



2000

Establishment of Religion

Robert Gingher

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Gingher, Robert (2000) "Establishment of Religion," *Touro Law Review*: Vol. 16 : No. 2 , Article 28.
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol16/iss2/28>

This New York State Constitutional Decisions is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

Gingher: Lightman v Flaum
SUPREME COURT
QUEENS COUNTY

Lightman v. Flaum¹
(Decided March 4, 1999)

In a case of first impression, Plaintiff Chani Lightman brought an action for breach of the clergy-penitent privilege pursuant to New York Civil Practice Law and Rules § 4505² and for intentional infliction of emotional distress and defamation.³ Defendants, Rabbi Tzvi Flaum and Rabbi David Weinberger, moved to dismiss the claim for failure to state a cause of action and the court converted the motion to a summary judgment motion.⁴ Defendants claimed that Jewish law compelled them to disclose the confidences, that the plaintiff waived the clergy-penitent privilege by having a third person present,⁵ and that the First Amendment of the United States Constitution⁶ protected their action.⁷ The Supreme Court, Queens County, held that the plaintiff could bring an action for breach of the clergy-penitent privilege, and that unless the factual issues at trial showed that “the privilege had been waived by the presence of a third person”⁸ or the nature of the meeting was not for spiritual guidance or was not

¹ 179 Misc. 2d 1007, 687 N.Y.S.2d 562 (Sup. Ct. Queens County 1999).

² N.Y. C.P.L.R. § 4505 (McKinney 1992). §4505 provides: “Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed disclose [sic] a confession or confidence made to him in his professional character as spiritual advisor.” This rule grants permission to a member of the clergy given a privileged communication to remain silent when asked to testify about the communication, without incurring the penalty of perjury.

³ 179 Misc. 2d at 1008, 687 N.Y.S.2d at 565.

⁴ *Id.* at 1009, 687 N.Y.S.2d at 565.

⁵ *Id.* at 1010, 687 N.Y.S.2d at 566.

⁶ U.S. CONST. amend. I. The First Amendment provides in pertinent part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” *Id.*

⁷ 179 Misc. 2d at 1013-14, 687 N.Y.S.2d at 568.

⁸ *Id.* at 1018, 687 N.Y.S.2d at 571.

made “to the Rabbis in their spiritual capacity,”⁹ the defendants would be liable.¹⁰

In 1995, plaintiff, an Orthodox Jew, sought religious counseling from the defendants, during which she disclosed that she had stopped her religious bathing¹¹ so that she “would not have to engage in sexual relations with [her husband], Dr. Lightman.”¹² Rabbi Flaum claimed that Dr. Lightman met with him because the couple was having marital difficulty, and perhaps his wife was engaging in “adulterous relationships.”¹³ Subsequently, plaintiff, accompanied by her mother, berated Rabbi Flaum for speaking to her husband, but admitted “she had stopped engaging in religious purification laws’ and was ‘seeing other men in social settings.’”¹⁴ Plaintiff told Rabbi Weinberger that her husband could not relate to her, and “she was not getting fulfillment” from him.¹⁵ Rabbi Weinberger claims that the plaintiff described “the most intimate details of her marriage” to him while her friend, Yael Hirsch, was present.¹⁶ In February 1996, Mrs. Lightman filed for divorce from her husband, and for “temporary custody of her four children.”¹⁷ Both Rabbis admitted to notifying her husband of their conversations with her through affirmations¹⁸ provided to support

⁹ *Id.*

¹⁰ *Id.*; see also *People v. Drelich*, 123 A.D.2d 441, 443, 506 N.Y.S.2d 746, 748 (2d Dep’t 1986) (where a communication was made to a Rabbi, but his role was secular in nature, so the communication would not be privileged).

¹¹ *Id.* at 1016, 687 N.Y.S.2d at 570. The Mikvah is “a ritual bathing to purify the woman during her menstrual period.” Without purification, the husband could violate Jewish law or tradition by engaging in marital relations.

¹² *Id.* at 1009, 687 N.Y.S.2d at 565.

¹³ *Lightman*, 179 Misc. 2d. at 1010-11, 687 N.Y.S.2d at 566.

¹⁴ *Id.* at 1011, 687 N.Y.S.2d at 566.

¹⁵ *Id.* at 1009, 687 N.Y.S.2d at 565.

¹⁶ *Id.* at 1010, 687 N.Y.S.2d at 566.

¹⁷ *Id.* at 1009, 687 N.Y.S.2d at 565.

¹⁸ *Lightman*, 179 Misc. 2d. at 687 N.Y.S.2d at 565; see BLACK’S LAW DICTIONARY 59 (6th ed. 1990) (defining affirmation as “[a] solemn religious asseveration in the nature of an oath”). Defendants claimed that “breach of the privilege is merely a violation of an evidentiary rule, and that the sole remedy is the exclusion of the communication from evidence.” *Id.* at 1010, 687 N.Y.S.2d at 566.

Dr. Lightman's custody position, and both felt that they had a religious obligation to do so.¹⁹

The court compared the breach of clergy-penitent privilege to other professional violations of privileges, and noted that a common law cause of action for breach of this fiduciary duty of confidentiality would be an issue of first impression.²⁰ Because the clergy was normally careful about making disclosures, the issue never arose.²¹ The court recognized the tension between the Free Exercise Clause and the C.P.L.R. clergy-penitent privilege, citing the only case addressing the issue, a California Court of Appeals case, *Snyder v. Evangelical Orthodox Church*.²² *Snyder* expressed a four-prong balancing standard to determine whether significant societal interests justified placing a burden on religious expression:

First, the government must be in furtherance of some compelling state interest; second, the burden on religious expression must be essential to further the government's compelling state interest; third, the type and level of the burden must be the minimum necessary to achieve the state interest; [and,] fourth, the burden must apply to everyone, not merely to those who have a religious belief.²³

¹⁹ *Id.* at 1011, 687 N.Y.S.2d at 566.

²⁰ *Id.* at 1011, 687 N.Y.S.2d at 567 (the court did not elaborate how the breach of an evidentiary rule could be extended to a cause of action for conduct occurring outside of the courtroom). See *Oringer v. Rotkin*, 162 A.D.2d 113, 556 N.Y.S.2d 67 (1st Dep't 1990) for the proposition that a breach of psychologist-patient privilege amounts to a common law cause of action. See also *MacDonald v. Clinger*, 84 A.D.2d 482, 446 N.Y.S.2d 801 (4th Dep't 1982) (breach of psychiatrist-patient privilege); *Harley v. Druzba*, 169 A.D.2d 1001, 565 N.Y.S.2d 278 (3d Dep't 1991) (violation of social worker-client privilege); *Doe v. Roe*, 190 A.D.2d 463, 599 N.Y.S.2d 350 (4th Dep't 1993) (violation of doctor-patient privilege); and *Krouner v. Koplovitz*, 175 A.D.2d 531, 572 N.Y.S.2d 959 (3d Dep't 1991) (breach of the attorney-client privilege).

²¹ *Lightman*, 179 Misc. 2d. at 1012, 687 N.Y.S.2d at 567.

²² *Snyder v. Evangelical Orthodox Church*, 264 Cal. Rptr. 640 (6th Dist. 1989) (where divulging confidences by clergy without a religious expression justification could amount to liability in tort).

²³ *Snyder*, 264 Cal. Rptr. at 645 (citing *Wollersheim v. Church of Scientology*, 260 Cal. Rptr. 331, 339 (2d Dist. 1989)).

In *Snyder*, both parties were involved in an extra-marital affair, each confessed to church elders, and each requested that church officials not divulge the communication.²⁴ Less than a week later, the elders disclosed the privileged communication “to the assembled congregation [during] Sunday services.”²⁵ The *Snyder* court held that defendant’s motion to dismiss for lack of jurisdiction could not be sustained by a general assertion that religion motivated their conduct.²⁶ The California Court of Appeals remanded *Snyder* for the threshold “determination whether there was a religious purpose for the disclosure,” which if found would trigger the balancing standard.²⁷ The *Lightman* court applied the same reasoning to a broader disclosure, and rather than granting defendant’s motion for summary judgment, sought a finding of fact at trial whether there was a religious purpose for the disclosure.²⁸

The *Lightman* court discussed several general legal principles where the First Amendment would serve as a defense. If a court were excessively entangled with religious doctrine and standards, then the First Amendment would apply.²⁹ It would also apply if the ruling of the court did not refrain from answering ecclesiastic questions.³⁰ The court reiterated the general standard that civil

²⁴ *Id.* at 642.

²⁵ *Id.* at 642.

²⁶ *Id.* at 648 (reasoning that far greater harm would come from giving deference to and thus favoring those who assert that their conduct was a religious matter rather than a civil matter).

²⁷ *Lightman*, 687 N.Y.S.2d at 567 (noting that the lower court dismissal for lack of subject matter jurisdiction was reversed).

²⁸ *Id.* at 571. The disclosure was broader because it was made to the entire world through the Rabbis’ affirmations rather than to just the congregation.

²⁹ *Schmidt v. Bishop*, 779 F. Supp. 321, 328 (S.D.N.Y. 1991). Ironically, the *Schmidt* court finds that imposing a duty of care on the clergy would violate the third prong of the *Lemon v. Kurtzman* test for determining unconstitutional government infringement of religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-3 (1971). The standard test provides in pertinent part: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion... finally, the statute must not foster ‘an excessive government entanglement with religion.’”*Id.*

³⁰ *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 446 (1969) (finding that a civil award could amount to a determination of an ecclesiastic question).

disputes should be resolved without delving into underlying religious doctrine by applying neutral principles of law.³¹

Defendants claim that when abridgement of the free exercise of religion occurs, historically there can be no imposition of liability in tort against religious societies or their members.³² The court cited the case of *Oregon v. Smith* where two drug rehabilitation counselors employed by a private firm were dismissed for taking peyote, a hallucinogenic drug, as part of a Native American Church ceremony.³³ They were denied unemployment benefits because they were let go for work-related "misconduct."³⁴ The Oregon Supreme Court ruled that even though the religious conduct violated state statute, which did not provide for a religious use exception, their conduct could not serve as a basis for denial of unemployment benefits.³⁵ The United States Supreme Court disagreed.³⁶ The Supreme Court reaffirmed the notion that the First Amendment does not prohibit the regulation of conduct of a religious entity for the protection of society, especially when such conduct violates religion-neutral laws of general applicability.³⁷

³¹ *Id.* at 449. The danger arises when civil property awards are made to ecclesiastic entities, thus "establishing" a church where none may have existed before.

³² *Lightman* at 1014, 687 N.Y.S.2d at 568 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) which held that there is some "religiously grounded conduct, protected by the Free Exercise Clause of the First Amendment" which falls outside of the State's police power "to control, even under regulations of general applicability").

³³ *Black v. Employment Div.*, 707 P.2d 1274, 1276 (Or. App.1985).

³⁴ *Id.* at 1277.

³⁵ *Smith v. Employment Div.*, 763 P.2d 146, 150 (Or. 1988).

³⁶ *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872, 890 (1990).

³⁷ *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982)). *See also id.* at 886 n. 3 (where there is a valid and neutral law, of general applicability, an impingement of individual spiritual beliefs does not make the law unconstitutional as a violation of the Free Exercise Clause. This is a rational relation test--if a legislator can rationally believe that the law is needed, it is constitutional. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 486 (1955)). However, if the law were not neutral, one that singles out a particular religion for advancement or inhibition, then the strict scrutiny standard would apply. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 529 (1993) (where intent plays a role, and where there is

The *Lightman* court noted that the Free Exercise Clause “may only serve as a defense where the alleged tortious conduct was undertaken pursuant to religious principles or doctrine.”³⁸ If the ecclesiastic tortfeasor founded the alleged conduct on religious beliefs, such conduct may still impose liability if outweighed by a significant societal interest.³⁹ The court cited *Kenneth R. v. Roman Catholic Diocese of Brooklyn*,⁴⁰ which found a valid cause of

intent to single out a religion, strict scrutiny applies). Even in a case where a statute seems neutral on its face, but is unequally applied, strict scrutiny would lie. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (stating that a statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race). Similarly, if C.P.L.R. §4505 were applied so as invidiously to discriminate on the basis of religion, §4505 would be rendered unconstitutional. In 1993 after *Oregon v. Smith* was decided, Congress enacted the Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1 (1999), which provides:

(a) In general. Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception. Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

The four-prong test found in *Snyder* repeats the two elements listed in the exception clause above.

³⁸ *Lightman* at 1015, 687 N.Y.S.2d at 569 (not addressing whether C.P.L.R. §4505 substantially burdened the Rabbis’ exercise of their religion, nor if it was the least restrictive means of furthering the compelling governmental interest. The court held that the Rabbis’ actions were not an exercise of their religion.).

³⁹ *Id.*, 687 N.Y.S.2d at 569 (citing *Meroni v. Holy Spirit Ass’n for the Unification of World Christianity*, 119 A.D.2d 200, 203, 506 N.Y.S.2d 174, 176 (2d Dep’t 1986) where a cause of action was claimed for intentional infliction of emotional distress which led to plaintiff’s son committing suicide. The court in *Meroni* stated that although the proselytizing practices of the church arose from their beliefs, their conduct was not sufficiently outrageous nor beyond the bounds of societal decency to warrant a cause of action for intentional infliction of emotional distress.).

⁴⁰ *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 654 N.Y.S.2d 791 (2d Dep’t 1997). The Roman Catholic Diocese of Brooklyn employed an ordained Roman Catholic priest, who later sexually abused the infant plaintiff. *Id.* at 161, 654 N.Y.S.2d at 793. The plaintiff argued that the employee made statements as to his sexually deviant conduct to other priests,

action for negligent supervision and retention of a church employee. Tortious liability occurred readily in *Kenneth R.* because examination of the issues would not require exploration of any religious doctrine nor interfere with the practice of religion.⁴¹

Finally, the court quoted *Alexander v. Culp*⁴² that “public policy supports an action for breach of confidentiality by [clergy].”⁴³ The plaintiff appellant, Neil Alexander, met with the defendant appellee, Reverend Harriet Culp, for marital counseling, and was assured that his communication would remain confidential.⁴⁴ Culp later disclosed to appellant’s wife that Alexander was having an affair and was contemplating a kidnapping of their children.⁴⁵ The *Alexander* court held that the plaintiff had a cause of action for negligence rather than the alleged action for clergy malpractice.⁴⁶

The *Lightman* court noted that people should be able to confide in their spiritual leaders, and expressed a significant societal interest in promoting such confidences.⁴⁷ *Lightman* also observed that any privileged communication must be made while fulfilling a religious capacity, and not just one stated in a secular conversation.⁴⁸ Disclosure by the Rabbi was not required to prevent Dr. Lightman from violating Jewish law. Rabbi Flaum knew the couple had ceased marital relations, thus there was no

thus the plaintiff acquired a cause of action for negligent supervision and retention. *Id.* at 164, 654 N.Y.S.2d at 795.

⁴¹ *Id.* at 164-65, 654 N.Y.S.2d at 796. *Cf.* *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940) (where a Jehovah’s witness was soliciting on the street, in violation of a general regulation, the court held that the regulation would not be subject to constitutional objection if it did not obstruct or delay the collection of funds and did not involve any religious test, even if the “collection [were] for a religious purpose.” *Id.*).

⁴² 705 N.E.2d 378 (Cuyahoga County 1997).

⁴³ *Id.* at 382 (holding that a breach of confidentiality by a minister was actionable for common law negligence, but not malpractice, and did not involve nor compromise any religious tenets).

⁴⁴ *Id.* at 16, 705 N.E.2d at 379.

⁴⁵ *Id.*, 705 N.E.2d at 379.

⁴⁶ *Id.* at 19, 705 N.E.2d at 382 (reasoning that “preserving appellant’s confidences neither involved nor compromised any religious tenets”).

⁴⁷ *Lightman* at 1017, 687 N.Y.S.2d at 570.

⁴⁸ *See Drellich*, 123 A.D.2d at 443, 506 N.Y.S.2d at 748, and *supra* text accompanying note 10.

religious basis for disclosure. Rabbi Flaum could have “emphasized to the husband the importance of ensuring that his wife was still going to the Mikvah”⁴⁹ rather than disclosing her reasons for not going. The court established that there existed an “overwhelming public and societal interest in preserving the sanctity of such confidential communications”⁵⁰ to members of the clergy.

Even if the court found a religious purpose, preserving the privilege outweighed the general concern of a negative impact on the children if disclosure were not made. Preserving the privilege outweighed the potential damage of Dr. Lightman violating Jewish law or the need to shield the children from their mother’s improper conduct. The court found defendant’s stated burden on religious expression, “a negative impact on the children’s ‘level of religious observance as well as their general well being,’”⁵¹ was both general and unimportant compared to the overwhelming “state and public interest in preserving confidentiality.”⁵² It was outrageous and offensive for the Rabbis to render public affirmations in the Lightman’s custody battle. The court found that “preventing the husband from having relations with a woman ‘who admittedly socialized with other men’ or in terms of the children, to shield them ‘from their mother’s improper conduct’” would create a standard the rest of society does not adhere to.⁵³

The court held that, absent any religious purpose, the Rabbis would be liable in tort for breach of the clergy-penitent privilege. Since the court could find alternative means for the Rabbis to achieve their religious goals without divulging the sensitive

⁴⁹ *Lightman* at 1017, 687 N.Y.S.2d at 570.

⁵⁰ *Id.*

⁵¹ *Id.* The court lacked any discussion of a minimum level of burden necessary to achieve the state interest or a general applicability of the C.P.L.R. §4505 burden on everyone, probably because it does not apply to agnostic persons. *Id.*

⁵² *Id.*

⁵³ *Id.* The burden the rule placed on the Rabbis was minimal considering that they “could have emphasized to the husband the importance of ensuring that his wife was still going to the Mikvah.” *Id.* Furthermore, the communication itself revealed that all sexual activity with the husband had ended, thus there was no reason to disclose to prevent violation of Jewish law or tradition. *Id.*

communications made, the court concluded that there could be no religious purpose for the breach. The court finds no religious justification for divulging plaintiff's socialization with men outside of her marriage.⁵⁴ Unless the plaintiff waived the privilege, the Rabbis must maintain the confidence. Therefore, the court held as a matter of law that there was no religious purpose for the breach, and absent a waiver, the Rabbis would be liable.⁵⁵

The original purpose of the evidentiary rule C.P.L.R. 4505 was to protect confessions made to spiritual leaders, and to shield spiritual leaders from contempt when they refused to testify about communications made in spiritual context to them.⁵⁶ Sometimes litigants attempted to misuse this privilege,⁵⁷ but the *Lightman* court applied the statute as it was worded, in a manner backward from the purpose. Disclosure without permission from the penitent results in negligence per se, unless the disclosure has a religious purpose, and then the analysis becomes more complicated. Furthermore, if the plaintiff filed this case in federal court, the Federal Rules of Evidence would not change the result. Rule 501 is a general privilege rule, which incorporates the common law rules of each state.⁵⁸ So, if the case were tried in federal district

⁵⁴ *Id.*, 687 N.Y.S.2d at 570.

⁵⁵ *Id.*, 687 N.Y.S.2d at 570.

⁵⁶ N.Y. C.P.L.R. § 4505 (McKinney 1992). Compare FED. R. EVID. 501 which states in pertinent part, "... [I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." The Federal Rules of Evidence were originally submitted for approval to the judiciary committee with individual privilege rules. The proposed Federal Rule of Evidence 506 was a clergy-congregant privilege. These rules were not approved, and what remains in the federal system is rule 501, a general rule of privileges based on common law. Thus the federal rule incorporates C.P.L.R. §4504 in a civil action such as this one in the jurisdiction of New York.

⁵⁷ See *Matter of Keenan v. Gigante*, 47 N.Y.2d 160, 417 N.Y.S.2d 226 (1979) (cleric is required to testify concerning his activities to get an inmate in a work-release program). But compare *People v. Carmona*, 82 N.Y.2d 603, 612, 627 N.E.2d 959, 964, 606 N.Y.S.2d 879, 884 (1993) (although defendant appeared to waive the clergy congregant privilege by making the same statement to detectives, the defendants' admissions made to clergymen should not have been admitted because they were made while obtaining spiritual guidance).

⁵⁸ FED. R. EVID. 501. See also *supra* text accompanying note 56.

court in New York State, C.P.L.R. §4505 would still be applicable, as would be the standards under the New York State Constitution,⁵⁹ and the Federal Constitution.

Whether the statute is constitutional in the federal context, as applied by *Lightman*, depends on the standards set forth by the Supreme Court. A compelling governmental interest in preserving the sanctity of confidential communications made to a spiritual advisor appears to violate the Establishment Clause of the First Amendment, because by fostering the communication, the statute promotes a religion.⁶⁰ The court's use of the statute fails the first prong of the Lemon test,⁶¹ because it has a non-secular purpose relating purely to persons of religion who make confidential communications to their spiritual leaders.

C.P.L.R. 4505 also promotes religion by legally fostering a reliance on the sanctity of privileged communications between clergy and their congregation. The legal reliance is strengthened by the *Lightman* court's use of the statute as actionable in tort. Thus, it fails the second prong of the test, which requires that the statute neither promotes nor inhibits religion.

Nevertheless, it may pass the third prong of the Lemon test, no excessive government entanglement with religion, because religious doctrine does not have to be examined in order to determine whether C.P.L.R. 4505 is violated. The court applied the standards of society when judging the actions of the Rabbis, and did not consider their rights. The Rabbis' rights would have been taken into account had the court analyzed the issue with

⁵⁹ N.Y. CONST. art. XI, § 3. This section provides in pertinent part:

Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.

Id.

⁶⁰ U.S. CONST. amend. I. The First Amendment provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." *Id.*

⁶¹ *Lemon v. Kurtzman*, 403 U.S. 602, 612-3 (1971). See *supra* text accompanying note 29.

2000

ESTABLISHMENT OF RELIGION

589

respect to the Federal Constitution. In sum, from the way the court applied the statute, one can conclude that the New York State Constitution gives the penitent more rights than he or she has under the Federal Constitution.

Robert Gingher

