Religious Confession Privilege and the Common Law

Introduction

The chronological genesis for the research that became my PhD and eventually my book entitled “Religious Confession Privilege at Common Law”,[[1]](#footnote-1) came in 1999 at the District Court in Orange, New South Wales in an unreported case called *R v Mills*. In a religious confession privilege case that involved a paedophile, issues of waiver saw that District Court Judge admit some recorded confessional evidence which had found its way into the hands of police and saw that District Court judge claim, despite the NSW Religious Confession Privilege statute to the contrary,[[2]](#footnote-2) that there was no religious confession privilege at common law. I was surprised and perhaps even shocked that he should so believe.

But the ideological genesis for my commitment came much earlier and I cannot identify a specific start date. It is bound up in my religious faith as a whole which came at my parents fireside and in Sunday School and Seminary classes. But two statements that have refined my generalized beliefs where religious confession are concerned and which I discovered in the early 1990s are as follows:

The LDS Prophet Joseph Smith said:

I am bold to declare before Heaven that I am just as ready to die in defending the rights of a Presbyterian, a Baptist, or a good man of any other denomination; for the same principle which would trample upon the rights of the Latter-day Saints would trample upon the rights of the Roman Catholics, or of any other denomination who may be unpopular and too weak to defend themselves.[[3]](#footnote-3)

The 15th President of the LDS Church, Gordon B. Hinckley told a select group of us in his Office of General Counsel:

The confidentiality of confession is essential to the operation of the Christian atonement.

I cannot give you a source for that statement because apart from my own writings, I have not seen it published. But I have pondered it carefully and I have concluded that it means at least this – that if human beings are not able to shrive their souls, they cannot repent and be cleansed of their sins and begin or continue their faith journey to become like God and Jesus Christ. In secular terms, the human need for a clean slate as a part of starting over, requires an avuncular figure to physically hear that resolve expressed as a symbol of the beginning of a new and improved life journey. Any impediment to religious confession thus stands as an impediment to the spiritual, emotional and psychological healing of all human beings.

History

The Seal of Confession

Though Christians like to trace modern confessional practice to various biblical statements made by Christ himself,[[4]](#footnote-4) general scholarly consensus holds that confessional practice developed after his death and was initially public in nature.[[5]](#footnote-5) The Greek word “exomologesis” describes a practice under which intending new converts would address the congregation and renounce their old sins in a public and generalized way. But it is not clear whether this practice was available to existing members of the Church or whether it could be repeated. There is diversity of opinion as to when and how private confession and the seal took root, but it seems clear that the practice had Irish origins and that the process was complete by the end of the fourth century AD.[[6]](#footnote-6) At least in part, privacy originated to avoid the scandal that could result when too much detail about serious sin was revealed publicly,[[7]](#footnote-7) and to ease conversion.[[8]](#footnote-8)

But the seal itself came more slowly. Originally, even though confession became private, the names of penitents and their transgressions were read in church.[[9]](#footnote-9) But by 459 AD, Pope Leo I issued a papal letter that declared this practice was an abuse.[[10]](#footnote-10) Kurtsheid calls this letter “the first papal decretal safeguarding the secret of confession”.[[11]](#footnote-11) But he acknowledges that the evolution of the seal involved a distinction between secret or conscience sins and those which came to be defined in church canon law as scandal.[[12]](#footnote-12)

In any event, in England, Lanfranc whom William the Conqueror appointed Archbishop of Canterbury in 1070, wrote that a priest sinned against the sacrament of penance if he did or said anything to arouse public suspicion regarding what had been confessed to him.[[13]](#footnote-13) And the Fourth Lateran Council of 1215 put the inviolability of the seal beyond doubt anywhere in the church in its 21st canon which reads:

Let the priest absolutely beware that he does not by word or sign or by any manner whatever in any way betray the sinner: but if he should happen to need wiser counsel let him cautiously seek the same without any mention of person. For whoever shall dare to reveal a sin disclosed to him in the tribunal of penance we decree that he shall be not only deposed from the priestly office but that he shall be sent into the confinement of a monastery to do perpetual penance.[[14]](#footnote-14)

That canon has never been revoked. But the idea of confessional privacy can be detected in English law well before the Norman conquest in 1066 – in the secular laws of Edward the Elder (921-924), Ethelred (978-1016) and Canute (1017-1035).[[15]](#footnote-15) And though the so-called ‘investiture struggles’ between what we might call the secular and lay authorities had very English manifestations, as Pollock and Maitland point out, it was still most unlikely that a secular judiciary manned by ecclesiastics would deny the inviolability of the confessional seal when the confession was a sacrament of their faith.[[16]](#footnote-16)

Nor did the English reformation have a significant influence on the canon law surrounding religious confession. For although protestant confession became non-compulsory, Henry VIII needed clerical support to implement his version of the reformation and in practice, one price of that support was the status quo were canon law was concerned. While the clergy could make no new canons “except in convocation summoned by the King’s writ”,[[17]](#footnote-17) there were no new canons until the very end of the reign of Elizabeth I in 1603. Even then, the new 113th canon of the Anglican Church had a distinctly Catholic flavor. It reads:

Provided alwayes, that if any man confesse his secret and hidden sinnes to the Minister for the unburthening of his conscience, and to receive spirituall consolation and ease of minde from him, We doe not any way bind the sayd Minister by this our Constitution, but doe straightly charge and admonish him, that he do not at any time reveale and make knowen to any person whatsoever, any crime or offence so committed to his trust & secrecie (except they bee such crimes as by the Lawes of this Realme, his own life may be called into question for concealing the same) under paine of irregularitie[[18]](#footnote-18)

While there is debate about what authority that canon has in secular English law courts, despite canon law reviews in 1959 and 1969, that canon was preserved intact.[[19]](#footnote-19)

Legal history

In his last trial as Attorney-General before he was appointed Chief Justice of Common Pleas by King James I,[[20]](#footnote-20) Sir Edward Coke prosecuted the surviving gunpowder plotters. The last of those prosecuted was Father Henry Garnet, the Jesuit superior of England.[[21]](#footnote-21) Father Henry Garnet defended himself.[[22]](#footnote-22) He argued that what little he knew by reading between the lines, came to him in confession. Coke replied in effect that one could not prospectively confess one’s sins and in any event, treason was an exception to the inviolability of the seal of confession.[[23]](#footnote-23)

Though Wigmore and those who followed him in legal commentary upon the seal of confession state that this trial was an ‘indecisive incident’[[24]](#footnote-24) in the development of the law, it is surely difficult to suggest that Sir Edward Coke thought there was no such thing as religious confession privilege at common law in1606 else why did he need to distinguish it? And he did not leave the law on the matter to the record of trial, for he maintained his position in his Second Law Institute written and published after he had completely fallen out of favour with King James I and his son and successor Charles 1. There he wrote in commentary on the Statute Articuli Cleri of 1315:

This branch declareth the common law, that the priviledge of confession extendeth only to felonies ... and not to appeales of treason.[[25]](#footnote-25)

And he went on to justify his conclusion with extensive commentary on individual phrases used in the Statute, with some revealing stretching to find English common law authority for his treason exception which really had its antecedents in France.[[26]](#footnote-26)

Though Coke was said to be ‘ambiguous’[[27]](#footnote-27) where religious confession privilege was concerned, his heirs commenting upon the law of evidence have been decisive that there was no privilege. They have successively cited cases in 1791,[[28]](#footnote-28) 1828[[29]](#footnote-29) and 1881[[30]](#footnote-30) as authority for that proposition. But when those cases are read against the propositions they are said to justify in the texts, they simply do not make sense. *R v Sparkes* in 1791 was an unreported decision of a circuit judge and is only know because it was expressly disapproved in obiter comments made by the Chief Justice in a case about legal professional privilege the following year. Lord Justice Kenyon CJ said he would “have paused before [he] admitted the evidence there admitted”.[[31]](#footnote-31) *R v Gilham* in 1828 was a murder case where the accused had been persuaded by his gaoler to talk to the prison chaplain and thereafter had made a full confession to the mayor. His defence counsel argued that his confession was illegally obtained with what we might call, undue influence.[[32]](#footnote-32) Yet the case is cited in many texts as authority for the proposition that “it has ever been held that a minister is bound to disclose that which has been revealed to him in a matter of religious confession”.[[33]](#footnote-33) The more one reviews the early texts, the more one realizes that the early text writers simply copied one another without independently reviewing the cases which their predecessors cited as source.[[34]](#footnote-34) *Wheeler v LeMarchant* in 1881 was another case about legal professional privilege but in this case the question was whether that privilege protected a report obtained by a solicitor from a surveyor in connection with litigation. In an extemporaneous judgment, Sir George Jessel MR said without citing any authority:

[T]he principle [protecting confidential communications] is of a very limited character. It does not protect all confidential communications which a man must necessarily make in order to obtain advice necessary even for the protection of his life, or of his honour, to say nothing of his fortune. There are many communications which are quite unprotected, but which must be made because, without such communications being made, the ordinary business of life cannot be carried on. The communication made to a medical man, whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, and which must necessarily be made in order to enable the medical man to advise or to prescribe for the patient, is not protected. All communications made to the priest in the confessional, on matters perhaps considered by the penitent to be more important even than the care of his life or his fortune, are not protected. Communications made to a friend with respect to matters of the most delicate nature on which advice is sought, with respect to a man’s honour or reputation, are not protected. Therefore it must not be supposed that there is any principle which says that every confidential communication which, in order to carry on the ordinary business of life, is necessary to be made, is protected. The protection is of a very limited character. It is a protection in this country restricted to the obtaining the assistance of lawyers as regards the conduct of litigation, or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things necessary in the shape of communication to the legal advisers are protected from production or discovery, in order that that legal advice may be obtained safely and sufficiently.[[35]](#footnote-35)

There were many opposing views which might have been cited at the time, but they were not.[[36]](#footnote-36) And yet, because he was the Master of the Rolls and perhaps because so few religious confession privilege cases come before the courts because priests and other members of the clergy keep their confidences, *Wheeler v LeMarchant* is still cited as authority for the proposition that there never has been a religious confession privilege at common law. But that decision seems to have been the catalyst for the origins of religious confession privilege statutes in the British common law world. For the first of those turns up in New Zealand just four years later.[[37]](#footnote-37) The first Australian religious confession privilege statute came in Victoria in 1890.[[38]](#footnote-38) A similar contrary decision in New York in 1817 seems to have produced the same result in the United States.[[39]](#footnote-39) Every US State now has a religious confession privilege statute of some kind.[[40]](#footnote-40) And Australia has only three states (some would say two) without a statute on the point.[[41]](#footnote-41)

Policy

If we set aside the history and precedent wherever it leads; if we started with a clean sheet, should there be a religious confession privilege in the 21st century? The question is particularly topical in Australia in April 2013 since The Royal Commission into Institutional Responses to Child Sexual Abuse held its first sitting at 10.00am on Wednesday April 3rd in the County Court in William Street, Melbourne.

Rationales for and against religious confession privilege may be found in both jurisprudence and commentary. Sir George Jessel MR apparently dismissed the idea on the basis that the need for all the relevant evidence trumped any suggestion that a privilege that he had never studied would protect any communications with the clergy.[[42]](#footnote-42) Sir Owen Dixon CJ thought he could understand why a legislature might want to create such a privilege by statute since it was demonstrable that the judicial search for truth could cost too much and did not trump ever other public interest.[[43]](#footnote-43) Jeremy Bentham, otherwise well-known as a critic of evidentiary privileges in law,[[44]](#footnote-44) thought religious confession privilege was justified by the need for freedom of conscience and belief.[[45]](#footnote-45) Most academic commentators since have agreed that the public interest justified some form of religious communications privilege - often commenting after judges interpreted a statutory expression of the privilege narrowly to the seeming extinction of the legislative intent. Most notable among those has been John Henry Wigmore whose canons[[46]](#footnote-46) of interpretation were designed to guide courts in deciding whether a new confidential communications privilege should be recognised.[[47]](#footnote-47) His canons have been cited by many judges and other academic commentators since he first formulated them in 1904.[[48]](#footnote-48) The twentieth century’s surge of interest in human rights following the two world wars, has added a whole new layer of constitutional arguments which have been used to justify a religious confession privilege, though all of these arguments have genealogical roots in the first amendment to the United States Constitution and its denial to the United States Congress of any power to abrogate “the free exercise of religion”.[[49]](#footnote-49)

In the New Zealand Court of Appeal, Cooke J, later Lord Cooke of Thorndon in the House of Lords, has said:

The rationale of any such privilege must be that a person should not suffer temporal prejudice because of what is uttered under the dictates or influence of spiritual belief.[[50]](#footnote-50)

Chief Justice Burger from the United States Supreme Court has said:

The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. 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.[[51]](#footnote-51)

And Justice L’Heureux- Dubé J has suggested that a religious communications privilege could be justified by:

 society’s interest in religious communications;

freedom of religion;

 privacy interests.[[52]](#footnote-52)

She quotes Professor Cole’s explanations of society’s interest in religious confession privilege:

Religious confidentiality is vitally important to the maintenance of religious organizations as well as to their individual members. An atmosphere of trust, made possible by the knowledge that communications made in secret will remain secret, is the keystone of strong clergy-communicant relationships which are in turn the cement that holds many religious organizations together. In a very real sense, then, the value of religious confidentiality is the value to society of religion and religious organizations generally. Even from a purely utilitarian perspective, that value cannot be overstated. Religious organizations based on claims to unchanging truths are a stabilizing influence in an increasingly fast-paced and atomized society where bonds of community are scarce and worth preserving. Moreover, many provide needed social services that government is unwilling or unable to provide in a cost-efficient and humane manner.[[53]](#footnote-53)

Justice L’Heureux- Dubé J ends convinced. She states

These societal interests are intuitively compelling, if they acknowledge a privilege in those uncommon situations where the confidentiality of a relationship is so fundamental that breaching it would do more harm than good to society. In those circumstances, public policy would be promoted at the cost of the search for truth.[[54]](#footnote-54)

These last words are an uncited reference back to Knight Bruce VC in *Pearse v Pearse* who had stated in 1846

The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still for the obtaining of these objects, which however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination...Truth, like all good things, may be loved unwisely – may be pursued too keenly – may cost too much.[[55]](#footnote-55)

Owen Dixon J in Australia in 1940 later more negatively observed that “an inflexible rule was established that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box.”[[56]](#footnote-56) Only in a few cases

where paramount considerations of general policy appeared to require that there should be a special privilege, such as husband and wife, attorney and client, communications between jurors, the councils of the Crown and State secrets, and by statute, physician and patient an priest and penitent[[57]](#footnote-57)

would Owen Dixon J concede an exception to the inflexible disclosure rule. Owen Dixon J’s narrowing of the breadth of Knight Bruce VC’s principle, seems more consistent with the narrow approach to privilege that is common in modern courts.

Against all of this and consistent with the direction Owen Dixon J would have the courts take when exceptions to the inflexible disclosure rule are mooted, Wright and Graham have written that there is no empirical evidence to prove that confessions would dry up or presumably that churches would cease to exist, if there were no religious confession privilege. They state that “[t]he absence of any such privilege in most of the [United States] for much of our history suggests that the privilege is not essential to the legitimacy of the government”[[58]](#footnote-58) or presumably to the existence of the church and the continued practice of religious confession. They continue that

experience in countries that have taken more extreme measures against organized religion than requiring its functionaries to testify to confidential communications offers no convincing evidence of the destabilizing effects on governments or repression of religious activities.[[59]](#footnote-59)

But they are not completely convinced despite their effort to provide a balanced review of this instrumental argument. Why are they not convinced? Because “the continued vitality [of]...supposedly dormant religious feelings”[[60]](#footnote-60) was an unmistakable factor “in the collapse of governments in Eastern Europe in the late 1980s and [in the destabilization of]...the Middle East and the outlying parts of the Soviet Union”.[[61]](#footnote-61)

Professor Michael Young, former President of the University of Utah and a former Chair of the US Commission on International Freedom, has made this point more clearly and more recently when he stated

Religion is profoundly important intellectually. We cannot understand geopolitical movement, economics, politics and history without taking seriously the role and the nature of religion in the process…..Four fifths of the world’s people are profoundly religious, and religion matters enormously in their lives.[[62]](#footnote-62)

On balance, it would seem L’Heureux-Dubé J is right to be convinced that society has a significant interest in preserving religious confession privilege. That conclusion is the more justifiable when the power of religion is harnessed or at least neutralised as a factor in the legitimacy of government.

Recently, Professor Frank Brennan asserted like Professor Cole, that freedom of religion is an absolute and non-derogable value in a paper presented as part of the Australian debate about whether that country should adopt a bill or charter of rights or not. To demonstrate his point that the mere creation of a human rights instrument without more would not protect human rights in practice, he cited the failure of the Victorian State Parliament and the Australian Medical Association to protect the conscience rights of medical practitioners who did not wish to perform abortions. He said

this was the first real test of the Victorian Charter of Human Rights and Responsibilities and it failed spectacularly to protect a core non-derogable ICCPR human right which fell hostage to a broader social and political agenda for abortion law reform and a prevailing fad in bioethics which asserts that doctors should leave their consciences at the door. The outcome was the opposite of that reached in the UK, and with much thinner, more ideological reasoning.[[63]](#footnote-63)

While Brennan does not have much company in asserting that freedom of conscience (and one suspects, religion) is a non-derogable right even in light of the ICCPR context he cites, it clearly has a higher value than some other rights. In a chapter entitled “Are Human Rights Absolute?”[[64]](#footnote-64) Michael Perry says that

[n]o one argues that every human right – every “ought” and “ought not” – established by the international law of human rights is or even should be absolute. Indeed, some human rights established by international law are explicitly conditional rather than unconditional – and appropriately so.[[65]](#footnote-65)

But what of the right to freedom of conscience and religion? Contrary to Brennan, Perry says

Even some rights that many members of liberal democratic societies consider to be “fundamental” or “core” human rights – for example, the rights to freedom of expression and to freedom of religion – are, as established by international law, conditional rather than unconditional... Article 18 (protecting “the right to freedom of thought, conscience, and religion”)....provide[s] that the protected right is “subject...to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals of the fundamental rights and freedoms of others.”[[66]](#footnote-66)

Indeed, the only rights which Perry considers are truly non-derogable under the ICCPR are

“the inherent right to life” (Article 6); the right not to “be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (Article 7); and the right not to “be held in slavery...[or] in servitude (Article 8(1) & 8(2)).[[67]](#footnote-67)

And Perry observes that “Article 15(2) of the European Convention makes substantially the same rights non-derogable”.[[68]](#footnote-68) He then observes though some may consider that even these rights are derogable when analysed morally, the ICCPR and European Convention have made them legally non-derogable.[[69]](#footnote-69)

Long before the twenty-first century in the case of *The People v Phillips*,[[70]](#footnote-70) it was the 1777 New York Constitution that placed conditions upon the freedom of religion which it guaranteed. Those conditions were expressed in the Proviso to Article XXXVIII which stated “that the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state”. In summarizing the guarantee of freedom of religion thus granted Mayor De Witt Clinton who wrote the unanimous judgement observed that only negative acts would offend the proviso. “It would be stretching [the proviso] on the rack so [to] say that it can possibly contemplate the forbearance of a Roman catholic priest, to testify what he received in confession, or that it could ever consider the safety of the community involved in this question.”[[71]](#footnote-71) But though such interpretation was accommodating to this culturally understandable religious practice, the very same judge’s statement against some less well understood religions identifies space for the concern. He indicated that the law would not be prepared to accommodate

a religious sect [which]...violated the decencies of life, by practising their religious rites, in a state of nakedness: by following incest, and a community of wives. If the Hindoo should attempt to introduce the burning of widows on funeral piles of their deceased husbands, or the Mahometan his plurality of wives, or the Pagan his bacchanalian orgies or human sacrifices....would be rightfully...chastise[d by the hand of the magistrate][[72]](#footnote-72)

Mayor Clinton’s honest candour demonstrates just how subjective and unaccommodating some religious freedom formulations can be. Professor Martha Nussbaum says “[t]his language should raise a red flag for us, showing us how ready even liberal defenders of religious liberty are to demonize what they do not know”.[[73]](#footnote-73) Again, these formulations provide little more understanding of how it is that freedom of religion as a human right or constitutional value can and should protect religious communications privilege – and they bring us back to Wigmore’s insight that a society will only protect those values that it wants to foster.[[74]](#footnote-74) But Nussbaum suggests that “a distinctively American combination of principles”[[75]](#footnote-75) has been evolved in that nation which has the potential to guide the protection of liberty of conscience despite majoritarian pressure and even national hysteria.[[76]](#footnote-76) If she is correct, then her principles may also provide a sound philosophical basis from which to justify a religious communications privilege premised in freedom of religion. Her book laments that it has been necessary for each succeeding American generation to relearn the needful fundamentality of freedom of religion as expressed in the First Amendment because of some terrible abuses.[[77]](#footnote-77) But she finds a silver lining through that experience and suffering which may help other countries avoid the repetition of American errors. She says that even though the First Amendment has sometimes been represented as the talismanic expression of a fundamental and non-derogable value, that foundational expression has not protected Jehovah’s Witnesses, Mormons and Roman Catholics when those faiths were at their most vulnerable.[[78]](#footnote-78) And she notes that even the United States Supreme Court has conspired in that persecution.[[79]](#footnote-79) But through it all the United States has retained “a shared understanding of religious fairness...[as a] ‘fixed star’ of [her] tradition”.[[80]](#footnote-80) That “fixed star” includes the notion that “liberty of conscience is worth nothing if it is not equal liberty”[[81]](#footnote-81) and that “no [religious] orthodoxies are admissible”.[[82]](#footnote-82)

Conformity to an orthodoxy, even a state imposed secular orthodoxy, does not satisfy Nussbaum as real respect for freedom of conscience, thought and religion. Criticism of that European idea is part of the reason why she wrote her book entitled “Liberty of Conscience”. L’Heureux-Dubé J similarly recoils from the European idea that it is all right for the state to impose a homogeneous orthodoxy which chills free exercise of religion. She would bulwark religious communications privilege against majoritarian tyranny by recognising it as a distinct and probably non-derogable rule of Canadian evidence law. Father Frank Brennan appears to be willing to legislatively force the state to take the need to accommodate freedom of conscience, thought and religion so seriously that laws which would abrogate any part of that freedom must be scutinized and revised until there is no possibility that a conscience, and particularly a religious conscience, will be coerced.

So can a religious communications privilege be justified by the need to promote freedom of religion? The answer must be that the jury is still out. But Bentham’s practical insight that the state does not have very much to lose by making this relatively trivial accommodation,[[83]](#footnote-83) still seems to tip the scales in favour of freedom of religion as such a justification. Even if we recoil from accepting freedom of religion as justifying a religious communication privilege all by itself, one senses with L’Heureux-Dubé J, that it does not take much more justification than the need to recognize freedom of religion generally to make the justification case for a religious communications privilege very compelling indeed.[[84]](#footnote-84)

Privacy interests

It is very difficult to imagine that a religious communication privilege in evidence law could be solely justified by an individual confessor’s interest in keeping his most intimate communications private. That is because it is difficult to imagine that such an individual’s interest in keeping a confidence about paedophilia or terrorism would ever trump society’s interest in uncovering those crimes. But a little further thought suggests it is not as simple as those two emotive examples of confession by a criminal would suggest. For if society’s majoritarian interest always outweighed an individual’s minority right, there would be no protection of any minority rights in any society.

Mitchell articulates the privacy rationale for religious communications privilege when she states:

The privacy rationale rests the clergy privilege on each person’s interest in the dignity of privacy for his most intimate relationships. A confider who seeks out a member of the clergy for confession and counsel draws on or establishes a soul-baring relationship as deeply intimate as any among family members. There is general repugnance at the law’s intrusion into such a relationship.[[85]](#footnote-85)

L’Heureux-Dubé J says privacy cannot justify a religious communications privilege under Wigmore’s utilitarian canons because the alleged benefit from the privacy of a religious confidence accrues “to the individual [rather than]... to society as a whole”.[[86]](#footnote-86) She quotes Mitchell further in explanation:

Unlike Wigmore’s utilitarian rationale, the privacy rationale justifies the clergy privilege primarily in terms of the participants’ interests and not society’s benefit – except to the extent that everyone benefits from living in a society in which the law does not intrude unnecessarily into people’s private lives. Whereas the Wigmore rationale seems to imply that society favors persons confiding in their clergy, the privacy rationale is consistent with society’s neutrality or even antipathy towards such confidences. The privacy rationale protects the clergy-confider relationship because the confider, and not society generally, values that relationship. One advantage, then, of the privacy rationale over the Wigmore rationale is that a privacy rationale maintains the privilege even in the face of popular loss of confidence in the clergy. A related advantage of the privacy rationale is that it does not depend on any showing that disclosure of confidences would in fact deter or inhibit relationships with clergy. In other words, the privacy rationale eliminates the need to meet Wigmore’s second and third prerequisites for a privilege.[[87]](#footnote-87)

But L’Heureux-Dubé J does not appear completely convinced since she suggests that the privacy rationale is not compelling without the religious element which arises in the context of a religious communication.[[88]](#footnote-88) That is, privacy by itself does not justify an evidentiary privilege for any communication no matter how intimate that communication may have been. This in turn explains why it is that when a spousal communications privilege is considered to be justified in law, it is only justified when other societal values[[89]](#footnote-89) are superadded to the privacy considerations which are a part of its core. The insight that privacy alone cannot justify an evidentiary privilege resonates with comments made by various members of the House of Lords in England in *D v NSPCC[[90]](#footnote-90)* in response to submissions by the appellant that Lord Denning’s observations in the Court of Appeal suggested an evidentiary privilege could be founded in mere confidence.[[91]](#footnote-91) Lord Diplock rejected the submission that confidentiality simpliciter could outweigh public interest in the administration of justice and prevent disclosure of a communication.[[92]](#footnote-92) Lord Hailsham similarly could not accept the breadth of that proposition.[[93]](#footnote-93) Lord Simon said that “confidentiality...in itself [did not provide] a satisfactory basis for testing whether relevant evidence should be withheld”[[94]](#footnote-94) and Lord Edmund-Davies similarly stated that “the mere fact that information is imparted in confidence does not, of itself, entitle the recipient to refuse disclosure”.[[95]](#footnote-95) But it is noteworthy that like Lord Denning in the minority in the Court of Appeal, all of the Law Lords in *D v NSPCC* found that the identity of the informer in that case should remain confidential because the public interest in protecting the identity of this informer outweighed both the plaintiff’s private interest in access to that information and the public interest in judicial access to that information so that they might properly administer justice in that case. Though Lord Diplock in particular sought to narrow Lord Denning’s principle that confidences should not be disclosed except as a last resort[[96]](#footnote-96) so that it was not larger than necessary in the *D v NSPCC* case, Lord Denning’s view that the judiciary ought to respect confidentiality is as compelling a judicial expression of the privacy rationale as exists in jurisprudence in the British Commonwealth. He said:

I do not regard the N.S.P.C.C. as claiming any privilege...They say they have a duty not to disclose it...The question is not one of their privilege, but of their duty. How far should the court go to compel them to break this confidence?

To my mind it is all a question of balancing the competing interests. “‘Confidentiality...is not a separate head of privilege.” But it is a very material consideration when deciding whether to compel disclosure. In holding the scales of justice, the courts should not allow confidences to be lightly broken. When information has been imparted in confidence, and particularly where there is a pledge to keep it confidential, the courts should respect that confidence. They should in no way compel a breach of it, save where the public interest clearly demands it, and then only to the extent that the public interest requires.

In the converse case where the recipient of confidential information himself threatens to disclose it to others, the courts have repeatedly restrained him from breaching the confidence...save when the disclosure is justified in the public interest...

If the courts thus *restrain* a breach of confidence, surely they should not themselves *compel* a breach save when the public interest requires. Such is the principle which runs through the cases. In applying it, there are subsidiary rules of particular application. They have emerged singly, but the time has come to group them together. They are sometimes said to be grounds of “privilege,” but I would discard that word because it is misleading. It distracts the mind from the true question which is whether the court will compel a person to break a confidence.[[97]](#footnote-97)

Lord Denning then discussed eight categories of confidential advice, including communications with one’s lawyer, with one’s priest or medical doctor; communications received by a member of parliament, by a police officer from an informer, by a probation officer or marriage counsellor, by a children’s officer, by the Gaming Board; and on occasions when a government department wished to withhold documents on the grounds of Crown privilege.[[98]](#footnote-98) Lord Denning summarised the approach he believed the court should take when it considered confidential information arising in any of these cases by quoting Lord Cross of Chelsea in *Alfred Crompton Amusement Machines Ltd.* v *Customs and Excise Commissioners (No. 2)* [1974] A.C. 405, 433-434:

What the court has to do is weigh on the one hand the considerations which suggest that it is in the public interest that the documents in question should be disclosed and on the other hand those which suggest that it is in the public interest that they should not be disclosed and to balance one against the other.[[99]](#footnote-99)

Writing in broad dissent, it does not seem that Lord Denning expected his proposed rewriting of the law of evidence with regard to privilege would persuade his then brethren in either the Court of Appeal or the House of Lords. And his theorising about confidence has yet to bear any substantive fruit. He simply took the opportunity a dissenting judgment provided to opine that confidentiality and by simple analogy, privacy, deserved more respect in English law than it had yet been accorded. But it is noteworthy that none of the law lords who each considered his dictum dismissed it completely. They all wrote judgments restricted to the facts of the *D v NSPCC* case, but they all acknowledged that confidentiality was a factor to be weighed in deciding whether a court should compel disclosure of a communication or not.

It is submitted that this is precisely the same approach that Owen Dixon J took when he said the inflexible rule of disclosure was moderated only in cases of demanding public interest.[[100]](#footnote-100) Like Lord Diplock disapproving Lord Denning’s breadth of principle not needed in the case before him,[[101]](#footnote-101) Owen Dixon J would circumscribe Knight Bruce VC’s broad principle “that the truth can cost too much”.[[102]](#footnote-102) Owen Dixon J would say that it does not cost too much unless overriding considerations of public interest as recognised by a long common law tradition or expressly by statute so dictate. Lord Denning and Viscount Knight Bruce suggest that the value of privacy in society is larger than their brethren have yet conceded.

In that context, Mitchell’s suggestion that privacy can be a compelling justification for religious communications privilege on its own since it can endure “even in the face of popular loss of confidence in the clergy”,[[103]](#footnote-103) requires further analysis. In essence, Mitchell suggests that evidentiary privileges like human rights are safest when they are reviewed objectively rather than subjectively. That is, evidentiary privileges and human rights are at their most effective when they stand as far apart from changeable popular opinions as they can. The problem with Wigmore’s canons for the establishment of any evidentiary privilege is that they are inherently utilitarian. They move in accordance with the vagaries of public opinion. This is the same circular argument which arises when human rights are considered for legislative entrenchment. Must rights and privileges be constitutionally entrenched to protect them or is society entitled to review them from time to time, and if so, who should review them? L’Heureux-Dubé J’s belief that religious communications privilege should be established as a new and separate category of evidentiary privilege in Canadian common law was intended to protect confidential religious communications from discretionary judicial review that could chill the underlying spiritual relationship. The majority in her court decided in effect that judges could be trusted to decide on a case-by-case basis whether to scrutinize such evidence or not. But she felt that posture was inherently disrespectful. One senses her concern that judges will always want to hear and weigh all relevant evidence before they decide what is most compelling. She also seemed concerned that judges are as apt to be swayed by movements in popular opinion against long term principle as any other member of society. To suggest that by hearing evidence but then directing it be excluded from the formal judicial decision making to follow, is little more than a pretence. The disrespect to any underlying confidentiality is complete if judges get to hear religious confidences whether on a voir dire or otherwise, even if those judges say they have not ultimately weighed the relevant confidential material in their decision making balance. The thrust of L’Heureux-Dubé J’s concern is that judges should follow rules of evidence rather than retreat to discretion as the basis upon which they make their decisions. To premise decision making in discretion is to reduce both the predictability of the law and the safety of human rights and values. The dilemma as to whether a formal common law rule should have been established in Canada in the *Gruenke case* rather than leaving the matter to judicial discretion would have been avoided had each provincial legislature created a statutory privilege to put the matter beyond theoretical judicial reach. But no legislation followed. Perhaps the majority in *Gruenke* showed sufficient respect to privacy and religion in their decision to satisfy the legislature that no further action was needed; perhaps the legislature did not think religious communications needed evidentiary protection in the first place; or perhaps the legislatures did not even hear about the dilemmas which arose in the case.

There is one other angle on privacy as a policy justification for a confidential religious communications privilege that can be put, and it arises out of the United States constitutional context. Wright and Graham have observed that privacy arguments are seldom used to moot such privilege in the United States. They suggest that may be because founding a privilege for confidential religious communications in privacy would be an

attempt to turn a ritual of submission to, and faith in, a power greater that humans into some sort of incantation of individualistic egoism [and would] trivialize...the values that confession symbolizes for those who are prepared to go to jail rather than permit such secular intrusions into the religious experience.[[104]](#footnote-104)

A privacy rationale for confidential religious communications privilege might even be blasphemous.[[105]](#footnote-105) However the language used by those who argue a “non-instrumental”[[106]](#footnote-106) or rights-based rationale for the privilege, implies that the privilege has at least some foundation in privacy considerations. Wright and Graham cite Livingston who says that “to force the disclosure [of] religious confessions would be a tyrannical invasion of the rights of conscience”.[[107]](#footnote-107) This quotation recalls Cole’s argument in favour of a privacy rationale for confidential religious communication. He said simply that “[t]here is general repugnance at the law’s intrusion into such a relationship.”[[108]](#footnote-108)

But once again, there is no separation between the clear reference to the right to the free exercise of religion enjoined by the First Amendment and some unarticulated notion that the conscience is private space for secular as well as religious reasons. The most that can thus be said in favour of a privacy justification for a confidential religious communications privilege, is that it adds weight to a policy justification premised in freedom of religion. No one has suggested that a right to privacy by itself is sufficient policy justification for the recognition of such a privilege.

Other justifications for religious confession privilege

There are other arguments that can be used to justify religious confession privilege. These range from the insight that it is futile to try and coerce the disclosure of religious confessions since priests will go to gaol rather than do so and that will bring the judicial system into disrepute; there is the practical idea that the benefit that society gains from the disclosure of confessional secrets is negligible and short lived when compared with the benefit it would forego in that interest; and there are various the theological ideas including that ultimately confessions are made to proxies for God and He is beyond compulsion.

No one argument by itself adequately justifies the existence of confidential religious communications privilege as a matter of policy. But when all these different threads of reason are weighed together, it seems hard to disagree with L’Heureux-Dubé J that “it is more in line with”[[109]](#footnote-109) the weight of all these rationales, the spirit of enduring constitutional respect for free exercise of religion, “and the goal of assuring the certainty of law, to recognize a pastor-penitent category of privilege”[[110]](#footnote-110) than to leave the matter as one for discretionary judicial decision making on a case-by-case basis.

Wigmore was right to state that an evidentiary privilege must be premised in some value that the society concerned wants to “sedulously foster” – this despite the fact that Wright and Graham began their analysis with the suggestion that Wigmore’s historical treatment of religious confession privilege was not “so decisive” as he made appear.[[111]](#footnote-111) Wigmore may have understated the historical arguments for the existence of this privilege at common law, but ultimately his sense of the necessary foundation for any privilege was accurate. But it remains disconcerting as L’Heureux-Dubé J intoned, to say in effect, that this particular privilege is a relative value and will only endure so long as society values free exercise of religion. Somehow, we want to say with Father Frank Brennan, that free exercise of religion is or ought to be less derogable than that. It seems ‘necessary’ with McNicol to say that despite the relativism of post-modern philosophical thought, this aspect of freedom of conscience as a recognised international human right should be entrenched beyond repeal. But the truth is, that without recourse to theology, we simply cannot make that argument stick. Our only reassurance may be Michael K. Young’s[[112]](#footnote-112) earlier observation that

Religion is profoundly important intellectually. We cannot understand geopolitical movement, economics, politics and history without taking seriously the role and the nature of religion in the process…..Four fifths of the world’s people are profoundly religious, and religion matters enormously in their lives.[[113]](#footnote-113)

Though philosophers have been predicting that religion was certain to wither away and die completely when either the communistic or liberal society achieved maturity, the truth is that religious values including the need for respect and toleration seem to be even more important in the twenty-first century than they have been before.[[114]](#footnote-114) Since Bentham asserted the need for religious toleration and the recognition of religious confession privilege as a protected legal value in the age of utilitarianism, none of this is really surprising. And while he did make some secular political arguments in favour of religious confession privilege with “legitimacy” and “futility” limbs[[115]](#footnote-115) as Wright and Graham have called them, Bentham’s essential justification for the privilege was simply that social justice required it – that the coercion of religious conscience was “altogether inconsistent and incompatible [with any idea of toleration]”.[[116]](#footnote-116) That phrase from Bentham continues to capture the essential germ of the reason why legislatures have almost universally passed a religious confession privilege statute if a judge ruled that there was no religious confession privilege at common law. Sadly, the fact that so many western legislatures have had to pass religious confession privilege statutes is also a commentary on the susceptibility of judges to the same prejudices which are the lot of all human beings.

1. *Religious Confession Privilege at Common Law*, Thompson AK, Martinus Nijhoff, Leiden, 2011. [↑](#footnote-ref-1)
2. The NSW Religious Confession Privilege statute was first legislated in 1989 as the *Evidence Amendment (Religious Confessions) Amendment* Act 1989 which inserted section 10(6) into the then *Evidence Act* 1898. Section 127 of both the New South Wales and Commonwealth *Evidence Acts* have affirmed since 1995 that “[a] person who is or was a member of the clergy ... is entitled to refuse to divulge [even] that a religious confession was made, ... [and not just] the contents of a religious confession made”. [↑](#footnote-ref-2)
3. *History of the Church,* 5:498–99; from a discourse given by Joseph Smith on July 9, 1843, in Nauvoo, Illinois; reported by Willard Richards; see also appendix, page 562, item 3. [↑](#footnote-ref-3)
4. For example “the keys of the kingdom” given to Peter to bind and loose on earth and in heaven (Matthew 16:16-19). [↑](#footnote-ref-4)
5. McNeill, JT, *A History of the Cure of Souls*, New York, Evanston and London, Harper & Row, 1951, pp 90, 91. Note also that EF Latko says that “exomologesis ... has a variety of meanings, but ordinarily signifies an avowal of sin, made either to God or to man”, but “etymologically [it] denotes open declaration and implies public confession [and was employed] in the primitive Church ... for confession of sins and for the sacramental procedure involving austere discipline” (Latko, EF, “Auricular Confession” (1966) 4 *New Catholic Encyclopedia* 131). See also Meninger, K, *Whatever became of sin?*, New York, Hawthorn Books Inc, 1973, p 25. [↑](#footnote-ref-5)
6. McNeil, n5, pp 96-99; Kurtsheid, B, *A History of the Seal of Confession*, Mark, PA, transl, St Louis and London, B Herder Book Co, 1927, pp 51-64. [↑](#footnote-ref-6)
7. Kurtsheid, n6, pp 17-21, 37, 55. [↑](#footnote-ref-7)
8. Kurtsheid, n6, p 65. [↑](#footnote-ref-8)
9. Kurtsheid, n6, p 51. [↑](#footnote-ref-9)
10. Kurtsheid, n6, pp 51-58, 83-84. [↑](#footnote-ref-10)
11. Kurtsheid, n6, p 51. [↑](#footnote-ref-11)
12. Kurtsheid, n6, pp 57-76. [↑](#footnote-ref-12)
13. Kurtsheid, n6, p 92. [↑](#footnote-ref-13)
14. Nolan, RS, “The Seal of Confession” (1913) 13 *Catholic Encyclopedia* 649 [↑](#footnote-ref-14)
15. Ibid. [↑](#footnote-ref-15)
16. Ibid, p 652 quoting Pollock and Maitland’s *History of the Laws of England.* Berman confirms that “[i]n the twelfth and thirteenth centuries ... most of the men who served as officials and judges and counsellors of Kings and emperors were clerics who owed at least half of their allegiance to the pope” (op cit, p 147). [↑](#footnote-ref-16)
17. Holdsworth, WS, *A History of English Law,* 2nd ed, Boston, Little Brown and Co, Vol 1, p 592. [↑](#footnote-ref-17)
18. Constitutions and canons ecclesiasticall/treated upon by the Archbishops of Canterbury and York, London, printed by Robert Barker and by the assigns of John Bull, 1640. [↑](#footnote-ref-18)
19. Bursell, Judge RDH, “The Seal of the Confessional”, *Ecclesiastical Law Journal* 1(7) (1990), 84, 95. [↑](#footnote-ref-19)
20. Coke was appointed Chief Justice of Common Pleas on 20 June 1606 and served till his dismissal in the autumn of 1613. He was appointed Chief Justice of King’s Bench on 25 October 1613 (which was a less lucrative post and considered a demotion) until he was again dismissed by the King on 14 November 1616 (Hostettler, J, *Sir Edward Coke, A Force for Freedom,* Chichester, Barry Rose Law Publishers Ltd, 1997, pp 61, 79, 93). [↑](#footnote-ref-20)
21. *Garnet’s case* (1606) 2 Howell’s State Trials 217. [↑](#footnote-ref-21)
22. Prisoners were not “allowed counsel at the trial itself ... until 1696 in cases of treason, [and] until 1836 in cases of felony” (Milsom, SFC, *Historical Foundations of the Common Law*, London, Butterworths, 1969, 360). Stone and Wells say that the year of this change occurred in 1695 but confirm that this change was not available to criminal defendants till near the beginning of the seventeenth century (Stone, J, *Evidence, Its History and Policies,* Revised by WAN Wells, Sydney, Butterworths, 1991, pp 34-35). [↑](#footnote-ref-22)
23. It is not clear from the report of the trial whether Garnet was charged with treason or ‘misprision of treason’. One modern legal dictionary defines “misprision” as “[a] word used to describe an offense which does not possess a specific name ... But more particularly and properly the term denotes either: (1) a contempt against the sovereign, the government, or the courts of justice, including not only contempts of court, properly so called, but also all forms of seditious or disloyal conduct and leze-majesty [sic]; (2) maladministration of public office; neglect or improper performance of official duty, including peculation of public funds; (3) neglect of light account made of crime, that is failure in the duty of a citizen to endeavor to prevent the commission of a crime, or ,having knowledge of its commission, to fail to reveal it to the proper authorities” (Black, HC, *Black’s Law Dictionary*, 6th ed, St Paul, Minnesota, West Publishing Co., 1990, p 1000). The dictionary goes on to indicate that “misprision of felony” connotes concealment “but without such previous concert with or subsequent assistance to the felon as would make the party concealing an accessory before or after the fact” (idem). [↑](#footnote-ref-23)
24. Wigmore, JH, *Evidence in trials at common law,* Revised by John T McNaughton, Boston, Little Brown, 1961, Vol 8, p 869. [↑](#footnote-ref-24)
25. Coke, Sir E, *The Second Part of the Institutes of the Laws of England*, New York, Garland Publishing Co, 1979, p 629. [↑](#footnote-ref-25)
26. Kurtsheid, n6, pp 152-169. See also Thompson, AK, *Religious Confession Privilege and the Common Law,* Martinus Nijhoff, Leiden and Boston, 2011, pp 43-54. [↑](#footnote-ref-26)
27. Wigmore, n24, Vol 8, p 869. [↑](#footnote-ref-27)
28. *R v Sparkes* unreported but referred to in *Du Barré v Livette* (1791) 1 Peake 108; 170 ER 86. [↑](#footnote-ref-28)
29. *R v Gilham* (1828) 1 Moody 186; 168 ER 1235. [↑](#footnote-ref-29)
30. *Wheeler v LeMarchant* (1881) 17 Ch D 675; 50 LJ Ch 793; [1881-5] All ER 1807. [↑](#footnote-ref-30)
31. *Du Barré v Livette* (1791) 1 Peake 108, 110; 170 ER 96, 97. [↑](#footnote-ref-31)
32. *R v Gilham* (1828) 1 Moody 186, 193; 168 ER 1235, 1238. [↑](#footnote-ref-32)
33. Starkie, T, *A Practical Treatise on the Law of Evidence*, London, J & WT Clarke, 1824, Vol 1, p 105. [↑](#footnote-ref-33)
34. Thompson, n26, p 21. [↑](#footnote-ref-34)
35. *Wheeler v LeMarchant* [1881-5] All ER 1807, 1809. [↑](#footnote-ref-35)
36. For example, *Anon* (1693) Skin 404; 90 ER 179; *Broad v Pitt* (1828) 3 Carr & P 518; 172 ER 528; *R v Wild* (1835) 1 Moody 452; 168 ER 1341; *R v Griffin* (1853) 6 Cox Cr Cas 219 and *R v Hay* (1860) 2 Foster & Finlason 4; 175 ER 933. [↑](#footnote-ref-36)
37. The first New Zealand religious confession privilege was enacted in the *Evidence Further Amendment Act 1885*, s 7 (49 Vict No 15). [↑](#footnote-ref-37)
38. The first Victorian religious confession privilege was enacted in 1890 (*Evidence Act 1890)* (54 Vict No 1088 c 55). [↑](#footnote-ref-38)
39. Rev. Stat. of N.Y. (1828), Pt. 3. c.7. tit. 3 §72. [↑](#footnote-ref-39)
40. All fifty United States feature some kind of religious confession privilege statute (Alabama Code # 12-21-166 (1975); Alaska R. Evid. 505; Arizona Rev. Stat. Ann. #13-4062; Arkansas R. Evid. 505; California Evid. Code ## 1030-1034; Colorado Rev. Stat. # 13-90-107(c); Conneticut Gen. Stat.Ann. # 52-146(b); Delaware R. Evid. 505; Florida Stat. Ann. # 90.050; Georgia Code Ann. # 38-419.1; Hawaii Rul. Evid. 506; Idaho Code # 9-203(3) (1990); Illinois Comp. Stat. Ann. 5/8-803; Indiana Code Ann. #34-1-14-5; Iowa Code # 622.10 (1997); Kansas Stat. Ann. # 60-429 (1994); Kentucky Rev. Stat. Ann. # 421.210(4); Louisiana Code Evid. Ann art 511; Maine R.Evid. 505; Maryland Code Ann., Cts.& Jud.Proc. #9-111 (1995); Massachusetts Gen. Law Ann. ch. 233, #20A; Michigan Sta. Ann. #600.2156; Minnesota Stat. Ann. #595.02 (1)(c); Missouri Code Ann. #13-1-22(Supp. 1986); Montana Code Ann. #26-1-804 (1994); Nebraska Rev. Stat. #27-506 (1989); Nevada Rev. Stat. # 49.255 (1995) New Hampshire Rev. Stat. Ann. #516.35 (Supp. 1995); New Jersey Stat. Ann. #2A:84A-23; New Mexico R. Evid. 11-506; New York C.P.L.R. 4505; North Carolina Gen. Stat. # 8-53.2 (1995); North Dakota R. Evid. 505; Ohio Rev. Code Ann. # 2317.02(C); Oklahoma Stat. Ann. tit. 12, #2505; Oregon Rev. Stat. # 40.260 (1995); 42 Pennsylvania Cons. Stat. Ann. #5943; Rhode Island Gen. Laws # 9-17-23 (1985); South Carolina Code Ann. # 19-11-90; South Dakota Codified Laws ## 19-13-16 to 18 (1995); Tennessee Code Ann. #24-1-206; Texas T. Crim. Evid. 505; Utah Code Ann. #78-24-8(3) (1987); Vermont Stat. Ann. tit.12, #1607 (1973); Virginia Code Ann. #8.01-400; Washington Rev. Code Ann. # 5.60.060(3); West Virginia Code # 57-3-9; Wisconsin Stat. Ann. #905.06; Wyoming Stat. Ann. # 1-12-101(a)(iii) (1988)). [↑](#footnote-ref-40)
41. West Australia, Queensland and possibly South Australia. Note however, that Nick Xenophon’s private member’s bill (*Children’s Protection (Mandatory Reporting) Bill 2003*) to eliminate religious confession privilege at common law in cases where child abuse was alleged in September 2003, was unsuccessful and this raises a question whether the failure of that bill has affirmed religious confession privilege at common law in that state. [↑](#footnote-ref-41)
42. *Anderson v Bank of British Columbia* (1876) 2 Ch D 644; *Wheeler v LeMarchant* (1881) 17 Ch D 675; 50 LJ Ch 793; [1881-5] All ER 1807. [↑](#footnote-ref-42)
43. McGuinness v Attorney-General of Victoria (1940) 63 CLR 73, 102-103. [↑](#footnote-ref-43)
44. Wigmore, JH, *Evidence in Trials at Common Law*, Revised by John T McNaughton, Boston, Little Brown, 1961, Vol. 8., p 877. [↑](#footnote-ref-44)
45. Bentham, J, *Rationale of Judicial Evidence*, New York and London, Garland Publishing, Inc, 1978 (Reprint of the 1827 ed published by Hunt and Clarke, London), Vol. IV, pp 586-592. [↑](#footnote-ref-45)
46. The Wigmore principles are: 1. The communications must originate in a *confidence* that they will not be disclosed. 2. The element of *confidentiality must be essential* to the full maintenance of a satisfactory maintenance of the relation between the parties. 3. The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.* 4. The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation (italics original) (Wigmore JH, *Evidence in Trials at Common Law,* Revised by John T McNaughton, Boston, Little Brown, 1961, Vol 8, p 527). [↑](#footnote-ref-46)
47. Wigmore, JH, Evidence in Trials at Common Law, Revised by John T McNaughton, Boston, Little Brown, 1961, Vol. 8, p 527. [↑](#footnote-ref-47)
48. Wigmore, JH, A Treatise on the Anglo-American System of Evidence in trials at common law: including the statutes and judicial decisions of all jurisdictions of the United States and Canada, Boston, Little Brown, 1904. [↑](#footnote-ref-48)
49. First Amendment to the United States Constitution, 1791. [↑](#footnote-ref-49)
50. *R v Howse* [1983] NZLR 246, 251. [↑](#footnote-ref-50)
51. *Trammel v United States* 445 U.S. 40 (1980), 51. [↑](#footnote-ref-51)
52. *R v Gruenke* [1991] 3 SCR 263, 297. [↑](#footnote-ref-52)
53. *R v Gruenke* [1991] 3 SCR 263, 299-300, L’Heureux-Dubé J quoting Cole, op cit., pp 15-16. [↑](#footnote-ref-53)
54. *R v Gruenke* [1991] 3 SCR 263, 300. [↑](#footnote-ref-54)
55. *Pearse v Pearse* (1846) 63 ER 950, 957. [↑](#footnote-ref-55)
56. *McGuinness v Attorney-General of Victoria* (1940) 63 CLR 73, 102-103. [↑](#footnote-ref-56)
57. Ibid, p 103. [↑](#footnote-ref-57)
58. Wright, CA, and Graham, KW, *Federal Practice and Procedure: Evidence*, 3rd ed, St Paul Minnesota, West Publishing Co, 1992

p 87. [↑](#footnote-ref-58)
59. Idem. [↑](#footnote-ref-59)
60. Ibid, p 86. [↑](#footnote-ref-60)
61. Ibid, p 86-87. [↑](#footnote-ref-61)
62. “The Relevance of Religious Freedom”, *Clark Memorandum*, Spring 2008, 15, 19. [↑](#footnote-ref-62)
63. Brennan, F. “The Place of the Religious Viewpoint in Shaping Law and Policy in a Pluralistic Democratic Society: a case study on rights and conscience”, Values and Public Policy Conference, Fairness, Diversity and Social Change, Centre for Public Policy, University of Melbourne, 26 February 2009. [↑](#footnote-ref-63)
64. In Perry, M., *The Idea of Human Rights,* Oxford University Press, New York, 1998, p 87. [↑](#footnote-ref-64)
65. Ibid, p 88. [↑](#footnote-ref-65)
66. Ibid, pp 89-90. [↑](#footnote-ref-66)
67. Ibid, p 93. [↑](#footnote-ref-67)
68. Idem. [↑](#footnote-ref-68)
69. Idem. [↑](#footnote-ref-69)
70. *The People v Phillips* (1813) NY Ct of General Sessions, reprinted at (1843) 1 Western LJ 109 and (1955) 1 Catholic Lawyer 199. [↑](#footnote-ref-70)
71. Ibid, p 208. [↑](#footnote-ref-71)
72. Ibid, pp 208-209. [↑](#footnote-ref-72)
73. Nussbaum, M., *Liberty of Conscience*, Basic Books, New York, 2008, p 129. [↑](#footnote-ref-73)
74. Supra n46. [↑](#footnote-ref-74)
75. Nussbaum, op cit, p 25. [↑](#footnote-ref-75)
76. Idem. She generalizes European practice to state that if a religious minority “wanted political rights, they would have them at the sufferance of the majority...The European tradition also sees no problem with curtailing liberty, sometimes unequally as the French headscarf case shows. Current problems that many European nations are experiencing should, I believe, lead them to study and consider adopting the subtly different American conception.” [↑](#footnote-ref-76)
77. Ibid, pp 359-360. [↑](#footnote-ref-77)
78. Ibid, p 4. [↑](#footnote-ref-78)
79. Ibid, pp 4, 193-198, 222. [↑](#footnote-ref-79)
80. Ibid, p 3. [↑](#footnote-ref-80)
81. Ibid, p 2. [↑](#footnote-ref-81)
82. Ibid, p 18. [↑](#footnote-ref-82)
83. Bentham, J, n45, pp 586-592. [↑](#footnote-ref-83)
84. *R v Gruenke* [1991] 3 SCR 263, 311-312. [↑](#footnote-ref-84)
85. Mitchell, MH, “Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion” (1987) 71 *Minn L Rev* 723

p 768 as quoted by L’Heureux-Dubé J in *R v Gruenke* [1991] 3 SCR 263, 302. [↑](#footnote-ref-85)
86. *R v Gruenke* [1991] 3 SCR 263, 302. [↑](#footnote-ref-86)
87. Mitchell, n85, p 769 as quoted by L’Heureux-Dubé J in *R v Gruenke* [1991] 3 SCR 263, 302-303. [↑](#footnote-ref-87)
88. *R v Gruenke* [1991] 3 SCR 263, 303. [↑](#footnote-ref-88)
89. For example, society’s interest in preserving the integrity of the marriage relationship. [↑](#footnote-ref-89)
90. *D v NSPCC* [1978] AC 171. [↑](#footnote-ref-90)
91. *D v NSPCC* [1978] AC 171. [↑](#footnote-ref-91)
92. Ibid, pp 219-220. [↑](#footnote-ref-92)
93. Ibid, pp 224-225. [↑](#footnote-ref-93)
94. Ibid, p 237. [↑](#footnote-ref-94)
95. Ibid, p 242. [↑](#footnote-ref-95)
96. Ibid, pp 191, 219-220. [↑](#footnote-ref-96)
97. Ibid, p 190. [↑](#footnote-ref-97)
98. Ibid, pp 190-191. [↑](#footnote-ref-98)
99. Ibid, p 192. [↑](#footnote-ref-99)
100. See n57 and supporting text. [↑](#footnote-ref-100)
101. *D v NSPCC* [1978] AC 171, 219-220. [↑](#footnote-ref-101)
102. *Pearse v Pearse* (1846) 63 ER 950, 957. [↑](#footnote-ref-102)
103. n87. [↑](#footnote-ref-103)
104. Wright and Graham, n58, p 90. [↑](#footnote-ref-104)
105. Idem. [↑](#footnote-ref-105)
106. Ibid, p 88. [↑](#footnote-ref-106)
107. Ibid, p 89, citing 1 Livingston, Works, 1873, p 467. [↑](#footnote-ref-107)
108. Mitchell, n87, p 768 as quoted by L’Heureux-Dubé J in *R v Gruenke* [1991] 3 SCR 263, 302. [↑](#footnote-ref-108)
109. *R v Gruenke* [1991] 3 SCR 263, 311. [↑](#footnote-ref-109)
110. Idem. [↑](#footnote-ref-110)
111. Supra n46. [↑](#footnote-ref-111)
112. President of the University of Utah and a former Chair of the US Commission on International Freedom. [↑](#footnote-ref-112)
113. “The Relevance of Religious Freedom”, *Clark Memorandum*, Spring 2008, 15, 19. [↑](#footnote-ref-113)
114. Idem. [↑](#footnote-ref-114)
115. Wright and Graham, n58, pp 84-88. [↑](#footnote-ref-115)
116. Bentham, n45, p 588. [↑](#footnote-ref-116)