facsimile edition that William Sampson's rare and complete 1813 first edition of his report of *Philips* would be reproduced in full.

Although Father Manahan's reprint of *Philips* never saw the light of day, the 1813 decision was not forgotten. In 1870, a Catholic historian recalled that the trial had "excited a good deal of interest at the time, and led to a decision of much importance to the Catholic community." He added that "[t]he decision, as well as the whole manner in which the discussion was carried on, shows that a great change had taken place, not only in the form of government, but in the dispositions and character of the people" since colonial executions of suspected priests.<sup>128</sup> Soon afterwards, the first standard history of Catholicism in the United States carried a similar account of the case and its repercussions.<sup>129</sup>

Although *Philips* was apparently never judicially cited between the Civil War and the Second World War, the priest-penitent privilege it announced was steadily gaining national support. Maybe influenced by Stephen Field's early role in codifying the Western priest-penitent privilege, soon after the Civil War the *Philips* principle won an unexpected endorsement from the United States Supreme Court. The Supreme Court opinion was written by none other than Justice Field, who had codified the California clergy privilege as a pioneer legislator just a couple of decades before.

127. MANAHAN, *supra* note 71.

128. BAYLEY, *supra* note 103, at 77–82.

129. SHEA, *supra* note 71, at 165–67.

The question raised in *Totten v. United States*<sup>130</sup> was whether the government was bound to a contract entered into by the President for secret service behind Confederate lines. Holding the contract valid but unenforceable, the Court explained that there are some matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.<sup>131</sup> Without citation, Justice Field matter-of-factly added that, on the same principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional. The court also offered the husband-wife, attorney-client, and physician-patient privileges as similar examples.<sup>132</sup>

Jacob Yellin contends that this friendly pronouncement from the Supreme Court in *Totten* shows that the recognition of the clergy privilege was being accomplished at that time in the general absence of a statute, and despite a general notion that no such privilege existed at common law.<sup>133</sup> Yellin overlooks the possible further influence of Justice Field's earlier personal role in codifying the California clergy privilege. Indeed, Justice Field learned at a very young age the importance of religious tolerance, by observing the Catholics of Smyrna where his father was stationed as a Protestant missionary.<sup>134</sup>

More significantly, the nineteenth-century, evidentiary writer Francis Wharton contemporaneously observed the persistent rise of the postcolonial clergy privilege. In his *Law of Evidence*, Wharton described the clergy privilege as "much agitated."<sup>135</sup> He repeated his statement from two earlier editions that no such privilege existed under the English common law, and acknowledged that it is hard to reconcile with the court's search for the truth. "But, however this may be," continued Wharton, "there is a strong present current of opinion in favor of granting this privilege to priests of communions in which the confessional is part of an obligatory religious system."<sup>136</sup>

In contrast to his imperial precursor Greenleaf, and despite the contrary arguments, Wharton himself seems to have been swept along on that postcolonial, Sampsonian current. He asserted that on several occasions, the clergy privilege had been denied to Roman Catholic priests both in England and the United States. "At the same time," wrote Wharton, "prosecuting officers properly shrink from calling upon priests to disclose confessions as evidence against parties on trial for crimes; and eminent judges have gone a great way in encouraging this reluctance."<sup>137</sup> Wharton quoted dicta from English judges friendly to the privilege and cited *Philips*, *Farnandis*, and *Cronin* in a

130. 92 U.S. 105 (1875). See also Walsh, *supra* note 4.

131. *Totten*, 92 U.S. at 107.

132. *Id.*

133. Yellin, *supra* note 106, at 107.

134. CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 16 (University of Chicago Press, photo. reprint 1963) (1930).

135. 1 FRANCIS WHARTON, A COMMENTARY ON THE LAW OF EVIDENCE IN CIVIL ISSUES 580 (3d ed. 1888).

136. *Id.*

137. *Id.* at 581. Almost identical remarks about professional reticence and judicial discomfort with the general rule in England were made by the Victorian jurist, Lord Chief Justice Coleridge, in a letter to Gladstone. 2 ERNEST HARTLEY COLERIDGE, LIFE & CORRESPONDENCE OF JOHN DUKE LORD COLERIDGE LORD CHIEF JUSTICE OF ENGLAND 364-65 (1904).

footnote. Then he set forth in full, in the body of his text, the language of New York's 1828 codification of *Philips*.<sup>138</sup>

Of the nineteenth-century evidentiary treatise writers, perhaps the clergy privilege's most enthusiastic supporter was William Best, whose first edition was published in England in 1849. Carried to the United States in James Morgan's first American edition, Best's *Law of Evidence* (1878) began by describing this as "a question of some difficulty, despite what was commonly thought."<sup>139</sup> Without quoting a single judicial utterance against the privilege, Best methodically distinguished away almost every such English and Irish decision, including specifically the two precedents that Mayor Clinton had expressly repudiated in *Philips*: "How far a particular form of religious belief being disfavored by law at the period (A.D. 1802) affected the decision in *Butler v. Moore* is not easy to say: but both that case and *R. v. Sparkes* leave the general question untouched."<sup>140</sup>

Best concluded emphatically that the early English common law recognized the privilege, and questioned Lord Coke's early seventeenth-century limitation to confessions not involving high treason. Best argued for an expansive interpretation of the modern clergy privilege: "If it be error to refuse to hold sacred the communications made to spiritual advisers, an opposite and greater error is the attempt to confine the privilege to the clergy of some particular creed."<sup>141</sup> Borrowing from Greenleaf, Best prominently set forth in his text *Philips*' 1828 New York codification, as had Wharton. However, Best's American editor James Morgan was less thorough. Evidently relying on Greenleaf's influential but misleading treatise, Morgan threw in an obligatory citation to the *South-western Law Journal*'s abstract of *Philips*. Declaring himself unable to locate that secondary report, Morgan misread Greenleaf's passing reference and mistakenly identified *Philips* as a rejection of the clergy privilege!

In a quiet revolution in postcolonial jurisprudence, the increasing ascendancy of *Philips*' priest-penitent privilege was manifest by the close of the nineteenth century. By 1892, when Greenleaf's nephew edited the fifteenth edition of that three-volume treatise, his new preface listed the clergy privilege among the "subjects which have been affected most materially in the period covered by the new matter of this edition."<sup>142</sup> The statement that confessions to priests and clergymen are not privileged "was undoubtedly the rule at the time the author wrote, and is still the rule at common law; but in a large number of States the rule has been changed by statutory enactments."<sup>143</sup> Although, in the style of old-fashioned anglocentric jurisprudence, the new Greenleaf text continued to overlook the constitutional dimensions of *Philips*, it duly set forth most of the ensuing legislation codifying the priest penitent privilege. Under Californian influence, the eight antebellum states, New York, South Carolina, Missouri, Michigan, Wisconsin, California, Iowa, and Virginia, had since been joined

138. WHARTON, *supra* note 135, at 581–82.

139. 2 W.M. BEST, THE PRINCIPLES OF THE LAW OF EVIDENCE §§ 583–85 (J. Morgan ed., 1878).

140. *Id.* § 583.

141. *Id.* § 585.

142. Simon Greenleaf Crosswell, *Preface* to 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 1–2 (Simon Greenleaf Crosswell ed., 15th ed., Boston 1892).

143. *Id.* at 333, 335–36 & n.(a).

by the seven western codifying legislatures of Colorado, Indiana, Kansas, Minnesota, Nebraska, Ohio and Utah—making a total of fifteen states in all.<sup>144</sup>

Under these proliferating exemption statutes, nineteenth-century reports of judicial decisions became more frequent. In contrast to *Philips*, which considered the existence of the postcolonial priest-penitent privilege, later conflicts construed protective state statutes to determine their scope. Such interpretive disputes began in New York (1835),<sup>145</sup> Indiana (1877),<sup>146</sup> California (1880),<sup>147</sup> Iowa (1895),<sup>148</sup> and Missouri (1900).<sup>149</sup>

#### IV. THE PRIEST-PENITENT PRIVILEGE IN THE EARLY TWENTIETH CENTURY

By the turn of the century, therefore, *Philips*' recognition of an American clergy privilege had already gained considerable judicial, statutory, scholarly, and popular endorsement. Just as *Philips* took its principal nineteenth-century impetus from New York's 1828 codification, its postcolonial, American evidentiary rule grew in the twentieth through the academic writer John Henry Wigmore's widely influential scholarship. In 1904, Wigmore began publishing the first of numerous editions of his authoritative multi-volume treatise on the law of evidence. He eventually devoted one entire volume to the problem of evidentiary privileges, showing that overriding social and jurisprudential policies can justify limitations on the trial court's quest for truth.<sup>150</sup> Among many substantial theoretical contributions to the law of evidence, Wigmore rationalized *all* privileged communications by identifying four utilitarian common criteria for their recognition.<sup>151</sup> Dean Wigmore's comprehensive work was soon recognized as a classic, and became the starting point for countless American judicial discussions of evidentiary questions. Because of Wigmore's undeniable significance, his treatment critically shaped, and in important respects warped, the conventional modern understanding of the clergy privilege.

144. *Id.* at 335–37 & n.(a). During the nineteenth century, no eastern state followed New York in codifying the clergy privilege. The codification story raises interesting questions concerning the frontier as a formative element in American legal development. *See generally* William Wirt Blume, *Civil Procedure on the American Frontier*, 56 MICH. L. REV. 161 (1957); William Wirt Blume, *Legislation on the American Frontier*, 60 MICH. L. REV. 317 (1962); William Wirt Blume & Elizabeth Brown, *Territorial Courts and Law*, 61 MICH. L. REV. 39 (Part I), 467 (Part II) (1962); CHARLES M. HEPBURN, *HISTORICAL DEVELOPMENT OF CODE PLEADING* (1897).

145. *People v. Gates*, 13 Wend. 311 (1835).

146. *Knight v. Lee*, 80 Ind. 201 (1881); *Gillooley v. State*, 58 Ind. 182 (1877); *Dahlev v. State*, 53 N.E. 850 (1899).

147. *In re Toomcs*, 54 Cal. 509 (1880).

148. *State v. Brown*, 64 N.W. 277 (1895).

149. *Martin v. Bowdern*, 59 S.W. 227 (1900).

150. 5 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS IN THE UNITED STATES AND CANADA* (2d ed. 1923). Wigmore's third edition was published in 1940, shortly before the author's death. The most recent edition is McNaughton's 1961 revision.

151. 5 *id.* § 2285.

In what McCormick described as his "seemingly grudging acceptance" of the clergy privilege,<sup>152</sup> Wigmore declared that it met his four canons. Such communications were made in confidence, essential to the relationship between clergy and congregant, whose relationship was socially fostered, and breach of the confidence would do more social harm than litigating with incomplete evidence. "On the whole, then," Dean Wigmore concluded, "this privilege has adequate grounds for recognition."<sup>153</sup>

Wigmore's historical treatment of the postcolonial clergy privilege was unimpressive. He seems to have been somewhat mesmerized by a line of hostile but inconclusive and contested statements in the English decisions. Wigmore passed quickly and uneasily over the general consensus that a priest-penitent privilege existed in the early English common law.<sup>154</sup> Then he made the completely unsupported assertion that "since the Restoration, and for more than two centuries of English practice, the almost unanimous expression of judicial opinion (including at least two decisive rulings) has denied the existence of a privilege."<sup>155</sup> In fact, Wigmore's footnotes are at war with his text; his handling of both the early and modern English precedent on the clergy privilege was deeply unreliable.<sup>156</sup>

More conspicuously, Wigmore's anglocentric treatment of the constitutional and common-law American precedent was flat wrong. He compounded the shoddy history of Greenleaf and Morgan, Best's American editor. Wharton did better, but not by much. Wigmore's entire discussion of *Philips* amounts to a curt acknowledgment that the priest-penitent privilege "was recognized in an inferior court in New York."<sup>157</sup> Although he cited Timothy Walker's heavily abridged abstract, Wigmore's vague dating "1820 circa" betrays his unfamiliarity with *Philips* and suggests that he never even set eyes on that secondary source! Nor did Wigmore study William Sampson's much more comprehensive original report in *The Catholic Question in America* (1813). His lack of familiarity with the leading American decision on the priest-penitent privilege is further betrayed by a confusing parenthetical to the later *Smith* case, in which Wigmore seems to mistakenly assert that Justice Van Ness relied on some other unidentified opinion by Mayor Clinton. Critically, Wigmore offered no hint of the pioneering, postcolonial constitutional and common-law reasoning of *Philips*. Omitting vital jurisprudential context, Wigmore made no reference to the historical context of *Philips*, its hibernian ethnic dimension, the striking role of its advocate and reporter Sampson (an Irish Protestant imprisoned, banished, and disbarred for demanding religious equality in his anti-Catholic homeland), or its prompt and heavily influential codification by New York.<sup>158</sup>

Compounding his anglocentric dismissal of the postcolonial, American priest-penitent privilege, Wigmore cites *Drake* for the emphatic proposition that the clergy privilege was "early denied in Massachusetts."<sup>159</sup> This statement is also wrong.

152. JOHN W. STRONG, MCCORMICK ON EVIDENCE, § 76.2 (5th ed. 1999).

153. WIGMORE, *supra* note 150, § 2396.

154. For a discussion of that scholarship, see *supra* Part III.

155. WIGMORE, *supra* note 150, at 229 nn.4-6.

156. For a more detailed criticism of Wigmore's discussion of English legal history on the clergy privilege, see *infra* Part III.

157. WIGMORE, *supra* note 150, at 229 n.7.

158. *Id.*

159. *Id.*

Wigmore neglects to point out that in *Drake* the State *never* questioned the existence of the privilege, nor did the Massachusetts court ever issue any opinion actually addressing the issue. Apparently conceding the underlying principle, the State argued that Drake's communal confession was not required by the rules of his congregation and was therefore gratuitous and unprotected; moreover, Drake's confession was made to fellow Protestant congregants, who raised no conscientious objection to testifying, as opposed to a clergyman like Father Kohlmann who was bound to guard the secret with his life. In its unexplained rejection of Drake's claim, the Massachusetts Supreme Court may well have been swayed by either or both of these critical facts. Wigmore wanders beyond dramatic overstatement when he describes *Drake* as an American decision that "denied" the priest-penitent privilege, rather than one that merely defined its reach, like *Smith*.

Here would be a more accurate historical rendering of the postcolonial, American precedents that Wigmore relegated to a defeated footnote: *Philips* established the clergy privilege on postcolonial common-law and constitutional foundations, giving rise to a powerful codification movement; *Smith* accepted the privilege in principle but insisted that it be applied objectively in light of church tenets; and *Drake* was simply inconclusive. Thus, Wigmore's own incomplete sources belie his opening assertion that the privilege had not been judicially recognized in the United States.<sup>160</sup> In truth, since *Philips*, no American court has ever denied the existence of the clergy privilege.

Exacerbating his unconvincing treatment of postcolonial, American precedent supporting the priest-penitent privilege, Wigmore neglects to mention other American judicial precedents that actually required the clergy privilege: explicit affirmations of *Philips* by South Carolina's Chancellor Desaussure in *Farnandis* and by Virginia's Judge Meredith in *Cronin*, and even an unequivocal federal endorsement from Justice Field's United States Supreme Court in *Totten*. Wigmore never hinted, as *Philips* and *Cronin* had explicitly held, that postcolonial, American state and federal religious freedom guarantees put the clergy privilege on a constitutional footing unlike that in England.<sup>161</sup>

As if to make amends for his unimpressive treatment of American judicial authority, Wigmore's next section was a detailed recitation of the numerous statutes that *Philips* had inspired through its influential 1828 New York codification. Wigmore did not identify the powerful comparative judicial and legislative influence of New York, and later California, which provided the two statutory variations of the postcolonial clergy privilege. Writing in his second edition of 1923, Wigmore reported that "[i]n two jurisdictions of Canada and in more than one half of the jurisdictions of the United States the privilege has been sanctioned by statute."<sup>162</sup> In detail, he set forth the provisions of all those enactments. Adding to Greenleaf's list from three decades earlier, Wigmore added fourteen new priest-penitent privilege statutes passed by Alaska, Arkansas, Hawaii, Idaho, Kentucky, Montana, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Vermont, Washington, and Wyoming, making a total of 27 states and 4 territories including Alaska, Hawaii, the Philippine Islands, and Puerto Rico. He also noted similar statutes in the Canadian provinces of Newfoundland

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160. *Id.* § 2394.

161. See *People v. Philips* (N.Y. Ct. Gen. Sess. 1813), reported in SAMPSON, *supra* note 2, at 95–114; *Commonwealth v. Cronin*, 1 Q.L.J. 128 (Va. Cir. Ct. 1855).

162. WIGMORE, *supra* note 150, § 2395.

and Quebec.<sup>163</sup> In 1940, in his third edition, published during the Second World War, Wigmore added new state priest-penitent statutes in Louisiana and West Virginia, as well as in the Virgin Islands and the Canal Zone—making a total of 29 states and 6 federal territories.<sup>164</sup>

Turning to the policy of the privilege, Wigmore noted that “[e]ven by Bentham, the greatest opponent of privileges,” the clergy privilege was deemed worthy of recognition.<sup>165</sup> Wigmore set forth and adopted a lengthy abstract from the *Rationale of Judicial Evidence* (1827), in which Bentham justified the priest-penitent privilege by saying that “with any idea of [religious] toleration, a coercion of this nature is altogether inconsistent and incompatible.”<sup>166</sup> Wigmore then proceeded to apply his own four canons for the recognition of confidential communications and found that they were met.<sup>167</sup> On policy grounds, he therefore concluded that the priest-penitent privilege *should* be recognized; and his approval holds absent legislative recognition.

Curiously, a careful reading of Wigmore therefore yields an interpretation directly the opposite of that most frequently attributed to him. While Wigmore ultimately endorsed the clergy privilege, he is constantly cited for the contrary idea that the clergy privilege is purely statutory in nature and unsupported by common-law reasoning.<sup>168</sup> Wigmore must shoulder some of the blame for this confusion regarding his ultimate position. His reductionist and inaccurate history of both English and American judicial precedent was unfortunately preceded by the absolutist and misleading heading: History: No Privilege at Common Law.<sup>169</sup> In an abject failure to start from the most basic postcolonial premises of American jurisprudence, at no point does Wigmore mention either state or federal constitutional provisions.

Thus, although Wigmore’s ultimate approval undoubtedly strengthened the modern, postcolonial Irish-American clergy privilege originally announced in *Philips*, it did so at the expense of much historical and jurisprudential complexity. As Professor Louisell has pointed out, “[i]t may be that Wigmore, despite his monumental contribution to the law of privileges, has conduced to the current confusion by his emphasis on strictly utilitarian bases for the privileges, bases which are sometimes highly conjectural and defy scientific validation.”<sup>170</sup>

Nevertheless, other writers continued to draw inspiration from Sampson’s report of *Philips*. In 1916, Edward J. McGuire wrote that “Sampson’s argument in this case is alive with eloquence, strength, and courage. It supports with inexorable logic true

163. *Id.* § 2395.

164. 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS IN THE UNITED STATES AND CANADA § 2395 (3d ed. 1940).

165. WIGMORE, *supra* note 150, § 2396.

166. 9 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, pt. 2, ch. 6 (1827), reproduced in 7 JEREMY BENTHAM, WORKS OF JEREMY BENTHAM 366–67 (John Bowring ed., Edinburgh, William Tait 1843).

167. For a judicial application of Wigmore’s four canons, see the discussion of *Cook v. Carroll* immediately following.

168. Callahan, *supra* note 13, at 349; Kuhlmann, *supra* note 53, at 266; Yellin, *supra* note 106, at 102–03.

169. WIGMORE, *supra* note 150, § 2394.

170. Louisell, *supra* note 8, at 111.

religious liberty.”<sup>171</sup> In 1935, Ryan described *Philips* as a “famous trial.”<sup>172</sup> From the defeat of Governor Al Smith in the presidential primary, to the controversial election of John F. Kennedy as the United States’ first and only Catholic president, *Philips* continued to be cited as a rare early counterexample to rampant religious intolerance against equal civil rights for American Roman Catholics.<sup>173</sup>

#### V. THE PRIEST-PENITENT PRIVILEGE AFTER THE SECOND WORLD WAR

At the end of the Second World War, the historicist case for the postcolonial clergy privilege resurfaced with startling clarity. More than a century after William Sampson’s death, Wigmore’s text repatriated the Irish-American clergy privilege across the Atlantic to overthrow the English common law that Sampson attacked so relentlessly both before and after his banishment. In the meantime, the modern Irish Republic had emerged like a phoenix from the disastrous Easter Rising of 1916. Similarly shaping postcolonial constitutionalism, Judge Gavan Duffy of the Irish High Court echoed Mayor De Witt Clinton’s holding that a Roman Catholic priest could not be forced to testify.<sup>174</sup>

In Ireland, the priest-penitent issue in postcolonial jurisprudence resurfaced in the case of *Cook v. Carroll* (1945).<sup>175</sup> Ironically, although he was heavily influenced by the statutory codification of *Philips* in the United States, nothing in Wigmore alerted Judge Gavan Duffy to that neglected American decision’s direct, historic implications for hibernocentric postcolonial jurisprudence. Thus, the priest-penitent issue was posed a century apart and in a sharply contrasting cultural context. Just like his Jeffersonian American counterpart Mayor De Witt Clinton, Judge Duffy worked from first principles, breathing interpretive life into a recently-crafted constitution, and laying the jurisprudential foundations of a newly independent postcolonial republic. Like Mayor Clinton in *Philips*, in deciding *Cook*, Judge Duffy found his way blocked by the newly-vulnerable English common law of evidence.

“In order to ascertain the true juristic principle,” Judge Duffy resorted to the 1940 edition of Wigmore’s “monumental work on the Anglo-American System of Evidence.”<sup>176</sup> He mentioned Sir William Holdsworth’s description of that treatise as “a classic,” observing also that it was “hardly known in Ireland, where English textbooks on evidence hold the field” (and adding that none was comparable).<sup>177</sup> In *Cook*, Judge Duffy was explicit in his considerable debt to Wigmore’s comparative influence, even throwing in biographical detail<sup>178</sup> about the great scholar’s career. From Wigmore’s treatise, Judge Duffy learned that in other countries the penitential privilege was widely recognized. He specifically relied on the numerous statutory codifications inspired by

171. Edward J. McGuire, *William Sampson*, 15 J. AM. IRISH HIST. SOC. 342, 343 (1916).

172. RYAN, *supra* note 67, at 111. See also PETER GUILDAY, *THE LIFE AND TIMES OF JOHN CARROLL* 116–33, 556 (1922); GUSTAVUS MYERS, *HISTORY OF BIGOTRY IN THE UNITED STATES* 118–22 (1945).

173. MICHAEL SCHWARTZ, *THE PERSISTENT PREJUDICE* 36 (1984).

174. *Cook v. Carroll*, [1945] I.R. 515 (Ir. H. Ct.).

175. *Id.*

176. *Id.* at 520.

177. *Id.* (quoting 59 L.Q.R. 289 (1943)).

178. *Id.* at 520.



*Philips*: "Catholics and their sympathisers have been strong enough to get laws passed in most of the Legislatures of the United States declaring the privilege of silence for the secrets of the confessional . . . ." <sup>179</sup> He praised such statutes for extending the privilege to every religious denomination. He recommended the passage of a similar statute by the Irish Parliament, for in the absence of legislative direction judges might differ on the extent of the privilege. <sup>180</sup>

Judge Duffy felt that the influential American scholar John Henry Wigmore examined this development of the sacerdotal privilege in many jurisdictions "from a rather adverse standpoint." <sup>181</sup> Nevertheless, he gratefully accepted "the learned jurist's penetrating analysis" in Wigmore's four canons for testing whether a communication should be privileged. <sup>182</sup> After quoting those canons in full, Judge Duffy proceeded to apply them one by one. In Judge Duffy's view, Wigmore's utilitarian canons applied "as neatly as if they had been made to Father Behan's order." <sup>183</sup> Judge Duffy held:

Accordingly, the privilege requisite to secure testimonial immunity to the parish priest in this case is one in which the four conditions predicated by Wigmore are all present. It follows that Father Behan was within his legal right in refusing to divulge the conversation as a witness, unless I am to be precluded by very questionable adverse pre-Treaty precedent and the absence of any precedent in our own Courts. <sup>184</sup>

Judge Duffy articulated a broad constitutional clergy privilege, not confined to sacramental confessions, and implicitly nondenominational.

The postcolonial Irish decision in *Cook* was later influential upon the American clergy privilege because it was showcased with extensive extracts in Wigmore's treatise as a leading judicial precedent in support of the privilege, the role in which *Philips* had been conspicuously omitted from Dean Wigmore's earlier editions. <sup>185</sup> After the Second World War, aided by Judge Duffy's Irish opinion in *Cook*, William Sampson's early postcolonial clergy privilege spread quickly throughout the remaining United States. During that same period, *Philips* enjoyed a remarkable American renaissance, earning recognition from prominent non-Catholic writers. In 1943, Gustavus Myers described it as "a precedent of immense importance." <sup>186</sup> In 1950, finally making Sampson's 1813 masterpiece accessible to modern readers, Anson Phelps Stokes reprinted extensive extracts from the arguments and opinion, in a full chapter devoted to *Philips* in his three-volume work on church and state in the United States. <sup>187</sup>

179. *Id.* at 518.

180. *Id.* at 518–19.

181. *Id.* at 520.

182. *Id.*

183. *Id.* at 521.

184. *Id.* at 522.

185. See WIGMORE, *supra* note 150, § 2394.

186. MYERS, *supra* note 172, at 122.

187. 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 788–90, 838–50 (1950); 3 *id.* at 452.

Accelerating the rediscovery of *Philips*, in 1955, Mayor Clinton's opinion (but not the entire report) was reproduced in full for the first time since Sampson's *The Catholic Question in America*. It was extracted from the original 1813 law report by an anonymous historian since identified as Tinnelly. Although Mayor Clinton's complete opinion improved upon McGroarty's 1844 summary, and complemented Stokes' extensive 1950 extracts, Tinnelly's 1955 opinion does not reproduce the proceedings, the arguments of counsel, or the original appendices, thus, it is *not* a substitute for Sampson's authentic 1813 report.

In the heading of Tinnelly's 1955 extract, Mayor Clinton's opinion is accurately attributed to its source, but a footnote stating that Sampson's original 1813 report was "later reprinted" by Walker seems to have encouraged many legal researchers to continue citing to McGroarty's abbreviated 1844 abstract as the original, or an acceptable substitute. This oversight is inexcusable, especially as the brief 1844 abstract is obviously not the source of Tinnelly's 1955 reproduction of Mayor Clinton's opinion. Tinnelly also added extracts from *Smith*.<sup>188</sup> These excerpts, he explained, "reflect[] the great contribution of American legal thought to the growth of genuine freedom of conscience."<sup>189</sup> In a few brief concluding remarks, Tinnelly's survey noted the 1828 adoption of the New York statute codifying *Philips*, and the many American jurisdictions to which the idea had since spread.<sup>190</sup> Despite continuing bibliographical confusion, Tinnelly's 1955 reprint of Mayor Clinton's opinion revived a considerable scholarly and judicial interest in *Philips*.

By the end of the 1950s, Mayor Clinton's newly republished opinion in *Philips*, its 1828 New York codification, and Judge Duffy's recent decision in *Cook* all combined to influence a significant federal court decision. In *Mullen v. United States* (1959),<sup>191</sup> without statutory guidance and without explicit reference to the federal Free Exercise Clause, the United States Court of Appeals for the District of Columbia Circuit declared that "[s]ound policy—reason and experience—concedes to religious liberty a rule of evidence that a clergyman shall not disclose on a trial the secrets of a penitent's confidential confession to him, at least absent the penitent's consent."<sup>192</sup> Extending *Philips* beyond *Smith*, the court ruled inadmissible the testimony of a Lutheran minister who was willing to break the confidence reposed in him.

Conspicuous in the impressive scholarly bibliographical appendix to the *Mullen* court's decision is Tinnelly's 1955 reprint of Mayor Clinton's full opinion, and in his opinion for the court Judge Fahy also cites to McGroarty's brief 1844 abstract. The *Mullen* court's bibliography also includes New York's 1828 codification of *Philips*, and Judge Duffy's Irish decision in *Cook*.<sup>193</sup> Judges Fahy and Edgerton, who decided

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188. *People v. Smith*, 2 Roger's N.Y. City-Hall Recorder 77 (Ct. Oyer & Term. 1817), reproduced in 1 AMERICAN STATE TRIALS 779 (John D. Lawson ed., 1914).

189. *Privileged Communications*, *supra* note 104, at 199.

190. *Id.* at 213.

191. 263 F.2d 275 (D.C. Cir. 1959). I also discuss *Mullen* in my article *The First Free Exercise Case*, *supra* note 4.

192. *Mullen*, 263 F.2d at 280.

193. *Id.* at 281. The *Mullen* bibliography also included a citation to Edward A. Hogan, Jr., *A Modern Problem on the Privilege of the Confessional*, 6 LOY. L.REV. 1 (1951). In his article, Hogan set forth a lucid account of the priest-penitent's recognition in the early English common law, and argued for its further extension. Hogan had failed to discover *Philips* and

*Mullen*, were almost certainly the first judges to read the unedited text of the *Philips* opinion since Judge Meredith before the Civil War.

The *Mullen* court was bound only by the Federal Rules of Criminal Procedure, which left it free to determine the existence of the clergy privilege "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."<sup>194</sup> It noted American dicta in favor of the privilege, including the comment of Justice Field in *Totten* and a more recent endorsement of that view by Learned Hand, an influential modern jurist.<sup>195</sup> These decisions, according to Judge Fahy, correctly assumed the existence of the clergy privilege.

Historically, Judge Fahy followed *Cook* in concluding that the priest-penitent privilege was part of early English common law, but was abrogated or abandoned sometime after the Reformation, during a period "when religious and political tensions largely set the pattern in such matters . . . ."<sup>196</sup> In determining whether the clergy privilege should be recognized in modern America, the Court declared that if reason and experience recommended the privilege, "the dead hand of the common law will not restrain such recognition."<sup>197</sup> In answering that question, the Court acknowledged that it "relied] heavily" on Wigmore's lengthy discussion, and concluded that his four canons applied.<sup>198</sup>

[N]on-recognition of the privilege at certain periods in the development of the common law was inconsistent with the basic principles of the common law. It would be no service to the common law to perpetuate in its name a rule of evidence which is inconsistent with the foregoing fundamental guides [Wigmore's four canons] furnished by that law.<sup>199</sup>

The *Mullen* court then recognized the underground authority of *Philips*, the constitutional test case that had first pressed the clergy privilege in the United States. "As we have seen," wrote Judge Fahy, citing both *Philips* and Wigmore, "the denial was never uniform or resolute, so strong were the claims of reason in support of the privilege."<sup>200</sup> He added that in the modern climate of religious freedom, the federal courts must recognize the clergy privilege as "a rule of evidence on this subject dictated by sound policy."<sup>201</sup> This homage was the first judicial recognition of *Philips* since the forgotten *Cronin* decision a century before. Although First Amendment principles seem implicit in his discussion, Judge Fahy never explicitly mentions the United States Constitution.

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erroneously asserted that from the earliest days in America courts had denied the priest-penitent privilege.

194. *Mullen*, 263 F.2d at 278 (quoting FED. R. CRIM. P. 26 (1944) (repealed in 1972)). The rule borrows its wording from *Wolfe v. United States*, 291 U.S. 7, 12 (1934).

195. *Mullen*, 263 F.2d at 278 (citing *Totten v. United States*, 92 U.S. 105, 107 (1875); *McMann v. Sec. & Exch. Comm'n*, 87 F.2d 377, 378 (2d Cir. 1937); *United States v. Keeney*, 111 F. Supp. 233, 234 (D.D.C.), *rev'd on other grounds*, 218 F.2d 843 (D.C. Cir. 1959)).

196. *Id.*

197. *Id.* at 279.

198. *Id.*

199. *Id.* at 280. Thus, the *Mullen* court followed *Cook* in recognizing the full implications of Wigmore's analysis.

200. *Id.*

201. *Id.*

Judge Edgerton added his view that "a communication made in reasonable confidence that it will not be disclosed, and in such circumstances that disclosure is shocking to the moral sense of the community, should not be disclosed in a judicial proceeding," regardless of whether the trusted person is minister, wife, husband, doctor or lawyer.<sup>202</sup> He borrowed the words of Justice Holmes, who thought it "a less evil that some criminals should escape than that the Government should play an ignoble part."<sup>203</sup>

In 1955, Tinnelly's research revealed that thirty states had statutes codifying the *Philips* clergy privilege, and that it had been recognized as state common law in Pennsylvania.<sup>204</sup> He overlooked other favorable antebellum South Carolina decisions in *Farnandis*<sup>205</sup> and *Cronin*.<sup>206</sup>

In one sense, the pace of modern codification had slowed, with New Jersey's being the only new enactment during the 1940s. In another, the impetus had intensified, as serious efforts were now underway to ensure the clergy privilege's uniform recognition throughout the United States. In 1942, the American Law Institute adopted Rule 219 of the Model Code of Evidence, which the American Bar Association and the National Conference on Uniform State Laws incorporated in 1953 as Rule 29 of the Uniform Rules of Evidence.<sup>207</sup> This proposed national rule was far more cumbersome than any of the state statutes, which were based either on New York's 1828 codification of *Philips*, or on David and Stephen Field's 1851 California reformulation of the early New York priest-penitent privilege. Although the wording of the modern uniform rule did not prove popular, its mere existence prompted many more state priest-penitent statutes, both directly and indirectly.<sup>208</sup>

Remarkably, during the decade beginning with the adoption of Rule 29 and ending with the Supreme Court's recognition of religious exemptions in *Sherbert v. Verner* (1963),<sup>209</sup> no fewer than 14 legislatures passed priest-penitent statutes, bringing the total to 44 states and 4 territories (including a Pennsylvanian common-law privilege). The new states codifying *Philips*' postcolonial clergy privilege were Georgia in 1954; Maryland in 1957; South Carolina, Rhode Island, Tennessee, and Florida in 1960 (the year in which John Fitzgerald Kennedy became the first Roman Catholic leader of the United States); Delaware and Illinois in 1961; and Massachusetts and Virginia in 1962.<sup>210</sup>

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202. *Id.* at 281 (Edgerton, J., concurring).

203. *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting)).

204. Shortly after Wigmore published his third edition, and a year before his death, a lower court in Pennsylvania appeared to recognize the privilege in passing as a matter of common law. *Privileged Communications*, *supra* note 104, at 213 (citing *In re Shaeffer's Estate*, 52 Dauph. 45 (Pa. Orph. 1942)).

205. For more discussion of *Farnandis*, see Walsh, *supra* note 4, at 41.

206. For more discussion of *Cronin*, see Walsh, *supra* note 4, at 42-43.

207. See generally Reese, *supra* note 106, at 63.

208. Kuhlmann, *supra* note 106, at 288-89; Reese, *supra* note 106, at 58, 62-63, 84; Yellin, *supra* note 106, at 139-41.

209. 374 U.S. 398 (1963). This case is also discussed in Walsh, *supra* note 4, at 54-55.

210. Reese, *supra* note 106, at 58.

In this modern codification process, despite the postcolonial clergy privilege's roots in multicultural New York, the original colonies were generally among the last to afford it statutory recognition, belatedly following the progressive postcolonial lead of western legislatures. By 1963, the only staunchly anglocentric states *without* a clergy privilege were the three New England states of Connecticut, Maine, and New Hampshire; the two Southern states of Alabama and Mississippi; and Texas in the Southwest. Eighty-nine per cent of the American population lived in states with a clergy privilege.<sup>211</sup>

In the words of Seward Reese, writing in the same year that President Kennedy was assassinated, and that the United States Supreme Court adopted *Philips'* broader principle of constitutional exemptions, William Sanipson's hibernocentric, postcolonial clergy privilege had already become "deeply embedded in American jurisprudence."<sup>212</sup> In addition to *Philips'* antebellum judicial influence, roughly half of the forty-four state legislatures had borrowed their provisions almost word for word from that decision's 1828 codification by New York state; most other state statutes followed the Field brothers' 1851 California rewording of that original New York codification of *Philips'*.

Significantly, Reese's article simply asserted the existence of the postcolonial clergy privilege and went straight to its various applications. This dramatic shift in jurisprudential assumptions is a marked feature of the substantial legal scholarship that has grown around the clergy privilege since the Second World War.<sup>213</sup> Perhaps

211. Reese, *supra* note 106, at 60.

212. *Id.* See also Kuhlmann, *supra* note 106, at 287–88.

213. See JOHN C. BUSH & WILLIAM HAROLD TIEMANN, *THE RIGHT TO SILENCE: PRIVILEGED COMMUNICATIONS AND THE LAW* (3d. ed. 1989); JOHN T. MCNEILL, *A HISTORY OF THE CURE OF SOULS* 220 (1951); *The Seal of Confessional*, in 4 *NEW CATHOLIC ENCYCLOPEDIA* 134 (1967); Michael James Callahan, *Historical Inquiry into the Priest-Penitent Privilege*, 36 *JURIST* 328, 336–37 (1976); Simone Cambell, *Catholic Sisters, Irregularly Ordained Women and the Clergy Privilege*, 9 *U. CAL. DAVIS L. REV.* 523 (1976); Hogan, *supra* note 193; Knapp & Van de Creek, *Privileged Communication for Pastoral Counseling: Fact or Fancy?*, 39 *J. Pastoral Care* 293 (1985); Kuhlmann, *supra* note 106; J.R. Lindsay, *Privileged Communications (Part I) – Communications with Spiritual Advisers*, 13 *NO. IR. L.Q.* 160 (1959); *Privileged Communications*, *supra* note 104; Reese, *supra* note 106; Robert L. Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege—The Applicability of the Religion Clauses*, 29 *U. PITT. L. REV.* 27 (1967); Yellin, *supra* note 106; Note, *The Clergyman: His Privileges and Liabilities*, 9 *CLEV.-MARSHALL L. REV.* 323 (1960); Stephen H. Anderson, Note, *Confidential Relationships: Does the Law Require Silence Outside the Courtroom?*, 6 *UTAH L. REV.* 380 (1958); Annotation, *Matters to which the Privilege Covering Communications to Clergyman or Spiritual Adviser Extends*, 71 *A.L.R.* 3d 794 (1976); Erwin S. Barbe, Annotation, *Who Is "Clergyman" or the Like Entitled to Assert Privilege Attaching to Communication to Clergymen or Spiritual Advisers*, 49 *A.L.R.* 3d 1205 (1973); 97 *C.J.S.*, *Witnesses* § 263 (1957); G. H. Fischer, Annotation, *Matters to which the Privilege Covering Communications to Clergyman or Spiritual Adviser Extends*, 22 *A.L.R.* 2d 1152 (1952); 58 *Am. Jur. Witnesses* §§ 531–32 (1948); 70 *C.J. Witnesses* § 615 (1935); Augsburger, *Legal Concerns of the Pastoral Counselor*, 29 *PASTORAL PSYCHOLOGY* 109 (1980); 21 *N.Y.S. BAR BULL.* 288 (1949); Dean M. Kelley, *Beyond the Priest-Penitent Privilege: The Church, the FBI and Privacy*, *CHRISTIANITY AND CRISIS*, February 20, 1978, at 28; Robert E. Regan & John T. McCartney, *Professional Secrecy and Privileged Communications*, *CATHOLIC LAWYER*, January 1956, at 3; *Sacerdotal Privilege in English Law*, *THE LAW TIMES*, May 25, 1956, at 268; Michael Clay Smith, *The Pastor on the Witness Stand: Toward a Religious Privilege in the Court*, *CATHOLIC LAWYER*, Winter 1984, at 1; D. Jones, *Privileged Communications with Clergy in the United States—An*

capturing the very moment that William Sampson's hibernocentric postcolonial jurisprudence ultimately triumphed over rival anglocentric legal principles inherited from the colonial regime, the priest-penitent privilege's general acceptance in the United States seems to have first been assumed (that is, neither doubted nor denied) in Tinnelly's editorial commentary setting forth his 1955 reprint of Mayor Clinton's opinion.<sup>214</sup> A few years later, in McNaughton's 1961 revision of Wigmore, extensive extracts from Judge Duffy's opinion in *Cook* and Judge Fahy's opinion in *Mullen* appear. McNaughton also cleaned up Wigmore's sloppy footnotes and added his own bibliography of scholarly articles on the privilege.<sup>215</sup> Rather than relegating *Philips* to a defeated footnote, as did their nineteenth-century precursors, modern legal historians typically open their discussions with it.<sup>216</sup>

In 1974, a major event in the bibliographical history of *Philips* took place. A complete and widely available facsimile reprint of Sampson's *The Catholic Question in America* was published in the series *Civil Liberties in American History* under the editorial supervision of Leonard Levy.<sup>217</sup> In belated place of Reconstruction-era Ambrose Manahan's beautifully printed but unpublished book, this modern facsimile edition made Sampson's now extremely rare original report, including the full proceedings, counsel's arguments, and Sampson's appendices, generally available for the first time since its original publication in 1813. However, Levy's 1974 edition did not eliminate the prevailing bibliographical confusion, which continues to result in misplaced scholarly and judicial reliance on McGroarty's brief summary of 1844, Stokes' extracts of 1950, and the *Catholic Lawyer's* reprinted opinion of 1955.

Reporter William Sampson's deliberate choice of an accurate and expansive title for his work aimed at a wide audience, playing down the formal case name *People v. Philips*, compounded by inadequate attribution by later editors, evidently deflected the

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*Analytical Study of the Laws of Each State, Territory and Protectorate Concerning Such Privileged Communications* (April 16, 1979) (unpublished Doctor of Ministry dissertation available in San Francisco Theological Seminary Library); A. Robert Thiebault, *Are Your Communications Privileged?* (1958) (report by D.C. bar member to Baptist Joint Committee on Public Affairs), cited in Reese, *supra* note 106, at 59 n. 19; Rupert D. H. Bursell, *The Seal of the Confessional*, 2 ECC. L. J. 84 (1990); Faye A. Silas, *Embattled Clergy: Is Confession Always Private*, ABA J., Feb. 1986, at 36.

For literature discussing clergy privilege in context of child abuse reporting statutes, see *infra* note 225.

For literature discussing clergy privilege in context of particular states, see generally, William E. Hurley, *Privileged Communications in Oregon*, 36 OR. L. REV. 132 (1957); J. Michael Medina, Note, *Evidence: "Is There a Time to Keep Silence?"—The Priest-Penitent Privilege in Oklahoma*, 27 OKLA. L. REV. 258 (1974); Herbert L. Moody, Jr., Note, *The Priest-Penitent Privilege in South Carolina—Background and Development*, 12 S.C. L. Q. 440 (1960); Thomas W. Taylor, Note, *Evidence—Privileged Communication—The New North Carolina Priest-Penitent Statute*, 46 N.C. L. REV. 427 (1968); Note, *Testimonial Privilege and Competency in Indiana*, 27 IND. L.J. 256 (1952).

214. *Privileged Communications*, *supra* note 104.

215. See 5 JOHN HENRY WIGMORE & JOHN T. MCNAUGHTON, *EVIDENCE IN TRIALS AT COMMON LAW* § 2394 (4th ed 1961).

216. Callahan, *supra* note 13, at 333–37; Kuhlmann, *supra* note 106, at 267; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1410–12, 1504–05, 1513 (1990); Reese, *supra* note 106, at 57; *Privileged Communications*, *supra* note 104, at 199–209; Yellin, *supra* note 106, at 95, 104–05.

217. SAMPSON, *supra* note 2.

attention of both legal scholars and jurists from his original 1813 report of *Philips*, which has generally been familiar only to historians of the American Catholic experience. In keeping with other titles in this valuable reprint series, Levy's 1974 facsimile edition lacks any modern introduction, thus foregoing the opportunity to point out that the several intervening versions of *Philips* were incomplete. Unfortunately, legal writers on the clergy privilege, including Justice Scalia in *Flores*, have almost invariably relied on those incomplete derivatives. Sampson's original 1813 report has been relied on only by those later editors and (since its facsimile republication in 1974) by Michael James Callahan (1976), Judge Julia Cooper Mack (1987), Michael McConnell (1990), myself (1991), and O'Brien and Flannery (1991) (as well as by various religious historians discussing *Philips*).

Ironically, despite banished human rights cause lawyer William Sampson's ultimately complete postcolonial triumph over the inherited anglocentric colonial jurisprudence, his original constitutional justifications for the clergy privilege in *Philips* were largely eclipsed by the codifying statutes that his equality test case later successfully inspired throughout the Union. While New York's 1828 codification set in motion a gradual Irish-American jurisprudential revolution against the prevailing anti-Catholic English common law, that legislative model also deflected attention from Mayor Clinton's pioneering judicial reasoning. The *Philips* court relied on the constitutional guarantee of free religious exercise, and on the need for the United States to develop a nationalist common-law jurisprudence. Wigmore's influential but inaccurate anglocentric historiography obscured his own support for a postcolonial, American common-law clergy privilege. Struck by the nationwide adoption of New York's early codification of *Philips*, later legal theorists have tended towards Wigmore's antihistorical assumption that the privilege was purely statutory in origin. Today, this jurisprudential misconception continues to inform conventional scholarly and judicial misunderstandings of the clergy privilege.

With the possible recent exception of Justice Scalia, the Supreme Court has seemingly taken the clergy privilege for granted since first approving it in 1875.<sup>218</sup> A century later, the Supreme Court included an elaborate version of the clergy privilege along with eight others submitted to Congress for approval.<sup>219</sup> In 1973, Congress declined to adopt any of those proposed privileges, partly because some lawmakers adopted Professor Louisell's argument and insisted that evidentiary privilege law protects substantive rather than procedural rights, and is therefore beyond the Supreme Court's rulemaking power. Instead, Congress preferred to allow the federal law of evidentiary privileges to develop on a case-by-case basis.<sup>220</sup> Notably, in contrast to the other proposed privileges, the clergy privilege was not attacked during the 1973 debates, but was rather treated as "a long-recognized principle of American law."<sup>221</sup>

A year later, in rejecting President Nixon's claim for an executive privilege, the Court noted that "generally, an attorney or a priest may not be required to disclose what has been received in professional confidence."<sup>222</sup> More recently, in refusing to

218. *Totten v. United States*, 92 U.S. 105 (1875).

219. Proposed Rules of Evidence for the United States Courts and Magistrates, 56 F.R.D. 183 (1973).

220. *In re Grand Jury Investigation*, 918 F.2d 374, 380 (3d Cir. 1990).

221. *Id.* at 381.

222. *United States v. Nixon*, 418 U.S. 683, 709 (1974).

recognize a spousal privilege, the federal high court described the clergy privilege as "rooted in the imperative need for confidence and trust. 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."<sup>223</sup>

Within the past couple of decades, the historic constitutional underpinnings of the priest-penitent privilege, as established in *Philips*, have returned to the center of academic controversy. Out of concern for the national problem of child abuse, many states have enacted statutes imposing reporting obligations on doctors, psychotherapists, and other professionals who suspect that a child is at risk.<sup>224</sup> Some of these statutes explicitly require clergy to report confidentially communicated information to the authorities, and others seem to do so implicitly.

These reporting statutes raise anew the central question of the clergy privilege's fundamental basis in religious freedom. Does the clergy privilege exist at the mere discretion of state legislatures, or does it instead rest on some stronger, constitutional foundation? A major modern test of the clergy privilege's constitutional dimensions seems imminent. So far, every modern court and almost every commentator who has considered this issue has followed William Sampson and Mayor Clinton in concluding that the clergy privilege does indeed rest on constitutional guarantees of free religious exercise. Most of these discussions, however, took place before the Supreme Court recently retreated from the constitutional theory of free exercise exemptions originally announced in *Philips*.<sup>225</sup>

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223. *Trammel v. United States*, 445 U.S. 40, 51 (1980). Apart from *Flores*, the only other conflicting utterance came in the famous case protecting Jehovah's Witness children from a compelled flag salute. Ironically enough, it is contained in the concurrence of Justice Murphy, the only justice to decide that case on free exercise rather than free speech grounds, and moreover the only Catholic on the court. Justice Murphy wrote:

The right of freedom of thought and of religion guaranteed by the Constitution against state action includes both the right to speak and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society—as in the case of compulsion to give evidence in court.

*W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring). It is unclear whether Justice Murphy actually had the clergy privilege in mind. Because he was such a staunch champion of civil liberties, that seems unlikely to Professor Eugene Gressman, who began his judicial clerkship with Justice Murphy only a few months after *Barnette* was decided, and continued working in his chambers until 1948. Telephone Interview with Professor Eugene Gressman, North Carolina School of Law (Spring 1997).

224. See generally Robert Weisberg & Michael Wald, *Confidentiality Laws and State Efforts to Protect Abused or Neglected Children: The Need for Statutory Reform*, 18 FAM. L.Q. 143 (1984).

225. See *Employment Div. v. Smith*, 494 U.S. 872 (1990). Several articles written prior to *Smith* found reporting requirements as applied to clergy unconstitutional on free exercise grounds. William A. Cole, *Religious Confidentiality and the Reporting of Child Abuse: A Statutory and Constitutional Analysis*, 21 Colum. J. L. & Soc. Probs. 1 (1987); Mary H. Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 Minn. L. Rev. 723 (1987); William N. Ivers, Note, *When*



During the 1990s, while the United States Supreme Court in *Smith* and *Flores* discarded the conscientious exemption announced in *Philips* and embraced in *Sherbert*, both federal and state legislatures struggled to preserve that constitutional exemption principle from judicial encroachment.<sup>226</sup> In that decade, several important cases examined the historic, constitutional foundations of the postcolonial clergy privilege. In *Simpson v. Tennant*,<sup>227</sup> the first such fin-de-millennium case to rely on *Philips*, the Texas Court of Appeals approached the issue as a question of statutory interpretation. On facts identical to *Philips*, the court ruled that the clergy privilege protects not just the content of secret communications, but also the identity of their bearer; Justice Cannon relied on Father Kohlmann's 1813 refusal to name the penitent who brought him stolen jewelry, which was then restored to its rightful owner.<sup>228</sup>

In holding that the clergy privilege protects even nonpenitential spiritual communications within The Church of Jesus Christ of Latter-day Saints, the Utah Supreme Court put the clergy privilege on a constitutional footing. In *Scott v. Hammock*,<sup>229</sup> decided just a couple of weeks after *Simpson*, Associate Chief Justice Stewart borrowed from the scholarly resurgence of *Philips* to offer a historical summary of the clergy privilege's development. Relying heavily on the constitutional theory introduced in *Philips*, the court determined that even suspected child abuse by the penitent did not overcome the need for a broad reading of Utah's clergy privilege statute, one necessary for that statute to comport with both the federal Free Exercise Clause and the state constitution's protection of religious freedom. The Utah Supreme Court blithely ignored *Smith*, in which the federal Supreme Court had recently rejected the constitutional doctrine of free exercise exemptions first recognized in *Philips*.

The following year, in *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*,<sup>230</sup> a Connecticut trial court faced another case involving suspected child abuse by the penitent. No statutory resolution was possible, however, because the state clergy

*Must a Priest Report Under a Child Abuse Reporting Statute?: Resolution to the Priest's Conflicting Duties*, 21 Val. U. L. Rev. 431 (1987); Kathryn Keegan, Note, *The Clergy-Penitent Privilege and the Child Abuse Reporting Statute: Is the Secret Sacred?*, 19 J. Marshall L. Rev. 1031 (1986); Jane E. Mayes, Note, *Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise of Religion Govern*, 62 Ind. L.J. 397 (1987); see also Jeffrey Warren Scott, *Confidentiality and Child Abuse: Church and State Collides*, Christian Century 174-76 (Feb. 19, 1986). Two articles written after *Smith* reach the same conclusion. Alexander D. Hill & Chi-Dooh Li, *A Current Church-State Battleground: Requiring Clergy to Report Child Abuse*, 32 J. Church & State 795 (1990); Raymond C. O'Brien & Michael T. Flannery, *The Pending Gauntlet to Free Exercise: Mandating that Clergy Report Child Abuse*, 25 Loy. L.A. L. Rev. 1 (1991). All of these articles finding the clergy privilege constitutionally protected rely on *Philips* in reaching their conclusion. A contrary opinion was reached in a state attorney general opinion. Opinion on the Constitutionality of the Child Abuse Reporting Statute as Applied to Clergy, Op. Tex. Attorney General No. JM-342 (Aug. 5, 1985).

226. In my article *The First Free Exercise Case*, *supra* note 4, I discuss the implications of *Philips* for the constitutional theory of religious exemptions, including its implications for these most recent controversies.

227. 871 S.W.2d 301 (Tex. Ct. App. 1994). I also discuss *Simpson* in my article *The First Free Exercise Case*, *supra* note 4, at 59.

228. *Simpson*, 871 S.W.2d at 312.

229. 870 P.2d 947 (Utah 1994). I also discuss *Scott* in Walsh, *supra* note 4, at 59-60.

230. *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, No. CV 93 302072, 1995 WL 348181 (Conn. Super. Ct. May 31, 1995). I also discuss *Rosado* in Walsh, *supra* note 4.

privilege statute protected only the minister from forced disclosure, not the accused penitent. Nevertheless, going beyond the statute, the court declared that Connecticut common law must be read in light of the nation's postcolonial origins and its historical constitutional commitment to religious liberty. Invoking *Philips*, the Connecticut court declared that "[w]hatever the basis, since the early nineteenth century, courts have manifested a reluctance to compel the disclosure of confidential communications to the clergy."<sup>231</sup> Judge Levin was satisfied that the statutory limitation was an oversight, and that recognizing the penitent as an additional holder of the privilege would indeed further its benevolent social purpose. Accordingly, in an erudite opinion, Judge Levin announced a rule of Connecticut common law, implied by constitutional guarantees of religious freedom, that penitents may not be forced to disclose their own spiritual communications any more than the clergy to whom they entrust their confidences.

The next year, in *Nestle v. Commonwealth of Virginia*,<sup>232</sup> the Virginia Court of Appeals faced the identical issue posed in *Rosado*, but chose to treat the issue as one of pure statutory construction, concluding that only the clergy hold the privilege. The defendant, who was charged with embezzlement of church funds, had successfully asserted the clergy privilege at trial. This ruling was reversed on appeal when the court held "that under Virginia law, the priest-penitent privilege belongs to the clergyman, not the layman."<sup>233</sup> Again, the court relied on *Philips* as the historical foundation of the American clergy privilege, noting that even today this evidentiary principle constitutes a significant postcolonial constitutional deviation from English common law.

In early 1997, the federal Court of Appeals for the Ninth Circuit decided a case which had already achieved international notoriety. In *Mockaitis v. Harclerod*,<sup>234</sup> an Oregon district attorney had secretly taped the sacramental jailhouse confession of an accused murderer, with the intention of introducing its contents at trial. When this became known, a public outcry resulted. Father Timothy Mockaitis, the Catholic priest who heard the confession, and other diocesan representatives immediately demanded that the tape be destroyed, and that no further taping of sacramental confessions take place in the jail. District attorney Douglass Harclerod stood his ground, claiming that such evidence might help convict a brutal killer.

Without any notice to Father Mockaitis, two successive trial judges issued separate orders allowing the prosecution to seize and transcribe the tape, and holding that the diocese had no standing to object. Under intense public pressure, district attorney Harclerod sheepishly conceded that while his action was both legal and ethical, it was "simply not right" and fell "within the zone of societally unacceptable conduct."<sup>235</sup> Curiously, however, the accused penitent sided with the prosecution, claiming that the tape exonerated him: "I want the tape to be preserved and for my attorneys to be able to use it as evidence in my defense, because people may not believe what I say about it. Lots of people think that I confessed to killing the victims because of the news reports about the tape, but I didn't confess to that because I didn't do it."<sup>236</sup> Father Mockaitis and his archbishop then sued in the federal district court, which refused to interfere

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231. *Rosado*, 1995 WL 348181, at \*14.

232. 470 S.E.2d 133 (Va. Ct. App. 1996). I also discuss *Nestle* in Walsh, *supra* note 4.

233. 470 S.E.2d 133 at 137.

234. 104 F.3d 1522 (1997). I also discuss *Mockaitis* in Walsh, *supra* note 4.

235. 104 F.3d at 1527.

236. *Id.*

with the pending state criminal prosecution, reasoning that the defendant's right to a fair trial outweighed the First Amendment rights of Father Mockaitis.<sup>237</sup>

On appeal, Father Mockaitis argued that the federal district court had denied his religious freedom rights under the First Amendment, under the Oregon state constitution, and under the federal Religious Freedom Restoration Act ("RFRA"); had denied his right to privacy under the Fourth Amendment; and had also denied his rights under the Wiretapping Act and the Civil Rights Act. District attorney Harclerod responded that the RFRA was unconstitutional and that his actions were otherwise perfectly lawful. The United States entered the case as *amicus curiae* to defend the RFRA's constitutionality. The opinion for the Ninth Circuit federal appeals court was written by Judge John Noonan, ironically perhaps the most prominent Catholic intellectual on the federal bench, together with Justice Scalia. In contrast to Justice Scalia, Judge Noonan joined Judges Thompson and Kleinfeld in upholding the constitutionality of the RFRA. The *Mockaitis* court denied only the request for destruction of the controversial tape, pointing out that the penitent had his own right to disclose the substance of his own sacramental confession, and reasoning that the continuing existence of the tape during the pending prosecution did nothing to burden Father Mockaitis's religious exercise. The Ninth Circuit remanded the case to the federal district court for declaratory and injunctive relief in favor of the Roman Catholic diocese, ensuring that no future intrusions into the priest-penitent relationship would occur.<sup>238</sup>

Judge Noonan wrote that there was "no question"<sup>239</sup> that the district attorney's actions violated the First Amendment rights of both Father Mockaitis and the jail inmates. Relying on a previously untried constitutional theory, Judge Noonan also held that the taping of the sacramental confession violated Father Mockaitis's expectation of privacy under the Fourth Amendment. "[T]he history of the nation has shown a uniform respect for the character of sacramental confession as inviolable by government agents interested in securing evidence of crime from the lips of criminal[s]." For this proposition, Judge Noonan cited *Philips*, saying that "The first known case in the United States to consider such an attempt is famous for the court's rejection of the invasion and for the court's reason for its rejection."<sup>240</sup>

In *Mockaitis*, Judge Noonan quoted at considerable length from Mayor Clinton's opinion in *Philips*. Like the other courts that have recently confronted this issue, Judge Noonan summarized the history of the postcolonial priest-penitent privilege, including its codification and its apparent adoption by the federal Supreme Court. Because no case exists in which a court has permitted a government agency to break the seal of the Catholic confessional, Father Mockaitis reasonably relied on "the nation's history of respect for religion in general and respect for the sanctity of the secrets of confession in particular, and so had a reasonable expectation of privacy."<sup>241</sup>

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237. *Id.* at 1522.

238. *Id.* at 1530-34.

239. *Id.* at 1530.

240. *Id.* at 1532.

241. *Id.* at 1533. Since *Mockaitis*, another federal circuit court has considered the applicability of the priest-penitent privilege to communications between Alcoholics Anonymous members while declining to consider whether they are constitutionally protected. *Cox v. Miller*, 296 F.3d 89 (2d Cir. 2002).

Just a few months after *Mockaitis*, Justice Scalia's concurrence in *Flores* joined in the federal Supreme Court's declaration that the RFRA was unconstitutional, and argued that the *Philips* doctrine of constitutional exemptions from generally applicable laws lacks historical support. In particular, Justice Scalia insisted that *Philips* was wrongly decided and, he seems to argue, provides no constitutional free exercise justification for the priest-penitent privilege. In *Flores*, Justice Scalia thus became the first Supreme Court jurist to cast doubt on the constitutionality of the clergy privilege, criticizing *Philips* as "weak authority," a "lone case" from a "minor court," which had completely misread the constitutional free exercise guarantees in Jeffersonian America.<sup>242</sup>

In reaching this aberrant conclusion, Justice Scalia's only judicial ally is Pennsylvania's antebellum Chief Justice Gibson in *Simon's Executor's v. Gratz* (1831).<sup>243</sup> In fact, 13 courts have directly cited *Philips* as historical support for an American clergy privilege, 4 before the Civil War, and 9 since the Second World War, and *Philips*' win-loss record now stands at an impressive 11-2. Indeed, *Philips*' post-war renaissance after a century of judicial oblivion has recently gained strong momentum, since fully half of these baker's dozen references to *Philips* have come within the past decade, most notably in *Flores*.<sup>244</sup>

#### VI. *PHILIPS*' LESSON FOR POSTCOLONIAL JURISPRUDENCE

Why the enduring jurisprudential legacy of William Sampson's hibernocentric postcolonial constitutional principle of a priest-penitent testimonial privilege?

Despite frequent scholarly failure to notice the postcolonial constitutional and common-law justifications for the now-codified priest-penitent privilege, religious liberty is routinely assigned as its basic rationale.<sup>245</sup> Legal scholars have also touted a

242. *City of Boerne v. Flores*, 521 U.S. 507, 543 (1997). For a full critique of Justice Scalia's historiography, see Walsh, *supra* note 4.

243. *Simon's Executors v. Gratz*, 2 Pen. & W. 412, 416-18 (Pa. 1831).

244. All of these cases are cited *supra* note 108, and discussed in detail in Walsh, *supra* note 4.

245. *Trammel v. United States*, 445 U.S. 40, 45 (1980); *In Re Verplank*, 329 F. Supp. 433, 435 (C. D. Cal. 1971); *Mullen v. United States*, 263 F.2d 275, 281 (D.C. Cir. 1959); *People v. Philips* (N.Y. Ct. Gen. Sess. 1813), reported in SAMPSON, *supra* note 2; *People v. Smith*, 2 Rogers' N.Y. City-Hall Recorder 77 (Ct. Oyer & Term. 1817), reproduced in 1 AMERICAN STATE TRIALS 779 (John D. Lawson ed., 1914).

For legal scholarship, see BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, *supra* note 166; BEST, *supra* note 139 §§ 990-94; Callahan, *supra* note 13, at 333-37; CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 76.2 (1985); GREENLEAF, *supra* note 142; Hogan, *supra* note 193; Timothy Walker, Editor's Note to *People v. Phillips*, 1 West. L.J. 109, 113-114 (1844); W.F. Finlason, Note to *Regina v. Hay*, 2 Foster & Finlason 4, 175 Eng. Rep. 933 (Assizes 1860); Note on the Priest-Penitent Privilege, 6 JURIST (n.s.), Pt. 2, 320-21 (London 1860); EDWARD BADELEY, THE PRIVILEGE OF RELIGIOUS CONFESSIONS IN ENGLISH COURTS OF JUSTICE CONSIDERED, IN A LETTER TO A FRIEND (1865); WHARTON, *supra* note 122 §§ 580-83; COLERIDGE, *supra* note 137, at 364; Reese, *supra* note 106; Kuhlmann, *supra* note 106, at 287; Yellin, *supra* note 106 at 112-13. Of these theorists, the following have relied explicitly on constitutional free exercise grounds: Callahan, *Philips*, Walker, Anonymous (Privileged Communications). Others may do so implicitly: *Trammel*, *Smith*, *Cook*, *Mullen*, *Verplank*, and

dizzying array of additional explanations. Like religious liberty, some are principled. A second justification is that the clergy privilege is in the general realm of the right to privacy.<sup>246</sup> Third, in similar vein, some argue that relationships of trust should not be broken by the law.<sup>247</sup> Fourth, it is sometimes seen as necessary to protect both penitent and clergy from incriminating themselves.<sup>248</sup>

Next come several justifications that are roughly utilitarian. Fifth, it is said the public expects that such communications will be protected.<sup>249</sup> Sixth, there is the utilitarian claim of a benefit to society from the repentance of wrongdoers and their diversion from crime.<sup>250</sup> Seventh, on similar grounds it is argued that confidential communications between believers and their spiritual advisers serve a socially benevolent therapeutic purpose for those in trouble.<sup>251</sup> Eighth, and equally pragmatically, some point to the futility of seeking testimony from those who are bound to conceal it.<sup>252</sup> Ninth, the clergy privilege satisfies Wigmore's four utilitarian canons for the protection of confidential communications, which embody several of the above rationales.<sup>253</sup>

Other disparate justifications for the priest-penitent privilege remain. Tenth, there is the historical argument that the English denial of the privilege since the Protestant Restoration is a perversion of the early common law.<sup>254</sup> Eleventh, the postcolonial

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McCormick. Hogan seemed to recognize the constitutional argument, but found it lacking in precedent. Kuhlmann, a strong but pessimistic supporter of the privilege, concluded that *Philips'* constitutional foundation would be rejected today in light of more recent cases describing the privilege as purely statutory. Yellin left the free exercise argument open.

246. Reese, *supra* note 106, at 60.

247. *Mullen v. United States*, 263 F.2d 275, 281 (D.C. Cir. 1959); Reese, *supra* note 106, at 181; Kuhlmann, *supra* note 106, at 286; 5 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* 1 (2d ed. Boston 1923); WHARTON, *supra* note 122, § 596; COLERIDGE, *supra* note 137, at 364; Yellin, *supra* note 106, at 110–11, 113.

248. *People v. Philips* (N.Y. Ct. Gen. Sess. 1813), reported in SAMPSON, *supra* note 2; *Commonwealth v. Drake*, 15 Mass. (14 Tyng) 161 (1818); *People v. Smith*, 2 Rogers' N.Y. City-Hall Recorder 77 (Ct. Oyer & Term. 1817), reproduced in 1 AMERICAN STATE TRIALS 779 (John D. Lawson ed., 1914); Kuhlmann, *supra* note 106, at 287; Callahan, *supra* note 13, at 328, 333.

249. WHARTON, *supra* note 122 §596; 8 J. WIGMORE, *WIGMORE ON EVIDENCE*, § 2394 (McNaughton rev. 1961); *Cook v. Carroll*, [1945] 1.R. 515 (Ir. H. Ct.); Reese, *supra* note 106, at 81; Yellin, *supra* note 106, at 95.

250. *People v. Philips* (N.Y. Ct. Gen. Sess. 1813), reported in SAMPSON, *supra* note 2; 9 BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE*, *supra* note 166; Reese, *supra* note 106; WIGMORE, *supra* note 249; Kuhlmann, *supra* note 106, at 287; Yellin, *supra* note 106, at 109, 113.

251. *Trammel v. United States*, 445 U.S. 40, 45 (1980). Reese, *supra* note 106, at 81–82; Kuhlmann, *supra* note 106, at 287.

252. Reese, *supra* note 106, at 81; Yellin *supra* note 106, at 110–113; Kuhlmann argues that without the privilege, such communications would “dry up,” with no gain to society. Kuhlmann, *supra* note 106, at 287.

253. *Cook v. Carroll*, [1945] 1.R. 515 (Ir. H. Ct.); *Mullen v. United States*, 263 F.2d 275, 279–80 (D.C. Cir. 1959); WIGMORE, *supra* note 249.

254. *Note on the Priest-Penitent Privilege*, 6 JURIST (n.s.), Pt. 2, 319, 320 (London 1860); BADELEY, *supra* note 245; Best, *supra* note 139 §§ 583–585; W.F. Finlason, *Note to Regina v. Hay*, 2 Foster & Finlason 4, 175 Eng. Rep. 933 (Assizes 1860) Nolan, *The Law of the*

clergy privilege has been recognized because of the need to construct a nationalist jurisprudence free of colonial debris.<sup>255</sup> Last, and surely most bizarre, is the rationale offered by the English Victorian jurist, Justice Willes, who resolved to uphold the clergy privilege on the ground that "[a]bsolution is a judicial act. . . and no judge is ever obliged to state his reasons for his decision."<sup>256</sup>

Modern American controversies no longer concern themselves with establishing the existence of the postcolonial priest-penitent privilege, but rather with defining its unruly scope. In 1963, Reese reported that "relatively few cases in the field have reached appellate courts."<sup>257</sup> He located decisions in only fourteen out of the forty-four states that then had clergy statutes. Five years later, Kuhlmann could discover "no rhyme or reason in the cases" to guide the clergy. "The court's decision on the issue of privilege often seems to depend more on the result the court wants to reach on the substantive issue in the case than on a logical application of the clergyman-privilege statute."<sup>258</sup> As late as 1983, Yellin still found that "relatively few cases" had considered the privilege.<sup>259</sup> Since colonial times, he compared roughly seventy indexed cases on the clergy privilege nationwide with almost double that number on the attorney-client privilege in California alone over a shorter period. Dissatisfied with the manifest failure of the proposed uniform rule on the clergy privilege, Reese, Kuhlmann, and Yellin urged and even drafted new model statutes.<sup>260</sup>

Current conflicts regarding the postcolonial clergy evidentiary privilege revolve around issues such as the following: Who holds the privilege, clergy, congregant, or both? Can either waive it? Who are "clergy" for the purpose of the privilege? Must they be acting in their professional capacity? Does the privilege extend to those who assist them in their work? What about communications to clergy of another denomination? Beyond sacramental communications like confessions, what other secrets are protected by the privilege, and does this turn on internal church discipline? Although the clergy may not disclose what they hear, must they reveal their own observations during the course of the spiritual communication? And how far does the privilege go when third parties are threatened?<sup>261</sup> Typical topical tussles, for example, include whether marital counseling or knowledge of child abuse should be privileged.

In answering such questions, the jurisprudential source of the privilege is surely relevant. Do modern American statutes actually create the clergy privilege, or rather acknowledge constitutional, common-law, or natural human rights? Mayor Clinton's postcolonial legal reasoning in *Philips* is quite different to that of modern courts parroting Wigmore that have routinely failed to examine this fascinating jurisprudential

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*Seal of the Confessional*, 13 Cath. Encyc. 649 (1913); Callahan, *supra* note 13, at 334-37; Yellin, *supra* note 106, at 95-101.

255. *People v. Philips* (N.Y. Ct. Gen. Sess. 1813), reported in SAMPSON, *supra* note 2; *Cook v. Carroll*, [1945] I.R. 515 (Ir. H. Ct.); *Mullen v. United States*, 263 F.2d 275, 280 (D.C. Cir. 1959); *In Re Verplank*, 329 F. Supp. 433, 435 (C. D. Cal. 1971). Callahan, *supra* note 13.

256. COLERIDGE, *supra* note 137.

257. Reese, *supra* note 106, at 58-59.

258. Kuhlmann, *supra* note 106, at 269.

259. Yellin, *supra* note 106, at 95-96.

260. Kuhlmann, *supra* note 106, at 286-92; Reese, *supra* note 106, at 80-88; Yellin, *supra* note 106, at 142-56.

261. For answers to these questions, and more, see Kuhlmann, *supra* note 106; Reese, *supra* note 106; Yellin, *supra* note 106.

history. Most legal scholars have been equally delinquent. Throughout its history, and certainly since *Philips* was argued as a test case for New York's Irish Catholic exiles by their banished United Irish cause lawyer William Sampson, the Irish-American clergy privilege has been intimately tied to the larger constitutional and human rights history of religious freedom and equality.

On the jurisprudential conundrum of the postcolonial priest-penitent privilege, neither constitutional nor evidentiary scholars have ever fully come to grips with the intricate and interdependent relationships between ideology, power, and legal doctrine. Perhaps among the most thoughtful, if still inadequate, descriptions of the clergy privilege's political dimensions is that offered by the student editors of the *Harvard Law Review* in their essay on the evolution of the law of evidence. The Harvard editors come closest to capturing the Sampsonian essence of the postcolonial priest-penitent evidentiary privilege. They begin by rejecting as incoherent the two primary rationales, Wigmore's utilitarian canons and the privacy theory, that have been offered to justify the law of privileges in general. With respect to Wigmore's four canons ("the traditional justification"), the authors note telling attacks on their lack of empirical foundation.<sup>262</sup> With respect to the privacy theory, the authors point out that it provides no normative standard for choosing which interests are to be protected.<sup>263</sup>

In place of these older rationales, the review editors attempt a political explanation for the confused body of privilege law, including the priest-penitent privilege. Two new theories of evidentiary privileges are proposed, the power theory and the image theory.<sup>264</sup> The power theory largely departs from the received dichotomy between law and politics. "It asserts instead that the real roots of privilege law lie in the power of those benefiting from it. . . . It explains privilege law not as an effort to encourage communications or to protect privacy, but as special treatment won by the power of those privileged."<sup>265</sup> The power theory suggests that both legislative and judicial decisions on privilege law are influenced by powerful minorities advancing their self-interest. Indeed, the very word "privilege" transparently suggests the protection of "a favored elite."<sup>266</sup>

The image theory is a variant of the power theory. It posits that the law of privileges may be understood as a means of preserving the image and legitimacy of the legal system. By avoiding confrontations with those most likely to defy the authority of the court, the distribution of privileges masks the system's possible incapacity to compel obedience.<sup>267</sup> Both the power theory and the image theory see privileges as politically influenced, but the power theory focuses on power relations among litigants, whereas the image theory focuses on the allocation of power between judges and litigants.<sup>268</sup>

In marked contrast, under the questionable historical methodology of recent constitutional theorists such as Justice Antonin Scalia and Professor Gerard Bradley, the reasons that impelled Mayor Clinton and three other judges in *Philips* to recognize a free exercise exemption must be peremptorily dismissed as "a political

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262. *Privileged Communications*, *supra* note 104, at 1472–80.

263. *Id.* at 1480–83.

264. *Id.* at 1493–1500.

265. *Id.* at 1493.

266. *Id.* at 1494.

267. *Id.* at 1498–99.

268. *Id.* at 1500.

phenomenon."<sup>269</sup> Thus, that early, deliberate constitutional defense of a religious, cultural, ethnic, and political minority must be suppressed. Instead, the Harvard editors candidly consider "whether the imperfect political input of powerful minorities is *per se* delegitimizing or whether it could ever actually legitimate privilege law."<sup>270</sup> By the nature of normative choice, they point out, legal and political decisions are informed by a social vision that incorporates particular empirical assumptions about human behavior and values. Announced justifications for the law of privileges are not rendered incoherent simply because some predominant social vision supplies their assumptions and shapes their contours. The fact that political power influences these normative and empirical assumptions does not show that the proffered rationale is applied illegitimately. "Indeed, the legitimacy of these decisions *requires* that the assumptions be politically influenced."<sup>271</sup>

Doesn't acknowledging the legitimacy of political influence risk privileging the interests of a powerful majority over those of the powerless minority? It is certainly true that the more powerful the group, the more likely that its vision of behavior and value will predominate, reply the Harvard writers. "But competing visions of behavioral patterns and social values will always exist."<sup>272</sup> This requires a compromise equilibrium which advances the interests of the powerful while gaining the acquiescence of the less powerful in society.

But the *Harvard Law Review* editors then stumble in their particular effort to explain the Irish-American postcolonial priest-penitent privilege. They begin with the uncontroversial observation that the clergy privilege is founded on a social vision that values the sanctity of religious counseling. This belief certainly serves the groups promoting it, but it may also serve the society that accepts it. Then they make this ahistorical pronouncement: "[A]lthough the recognition of the priest-penitent privilege undoubtedly stems in part from the power of the Catholic Church, its recognition also stems from an accommodation by the secular state to the religious beliefs of a large population."<sup>273</sup> Neither proposition accurately describes the historical circumstances surrounding *Philips*. Moreover, in locating "power" within society, the law review editors describe the legal regulation of social relations as something static, not as a shifting jurisprudential product of political struggle.

Although the review authors duly apply their power theory to explain the current recognition of the clergy privilege, they fail hopelessly in accounting historically for its surprisingly early appearance in the postcolonial Jeffersonian United States. This is surely conspicuous, since the editors claim subtle support for their version of a power theory in the historical evolution of privilege justifications. In the legislature, they note, the influence of powerful minorities has been illustrated by the fact that many new privileges have been won through successful lobbying.<sup>274</sup> Older judicially recognized doctrines such as the attorney-client and marital privileges can also be explained by the power theory, the former in terms of the power of lawyers, the latter in terms of the

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269. Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 292 (1991). For a full critique, see Walsh, *supra* note 4.

270. *Privileged Communications*, *supra* note 104, at 1496.

271. *Id.* (emphasis in original).

272. *Id.* at 1497.

273. *Id.*

274. *Id.* at 1494.



historic domination of wives by husbands.<sup>275</sup> Conversely, the Harvard writers propose that rising egalitarianism may have killed off the eighteenth-century privilege shielding the honor of "gentlemen" who had promised confidentiality.<sup>276</sup>

Historically, as attested by their complete silence on the matter, the postcolonial priest-penitent privilege is problematic for the *Harvard Law Review's* analysis. Simply stated, their version of a power theory does not easily account for *Philips'* constitutional break from the English common law. Professor Gerard Bradley does point out that *Philips* can readily be understood in terms of Mayor Clinton's close political ties to the United Irish immigrant community which flocked to New York after the failed rebellion of 1798. But this quick explanation is at best superficial with regard to *Philips*; and, more importantly, it utterly fails to comprehend the subsequent legislative and judicial adoption of the postcolonial priest-penitent privilege nationwide. Surprisingly, perhaps, this transformation in human rights jurisprudence occurred through the course of a persistent and often violent tradition of American nativist anti-Catholicism that has extended well into the present century. In 1813, when *Philips* was decided, far from a being a favored elite, Sampson's immigrant Irish Catholic refugee clients were barely tolerated cultural outsiders. They fought for equality, not for dominance. Theirs was a principled triumph for human rights, not a show of force. Jeffersonian New York City's Irish Catholic refugee community can be termed a powerful minority only by saying the same today of many other historically-excluded groups such as African-Americans, women, or the gay and lesbian community.

We can look towards William Sampson's United Irish postcolonial legal rhetoric in *Philips* for the key to unlocking this perplexing jurisprudential puzzle. Sampson's argument in hibernocentric postcolonial jurisprudence for Father Kohlmann is certainly one important early articulation of a power theory of law, but Sampson offers a critical refinement that is often missed. Sampson pointed out that control of legal ideology itself confers normative legitimacy, for better or for worse. Even during the disintegration of the Irish Penal Laws against Roman Catholics, recognition of the priest-penitent privilege by a Protestant judiciary was unlikely. "The system under which they acted; the barbarous code with which they were familiar, was enough to taint their judgment. No judge, no legislator, historian, poet or philosopher, but what has been tinctured with the follies or superstitions of his age."<sup>277</sup> In rejecting the privilege, "may we not well suspect those Irish judges to have imbibed the poison of their cruel code, and to have eaten of the insane root that taketh the reason prisoner."<sup>278</sup>

More recently, Marxist critical theorists have similarly dwelt on the ability of the dominant order to regenerate itself without apparent coercion, Gramsci speaking in terms of ideological hegemony and Bourdieu in terms of symbolic capital. While acknowledging that legal ideology reflects existing distributions of power, these thinkers follow Sampson in suggesting that legal ideology also acts autonomously, itself either perpetuating or reallocating political power distributions. Thus, any calculation of political power must somehow weigh the rhetorical force of insurgent legal argumentation, whose radical ideological power lies precisely in the doubtful

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275. *Id.* at 1527 n.146.

276. *Id.* at 1495.

277. SAMPSON, *supra* note 2, at 64.

278. *Id.*

domain of human interpretation. A power theory of law is of little use if it merely retrospectively purports to confirm some false inevitability of legal rules. It would be valuable only if one could anticipate, prospectively, the political power of some untested legal claim against an existing power distribution. Put differently, when *Philips* was argued in a New York City courtroom in that hot, fateful summer of 1813, was the postcolonial jurisprudential history of the Irish-American priest-penitent privilege somehow already ordained? How so?

The Harvard authors avoid these difficult questions. They simply say that “[t]he acceptability of any particular vision to other groups will determine both whether that vision predominates and, *concomitantly*, the power of the group promoting that vision.”<sup>279</sup> Their static approach to privilege justifications obscures the constant that emergent legal ideologies are in themselves important sources of political power. It is impossible to measure the political power of competing social groups without first attributing a precise value to the legal rhetoric at their disposal. In impact litigation such as *Philips*, the power of the group seeking to convert its political demands into legal doctrine is not simply concomitant upon the acceptability of its social vision to other groups: social acceptance is itself conditioned by the persuasive articulation of revisionist legal ideology.

*Philips* was argued during the continuance of colonial laws denying equal civil rights to Roman Catholics, long before their refugee immigrant community had gained a strong demographic or constitutional foothold in the United States. Thus, *Philips* cannot be understood as a simple reaction to political considerations. To the contrary, the tenuous influence of the Irish Catholic refugees was a product of the radical egalitarian United Irish legal rhetoric constructed by their advocates. In response, Mayor Clinton and his fellow judges made a calculated choice to break and reallocate prevailing political power by legitimating the iconoclastic legal theory of a hitherto excluded group. Not content with this courtroom victory, Sampson continued his assault on the anti-Catholic premises of the English common law with his publication of *The Catholic Question in America* and his nationalist push for wholesale codification. Only a Sampsonian recognition of the independent political power unleashed by these subversive but emergent postcolonial legal ideologies can fully explain the subsequent endorsement of the clergy privilege by a Protestant judiciary, and its nationwide adoption by state legislatures in which Catholics were typically outnumbered.

As every minority knows, resistance tests power. In the words of William Sampson, “to the just resistance of the people is owed everything boasted of in our political theory.”<sup>280</sup> This is empirically evident from the history of the American clergy privilege from *Philips* onwards. Historically, the postcolonial priest-penitent privilege did not merely react to the power of the historically distrusted Catholic Church in the United States, but rather that legal principle itself constituted a vital source of that power. Ideologically armed with the very political power they had newly acquired through constitutional guarantees of free religious exercise, judicial application of that protection in *Philips*, and increasing statutory recognition of their legal equality, the

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279. *Privileged Communications*, *supra* note 104, at 1497 (emphasis added).

280. WILLIAM SAMPSON, *ADVICE TO THE RICH* 7 (Dublin 1796). The postcolonial American priest-penitent privilege of *Philips* was adopted in place of the colonial Irish decision of *Butler v. Moore*.

rapidly growing American Catholic minority gradually claimed cultural space in a formerly closed and hostile society. By doing so, they forced open the door for other excluded minorities to follow them by asserting similar claims to freedom and equality. New York City's United Irish immigrants thus laid vital historical foundations for the uniquely American phenomenon of multicultural pluralism that the federal Supreme Court recognized in *Sherbert* a century and a half later.

In this Article, I have followed the jurisprudential influence of *Philips*, the first successful free exercise case in American constitutional law, as the historical source of the Irish-American postcolonial priest-penitent privilege in the law of evidence. I have suggested that constitutional and evidentiary historians typically misread *Philips* because they fail to appreciate its complex ethnic and ideological dimensions. In its inception, its argumentation, and its resolution, the first free exercise case did not turn on so-called original intent, but rested on a radically revisionist United Irish portrait of the historic persecution suffered by New York City's immigrant Irish Catholics. The courtroom victory of an oppressed people in *Philips* reflected a great deal more than one judge's views. In the first free exercise case, an historically-excluded American minority successfully asserted their postcolonial constitutional claim to religious, political, and cultural equality in their adopted republican homeland. By tracing the legal history of that case, I have tried to offer this postcolonial jurisprudence of struggle which stands opposed to the imperial tradition of repressing religious freedom in the North American colonies.

After challenging previous interpretations of *Philips*, I located that decision within a larger story of power and resistance. I have tried to decipher William Sampson's postcolonial legal theory and practice which draws heavily upon Sampsonian thought and experience. Although critical in inspiration, that jurisprudence nowhere discounts the central importance of legal ideology. Rather, legal structure is presented as a changing cultural artifact which both reflects and engenders social conflict. Minority groups such as the immigrant Irish have had to destabilize existing political structures and cultural norms. In the courtroom, such political demands gain authority precisely because they are presented as legal claims. Legal ideology is not simply the contested prize of political struggle, it also sets the terms within which resistance takes place. Just as law can be the instrument of dominant power, it can also be the lever that overturns an oppressive social order. Hence, a postcolonial jurisprudence explicitly recognizes the central role of legal ideology in both establishing and destroying structures of political and cultural domination.

This recovered history suggests that Louisell's hunch was surely right. Empirical study does show that the adoption of William Sampson's postcolonial 1813 argument for the priest-penitent privilege was indeed a signal early triumph for human rights jurisprudence and equality theory. As the first constitutional victory for religious freedom, and the first judicially recognized conscientious exemption, *Philips* teaches us much about the postcolonial minority legal politics of religion, ethnicity, equality and cultural inclusion. From that minority hibernocentric perspective, *Philips* represented a legal victory for the political demand of the Irish Catholic refugees to be accepted as equals in their adopted republic. At no time in American constitutional history has that jurisprudence of minority struggle lain dormant, although its full implications have become increasingly manifest since the 1960s. At the outset of that decade, after a long history of exclusion and resistance, the Irish Catholic immigrants finally achieved their great American symbol of minority inclusion: John Fitzgerald Kennedy, a son of Irish immigrants, was elected the first Roman Catholic president of

the United States. This essay on the history of the postcolonial Irish-American priest-penitent privilege is an essay on the early history of modern human rights jurisprudence, long before the more recent adoption of international treaties.

At this point I shall lay down my pen. I have tried to write the first postcolonial history of the clergy privilege's gradual transcendence over the prior anglocentric jurisprudence inherited from the colonial regime. The story of the Irish-American priest-penitent privilege is one of shadows, myth, and illusion. If nothing else, it demonstrates that in legal ideology, perception is the only reality. This history exposes the political quality of legal doctrine, and offers the means for the destruction of dominant power through an alternative social vision and the rhetorical elevation of subversive legal theory. This is William Sampson's jurisprudence of postcolonial struggle.

