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Codification and the Origins of Physician-Patient Privilege

Abstract: This essay examines the origins of physician-patient privilege in the United States. It concentrates an 1828 New York law that protected medical confidentiality in the courtroom—the first statutory guarantee of physician-patient privilege—as well as the rapid spread of privilege statutes throughout the nineteenth century. Using the published notes of the authors of New York's influential statute alongside other primary sources, I argue that these early statutes are best explained as the result of nineteenth-century efforts to codify American law. The medical profession took little note of physician-patient privilege until much later, indicating that privilege emerged not as a protection of doctors' professional status, nor as a means of protecting patients in the courtroom, but rather as an inadvertent offshoot of attempts to streamline and simply judicial proceedings. It is perhaps because of these unsystematic origins that physician-patient privilege still remains such an unevenly applied rule in American courtrooms.

Keywords: Physician-Patient Privilege, Confidentiality, Medical Evidence, Medical Jurisprudence, Medical Ethics, Professionalization

Medical confidentiality mandates that doctors work to protect their patients' secrets. But what happens when physicians are called upon to testify in a court of law? Upon questioning in the courtroom, are physicians ethically—or legally—justified in revealing their patients' secrets? In the United States, the laws governing medical testimony in the courtroom are myriad and contradictory. In some courtrooms, doctors are forbidden from disclosing their patients' secrets. In others, doctors risk being held in contempt of court if they withhold any information. New York's statutory code protects almost all

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communications between doctor and patient. Massachusetts, on the other hand, requires physicians to submit to any and all questions. In California, physicians must reveal their patients' secrets in criminal trials, but cannot in civil trials. At present, federal law is ambiguous on the subject.[1] These contradictions are a product of the unusual origins and uneven evolution of physician-patient privilege in the nineteenth century—factors not fully appreciated by medical historians or legal scholars.[2]

In the United States, the origins of physician-patient privilege can be traced to the early nineteenth century. At the time, owing to a precedent originally established in the Duchess of Kingston's 1776 trial for bigamy, no American jurisdiction recognized physician-patient-privilege. In 1828, however, the New York legislature passed a statute that barred physicians from revealing their patients' secrets in the courtroom. With this addition to the state's evidence laws, New York became the first state to extend medical confidentiality into the courtroom. By 1905, thirty different states or territories had followed New York's example, incorporating physician-patient privilege into their revised legal codes.[3]

Somewhat surprisingly, however, the spread of privilege statutes went largely unnoticed in the medical journals and medical textbooks of the day—unnoticed even in treatises on medical jurisprudence. Likewise, legal scholars took little note of these new laws, and, until the latter half of the nineteenth century, physician-patient privilege was, in fact, seldom exercised in the courtroom. If privilege remained an arcane and seemingly inconsequential legal doctrine even after New York and other states recognized it, why, then, did New York adopt physician-patient privilege in the first place? And why did state after state follow New York's lead, adopting similar statutes throughout the mid-nineteenth century?

THE DUCHESS OF KINGSTON'S TRIAL AND COMMON LAW PRECEDENT

Most legal sources maintain that physician-patient privilege was first invoked in 1776 during the Duchess of Kingston's trial for bigamy. When asked to reveal the intimate details of a longtime client, the Duchess's surgeon, Caesar Hawkins, bravely took a stand for the "honour of [his] profession." Hawkins argued that medical men were entrusted with great secrets; betraying these secrets under any circumstances would damage the welfare of their patients and the honor of their profession. But the presiding judge, Lord Mansfiled, was unsympathetic, stating, "If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour, and of great indiscretion; but,

to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatsoever."[4] Documented in court cases and evidence manuals ever since, this brief aside by Lord Mansfield has long been cited as a foundational legal precedent that denies doctors any inherent claim to privileged communications.[5]

Yet these sources have often overlooked the peculiar circumstances surrounding the Duchess's trial. A close examination of the trial reveals that Hawkins's attempt to invoke "professional honor" was not an appeal to widely practiced or universally recognized medical standards, but rather a suggestion that his standing at the top of the medical profession granted him privileges that would have been denied to other practitioners.[6] Hawkins, a wealthy and successful surgeon, built his career by distinguishing himself from other, more humble practitioners. He relied upon his relationships with aristocratic clients to gain social status, adopting the values and styles of the fashionable elite, including gentlemanly honor—a code of extralegal norms that governed aristocratic life.[7] When called into court to reveal the intimate details of one of these clients, Hawkins demurred, arguing that he, as an aristocratic gentleman, could not reveal secrets entrusted to him. Thus his appeal to "professional honor" was an attempt to secure the privileges of elite social status and to protect his personal relationship with the Duchess. It was not a claim that medical ethics mandated confidentiality in the courtroom.[8]

The unique circumstances and timing of the case, however, allowed this brief conversation to be transformed over the course of several decades into a lasting legal precedent that seemingly addressed modern notions of medical confidentiality. The Duchess of Kingston's trial took place in the midst of larger transformation of courtroom proceedings. Over the course of the eighteenth and nineteenth centuries, the advent of adversarial criminal trials with attorneys representing both prosecution and defense slowly led to the formation of standardized rules of evidence.[9] Lord Mansfield (whose ruling has been cited as a rejection of physician-patient privilege) was at the head of this movement, and his decisions on numerous other legal issues formed crucial precedents that helped modernize English law.[10] As the notions of gentlemanly honor subsided and the medical profession grew stronger in the early nineteenth century, legal scholars increasingly looked to the Duchess's case—one of the best recorded and preserved trials of the era— as a legal precedent, ascribing the well-remembered case with the more modern notions of medical confidentiality and medical ethics.

Until 1828, medical witnesses in the United States were, in theory, governed by the precedent established in the Duchess of Kingston's trial for

bigamy. The matter was seldom considered in American courtrooms, however, and the few instances in which medical confidentiality was invoked in the courtroom demonstrated that American courts were often unable to reach a consensus on the issue. In *Sherman v. Sherman*, a 1793 divorce case, a doctor was forced to testify despite his objection that "all he could testify came to his knowledge in confidence." Legal scholars have cited this case as proof that the precedent established in the Duchess of Kingston's trial "would probably have been acknowledged as a common law principle in every American court."[11] Other sources suggest, however, that some courts were willing to grant physicians privileged communications. The Medical Society of the State of New York's *System of Ethics* claimed that, in 1800, the Pennsylvania courts barred the disclosure of medical secrets in the courtroom on the grounds that these communications were analogous to privileged communications between priest and penitent.[12] And yet none of these references appeared in nineteenth-century evidence manuals or became lasting precedents.[13]

Instead, American legal scholars continued to look to England, where only a few judicial decisions addressed the topic of physician-patient privilege. *Wilson v. Rastall*, the first and most frequently cited of these British decisions, was adjudicated in 1792. A bribery suit brought before the King's Bench, the case featured no medical testimony. Yet in the court's decision, Justice Buller, a protégé of Lord Mansfield, delivered a brief aside that reiterated the precedent established by his late mentor:

> There are cases to which it is much to be lamented that the law of privilege is not extended; those in which medical persons are obliged to disclose the information which they acquire by attending in their professional characters. This point was very much considered in the Duchess of Kingston's case, where Sir C. Hawkins, who had attended the Duchess as a medical person made the objection himself, but was overruled, and compelled to give evidence against the prisoner.[14]

Part of a lengthy monologue on attorney-client privilege, these few lines were the first to invoke Mansfield's ruling in a court of law, showing that, within a few decades of the Duchess's trial, the historical meaning of the brief exchange between Mansfield and Hawkins had drastically changed.[15] The conversation was no longer about gentlemanly honor. Instead, Buller's speech articulated what has become the modern reading of the trial—that Mansfield denied Hawkins's claims of physician-patient privilege, establishing a precedent for all common law jurisdictions. In Buller's brief description of the trial, the

exchange between Hawkins and Mansfield was stripped of its historical context and imbued with new values. What was originally a minor aside in a very controversial case suddenly became "much considered" and was preserved one of the trial's lasting legacies. Ironically, Buller's lament that privileged communications ought to be extended to medical practitioners helped secure this new reading of the Duchess's trial, reaffirming that issues of privileged communications had been central to the Duchess's case. Buller's remarks were then cited, along with Mansfield's ruling, in *Rex v. Gibbons* and *Broad v. Pitt.*[16]

Nineteenth-century legal scholars typically cited these cases as a source of binding legal precedent that limited privileged communications to lawyers and lawyers alone.[17] In 1804, Thomas Peake's *A Compendium on the Law of Evidence* cited Mansfield to argue that "[the] rule of professional secrecy extends only to the case of facts stated to a legal practitioner, for the purpose of enabling him to conduct a cause; and therefore. . . the statement. . . of a patient to his physician [is] not within the protection of the law." [18] Similarly, Samuel March Phillips' *A Treatise on the Laws of Evidence* cited both Mansfield and Buller to show that "privilege extends to the three enumerated cases of council, solicitor, and attorney, but it is confined to those cases alone."[19] In this way, evidence manuals lifted brief asides from justices Mansfield and Buller and transformed them into an enduring legal precedent that denied any medical privilege.[20]

CODIFICATION AND THE INTRODUCTION OF PHYSICIAN-PATIENT PRIVILEGE IN NEW YORK

In the decades following the American Revolution, New York, like the rest of the union, struggled with questions of how to adapt British common law to the realities of the new republic. Some questions challenged the fundamental principles of American society—how would property relationships designed to function within a feudal, mercantilist society need to be reworked to function in an increasingly democratic and capitalist nation?[21] Others were more practical. New York's constitution specified that all British statute law as well as all relevant common law decisions would remain in effect. The state's constitution carved out an exception, however, for all laws and decisions deemed "repugnant to the constitution." These were to be "abrogated and rejected." Which laws and decisions were to be enforced and which were to be tossed out remained largely unanswered into the early nineteenth century.[22]

These enduring questions were further complicated by the New York's rapid growth. Between 1800 and 1820, the state's population tripled. New York City emerged as the nation's preeminent commercial center after the Erie Canal opened in 1825. The canal also facilitated rapid growth in the state's interior. In boomtowns like Rochester and Buffalo and throughout the surrounding countryside, an emergent middle class seized opportunities to improve their social and economic status. Populated by new immigrants and Yankee migrants from New England, the region became known as the "burned-over-district" for the numerous religious revivals that swept over it. This combination of religious zeal and economic prosperity made the region fertile ground for various reform movements. Some looked outwards, advocating sweeping changes—the abolition of slavery, women's suffrage— in the hopes of producing a more just society. Others isolated themselves from the outside world, striving for "perfection" within the enclosed confines of utopian communities.[23]

Likewise, the New York legislature worked at a furious pace to regulate the state's booming economy—in one legislative term, for example, the state passed some three-hundred forty-three new laws. One cumulative effect of all of this legislation, however, was to create a sprawling, often-contradictory body of laws. By the 1820s, the New York statutes were catalogued in nineteen different, privately published volumes, some of which approached one thousand pages. At the same time, an additional thirty volumes recorded relevant common law decisions and another seven volumes on chancery law were in circulation.[24] For lawyers and legislators faced with sorting through this morass of obscure and often-contradictory laws, it could be difficult to determine which statutes and which rulings applied to specific cases.

In order to bring clarity to the New York law, the state legislature commissioned three separate revisions of the state code.[25] Each round of revisions only added more uncertainty, however, and in 1821 the New York legislature called a convention to completely rewrite the state constitution. Gathering in Albany, delegates to the convention trimmed away sections of the state's code that were outdated or, in some cases, "repugnant" to the principles of American democracy. Still, the vague language of New York's new constitution did little to resolve the complications surrounding the state's law.[26] And so, in 1824, the state legislature commissioned a three-man committee to "alter the phraseology" of the state's legal codes and increase the legibility of the state's statutory law.[27] The legislature asked attorneys Benjamin Butler and Erasmus Root, as well as the prominent legal scholar James Kent, to examine the state's laws. Root and Butler accepted, but Kent

declined. In his place, the legislature appointed John Duer, one of New York's foremost private attorneys.[28]

While the state legislature commissioned multiple revisions of New York's statutory code, a small cadre of lawyers began to call for more drastic reforms. To these reformers, the problems facing New York were emblematic of larger, structural problems with the common law system. Inspired by the British legal philosopher Jeremy Bentham as well as the French Code Napoleon, these reformers believed that codification, the process of collecting and restructuring the law into singular legal code, offered a means to eschew the mysteries of a common law system based on tradition and precedent in favor of a simpler, more accessible legal code.[29] Codifiers argued that the common law was too complicated for a fledgling democracy as, in many cases, Americans did not have the knowledge necessary to represent their interests in court. Moreover, the common law, with its reliance on arcane precedents and traditions, added numerous unnecessary steps to the judicial process, making the legal system both slow and expensive. The only solution to these problems, codifiers argued, was to replace the entire common law system with a new set of codes and statutes.[30]

Codification also offered the promise of Americanizing a legal system still tied to traditions and legal precedents established in Great Britain. To William Sampson—a New York attorney, an Irish-Catholic refugee, and one of the most vocal advocates of codification—the common law was a "pagan idol" imposed by British tyrants. Americans, Sampson argued, "should have. . . laws suited to [their] condition and high destinies." With codified laws, the United Sates would "no longer [be] forced into the degrading paths of Norman subtleties, nor [be forced] to copy from the models of Saxon barbarity, but taught to resolve every argument into principles of natural reason, universal justice, and present convenience."[31] In this way, codification tapped into a growing democratic sentiment in the 1820s, offering a utopian overhaul of the American legal system. Through codification, Sampson and others argued, the law would "advance with a free and unimpeded step towards perfection. . . [It would] be separated from the rubbish and decay of time and stripped of the parasitical growths that darken and disfigure it."[32] If the proclamations of the most ardent reformers are to be believed, codification was, as one legal scholar put it, nothing short of "a democratic movement for access to justice—for reforming the legal system so that laypersons could not only understand, but operate the machinery of law."[33]

These reformers found powerful allies within the New York government. Governor DeWitt Clinton quickly emerged outspoken advocate of codification.

In 1825, he successfully lobbied to expand the ongoing revisions of the New York legal code. Clinton empowered the revisory committee to consolidate laws relating to the same subject, to expunge expired or outdated legislation from the state code, and to suggest new laws to the state legislature. By entrusting the committee with these unprecedented powers, Governor Clinton sought nothing short of a complete overhaul of New York's legal system—Clinton boldly asserted to the assembled legislature that he hoped to create "[a new] complete code founded on the salutary principles of the common law, adopted to the interests of commerce and the useful arts, the state of society and the nature of our government, and embracing those improvements which are enjoined by enlightened experience." Governor Clinton hoped codification would "free [state] laws from uncertainty, elevate a liberal and honorable [legal] profession, and utterly destroy judicial legislation, which is fundamentally at war with the genius of republican government."[34]

Not everyone on the committee shared Governor Clinton's lofty ambitions. Uncomfortable with the new powers entrusted to the committee, Erasmus Root resigned. His replacement, Supreme Court reporter Henry Wheaton served for a year before he too resigned. To fill the seat opened by these resignations, the state legislature turned to John C. Spencer, a promising young New York lawyer who had previously served in both congress and the state legislature. A longtime friend of Dewitt Clinton, Spencer shared the governor's unwavering belief in codification. Spencer's views on the subject were likely shaped in part by his father, Ambrose Spencer, who had long served as a judge in a New York Supreme Court and was "well known for his efforts to construct what might be called an American common law on the basis of state court rulings." Throughout his legal career, Ambrose Spencer "often overrode English precedents in favor of what seemed to him to be commonsensical decisions appropriate to the circumstances of the new republic."[35] A tireless worker, John Spencer quickly took control of the committee where he put his political connections to use, drafting numerous laws and working tirelessly to secure their passage through the state legislature.

Seizing this unique opportunity, the revisers used the "liberal application" of their powers to completely rewrite the New York Statutory Code. The committee compiled all of the states' disparate statutes into a single volume, which was, in turn, split into five categories: the first dealt with issues of "internal administration and civil polity of the state;" the second contained "substantive laws relating to property domestic relations and private rights;" the third covered "the state's judicial machinery and civil procedure;" the fourth outlined the New York's criminal law statutes; and the fifth included

"all public laws of a local and miscellaneous character." These statutes were delivered "in simple and concise declaratory statements" and each category was presented individually to the state legislature.[36] The new *Revised Statutes* made numerous substantive changes to New York's laws, reforming the state's electoral process, making early abortion illegal, and radically reshaping the state's property and inheritance laws.[37]

The powers of the committee increased substantially when several members took on new, prestigious positions within the state government. In 1825, John Spencer was elected to the New York state senate. Three years later, Benjamin Butler was elected to the state assembly. Thus, by the time the revisers submitted their third batch of revisions on civil proceedings in 1828, both Butler and Spencer were voting members of the state legislature. From this position, the revisers defended some of their more controversial provisions. Butler, in particular, "took up multiple daily sessions in the assembly fending off objections to the revisers' proposal to extend powers of documentary discovery and witness examination from chancery to courts of common law."[38] In the category pertaining to civil procedure, the revisers included a new statute: "No person duly authorized to practice physic or surgery, shall be allowed to disclose any information [in court] which he may have acquired in attending to any patient, in a professional character, and which information was necessary to enable him to prescribe as a physician, or do any act for him, as a surgeon."[39] The law was met with little objection from the state legislature, which quickly enacted the statute.

THE ORIGINS OF PHYSICIAN-PATIENT PRIVILEGE IN NEW YORK

Historians and legal scholars have advanced several theories to account for this unprecedented legislation. Some hypothesized that the revisers were influenced by British legal scholarship; others suggested that prominent New York physicians managed to successfully push for adoption of the statute.[40] Yet, as one historian writes, "the exact circumstances of the introduction of this statute are not known."[41] Any attempt to uncover these circumstances must begin with an examination of the revisers' published notes.

The revisers were well aware that their new law regarding physician-patient privilege challenged accepted legal precedents. As with all of their potentially controversial provisions, the committee kept careful notes, justifying their actions in case of potential opposition within the legislature. In their notes, the revisers provided the legislature with a lengthy argument in favor of the new statute. They began by citing *Wilson v. Rastall*, stating,

"[Justice] Buller (to whom no one will attribute a disposition to relax the rules of evidence) said it was 'much to be lamented' that [medical communications were] not privileged." The statute was modeled upon attorney-client privilege and passed alongside a companion statute that also privileged to communications between priest and penitent. Yet the revisers saw the need to privilege medical communications as more pressing than the need to privilege communications between attorney and client:

> The ground on which communications to counsel are privileged, is the supposed necessity of the full knowledge of the facts, to advise correctly, and to prepare for the proper defense or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offence.

Moreover, the revisers feared that physicians, if torn between conflicting obligations, would choose to protect their patients in any event, disobeying the courts in the process:

> Besides, in such cases, during the struggle between legal duty on the one hand, and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will, in most cases, furnish a temptation to the perversion or concealment of truth, too strong for human resistance.

Given the support of prominent legal scholars and physicians' desire to protect their patients, the revisers urged the state legislature to adopt the privilege immediately. The revisers concluded, "In every view that can be taken of the policy, justice or humanity of the rule, as it exists, its relaxation seems highly expedient." They also suggested that the proposed law was "so guarded that it can not be abused by applying it to cases not intended to be privileged."[42]

Still, the Reviser's Notes do not completely illuminate the reasons a few New York lawyers suddenly felt the need to entrust doctors with unprecedented legal privileges. One possibility is that a small group of influential New York physicians managed to convince the revisers to enact a statutory guarantee of physician-patient privilege. Five years before the New York State Legislature enacted the United States' first medical confidentiality law, the Medical Society of the State of New York (MSSNY) had openly called for

physician-patient privilege in its *System of Ethics*. Comparing physicians to Catholic priests, the *System of Ethics* suggested that physicians were obliged to maintain patient confidences even in a court of law. Written by several prominent physicians, this document may very well have informed the committee's decision to enact physician-patient privilege.[43]

Moreover, the revisers sought the council of the MSSNY's president, Theodoric Romeyn Beck, for guidance on the revised code's application to medical policy. Beck, an Albany physician, was already recognized as the nation's foremost scholar of medical jurisprudence, and as one of Albany's most prominent citizens, he was also well acquainted with the members of the revising committee, especially John C. Spencer. Beck and Spencer had both attended Union College, graduating one year apart. Each was a close friend of Governor Clinton. Historian James Mohr has demonstrated that Beck worked closely with the revisers—none of whom were experts on medical issues—to revise New York's medical laws.[44] Though much of the communication between Beck and the revisers was likely conducted in private, excerpts from Beck's personal correspondence reveal the extent to which Beck was involved in the process of revision:

> Albany, Sept. 11, 1828
>
> I have prepared various Sections against medical malpractice according to your Suggestions, particularly the improper use of instruments, capital operations in surgery, selling poisons &c. which when examined by Mr. Butler I will have edited and sent to you. In the mean while I want you to prepare the public and particularly the Legislature, by communications in the different newspapers, by extracts from approved writers on such subjects, and by such other means as occur to you, for a favorable examination and discussion upon our provisions. I have neither the time nor ability to do it.
>
> Yours very respectfully,
> J. C. Spencer

To Mohr, this "letter makes clear the fact that Beck was given a reasonably free hand to try to insinuate into the proposed legal code any medically related provisions he wanted."[45] At the same time, Spencer entrusted his friend and colleague to curry the favor of state legislators, suggesting that Beck was actively involved in nearly every phase of the process. Furthermore, the law itself as well as the justification presented in the Revisers' Notes expounded

upon many of the themes present throughout Beck's work. Mohr makes a compelling argument that Beck was responsible for another new section of the code, a section that criminalized the performance of early term abortions. But was he also responsible for inserting the statute guaranteeing physician-patient privilege into the revised code?

A closer examination of Beck's publications provides no evidence that physician-patient privilege, unlike early abortion, was an issue that concerned him. The initial 1823 edition of *Elements of Medical Jurisprudence*, Beck's seminal work, featured little discussion of the duties facing medical witnesses. In 1828, Beck addressed the Medical Society of the State of New York on the subject of medical testimony in the courtroom, but again did not mention privileged communications.[46] Thus, while Beck might have been involved, he never publicly advocated in favor of physician-patient privilege before the law was passed. Moreover, in later editions of *Elements of Medical Jurisprudence*, Beck did mention the precedent established in the Duchess of Kingston's trial, but failed to mention New York's medical confidentiality law.[47]

Beck's silence on the subject of medical privilege makes it impossible to argue that the first law extending medical confidentiality into the courtroom was the work of the medical profession. This was not a simple oversight on Beck's part, but rather, paradigmatic of the field of medical jurisprudence as a whole. No surviving student notebooks on medical jurisprudence from the early nineteenth century "contained instruction about how information being conveyed to the students was supposed to be presented in actual courts of law."[48] Likewise, Beck's silence also rules out the possibility that the MSSNY successfully lobbied for the inclusion of physician-patient privilege in the *Revised Statutes.* If the society was responsible for this legislation, then surely Beck, as the MSSNY's president and foremost expert on medico-legal issues, would have known about the new law.

Instead, the *Revisers' Notes* suggest that the New York statue was prompted by nineteenth-century legal scholarship. The language in the revisers' notes echoed the language of earlier court cases and legal manuals rather than medical texts. The revisers specifically referred to physicians' "professional honor"—language lifted from the Duchess of Kingston's trial for bigamy. Likewise, the reviser's cited Justice Buller's aside in *Wilson v. Rastall* and the legal scholar Samuel March Phillips. They did not cite any physicians or medical experts. Likewise, the revisers justified their changes to the New York code, by comparing physician-patient privilege to attorney-client privilege, not priest-penitent privilege as the MSSNY had done. Moreover, while much of the legislation proposed by Beck was placed in the medical

section of the code, New York's privilege statute was included in the state's evidentiary code, a topic on which neither Beck nor the MSSNY were likely to have been consulted.

Furthermore, the revisers would have had their own reasons to take issue with the common law position on physician-patient privilege. To the proponents of codification, judicial decisions like Lord Mansfield's ruling on physician-patient privilege were symptoms of two of the major problems plaguing the judicial system. First, as unelected officials, judges were afforded too much power to interpret and enforce the laws. Second, the common law, which depended upon the interpretation of legal precedent, was virtually incomprehensible to laymen. Replacing this arcane legal doctrine with a precise and proscriptive law would have solved each of these dilemmas. In their efforts to compress New York law into one coherent volume, the revisers often replaced the language of early statues with text pulled from "judicial exposition" and "professional criticism" where they believed it made the law more coherent.[49] Given the reasoning offered in the *Reviser's Notes*, it is likely that the revisers, influenced by the frequent recording of Justice Buller's lamentation in *Wilson v. Rastall* in nineteenth-century evidence manuals, simply believed physician-patient privilege to be an uncontroversial and commonsensical correction of a trivial legal matter.[50]

CODIFICATION AND THE SPREAD OF PHYSICIAN-PATIENT PRIVILEGE

Whatever the motivations of the New York revisers, their statute quickly influenced other states to follow suit.[51] Missouri passed a law guaranteeing physician-patient privilege in 1835. Mississippi enacted a statute the following year.[52] By 1840, both Arkansas and Wisconsin had enacted statutes. Significantly, each of these states—like New York—passed their statutes guaranteeing physician-patient privilege as part of larger processes of codification, often using New York as an example.

For the most part, these laws echoed the language of New York's statutory provision. In Missouri, the legal code stated that no physician "shall be required or allowed to disclose" patients' confidences. Though the states' revisers added the word required to the statute, this minor alteration did little to change the effect or intent of the law.[53] Mississippi adopted the New York statute word-for-word. Other states made minor alterations. Moreover, the revisers of later codes often had connections to New York's legal establishment. The revised codes of both Michigan and, later, Arizona, for example, were both written by William Thompson Howell, an attorney who had

practiced in New York.[54] Elsewhere physician-patient privilege was proposed, but not enacted. In the 1830s, the Massachusetts State Legislature debated a privilege statute identical to New York's 1828 law as part of a larger codification movement. When attempts to codify Massachusetts law stalled, however, the proposed privilege statute was scrapped and quickly forgotten.[55]

Only Wisconsin and Arkansas made changes that affected the potential applications of the privilege in court. Each of these states replaced the New York statutory prohibition on disclosing patients' secrets with a weaker provision that merely prevented doctors from being compelled to reveal their patients' secrets. For example, the Wisconsin statute read: "No Person duly authorized to practice physic or surgery, **shall be compelled** to disclose any information which he may have acquired in attending any patient in a professional capacity and which information was necessary to enable him to prescribe for such patient as a physician or do any act for him as a surgeon."[56] Legal scholars have attributed this change in language to the authors' desire to limit the power of the privilege.[57] In time, doctors would come to embrace these statutes as their language left decisions about the admissibility of medical secrets open to the interpretation of physicians. The Wisconsin statute would later serve as model as physicians lobbied for new privilege laws in the late nineteenth century.[58]

Calls for codification only intensified in the 1840s. When New York adopted a new constitution in 1846, the state legislature commissioned two committees—one to reform the state's legal practice and another to assess the possibility of further codification. A series of political compromises placed the pro-codification attorney David Dudley Field at the head of these reform movements.[59] Like Spencer two decades earlier, Field was committed to simplifying and improving New York's legal system. He took issue with the lack of uniformity in the ways cases were brought and pleaded before the state's courts, arguing that the state's myriad common law precedents should be replaced with a uniform and easily accessible code of procedure.

In 1848, Field and his colleagues presented the New York State Legislature with a revised Code of Civil Procedure. Modeled upon the French Civil Code, Field's Code of Civil Procedure took issue with the complexity and confusions of the common law as well as the jargon and Latin that underpinned nineteenth-century legal procedure. He posited, for example, that the new Code of Civil Procedure should replace "habeas corpus" with a "writ of deliverance from prison." Even more than the revisions of the 1820s, the Field code, as one legal historian wrote, was "a colossal affront to the common-law

tradition." While the state legislature rejected some of Field's most radical proposals, the bulk of Field's Code was accepted into law in 1848.[61]

Field's Code did not change New York's medical confidentiality law.[62] The 1848 revisions did, however, spark a new wave of codification that brought similar statutes to still more jurisdictions, especially in the western United States. Compared to the older eastern states, the American west featured a young, progressive bar, greater exposure to civil law, and less rigidly established common law traditions—characteristics that made these states especially receptive to codification. California adopted Field's Code in 1851, adopting physician-patient privilege in the process. Other western states followed California's lead with identical statutes. In the following decades, Iowa, Minnesota, Indiana, Ohio, Washington Territory, Nebraska, Wisconsin, and Kansas all adopted the code. By the turn of the century the Dakotas, Idaho, Arizona, Montana, Wyoming, North Carolina, South Carolina, Utah, Colorado, Oklahoma, and New Mexico had all adopted Field's Code of Civil Procedure.[63]

Some of these jurisdictions, like Missouri and Wisconsin had already adopted physician-patient privilege. In those states, the existing statutes were incorporated into the new Code of Civil Procedure. In many more jurisdictions, however, physician-patient privilege was adopted as part of Field's Code. Among others, California, Kansas, and Indiana adopted physician-patient privilege in this manner. At the same time, however, numerous states rejected the Field's controversial code altogether. Much of the eastern seaboard remained what one legal scholar termed, "common law states." Rejecting codification, these "older states, particularly of English origin, [stuck] to the common law, and never attempt[ed] to define it, rarely even to improve it by statute." These states remained bound to the precedent established in the Duchess of Kingston's trial for bigamy.[64]

CONCLUSION

The middle of the nineteenth century brought more legislation on physician-patient privilege than any time before or since. Between 1828 and 1870, seventeen states or territories enacted statutory guarantees of medical confidentiality. While all of these statutes have been amended and changed numerous times since the nineteenth century, these early statutes form the basis for modern physician-patient privilege. With the exception of Mississippi, none of these statutes was ever repealed. Instead, the effects of these early statutes continue to shape the intersections between medicine and the

law today. By and large, privilege is observed where it was adopted in the nineteenth century and is not observed in the few Southern and New England states that did not adopt it. Moreover, by adopting privilege via statute, these laws had the effect of cementing the absence of privilege in federal courts which remain to the present time still tied to the common law precedent.

A thorough review of these early statutes reveals that physician-patient privilege first emerged as an inadvertent byproduct of numerous codification movements. Though there were small variations between individual statutes, by and large, all of these laws shared a common language that had been inherited from earlier legal scholarship. More importantly, each statute was enacted as part of a larger scheme of codification. Physician-patient privilege appeared in jurisdictions where codification was most popular and remained absent where codification failed to take hold. By the latter half of the century, the dividing line that would characterize later debates over physician-patient privilege had been set. Western States, most of which embraced Field's Code of Civil Procedure, almost all guaranteed medical confidentiality in the courtroom. Eastern States, on the other hand, remained reluctant to enact physician-patient privilege.

And yet, many of these developments went unnoticed in their time. Throughout much of this period, both doctors and lawyers viewed the privilege as a legal issue and, as such, it was often overshadowed by other legal developments. For legal scholars, codification carried so many pressing implications that physician-patient privilege seemed trivial by comparison. Legal records show that, despite the rapid spread of privilege statutes throughout the mid-nineteenth century, privilege was seldom invoked in the courtroom. The subject was scarcely covered in the legal literature of the day, and, until the late 1870s, only a few cases—all adjudicated in New York—appear in any of these sources.[65] Moreover, in these cases, the courts often contradicted one another as doctors, lawyers, and judges were all unsure as to how privilege was to be interpreted in the courtroom.[66]

At the same time, doctors—seldom trained in how to carry themselves in the courtroom—often failed to notice slight changes in states' evidentiary codes. In 1831, several doctors wrote to the *American Journal of Medical Sciences* asking, "Are there certain questions which a medical man in a court of justice may refuse to answer?" It was a novel question—such issues were seldom discussed in the medico-legal literature of the day—and Isaac Hays, the journal's editor, was at a loss as to how to answer this query. Hays examined a variety of different sources including records of the Duchess of

Kingston's trial for bigamy and *Wilson v. Rastall* and came to the conclusion that "that medical persons have *no privilege whatsoever*, not to disclose circumstances revealed to them professionally," failing to note that, in New York, such communications were expressly barred by statute. This makes it all the more surprising that a decade later Hays would go on to become one of the most vocal champions of physician-patient privilege. In the 1840s, Hays took the lead in the drafting of the American Medical Association (AMA)'s *Code of Ethics*—a document that championed physician-patient privilege as the logical extension of physicians' duty to preserve confidentiality. Here, Hays wrote, "Secrecy and delicacy, when required by peculiar circumstances, should be strictly observed. . . . The force and necessity of this obligation are indeed so great, that professional men have, under certain circumstances, been protected in their observance of secrecy by courts of justice."[67]

The AMA *Code of Ethics* marked an important turning point in the history of physician-patient privilege. The formal recognition of physician-patient privilege by what would become the nation's most powerful medical society was the culmination of a decades-long process in which physicians came to view privilege as both an essential part of the physician-patient relationship and a useful tool for advancing the status of the medical profession. In the ensuing decades, the same doctors that championed the AMA *Code of Ethics* would publicly advocate for the spread of physician-patient privilege. To these physicians, privilege was the logical extension of the AMA *Code* and its emphasis on gentlemanly honor. It was also a powerful signal that the ethics and values of the regular physicians carried beyond the medical profession, as it suggested that the physician-patient relationship could be more important than the fact-finding mission of the courts.

Only through this later process, did privilege take on many of the associations it holds today. In arguing for physician-patient privilege in the late-nineteenth century, doctors came to associate the privilege with the status and prestige of their profession. Likewise, in the early twentieth century, privilege came to be associated with modern notions of privacy and patients' rights. It is noteworthy, however, that both of these developments came much later, long after privilege had spread throughout much of the United States. In order to understand the origins of physician-patient privilege it is imperative to detach the privilege from these modern associations. With a few exceptions, the earliest advocates of physician-patient privilege were neither physicians nor patients, but instead a small group of lawyers intent on a larger agenda of

codification. Perhaps because of these origins, physician-patient privilege remains an unevenly applied rule in American courtrooms to this day.

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NOTES

1. On the law of Evidence today, see Kenneth C. Broun, *McCormick on Evidence*, 7th ed. (Eagan, MN, 2013). In criminal cases, federal courts operate under the *Federal Rules of Evidence*, which were adopted in 1975 and do not include physician-patient privilege. In civil cases, federal courts operate according to the laws of the state in which the suit is adjudicated—physician-patient privilege is observed in those states that have privilege statutes and not observed in those states that do not have statutes. Federal Rules of Evidence, H.R. Rep. No. 93-650, 93rd Cong., 1st sess. 28 (1973), rule 501.

2. To date, the most thorough treatment of this history has occurred in legal treatises, where legal scholars have traced the evolution of various privilege statutes over the course of the nineteenth and twentieth centuries. For examples, see John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law Including the Statutes and Judicial Decisions of All Jurisdictions of the United States*, vol. 4 (1st ed., Boston, 1905); Clinton DeWitt, *Privileged Communications Between Physician and Patient* (Springfield, Ill., 1958); and Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* (3rd ed., New York, 2016). The best historical analysis of physician-patient privilege is Andreas-Holger Maehle, *Contesting Medical Confidentiality: Origins of the Debate in the United States, Britain, and Germany* (Chicago, 2016). Angus Ferguson, *Should a Doctor Tell? The Evolution of Medical Confidentiality in Britain* (Farnham, 2013), offers an overview of similar developments in the United Kingdom. Legal examinations such as Daniel Shuman, "The Origins of Physician-Patient Privilege and the Professional Secret," *Southwestern Law Journal* 39, no. 2 (June 1985): 661–88, offers useful information on the evolution of legal arguments for and against physician-patient privilege in America, but does not analyze the social context in which these statutes arose or their effects on the medical profession.

3. Wigmore, *On Evidence*, 1st ed., 4:348–49.

4. *The Trial of Elizabeth Duchess Dowager of Kingston for Bigamy* (London, 1776), 119–20.

5. Rex v. Gibbons, 1 Car & P 97 (1823); Broad v. Pitt, 3 C & P 518 (1828); Thomas Peake, *A Compendium on the Law of Evidence* (Philadelphia, 1812), 183; Samuel March Phillips, *A Treatise on the Law of Evidence: First American Ed., from the Second London Ed.* (New York, 1816), 104; Thomas Starkie, *A Practical Treatise on the Law of Evidence and Digest of Proofs in Civil and Criminal Proceedings*, vol. 2 (Philadelphia, 1834), 230.

6. By the late eighteenth century, medical confidentiality was widely recognized as one of the foundational principles of medical ethics, from the early 1730s, every physician graduating from the University of Edinburgh Medical School—one of the world's premier medical schools and a popular choice among elite colonial American physicians— swore: "[I A.B. do solemnly declare that I will] practice physic cautiously, chastely, and honourably; and faithfully to procure all things conductive to the health

of the bodies of the sick; and lastly, and never, without great cause to divulge anything that ought to be concealed, which may be seen or heard during professional attendance." "Edinburgh University Medical Oath, Circa 1732–1735 Onward," quoted in Robert Baker, *Before Bioethics: A History of American Medical Ethics from the Colonial Period to the Bioethics Revolution* (Oxford, 2013), 37. Likewise, the most important writers on the subject of medical ethics frequently extolled the need for confidentiality: Thomas Percival, *Medical Jurisprudence or a Code of Ethics and Institutes, Adapted to the Professions of Physic and Surgery* (Manchester, 1794); Thomas Percival, *Medical Ethics or a Code of Ethics and Institutes, Adapted to the Professions of Physic and Surgery* (London, 1803); John Gregory, *Observations on the Duties and Offices of a Physician, and on the Method of Prosecuting Enquiries in Philosophy* (London, 1770); John Gregory, *Lectures on the Duties and Offices of a Physician* (London, 1772); John Gregory, *John Gregory's Writings on Medical Ethics and the Philosophy of Medicine* (Dordrecht, 1998). On the subject of privilege, Gregory and Percival were divided: Gregory believed that confidentiality ought to extend into the courtroom, while Percival did not. On the history of medical ethics in general, see Baker, *Before Bioethics*; Robert Baker, Arthur Caplan, Linda Emanuel, and Stephen Latham, *The American Medical Ethics Revolution: How the AMA's Code of Ethics Has Transformed Physicians' Relationships to Patients, Professionals, and Society* (Baltimore, 1999); Albert R. Jonsen, *A Short History of Medical Ethics* (Oxford, 2008); and Donald E. Konold, *A History of American Medical Ethics, 1847–1912* (Madison, 1962).

7. Donna T Andrew, "The Code of Honour and Its Critics: The Opposition to Dueling in England, 1700–1850," *Social History* 5, no. 33 (1980): 409–34; Donna Andrew, *Aristocratic Vice: The Attack on Dueling, Suicide, Adultery, and Gambling in Eighteenth Century England* (New Haven, 2013); V. G. Kiernan, *The Duel in European History: Honour and the Reign of Aristocracy* (Oxford, 1988).

8. As a surgeon, Hawkins would have occupied the lowest station within a rigidly hierarchical medical profession. As an aristocratic gentleman, however, Hawkins could make claims that few if any other medical professionals could. A few years after the Duchess of Kingston's trial, Hawkins would be knighted for his services to the crown. Several historians and legal scholars have recently reexamined this case: Danuta Mendelson, "The Duchess of Kingston's Case, the Ruling of Lord Mansfield and Duty of Medical Confidentiality in Court," *International Journal of Law and Psychiatry* 35 (2012): 480–89; Angus Ferguson, "The Lasting Legacy of a Bigamous Duchess: The Benchmark Precedent for Medical Confidentiality," *Social History of Medicine* 19 (2006): 37–53; Angus Ferguson, *Should a Doctor Tell?: The Evolution of Medical Confidentiality in Britain* (Farnham, Surrey, 2013).

9. J. M. Beattie, "Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries," *Law and History Review* 9, no. 2 (1991), 221–67; J. H. Langbein, "Historical Foundations of the Law of Evidence: A View from the Ryder Sources," *Columbia Law Review* 96, no. 5 (1996): 1168–1202; and Barbara Shapiro, *A Culture of Fact: England, 1550–1720* (Ithaca, 2000).

10. James Oldham and William Murray Mansfield, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (Chapel Hill, 1992).

11. Sherman v. Sherman; and Wigmore, *On Evidence* 1st ed., 4:3348.

12. The society failed to mention the name of the case, merely stating that "secrecy was vindicated to a physician (by a superior court of Philadelphia, 1800) refusing the disclosure

of his professional acts, against a plaintiff suing for Divorce on the plea of adultery." Medical Society of the State of New York, *System of Ethics* (Albany, 1823), 21–22.

13. See, for example, Samuel March Phillips, *A Treatise on the Law of Evidence: First American Ed.* (New York, 1816), 104.

14. *Term Reports in the Court of King's Bench: from Michaelmas Term 31st George III. 1790 to Trinity Term, 32nd George III. 1792. Both Inclusive* (London, 1799), 760.

15. *Wilson v. Rastall* had little to do with medical testimony, but rather focused on the scope of attorney-client privilege. On *Wilson v. Rastall* and its implications for physician-patient privilege, see Ferguson, *Should a Doctor Tell?*, 24. On the related history of attorney-client privilege, see Wigmore, *On Evidence* 1st ed., 3194–3256; and T. C. Dawson Jr., "The Attorney-Client Privilege," *University of Richmond Law Review* 19 (1984): 560–99. Wigmore traces attorney-client privilege to the late sixteenth century. Some recent scholarship contests that attorney-client privilege was not widely recognized until much later. According to these histories, while privilege was sometimes accepted in earlier trials, it was not until the 1833 case, *Greenough v. Gaskill*, that privilege was widely recognized under common law. See Imwinkelried, *The New Wigmore: Evidentiary Privileges*, 163; and Geoffrey C. Hazard Jr., "An Historical Perspective on the Attorney-Client Privilege." *University of Pennsylvania Law School Scholarship Repository* Paper 1068 (1978).

16. Wilson v. Rastall; Rex v. Gibbons; Broad v. Pitt; and Ferguson, *Should a Doctor Tell?*, 24.

17. There was some debate as to whether priests and other religious figures would have been barred from testifying at trial. Despite the arguments of several judges, however, "the almost unanimous expression of judicial opinion (including at least two decisive rulings) [denied] the existence of a privilege [protecting communications between priest and penitent]." Wigmore, *On Evidence*, 1st ed., 4:3362–63.

18. Thomas Peake, *A Compendium on the Law of Evidence* (London, 1804), 175.

19. Phillips, *A Treatise on the Law of Evidence*, 104.

20. Ferguson, *Should a Doctor Tell?*, 24.

21. Roscoe Pound, *The Formative Era in American Law* (Boston: 1938); Morton Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass., 1977); Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge, 1993); and William E. Nelson, *The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Athens, 1994).

22. *The Constitution of New York*, Article XXXV (1777).

23. Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815–1848* (Oxford, 2007), 117–20, 170–76, and 216–17. The social transformations, as well as the numerous reform movements and religious revivals that emerged out of New York during this period have long been the subject of historical debate. On these social transformations and the various reform movements that emerged in New York in the 1820s, see Sean Wilentz, *Chants Democratic: New York City and the Rise of the American Working Class* (Oxford, 2004); Mary Ryan, *Cradle of the Middle Class: The Family in Oneida County, New York, 1789–1860* (Cambridge, 1981); Paul Johnson, *A Shopkeeper's Millennium: Society and Revivals in Rochester New York, 1815–1837* (New York, 1978); Thomas Bender, ed., *The Antislavery Debate: Capitalism and Abolitionism as a Problem in Historical Interpretation* (Berkley, 1992); and Nathan O. Hatch, *The Democratization of American Christianity* (New Haven, 1991).

24. Charles Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (Westport, 1981), 132; and Kellen Funk, "The Rule of Writs: Civil Justice Before the Code" (Manuscript, 10 May 2019).

25. Cook, *The American Codification Movement*, 155. These revisions occurred in 1789, 1801, and 1813. New York's colonial government also revised its laws in 1752, 1762, and 1774.

26. Ibid., 132–35.

27. *New York State Constitution of 1821*, Article 6, Section XIII; Mohr, *Doctors and the Law*, 78.

28. Mohr, *Doctors and the Law*, 79.

29. Cook, *The American Codification Movement*, 69–79, 102. The term "codification" was coined by Bentham. According to Cook, "the French codification achievement . . . was the greatest source of tangible inspiration for the codifiers." While many codifiers were quick to acknowledge Napoleon's autocratic tendencies, "when they spoke of Napoleon as a law reformer, they spoke with unrepressed admiration"; to these codifiers, Napoleon was "a modern Justinian" (73–74). The code was transported to the United States in bits and pieces. The French penal code was translated and published in the *American Review* in 1811. The *United States Law Journal* also published the French Penal code along with sections of the French civil code on bankruptcy in 1823. John Rodman published a translation of the French commercial code in New York in 1811.

30. Discussion of the codification movement in this section draws upon: Cook, *The American Codification Movement*; Kermit Hall, *The Magic Mirror: Law in American History*, 2nd ed. (New York, 2009), 139–40; Lawrence Friedman, *A History of American Law*, 3rd ed. (New York, 2005), 391–411; Charles McCurdy, *The Anti-Rent Era in New York Law and Politics, 1839–1865* (Chapel Hill, 2006); Michael Grossberg and Christopher Tomlins, eds., *The Cambridge History of Law in America, Vol. II: The Long Nineteenth Century (1789–1920)* (Cambridge, 2008), 95–99.

31. William Sampson, "Showing the Origin, Progress, Antiquities, Curiosities, and the Nature of the Common Law," *Anniversary Discourse Before the Historical Society of New York* (6 December 1823) quoted in Norman W. Spaulding, "The Luxury of the Law: The Codification Movement and the Right to Counsel," *Fordham Law Review* 73, no. 3 (2004): 983–96 at 986.

32. Ibid.

33. Spaulding, "The Luxury of the Law," 985. This view was first championed by Charles Warren in *A History of the American Bar* (Boston, 1911), 508–32. Warren's thesis found numerous champions throughout the twentieth century, including Roscoe Pound, who argued that this period represented a "formative era of American Law." Other scholars, such as Robert Gordon, have more recently challenged this thesis, however, arguing that codification often failed to achieve the lofty goals that Sampson and other reformers set. Gordon highlights the fact that, while codifiers made up a vocal subset of the bar in New York and elsewhere, there remained a larger contingent of moderate and conservative lawyers who were either indifferent to or outright opposed to codification. To Gordon, the American legal profession, "a notoriously conservative profession," steeped in common law tradition, was never going to fully adopt codification in the early nineteenth century. Robert W. Gordon, "The American Codification Movement," *Vanderbilt Law Review* 36 (1983): 431–58, quote at 433. Others have shifted the focus on the codification movement

toward later developments, most notably the advocacy of New York attorney David Dudley Field. See, for example, Friedman, *A History of American Law*, 391–411; or Kellen Funk, "Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846-76," *Journal of Legal History* 36, no. 2 (2015): 152–91.

34. Charles Z. Lincoln, ed., *Message from the Governors, Comprising Executive Communications to the Legislature . . .* , 11 vols. (Albany, 1909), 2:90, quoted in Cook, *The American Codification Movement*, 138.

35. Mohr, *Doctors and the Law*, 80.

36. Cook, *The American Codification Movement*, 133.

37. Ibid., 142–43. The organization of the *Revised Statutes* was based on the organization of Blackstone's *Commentaries.*

38. Funk, "The Rule of Writs," 85.

39. *Revised Statutes of the State of New York* (Albany, 1828), 409.

40. Clinton DeWitt, *Privileged Communications Between Physician and Patient* (Springfield, Ill., 1958), 15. DeWitt would go on to hypothesize that "admittedly the revisers were influenced to some extent by the comment of Mr. Justice Buller in *Wilson v. Rastall.* It seems likely, too that a compelling, if not paramount consideration was the desire to give the medical profession the same protection which the legal profession enjoyed." In *Contesting Medical Confidentiality*, the most thorough historical examination of the debate surrounding medical confidentiality in the United States, Andreas-Holger Maehle echoed DeWitt, stating, "the exact circumstances of the introduction of this statute are not known. . . . Justice Buller's statement in the case of *Wilson v. Rastall* and a wish to grant the medical profession the same privilege as the legal profession in keeping communications with clients confidential seem to have been relevant." Maehle added a second hypothesis, stating, "the position of the Medical Society of the State of New York probably played a role here" (11–12). Likewise, Wigmore had little to say on the origins of the New York statute, merely stating that "in New York in 1828 came a statutory innovation, establishing a privilege." Wigmore, *A Treatise on Evidence* 1st ed., 4:3347–48.

41. Maehle, *Contesting Medical Confidentiality*, 11–12.

42. *Commissioners on Revision of the Statutes of New York* (Albany, 1836), 3:737.

43. Medical Society of the State of New York, *System of Ethics* (New York, 1823); Baker, *Before Bioethics*, 112–23. This document would prove influential in the history of American medical ethics. According to historian Robert Baker, "The MSSNY *System of Ethics* reasserts physicians' oath-sworn duty to prioritize the welfare of the patient by obligating physicians to an absolute duty of confidentiality. Courts may probe for the physician's opinion about infanticide, bastardy, paternity, virginity, sexually transmitted diseases, or malingering, but the physician's duty to his patients, like a priest's duty to protect the secrets of the confessional, overrides his obligation to testify on these issues before a court of law." In these respects, the document served as an early model for later ethical codes, including the AMA *Code of Ethics*, which was adopted in 1847.

44. Mohr, *Doctors and the Law*, 78–83.

45. Ibid., 81. A small collection of Beck's correspondence is preserved at the New York Public Library. While this letter is all that remains linking Beck to the revision process, it is safe to assume, given the responsibilities given to Beck here, that Beck played an active role in the process.

46. Beck, *Elements of Medical Jurisprudence*; Theodric Romeyn Beck, "Annual Address Delivered before the Medical Society of the State of New York, February 6, 1828," *Transactions of the Medical Society of the State of New York* (Albany, 1828).

47. Theodric Romeyn Beck and John B. Beck, *Elements of Medical Jurisprudence*, 5th ed., vol. 2 (Albany, 1835), 661.

48. Mohr, *Doctors and the Law*, 94.

49. Cook, *The American Codification Movement*, 148.

50. In this respect, American codifiers differed markedly from their intellectual forebears in Britain. Bentham was vehemently opposed to evidentiary privileges. For Bentham and his influence on the law of privilege, see Imwinkelried, *The New Wigmore: Evidentiary Privileges*, 176–91. Beyond the *Revisers' Notes* the codifiers left behind little writing on the subject of physician-patient privilege. However, William Sampson successfully made the case for a priest-penitent privilege in court before then–New York City Mayor DeWitt Clinton in 1813. William Sampson, *The Catholic Question in America: Whether a Roman Catholic Clergyman be in any case compellable to disclose the secrets Aurieular Confession* (New York, 1813).

51. Again, Maehle, Clinton, and Wigmore have provided the most thorough accounts of this phenomena, but each author focused more on the differences in form and language between the various statutes adopted over the course of the nineteenth century than on the underlying causes for the rapid spread of these laws. Maehle, *Contesting Medical Confidentiality*, 11–15; Clinton, *Privileged Communications Between Physician and Patient*, 15–18; and Wigmore, *A Treatise on Evidence* 1st ed., 4:3349–50. Perhaps the most compelling explanation of these early laws can be found in Frederick Stimson's paper, "Privileged Communications to Physicians," read before the Massachusetts Medical Society in 1903. In this paper, Stimson recast the debate as a contest between statutory and common law. To Stimson, states that embraced codification and statutory law were more likely to adopt physician-patient privilege. States that remained tied to the common law system, by contrast, were unlikely to adopt physician-patient privilege. Frederick J. Stimson, "Privileged Communications to Physicians," *Communications of the Massachusetts Medical Society* 19, no. 1 (1904): 607–14.

52. The Mississippi Statute offers an excellent example of the challenges in tracing the origins and transformation of some of these early statutes. The law appears in the state's *Revised Statutes of the State of Mississippi* (Jackson, 1836), 1052. Yet the law does not appear in any of the states' later revisions and was never mentioned in later publications on the history of physician-patient privilege. See, for example, *Revised Code of the Statute Laws of the State of Mississippi* (Jackson, 1857); Wigmore, *On Evidence*, 1st ed., 3348–49; or the list of statutes compiled in the 1882 case, *Gartside v. The Connecticut Mutual Life Insurance Company*, 76 Mo. 446 (1882). Mississippi would again adopt physician-patient privilege in the twentieth century.

53. *The Revised Statutes of the State of Missouri, Revised and Digested by the Eighth General Assembly . . . With the Constitutions of Missouri and the United States* (St. Louis, 1835), 623.

54. Alfred Lucking, "Privileged Communications to Physicians," *Physician and Surgeon: A Professional Medical Journal* 20 (Detroit and Ann Arbor, 1898), 493–96; John S. Goff, "William T. Howell and the Howell Code of Arizona," *American Journal of Legal History* 11, no. 3 (July 1967): 221–33.

55. "Massachusetts Legislature," *Gloucester Telegraph* (14 October 1835).

56. *The Revised Statutes of the State of Wisconsin . . . to which are Prefixed the Declaration of Independence and the Constitutions of the United States and the State of Wisconsin* (Southport, WI, 1849), 526.

57. John B. Sanbourn, "Physician's Privilege in Wisconsin," *Wisconsin Law Review* 1 (1922): 141–46.

58. See, for example, Horatio Wood's proposal for Pennsylvania statute "Editorial: Professional Secrets and the Law," *Philadelphia Medical Times and Register* (26 February 1881), 337.

59. Kellen Funk, "Mere Machinery: The Political Shape of Civil Procedure" (Manuscript, 10 May 2019); Friedman, *A History of American Law*, 293–98.

60. Friedman, *A History of American Law*, 293.

61. Ibid., 293–98.

62. In general, Field seemed indifferent to the matter of evidentiary privileges, but unwilling to alter the laws on the books. In Field's notes to later revisions of the New York code, he wrote: "Whether these four exclusions [marital, attorney, clerical and medical privileges] should all be retained is a question not admitting of an easy solution." Field noted that neither Bentham nor the codifier Edward Livingston had been in favor of these privileges. Commissioners on Practice and Pleadings, *The Code of Civil Procedure of New York: New York Field Codes, 1850–1865*, Vol. 1: 1850 (Union, NJ, 1998), 727.

63. Friedman, *A History of American Law*, 293–98; Mildred Coe and Lewis W. Morse, "Chronology of the Development of the David Dudley Field Code," *Cornell Law Review* 27, no. 2 (February 1942): 238–45. For more on the similarities and differences between various codification movements, see Kellen Funk's online project, kellenfunk.org, which features the most comprehensive list of these various codification projects as well as the figures responsible for each respective codification movement.

64. Friedman, *A History of American Law*, 293–98; Stimson, "Privileged Communications to Physicians," 608.

65. On the treatment of privilege in mid-nineteenth-century legal texts, see Thomas Starkie, *A Practical Treatise on the Law of Evidence*, 5th American ed., vol. 2 (Philadelphia, 1834), 228–32. The fourth American edition of Samuel March Phillips's *A Treatise on the Law of Evidence*, published in 1839, was the first to offer any mention of the New York statute, but this text did not mention any of the other laws on the books. By then, Missouri, Mississippi, Arkansas, and Wisconsin had also adopted similar legislation. Samuel March Phillips, *A Treatise on the Law of Evidence*, 4th American ed. (New York, 1839), 279–83. In Simon Greenleaf's *A Treatise on the Law of Evidence*, the most popular treatise on the law of evidence in the mid-nineteenth century, the subject was covered in one brief sentence: "Neither is this protection [privileged communications] extended to medical persons in regard to information, which they have acquired confidentially by attending in their professional characters." To this, Greenleaf added a brief note. He cited the Duchess of Kingston's trial and several other British decisions; the text of the New York statute; Missouri's 1835 statute; and the recently settled case, *Johnson v. Johnson.* Greenleaf did not mention the laws on the books in Wisconsin, Mississippi, or Arkansas. Nor did he mention the recent New York case, *Hewit v. Prime*, which would be frequently cited in late-nineteenth-century cases. Simon Greenleaf, *A Treatise on the Law of Evidence*, 1st ed., vol. 1

(Boston, 1842), 283–84. The three cases referenced in some of these legal texts were: *Johnson v. Johnson*, 14 Wend. 637 (1835); *Hewit v. Prime*, 21 Wend. 79 (1839); and *People v. Stout*, 3 Park. Cr. 670 (1858). *Johnson v. Johnson* and *Hewit v. Prime* were both frequently cited cases that established important and lasting precedents. *People v. Stout*, on the other hand, received only a brief reference in Francis Wharton's *Commentary on the Law of Evidence in Civil Issues*, vol. 1, 581.

66. The treatment of privilege in the divorce case *Johnson v. Johnson*, the first privilege case to make its way through the New York courts, is paradigmatic of these early cases: *Johnson v. Johnson*, 1 Edw.Ch. 439 (1832); *Johnson v. Johnson*, 4 Paige 460 (1834); and *Johnson v. Johnson*, 14 Wend. 637 (1835). See also the courts' frequent reversals on the admissibility of physicians' testimony in abortion trials: *Hewit v. Prime*, 21 Wend. 79 (1839); *People v. Murphy*, 101 N.Y. 126 (1886); and *People v. Brower*, 53 Hun. 217 (1889). For more on privilege in nineteenth-century abortion cases, see Holger-Maehle, *Contesting Medical Confidentiality*, 68–74.

67. American Medical Association, *Code of Ethics* (1847), in *The American Medical Ethics Revolution*, 324–32.