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The Scrying Game: The First Amendment, the Rise of Spiritualism, and State Prohibition and Regulation of the Crafty Sciences, 1848-1944

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THE SCRYING GAME: THE FIRST AMENDMENT, THE RISE OF SPIRITUALISM, AND STATE PROHIBITION AND REGULATION OF THE CRAFTY SCIENCES, 1848-1944¹

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* Richard C. Cadwallader Associate Professor of Law, Louisiana State University Law Center; Associate Professor of Women's and Gender Studies, Louisiana State University A&M, Baton Rouge, Louisiana. This Article is the first of a series investigating the legal, political and social treatment of Spiritualism and the crafty sciences in the United States, the United Kingdom, other Commonwealth countries, and other European countries between 1848 and the present day. Many thanks to my colleagues Grace Barry, John Devlin, and Philip Hackney of Louisiana State University Law Center. Professor Hackney was particularly helpful with regard to arcane areas of the tax law (which is to say, all areas of tax law). I am also indebted to Kevin Baggett, Susan Gaultier, and Melanie Sims of the LSU Law Center Library, Phillip Gragg, now at California Western School of Law, and to Danielle Goren, LSU Law 2012, and Justin C. Ward, LSU Law 2013, and Madeleine Arivett Aldridge, LSU Law '17, for research assistance, and to Cynthia Virgillio for secretarial assistance.

1. "Scrying" is an occult practice, used by many mystical religions as well as what the law calls "crafty sciences." The Oxford English Dictionary defines "to scry" as "[t]o see images in pieces of crystal, water, etc. which reveal the future or secrets of the past or present; to act as a crystal-gazer." 14 OXFORD ENGLISH DICT. 2D ED. 1989 at 757. Scrying consists of using a reflective surface or translucent body that allows the individual to perceive the past, present or future in aid of what she or he believes are psychic abilities (clairvoyance or precognition for example). To that extent it constitutes fortune telling. Wicca is among the religions which use scrying. See *Pugh v. Caruso*, 2006 U.S. D. C. LEXIS 24709 (W.D. Mich. S.D., 2006) (plaintiff argued that he was "wrongfully denied his right to exercise Wicca" because prison officials refused his request for access to religious objects, including a "scrying bowl and/or crystal ball.>").

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I. INTRODUCTION

United States jurisdictions have attempted to regulate, or ban altogether the practice of the so-called “crafty sciences”—palmistry,² tarot card reading,³ astrology,⁴ or other types of fortune telling, clairvoyance,⁵ and many other magical arts—since before the founding of the Republic. Early statutes, both in the United Kingdom and in the United States, banned such practices in the interest of combating fraud.⁶ The rise of the Spiritualist movement emphasized communication with the dead through “rappings,”⁷ and the use of practices that seemed to resemble these banned activities very closely.⁸ Because no “ministerial

2. Palmistry, also called chiromancy, “is the practice of telling fortunes from the lines, marks, and patterns on the hands, particularly the palms.” Robert T. Carroll, *The Skeptic’s Dictionary*, SKEPTIC’S DICTIONARY, <http://skeptdic.com/palmist.html> (last visited Apr. 10, 2017).

3. In cartomancy or card reading, the practitioner uses decks of cards to predict the future. See Carroll, *supra* note 2.

4. “Astrology, in its traditional form, is a type of divination based on the theory that the positions and movements of celestial bodies (stars, planets [except the one you are born on or those in other solar systems], Sun, and Moon) at the time of birth profoundly influence a person’s life.” Carroll, *supra* note 2.

5. “Clairvoyance is an alleged psychic ability to see things beyond the range of the power of natural vision or vision assisted by technology.” Carroll, *supra* note 2.

6. See, for example, the Vagrancy Act 1824, (5 Geo. 4. c. 83), which applied to England and Wales, and which Parliament extended to Scotland and Northern Ireland through the Prevention of Crimes Act 1871 (1871 c. 112 (34 and 35 Vict.)); and Criminal Law Amendment Act 1912 (2 & 3 Geo. 5 c. 20) (repealed for England and Wales by the Sexual Offences Act 1956, s. 51 & Sch. 4; and for Scotland by the Sexual Offences (Scotland) Act 1976, s. 21(2) & Sch. 2). States in the U.S. enacted their own statutes, but such legislation was remarkably similar from jurisdiction to jurisdiction and they modeled their legislation on the UK legislation that preceded it. See, for example, the New Jersey statute passed in 1799 regulating the behavior of the poor, as well as those whom the government believed to be engaged in fraud. Note the reference to it in a case from 1953. “All paupers, who shall unlawfully return to the city or township, from which they were legally removed...and all persons, who shall use, or pretend to use, or have any skill in physiognomy, palmistry, or like crafty science, or who shall pretend to tell destinies or fortunes...shall be deemed and adjudged to be disorderly persons.” *State v. Maier*, 99 A. 2d. 21, 33–36 (1953).

7. “Rappings” were simply the sounds that the spirits used to communicate with séance sitters. Almost immediately, skeptics investigating the Fox sisters attributed the rappings in that case to “crackings of their knee joints.” See R. LAURENCE MOORE, IN *SEARCH OF WHITE CROWS* 27 (Oxford University Press, 1977).

8. On contemporary reactions to the rappings, including suggestions from some clergy that Kate and Maggie Fox were “witches,” see Nancy Rubin Stuart, *The Raps Heard Round the World*, AM. HIST. 42, 47 (Aug. 2005).

exceptions” existed in the statutes to exempt Spiritualist practitioners to allow them to claim the same immunity from prosecution as mainstream clergy, district attorneys often filed charges against these practitioners for breaking fraud and vagrancy laws. Additionally, because many legislators found themselves out of sympathy with Spiritualism in general, they saw no reason to enact “ministerial exceptions”⁹ that would protect Spiritualist clergy from accusations of fraud.

In contrast, clergy in mainstream religions did not need such exceptions, simply because society in general did not view them as the kind of individuals who “told fortunes.” No legislator would have thought of a Protestant minister—even one who discussed the future from the pulpit—as an individual who “prophesied the future.”

Consequently, Spiritualist practitioners, many of whom were women, spent decades arguing, often unsuccessfully, a First Amendment defense in the courts, as intellectual, political, and scientific interest in Spiritualism came and went.¹⁰ The history of state regulation of

9. A “ministerial exception” provides the clergy, provided they meet other statutory requirements, with immunity from criminal liability from prosecution under statutes of general applicability. See, e.g., Fremont, Cal. Code Regs. 5.60. Fortune-Telling [hereinafter Fremont ordinance]. The general section, 5.60.040., requires the prospective fortune teller to apply for a permit and to provide fingerprints, a sworn statement, personal information, and other information to provide for a possible background check. Other conditions apply, including the possibility that the police chief might not issue the permit. The criteria listed to qualify for the ministerial exception track the Supreme Court’s decision in *U.S. v. Ballard*, 322 U. S. 78, 313 (1944) and *U.S. v. Seeger*, 380 U.S. 163 (1965). “Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.” *Ballard*, 322 U.S. at 86-87. “[We] hasten to emphasize that while the “truth” of a belief is not open to question, there remains the significant question whether it is “truly held.” This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact -- a prime consideration to the validity of every claim for exemption...” (discussing a conscientious objector case under the free exercise clause) *Seeger*, 380 U.S. at 185.

10. Erika White Dyson discusses the history of this issue in her 2010 dissertation, concentrating on the activities of the National Spiritualist Association and its attempts to respond to what it deemed an anti-Spiritualist environment between the late 1890s and the mid-1930s. See Erika White Dyson, *Spiritualism and Crime: Negotiating Prophecy and Police Power at the Turn of the Twentieth Century* (2010) (Ph.D. dissertation, Columbia University) (available at <http://pqdtopen.proquest.com/doc/750174018.html?FMT=ABS>). This dissertation was unavailable for a number of years after its completion but is now available through ProQuest’s open access project.

Spiritualist practice is a prime example of the difficulty that legislatures and courts had between 1848 and 1944 with differentiating between freedom of religion, which they acknowledged was protected under the federal and state constitutions, and certain activities and behaviors that some individuals claimed to be religious practice, but which many in society considered to be devious, deviant, or fraudulent. The Church of Latter Day Saints (LDS) came to a forced accommodation with the national polity by abandoning polygamy after *Reynolds*,¹¹ and some Christian Scientists (whose first church was called officially the Church of Christ, Scientist) have slowly moved away from a strict adherence from Mary Baker Eddy's directive to use prayer as healing when they or their children fall ill.¹² Therefore, the Christian Scientists came into less conflict with traditional medicine, and thus with the legal system.¹³ Spiritualists, however, continued to find themselves at odds with the government, the courts, and society until nearly the end of the Second World War.¹⁴

What accounts for the delay in granting Spiritualist practitioners the same First Amendment protections as other religious observers? I suggest that a number of factors contribute to the phenomenon, including the fact that Spiritualism was, and is, a decentralized religion, that it did and does attract primarily female followers (though not necessarily female practitioners), and that when it first appeared, it, like LDS and Christian Science, seemed to display elements of what we would now label a cult,¹⁵ causing members of mainstream religions to distrust its

11. *Reynolds v. United States*, 98 U.S. 145 (1879).

12. See David L. Weddle, *The Christian Science Textbook: An Analysis of the Religious Authority of Science and Health by Mary Baker Eddy*, 84 HARV. THEOLOGICAL REV. 273 (July 1991) (discussing Eddy's writings and authority).

13. See Paul Vitello, *Christian Science Church Seeks Truce With Modern Medicine*, NEW YORK TIMES, (Mar. 23, 2010), http://www.nytimes.com/2010/03/24/nyregion/24heal.html?pagewanted=1&_r=2 (discussing acceptance of evidence-based medicine in Christian Science theology).

14. See SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (Durham: University of North Carolina Press, 2002) (discussing the battle over polygamy in the nineteenth century).

15. Colin Campbell, *Clarifying the Cult*, 28 BRIT. J. SOC. 375 (Sept. 1977) (suggesting a definition of a cult as "a distinctly cultic system of beliefs, which possess internal coherence and imply a particular form of social organization," rather than an "empirical construct"). See also Geoffrey K. Nelson, *The Spiritualist Movement and the Need for a Redefinition of Cult*, 8 J. SCI. STUDY REL. 152 (1969) (arguing forcefully that

founders and those attracted to it.¹⁶ However, like Christian Science, and unlike the LDS Church, Spiritualism required a firm belief in practices that mainstream religions seemed to have abandoned.¹⁷ For Christian Science, that practice was faith healing.¹⁸ For Spiritualism, it was spirit

Spiritualism was not and is not a cult, if cults are religious movements that break with the religious mainstream).

16. Mary Farrell Bednarowski, *Outside the Mainstream: Women's Religion and Women Religious Leaders in Nineteenth-Century America*, 48 J. AM. ACAD. REL. 207, 213–17 (June 1980) (discussing the more “feminist” aspects of Spiritualism including the “denial of the Fall,” and rejection of the prevailing view that the husband should be the dominant partner in marriage).

17. Emma Hardinge Britten, one of the most famous nineteenth century Spiritualist thinkers, laid out the foundation of the belief system as Seven Principles. These Principles act as “guidelines for the development of a personal philosophy of how to live one’s life.” They are 1) “the Fatherhood of God” 2) “the Brotherhood of Man” 3) “the communion of spirits and the ministry of angels” 4) “the continuous existence of the human soul” 5) “personal responsibility” 6) “compensation and retribution hereafter for all good and evil deeds done on earth” and 7) “eternal progress open to every human soul.” See THE PRINCIPLES OF SPIRITUALISM at <http://www.snu.org.uk/spiritualism/principles> (visited April 19, 2017). Mrs. Britten claimed to have received the Seven Principles in a communication directly from Robert Owen, the social reformer and Spiritualist (1771-1858). See *History of Spiritualism*, SNU, <http://www.snu.org/index.php?act=viewDoc&docId=9> (last visited Apr. 10, 2017). Compare Britten’s development of the Seven Principles with Mary Baker Eddy’s seven synonyms of God—Principle, Mind, Soul, Spirit, Life, Truth, and Love--, although Eddy makes clear that she refers to “one absolute God” when she uses any or all of these synonyms. See STEPHEN GOTTSCHALK, *THE EMERGENCE OF CHRISTIAN SCIENCE IN AMERICAN RELIGIOUS LIFE* 53–56 (Berkeley: University of California Press, 1973).

18. In a few cases, Spiritualists or those claiming to be Spiritualists did practice faith healing. See, for example, *People v. Vogelgesang*, 116 N.E. 977 (N.Y. 1917) (spiritualist convicted of practicing medicine without a license); see also *infra* *Commonwealth v. Lindsey*, 111 N.E. 869 (Mass. 1916). On the Lindsey case, see also note 249 and accompanying text; *Commonwealth v. Blair*, 92 Pa. Super. 169 (1927); see also *infra* note 315 and accompanying text. On the Vogelgesang case, see also *Spiritualism, Patent Medicine and the Law*, 12 BENCH AND BAR, N.S. 196 (1917-1918). The writer of this article notes that the court reached an “inescapable conclusion, that the defendant was within the prohibition of the statute and was not saved by the exception” In a 1935 New York City case, a court convicted a Spiritualist of practicing medicine without a license when he admitted impersonating a ghost in order to “massage” an undercover policewoman while administering healing treatments. See *Séance For Court Shunned by Ghosts*, N.Y. TIMES (Mar. 4, 1935), <http://query.nytimes.com/mem/archive/pdf?res=FA0E13FB395C147A93C6A91788D85F418385F9>; *‘Medium’ Admits Séance Was Fake* (Mar. 18, 1935), <http://query.nytimes.com/mem/archive/pdf?res=FA0715FE355B107A93CAA81788D85F418385F9>. Similarly, in *People v. Klinger*, the defendant pled that as part of her Spiritualist faith she practiced faith healing and should not have been convicted of practicing medicine without a license. She had been convicted in the lower court of

communication and prophecy—the practice of communicating with the dead and the belief that the dead could communicate messages that could reveal both the existence of life after death and certainty about the future.¹⁹ Many, but not all adherents of mainstream religions (primarily Judaism and Christianity) had rejected the notion that the dead could communicate anything at all to the living.

While some attorneys,²⁰ judges,²¹ and members of the middle and upper classes of society²² found themselves attracted to Spiritualism,

violating the state's Medical Practice Act (practicing medicine without a license and taking money for practicing medicine without a license) and that she had done neither. The appellate court reversed her conviction. *See* 11 N.E. 2d 40 (Ill. Ap. Ct. 1937). The Spiritualist National Union states that "Spiritualist healing is not faith healing," at 4, Spiritualist National Union, *Mission Statement: The Religion of Spiritualism* (2002) available at <http://hull-snu.org.uk/The%20Religion%20of%20Spiritualism.pdf>.

19. Prophetic speech as a particular category under the First Amendment needs some legal academic scrutiny which it has not so far received. *But see* Jeremy G. Mallory, *Prophetic Speech*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2135820 (discussing the Westboro Baptist Church case) and D. K. Fitzgerald, *PROPHETIC SPEECH IN GEORGIA SPIRIT MEDIUMSHIP* (1970).

20. The definitive study between lawyers and belief in spiritualism remains to be written, although a link surely exists; consider the vital interest of Luther Marsh in the work of Ann Diss Debar. Edmund Richardson discusses Marsh's championship of Debar and her "spirit paintings" in *Nothing's Lost Forever*, <http://www.bu.edu/arion/nothings-lost-forever/>. Note that Catherine Fox, one of the Fox sisters who started the Spiritualist movement, married an attorney. *See* ROCHESTER RAPPINGS, *infra note* 53 and accompanying text.

21. John Worth Edmonds (1816-1874), who served on the New York Supreme Court, then on the New York Court of Appeals, became an avid Spiritualist. He began investigating spiritualist mediums in 1851, shortly after the death of his wife, and probably out of a desire to try to contact her, and eventually grew to believe that many of the psychic phenomena he observed were real. In 1853 he and Dr. George Dexter, whom he met in 1852 during one of his investigations, published *Spiritualism*, which most of the media attacked virulently; this reaction forced him to realize that he could not continue his tenure on the bench and his private interests in psychic research. *Great Spiritualists and Friends, Edmonds, Judge John W. (1816-74): "A Lawyer of Great Sagacity,"* <http://www.spiritualistresources.com/cgi-bin/great/index.pl?read=52> (last visited Apr. 6, 2017).

22. *See* MARLENE TROMP, *ALTERED STATES*, *infra note* 119 at 35-37 (arguing that the middle class's interest in Spiritualism has been overlooked). Certainly the middle and upper classes of society were not the only individuals interested in Spiritualism. *See also* LOGIE BARROW, *INDEPENDENT SPIRITS: SPIRITUALISM AND ENGLISH PLEBEIANS, 1850-1910* 30-66 (1986) (discussing the links between the founding of the Spiritualist movement in the US and its exportation to Great Britain. Spiritualism was not the only movement of the time to rely on the paranormal as its founding principle). *See also* ALISON WINTER, *MESMERIZED: POWERS OF MIND IN VICTORIAN BRITAIN 2* (Chicago:

they did not convert in sufficient numbers to overcome societal prejudices against this odd belief system. The Spiritualist Free Exercise claim did not prevail until society in the United States generally began to change its attitude toward the definition of what constituted a “religion” and became somewhat more inclusive, a change in attitude that came slowly after the First World War, continued through the Second, and continues today.²³ Although the law and the courts should treat each litigant that comes before it fairly, the history of Spiritualists who appeared before the state courts between the mid-nineteenth century and the 1970s suggests that those litigants appeared before many judges whom the times and their own religious beliefs conditioned to view Spiritualism and its adherents with a cynical eye.

Spiritualism and its practices caused legislators and prosecutors to expand the existing legal definitions of religious congregations to include members of Spiritualist churches in the “crafty science” category, and to ban Spiritualist practices as well, in spite of Spiritualists’ arguments that they were members of a legitimate, albeit new, religious denomination. Thus, the First Amendment should have protected their methods of worship. This Article examines the legal arguments which Spiritualists presented between 1848 (the year that the Fox sisters essentially set in motion the Spiritualist movement) and 1943, the year in which a New York judge resoundingly recognized a Spiritualist practitioner’s First Amendment right to claim a ministerial exception,²⁴ the reasons courts rejected those arguments, and then ultimately finally accepted those arguments, and the environments in which the arguments, pro and con, developed.

University of Chicago Press, 1998). See also Cathy Gutierrez, *From Electricity to Ectoplasm: Hysteria and American Spiritualism*, 3 *ARIES* 55, 60–63 (2003) (discussing the origins and rise of the popularity of mesmerism).

23. This conflict continues to this day in the form of contentiousness between legislators and law enforcement on the one hand, and “crafty science” practitioners who engage in many of the same kinds of rituals as do Spiritualists on the other. See Christine A. Corcos, *Seeing It Coming Since 1945: State Bans and Regulations of “Crafty Science” Speech and Activity*, 37 *T. JEFFERSON L. REV.* 39 (2014).

Even today, some Americans are cautious about, if not downright suspicious, of religions and belief systems with which they are unfamiliar. According to a June 2011 Gallup poll, 22 percent of Americans would not vote for a member of the LDS Church for President. See Lydia Saad, *In U.S., 22% Are Reluctant To Support a Mormon in 2012*, *GALLUP* (June 20, 2011), <http://www.gallup.com/poll/148100/Hesitant-Support-Mormon-2012.aspx>.

24. *People ex rel. Mirsberger v. Miller*, 46 N.Y.S.2d 206 (Mag. Ct. 1943).

One of the difficulties in dissecting legal arguments during this period is that courts often did not articulate the basis upon which they affirmed or rejected the First Amendment defenses which Spiritualists advanced for their contravention of crafty sciences legislation. Courts normally applied just one standard of scrutiny in First Amendment jurisprudence. This standard translated to an assumption that the government usually exerted its power rationally, except if it quite obviously did not. Therefore, prior to 1938, the year that the United States Supreme Court decided *Carolene Products*,²⁵ the idea of a tiered structure of standards of scrutiny was alien to both United States state and federal courts. Furthermore, until the 1920s, the Supreme Court (and by extension other federal courts) generally applied the First Amendment only to cases of prior restraint with regard to the press clause.²⁶ In 1942, the Court decided *Valentine v. Chrestensen*, in which it ruled that a city may lawfully limit the dissemination of commercial advertising that does not include legitimate information of public interest.²⁷

Consider the reasoning of a New York state court, in a 1918 case, squarely during the period of concern. The court makes an appeal to genuine religious belief, to history, to United States constitutional jurisprudence, and to English law, arguing that society has always considered witchcraft to be unsavory at best, and witches to be “different” from “mere fortune tellers,” and that the purpose of laws banning fortune tellers was to protect the ignorant and the weak from the effect of fortune tellers, not to prohibit genuine exercise of religious belief.²⁸

25. *U.S. v. Carolene Products*, 304 U.S. 144 (1938).

26. Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 760 (1993).

27. *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942).

28. “Witches appear to have been in bad repute in all jurisdictions since 2000 B. C. ., but witches, bad as they were, always occupied a different plane from mere “fortune tellers.” The latter have always been classed with rogues and mountebanks and generally disreputable members of society to be summarily dealt with for the good of the community. The early English statutes show that the purpose of their enactment was the more effectually to prevent such practices whereby ignorant persons were frequently deluded and defrauded. Encouraging these people to rely upon and guide their conduct by force of so-called occult suggestions obtained from the spirits of the dead through the medium, was thought to be demoralizing. The story of the complaining witness, which was believed by the magistrate who saw and heard her as he saw and heard the defendant, does not read like the Old Testament or the New Defendant’s second point is that

Suggesting that an appeal to a fundamental right is a “modern attempt to excuse violations of lawful salutary police regulations enacted for the protection of the community” was a common judicial position during the late nineteenth and early twentieth centuries. The notion that the First Amendment Free Exercise clause should trump the exercise of the police power as expressed in a “crafty sciences” statute or ordinance simply did not occur to the court. One’s religious belief, expressed silently, is one thing. An individual who expresses her religious belief in deceitful speech, however, cannot use the First Amendment to escape civil liability or criminal sanction. The court thus links traditional prohibitions against the practice of witchcraft (“old-time wrongdoing or indecency”) with newer criminal activity practiced by ordinary deceivers (“rogues and mountebanks”), sometimes referred to as “rogues and vagabonds.”

In part, government officials have always thought it quite obvious that the less reputable classes of society should necessarily be the ones most likely to practice those activities that fall into the “crafty sciences” category.²⁹ In addition, until the seventeenth and eighteenth centuries, legislatures, particularly the English Parliament, have associated witchcraft, alchemy, and in some cases, sedition against the government with the practice of the crafty sciences, labeling many of these “black

the statute is unconstitutional in that it deprives the defendant of the exercise and enjoyment of her religious profession and worship in violation of article 1, section 3, of the State Constitution, and in violation of the Constitution of the United States. Applying Doctor Warne’s interpretation of the tenets of spiritism under the facts as found by the court, defendant was telling fortunes for money. This modern attempt to excuse violations of lawful salutary police regulations enacted for the protection of the community, by appeals to constitutional rights and religious beliefs, does not find favor with the courts. The State may not interfere with the religious beliefs and opinions of a citizen, . . . but it may prohibit acts and practices which are deemed to be detrimental to the community These religious and constitutional arguments are always important but should be carefully examined to see that they are not a cover for some old-time wrongdoing or indecency sought to be brought to life again. This seems to be such a case.” *People v. Ashley*, 172 N.Y.S. 282, 283–86 (1918).

29. The City of Fremont ordinance cited *supra* notes in section 5.60.010 that “the practice of fortune-telling, as defined in this chapter, has historically been subject to abuse by certain unscrupulous persons using the practice to commit fraud and larceny upon clients.” The drafters then indicate the purpose of the ordinance is to “regulate the practice of fortune-telling in such a manner as to reduce the risk of fraud and larceny to clients, while allowing fortune-tellers to provide their services to clients with only minimal restrictions.” Fremont ordinance, *supra* note 9.

arts.”³⁰ The early laws of at least one colony allowed law enforcement to arrest crafty sciences practitioners routinely without warrants.³¹ Even before the founding of the Republic, the colonial governments considered crafty science practitioners like disorderly persons, threats to the general peace of the community. Disorderly persons did not

30. The Witchcraft Act of 1542, passed as a result of the mounting religious and political tensions during the reign of Henry VIII, made the practice of witchcraft a felony, and removed the right of “benefit of clergy” from those convicted. The act forbade persons the “use devise practise or exercise, or cause to be used devysed practised or exercised, any Invocacons or cojuracons of Sprites wichecraftes enchaumentes or sorceries, to thentent to get or fynde money or treasure, or to waste consume or destroy any persone in his bodie membres or goodes, or to pvoke [provoke] any persone to unlawfull love, or for any other unlawfull intente or purpose . . . or for despite of Cryste, or for lucre of money, dygge up or pull downe any Crosse or Crosses or by suche Invocacons or cojuracons of Sprites wichecraftes enchaumentes or sorceries or any of them take upon them to tell or declare where goodes stollen or lost shall become . . .” See 1541 (33 Hen. 8) C.A.P. VIII. The Parliament of Edward VI repealed this statute in 1547. See Treason Act 1547 (1 Ed. 6 ch. 12). The Treason Act 1547 (Repeal of Statutes as to Treasons, Felonies, etc. Act 1547) is the first treason statute that requires two witnesses to the act. For a discussion of the history and operation of the Tudor and Stuart witchcraft statutes see Alan J. Macfarlane, *Witchcraft in Tudor and Stuart Essex*, in *CRIME IN ENGLAND 1550-1800* 72 (J. S. Cockburn ed.; 1977) 72-78. When Edward’s half-sister Elizabeth I came to the throne, her Parliament enacted the Witchcraft Act, 1562, prohibiting the use or practice of “any Witchcrafte, Enchantment Charme or Sorcerie, whereby any person shall happen to bee killed or destroyed.” See 5 Eliz. I. At the same time the Scottish Parliament under James VI (later to come to the English throne as James I) enacted its own Witchcraft Act, 1563, which criminalized not just the practice of witchcraft, but also the consultation with those who claimed to be witches. In 1604, Parliament, at the behest of its new sovereign, James I, retooled the 1562 statute and renamed it An Act against Conjururation, Witchcraft and dealing with evil and wicked spirits. 2 Jac. 1. Like the Elizabethan statute, this statute made the practice of witchcraft prosecutable in the sovereign’s courts rather than in the church courts because the practice was a felony. The accused had access to what passed for criminal procedure at the time. First time offenders might escape being hanged (rather than burned; burning witches was no longer practiced). But second time offenders were put to death. Parliament repealed The Act Against Conjururation in 1736 and replaced it with the Witchcraft Act, which made practicing witchcraft punishable by a jail term. Parliament determined that since witches didn’t exist, claims that someone was a witch were futile, as was the claim that one was a witch. See 1735 (9 Geo. 2 ch. 5). Civil law countries also prosecuted crafty science practitioners. See David Allen Harvey, *Fortune-Tellers in the French Courts: Antidivination Prosecutions in France in the Nineteenth and Twentieth Centuries*, 28 *FRENCH HIST. STUD.* 131, 131-39 (2005).

31. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 337 (2001).

necessarily get the benefit of constitutional protections once they existed.³²

Today, we still hear the assertion that tarot card readers, psychics, and other crafty science practitioners are involved in fraud, not in real religious practice.³³ Defenders of those accused can and do argue that the evidence for the crime alleged is both selective and one-sided. During the 2002 Washington D.C. sniper killing spree, police found a number of tarot cards near victims.³⁴ Police departments can be dogged in their actions to close down fortune tellers and psychics whom they consider to be scammers and con artists. Consider, for example, the more than two-year fight of law enforcement to locate and arrest Sylvia Mitchell, a psychic working in New York City.³⁵

If one considers that, historically, many legislators as well as laypeople thought (and continue to think) because of a Biblical

32. *Byers v. The Commonwealth*, 42 Pa. 89, 95 (1862) (holding that the defendants were professional thieves and thus not entitled to the protections of due process under the Constitution).

33. See Jeralyn, *Federal Judge Rules for Tarot Card Reader* (June 8, 2004), <http://www.talkleft.com/story/2004/06/08/449/00551>; *Howell v. City of New Orleans*, 844 F. Supp. 292, 293–94 (E.D. La. 1994) (granting fortune teller's request for preliminary injunction because city's ordinance allowing only those with certain types of permits to set up furniture in a public forum impermissibly burdened speech). One of the most recent attempts to ban tarot card readers and fortune tellers came in *Adams v. City of Alexandria*, in which the plaintiff challenged the city's ordinance banning the "business or practice of palmistry, card reading, astrology, fortune-telling, phrenology, medium[ship] or activities of a similar nature . . . whether [or not] a fee is charged . . ." The court ruled that such an ordinance violated the plaintiff's First Amendment free speech rights. *Adams v. City of Alexandria*, 878 F. Supp. 2d 685, 689–90 (U.S.D.C.W.D. La. 2012) (citing *Trimble v. City of New Iberia*, 73 F. Supp. 2d 659 (W. D. La. 1999)). While the court decided this case along free speech rather than on free exercise grounds, the case still raises issues that are relevant in this article, demonstrating that prosecutors and legislators continue to try to regulate or ban crafty science practices because they believe that practitioners are involved in deceit.

34. See SARI HORWITZ & MICHAEL RUANE, *SNIPER: INSIDE THE HUNT FOR THE KILLERS WHO TERRORIZED THE NATION* 125, 126, 156, 170 (Random House, 2003) (discussing the leaving of tarot cards at the scene of the Washington D.C. killings).

35. See Michael Wilson, *Your Palm Is Telling Me You Must Let Go. Of \$27,000*, N.Y. TIMES (May 13, 2011), http://www.nytimes.com/2011/05/14/nyregion/psychic-is-expert-in-teaching-how-to-let-go-of-money.html?_r=0 (discussing Mitchell's relationships with clients and the grand larceny charges filed against her); Michael Wilson, *A Psychic's Legal Problems Grow, Perhaps Not Unforeseeably*, N.Y. TIMES (Feb. 8, 2013), <http://www.nytimes.com/2013/02/09/nyregion/a-psychics-legal-problems-perhaps-predictably-grow.html> (discussing Mitchell's arrest and upcoming trial).

prohibition that if these practices are *not* religious—that they are in fact outright fraud—then the proffered justification for banning them, or burying them in restrictive licensing codes, becomes quite understandable.³⁶

In Part II of this Article, I review “rogue and vagabond” legislation, those statutes which both British and the early United States governments used to identify “disorderly persons,” undesirables, or those without a fixed address. Law enforcement and prosecutors soon used rogue and vagabond legislation to identify and criminalize other kinds of activities, including fortune telling, astrology, and palmistry, what legislatures defined as “crafty sciences.” Because those who engaged in these activities often traveled from town to town, law enforcement also targeted them as “disorderly,” and therefore criminals, or “rogues and vagabonds.” In Part III, I explain the origins and rise of Spiritualism—a new belief system—in 1848, and the beginnings of scientific interest and investigation into this belief system, which suggested that one might be able to prove through experimental means that the living and the dead could communicate. In Part IV, I examine the resistance from mainstream churches to the Spiritualist assertion that Spiritualism was a religion, explain traditional Spiritualist practices, and show why the common law enforcement notion that such practices were “crafty sciences” practices, and thus deceptive, was certainly

36. A good many elected officials make clear that their objections to fortune tellers come from their Christian beliefs. See Jennifer Jacob Brown, *Fortune Telling Ban Upheld Again*, MERIDIAN STAR (June 22, 2011), <http://meridianstar.com/local/x1625123798/Fortune-telling-ban-upheld-again> (discussing motivations of Meridian, Mississippi, City Council for refusing to lift a ban on fortune telling even after local resident Danna Jones filed a legal challenge). One council member, Mary Perry, who voted against lifting the ban, told reporters, “I read my Bible, too, and it talks about fortune telling and so forth,” said Perry. “Everyone has their own opinion and can do what they want but I try to follow what is legal and within my heart, and after praying about something, I kind of go with that.” See *Convince City of Meridian Mississippi to Allow a Fortune Teller a Business Within the City Limits*, <http://www.change.org/petitions/convince-city-of-meridian-mississippi-to-allow-a-fortune-teller-a-buisness-in-the-city-limits> (last visited Apr. 6, 2017). On August 16, 2011, facing a lawsuit from the ACLU, the City Council reversed itself and lifted the ban. See Jennifer Jacob Brown, *Fortune Telling Ban Lifted*, MERIDIAN STAR (Aug. 17, 2011), <http://meridianstar.com/local/x850302242/Fortune-telling-ban-lifted>. Positions and votes such as Perry’s necessarily make any constitutional defense of the legislation against fortune telling that much more difficult because they suggest that the purpose of the legislation is not secular, but religious, making that purpose impermissible under the First Amendment. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

understandable. I also examine the beginnings of the attacks on Spiritualist mediums by professional magicians and other skeptics who claimed that the paranormal phenomena produced in Spiritualist séances were nothing more than magic tricks. In Part V, I show the change that Spiritualist then undertook in their position, beginning in the 1860s, from attempting to demonstrate scientifically that paranormal activity was real, to attempting to demonstrate legally that they had the right under the United States and state constitutions to engage in their chosen religious practices. In Part VI, I identify what I consider to be the turning point for the protection of practicing Spiritualists, a New York case decided in 1943. Finally, in Part VII, I conclude by listing the areas in which Spiritualists had managed to prevail by 1943, and the issues that continue to be contentious.

II. ROGUE AND VAGABOND LEGISLATION IN THE UNITED STATES

After the conclusion of the Revolutionary War, the newly independent states continued to include such practitioners in the same category as persons likely to disturb the peace because they were, in the parlance of the time, “rogues or vagabonds.”

All paupers, who shall unlawfully return to the city or township, from which they were legally removed, without a certificate from the city or township, to which they belong, or who shall leave their places of legal settlement; and all persons, who shall go about from door to door, or place themselves in streets, highways or passages, to beg, crave charity, or collect alms, or who shall wander abroad and lodge in taverns, inns, beer houses, out houses, houses of entertainment, market houses, barns or other places, or in the open air, and not give a good account of themselves, or who shall wander abroad, and beg or solicit charity, under pretence of being or having been soldiers, mariners, or seafaring men, or of loss by fire, or other casualty, or of loss by the Indians, or by war, or other pretence or thing; and all persons, who shall leave, or threaten to leave their families to be maintained by the city, township or county, or to become chargeable thereto, or who, not having sufficient property or means for their subsistence or support, shall live idle, or not engage in some honest employment, or not provide for themselves or families; and all persons, who shall use, or pretend to use, or have any skill in physiognomy, palmistry, or like crafty science, or who shall pretend to tell destinies or fortunes; and all runaway servants

or slaves, and all vagrants or vagabonds, common drunkards, common night walkers, and common prostitutes, shall be deemed and adjudged to be disorderly persons.³⁷

The suggestion that crafty science practitioners could raise a freedom of religion defense, or that their practices formed some part of religious belief, would never have been contemplated by legislatures, courts, or most of the population. Most citizens of the new republic, being Christians, were aware of the Biblical story of the Witch of Endor,³⁸ of Biblical warnings against false prophets,³⁹ against the dangers of divination,⁴⁰ and astrology.⁴¹ They tended to fear practices that seemed dangerous or different, and those practices beginning in the seventeenth century and moving forward included faith healing as practiced by “wise women,” “cunning folk,” and “witches.” Over the centuries, the English and Scottish Parliaments outlawed the practices associated with such groups,⁴² and English colonists imported that legislation to the New World. Whether or not the colonists, and eventually and the citizens of the early United States republic, understood the reasons for the prohibition is not so clear.⁴³

37. *State v. Maier*, 99 A.2d 21, 33 (N.J. 1953) (citing The Disorderly Persons Act, L. 1799, c. 3, Paterson’s Laws, 410, sec. 1).

38. 1 *Samuel* 28:3–25 (New Oxford Annotated Bible)

39. “And the Lord said to me: The prophets are prophesying lies in my name; I did not send them, nor did I command them or speak to them. They are prophesying to you a lying vision, worthless divination, and the deceit of their own minds.” Jeremiah 14:14 (New Oxford Annotated Bible, OUP, 3d ed. 1989).

40. “Do not turn to mediums or wizards; do not seek them out, to be defiled by them: I am the Lord your God.” Leviticus 19:31 (New Oxford Annotated Bible, OUP, 3d ed. 1989). Physical mediumship had a long history prior to the mid-nineteenth century. *See generally* JORDAN PAPER, *MEDIUMISM THROUGHOUT HISTORY AND AROUND THE GLOBE* 3 (2013).

41. Deuteronomy 4:19 (New Oxford Annotated Bible).

42. During the Protectorate, law enforcement and justices of the peace dealt with “crafty science” practitioners just as they dealt with vagrants and others whom Oliver Cromwell’s government considered “undesirable.” “Not only were county officials ordered to deal with such people, but the JPs listed the types of people to be stopped, scholars, seafarers without licences, palmists, physiognomy and other ‘crafty sciences’, jugglers, tinkers, pedlars, and petty chapmen were to be prevented from wandering and begging.” MARTYN BENNETT, *THE CIVIL WARS EXPERIENCED: BRITAIN AND IRELAND, 1638–1661* 199 (Routledge, 2000).

43. *See generally* William B. Stoebuck, Reception of English Common Law in the American Colonies, 10 WM. & MARY L. REV. 393, 409 (1968).

The early Colonial laws and state statutes closely mimicked the eighteenth century English Vagrancy Acts, as well as the later Vagrancy Act of 1824, both in word and in interpretation.⁴⁴ English colonists settling on the shores of North America would understandably have imported legislation with which they were familiar. In the seventeenth and eighteenth centuries, this legislation included witchcraft and vagrancy statutes to prevent practices that tracked not just witchcraft and vagrancy, but also behaviors that the state had commonly prosecuted under such statutes, including begging, breach of the peace, robbery, and prostitution.⁴⁵ By the time of the early Republic, the newly minted citizens had a string of English examples culminating in the 1792 Vagrancy Act, all intended to punish that crime and its effects.⁴⁶ The intent of such acts was to put persons without visible or socially acceptable means of support behind bars, as well as to assist persons who wanted to change their ways of life, and thus to thin the herds of bad actors presumed to be roaming the streets.⁴⁷ All of these statutes, whatever their years of passage, specifically listed crafty sciences practices as forbidden.⁴⁸

In contrast, beginning with the Vagrancy Act of 1824, Great Britain's Parliament intended exclusively to punish bad actors.⁴⁹ It did not have any intent to assist bad actors in changing their way of life. Indeed, it labeled "rogues and vagabonds" as the targets of the legislation. Such "rogue and vagabond" legislation, which had come into vogue during the mid-eighteenth century,⁵⁰ became the norm in the

44. See *State v. Kenilworth*, 69 N.J.L. 114, 115 (1903).

45. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 n.1, 161–63, 168 (1972) (ruling a municipal "rogue and vagabond" ordinance void for vagueness because it allowed local police to arrest virtually anyone and failed to alert "person[s] of ordinary intelligence fair notice" that their conduct was proscribed).

46. See 32 Geo. 3, c. 45 (1792).

47. Dennis J. Baker, A Critical Evaluation of the Historical and Contemporary Justifications for Criminalising Begging, 73 J. CRIM. L. 212, 219 (2009).

48. See, for example, the statute cited in *State v. Hatfield*, 87 N.J.L. 124 (1915). "This section, among other things, provides: and all persons who shall use or pretend to use or have any skill in physiognomy, palmistry, or like crafty science, or who shall pretend to tell destinies or fortunes * * * shall be deemed and adjudged to be disorderly persons." "An act concerning disorderly persons (Revision of 1898)." Sec. 1, *Comp. Stat.*, p. 1926.

49. Baker, *supra* note 47, at 220.

50. See JAMES FITZJAMES STEPHENS, HISTORY OF THE CRIMINAL LAW 266–75 (London MacMillan 3d., 1883). Two 18th century acts used the terminology: Vagrants Act of 1739, 13 Geo. 2, c. 24 (Eng.) and Vagrant Act of 1744, 17 Geo. 2, c. 5 (Eng.).

United Kingdom and in other Commonwealth countries, as well as in the United States.⁵¹ Early colonial vagrancy acts in the United States, which were modeled on those enacted in England, were aimed chiefly at persons that local legislators considered to be of disreputable character, however that characteristic might be defined.⁵²

After 1848, the issue became much more complicated for those individuals who joined the Spiritualist movement.⁵³ Practices, which had traditionally been labeled “crafty sciences” and been banned by rogue and vagabond legislation, had received quite a boost as a result of the popularity and spread of the rise and practice of Spiritualism.⁵⁴ Spiritualist mediums frequently gave séances and also practiced various arts of divination, which brought the new belief system into conflict with statutes and ordinances that prohibited such practices.

Since Spiritualism as a belief system, and Spiritualists as practitioners of that system, quickly adopted practices traditionally classified as “crafty sciences,” they also quickly found themselves running afoul of the law in many jurisdictions. Whether they did so with

The 1792 Vagrancy Act, 32 Geo. 3, c. 45 (Eng.) amended these acts, and the Vagrancy Act of 1822, 3 Geo. 4, c. 40 (Eng.) repealed them, but the famous Vagrancy Act of 1824, 5 Geo. 4, c. 83 (Eng.) completely overhauled the entire vagrancy scheme. It too used the “rogues and vagabonds” terminology.

51. “Rogue and vagabond” legislation still exists. *See, for example*, Gulfport, Florida, Code of Ordinances, 14-54 (2015).

52. *Brooker v. Coffin*, 5 Johns. 188, 189–90 (N.Y. Supp. Ct. 1809). Certainly being labeled a practitioner of the “crafty sciences” was to be thought reprehensible in the eyes of society, although at least in New York in the early nineteenth century according to the argument of one attorney, to call someone “a juggler, fortune-teller, or physiognomist” ought not to be actionable as defamation unless the plaintiff pled special damages. *Id.*

53. Moore, *supra* note 54, at 7. *See also The Rochester Rappings: The Fox Sisters and the Beginning of Spiritualism*, N.Y. TIMES (April 18, 1886), reprinted from The Rochester Union (April 18, 1886), (attributing the birth of Spiritualism to the activities of the three Fox girls, Maggie, Catherine and their older sister Leah). On the lives of the Fox sisters, *see* MAURICE LEONARD, PEOPLE FROM THE OTHER SIDE: THE ENIGMATIC FOX SISTERS AND THE HISTORY OF VICTORIAN SPIRITUALISM (Stroud, 2008); BARBARA WEISBERG, TALKING TO THE DEAD: KATE AND MAGGIE FOX AND THE RISE OF SPIRITUALISM (Harper San Francisco, 2004). For an interesting discussion of Spiritualist notions and philosophy generally on the relations between the sexes, including the Spiritualist coinage of the word “sexism,” *see* John B. Buescher, *More Lurid Than Lucid: The Spiritualist Invention of the Word “Sexism,”* 70 J. AM. ACAD. REL. 561 (2002) (tracing the origins and use of the word and contrasting it with the change in the meaning of the word in the late 1960s).

54. *See* MOORE, *supra* note 7; ALEX OWEN, THE DARKENED ROOM: WOMEN, POWER, AND SPIRITUALITY IN VICTORIAN ENGLAND (University of Chicago Press, 1989).

honest religious or philosophical belief, or deceitfully, soon became the subject of discussion. However, as Spiritualist defendants were soon to discover to their dismay, depending on the wording of a particular statute, a Spiritualist's *mens rea* might be irrelevant.⁵⁵

Beginning as early as the 1860s, some of the common defenses that Spiritualist practitioners raised included the following arguments: 1) Spiritualists were not "vagrants" because they had fixed addresses; 2) vagrancy acts were aimed at deceptive practices and speech and that Spiritualist practices and speech were not deceptive; and 3) acts aimed at preventing vagrancy were intended to prevent begging and fraud rather than to interfere with the legitimate practice of religion. Yet, both police and prosecutors used state vagrancy acts to prosecute Spiritualists because spiritualist practices resembled the practices carried on by persons who had traditionally been prosecuted and convicted under vagrancy legislation—fortune tellers, clairvoyants, palm readers, and other "crafty science" practitioners. Since Spiritualist speech resembled in its imagery and substance the kind of imagery and substance presented by those same "crafty science" practitioners, Spiritualists presented an obvious and to many police and prosecutors, a legitimate, target.

III. THE ORIGINS AND RISE OF SPIRITUALISM

A. *THE ORIGINS OF THE SPIRITUALIST MOVEMENT*

While the Spiritualist movement had roots in the beliefs propounded by such religious philosophers as the American Andrew Jackson Davis, the "Poughkeepsie Seer,"⁵⁶ it really exploded on the

55. Laws of general applicability, intended to protect the public and consumers against fraud and deception, caught the sincere practitioner and the bunko artist alike, as this Article attempts to show.

56. See BRET E. CARROLL, *SPIRITUALISM IN ANTEBELLUM AMERICA passim* (Bloomington: Indiana University Press, 1997); ROBERT W. DELP, *Andrew Jackson Davis and Spiritualism, in PSEUDO-SCIENCE AND SOCIETY IN NINETEENTH-CENTURY AMERICA 100* (Arthur Wrobel ed., University Press of Kentucky, 1987). See also FRANK PODMORE, *I MEDIUMS OF THE 19TH CENTURY 154–76* (University Books, 1963) (Reprint 1902) (arguing that the earlier examples of and visions of spirits and manifestations of clairvoyance were substantively different from the Hydesville rappings). ANN TAVES, *FITS, TRANCES, & VISIONS: EXPERIENCING RELIGION AND EXPLAINING EXPERIENCE FROM WESLEY TO JAMES 168* (Princeton, 1999) (on Andrew Jackson Davis's role in the Spiritualist movement as the individual who "model[ed] the transformation from clairvoyant somnambule to seer" who "provided a conceptual framework for

night of March 31, 1848,⁵⁷ when two bored young Hydesville, New York⁵⁸ girls named Kate and Maggie Fox decided to play a trick on their God-fearing Methodist mother.⁵⁹ Instead of going to sleep, they made various raps (variously reported to be with an apple or their knuckles and toes) against their headboard or the wall. When their mother questioned them about the strange noises, they told her a spirit had made them. Before they knew it, the hoax had gotten out of hand, an older sister with

understanding it.”). Taves cites the opinion of a contemporary observer on the appearance and effects of trance. “Dr. John F. Gray, a homeopathic physician . . . asserted that ‘the state of trance, near akin to dreaming, nightmare, etc., pertain to all shades of mediumship.’ . . . [T]he doctor described the physical signs of the trance state, and maintained that these signs were detectable in every exercise of true mediumship, especially in the temperature of the skin of the medium, in the state of the muscular system as to voluntary motion, and in the condition and action of the pupils and balls of the eyes. Even in the rapping medium, he thinks these signs are observable to some slight degree.” TAVES, at 179.

57. PODMORE, *supra* note 56, at 180. Podmore reports that within three years Margaret (or Margaretta) Fox admitted to a relative that she and her sister had faked the “haunting,” but by then the movement had caught on and the Fox girls had lost control of their hoax. *Id.* at 185–87.

58. Hydesville is located in the “burned-over” district of New York, so called because the Second Great Awakening of religious revivals of the 19th century took place in the area. See WHITNEY R. CROSS, *THE BURNED-OVER DISTRICT: THE SOCIAL AND INTELLECTUAL HISTORY OF ENTHUSIASTIC RELIGION IN WESTERN NEW YORK, 1800-1850* 3 (Ithaca: Cornell University Press, 1950). The other religions which traced their origins to the Burned Over District include the Church of Jesus Christ of Latter-Day Saints (LDS), also called the Mormon Church, the Millerites, the United Society of Believers in Christ’s Second Appearing (Shakers), the Oneida Society, and the Christian Science movement. Joseph Smith, Jr. founded the LDS movement after he claimed he saw a vision of the Angel Moroni who led him to the golden plates and thus to the text of the Book of Mormon. See generally RICHARD L. BUSHMAN, *JOSEPH SMITH AND THE BEGINNINGS OF MORMONISM* (University of Illinois Press, 1985). William Miller preached that the Second Coming would arrive October 22, 1844; “Millerism” took off in the Burned-Over District as a result, and there is some identification of Millerism and the Seventh-Day Adventists. See Jonathan Butler, *From Millerism to Seventh-Day Adventism: “Boundlessness To Consolidation,”* 55 *CHURCH HIST.* 50 (Mar. 1986). In addition, other utopian societies such as the Skaneateles Community settled in the area. See generally CROSS, *supra* note 58. The area also fostered radical political ideas, such as those that gave rise to the Seneca Falls Convention, which the well-known feminists Elizabeth Cady Stanton, Lucretia Mott, Martha Cady Wright (Mott’s sister), and Mary Ann McClintock attended from July 19-20, 1848. See JUDITH WELLMAN, *THE ROAD TO SENECA FALLS: ELIZABETH CADY STANTON AND THE FIRST WOMEN’S RIGHTS CONVENTION* (Bloomington: University of Illinois Press, 2004).

59. MOORE, *supra* note 7, at 7–8.

an eye on the main chance had become involved, and they had become the unwitting founders of a new religion.⁶⁰

The “raps” that the Fox sisters claimed were the manifestations of spirits, including demonic spirits, that lived in their Hydesville home, quickly became one of the preferred methods of communication used between the living and the dead in Spiritualist practice. The rappings satisfied séance sitters in a way that dry readings from good books or Andrew Jackson Davis’s communications from trance could not.⁶¹

[T]he guardian spirits of the Fox sisters held themselves available to answer test questions put to them by an investigative audience. Using one of several common codes, the summoned spirits proved their supermundane powers to members of the circle by rapping out messages containing trivial information known only to the sitters around the table.⁶²

B. THE INFLUENCE OF SPIRITUALISM ON THE PUBLIC IMAGINATION

Historian Bret Carroll explains that Spiritualists attempted to link themselves to traditional Revolutionary American values in order to validate both what looked like anarchy in terms of their religious organization and disorder, if not outright criminality, in terms of their activity.

Like other “insurgents” on the antebellum religious scene, Spiritualists explained themselves in terms of the American Revolution. The republican ideology that justified the Revolution and the impulse toward disestablishment that accompanied it encouraged an increasing role for private judgment in religious matters, a reverence for the idea of independent selfhood, and a premium on courageous resistance to perceived tyranny as the mark of manhood They understood Spiritualism as the culmination of the Revolution, a new religion perfectly suited to the young American republic In particular, Spiritualists concerned themselves with two kinds of spiritual tyranny and regarded spirit

60. Many writers have explored why the Fox sisters’ claims sparked belief so quickly. In addition to the Carroll, Moore, and Podmore works cited, *see supra* LOGIE BARROW, *INDEPENDENT SPIRITS: SPIRITUALISM AND ENGLISH PLEBEIANS 1850-1910* (Routledge and Kegan Paul, 1986) and RUTH BRANDON, *THE SPIRITUALISTS: THE PASSION FOR THE OCCULT IN THE NINETEENTH AND TWENTIETH CENTURIES* (NY: Knopf, 1983).

61. MOORE, *supra* note 7, at 15.

62. *Id.*

communications as the key to abolishing both. The first was the stifling effect of the religious establishment, whose despotism was over the spirit rather than the body and was therefore considered more insidious than political oppression . . . Spiritualists regarded moral corruption within, which they often likened to slavery, as an even greater danger to spiritual freedom and order than despotic religious institutions without. Freedom in their minds meant not thoughtless self-indulgence but something like the “Christian liberty” which John Winthrop had spelled out for the Puritan commonwealth of seventeenth-century Massachusetts: the ability to escape the enslaving grip of sensual behavior and to achieve spiritual self-realization.⁶³

The use of Spiritualism as a motivation and an excuse for all sorts of behavior spread quickly. One jury found itself with the task of deciding whether some mediums had improperly influenced their employers by passing on communications from the spirits.

Mrs. Herrick, one of the mediums, who was employed in the bank, testified before the jury that she “gave advice to Mr. Paine to open the bank on Tuesday, and let one person in at a time; this advice was given by the spirit of George Washington; did not know of any other communications; might have received one from Henry Clay; does not know who got a communication about the smoking; Henry Clay’s spirit told them to receive all the bills and redeem them; . . . a rule of the bank was not to redeem money for any person who came in smoking; did not know of any revelation not to redeem money for dishonest persons.”⁶⁴

The Baltimore *Sun* reported that the jury hearing the case was “unable to agree” on a verdict.⁶⁵ But a society that busied itself with creating a solid legal and moral foundation for a new republic could not afford to support what looked like chaos or crime. While some in the new country might have embraced a belief system like Spiritualism that seemed to allow a great deal of personal expression, the authorities could not be expected to support such a movement. And they did not.

63. CARROLL, *supra* note 56, at 36–37.

64. *The Spiritualist Bankers*, THE SUN (Baltimore, MD) (Feb. 23, 1853), at 1.

65. *Id.*

C. SCIENTIFIC INVESTIGATIONS INTO SPIRITUALISM

For the next two decades, many skeptics outside the government were inclined to give this new belief system the benefit of the doubt, at least to the extent that they were willing to investigate any claims that it might have some scientific foundation.⁶⁶ In addition, the better known spiritualists understood that acceptance by intellectuals and by those important persons who led public opinion, and wanted to demonstrate that science, not superstition, underlay and justified the practice of Spiritualism. They knew that an appeal to eyewitness testimony would be particularly powerful, but they combined it with the nineteenth century desire to anchor knowledge in the scientific sphere. As R. Laurence Moore writes,

In the interest of science and in the service of a population excited by scientific discovery, spiritualists proposed a religious faith that depended upon seeing and touching. Transforming a concern for man's inward spiritual nature into an empirical inquiry into the nature of spirits, they built a belief in an afterlife upon such physical signs as spirits from another realm could muster. What, after all, as one spiritualist inquired with a characteristic lack of any sense of the sublime, was the difference between the "spiritual world" and the "world of spirits?" In their early pamphlet on the Fox sisters, Eliab W. Capron and Henry D. Barron denied any wish "to feed the popular credulity, or to excite the wonder loving faculties of the ignorant and superstitious."⁶⁷

The early nineteenth century attractiveness of Romanticism was still there, but now it combined with the attractions of science as a method to understand the world.

From that time on, most leading spiritualists, in their efforts to make spirit communication credible, never wavered from four principles: a rejection of supernaturalism, a firm belief in the inviolability of natural law, a reliance on external facts rather than on an inward state of mind, and a faith in the progressive development of knowledge. In upholding such principles, they struck a responsive chord among many Americans who had earlier rejected orthodox

66. Scientific research into Spiritualism went on in Great Britain as well, with much the same result. See Janet Oppenheim, *Physics and Psychic Research in Victorian and Edwardian England*, 86 *PHYSICS TODAY* 62 (May 1986).

67. MOORE, *supra* note 54, at 19.

Christian theology partially because they wanted to believe that life posed a limited set of questions with rational, discoverable answers.⁶⁸

The public's interest in science and technology attached naturally to Spiritualism. In 1854, based on a petition signed by 15,000 citizens and forwarded to him, United States Senator James Shields introduced a bill in Congress to investigate the possibility of communication between this world and the next, including perhaps the creation of a "spiritual telegraph."⁶⁹ His initially astonished, and then cynical, colleagues quickly began to poke fun at the proposal. One suggested that the bill be forwarded to the Committee on Foreign Relations.⁷⁰ Abashed, Senator Shields agreed to shelve the bill. However, in an atmosphere in which many people, including an educated elite, believed that science and technology could bring us closer to the answers to many questions, Senator Shields' proposal did not seem quite so bizarre.

While many members of the middle class happily adopted Spiritualism, the new belief system also attracted attention among scientists who saw a chance to reconcile investigation of this life and the next,⁷¹ and among some attorneys and judges,⁷² although many lawyers had personal reasons for an interest in Spiritualism that had nothing to do with scientific research.⁷³ One of the most famous judges to accept

68. *Id.*

69. See Statement of Mr. Shields, 28 CONGRESSIONAL GLOBE (Apr. 17, 1854), at 923–24.

70. *Id.*

71. See generally Deborah Blum, *Ghost Hunters: William James and the Search for Scientific Proof of Life After Death* (NY: Penguin, 2007); Mary Roach, *Spook: Science Tackles the Afterlife* (NY: Norton, 2006).

72. "He was a great believer in spiritualism and in fiat money," LEANDER JOHN MONKS, 3 COURTS AND LAWYERS OF INDIANA 1114–15 (1916) (describing one "Colonel B", an Indiana attorney and judge). "Fiat money" is currency which the US government decrees to have value although it cannot be converted into coins or other currency. See "Fiat Money," 5 (V) OXFORD ENGLISH DICTIONARY, 2D Ed. 866 1989. The suggestion is that "Colonel B" accepted not only the tenets of an odd belief system that featured communication with the dead, but the notion that the federal government could give value to money that seemingly had no objective value (the suggestion being that its value derived from belief).

73. Some lawyers, however, expressed dismay at the rapid expansion of this new religious movement, among them George Templeton Strong (1820-1875), who wrote in his diary, "What would I have said six years ago to anybody who predicted that before the enlightened nineteenth century was ended hundreds of thousands of people in this country would believe themselves able to communicate daily with the ghosts of their

the tenets of Spiritualism was Joseph Edmonds, as discussed *infra*, who actually left his position on the bench and became a medium.⁷⁴ While Edmonds may have gone farther than other members of his profession in terms of his adoption of Spiritualist principles, his is an example of the type of attitude necessary to understand the religious and philosophical claims made by the new religion. Edmonds “had gained a reputation as an able, reform-minded judge with a particular interest in improving conditions of penal servitude. He was also a scholar whose legal writings were widely admired both before and after his fall from political favor.”⁷⁵ The sorts of individuals who busied themselves with investigating Spiritualism, without becoming converts, were skeptics, without being cynics, among them the celebrated chemist Michael Faraday, who was among the first scientific investigators to apply the principles of experimental research to the séance room.

Using a few simple pieces of apparatus of his own design, he succeeded in establishing the same kinds of controls that characterized his more famous experimental researches. And he succeeded in providing an explanation for the observed set of phenomena that was satisfactory to all.⁷⁶

Faraday was particularly interested in “table-turning,” the use of (usually round) tables to communicate with the spirits who would manifest their presence by elevating the piece of furniture while the sitters touched hands or fingers on the table’s surface.

“I have not been at work except in turning the tables upon the table-turners, nor should I have done that, but that so many inquiries poured in upon me, that I thought it better to stop the in pouring flood by letting all know at once what my views and thoughts were It is with me a clear point that the table moves when the parties, though they strongly wish it, do not intend, and do not believe that

grandfathers?—that ex-judges of the Supreme Court, senators, clergymen, professors of physical sciences, should be lecturing and writing books on the new treasures of all this, and that others among the steadiest and most conservative of my acquaintance should acknowledge that they look on the subject with distrust and dread, as a visible manifestation of diabolic agency? II George Templeton Strong, *Diary* 244-245 (Allan Nevins and Milton H. Thomas, eds. 1952) cited in MOORE, *supra* note 7, at 4-5.

74. Corcos, *supra* note 21. On Edmonds’ conversion and career as a Spiritualist see MOORE, *supra* note 7, at 19-22.

75. MOORE, *supra* note 7, at 19.

76. Michael Faraday, *Michael Faraday’s Researches in Spiritualism*, 83 SCI. MONTHLY 145 (1956) (reprints Faraday’s own observations and research).

they move it by ordinary mechanical power. They say, the table draws their hands; that it moves first, and they have to follow it, that sometimes it even moves from under their hands. With some the table will move to the right or left according as they wish or will it,—with others the direction of the first motion is uncertain:—but all agree that the table moves the hands and not the hands the table. Though I believe the parties do not intend to move the table, but obtain the result by a quasi involuntary action, still I had no doubt of the influence of expectation upon their minds, and through that upon the success or failure of their efforts.⁷⁷

Spiritualists might have objected that Faraday had made up his mind before he entered on his investigation, but his simple yet carefully administered experiments⁷⁸ demonstrated that human agency, and not paranormal activity, caused table-turning (or table-tipping, as Spiritualists and séance attendees sometimes referred to it). However clear and convincing Faraday hoped his scientific proof was that tables moved because of the actions of the sitters at the séances and not because of the agency of the departed. However, tables continued to turn. Indeed, soon they were “rapping, knocking, tilting, turning, tipping, dancing, levitating, and even ‘thrilling’”⁷⁹ in the United States, in the United Kingdom and on the Continent. Spiritualists could also call on their own famous scientist, the chemist Robert Hare, to validate the “good science” of their practices.⁸⁰ In addition to the frequent use of the appeals to

77. *Id.* at 146–47.

78. *Id.* at 147–50.

79. Daniel Cottom, *On the Dignity of Tables*, 14 *CRITICAL INQUIRY* 765, 765 (Summer 1988). Cottom suggests that the Spiritualists “vulgarized the supernatural. Spiritualists turned nature, the supernatural, human beings, and the world all-together into public scenes unregulated by social and sacramental conventions. They found unmediated truth in objects and phenomena accessible to all.” *Id.* at 769–70. Note, though, that Spiritualists still expected evidence to be physical—that is, to be accessible to the senses.

80. See Timothy Kneeland, *Robert Hare: Politics, Science, and Spiritualism in the Early Republic*, 132 *PENN. MAG. HIST. BIOG.* 245, 246–57 (2008). Historian Timothy Kneeland argues that Hare’s acceptance of the twin notions of the scientific underpinnings of Spiritualism and the somewhat contradictory belief in the unseen were consistent with his early interest in other fields, such as chemistry, which was then dominated by the theories of Antoine Lavoisier. *Id.* As other theories supplanted Lavoisier’s, Hare felt himself marginalized, and he sought refuge in intellectual circles that he found more welcoming, such as literature and the new belief system of Spiritualism. *Id.*

science, Spiritualists often used the “telegraph” analogy, famously invoked by Senator Shields, likening the communication between the living and the departed promoted by Spiritualist belief to a “celestial telegraph.” Rappings, especially on tables, played a part in the celestial telegraph’s functioning, but what was particularly attractive about this analogy was its call to the nineteenth century’s newest and most popular type of mass communication. And who introduced the celestial telegraph to Spiritualist mediums—significantly including the Fox sisters? Those mediums who claimed to receive information about this possible mode of communication alleged that Benjamin Franklin himself had contacted them to discuss it.⁸¹

Politician and spiritualist Warren Chase put the case for the investigation of Spiritualism thus:

We have also been enabled in our experiments of late to establish the fact, that our spirit friends, whose subtile forms are beyond the reach of our hands or eyes, are sometimes able to momentarily clothe themselves or parts of their forms . . . with the grosser particles that abound in our air . . . and during this momentary recovering of their spirit bands, or forms, to enable us to see and even touch them, and sometimes even to hear them speak to us, though usually in a whisper. The recent great abundance of matter thrown out into the air by the rapid decay of the victims of the war, has already supplied in greater abundance than before the necessary material, and such manifestations have accordingly increased, and no doubt will much more for several years to come. There are many phenomenal facts we have in our list that we cannot yet explain upon any scientific basis yet established; but we shall work at it till accomplished. These scientific discoveries, and the facts of modern spiritualism, by which we have opened an intellectual correspondence between the two spheres of being, takes the whole subject of life after death out of the hands of priests and superstitious bigots as effectually as geology does creation, and astronomy the position, forms, and motions of worlds. Hereafter spirit life will be in the domain of science, and the continued existence of our friends after we put their bodies in the ground, a demonstrated fact, which the success or failure of some persons to

81. Werner Sollors, *Dr. Benjamin Franklin’s Celestial Telegraph, or Indian Blessings to Gas-Lit American Drawing Rooms*, 35 AM. Q. 459, 468–80 (Winter 1983) (discussing the popularity of Franklin and Native Americans as spirit guides).

communicate will not alter, since each case is subject to incidents, if not accidents, in which the will of both parties has a share, and the laws are such that many may not be able to comply.⁸²

In this passage, Chase clearly outlines the idea, then wildly popular,⁸³ that science could prove the existence of life after death. The War between the States had recently ended, and as it would after both the First⁸⁴ and Second World Wars, interest in Spiritualism had greatly increased.⁸⁵

Spiritualists themselves appreciated the appeal to science and to scientific principles,⁸⁶ although when they used the word “science,” it meant something somewhat different from what it meant to mainstream scientists. To this day, some Spiritualists continue to follow “scientific” principles, although to them, “science” has a religious meaning, usually connoting alternative medicine or faith healing.⁸⁷

Not until after most scientists and other investigators, exasperated, had virtually abandoned paranormal investigation, having decided that many practicing Spiritualists were either self-deluded or actively engaged in fraud, did the Spiritualist church essentially abandon these concepts and adopt the Seven Principles put forward by Emma Hardinge Britten.⁸⁸ As a result, the prosecutorial and legislative drive to capture mediums and other Spiritualists engaged in deceit gained momentum. Once it became fairly clear that Spiritualists could not defend their practices as scientific, hostile prosecutors and legislators, as well as the press, renewed their attack on common Spiritualist practices such as

82. Warren Chase, *Lecture I: Relation of Spiritualism to Science*, delivered Washington D, D.C. (Jan. 1865), in *THE GIST OF SPIRITUALISM VIEWED SCIENTIFICALLY, PHILOSOPHICALLY, RELIGIOUSLY, POLITICALLY, AND SOCIALLY* 16–17 (3d. ed., 1867).

83. See CARROLL, *supra* note 56, at 75.

84. See generally JENNY HAZELGROVE, *SPIRITUALISM AND BRITISH SOCIETY BETWEEN THE WARS* (2000); Jennifer Hazelgrove, *Spiritualism After the Great War*, 10 *TWENTIETH CENT. BRIT. HIST.* 404 (1999).

85. See DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR 180–88* (2008).

86. See CARROLL, *supra* note 56, at 66–67, 69.

87. Jennifer E. Porter, “Science” and Spiritual Vibrations: Contemporary Spiritualism and the Discourse of Science, 19–21 (Dissertation, McMaster University, 1995).

88. See *supra* note 17 and accompanying text for a discussion of the Seven Principles.

table turning and prophecy, alleging that such rituals were simply crafty sciences by another name.⁸⁹

IV. SPIRITUALISM AS A RELIGIOUS BELIEF

A. *THE RESISTANCE TO SPIRITUALISM*

As familiarity with Spiritualist practices grew, societal resistance to them arose from leaders and members of traditional churches, legislators, prosecutors, some magicians, scientists, inventors, and the media, who investigated the movement and its followers. Each of these groups raised questions about Spiritualists and their beliefs and practices, and to a greater or lesser extent, rejected the responses that Spiritualists offered to justify those beliefs and practices. I discuss these interactions below. As a general matter, these objections to Spiritualist beliefs continue today because they reflect a profound disagreement concerning the nature of religious truth, and to what extent the First Amendment should protect discussion about it.

1. Resistance from Mainstream Churches and the Legal System

Because Spiritualism, like two other belief systems, the Church of Latter Day Saints (often called Mormonism) and Christian Science, all three significantly born in the United States, did not immediately receive acceptance as a mainstream religion, it struggled for recognition from the legal regime. Like Mormons and Christian Scientists, Spiritualists practiced rites that seemed odd or heretical to members of mainstream religions.⁹⁰ As I discuss above, among these were communication with the dead, a mainstay of the Spiritualist Church, easily condemned by

89. The press were generally anti-Spiritualism from the beginning. See *Shocking Suicide: Another Victim of Spiritual Humbug*, *The New York Herald* (March 29, 1857) (reprinted from the *San Francisco Globe*, March 5, 1857), http://infoweb.newsbank.com.ezproxy.law.lsu.edu/iw-search/we/HistArchive/?p_product=EANX&p_theme=ahnp&p_nbid=D62W50NIMTM3NDc3ODM5Ni41NjUzNDY6MToxMzoxMzAuMzkuMTkuMjU0&p_action=doc&s_lastnonissuequeryname=4&d_viewref=search&p_queryname=4&p_docnum=26&p_docref=v2:11A050B7B120D3F8@EANX-11ACD18BE8294FA0@2399403-11ACD18BF78F9A30@0-11ACD18C70A93AC8@Arrival+of+the+Illinois+Weeks+Later+from+California.

90. Michael Homer discusses similarities between early Spiritualism and early Mormonism in his article *Spiritualism and Mormonism: Some Thoughts on Similarities and Differences*, 27 *DIALOGUE* 171 (1994).

some as communication with evil spirits,⁹¹ and acting as a conduit between the living and the dead, which seemed to others like false prophecy, which the Bible also condemned. Some mainstream religious leaders condemned Spiritualism from the pulpit, and some commentators charged that Spiritualism upset the social fabric.⁹² In one bizarre Ohio case, a newspaper editor alleged that a Spiritualist “disturb[ed]. . .religious worship” in a local church and was a “contaminator of public morals, because of the agency he had in the rappings” caused by a young female medium who also attended the church. Interestingly, attorneys for both the plaintiff and the defense agreed that the principle of religious freedom was primary.

Another of the counsel insisted that the plaintiff had a right to believe what he pleased, and to enjoy that belief as he pleased; and that for that belief, he could not, with impunity, be denounced as a “contaminator of the public morals.” The defendant’s counsel. . .ridiculed the idea of “spiritual rappings,” and insisted that the worshippers in any church had a right to assemble in peace; and that any “disturbance,” whether by spirits in or out of the flesh, was a violation of the recognized and cherished principle of religious liberty. He did not, however, deny the right of the “spirits” to “rap,” but he did deny them the right to do so out of time and place.⁹³

The Spiritualist sued for libel. The jury, however, was unable to agree on a verdict.

In a later case, a Mrs. Dr. Hilligoss (presumably a practicing Spiritualist) filed a lawsuit in 1895 against one W. R. Covert, who had asserted that “all persons claiming to be spiritualist mediums are either liars, knaves, fools, frauds, or ignoramuses,” and had to prove his claim by putting up \$500 to “expose any spiritual manifestations that any medium will bring before him and [a] jury.” Mrs. Hilligoss apparently sued for defamation, although the article’s author does not name the

91. Deuteronomy 18:9–11 (New Oxford Annotated Bible); Jeremiah 14:14 (New Oxford Annotated Bible).

92. Some commentators today are still concerned about the effects of “new age” thinking on Christians. See Marvin Olasky, *The Return of Spiritism*, 36 CHRISTIANITY TODAY 20 (1992) (discussing what he considers to be the successful response of the Christian Church to Spiritualist theology in the mid-nineteenth century and suggests it as a template for a similar response to “New Age” incursions in the 1990s).

93. *A Strange Libel Case*, N.H. PATRIOT & ST. GAZETTE Jan. 18, 1854, at 4.

cause of action.⁹⁴ The jury, showing “no willingness to be deceived,” took twenty minutes to deliberate and found for the defendant.⁹⁵

Other leaders of society joined to investigate Spiritualism’s possibilities, even if they might privately believe that it was all ultimately based on delusion. Wrote one Connecticut minister,

Now shall we of the clergy, through the fear of compromising our dignity and damaging our reputation, make this investigation [into the validity of Spiritualist claims], or not? It is already intimated that clergymen are getting to be abstractions, rather than men, and if cowardice shall prevent us from looking any subject fair in the face, which we have reason to believe is leading society astray, this charge would not seem to be altogether undeserved. To say this matter does not merit examination, is to prejudge the case; *everything* deserves examination which lays any strong hold on the popular mind. The puerilities and nonsense which are connected with it do not furnish a sufficient reason for turning away with contempt, and if it were so, few subjects would have ever commanded attention in their beginning. Chemistry was once alchemy; astronomy was astrology. But then, behind these “rappings,” “tippings,” and other trivial operations, there is a work going on, which it is worse than folly to despise. I will venture to say that, if the whole extent of this work were disclosed, which the nature of the case renders impossible, it would greatly astonish us all. I am glad to see that one of the most judicious and exemplary western Bishops, whose sound churchmanship and piety none will dispute, has had the moral courage to announce, over his own printed signature, that he intends, as he has opportunity, to give the subject a careful investigation.⁹⁶

Other religious leaders feared Spiritualism’s attractions, and sought to deny Spiritualist clergy the benefits of ministerial exceptions,

94. See *Spiritualism In Court: A Man Who Disbelieves In It Sued For \$10,000 Damages*, N.Y. TIMES (Nov. 1, 1895), <http://query.nytimes.com/mem/archive-free/pdf?res=9C01EEDE1139E033A25752C0A9679D94649ED7CF>.

95. See *Hilligoss v. Covert*, N.Y. TIMES (Nov. 5, 1895), <http://query.nytimes.com/mem/archive-free/pdf?res=9504E7DF1E3DE433A25756C0A9679D94649ED7CF>.

96. T. M. Clarke, [Letter], *reprinted in Spiritualism and the Clergy*, ALTA CALIF. (Nov. 16, 1852), at 2.

which might be provided in general laws.⁹⁷ Still others urged legislators and courts to consider the dangers of Spiritualist practices that looked alarmingly like the frauds that prosecutors claimed crafty science practitioners had perpetrated for years on a gullible public. In particular, district attorneys and some members of the clergy objected to what looked like fortune telling, which many jurisdictions had banned since before the founding of the Republic.⁹⁸ If, they opined, it looked like a duck, walked like a duck, and quacked like a duck, it was a duck. Never mind that this particular duck claimed to be able to communicate with dead ducks. Some commentators went so far as to suggest that anyone who followed Spiritualist tenets was insane, a view which the number of will contests in the late nineteenth and early twentieth centuries clearly documented.

Ardent believers in the doctrines of “Modern Spiritualism” were generally deemed capable of making valid wills, even where there was proof that the testator consulted with the “spirit world” via a medium in the course of drafting the document. Indeed, one court approved the will of a believer in metempsychosis who left the bulk of his estate to the American Society for the Prevention of Cruelty to Animals, opining that it was a strangely self-interested but not insane testamentary act. Nor were the judges inclined to invalidate the final dispositions of those so given to licentiousness or vulgarity that they appeared to have “no idea of the moral obligations of kinship.” As courts repeatedly held, the law “does not require any particular grade of moral rectitude” to establish testamentary capacity or to dispel any suspicion of undue influence. However lamentable, the “grossest immorality” and “considerable intelligence” could be found in the same testator. The more deviant

97. Geoffrey K. Nelson, *Spiritualism and Society* 82 (NY: Schocken Books, 1969).

98. That the public and law enforcement were both suspicious of crafty science practitioners was understandable. Consider this news item from 1848, the year that corresponds with the birth of Spiritualism, and which tells the story of one Andrew Tyler, convicted as accessory to the murder of a young child in order to later successfully find that child’s body and “prove” his own psychic abilities. *Fortune Telling and Crime*, DAILY OHIO STATESMAN (Aug. 22, 1848), http://infoweb.newsbank.com.ezproxy.law.lsu.edu/iw-search/we/HistArchive/?p_product=EANX&p_theme=ahnp&p_nbid=D62W50NIMTM3NDc3ODM5Ni41NjUzNDY6MT0xMzoxMzAuMzkuMTkuMjU0&p_action=doc&s_lastnonissuequeryname=8&d_viewref=search&p_queryname=8&p_docnum=66&p_docref=v2:114748862FA816A8@EANX-11320DBCCC31BC10@2396262-11320DBD03491C38@1-11320DBE7824D168@Fortune+Telling+and+Crime.

the will seemed, the more courts contextualized their analyses by placing the document in the larger history of the testator's life. But they were ultimately prepared to accept perversity as an irreducible aspect of the human condition. "We have to deal with the human mind and heart as we find them," judges ruled, noting that men were fated "to indulge in prejudices and partialities."⁹⁹

Courts, however, did not necessarily hold that, absent other indicia, a belief in Spiritualist teachings by itself was proof of insanity or incompetence.¹⁰⁰ What they did require was evidence that in the case of a testator who accepted Spiritualist teachings, for example, that those challenging the will present other indications of incapacity and show evidence of undue influence before a judge would grant the request of an unhappy potential heir to invalidate an existing will.¹⁰¹

99. Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959, 1028–29 (Feb. 2006) (footnotes omitted).

100. *Robinson v. Adams*, 62 Me. 369 (1870) (court refused to hold that testator's belief in "spiritual communications," if proven, is "*ipso facto*, evidence of insanity, or of an insane delusion"). *See also* *Owen v. Crumbaugh* (81 N.E. 1044 (Ill. 1907)) (court refuses to set aside will of testator otherwise in full command of his faculties who believes in spiritualism); *Middleditch v. Williams*, 45 N.J. Eq. 726 (N.J. Prerog. Ct. 1889) (court rules testator's belief in Spiritualism not an "insane delusion", also citing *Robinson v. Adams*). *But see* *Compton et al., v. Smith*, 150 S.W.2d 657 (Ky. Ct. App. 1941) (while belief in spiritualism not sufficient to demonstrate testamentary incapacity, testator also said he had spoken to the dead on the telephone and that the dead had sent him mail; this evidence combined with other evidence sufficient to suggest that jury could find testator did not have sufficient capacity to make a will). Similarly, a testator's belief in witchcraft absent other indicia of incapacity is not sufficient to set aside a will. *See* *Addington v. Wilson*, 5 Ind. 153, 155–156 (1854). *See also* JAMES SCHOULER, *A TREATISE ON THE LAW OF WILLS* (2d ed.; Boston: The Boston Book Company, 1892) at 169–71; WILLIAM HERBERT PAGE, *A CONCISE TREATISE ON THE LAW OF WILLS* (Cincinnati: W. H. Anderson, 1901) at 133–34; Christopher Buccafusco, "Spiritualism and Will(s) in the Age of Contract" (August 2008); *University of Illinois Legal Working Paper Series*, (U. of Ill. L. & Econ., Working Paper 91, 2009), <http://law.bepress.com/uiuclwps/papers/art91>; Christopher J. Buccafusco, *Wills and the Wills in American Law, Science, Culture*, American Bar Foundation/University of Illinois Legal History Seminar Paper 2009, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1096367 (last visited May 16, 2012).

101. *See, e.g.,* *Buchanan v. Pierie*, 54 A. 583 (Pa. 1903) (holding that no evidence had been introduced showing testator was not of sound mind despite his Spiritualist beliefs). *See* *Lee v. Lee*, 4 McCord 183; 15 S.C.L. 183 (1827) (holding that even highly eccentric behavior and demonstrated beliefs in witchcraft on the part of the deceased did not merit

Similarly, the government needed more evidence than a defendant's simple protestation of belief in Spiritualism to obtain a fraud conviction under a vagrancy statute. Adherence to Spiritualism in itself, even if Spiritualist practices seemed to be equivalent to deceit, did not demonstrate fraud.¹⁰² The prosecutor must also prove all the elements of the crime alleged, presenting evidence that the defendant had performed some act forbidden under that statute. As the Spiritualist movement developed from the 1850s through the 1930s, the forbidden acts listed happened to be tied to rituals that various Spiritualists claimed were necessary parts of their practice. Because Spiritualist teachings emphasized contact with the dead, and those who visited Spiritualists wanted some indication that the medium had actually made such contact, the medium wanted to gratify the request of his (or more often her) clients. In the beginning, mediums could satisfy clients with messages obtained from the beyond during trances¹⁰³ and sounds heard in darkened rooms,¹⁰⁴ which limited the likelihood that prosecutors might bring fraud charges under an existing statute, although early

reversal of the jury verdict on the matter of his testamentary capacity). *See also* Blumenthal, *supra* note 99.

102. Spiritualists might also be prosecution witnesses in other cases. In an 1853 case, a clairvoyant accused a young woman of stealing a sum of money. She could not, however, remember anything she had said while in her clairvoyant state and the defendant's attorney managed to exclude what the clairvoyant had said to others about the alleged theft as hearsay and thus obtained an acquittal for his client. *See Spiritualists in Court*, THE CONST. (Middletown, CT) (July 27, 1853), at 2.

103. As the demand for messages became fiercer and more extensive, physical mediums found the method of transmitting messages via "rapping" less efficient than slate writing and speaking. As Taves points out, "[T]hey needed a way to signal that it was not they who wrote and spoke, but the spirits who wrote and spoke through them. Neither the idea of a spiritual telegraph nor the associated electrically based theory of spirit communications provided an adequate means of differentiating the speaking and writing of the spirits from the ordinary speech and writing of humans." Taves, *supra* note 56 at 179–80. Similarly, mediums who used trance communication (automatic writing) to channel the spirits in order to produce writings had difficulties if they later wished to claim copyright in the resulting works. *See* Christine A. Corcos, *Ghostwriters: Spiritualists, Copyright, and Rights of Publicity*, LAW AND MAGIC 79 (C. A. Corcos ed. Carolina Academic Press, 2010). *See also* Nancy M. Babb, *Cataloging Spirits and the Spirit of Cataloging*, 40 *Cataloging & Classification Q.* 89 (2005) (explaining the problem for catalog librarians who must assign authorial responsibility for works "written by" spirits) and the more serious but no less informative Helen Sword, *Necrobibliography: Books in the Spirit World*, 60 *Modern Lang. Q.* 85 (March 1999).

104. BRANDON, *supra* note 60.

investigators certainly suspected fraud.¹⁰⁵ Thus, proving the acts became crucial for the prosecutors, and arguing that the acts either were not proven or not identical to the ones performed by the defendants became the battle fought out in the courts. Further, depending on the clarity of the statute, Spiritualists still might attempt a defense arguing that 1) the activities they performed were possible even if the statute seemed to declare them impossible¹⁰⁶ or 2) the activities they performed were protected under the First Amendment even if the statute declared them criminal.

Concomitant with the antipathy toward the crafty sciences in the minds of many legislators, prosecutors, and judges of the nineteenth century was the notion that Christianity was the basis of the common law.

From Kent and Story in the early part of the century, to Cooley and Tiedeman toward the end, the maxim that “Christianity is part and parcel of the common law”. . . was heard so often that later commentators could refer to it as a matter “decided over and over again,” one which “text writers have reiterated and courts have affirmed. The maxim even received an endorsement of sorts from the Supreme Court, which in 1844 affirmed that “the Christian religion is part of the common law of Pennsylvania.”¹⁰⁷

Thus, for those mainstream Christian lawyers confronted by the new belief system of Spiritualism, and who found it odd, or disturbing,

105. According to critics, unlike the nineteenth and twentieth century physical mediums, today’s mediums rarely present physical evidence of such communications. Instead, they present communications such as “I’m getting a message about a flower,” or “I’m getting an ‘A’—does that mean anything to you?” or “I’m getting a pain in the chest” (or the head, if the sitter does not respond to the “chest” hint). Such statements and questions require the client to respond to the messages and volunteer much more information than previously. See MICHAEL A. SHERMER, *HOW WE BELIEVE: THE SEARCH FOR GOD IN AN AGE OF SCIENCE* (W. H. Freeman, 1999), <http://casa.colorado.edu/~dduncan/pseudoscience/howpsychicsandmediumswork-michaelshermer.pdf> (discussing the approach of well-known psychic medium James van Praagh).

106. An example of the first type of defense was to allege that the word “pretend” in a statute meant actually meant “pretend” and not “claim,” and that the Spiritualist could perform the act which the statute prohibited, therefore demonstrating his or her innocence. See, for example, the defense raised in *State v. Hatfield*, 87 N.J.L. 124 (1915), *supra* note 48.

107. Stuart Banner, *When Christianity Was Part of the Common Law*, 16 L. & HIST. REV. 27, 27 (Spring 1998).

or downright evil, particularly in view of its promulgation of the practices of prophecy and divination, the idea that the law should prohibit the practice of Spiritualism did not seem to be a violation of any religious right. They could not construe Spiritualism to be Christian at all, in spite of the propensity of its practitioners to begin their circles with the Lord's Prayer or the singing of a hymn.¹⁰⁸ However, as the century wore on, the idea that the common law was explicitly "Christian" and religious slowly began to give way to more secular notions of the content of the common law.¹⁰⁹ By the early to mid-1900s, lawyers and legal scholars had abandoned the idea and courts had begun to follow their lead, as one lawyer noted.

By the middle of the century, the maxim appeared in judicial opinions primarily to be rejected for this reason. Thus in Ohio: "we are not living in the horse and buggy days nor in the days of the doctrine of hell's fire and damnation. . . What may have been good law in the early 1800's is archaic today."¹¹⁰

Some Spiritualists themselves also seemed to have some trouble understanding how to reconcile their beliefs with the workings of the legal system. One Spiritualist, empaneled on an 1858 murder case, was undecided after long deliberations, and wished to return home to consult a medium (and the spirits) to help determine the guilt or innocence of the defendant.¹¹¹

108. BRANDON, *supra* note 60 at 99, 108.

109. Banner, *supra* note 107 at 47–48.

110. *Id.* at 48.

111. *Our Albany Correspondence*, N.Y. Herald (April 3, 1858), http://infoweb.newsbank.com.ezproxy.law.lsu.edu/iw-search/we/HistArchive/?p_product=EANX&p_theme=ahnp&p_nbid=D62W50NIMTM3NDc3ODM5N41NjUzNDY6MT0xMzoxMzAuMzkuMTkuMjU0&p_action=doc&s_lastnonissuequeryname=4&d_viewref=search&p_queryname=4&p_docnum=34&p_docref=v2:11A050B7B120D3F8@EANX-11B2CDDDB3A99BD50@2399776-11B2CDDDB601B44D0@2-11B2CDDC0A0771A0@Our+Albany+Correspondence+Albany%2C+April+3%2C+1858. Ultimately, the judge declared a mistrial. *See also Spiritualism in the jury box*, The Charleston Mercury (April 7, 1858), http://infoweb.newsbank.com.ezproxy.law.lsu.edu/iw-search/we/HistArchive/?p_product=EANX&p_theme=ahnp&p_nbid=D62W50NIMTM3NDc3ODM5N41NjUzNDY6MT0xMzoxMzAuMzkuMTkuMjU0&p_action=doc&s_lastnonissuequeryname=4&d_viewref=search&p_queryname=4&p_docnum=35&p_docref=v2:1116E1B9DF7C4D80@EANX-11307EC74F740630@2399777-11307EC79E9AEA48@1-11307EC9646E4B40@Spiritualism+in+the+Jury+Box. *See*

2. *Common Practices of Spiritualism and the Reaction of Professional Magicians*

The practices now familiar from films¹¹² and other popular depictions¹¹³ as part of Spiritualism evolved relatively quickly after 1848. They included a number of effects and rites intended to accentuate the communication with the dead central to Spiritualist belief, and included the practice of sitting in a circle, particularly when communicants gathered in a family home; the singing of hymns,¹¹⁴ in order to emphasize the link with Christianity, a spirit cabinet in which the medium secluded herself,¹¹⁵ the appearance of “apports,” physical objects that sitters associated with the departed person’s life on this earth

also Christine A. Corcos, *Prosecutors and Psychics On the Air: Does a “Psychic Detective Effect” Exist?*, LAW AND JUSTICE ON THE SMALL SCREEN 173, 190–91 (Jessica Silbey and Peter Robson eds.; Hart Publishing, 2012).

112. As early as 1903 the magician Georges Méliès made a two-minute film, *Le portrait spirituel* (The Spiritual portrait or The Spiritualist photographer), in which a photographer creates a likeness of a sitter on a photographic plate. Sarah Bernhardt’s last film was *La Voyante* (The Clairvoyant) (1923). Another film with the same title, *The Clairvoyant* (1935), starred Claude Rains and featured a storyline about an entertainer who pretends psychic abilities and then discovers that his predictions seem to be coming true. Robert Young starred in the 1939 film, *Miracles for Sale*, an adaptation of Clayton Rawson’s “Great Merlini” novel, *Death from a Top Hat* (1938), in which magician “Dr. Morgan” (Young) debunks fake mediums.

113. Popular culture was quick to depict Spiritualist practices. “Spiritualist photographers” caused a sensation when they began to use the new technology of cameras to create photographs of the dead. See Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J. L. & HUMAN. 1 (1998) (discussing the changing uses of and faith in photographs as evidence). Similarly, law related TV series continue to replicate practices associated with Spiritualism, including prophecy. The extent to which such representations affect viewers’ perceptions of the legal system, because jury members might accept such practices as revelatory, is a question. See Corcos, *supra* note 111 (discussing the effect that such scripted shows have on the public’s view of the justice system).

114. BRANDON, *supra* note 60, at 99. Brandon discusses materialization practices and séances extensively at 98–126.

115. *Id.* at 101–02. Mediums were often but not always women, partly because Spiritualism itself because of its decentralized nature was one of the few religious systems which allowed women to express themselves. However, some commentators suggest that Spiritualist mediumship also emphasizes the passive nature of women and thus is also compatible with the prevailing view of womanhood in the nineteenth century. See, for example, R. Laurence Moore, *The Spiritualist Medium In America: A Study of Female Professionalism In Victorian America*, 27 AM. Q. 200, 203–04 (1975) (hereinafter, Moore, *The Spiritualist Medium*). Moore also notes that an 1859 census of spirit mediums gives the ratio of female to male mediums as 121 to 110. *Id.* at 201–02.

or which verified the deceased's message;¹¹⁶ "ectoplasm,"¹¹⁷ the use of "spirit guides," often Native Americans;¹¹⁸ and the sitters' experience of physical touch by the deceased.¹¹⁹ Any of these manifestations, which occurred in a darkened room, darkness being required by the spirits,¹²⁰ were very likely to convince those who were seeking some verification and consolation. Many of the spirit guides were famous individuals, and included some of the founding fathers, as well as well-known philosophers. One favorite was Abraham Lincoln,¹²¹ who had links to Spiritualism himself.¹²² The communication with the dead, coupled with the transmission of messages from the dead, either through verbal means or through physical manifestation, was the major method through which Spiritualist mediums demonstrated their abilities to sitters at their séances, and provided the central means for those seeking proof of the existence of the afterlife. Unfortunately for Spiritualist practitioners, the ways in which they effectuated that proof—the producing of spirit messages and physical objects ("apports"), spirit writings on slates,¹²³ the production of prophecies from the dead through the reading of tarot cards, were all means that had been prohibited, either explicitly or

116. BRANDON, *supra* note 60, at 105.

117. The manifestation of ectoplasm was a particularly popular way for physical mediums to prove that communication with the dead had indeed occurred. Many spiritualists accepted Charles Richet's definition of "ectoplasm" as "'exteriorized substance' produced out of the bodies of some physical *mediums* and from which *materializations* are sometimes formed. [From the Greek *ektos*, 'outside,' + *plasma*, 'something formed or molded']." See Webpage of the Parapsychological Association, http://archived.parapsych.org/glossary_e_k.html.

118. See STEPHEN CONNOR WEYMEYER, *RED MYSTERIES: "INDIAN" SPIRITS AND THE SACRED LANDSCAPES OF AMERICAN SPIRITUALISM* (Dissertation, University of California, Los Angeles, 2002) (discussing the Spiritualist use of Native American spirit guides). See also TAVES, *supra* note 5656, at 196–97 (discussing the numbers and importance of Native American spirit guides to the Spiritualist movement).

119. Marlene Tromp, *Altered States: Sex, Nation, Drugs, and Self-Transformation in Victorian Spiritualism* 24–25 (2006).

120. BRANDON, *supra* note 60, at 99.

121. See, for example, *Dead Stir Up Spiritualists*, CHIC. DAILY TRIB. (Jan. 14, 1912), at 11.

122. See *infra* note 160; see also NETTIE COLBURN MAYNARD, *SEANCES IN WASHINGTON: ABRAHAM LINCOLN AND SPIRITUALISM DURING THE CIVIL WAR* (Ancient Wisdom Publishing, 2009) (a Civil War medium's journal).

123. On spirit writing and lawsuits, see Corcos, *supra* note 103.

implicitly, through legislation.¹²⁴ Such legislation did not include an exemption for anyone who was prophesying, reading, or producing apports in furtherance of religion, and the purported production of spirit messages from Benjamin Franklin or Abraham Lincoln, did not immunize the medium from prosecution.

The Spiritualist circle had another important meaning, which found a parallel with the popular new invention, Samuel B. Morse's telegraph. Morse demonstrated in 1835 that his apparatus could transmit electrical signals by wire; by 1844, the news that Henry Clay was the Whig Party's Presidential nominee traveled by telegraph. Spiritualists believed that messages to and from the dead could also transmit through electrical impulses, since the "rappings" they heard during séances were "similar to the sound heard in the telegraph office" according to one sitter.¹²⁵ Spiritualists assumed the magnetism that they thought they detected through tests that they devised was similar to the electrical impulses that facilitated the transmission of Morse's telegraph messages. The circle, which they called a "spiritual telegraph," was a method of amplifying the effect.¹²⁶

Many attendees at séances have described the events taking place at Spiritualist rituals, and magicians and mentalists have suggested that these phenomena can as easily be explained by natural as by supernatural means.¹²⁷ For example, a Spiritualist medium would encourage "sitters" or attendees to write down messages or questions to their dead loved ones and ask that these questions be answered; the sitter would then place the message in a sealed envelope. As the session progressed, the medium would place the sealed envelopes to her forehead, "read" the message and answer the question based on a communication from the spirits. Then she would open the envelope and everyone would discover that the spirits had communicated the correct question (and answer) to her. Thus, she would convince the sitters that she had true paranormal powers. The great mentalist Joseph Dunninger explains a number of methods of accomplishing this feat, including one known as the "one

124. See, e.g., *McMasters v. State*, 207 P. 566, 567 (Okla. Crim. App. 1922). See also *infra* note 293.

125. TAVES, *supra* note 56, at 172.

126. *Id.* at 172-73.

127. The practices continue today. See Richard Wiseman, Emma Greening, & Matthew Smith, *Belief in the Paranormal and Suggestion in the Séance Room*, 94 BR. J. PSYCH. 285 (2003) (describing current methods followed by psychic mediums and non-physical mediums).

ahead.”¹²⁸ As he would have admitted, such mundane methods of accomplishing what he would call a trick do not prove that a medium does not have paranormal powers. The medium might still accomplish the feat by paranormal means. Simply demonstrating that an event can be accomplished by ordinary means does not prove that it can be accomplished *only* by ordinary (natural) means. In addition, after the attacks on them began, mediums often alleged that even though genuine mediums might sometimes be caught in fraud, that did not mean they *always* resorted to fraud.¹²⁹ Nevertheless, skeptical mentalists and magicians would point out that the more non-paranormal methods one can amass to explain how such communications might occur, the less likely it is that the communications actually come about through paranormal means.¹³⁰

Such performances did not convince skeptics, nor did they convince prosecutors, who took them as evidence of deception and intent to defraud the public. And they did not usually convince magicians, who announced very quickly that they thought they could recognize in many Spiritualist practices merely repackaged magical illusions that they themselves used, and in some cases, the blatant use of magic tricks and deceptive practices that stage magicians used in their performances. Both magicians and law enforcement said they could discern as well such illusions and tricks in the practices of fortune tellers, astrologers, palmists, clairvoyants, and other “crafty science” practitioners. Such sleight of hand as practiced by Spiritualists in the dark of the séance room was nothing new, said skeptical magicians. Spiritualist demonstrations of contact with the dead were simply magic tricks disguised as religion, not religion itself.

Some magicians of the period grew suspicious of the Spiritualist movement quite early in its history, and they began to attend séances in order to determine exactly what, if anything might be amiss.¹³¹ When

128. See, e.g., Joseph Dunninger, *Inside the Medium's Cabinet* 31 (1935).

129. See Blewitt Lee, *Psychic Phenomena and the Law*, 34 *HARV. L. REV.* 625, 628 (1921).

130. The saying has been attributed to Carl Sagan, “Extraordinary claims require extraordinary proof.” Similarly, the principle of Occam’s Razor requires us to look for the simplest explanation. The simplest explanation—that someone is perpetrating a hoax by imitating our dead grandmother’s voice in the dark—is far likelier than that our dead grandmother has returned from the ethereal plane to bring us platitudes about Heaven.

131. See Fred Nadis, *Facing the Divide: Turn of the Century Stage Magicians' Presentations of Rationalism and the Occult*, 2 *J. OF MILLENNIAL STUDIES* 1 (Winter

they began to discover that some Spiritualist practitioners were not above using traditional magicians' tricks in order to satisfy the desires of hopeful attendees, the magicians cried foul, and either exposed the mediums themselves in elaborate demonstrations open to the public.¹³² These magicians, rather than scientists, or other experts, then began to serve as "expert witnesses" for police and prosecutors, who had little or no training in prestidigitation.¹³³ Magicians also acted as public debunkers of spiritualist phenomena. The now archetypal animosity between Spiritualists and secular magicians, most typified as that between Harry Houdini and, for example, Mina Crandon (who used the name "Margery"),¹³⁴ had begun to take shape.¹³⁵ In addition, some practicing Spiritualists abandoned their religion, and collaborated with magicians to argue to the public that other Spiritualists were involved in deception, at least some of the time.¹³⁶

As I indicate above, the first investigators into Spiritualist practice to gain influence and credibility were not magicians, however, but

2000); also available as a paper presented at the 4th Annual Conference of the Center for Millennial Studies, November 1999, <http://www.mille.org/publications/winter2000/nadis.PDF> (discussing the contentious relationship between magicians and physical mediums during this period).

132. *KELLAR KNEW IT ALL: A BOSTON SPIRITUALIST EXPOSED BY THE MAGICIAN*, N.Y. TIMES (June 25, 1888), <http://query.nytimes.com/mem/archive-free/pdf?res=F00F17FB3E5B11728DDDAC0A94DE405B8884F0D3>.

133. *See Discoveries into perception via popular magic tricks*, SCIENCE DAILY (May 22, 2012), <http://www.sciencedaily.com/releases/2012/05/120522180700.htm> (on the participation of magicians in scientific research).

134. *See A Review of the Margery Case*, 37 AM. J. PSYCH. 431 (July 1926) (on Mina Crandon's career and mediumship). *See also* Daniel Stashower, *The Medium & the Magician*, 34 AM. HIST. 38 (Aug. 1999) (on the contentious relationship between Mina Crandon and Houdini).

135. For an overview of the debate, *see* John B. Buescher, *Cornering the Market on Fraud: Stage Magicians Versus Spirit Mediums*, 9 MAGIC, RITUAL, AND WITCHCRAFT 210 (2014). The animosity continues today. Consider, for example, the career of James "The Amazing" Randi, who offers a one-million-dollar prize to anyone who can present acceptable evidence of paranormal ability (including an ability to communicate with the dead). To date, no one has succeeded in passing the preliminary tests. *See* James Randi, *One Million Dollar Paranormal Challenge*, <http://web.randi.org/home/jref-status> (last visited Apr. 13, 2017).

136. *See, e.g., TRICKS OF SPIRITUALISTS: CARRIE SAWYER AND MAGICIAN KELLAR EXPOSE THE HUMBUGS*, N.Y. TIMES (Feb. 25, 1889), <http://query.nytimes.com/mem/archive-free/pdf?res=9B04E7DE123AE033A25756C2A9649C94689FD7CF>.

“learned men”: scientists, educators, and lawyers.¹³⁷ I would suggest a simple explanation for this phenomenon. Prior to the mid to late nineteenth century, magicians themselves had no very good reputation. Jean-Eugène Robert-Houdin, the great French magician, had just begun to elevate the profession above that of the street performer by bringing it into the theater and dressing in the same clothing that his audience wore—the now-familiar top hat and black suit or tuxedo of the stage magician, noting that if the performer wishes to rise in the estimation of his audience, he must dress at least as well as the person paying him.¹³⁸

As commentators have pointed out, Spiritualist séances were essentially performances.¹³⁹ The theatricality of séances as well as the use of what seemed like deceit and sleight of hand to produce effects led stage magicians to investigate exactly what these “materialization mediums” were doing, and stage magicians quickly became among the most enthusiastic skeptics and (eventually) debunkers of Spiritualist mediumship. Among the most famous was of course Harry Houdini, who like many magicians included “Spiritualist” escapes in his early act. Houdini, of course, became famous for those escapes.¹⁴⁰ Later in life he began a friendship with the author and Spiritualist Sir Arthur Conan Doyle; they ultimately parted ways over Conan Doyle’s firm belief in Spiritualism and inability to accept Houdini’s repeated affirmation that his illusions and magic tricks were just that. Conan Doyle told Houdini that he certainly had psychic powers, and Houdini rejected that view, knowing very well that he used no paranormal powers in performing his illusions. What really offended Houdini’s sense of reason, however, was Lady Conan Doyle’s demonstration of automatic writing, in which she claimed to have contacted Houdini’s dead mother. Mrs. Houdini came through in English and addressed her son as “Harry.” Houdini’s mother

137. See MICHAEL SHERMER, *IN DARWIN’S SHADOW: A BIOGRAPHICAL STUDY ON THE PSYCHOLOGY OF HISTORY* (Oxford: Oxford University Press, 2002) at 175–201. See also R. Laurence Moore, *Spiritualism and Science: Reflections on the First Decade of the Spirit Rappings*, 24 *AM. Q.* 474 (1972); Nelson, *supra* note 97, at 8.

138. JEAN-EUGENE ROBERT-HOUDIN, *MEMOIRS OF ROBERT-HOUDIN* (translated from the French by Lascelles Wraxall) (1964) at 159.

139. Moore, *supra* note 115, at 204.

140. See KENNETH SILVERMAN, *HOUDINI!* (NY: Perennial, 1997) at 39. Whether Houdini actually accepted the possibility that the living could contact the dead is unclear, but what is clear that he thought every Spiritualist medium and psychic he had ever investigated was a fraud. See *infra* note 153.

did not speak in English in life and called her son Ehrich, which was his birth name.¹⁴¹

Part of the magicians' motive may have been the overlap in effects, since many nineteenth century magicians quickly adopted and transformed into entertainment the illusions that they saw Spiritualist mediums perform.

Spiritualist mediums, and afterward their magician counterparts, became the first 'escape artists.' That happened as the mediums' more and more spectacular results—up to full materialization of departed spirits—brought on widespread accusations of fraud. In the 1870s mediums countered by offering to produce their phenomena under test conditions. These included confinement in cabinets or cages, prior searches when nude (perhaps the model for Houdini's nude jail escapes), and subjection to various restraints. During some 1875 test séances in London, for instance, two mediums were tied around the waist and ankles by leather straps fastened with combination locks, then hitched by further locks to marble pillars. A "materializing test medium" named George Everett similarly advertised a "HANDCUFF TEST!!," offering a five-hundred-dollar reward for "the four pair of Handcuffs to hold him."¹⁴²

Magicians may have learned such tricks from Spiritualists, who, feeling the pressure from eager sitters who desired results from séances, quickly devised ways to provide them, or Spiritualists might have learned such tricks from magicians. Whatever the case might be, magicians who could duplicate such feats were certainly suspicious that a Spiritualist medium who claimed to be tied up and locked in a cabinet and yet purported to achieve effects such as "floating objects, jingling bells, and unfurling curtains"¹⁴³ through communication with the dead might not actually be quite as incapacitated as she claimed to be. Thus, some magicians, Houdini being an obvious example, quite enthusiastically participated with scientists in investigating Spiritualist claims, and in some cases, assisted prosecutors with compiling evidence against Spiritualist defendants. These stage magicians were not enemies

141. WILLIAM KALUSH AND LARRY SLOMAN, *THE SECRET LIFE OF HOUDINI: THE MAKING OF AMERICA'S FIRST SUPERHERO* (Atria Books 2006); SILVERMAN, *supra* note 140.

142. SILVERMAN, *supra* note 140, at 39.

143. *Id.* at 38.

of religious belief, but they were extremely concerned that mediums were deceiving the public through the use of such obvious stratagems.

Such claims on the part of practicing Spiritualists, and charges on the part of prosecutors urged courts to undertake investigations that they preferred to avoid: those of determining 1) whether practitioners “genuinely held” their beliefs, and 2) whether the practices in which they engaged were necessary to the practice of the belief system.¹⁴⁴ Further, because Spiritualist practices varied and because the Spiritualist belief system was decentralized, Spiritualist ministers could speak only to what practices were prevalent in their own denominations.¹⁴⁵ A Spiritualist who founded her own circle might practice differently. Indeed, in the early decades of American Spiritualism, different groups developed different practices for encouraging converts, including the use of lectures, regular meetings, and the production of regular publications, some of which became extremely popular.¹⁴⁶

To the dismay of Spiritualist believers, some legislative bodies, such as the Chicago City Council, identified spirit mediumship as a “crafty science” when attempting to eradicate fraud and protect the public.¹⁴⁷ Prosecutors pointed out that what the city prohibited was the use of “fraudulent devices and practices,” not the practice of spirit mediumship itself. Thus, they emphasized, the ordinance did not discriminate against the practice of any particular religion. They emphasized that what was forbidden was the activity itself, not the belief.

For non-Spiritualists, the reasons for such animosity were clear. Spiritualist practitioners engaged in practices that had long been proscribed as fraudulent, such as attempting to foretell the future through the aid of spirit contact. Mainstream religions had either abandoned the practice, or had obtained for it, through familiarity, the blessings of the

144. See generally Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865 (2009) (explaining one reason for judicial reluctance to begin such investigations).

145. CARROLL, *supra* note 56, at 123–24.

146. David K. Nartonis, *The Rise of 19th-Century American Spiritualism, 1854-1873*, 49 J. SCI. STUDY REL. 361 (2010).

147. “Any person or persons who shall obtain money or property from another by fraudulent devices and practices in the name of, or by means of spirit mediumship, palmistry, card reading, astrology, seership, or like crafty science, or fortune telling of any kind, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than [\$25] nor more than [\$100] for each offense.” See CHICAGO, ILL., MUN. CODE § 1998 (1912).

law. In vain did Spiritualists, who overwhelmingly claimed to be Christian, plead that all that they were doing was already mentioned in the Bible.¹⁴⁸ Legislators and judges responded that the particular spirits with whom the Spiritualists trafficked were evil and to be avoided.¹⁴⁹ Like witchcraft, minority or unfamiliar belief systems such as the Church of Jesus Christ of Latter Day Saints (Mormonism) and Spiritualism were suspect. Late in the nineteenth century, one well-known Unitarian minister, Minot J. Savage, attempted to defend such unorthodox beliefs by suggesting that the story of Spiritualism's communication with the dead and the story of Christ's resurrection were essentially the same. Such an interpretation was certainly not mainstream, as evidenced by a response published in the *New York Times*.¹⁵⁰ Like astrology, palmistry, and clairvoyance, divination of any sort was historically subject to fraudulent practice statutes and included in legislative lists of prohibited activities. By the 1870s, many scientists and other intellectuals had lost interest in investigating Spiritualism, deciding that most practitioners were either self-deluded or in the process of deluding others. Others, like those appointed to the Seybert Commission, continued to investigate and test spirit mediums, and did so at the behest of philanthropists interested in the phenomena, but such investigatory bodies rarely found any worthy of prolonged attention.¹⁵¹ Few researchers, however took the absolutist position of

148. CARROLL, *supra* note 56, at 8–9.

149. *See, e.g.*, *People v. Ashley*, 172 N.Y.S. 282 (N.Y. App. Div. 1918).

150. MR. SAVAGE AND SPIRITUALISM TO THE EDITOR OF THE *NEW YORK TIMES*, N.Y. TIMES (Apr. 7, 1899), <http://query.nytimes.com/mem/archive-free/pdf?res=9D06E7D71730E132A25754C0A9629C94689ED7CF>.

151. *See INVESTIGATING SPIRITUALISM: A DISBELIEVING COMMITTEE TO CARRY OUT A SPIRITUALIST'S BEQUEST*, N.Y. TIMES (July 7, 1883). Said one member of the committee or commission as it came to be known, "I must frankly admit that I am prepared to deny the truth of Spiritualism as it is now popularly understood. It is my belief that all of the so-called mediums are humbugs without exception. I have never seen Slade perform any of his tricks, but from the published descriptions I have set him down as an imposter, the cleverest one of the lot." *Id.* The Seybert Commission eventually published its findings. *See generally* PRELIMINARY REPORT OF THE COMMISSION APPOINTED BY THE UNIVERSITY OF PENNSYLVANIA TO INVESTIGATE MODERN SPIRITUALISM IN ACCORDANCE WITH THE BEQUEST OF THE LATE HENRY SEYBERT (J.B. Lippincott Company 1887), <http://files.ncas.org/seybert/index.html>. No final report ever appeared. A member of the Pennsylvania Bar, Almon Benson Richmond, issued a critical review of the report called *WHAT I SAW AT CASSADAGA LAKE* (Colby and Rich, 1888). Subsequently Richmond published *THE HENRY SEYBERT BEQUEST, AND WHAT HAS BECOME OF IT? AN OPEN LETTER TO THE SEYBERT COMMISSIONERS AND THE LEGATEES OF HENRY SEYBERT*

magician and debunker Harry Houdini,¹⁵² who said categorically to a Congressional Committee in 1926 that

There are only two kinds of mediums, those who are mental degenerates and who ought to be under observation, and those who are deliberate cheats and frauds. I would not believe a fraudulent medium under oath; perjury means nothing to them I have examined 300 mediums . . . [i]f there are any genuine mediums I have never met one. I say that no human being possesses mediumistic powers¹⁵³

3. *Reactions in the Media*

Questions about the sort of behaviors that went on during Spiritualist meetings, particularly since women, including young, unmarried women, were involved on Sundays and in the evenings, caused comment not simply from clergy and members of the public but from newspaper opinion writers. Said the *New York Times* in an 1866 editorial,

Some people may have thought that tightrope spiritualism had been sufficiently exposed to make exhibitions in New-York unprofitable, either for the procurement of money or notoriety. In spite, however, of exposure, there is a large class of people so determined to be cheated and swindled, that neither human nor superhuman laws, apparently, can baulk them of their intent Most of those who take to spiritualism, whether of the rapping-table order, or the tight-

(Boston: Banner of Light Publishing Company, 1896). For a digital version of the Seybert Commission report, *see* https://ia601409.us.archive.org/35/items/p00reliminaryreporunivrich/p00reliminaryreporunivrich_bw.pdf (last visited Feb. 27, 2017).

152. Other magicians who devoted themselves to investigating Spiritualists included the noted mentalist Joseph Dunninger; *see* DUNNINGER, *INSIDE THE MEDIUM'S CABINET*, *supra* note 128; and David Abbott. *See* DAVID ABBOTT, *BEHIND THE SCENES WITH THE MEDIUMS* (1907).

153. Fortune-Telling. Hearings before the Sub-Committee on Judiciary of the Committee on the District of Columbia House of Representatives ... H.R. 8989, Washington, D.C., 1926. After his mother's death, having met Sir Arthur Conan Doyle, an avid believer in Spiritualism, Houdini took up visiting physical mediums but eventually turned against the movement and became one of its most outspoken opponents. *See generally* SILVERMAN, *supra* note 140, at 249–384 (discussing Houdini's interest in Spiritualism beginning in the 1920s and his career as a debunker and exposé of fraudulent mediums).

rope performances, will not be held back by moral suasion or any other suasion.

[A]nything said or done—however preposterous—outside of the work-a-day experience of men and women will attract sight-seers and listeners, and dreamers, and they will pay money for the show.

A public room on Broadway was filled on Sunday night to witness the antics of tying up a feeble young woman with ropes, in a portable cupboard, and allowing her time, either to invoke some able-bodied resident of the other world to *untie* her, or struggle to do the thing herself. The unfortunate girl thus put on exhibition seems to have prayed in vain for spiritual assistance to undo the ropes. She seems to have also struggled in vain to undo them herself. The result, after long and frantic effort, naturally, was a *real* fainting fit, with very little spiritualism and no sham at all about it. It may be said to be disgraceful to our civilization that such things should happen in a City with several thousand Police constables within call and an Excise Commission in perpetual session. But New-York is not singular in its patronage of these humiliating exhibitions. They are more rife in Paris and London than here. And the Pope of Rome is the only Potentate who has had the moral courage to rebuke the spiritualists and their familiars from the other world, and to order both outside of his dominions. In less strictly regulated communities than the States of the Church, the thing is tolerated and patronized by very great people; only the exhibitions are not generally so utterly disgusting and abominable as those which have recently been held in the most fashionable quarter of Broadway. The business has flourished with more or less success for four or five thousand years, and we are not undertaking to *write it down*. We merely suggest that there may be other modes of breaking the Sabbath day than drinking lager beer in Jones' Wood. The coarseness and vulgarity of these tight-rope exhibitions are not and never have been equaled in the lowest beer saloon on the Island.¹⁵⁴

The references to the “performance” qualities of the séance and/or the medium’s encounter with the sitters emphasized the concerns about

154. *Spiritualism on the Tight Rope—Sabbath-day Pastimes*, N.Y. TIMES (July 5, 1866), <http://query.nytimes.com/mem/archive-free/pdf?res=9500E3DC1638EF3ABC4D53DFB166838D679FDE>.

the morality of Spiritualist practices. Again, what went on during Spiritualist encounters seemed to resemble “crafty science” goings-on so closely that it raised serious concerns for law enforcement and for non-Spiritualists.

The language used in the passage above is obviously theatrical: “show,” “exhibition,” and “antics.” The comparison of the performance, which in terms of the “tight-rope” escape was already a traditional one for mediums, is to a “business” that had been going on for thousands of years, clearly an allusion to the charges prosecutors and police were already making. It lays out the possibilities by which the public and law enforcement could judge Spiritualist practitioners: that they were at worst fraudsters and deceivers busy at the kind of shenanigans that had deprived the foolish of their money for centuries, and at best self-deluded believers themselves who wanted to communicate with the dead so much that they could not distinguish between reality and illusion.

The *Times* writer is careful not to accuse the young woman he describes here of fraud, but the implication is clear. Nothing supernatural has gone on during the performance, nor is it likely to in the future. But the writer here expresses concerns (genuine or not) about the general propriety of a young woman’s participation in such an “exhibition,” a concern shared by legislators, who thought that people should restrict their Sunday activities to attending church, visiting family and friends, and performing good works. Here the “Spiritualist” performance is just that—an entertainment—and nothing like religion. The closest it came to anything genuine was in the girl’s “*real fainting fit, with very little spiritualism and no sham at all about it.*”

By the 1890s, newspapers with large readerships such as the *Philadelphia Inquirer* printed articles that discussed whether psychic powers existed or whether Spiritualists were “all humbugs and imposters?”¹⁵⁵ The public disenchantment with Spiritualism was in full bloom at the same time that Spiritualists were actively beginning to challenge “crafty science” statutes on constitutional grounds.

155. S. S. McClure, Are There Mediums? Or Are the Spiritualists All Humbugs and Imposters?, PHILA. INQUIRER (April 13, 1890) at 9.

V. SPIRITUALISTS IN COURT

A. EARLY ATTEMPTS TO PROTECT SPIRITUALIST RIGHTS IN COURT

1. *Making Spiritualism a Federal Case: Licensing and the Colchester Tax Challenge of 1865*

The Colchester tax case is one of the few federal cases, if not the only one, involving a spiritualist.¹⁵⁶ It is also an example of both an early licensing and a tax evasion case.¹⁵⁷ Charles Colchester challenged the federal government's power to order him to pay for a twenty dollar license¹⁵⁸ as a " juggler" under the Income Tax Act of 1864.¹⁵⁹ He

156. *United States v. Colchester*, 25 F. Cas. 492 (1865). However, in recent years, the Federal Trade Commission has joined some states attorneys general in investigating at least one case of "psychic" fraud. *See FTC Charges "Miss Cleo" With Deceptive Advertising, Billing and Collection Practices*, (Feb. 14, 2002), <http://www.ftc.gov/opa/2002/02/accessresource.shtm> (discussing "Miss Cleo," the television "psychic" and spokesperson for the Psychic Television Network, whom state attorneys general and the Federal Trade Commission pursued for several years on charges of fraud). Erika Dyson discusses the Colchester case and its effects on Spiritualists at length. Dyson, *supra* note 10, at 124–46.

157. Both Spiritualists and crafty science practitioners began challenging licensing cases much more after the 1940s, beginning with *Bridewell v. City of Bessemer*, 35 Ala. App. 337 (1950), often on the theory that the practices outlawed were legitimate. Invariably the courts disagreed.

158. *The Colchester Case: Why the Spiritualist Is Not a Juggler*, N.Y. TIMES (Sept. 3, 1865), <http://www.nytimes.com/1865/09/03/news/the-colchester-case-why-the-spiritualist-is-not-a-juggler.html?scp=1&sq=the%20colchester%20case&st=cse>. Congress originally instituted the Tax Act as a means of funding the War Between the States. *See* Tax History Museum: The Civil War, 1861-1865, Tax Analysts, <http://www.taxhistory.org/www/website.nsf/Web/THM1861?OpenDocument> (last visited Apr. 13, 2017).

159. An Act to Provide Internal Revenue to Support the Government, to Pay Interest on the Public Debt, and for other Purpose. 13 Stat. 223, ch. 173; §39. Jugglers shall pay for each license twenty dollars. Every person who performs by sleight of hand shall be regarded as a juggler under this act. The proprietors or agents of all other public exhibitions or shows for money, not enumerated in this section, shall pay for each license ten dollars: *Provided*, that no license procured in one state shall be held to authorize exhibitions in another state. And but one license shall be required under this act to authorize exhibitions within any one state. Annual licenses were also required for bankers, auctioneers, wholesale and retail dealers, pawnbrokers, distillers, brewers, brokers, tobacconists, confectioners, horse dealers, livery stable keepers, cattle brokers, tallow-chandlers and soap makers, coal- oil distillers, peddlers, apothecaries, photographers, and physicians. Theater owners also paid the license fee (section 37) as did, interestingly, lawyers (section 43).

argued, plausibly enough, that he was not a “juggler” as the Internal Revenue Board had categorized him, but a member of the clergy. Colchester was a Spiritualist medium who claimed to be a member of the British aristocracy, and had become famous as the Spiritualist whom Mary Todd Lincoln consulted.¹⁶⁰ The prosecutor, however, defended the statute’s classification, arguing that Colchester’s use of “sleight of hand” should place him in the category of persons named as a “juggler.” In this way, the prosecutor made use of the idea that the activity in which Spiritualists engaged (“sleight of hand”), rather than what they believed (communication with the dead), defined the category in which they fit. The Colchester case also demonstrates very clearly the problems that Spiritualists encountered in explaining the difference between their beliefs, which arguably might be protected under the First Amendment, and their activities, which many thought looked like deceit and fraud, and therefore would not be protected as expressions of religious or spiritual belief or practice.¹⁶¹

Under the federal statute, any performer who used “sleight of hand” would be considered a “juggler,” whether or not he or she actually juggled *anything* during a performance. Also included in the category would be practitioners of the crafty sciences and certain individuals who had particular religious beliefs, as the Colchester case demonstrates. The government refused to classify Spiritualists as ministers, instead assuming that they used “sleight of hand” in their séances, although it stopped short of alleging that “sleight of hand” was actually fraud. But the implication is clear. “Sleight of hand” is in the same category as

160. Michael Lind, *What Lincoln Believed: The Values and Convictions of America’s Greatest President* 65 (2005); Noah Brooks, *Washington in Lincoln’s Time* 64 (1989) (Herbert Mitgang ed.); *Mary’s Charlatans: Charles J. Colchester*, Lehrman Inst., <http://www.mrlincolnwhitehouse.org/inside.asp?ID=179&subjectID=2> (last visited Apr. 7, 2017). See Richard Wiseman, *Paranormality* 284–85 (Pan Macmillan, 2011) (discussing the notion that Lincoln foresaw his own death in a dream). See also Joe Nickell, *Paranormal Lincoln*, 23 *Skeptical Inquirer* (1999), http://www.csicop.org/si/show/paranormal_lincoln/ (disputing contemporary accounts of Lincoln’s White House dream and discussing Lincoln’s treatment of Colchester); Joe Nickell, *Ghostly Goodnights: Investigative Briefs With Joe Nickell*, Center for Inquiry (Mar. 22, 2010), http://www.centerforinquiry.net/blogs/entry/ghostly_goodnights/ (providing non-paranormal explanations for the impression that ghost inhabit homes and bedrooms).

161. Cynthia G. Fox, *Income Tax Records of the Civil War Years*, 18 *PROLOGUE MAGAZINE* (1986), <http://www.archives.gov/publications/prologue/1986/winter/civil-war-tax-records.html#F4>.

entertainment (“juggling”), because both those who use sleight of hand and those who juggle are, according to the government, performers (entertainers). In addition, the federal government, like local governments, identified certain classes of persons who wished to carry on a trade or business as persons who must obtain a license (“brokers . . . peddlers, apothecaries, photographers, lawyers, and physicians”), and required them to pay a tax under the statute. Ministers, however, did *not* pay such a tax.¹⁶² Understandably, Colchester wanted the government to recognize his claim to be a Spiritualist minister.

By the 1860s, the Spiritualist movement was about twenty years old, and courts and legislators, as well as many members of the general public, had come to consider it no better than hocus-pocus. Since courts and legislatures did not necessarily deem Spiritualism to be a legitimate belief system,¹⁶³ they might reasonably look to a classification system, such as the one Congress provided under the Income Tax Act of 1864, to clarify what to label it. The case of “The Buffalo Spiritualist Trial,” which the federal government considered a tax evasion case, provided an opportunity to consider just that issue.¹⁶⁴

Colchester’s attorneys, Cook and Hibbard, made the following objections to Colchester’s classification as a juggler under the statute, and to the statute’s application at all.

First—the indictment alleged that COLCHESTER carried on the business of a juggler and performed by sleight of hand. The statute provides that every juggler shall pay a license of \$20, and that every person who performs by slight (sic) of hand shall be deemed a juggler. Mr. HIBBARD argued that to state the offence, the indictment should allege the carrying on of the trade, and

162. “The Internal Revenue Act of 1862, enacted by Congress in July, 1862, soaked up much of the inflationary pressure produced by Greenbacks. It did so because the Act placed excise taxes on just about everything, including sin and luxury items like liquor, tobacco, playing cards, carriages, yachts, billiard tables, and jewelry. It taxed patent medicines and newspaper advertisements. It imposed license taxes on practically every profession or service except the clergy.” Tax History Museum: The Civil War, 1861-1865, Tax Analysts, <http://www.taxhistory.org/www/website.nsf/Web/THM1861?OpenDocument> (last visited Apr. 13, 2017). See STEVEN R. WEISMAN, THE GREAT TAX WARS 29–50 (Simon & Schuster, 2002) (discussing the history of the enactment of the income tax to pay for the War Between the States).

163. *Feital v. Middlesex R. Co.*, 109 Mass. 398 (1872).

164. *United States v. Colchester*, 25 F. Cas. 492, 492 (S.D.N.Y. 1865).

performance of sleight of hand sufficient to constitute the exercise of a trade or profession.

He claimed that the indictment contained no allegations of the means by which the alleged “jugglery” was accomplished, and was insufficient.

Second—That the indictment did not state the particulars of the acts of jugglery.

Third—That, as the exhibitions were given to a few individuals at separate seances, there was no performance and no public exhibition.

Fourth—That any part of the Revenue law which imposes a licensefee is unconstitutional. The constitution permits Congress to lay taxes, imposts and excises, and provides that all direct taxes shall be paid according to the enumeration of the census. Mr. HIBBARD argued that a license tax was not a tax, duty, impost or excise, and if either, it was a direct tax, and unconstitutional as not laid according to the enumeration of the census.

Fifth—**That the license law in its application to this subject, was unconstitutional, under the provision of the constitution, that Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.**¹⁶⁵

Interestingly, Hibbard’s constitutional argument—that the tax impermissibly interferes with Colchester’s right to practice his religion—is one of the first, if not the first, that I have found in the case law. That he put it last in line suggests that he thought it was weak. Given the manner in which legislatures and courts had treated and would treat Spiritualists, he was probably right.

The federal prosecutors argued the case for the government, alleging that,

A license was not only required for certain trades and occupations, but also for the performances of certain acts. The defendant, in the indictment, is alleged to be a juggler, and also to have performed the acts which, by the statute, are defined to constitute jugglery.

Second—It is alleged by the defendant that the acts claimed to constitute jugglery were matters pertaining to the exercise of a

165. *Id.* (emphasis added).

religion, and that there was no public performance, within the meaning of the act of Congress. The jury has decided that the performance is public, and by sleightofhand (sic), and the court cannot interfere with their finding.

...

It is sufficient, in all statutory offences, to charge in the indictment the language of the statute creating it, and that this indictment was in that language.

... The question of fact as to whether or not this was jugglery was a question of fact submitted to the jury, and has been passed upon by the jury against the defendant.

... **The defendant was carrying it on as a trade, business or profession, in which he claimed that he was moved by a superior power. The jury have found his performances to have been by sleight of hand, which is not the groundwork of any religious belief, and, consequently, the provision of the constitution allowing freedom in religious belief, is not infringed.**¹⁶⁶

The court's opinion consisted of the district attorney's closing remarks to the jury, and the statement that "This, in fact, determines 'paying mediums' like Mr. Colchester, to be jugglers within the meaning of the excise law, and as such liable to license."¹⁶⁷

166. *Id.* (emphasis added).

167. *Id.* The judge's reasoning is unclear. Does "this" refer to the jury's verdict? To the language of the statute as interpreted by the jury? The judge seems not to have considered the First Amendment free exercise argument at all, but to have assumed that the Internal Revenue rule, as one of general application, is due only the minimum standard of review, both because of appellate concerns and because tax rules generally invite a lower standard of review. Scholars have long noted the tension between courts and agencies as to who has the ultimate authority to determine what the law is: courts, according to the oft-repeated language in *Marbury v. Madison* that it is for the courts to "say what the law is," or agencies, according to a "counter *Marbury*" principle. The pedigree of the former position can be traced back even beyond *Marbury* itself to the *Federalist Papers*, which noted that "[t]he interpretation of the laws is the proper and peculiar province of the courts." Agencies' unclear relationship with the judiciary was not an issue before the New Deal because of the manner in which agencies operated and the posture in which cases came before the courts. Agencies did not take actions to interpret statutes in a manner that would lead to legal challenges being brought directly against the Executive Branch; this left the judiciary with the exclusive role of interpreter of federal statutes. In addition, the relatively small scale of administrative action before the New Deal and the concomitant rise of the regulatory state made the issue far less pressing a century ago than it is today." Nancy M. Modesitt, *The Hundred-years War:*

Whatever the reasoning, Colchester lost and had to pay the tax. Under federal law, a Spiritualist minister was deemed to be a “juggler,” and subject to the tax rules for the listed category. A *New York Times* editorial weighed in on the outcome. The writer’s tone overall is rather cynical, clearly on the side of those who do not believe in the paranormal, and does an excellent job of summing up the general societal and legal objections to Spiritualism.

Much of this investigation is idle and useless; little of it is productive of any valuable fruit; and none has been able to present results whose value is patent to the world. Of these inquirers, a few (perhaps more than a few) are believers in the supernatural origin of the manifestations, and are subdivided into two classes, one of which find in them a religious inspiration, and the other refers them in the mass to Satanic influence. . . . Possibly the manifestations are in some way attributable to clairvoyance; perhaps they belong to the same category with the familiar developments of “mesmerism;” the mind of the inquirer may, in some way, operate on the mind of the medium; happily some mysterious “odic force” (whatever that may be) knocks furniture about, and makes three-legged stools oracular; but the presence of the beloved dead cannot be certified in these uncouth modes of communication, nor the identity of one’s orthodox old grandmother be established in the new lingo she purports to utter from the “spirit-land.” . . . The practical inference from all this would seem to be, first,—however puzzled you may be with “spiritualism,” however interested in it as a curious development in philosophy, don’t trust it; by its own showing it is not a thing to be trusted. Secondly, do not spend much of your time with it, unless you are consciously the very man or woman whose mission, clearly indicated by nature and education it is, to study it in the interest of science and religion, truth and humanity. In the time-honored Yankee phrase, in the end it will not be found to “pay.” Finally, give a wide margin to public mediums, who peddle out their celestial opportunities at so much a head. Not that they are necessarily dishonest, but they live by the love of the marvelous in the souls of their customers, and their temptation to cheat is immense. Like certain of old, they “covet earnestly” not “the best,” but the most showy, gifts. In these respects, they are as jealous of

one another as girls: none of them can abide to have it said that his morals are surpassed by those of the “concern over the way.” . . . Who cares, then, if such fellows are pronounced by juries jugglers? Who cares if they are compelled to pay a part of their badly-earned gain for the licenses that are required of other mountebanks? Who will not rejoice, if the result of such verdicts be to make the profession of “spiritual medium” as unprofitable as it is disreputable, and to destroy a trade which thrives best where human nature is the weakest, and adds nothing to the material, mental or moral wealth of the community in which it is tolerated?¹⁶⁸

The *Times* reacted a few days later to a letter written to the *New York Herald* from Judge Edmonds, in which he suggested that truth, whether it came in the shape of Spiritualist revelation or any other sort of religious faith, was not subject to the decision of a jury.¹⁶⁹

The external or physical manifestations are but the A B C of this matter. You may strike out of existence all the knockings, the table tipping, the moving of inanimate matter without mortal contact, the writing on the arm, &c., and you have still left the proposition that there is an intelligence which talks to us, which is not and cannot be of mortal origin.¹⁷⁰

Finally, on September 21, 1865, a judge fined Colchester forty dollars and ordered him to pay 473 dollars in court costs.¹⁷¹

168. *Spiritualism and Jugglery*, N.Y. TIMES (Aug. 27, 1865), <http://www.nytimes.com/1865/08/27/news/spiritualism-and-jugglery.html?pagewanted=all>.

169. *More of Spiritualism*, N.Y. TIMES (Sept. 1, 1865), <http://www.nytimes.com/1865/09/01/news/more-of-spiritualism.html?scp=2&sq=spiritualism+and+jugglery&st=p>.

170. *Id.* (citing Judge Edmonds). Other newspapers reacted *pro* and *con* to Judge Edmonds. See *Spiritualism*, DAILY GLOBE (Sept. 2, 1854) at 3 (reviewing Edmonds & Dexter’s work on Spiritualism somewhat favorably and suggesting that the New York newspaper the Evening Express was too harsh in denouncing the movement as “lies and impostures.”).

171. *The Case of Colchester the “Medium,”* N.Y. TIMES (Sept. 22, 1865), <http://www.nytimes.com/1865/09/22/news/the-case-of-colchester-the-medium.html>.

2. *Spiritualism as a Religion: Stating a Claim Under a State Statute: The Feital Case (Massachusetts, 1872)*

Legislators were successful in imposing such restrictions both in New York,¹⁷² whose Sunday laws prohibited any number of activities including theater-going, not for religious but for public policy (nuisance) reasons, and in Massachusetts.¹⁷³ In Massachusetts, for example, a state whose largest city—Boston—had a population of over 177,000 in 1860, a state statute forbade travel by rail on Sundays, except for limited purposes.¹⁷⁴ That statute, the “Lord’s Day Act,” was at issue in the *Feital* case.

In *Feital v. Middlesex Railroad Company*, a passenger traveling to attend a Spiritualist meeting on a Sunday was injured when the train on which she and her husband were riding ran off the track.¹⁷⁵ According to the Lord’s Day Act,¹⁷⁶ persons alleging negligence could not recover unless they could prove that they needed to travel in order to attend church services, attend to a sick relative, or for some other worthy purpose.¹⁷⁷ The decision as to the propriety of travel was a matter for the factfinder.

The defendants tried to argue both that the meeting was not religious, and that they were not the owners of the stretch of track on which the car derailed. Both the trial and appellate courts rejected their arguments: the trial court because it accepted that the plaintiff, Mrs. Feital, held Spiritualist beliefs in the nature of a religion;¹⁷⁸ and the appellate court because it found no abuse of discretion in the decision of the lower court.¹⁷⁹

172. In 1860, New York had a population of 1,174,779, and in 1870, a population of 1,478,103. See *Statistical Abstract of the United States: 1915*, U.S. DEP’T OF COM. 41 (1916). Boston had a population of 177,840 in 1860, and in 250,526. *Id.* at 40. While New York still had aspects of the provincial (including “blue laws,” one writer described it as “justly regarded as the Metropolitan City of the New World.” Robert A. M. Stern, Thomas Mellins, & David Fishman, *New York 1880: Architecture and Urbanism in the Gilded Age*, N.Y. TIMES (1999), <http://www.nytimes.com/books/first/s/stern-1880.html>).

173. Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 ALB. L. REV. 675, 701, 747–50 (2000).

174. *Id.*

175. *Feital v. Middlesex R. Co.*, 109 Mass. 398, 399 (1872).

176. Mass. Gen. Sts. c. 84, § 2.

177. *Id.*

178. *Feital*, 109 Mass. at 404.

179. *Id.*

There was evidence tending to prove that the meeting which the plaintiff attended, and from which she was returning when injured, on the Lord's day, was a religious meeting of those who held a religious belief in common with her; and that she attended it in good faith, for devotional exercise, as matter of conscience, and because the meeting which she regularly attended in Charlestown, where she lived, was temporarily suspended. The jury must have so found.¹⁸⁰

Similarly, the trial court found that the railroad was in possession and control of the track where the accident occurred,¹⁸¹ and the appellate court agreed.¹⁸² But, for purposes of the Spiritualist/First Amendment argument, the significance of *Feital* lies in the fact that the plaintiff obtained a judgment that, under the law, Spiritualism possessed the elements of a religion.

B. ANOTHER PROBLEM: FITTING SPIRITUALISM INTO THE "RELIGION" CLASSIFICATION

Despite what looked like a "win" in the *Feital* case, Spiritualists also had difficulty fitting their belief system into the classification of a "religion," as determined by the case law and relevant legislation. For traditional religions to describe their beliefs in traditional religious terms was fairly simple. They had custom, familiarity, and the control of the legal system on their side. Similarly, prosecutors had little difficulty making a case against defendants who affronted mainstream religions.¹⁸³ Equally, for an individual to qualify as a member of the clergy, he¹⁸⁴ generally had to demonstrate that he fit within the mainstream pattern, which Colchester and other Spiritualist ministers did not.

180. *Id.*

181. *Id.* at 404–05.

182. *Id.* at 404.

183. See *People v. Ruggles*, 8 Johns. 290, 295–97 (N.Y. Supp. Ct. 1811) (holding the defendant was guilty of blasphemy for speaking maliciously and contemptuously of religion). Notice that while the court defines religion fairly broadly as Christian, Muslim, or Buddhist, it still limits the definition to a mainstream religion that has structure and a large following, although not necessarily a large following in the United States.

184. See generally PAULA D. NESBITT, *FEMINIZATION OF THE CLERGY IN AMERICA: OCCUPATIONAL AND ORGANIZATIONAL PERSPECTIVES* 20–23 (Oxford University Press, 1997) (noting most members of the clergy in the United States during the nineteenth century were male).

While certainly structured as an organized belief system, Spiritualism also had elements of freedom. That freedom drew people to membership and to defeat attempts at creating a hierarchy within it. This individualism and freedom expressed itself not simply through organization, but through practice in Spiritualist gatherings.¹⁸⁵ Thus, where an individual claims to be a Spiritualist minister, if one of the factors used to make that claim *more* credible is that she had a congregation, or was high in the “hierarchy” of the Spiritualist Church, then such an individual was unlikely to be able to substantiate such a claim. At most, she might be able to say that she led a “circle.” That such circles were part of the religious rituals of Spiritualism, however, is nevertheless true.¹⁸⁶

C. SPIRITUALISTS CHALLENGE THE “CRAFTY SCIENCES” STATUTES

1. *Early State Cases: The Spiritualists Take on Laws of General Applicability*

Police and prosecutors were likely to view Spiritualist practices, such as necromancy, as equivalent to fortune telling and divination, which were both against the law in most if not all jurisdictions. Members of law enforcement were also likely to consider Spiritualist ministers, who did not have established churches or permanent congregations, to be so different from traditional clergy that they were unable to claim the traditional protections available to mainstream clerics. Thus, the Spiritualist whose practices, including the holding of séances and meetings with followers, ran afoul of a local ordinance or state statute was unlikely to be able to claim either the protection of the First Amendment, as courts interpreted it before 1945, or even any law of

185. “Apart from broad agreement on the outlines of the Spiritualist ideology, spirit messages were as varied as Spiritualists themselves and therefore could not provide a basis for unity among large numbers of them. Their commitment to spiritual republicanism, moreover, militated against the establishment of a single authoritative leader or text that might have become the focus of a tightly organized religious sect; Andrew Jackson Davis could never achieve the status that Joseph Smith or Mary Baker Eddy did, nor could his *Principles of Nature* serve the same function as the *Book of Mormon* or *Science and Health*.” CARROLL, *supra* note 56, at 123.

186. “‘Spiritualists’ need for community found expression in the way they structured their séance rituals, in their creation of the structure of religious authority based on the crucial role of the medium, and in their (usually abortive) attempts to organize and institutionalize their new religious movement.” CARROLL, *supra* note 56, at 123.

general applicability that might offer a ministerial exemption. Spiritualists, and those who participated in Spiritualist practices, often found themselves before unsympathetic judges. Newspapers began documenting these events beginning as early as the 1850s, commonly covering prosecutions of Spiritualists for violations of crafty science statutes. District attorneys generally handled such cases as quite ordinary violations of the law, and judges found them no great challenge to adjudicate.¹⁸⁷ The medium's behavior in trance and out seemed profoundly odd to those Americans who followed traditional religious rites.¹⁸⁸

Still, Spiritualists, and those "crafty science practitioners" who allied themselves with them, began to challenge such laws beginning in the late nineteenth century, and have continued to do so through the present day. Challenges to the contemporary state regulation and prohibition of what the law called the "crafty sciences"¹⁸⁹ began in the

187. Dyson argues that Spiritualists were particularly dismayed because they wanted law enforcement and the courts to assist them in ousting frauds from Spiritualist practitioner ranks. Dyson, *supra* note 10, at 210.

188. Spiritualists often claimed to have Native American spirit guides, they fell into trances, and warned the client not to wake them during the sessions (because such a disturbance could be dangerous to the medium's health and safety). The client, often a police officer, could be skeptical of such behaviors. *See Convicted for Fortune Telling*, PHILA. INQUIRER (Nov. 15, 1887), [http://infoweb.newsbank.com.ezproxy.law.lsu.edu/iw-search/we/HistArchive/?p_product=EANX&p_theme=ahnp&p_nbid=D62W50NIMTM3NDc3ODM5Ni41NjUzNDY6MToxMzoxMzAuMzkuMTkuMjU0&p_action=doc&s_lastnonissuequeryname=6&d_viewref=search&p_queryname=6&p_docnum=25&p_docref=v2:1126152C152E4978@EANX-119AD07230D236F8@2419744-119AD0725C10B910@3-119AD073CF86BB40@Spirits+Failed+a+Faker+a+Negro%27s+Inability+to+Invoke+the+Mystle+Powers+Cost+Him+%24200+in+Court](http://infoweb.newsbank.com.ezproxy.law.lsu.edu/iw-search/we/HistArchive/?p_product=EANX&p_theme=ahnp&p_nbid=D62W50NIMTM3NDc3ODM5Ni41NjUzNDY6MToxMzoxMzAuMzkuMTkuMjU0&p_action=doc&s_lastnonissuequeryname=6&d_viewref=search&p_queryname=6&p_docnum=1&p_docref=v2:110C9BFA1F116650@EANX-1171E66A3500FC28@2410591-1171E66AB4412AB0@2-1171E66CA5803458@Shady+Side+of+Politics+Full+Legal+Penalty+Imposed+for+illegal+Voting+Fortune+Teller+Found+Guilty) (recounting the trial and conviction of Emma S. Powell). The outcome did not change some thirty years later for S. R. Campbell in Kansas City. *See Spirits Failed a Faker*, THE KAN. CITY STAR (Dec. 7, 1912), http://infoweb.newsbank.com.ezproxy.law.lsu.edu/iw-search/we/HistArchive/?p_product=EANX&p_theme=ahnp&p_nbid=D62W50NIMTM3NDc3ODM5Ni41NjUzNDY6MToxMzoxMzAuMzkuMTkuMjU0&p_action=doc&s_lastnonissuequeryname=6&d_viewref=search&p_queryname=6&p_docnum=25&p_docref=v2:1126152C152E4978@EANX-119AD07230D236F8@2419744-119AD0725C10B910@3-119AD073CF86BB40@Spirits+Failed+a+Faker+a+Negro%27s+Inability+to+Invoke+the+Mystle+Powers+Cost+Him+%24200+in+Court.

189. The use of the term "crafty science" or "crafty sciences" appears routinely in codes and statutes throughout the nineteenth century. *See, for example*, City of Chicago v. Ross, 100 N.E. 159 (Ill. 1912); 1912 Ill. LEXIS 2036 (1912), citing section 1998 of the city's municipal code: "Any person or persons who shall obtain money or property

nineteenth century, an example being the Michigan case of *People v. Elmer*.¹⁹⁰ In *Elmer*, a psychic challenged his conviction under a vagrancy statute. The bases for the conviction were an advertisement in which the defendant offered to tell fortunes and evidence that he had in fact done so. Said the Michigan Supreme Court,

It is idle to attempt to draw distinctions between professing to possess a power and pretending to exercise that power. This respondent did both. The precise point is decided in *Penny v. Hanson* The English statute, under which conviction was had, provided that “every person pretending or professing to tell fortunes . . . shall be deemed a rogue and a vagabond.” . . . The circular upon which the respondent was convicted stated that, “by the positions of the planets in the nativity, and their aspects to each other,” he was enabled to forecast future events.

The Court noted with approval that the English court had said:

“No person who was not a lunatic could believe he [the respondent] possessed such power. . . . The advertisement and circular amounted to a pretending and profession to tell fortunes.” This language is especially applicable to this case. No sane, intelligent juror could come to any other conclusion than that reached by the circuit judge.¹⁹¹

The English court’s decision particularly gratified the Michigan jurists because the *Penny v. Hanson* decision also dealt with an astrologer and an advertisement as well as a vagrancy statute. Note the alacrity with which the Michigan court assumed that the object of the deception could not possibly be deceived unless he were witless—this point will become important later on, as will the question of whether the

from another by fraudulent devices and practices in the name of or by means of spirit mediumship, palmistry, card reading, astrology, seership, or like crafty science, or fortune-telling of any kind, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than \$25 nor more than \$100 for each offense.” The court upheld the ruling of the lower court finding that the City Council did not have the power to pass the ordinance.

190. *People v. Elmer*, 67 N.W. 550 (Mich. 1896). See also *Penny v. Hanson*, 56 LAW TIMES 235 (1887); *Cooper v. Livingston*, 19 Fla. 684 (1883) (holding that “conjuring” was not sufficient consideration to support a promissory note, apparently because the services performed were against public policy and the purchaser of the note knew the facts).

191. *Elmer*, 67 N.W. at 551.

defendant himself *intends to deceive*. In the *Elmer* case, however, intent to deceive is immaterial.

As the court continued:

No intent was involved. The offense was a misdemeanor. In such cases, when the facts are admitted or are undisputed, it is the duty of courts to instruct juries that the facts proven constitute the offense. There was no question of fact for the jury to pass upon. The conclusion is one of law Guilt follows, as a matter of law . . .
192

Further, the court dismissed the defense's request that the prosecution identify which of the acts constituted the crime as an idle one.

[W]itnesses for the people had testified to specific arts of pretending to tell fortunes, for which some of them had paid. . . . The offense was a continuing one, and any acts to sustain the general charge were admissible. But, if this were not so, the respondent was not prejudiced, because, aside from these specific acts, the advertisement itself constituted the offense.¹⁹³

Elmer, like similar cases in other jurisdictions, appears to have been a case of first impression, thus the reliance on the prior English case for assistance in interpretation. What is particularly interesting is the court's dismissal of the intent requirement, and its assumption that the statute requires no *mens rea*. The defendant "pretended" or "professed" to be able to tell fortunes (in the sense of "claiming" to be able to tell fortunes), and he did so, in contravention of the law. Therefore, he was guilty. "Pretend" in these statutes does not necessarily mean to claim falsely, although the prosecution certainly attempted to put that construction on the word. Rather, the meaning of the word "pretend" derives from the French word *pretendre*, which means to claim or to allege, rather than to claim fraudulently or deceptively. That is, the word does not *necessarily* carry with it a taint of falsity. Further, the statute under which the prosecution charged Elmer is a "rogue and vagabond" statute.

[A]ll persons pretending to tell fortunes, or with whom lost or stolen good are found; all common prostitutes; all keepers of bawdy

192. *Id.*

193. *Id.*

houses, or houses for the resort of prostitutes; all drunkards, tipplers, gamesters; all persons knowingly selling or giving intoxicating liquors to drunkards and tipplers or other disorderly persons, or who do, for the most part, support themselves by gaming; all jugglers, common showmen, and mountebanks, who exhibit or perform for profit, any puppet show, wire or rope dancing, or other idle show, acts or feats; all persons who keep in any highway, or in other public place, any gaming table, wheel of fortune, box, machine, instrument or device for the purpose of gaming; all persons who go about with such table, wheel of fortune, box, machine, instrument or device, exhibiting tricks or gaming therewith; all persons who play in the public streets or highways with cards, dice, or any instrument or device for gaming, and all vagrants shall be deemed disorderly persons¹⁹⁴

The defendant in *Elmer* attempted to make the argument that a fundamental difference exists between *falsely* claiming to have a supernatural power and *actually* claiming to have the power, and that if one really has a supernatural power, then one ought not to be convicted under a statute. Such a defense turns on the meaning of the word “pretends,” in the sense of “claiming.” The prosecution meant both “pretending” in the sense of falsely claiming and claiming something that is impossible to do, and which the Legislature has deemed to be impossible. The defendant in *Elmer*, by contrast, contended that “pretends” means that while *some* might “pretend” or claim that they have a supernatural power and do not, *he* in fact does have that power and can prove it. Thus, given the chance, he can show to the satisfaction of the court that his fortune telling abilities are real, and therefore, he has not violated the law. That the court in *Elmer* dismissed this interpretation of the meaning of the statute as illegitimate makes the law operate similarly to a strict liability statute. It holds that the legislature has determined that what the defendant asserts (the possibility that he can tell fortunes accurately) is impossible, and therefore, that anyone asserting that he or she has that power is guilty of a crime.¹⁹⁵ Such a determination by a legislature raises questions concerning whether legislatures, or courts, should be in the business of making decisions

194. 3 How. Stat. 1997a (Mich. Rev. Stat. 1846 Ch. 51; Sec. 1997a). Note that the defendant was entitled to a jury trial if a justice of the peace heard the case.

195. *Elmer*, 67 N.W. at 551.

concerning whether paranormal abilities exist, and if we continue down that road, what the nature of truth really is.¹⁹⁶

Seven years after the *Elmer* decision, a court convicted Zoza Kenilworth for “pretending to use and using palmistry.”¹⁹⁷ The legislation in question had been in effect since 1799, clearly modeled on an English jurisprudential tradition, of which the 1824 Vagrancy Act was merely the most famous example,¹⁹⁸ and read, “all persons who shall use or pretend to use or have skill in physiognomy, palmistry or like crafty science . . . shall be deemed and adjudged to be disorderly persons.”¹⁹⁹ Kenilworth challenged the statute as unconstitutional, although on what grounds is not clear from the record of the case.²⁰⁰ He did agree, however, that should palmistry be adjudged a “crafty science” within the meaning of the statute, his challenge could not stand. Said the court,

[u]ndoubtedly, within the intent of this statute, palmistry is a crafty science—that is, one by which the simple-minded are apt to be deceived. So much is plainly indicated by the collocation of words “palmistry or like crafty science If ever there shall be discovered rational evidence that palmistry is a real science, its use for honest purposes will pass beyond the range of this statute; but in the present case, the use of palmistry was plainly within the prohibition.²⁰¹

196. *United States v. Ballard*, 322 U.S. 78, 86 (1944). The U. S. Supreme Court would ultimately decide in the *Ballard* case that courts and legislatures ought not to be in the business of deciding truth, but that case was decades in the future. *Id.*

197. *State v. Kenilworth*, 54 A. 244, 245 (N.J. 1903).

198. One law review commentator traces early colonial and U.S. state laws to English statutes that predate the 1824 Vagrancy law. See Arthur H. Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CAL. L. REV. 557, 561 (1960) (noting the origins of the Massachusetts vagrancy statute of 1788). See also C.J. RIBTON-TURNER, *A HISTORY OF VAGRANTS AND VAGRANCY AND BEGGARS AND BEGGING* (Chapman and Hall, 1887) and Baker, *supra* note 47, at 213–21.

199. *Kenilworth*, 54 A. at 245.

200. *Id.* He also objected that the statute required the testimony of a creditable witness under oath to obtain a conviction, the correct word being *credible*. The court rejected the objection to the use of the word, since the statute had been revised since the word *credible* had come into use; thus the word *creditable* was used with intent by the drafters in 1888. *Id.* at 245–46.

201. *Id.* at 245.

Like physiognomy, the belief that an individual's facial characteristics reveal her personality traits,²⁰² astrology and palmistry were classed as, at best, unproven "sciences."

Note again the emphasis in the court's opinion on the necessity for protection of the "simple-minded," those members of the public likely to be deceived. The courts in these cases undoubtedly viewed these statutes as consumer protection acts, but did not require that the public, or indeed any complaining witness at all, actually be deceived in order to find the defendant guilty. To do so would have made conviction nearly impossible.²⁰³

However, state courts did not simply classify all Spiritualists and spirit mediums in the category of "disorderly persons" or "vagrants" if the statute or ordinance did not warrant such treatment, suggesting that as early as the start of the twentieth century judges were not simply parsing the language of crafty sciences statutes carefully, but also looking carefully at the facts of the cases. One of the first examples in which a court refused to uphold the conviction of a Spiritualist under a crafty science statute is that of the 1904 case of *Wolf v. Ohio*.²⁰⁴

In *Wolf*, decided one year after *Kenilworth*, the city of Cleveland sought to prosecute such a practitioner under a state statute against fortune telling. According to the indictment:

So far as this information charges, she made no representation to any one but to one person. . .that she was a fortune teller, and this is the way she made the representation: "By then and there pretending to have the power to reveal future events in the life of him. . .in the following manner, and in substance, to-wit: By then and there seating herself. . .and in a tranced condition. . .and while pretending to be in said tranced condition to clasp the right hand of said James Dolan, and then and there saying to said Dolan, in substance, the following: 'You are going to change your business

202. See generally TAMSYN BARTON, *POWER AND KNOWLEDGE: ASTROLOGY, PHYSIOGNOMICS, AND MEDICINE UNDER THE ROMAN EMPIRE* (Ann Arbor: Univ. of Mich. Press, 1994) (noting the study of physiognomy had been around since at least Roman times).

203. *Rushman v. City of Milwaukee*, 959 F. Supp. 1040, 1045 (1997). That state of affairs would not always be the case. It would depend on how the statute was written, for example, and whether it included a ministerial exemption. Eventually, those challenging such laws also began to do so under the First Amendment's Free Speech Clause, but not until the 1970's. *Id.*

204. *Wolf v. Ohio*, 24 Ohio C.C. (n.s.) 751, 752-53 (1904).

before the first of the year and next spring.’ Now to that extent there seems to be a fore-telling of a future event; but if it required any kind of mystic help to say to one he is likely to change his business, it seems a little strange.²⁰⁵

As the court viewed the event, Wolf simply discussed the likelihood that “something” would happen to the complaining witness, police officer Dolan. Wolf’s comment was no different from any other speculation likely to be made by any other person. “Indeed I suppose it would not be regarded as fortune-telling for anyone to say ‘I do not think you will continue in the business in which you now are.’”²⁰⁶ The court saw, in fact, no crime at all in the statements complained of.

Now, if there is any charge of crime in that information we are unable to see it. We think that a demurrer to that information, or a motion to quash should have been sustained. It is too ridiculous a thing to found a charge of crime upon. The statute itself is bad enough to make it an offense to represent one’s self to be a fortune teller, a palmister, a clairvoyant or an astrologer, but clearly it was not the understanding of the makers of that statute that because a person says to another person “I can read your palm, or I am a spirit medium and have communication,” to charge him with being a fortune-teller.²⁰⁷

Indeed, the court refused to equate the term “spirit medium” with the term “fortune-teller.”

A definition of fortune-telling includes making a practice of foretelling of pretending to foretell future events. But the said Dolan, who had time in the performance of his duties as a police officer to call on her, and all she told him, was that she saw gold fields, and she thought he would get richer, and that she was a little rosebud.²⁰⁸

Because here, unlike in *Elmer*, the prosecution provided no indication that the representations were continuing, nor that fortune-telling was the equivalent of mediumship, nor that “the intention of the [L]egislature [was] to include every one who represented himself to be

205. *Id.* at 751–52.

206. *Id.* at 752.

207. *Id.*

208. *Id.* at 753.

a spirit medium” within the reach of this statute,²⁰⁹ the court reversed the judgment. “Spirit communications are held very sacred by some excellent people, but certainly not, I take it, the trash given out here about a rosebud, big chief and big squaw.”²¹⁰ However, the court also found the communications here to be so lacking in content that even the most lackadaisical fortune teller would be embarrassed to lay claim to them. If the “something” Mrs. Wolf communicated here were worthy of being labeled “spirit communications,” and thus capable of prosecution under the statute, then virtually any “trash” (e.g., a conditional statement regarding the future) might be at risk of landing its speaker before a magistrate. Individuals would then be slipping just too far down the slope. Part of the prosecution’s job was to make out the elements of the charge, and here the prosecutor had failed to do just that.

In the court’s opinion in *Wolf*, we also see a clear indication that courts might be willing to extend, at least in some instances, First Amendment protections to Spiritualists who practiced what looked like “crafty sciences” if they were part of accepted religious practices (“Spirit communications are held very sacred by some excellent people . . .”),²¹¹ but also that the state had the power to require licensing.²¹² Further, this particular court was unwilling to affirm a conviction when the complaining witness was not deceived (although, as in *Elmer*, the deception of the complaining witness is not necessarily an element of the crime), when the defendant made no public claims of her powers, whatever they might be,²¹³ and when the prosecution failed to prove that the defendant intended to deceive the complaining witness. Indeed, this court could not believe that *anyone* could have believed Lena Wolf’s representations.

It is easy to understand that good men and women should be glad to converse with those who have passed into the spirit land; but how any one would care to talk with an ignorant Indian girl because she is dead and can not use either English or any known Indian dialect, how it should deceive any one, is a very strange thing.²¹⁴

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 752.

213. *Id.* at 752–53.

214. *Id.* at 753.

On the question of whether the defendant believed them herself, the *Wolf* court seems to have taken no clear position. The question remained: when, and under what theory, would courts accept a Spiritualist's First Amendment defenses to charges of fraud or deception against "crafty sciences" statutes? Would a defense of genuine self-delusion, self-deception, or genuine belief be enough to protect a defendant Spiritualist against a charge of fraud under a statute such as the one in *Elmer* or *Kenilworth*?

2. *Illinois Considers the Issue*

The Illinois State Legislature had been involved for a time in attempts to pass a vagrancy act that would criminalize fortune-telling as well as other "crafty science" practices. State Senator David Littler sponsored one such bill in 1895. In an interview with the *Chicago Daily Tribune*, he averred that his intent was to "knock out fortune tellers, seers, and all spiritualistic mediums excepting such as have credentials from spiritualistic associations or colleges."²¹⁵

Littler carefully disclaimed any animosity toward Spiritualists or fortune-tellers, declaring only that he had presented the bill because "a resident of Sangamon County, whose name I do not now recall," had sent him a letter about the issue.²¹⁶ When the reporter asked the Senator his opinion on "spiritualistic manifestations," Littler responded, "I believe in the highest liberty to man consistent with due regard for law. If any man can take comfort out of [S]piritualism that's his business."²¹⁷ When the reporter pressed him on the issue of fortune-telling, Littler continued, "Why, if a man can get any comfort out of getting his fortune told by cards, or coffee grounds, or tea leaves, that's his business."²¹⁸ Finally, when the reporter asked him for his opinion on the possible repercussions of banning the use of rabbits' feet (as good luck charms), Littler, true to form, responded:

"I have nothing for or against rabbits, although they do play the mischief with my apple trees. If a man wants to carry a rabbit's foot, or even a whole rabbit or a Welsh rarebit, in his pocket I suppose it

215. *Queer Bills Bob Up*, CHIC. DAILY TRIB. (Jan. 25, 1895), <http://archives.chicagotribune.com/1895/01/25/page/5/article/queer-bills-bob-up>.

216. *Id.*

217. *Id.*

218. *Id.*

is his business. Well, I have wasted enough time with you, so I believe I will ring off.”²¹⁹

While Littler may have treated the reporter and his questions facetiously, the fact that he was willing to introduce the bill reflected a particular attitude towards both Spiritualism and its practices among his constituents—that the belief system was somewhat foolish, and led to either silly or dangerous spending habits on the part of those who followed it.²²⁰

Five years later, the Chicago City Council actively pursued the passage of a vagrancy ordinance “similar to those in force in Cincinnati, Pittsburg (sic), and Philadelphia,” which, according to the chief of detectives, would “stop the existing or any future reign of crime in the city in short order.”²²¹ The police chief complained that the current ordinance allowed those arrested to evade detention by showing that they had a sum of money—any sum—on their persons, and that someone—anyone—would swear that they were employed in some legal occupation.²²² By 1907, the ordinance was in place.²²³ Under it, prosecutors brought charges against James Payne and seventeen other Spiritualists “on charges of fraudulent practice of spiritualism”²²⁴ The defendants were not just Spiritualists, but African-Americans, or “negroes” in the language of the time. Their attorney attacked the ordinance on the basis of its grammar: “mention[ing] historic incidents of prosecutions put to rout under ordinances nailed together with the unstable disjunctive ‘or’ instead of the hard and reliable conjunctive

219. *Id.*

220. *Id.* We can measure the attitude of the newspaper by the other articles it printed on the same page, which include one discussing a bill introduced by a New York legislator who wanted to regulate the size of hats worn by women attending theaters. “It is provided any person having purchased a seat in a place of entertainment and finding his view obstructed or the proper quietness disturbed by any cause within the control of the proprietor or manager of such place to his annoyance shall have the right to demand the return of the price of the seat unless the obstruction or annoyance be removed immediately. . . . Theatrical managers here do not believe any legislation on earth can prevent a woman wearing a big hat to the theater if she makes up her mind to, and that she will keep it on in spite of all statutes.” *Aimed At Big Hats In Theaters*, CHI. DAILY TRIB. (Jan. 25, 1895) at 5.

221. *New ‘Vag’ Law To Check Crime*, CHI. DAILY TRIB. (Nov. 16, 1900) at 1.

222. *Id.*

223. *See J. OF THE CITY COUNCIL OF CHI., Section 4, Unfinished Business*, (Dec. 16, 1907) at 3500.

224. *Flaw in Law for “Spooks”?*, CHI. DAILY TRIB. (Aug. 7, 1909) at 3.

‘and.’”²²⁵ The attorney further argued that the defendants “should not be accused of ‘practicing *or* permitting’ but of ‘practicing *and* permitting’—both or either, but state definitely, so that the accused may know with what he is charged—with the practicing or the permitting—which in the opinion of the defense, are widely different things.”²²⁶

Judge Walker dismissed the charges, and in *City of Chicago v. Payne*, the appellate court affirmed the dismissal of charges against Payne and his co-defendants.²²⁷ The prosecution alleged the elements of the crime, but failed to produce evidence to show that any crime had been committed. For the appellate court, the vagrancy ordinance at issue read much like others around the country.²²⁸ After examining the ordinance and the charges brought against the defendant, Justice Baker defined Spiritualism as “a belief in the power of some departed spirits to communicate with the living by means of mediums. Such belief is maintained by a very large number of persons in this and other countries.”²²⁹ He found that the ordinance was aimed at disorderly persons, not at religious practice.

We do not think that the common council of the city of Chicago . . . intended to declare such belief unfounded and make the act of a professed medium, who claimed to hold intercourse with departed spirits, for reward, a misdemeanor punishable by fine, nor that by section 3 of the ordinance the council intended to make the holding

225. *Id.*

226. *Id.* (emphasis added). The investigating police officer filed a complaint in which the monetary value involved was one dollar. *Id.*

227. *City of Chicago v. Payne*, 160 Ill. App. 641, 643 (1911). *See also Spirits Get O.K. From High Court*, CHI. DAILY TRIB. (Apr. 16, 1911) at 1.

228. “Section 2. That any person or persons who shall obtain money or property from another by fraudulent devices and practices in the name of or by means of spirit mediumship, palmistry, card reading, astrology, seership, or like crafty science, or fortune telling of any kind, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than twenty-five (\$ 25) dollars nor more than one hundred (\$ 100) dollars for each offense. The city of Chicago still does not license fortune telling as a ‘home occupation.’ Municipal Code of Chic., Ill. § 4-380-070; Section 3. That any person or persons who shall hold or give any public or private meeting, gathering, circle or seance of any kind in the name of spiritualism, or of any other religious body, cult or denomination, and therein practice or permit to be practiced fraud or deception of any kind, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than twenty-five (\$ 25) dollars nor more than one hundred (\$ 100) dollars for each offense.” *City of Chicago v. Payne*, 160 Ill. App. 641, 641 (1911).

229. *Payne*, 160 Ill. App. at 642.

of a meeting in the name of spiritualism, at which a professed medium claimed to hold intercourse with departed spirits, a misdemeanor punishable by fine.²³⁰

The court might also have accepted a First Amendment defense here, had one been pled, even though the city objected vociferously that what was going on was fraud. Yet, the defendant prevailed without raising a First Amendment claim. What the city failed to do was demonstrate that the “communication with spirits” was done entirely by trick; indeed, the prosecution did not provide *any* proof of the trick. Once again, the prosecution failed to show that the defendant intended any deception.

So far as they relate to spiritualism, the object and purpose of section 2 is, in our opinion, to make the obtaining of money or property from another by means of fraudulent devices and practices in the name of spirit mediumship a misdemeanor, and the object and purpose of section 3 is to make the holding of a meeting in the name of spiritualism and therein to practice or permit to be practiced fraud or deception, a misdemeanor. The only charge in the complaint that the defendant used or employed any fraudulent practice or device, or that he practiced or permitted to be practiced any fraud or deception, is the charge that he pretended that he would hold and that he did hold communication with departed spirits. This is not, in our opinion, sufficient to charge the defendant with a violation of either section of the ordinance, and the complaint was therefore properly quashed and the defendant discharged.²³¹

Thus, as early as 1909, it appeared that at least some judges were ready to entertain the notion that Spiritualism, odd as it seemed and alien as it might be to traditional definitions of religion, might rightly be classified as a religion under the First Amendment. However, as the judge points out in *Payne*, since the city failed to make out its case, he had to dismiss the charges against the defendants. Further, Judge Baker may have had some sympathy for the plight of Spiritualists themselves. At a minimum, he had some exposure to and understanding of the belief system, which sensitized him to its tenets. He certainly knew something about the literature of the subject. “Frauds in connection with professed communications from departed spirits have often been detected and

230. *Id.* at 642–43.

231. *Id.* at 643.

exposed—frequently by spiritualists themselves.” We can find an account of typical frauds of that class in D. D. Home’s *Lights and Shadows of Spiritualism*.²³²

In *City of Chicago v. Westergren*, decided in 1912, just one year after *Payne*, the city again tried to obtain a conviction under a section of the 1911 city code that closely resembled the ordinance at issue in *Payne*. Specifically, the city code provided, in pertinent part:

[a]ny person or persons who shall obtain money or property from another by fraudulent devices and practices in the name of or by means of spirit mediumship, palmistry, card reading, astrology, seership, or like crafty science, or fortune telling of any kind, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine²³³

As in *Payne*, the complaining witness was a police officer, Peter Sicokis, who paid Rosa Westergren fifty cents to hear that his brother

232. *Id.* D. D. Home was a well-known Spiritualist medium, generally touted as the only medium never to have been exposed as a fraud, although this claim does not seem to have been entirely true. In 1868 he lost a suit in equity over a gift of stock transferred to him by his adoptive mother Jane Lyon. The charge was undue influence. *See Lyon v. Home*, [L.R.] 6 EQ. CASES, L. R. 655 (1868). Annoyed over his wife Elizabeth Barrett’s devotion to Home’s teachings, the poet Robert Browning wrote the satire *Mr. Sludge the Medium*, which appeared in *DRAMATIS PERSONAE* (1864). “Now, don’t, sir! Don’t expose me!/Just this once! This was the first and only time, I’ll wear./Look at me,—see, I kneel,—the only time, I swear, I ever cheated,—yes, by the soul/Of Her who hears—(your sainted mother, sir!) All, except this last accident, was truth/This little kind of slip!—and even this/It was your own wine, sir, the good champagne./I took it for Catawba, you ‘re so kind) Which put the folly in my head!” *See* DEBORAH BLUM, *GHOST HUNTERS: WILLIAM JAMES AND THE SEARCH FOR SCIENTIFIC PROOF OF LIFE AFTER DEATH* 30 (NY: Penguin, 2007). *See also* TREVOR H. HALL, *THE ENIGMA OF DANIEL HOME: MEDIUM OR FRAUD?* (Buffalo: Prometheus Books, 1984) and GORDON STEIN, *THE SORCERER OF KINGS: THE CASE OF DANIEL DUNGLAS HOME AND WILLIAM CROOKES* (Buffalo: Prometheus Books, 1993). Nevertheless, to cite to Home’s *Lights and Shadows of Spiritualism*, as the judge does here, indicates an acquaintanceship with not just the movement itself, but with the leading medium of the time, and with the fact that that leading medium himself has written the leading exposé on “fraudulent mediums.” The New York Times ran a rather negative review of Home’s book in 1877. *Literary Notes*, N.Y. TIMES (May 19, 1877) <http://query.nytimes.com/mem/archive-free/pdf?res=9B02E7D9123FE63BBC4152DFB366838C669FDE>.

233. *City of Chicago v. Westergren*, 173 Ill. App. 562, 563 (1912); *see* Blewett Lee, *Spiritualism and Crime*, 22 COLUM. L. REV. 439, 446–47 (1922) (commenting on *Westergren*). Lee also discusses the *Ashley* case, mentioned *infra* note 266 and accompanying text, and the *Staufer* case, mentioned *infra* note 285 and accompanying text.

was not dead. The defendant told Sicokis a good many other things that were false, and that Sicokis in fact did not believe. Because the complaining witness did not in fact “rely upon or believe” the statements made by Westergren, even though the lower court erroneously limited cross-examination to that issue, the appellate court reversed the defendant’s conviction.²³⁴

While the opinion appears to have leaned heavily on a simple and literal reading of the ordinance to determine whether the lower court should have convicted Westergren, in fact, the court expanded its examination of the question to make the following inquiry: whether the city is contending that both Spiritualism and the Spiritualist practice of fortune telling are, without any further investigation or proof, fraudulent. It anchored its reversal of the lower court’s ruling in an affirmation of the right to speak and the right to believe in the First Amendment, without actually making a reference to that amendment. It questioned whether the prosecution was suggesting that the mere “belief in spirit mediumship and the claim of and attempt at fortune telling . . . are of themselves fraudulent,” and suggested that if that was the prosecution’s characterization of Spiritualism, then the prosecution, and by extension, the Chicago City Council, was an example of overreaching.²³⁵

234. “It is apparent that under such circumstances the defendant cannot be held guilty of obtaining money by false pretenses.” *Westergren*, 173 Ill. App. at 562.

235. “There is no evidence whatever of any ‘fraudulent devices and practices’ unless it be held, as contended by the counsel for the City, that the belief in spirit mediumship and the claim of and attempt at fortune telling by means thereof are of themselves fraudulent within the terms of the ordinance. We are not disposed, nor is it here necessary, to attempt any discussion of spirit mediumship. We wish only to observe that in this age of marvelous advancement in science, when all the energies and abilities of learned and sincere men are devoted to study, experiment and research on these questions, we have not the temerity to mark limitations therein. However unreasonable such ideas and beliefs may appear to many, it is certain, and so indicated in this record, that a large number of people have faith and confidence in spirit mediumship; and we are of the opinion that the belief therein and honest practice thereof without fraudulent means, tricks or devices cannot be held criminal.” *Westergren*, 173 Ill. App. at 563. The court’s mention of “advancement in science” is quite typical of the interest in and emphasis on the late nineteenth century desire to integrate spiritualism and science. Many parapsychologists have continued to try to ground their research in the scientific method. See GARY SCHWARTZ, *THE AFTERLIFE EXPERIMENTS: BREAKTHROUGH SCIENTIFIC EVIDENCE OF LIFE AFTER DEATH* 4–6 (Simon & Schuster, 2003). *But see* RAY HYMAN, *HOW NOT TO TEST MEDIUMS*, http://www.csicop.org/si/show/how_not_to_test_mediums_critiquing_the_afterlife_experiments/ (last visited Apr. 7, 2017); RICHARD WISEMAN & C. WATT, *PARAPSYCHOLOGY* (2005) (critiquing methods used by Schwartz and others to test psychics).

However unreasonable such ideas and beliefs may appear to many, it is certain, and so indicated in this record, that a large number of people have faith and confidence in spirit mediumship; and we are of the opinion that the belief therein and honest practice thereof without fraudulent means, tricks or devices cannot be held criminal.²³⁶

The court made two points that would become crucial to First Amendment defenses of Spiritualist practices: (1) the First Amendment protects honest belief and practice; and (2) legislatures cannot automatically assume that all Spiritualists are frauds and deceivers.²³⁷ Further, in cases involving fraud or deception, the court reiterated a third point that other courts have made with regard to unpopular defendants (though not necessarily in the context of cases involving Spiritualists). It noted that the prosecution must demonstrate, and not simply assume, that the defendant (the Spiritualist) has accomplished the deception complained of. Otherwise, the prosecution has not established the elements of the crime.²³⁸ Given the amount of prejudice that Spiritualists

236. *Westergren*, 173 Ill. App. at 564.

237. *Id.* Some legislative bodies eventually attempted to pass statutes or ordinances that assume without proof that all fortune tellers are frauds. Federal judges have struck down such legislation. See *Trimble v. City of New Iberia*, 73 F. Supp. 2d. 659, 667 (W. D. La. 1999).

238. *Westergren*, 173 Ill. App. at 564. This element becomes important not just for Spiritualists but for crafty science practitioners who began to claim a First Amendment defense against laws of general applicability beginning in the 1970s. In 1978, for example, a lower court convicted Irene Petke of violating a Schaumburg, Illinois, ordinance prohibiting card reading and other crafty sciences; the ordinance was “almost identical” to the Chicago ordinance of 1911. The appellate court reversed Petke’s conviction, holding that “[i]f the village ordinance had been intended to prohibit practices such as card reading, palmistry, astrology or fortune telling even when unaccompanied by fraud, the phrase ‘fraudulent devices and practices’ would not have been used in the ordinance. Instead, the ordinance would have directly prohibited these activities. Moreover, if the parenthetical phrase ‘or by means of’ is disregarded, the ordinance clearly requires fraud in connection with the activities referred to by the ordinance. The phrase ‘or by means of’ cannot be construed to equate the enumerated practices with fraud. The phrase is ambiguous, and any ambiguities, which exist must be construed narrowly because the ordinance is punitive in nature. . . . Therefore, the ordinance neither prohibits card reading in itself, nor declares that card reading is a fraudulent device or practice. The ordinance requires proof of fraud independent of the mere performance of the act of card reading to establish a violation.” *Schaumburg v. Petke*, 373 N.E.2d 716, 718–19 (1978). Further, the court points out that the witness who complained about the card reading does not seem to have been deceived or defrauded. *Id.* at 719.

attracted socially and politically, and which subsequently expressed itself legally, we should see such admonitions to prosecutors as an indication that some courts are beginning to understand the arguments that Spiritualists are making concerning the First Amendment.

A major problem with the Chicago municipal ordinance is in its equating spirit mediumship with “palmistry, card reading, astrology, seership, or like crafty science, or fortune telling or any kind” While the drafters may have had perfectly honest beliefs that Spiritualism was equivalent to “crafty science,” the belief system itself as a religious practice, as we have seen, was no stranger to the courtroom. Beginning in 1855, courts had used Spiritualism as an example of an absurd belief, but was nevertheless *not* in and of itself an example of insanity, nor an example of a practice that was necessarily fraudulent.²³⁹ Thus, to suggest that Spiritualism, *as a belief system*, was necessarily fraudulent was not so clear (as opposed to the notion that all those who practiced it were frauds).²⁴⁰

3. *Spiritualists in Other State Courts: Rogue and Vagabond Legislation Prevails*

In 1912, the same year that the City of Chicago lost the *Westergren* case, the State of Washington was successful in a crafty sciences case against a fortune teller, in which the Washington Supreme Court upheld a conviction for vagrancy under a statute closely resembling the statute

239. *Turner v. Hand*, 24 F. Cas. 355 (1855). Judges were not the only individuals who saw belief in spiritualism as a possible indicator of mental instability, although they did not accept it absent other indicators (see *supra* note 100). Newspapers of the time document many family quarrels over beliefs in Spiritualism that led to both personal and professional spats as well as to lawsuits. See, for example, *Mrs. Hopkins a Spiritualist; Searles Found It Out and Became a Medium—The Will Contest*, N.Y. TIMES, (September 9, 1891), <http://query.nytimes.com/mem/archive-free/pdf?res=F60D1EFD3E5E10738DDDA00894D1405B8185F0D3> (discussing the lawsuit over the will of the widow of financier Mark Hopkins).

240. On the fraud of some Spiritualists, see STEIN, *supra* note 232. Home admits in *Lights and Shadows* that some of his colleagues perpetuate frauds and suggests that his book may assist in uncovering those who seek to separate the unwary from their hard-earned cash. See D. D. HOME, *LIGHTS AND SHADOWS OF SPIRITUALISM* (NY: Carleton & Company, 1877). Similarly, “M. Lamar Keene” revealed a number of deceptive practices as well as his life as a psychic in his work *THE PSYCHIC MAFIA* (St. Martin’s Press, 1976). The book was “told to” Allen Spraggett.

at issue in *Elmer and Kenilworth*. In *State of Washington v. Neitzel*,²⁴¹ a police officer visited a supposed fortune teller and paid him a dollar; in response, the defendant told the officer that he “could not tell his fortune, but he could ‘figure it out.’”²⁴² The defense sought to show that Neitzel used astrology to “figure out” fortunes, and that astrology had a scientific basis.²⁴³ The defense attorney offered to demonstrate these scientific principles to the court, but the court, in refusing the proffer, pointed out that the statute in question prohibited fortune telling by any means whatever, “and therefore that it was “unimportant that the means of telling fortunes was based upon a science.”²⁴⁴ Thus, the court effectively held that the statute established, if not a strict liability offense, as close to one as the legislature could possibly create.

241. *State of Washington v. Neitzel*, 125 P. 939 (Wash. 1912); *See also Note: Prohibition of Fortune Telling and Kindred superstitions*, 43 LAW. REP. ANN. 203 (1912) (discussing *Neitzel*).

242. *Neitzel*, 125 P. at 939.

243. Whether or not astrology has a “scientific” basis has been a matter for lively discussion for decades, if not centuries. Some renowned seventeenth-century scientists, such as Johannes Kepler, practiced astrology along with traditional sciences such as astronomy. Even at that time, some of his contemporaries attacked the validity of astrology as a science. *See* Sheila J. Rabin, *Kepler’s Attitude Toward Pico and the Anti-astrology Polemic*, 50 *Renaissance Q.* 750 (1997). During the Enlightenment astrology fell into disrepute, and by the early nineteenth century, as we have seen, legislators in the UK and the US routinely classed astrologers with fortune tellers in the “crafty sciences” category. In 1949 psychologist Bertram Forer published the results of a classic experiment in which he demonstrated that people who accept the validity of astrological forecasts do so primarily because of personal validation. That is, they see in their horoscopes exactly what they wish to see. In the experiment, Dr. Forer gave each subject a personality analysis taken from a newspaper horoscope and asked each subject to score the analysis with regard to its accuracy. However, each subject in the experiment received the *same* analysis. Bertram R. Forer, *The Fallacy of Personal Validation: A Classroom Demonstration of Gullibility*, 44 *J. Abnormal & Soc. Psych.* 118 (1949). What Forer described is referred to as “the Forer effect,” or sometimes “the Barnum effect.” Despite Forer’s article, and the fact that numerous experimenters have obtained similar results over the years, people continue to believe in horoscopes and in the efficacy of astrology. *See also* D.H. Dickson & I.W. Kelly, *The ‘Barnum Effect’ in Personality Assessment: A Review of the Literature*, 57 *PSYCH. REP.* 367 (1985). According to a 2009 Harris Poll, 26 percent of Americans surveyed accepted the validity of astrology. *See* *What People Do and Do Not Believe In* (Dec. 15, 2009) http://www.harrisinteractive.com/vault/Harris_Poll_2009_12_15.pdf. A Pew Research Poll taken around the same time yielded 25 percent overall, with 23 percent of Christians accepting astrology as valid. *See* *Many Americans Mix Multiple Faiths*, http://www.pewforum.org/uploadedfiles/Topics/Beliefs_and_Practices/Other_Beliefs_and_Practices/multiplefaiths.pdf (last visited Apr. 7, 2017).

244. *Neitzel*, 125 P. at 939.

Neitzel also attempted to make the argument that fortune telling is a lawful occupation, but the court rejected this approach as well, stating that the statute “makes fortune telling unlawful, regardless of the means employed. It is plain that the defendant was engaged in fortune telling, for he was professing to tell future events in the life of the witness. The statute is clearly valid.”²⁴⁵

Finally, Neitzel offered up a religious defense, stating that he was a “regularly ordained minister in [the] ‘National Astrological Society’ and that the principles of religion laid down by that society include the practice of casting and reading horoscopes”²⁴⁶ However, religious practices do not necessarily exempt individuals from compliance with laws of general applicability.²⁴⁷ The “lawful occupation” argument is one that crafty science practitioners have made often throughout the years, but it falls on deaf ears, primarily because of the police power of the state.²⁴⁸ The legislation in the *Neitzel*, *Elmer*, and *Kenilworth* cases all prohibit the practice of crafty sciences for a fee, and do not permit First Amendment defenses based on religious belief (including a ministerial exception), or defenses on the grounds that the defendant can actually accomplish the activity. The state has prohibited the activity because it considers the activity, at its core, to be a fraudulent one—dangerous or deceptive to the public. No claim of honest, protected religious belief can cure that defect, because the state does not recognize the legitimacy of any religion that would adhere to such a belief. Derivative defenses, such as faith healing, also fail because if the court denies the validity of the religious belief altogether, then the faith healing belief automatically fails as well.

Similarly, at issue in the 1916 Massachusetts case of *Commonwealth v. Lindsey* was a content neutral law of general

245. *Id.* at 939–40.

246. *Id.*

247. *Reynolds v. U.S.*, 98 U.S. 145 (1879) (holding that religious belief does not exempt individuals from compliance with laws of general applicability); *See also* *Emp’t Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

248. The state has the power to prohibit or license occupations, particularly those whose practitioners make themselves a threat to the health, safety, and welfare of the community, unless the state does so in an arbitrary or capricious manner. In *Davis v. Ohio*, the court denied the Spiritualist’s First Amendment claims partly on these grounds. *Davis v. Ohio*, 159 N.E. 575 (Ohio Ct. App. 1927). *See also infra* note 317 and accompanying text; Christine A. Corcos, *Seeing It Coming Since 1945: State Bans and Regulations of “Crafty Sciences” Speech and Activity*, 37 T. JEFFERSON L. REV. 39, 88–95 (2014).

applicability. Defendant Willard M. Lindsey attempted to claim that his gifts as a “clairvoyant and magnetic healer”²⁴⁹ protected him against charges of practicing medicine without a license. The state attempted to show that claims of spiritual healing, if indeed that was the talent the defendant claimed to possess, were nevertheless insufficient to exempt him from the necessity of obtaining a medical license if he intended to prescribe and sell medications, as he admitted he had done. However, he alleged that “in selling medicine he was acting as president for the Magnetic Sanitarium Company or the Dr. Willard M. Lindsey, Inc.,”²⁵⁰ of which he was president. He also claimed that he decided which medications to prescribe “by his judgment reached through clairvoyancy.”²⁵¹ The court refused to accept this defense, affirming the state’s police power to regulate the practice of medicine and to protect the public. The law was therefore one of general applicability, which did not infringe impermissibly on a fundamental right.

The Ohio courts examined the First Amendment argument seriously in the 1917 case of *Haas v. State of Ohio*.²⁵² In *Haas*, the state prosecuted a member of the First Spiritualist Church of Canton, Ohio for having given readings without a fortune teller’s license, a violation of Ohio General Code section 13145.²⁵³ The statute in question was clearly a piece of consumer protection legislation aimed at “protect[ing] the general public from imposition of questionable practices of persons claiming the power to foretell future events, etc.”²⁵⁴ The appellate court found that the prosecution had successfully established the elements of the offense, because the defendant had provided spiritual “readings” without a license in contravention of the statute.²⁵⁵ The objection that

249. *Commonwealth v. Lindsey*, 111 N.E. 869, 870 (Mass. 1916).

250. *Id.*

251. *Id.* at 870–71.

252. *Haas v. State*, 26 Ohio C.C. (n.s.) 545 (1917).

253. *Id.* at 545.

254. *Id.* at 546.

255. “‘Whoever, not having been legally licensed so to do, represents himself to be an astrologer, fortune-teller, clairvoyant, or palmister, shall be fined, etc.’ No aids in interpretation or construction need be invoked to understand the full meaning of this section. It means just what it says. It is the *representation* when the license is lacking that is sought to be punished. Here it is clear from the evidence that it was pre-arranged between the plaintiff in error and the said John Mohler that applicants for ‘readings’ should first apply to and pay said Mohler for a certificate for said ‘readings’; that such certificate entitled each applicant to a ‘reading’ to be given by the plaintiff in error as a spiritual medium...but who had not been legally licensed to do so. Under this evidence,

Haas made to this statute, however, was that it forbade her to practice her religion—specifically, that it prevented her from carrying out the dictates of Spiritualism, certain practices she was forbidden to follow unless she had a license.²⁵⁶ The statute, she alleged, violated Article I, Section 7 of the Ohio Constitution’s Bill of Rights.²⁵⁷ The court summarily rejected this claim. Rather, it found that the defendant herself had failed to conform to a law of general applicability, which required that fortune tellers obtain licenses before they practiced their professions. It rejected the claim that any religious belief, religion, or church was under attack. “It is the nature of the plaintiff in error’s business, not the tenets of her church, that is in controversy here.”²⁵⁸ For the court, the plaintiff’s own behavior brought her into conflict with the generally accepted right of the state to regulate business activity.

. . . [A]s we view the case before us, the question raised here on the record is not an attack upon the religious freedom of what is known as the First Spiritualist Church of Canton, Ohio, or upon any other church, or its doctrines or beliefs, but upon the conduct of the plaintiff in error as an individual in unlawfully representing herself to be a fortune -teller and clairvoyant, not being legally licensed so to do. This is the sole question raised by said affidavit and, as stated, we do not consider the constitutionality of said section as affecting any church organization or society in issue here. It is the nature of the plaintiff in error’s business, not the tenets of her church, that is in controversy here. In this country laws are made for the government of actions, and while they can not interfere with mere religious belief and opinions, they may with practices. If it were otherwise, the professed doctrines or religious beliefs would be superior to the law of the land, and in effect to permit each citizen to become a law unto himself.²⁵⁹

Instead, it held that the statute was one of general applicability, much like the ones in *Neitzel*, and in another case, *Smith v. People*

we have no hesitancy in holding that the requisites of the offense as defined by this section were fully proven, both the representation and the overt act of undertaking to reveal the unseen and unknown future.” *Haas*, 26 Ohio C.C. (n.s.) at 547.

256. *Id.*

257. Ohio Const. of 1851, art. I, §7.

258. *Haas*, 26 Ohio C.C. (n.s.) at 548.

259. *Id.*; Emp’t Div., Dep’t of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

(Colorado, 1911).²⁶⁰ The court took the position that the state was not interfering with the expression of religion, but with conduct, and it was perfectly free to do so.²⁶¹

4. *New York Holds the Line*

The New York vagrancy statute, dating from 1881, sought to control the same type of activity as the other statutes I have discussed. The law read in part: “The following are disorderly persons: . . . 3. Persons pretending to tell fortunes, or where lost or stolen goods may be found; . . . 6. Jugglers, common showmen, and mountebanks, who exhibit or perform for profit, puppet shows, wire or rope dancers or other idle shows, acts or feats; . . .”²⁶² The authorities commonly enforced this law against palmists, astrologers, fortune-tellers, and entertainers.

New York police and prosecutors had attempted off and on to use this statute to clear city streets of crafty science practitioners. In 1911, for example, authorities had arrested the Reverend Rufus A. Macurda, a Spiritualist minister, on a complaint from a police matron who had been active in obtaining information against a number of targets.²⁶³ Macurda protested, “I’m a minister You can’t arrest me,”²⁶⁴ and attempted to demonstrate his abilities as a medium to the arresting officers, to no avail. The judge put him on probation for one year after he admitted giving investment advice to “some woman,” whom he eventually admitted was likely to have been the police matron, Mrs. Goodwin, even though he protested that he did not remember her.²⁶⁵

260. “No attempt is made to interfere with religion or religious devotions. This does not, however, authorize one under the cover of religion or a religious exercise, to go into healing commercially for hire, using prayer as the curative agency or treatment. Religion can not be used as a shield to cover a business undertaking. Defendant was engaged in a business venture, not a religious exercise.” *Smith v. People*, 51 Colo. 270, 277 (1911).

261. *Haas*, 26 Ohio C.C. (n.s.) at 548.

262. N.Y. Code of Criminal Procedure, Ch. 442 §899 (1881). Note the similarity, in terms of categorization, with the federal tax statute at issue in the Colchester case, *supra* note 164 and accompanying text.

263. *Seize Spiritualist as Fortune Teller: The Rev. R. A. Macurda Pleads That Using His Mediumistic Powers Doesn’t Violate Law*, N.Y. TIMES (Feb. 1, 1911). Macurda attempted to demonstrate his mediumistic bona fides while waiting for a friend to arrive with bail money, and apparently unnerved at least one of the officers at the station.

264. *Id.*

265. *Id.* The judge in the Macurda case had found Spiritualists in violation of the fortune telling ordinance before. In 1918, he found John Hill, a pastor of the Spiritual Church of the Advanced Thought, guilty of disorderly conduct for telling fortunes in

In *People v. Ashley*,²⁶⁶ the court considered the Free Exercise argument that Lena Wolf had already advanced and that an Ohio court had rejected. Kings County had convicted Alice Ashley of “pretending to tell fortunes,” and of “being a disorderly person” under a quite ordinary-looking vagrancy statute.²⁶⁷ Ashley appealed, claiming that she was not a fortune teller within the meaning of the act because she was a minister of the Brooklyn Spiritualist Society, and that the “fortunes” she told were in fact “advice” given as part of her ministering duties, since they were “communications from departed spirits.”²⁶⁸ Her expert witness testified that Spiritualist mediums practiced prophesying as described in the Old Testament, that this practice was not the equivalent of fortune telling as provided in the statute, and that it was done for the good of the church alone, rather than for the medium’s financial gain (thus not “for a fee”).²⁶⁹ Unfortunately for Ashley, the trial judge did not believe her, and pointed out that the apostle Paul “not only condemned witchcraft and fortune telling by the method of summoning departed spirits, which was the method followed by the defendant . . . but . . . he had very decided views against women acting as prophets or ministers.”²⁷⁰

The defense presented two issues on appeal. First, it claimed that the state did not prove that Ashley *pretended* to tell fortunes, and second, it claimed that the state failed to show that Ashley was in any way fraudulent or deceitful. The appellate court agreed that the information Ashley conveyed to the complaining witness did not seem to be very valuable; it consisted of platitudes about the likelihood of happiness when one is married, the possibility of travel in the future, and some

violation of the New York Criminal Code. See *Held as a Fortune Teller*, N.Y. TIMES (May 25, 1918), <http://search.proquest.com.ezproxy.law.lsu.edu/hnpnewyorktimesindex/docview/100243148/13EED2A371D17566040/26?accountid=26214>.

266. *People v. Ashley*, 172 N.Y.S. 282 (N.Y. App. Div. 1918). Dyson discusses the *Ashley* case as pivotal for Spiritualists’ attempts to persuade courts to take more seriously the argument that Spiritualism was a religion. See Dyson, *supra* note 10, at 312–313. She puts the defense’s religious freedoms arguments in the context of the greater argument that Spiritualists and their supporters made about the difference between “foretelling and fortune telling.” *Id.* at 331–36.

267. *Ashley*, 172 N.Y.S. at 282.

268. *Id.*

269. *Id.* at 283.

270. *Id.*

comforting words about her dead mother.²⁷¹ Yet, the appellate court took the position that the evidence could support the conclusion that the defendant told fortunes for money, even if the fortunes told were hardly worth the dollar paid.²⁷² It said nothing, however, about the appropriateness of the trial judge's comments concerning women's status as clergy, or appeals to the Bible as authority.²⁷³ Unlike the *Wolf* court, the *Ashley* court was uninterested in whether Ashley's speech had content or value for her listeners. Nor was it persuaded by the difference between "pretending" to tell fortunes and "actually" telling fortunes.²⁷⁴ The case presents the same constitutional argument as did *Wolf v. Ohio*, and the New York court dispatched it quickly, citing the *Reynolds* case, as well as several other cases addressing laws of general applicability.²⁷⁵

What is again significant about both the *Ashley* case, and the *Malcolm* case, is the attack the defendants mounted on the meaning of the word "pretends" in the statute.²⁷⁶ In both cases, the defendants contended that "as the statute provides that those who 'pretend' to tell fortunes are disorderly persons, an element of deceit or fraud must be shown in order to justify a conviction."²⁷⁷ That is, the word "pretend" must be given its every day meaning of "feign" or "claim" or "profess." Their defense in such a case would then be that they indeed could tell fortunes—real fortunes, actual fortunes—and that they had the power to tell fortunes and divine the future and convey it accurately to their clients, and could not therefore be convicted under the statute. The courts, however, did not accept this interpretation of the word "pretend," accepting instead the prosecutors' contention that the phrase "pretending to tell fortunes" means that "the legislature deemed it an impossible thing to tell fortunes and made it unnecessary to present proof that fortunes

271. *Id.*

272. *Id.* at 284–85.

273. *Id.* at 283–84.

274. *Id.* The first argument would eventually meet with favor after 1943. The second, representing a deeper question concerning the meaning of separation of church and state as well as ultimate truth, is one that we still struggle with today, since it raises questions about what the government can prohibit and what it can legislate concerning truth and belief. Can the government tell us whether a fortune teller can do what she claims to do? Is that fraud? Or is the claim, and its content, something that could be a matter of belief, and thus protectable by the First Amendment?

275. *Id.* at 286.

276. *People v. Malcolm*, 154 N.Y.S. 919 (Ct. Gen. Sess. 1915); see also *People v. Elmer*, 67 N.W. 550 (Mich. 1896).

277. *Malcolm*, 154 N.Y.S. at 920.

were really told, by providing that any one pretending to tell fortunes should be convicted.”²⁷⁸ Like the court in *Elmer*, the *Ashley* court deferred to the Legislature’s decision simply to prohibit fortune telling.²⁷⁹

Defendants such as *Elmer*, *Ashley*, and *Malcolm* further attempted to defend the practice by pleading that fortune telling was based on a scientific method.²⁸⁰ However, the courts took the position that since the Legislature had forbidden fortune telling by any method whatever that it might be based on science was irrelevant.²⁸¹ The *Malcolm* court noted that the legislature indicated its “disbelief in human power to prophesy human events,” thus providing no exceptions of any kind that would exempt the diviner, no matter his or her chosen method.²⁸² Like the defendants in *Neitzel and Kenilworth*, once the defendants admitted the elements of the crime, they had great difficulty mounting a defense.

Compare the attempted defense here with the charge in *Elmer*, in which the defendant was convicted not only of “pretending” or claiming to tell fortunes but of actually telling them as well.²⁸³ In addition, *Elmer* had advertised to tell them; the advertisement was the icing on the cake for the prosecution.²⁸⁴

278. *Id.*; see also *Ashley*, 172 N.Y.S. at 286 (quoting *New York v. Malcolm*).

279. Had crafty science practitioners had actually been successful in advancing the defense that could *actually do* what they claimed—predict the future accurately, for example—such a defense might backfire. They still would have had to present evidence that a court would accept regarding their powers, a procedure which would have implicated both scientific and religious issues, the very matter at the heart of the debate between Spiritualists and some of their opponents.

280. *Malcolm*, 154 N.Y.S. at 920–21; *Ashley*, 172 N.Y.S. at 291.

281. *Malcolm*, 154 N.Y.S. at 921.

282. “Should the first contention of the defendant be upheld, it would be obvious that no person could be convicted under this statute until the lapse of time had proved that the prophecy was false, which would nullify the efficacy of the statute. In my opinion the legislature employed the language of the statute to signify its disbelief in human power to prophesy human events. If this is so, as the statute contains no exceptions, I am unable to see that the basis on which such prophecies are made or the methods by which such prophecies are arrived at can be material.” *New York v. Malcolm*, 90 Misc. 517, 520 (N.Y. Misc. 1915). I discuss the change in the law between 1943 and 1997 in *Corcos, Seeing It Coming*, *supra* note 248.

283. *People v. Elmer*, 67 N.W. 550, 551 (Mich. 1896).

284. *Id.* at 550–51; cf. *Penny v. Hanson* [1887] 18 QBD 478 at 285–286 (Eng) (defendant sold a third party a “circular,” “advertising the ability to tell fortunes,” and defendant was guilty of violating the statute). A fair number of statutes forbid not just the activity but the advertising of the activity. See, e.g., 18 PA. STAT. AND CONS. STAT.

5. *Spiritualists and Commercial Speech*

However, simply advertising that one could tell fortunes might not lead to conviction. In one Texas case, the government attempted to show that advertisement of Spiritualist practices constituted a violation of the statute, or, that the advertisement was not protected speech. In *Staufer v. State*, the Dallas District Attorney alleged that the defendant had violated a vagrancy statute simply by giving the complaining witness a business card on which was written, “Phone Bell Haskell 7098, D. W. Staufer, Spiritualist,” with contact information.²⁸⁵ The defendant admitted that he was a Spiritualist and did teach the doctrines of Spiritualism.²⁸⁶ At trial, witnesses presented evidence that they had paid him, apparently for some kind of reading.²⁸⁷ What the state failed to do was link his actions as a Spiritualist to the proscribed actions under the statute—as a member of the class of individuals who “advertise and maintain themselves in whole or in part as clairvoyants or foretellers of future events, or as having supernatural knowledge with respect to present or future conditions, transactions, happenings or events.”²⁸⁸

ANN. §7104 (West 2016) (permitting the defendant’s advertisement of the prohibited practices as evidence of the defendant’s culpability).

285. *Staufer v. State*, 209 S.W. 748, 749 (Tex. Crim. App. 1919).

286. *Id.*

287. *Id.*

288. *Id.* The *Staufer* court comes tantalizingly close to saying that the defendant’s speech is protected. Interestingly, the *Malcolm* court points out that if a practitioner of a “crafty science” “merely deduces” a customer’s character and makes general comments about the future, he or she is not contravening the statute. In such cases, the palmist or astrologer may be practicing what is known as “cold reading” but not making predictions, escaping the reach of the statute, frustrating the purpose of the legislature, collecting fees, and annoying magicians and debunkers once again. *New York v. Malcolm*, 154 N.Y.S. at 920–21. “Cold reading” is the art of making general statements about individuals that tend to meet with their approval. See James Randi, “Cold reading,” *Encyclopedia of Claims, Frauds and Hoaxes of the Occult and the Paranormal*, <http://www.randi.org/encyclopedia/cold%20reading.html> (last visited Apr. 7, 2017). Cold reading, guessing, and the use of psychology seem to be beyond the reach of the statute. As a general matter, “cold reading” would be extremely difficult to criminalize, as the New York Police Commissioner discovered in the case of *Pellman v. Valentine*. See *Pellman v. Valentine*, 57 N.Y.S.2d 617 (Sup. Ct. 1945) (discussing the validity of regulation or prohibition of “character reading” or “character analysis” in entertainment context). The *Pellman* case reiterates the question that continues to bedevil both prosecutors and performers: when is the practice of what looks like crafty science protected because it is “entertainment,” and when can it be prohibited because it might actually be fraud?

In the 1922 Missouri case, *City of St. Louis v. Hellscher*, the court accepted as evidence of the defendant's guilt "[t]he distribution of cards by the appellant holding himself out as possessing supernatural powers," in contravention of the ordinance against "the pursuit or practice of the pretended art of telling and revealing information of a secret or hidden nature pertaining to the past or future of another's life."²⁸⁹ In the *Hellscher* case, as in many others, the complaining witness was not a member of the public, since these were so often either perfectly satisfied customers or persons too embarrassed to admit they had been deceived, but rather was a policewoman sent to obtain information.²⁹⁰ The defendant attempted to challenge her testimony, probably on the grounds of entrapment.²⁹¹ In addition, as in other Spiritualism cases, *Hellscher* offered up a freedom of religion defense under the Missouri Constitution, Article 2, Section 5, which the Missouri Supreme Court did not accept. Instead, the Court found the ordinance to be one of general applicability. "The freedom of religion is not abridged by prohibiting acts or practices inconsistent with the peace, good order or safety of the State."²⁹²

In 1922, the Oklahoma Court of Criminal Appeals had great fun with the *McMasters* case, a Spiritualist extravaganza out of Oklahoma City. In the early 1920s, Mrs. L. D. McMasters was plying her trade as a trance medium when the county attorney's office detailed its employee Bessie Jones to visit her and ask for a spiritualistic reading. Miss Jones duly paid Mrs. McMasters the sum of one dollar for insights from "the departed spirit of Minnehaha" such as:

[t]hat I wasn't working at the present time, but that I was going to have a job offered me right away, a good job, and that I would take it; and then she said I was going to take a trip right away. And she said I was going to meet a blond fellow—a blond-headed fellow—and also a black-headed fellow, and that this blond-headed fellow would come between me and the black-headed fellow, and that I was going to marry a wealthy man—²⁹³

289. *City of St. Louis v. Hellscher*, 242 S.W. 652 (Mo. 1922).

290. *Id.* at 652–53.

291. *Id.* at 652.

292. *Id.* at 653.

293. *McMasters v. State*, 207 P. 566, 567 (Okla. Crim. App. 1922).

The Oklahoma statute used the same kind of wording as many other state laws in prohibiting the “pretending or professing” of telling of fortunes by any means through “any subtle craft, means or device whatsoever” through any type of crafty science, and forbade both the charging of a fee and the acceptance of donations.

McMasters also asked Jones to distribute some business cards advertising her services.²⁹⁴ The trial court convicted McMasters and gave her the minimum sentence; she appealed, alleging an infringement of her First Amendment rights, since a necessary part of her firmly held Spiritualist beliefs included communication with the dead.²⁹⁵

While the court acknowledged the professionalism and persuasiveness of the appellate brief presented on McMasters’s behalf, it pointed out first that it had great difficulty in deciding whether Spiritualism was indeed a religion. As we have seen, this question was a crucial one for the courts, and the *McMasters* case is one of the first in which we see a court acknowledging that the issue must be confronted, instead of simply dismissed as irrelevant.²⁹⁶

The *McMasters* court obviously struggled with the problem, and could come to no clear conclusion. But this belief system raised the Court’s suspicions, particularly because of its failure to conform to traditional norms of religion. “This association prescribes no confession of religious faith; no rules of conduct, directing what its member shall do or refrain from doing, except as before stated.”²⁹⁷

The *McMasters* court was particularly incredulous that making predictions concerning one’s love life could have anything whatsoever to do with religion.

Even if the purposes of this organization are religious in their nature, it is difficult to see how the practice of giving “readings” or telling fortunes concerning the mating inclinations of men and women could be religious, in any sense. This medium, while in a

294. *Id.*

295. *Id.* at 567–68.

296. *Id.* at 568 (“Since both the federal and state Constitutions forbid the abridging of the freedom of conscience and religious liberty, we are confronted with a question whether, as a matter of law, the beliefs and practices of Spiritualism, as shown by this record, constitute a religion within the meaning of the federal and state Constitutions; and whether, if it is a religion, the practice of communicating with departed spirits through a spiritualist medium is within the purview and protection of the Constitution.”).

297. *Id.*

trance and assuming to speak for Minnehaha, told Bessie Jones, whom she supposed to be a lovelorn girl, that she would soon meet an attractive blond boy, and that later a brunette would supplant him in her affections; that she would soon go on a long journey; that she would eventually marry a man of wealth, etc. All of which sounds very secular to this court. It seems very like a Gypsy fortune teller, or the reading of the palm by some wrinkled old hag, or the interpretations of a crystal gazer in a freak side show. Doubtless it was this species of hypocrisy and legerdemain that this statute was intended to suppress. An innocent practice or entertainment, whether of a religious nature or not, may be regulated or suppressed where the tendencies and temptations to pervert it into evil channels is manifest, and where the evil is likely to overbalance the good. Fantastic philosophers and religious zealots, like other people, must conform to wholesome police regulations.²⁹⁸

The court's concern with peace and good order ("an innocent practice or entertainment . . . may be regulated and suppressed where the tendencies and temptations to pervert into evil channels is manifest . . .") takes a very paternalistic position.

"Further, the medium's 'control' was Minnehaha, who 'never existed in the flesh; hence a continuity of her spirit cannot exist in the spirit world.'"²⁹⁹ The court was careful not to dismiss or belittle the belief in Spiritualism altogether, but it could not resist a few playful jabs.

[T]here have been and are now many persons of extraordinarily high mentality and intelligence who implicitly believe that communication can be had with departed spirits through a spiritualist medium. One of the most prominent adherents of this faith, A. Conan Doyle (who should not be confused with Thomas H. Doyle, presiding judge of this court), claims that departed souls are enveloped with a kind of external body, capable of being photographed, and that such photographs are in existence; also, that he has the physical writing of a letter written by a spirit friend. Maybe so—but, like Bessie, the stool pigeon, we are somewhat skeptical.³⁰⁰

298. *Id.* at 569.

299. *Id.*

300. *Id.*

In his concurrence, Judge Matson made reference to the interest that legislators and scientists had in investigating possible links between the paranormal and the scientific world, although to some extent he too took the opportunity to make light of the situation. In part, he commented on the “medium of communication,” which, as we have already seen, was a popular analogy reaching back several decades.³⁰¹ He did set aside the humor to consider the important constitutional issues under the First Amendment and Commerce Clause.

Can the state constitutionally prohibit communication with the spirit world, with which, so far as I am advised, we are at peace? If it cannot, can it, under the Fourteenth Amendment, deny the mediums of such communication a reasonable compensation for the services rendered? These queries appear to me to be pertinent in the instant case. However, assuming that the statute in question is not in contravention of the commerce clause of the federal Constitution, and that the state has power to regulate, I concur, because the medium in question had never filed her schedule of rates with the State Corporation Commission.³⁰²

6. *Attitudes Soften: Pennsylvania, Ohio, New York*

By the late 1920s, the state courts were hearing more and more appeals from Spiritualists pleading free exercise and challenging restrictions on crafty science practices, and some courts were at least listening to these claims seriously. Thus, we have evidence that courts, if not legislatures, were beginning to think more substantively about the threshold questions: if the practice itself is a part of the religion, but the practice itself is labeled fraudulent, how can the practitioner ever escape the discriminatory label? If the practice itself is likely to be fraudulent, but the law permits it, how can the prosecutor and legislature protect the public from its ill effects? How can society balance these two important

301. “Verily, the spirit of regulation is abroad in the land. For some time most of the states have been regulating the mediums of communication between human beings such as the telephone and telegraph. Now this state proposes to regulate the mediums of communication with the spirit world. . . .” *Id.* at 569 (Matson, J., concurring).

302. *Id.* On the history of the notion of the link between the telegraph and the afterlife, see Richard J. Noakes, *Telegraphy is an Occult Art: Cromwell Fleetwood Varley and the Diffusion of Electricity to the Other World*, 32 BRIT. J. HIST. SCI. 421 (1999); see generally Werner Sollors, *Dr. Benjamin Franklin’s Celestial Telegraph, Or Indian Blessings to Gas-Lit American Drawing Rooms*, 35 AM. Q. 459 (1983); see also TAVES, *supra* note 56, at 172–73.

concerns? Two 1927 cases, one decided in Pennsylvania and the other in Ohio, illustrate the difficulty.

In the 1927 Pennsylvania case of *Commonwealth v. Blair*, the prosecution charged the defendant, a Spiritualist and religious healer, under an 1861 statute that prohibited individuals “for gain or lucre [to] pretend to effect certain purposes by spells, charms, necromancy and incantations.”³⁰³ A police officer and a reporter visited Blair, and the police officer presented himself as in need of healing. The defendant used ordinary table salt as a medicament and when asked, said he would accept as payment whatever the pair wanted to leave him.³⁰⁴ The reporter represented that he had stomach pains, and the defendant apparently used a Bible or similar tome and read from it in a low tone.³⁰⁵ His use of salt, his mutterings, and prayer seemed to be his usual method of healing.³⁰⁶ The court noted that the prosecution had failed to demonstrate that “the defendant pretended to heal by another of the means laid in the indictment.”³⁰⁷ The defendant’s advice might have been inconsequential, or foolish, and a customer might have been silly to take it, but it did not amount to a violation of the statute.³⁰⁸ Further, noted the court, “[t]here was no evidence that he used incantations or spells. He did not use any supposedly magical formula or hokus-pokus.”³⁰⁹

The *Blair* court appears to have been particularly concerned with the reason for the prosecution of the defendant, noting that the prosecution presented evidence that Blair was a “religious healer.”³¹⁰ Further, Blair was a Spiritualist, associated with the National Spiritualist Alliance, and authorized to “act as a healer.”³¹¹ Once the prosecution failed to provide evidence to support the charge of “pretend[ing] to effect certain purposes by spells, charms, necromancy and incantations,” the court turned its attention to whether the prosecution, through its reading of the statute or the statute itself, were in effect attempting to criminalize

303. *Commonwealth v. Blair*, 92 Pa. Super. 169, 170 (1927).

304. *Id.*

305. *Id.*

306. *Id.* Of course, he may have been muttering in order to avoid the possibility that the client could testify against him later.

307. *Id.* at 171.

308. *Id.* at 171–72.

309. *Id.* at 171.

310. *Id.*

311. *Id.*

legitimate religious practices. It noted that the defendant “assumed the usual attitude of prayer and very evidently was under the impression that he had (or at least pretended that he had) power to heal given to him from a higher source.”³¹² Such a practice was one that other religious practitioners certainly used, and used without interference from the authorities.³¹³ As the court admitted, it could not see into his heart.³¹⁴ It acknowledged that many individuals accept faith healing as legitimate, and willingly donate money to faith healers. “It was not to restrain such religious organizations from putting in practice their beliefs in this regard that the act of assembly under which the defendant was indicted was passed.”³¹⁵

That the *Blair* court was willing to consider a First Amendment defense, and accept some testimony that the defendant may have sincerely held his beliefs, did not mean, of course, that all state courts would do so. Juries still inquired into the sincerity of a defendant’s belief, just as they considered whether the defendant had any other defense to offer, assuming the statute allowed any defense at all.³¹⁶ Thus, if the government accused a Spiritualist of violating a crafty science statute, and she offered a “sincere belief” defense, as did the Reverend Blair, she needed to demonstrate both the sincerely held nature of her belief and the necessity for the prohibited practice as part of the religion, in order to defeat the government’s claim that generally applicable laws should take precedence over religious practices that would otherwise lead to disorder. Further, courts might still continue to ridicule the nature of the belief itself and dismiss the religious practices

312. *Id.*

313. See Stephen Pullum, *Foul Demons, Come Out!: The Rhetoric of Twentieth Century American Faith Healing* (1999) (on the popularity of faith healers in evangelical religion).

314. *Blair*, 92 Pa. Super. at 172.

315. *Id.* at 170–72. The other point that the court did not consider, but that could and did derail a Spiritualist’s defense, was the issue of telling fortunes for a fee. The defendant Blair did it—the Pennsylvania statute forbade “effect[ing] certain purposes by spells, charms, necromancy and incantations” by “gain or lucre.” However, having found that the prosecution had failed to make out the elements of the crime, and having determined that “anyone” has “the right to believe and assert that prayer will heal the sick,” the court did not address the issue of telling fortunes for a fee.

316. Not until 1944 would the U.S. Supreme Court declare an inquiry into the truth of belief itself off limits.

out of hand, relying on decades of precedent. The appellate court in *Davis v. Ohio*³¹⁷ took precisely this approach.

In the 1927 *Davis* case, decided the same year as *Blair*, a Spiritualist charged with violating a state statute against fortune-telling without a license objected on the ground that nowhere in the Ohio General Code had the Legislature provided for such licensing.³¹⁸ Her point was obviously that the state had made it impossible for sincere Spiritualists to comply with the statute, even though fortune-telling itself was theoretically legal.³¹⁹ The court rejected this argument, saying that the failure of the legislature to address the situation, by providing for a licensing scheme, simply meant that the legislature had eliminated the possibility of discrimination against anyone.³²⁰

One must admire the unsympathetic ingenuity of the *Davis* court. As it rightly points out, the statute places no one in an inferior position with regard to the rule's application. No one can comply with the

317. *Davis v. Ohio*, 159 N.E. 575, 578 (Ohio Ct. App. 1927).

318. *Id.* at 575–76.

319. *Id.* Today, an applicable Louisiana statute permits local jurisdictions to further restrict and/or regulate certain practices, including crafty sciences practices, giving these jurisdictions more police power in these areas. Under Louisiana law, “The governing authorities of the several parishes, the city of New Orleans and all municipalities excepted, may regulate and restrict, and impose a privilege tax on, all circuses, carnivals, shows, theaters, pool and billiard tables, bowling alleys, concerts, fortune tellers, cane or knife racks, gift enterprises, museums, menageries, flying jennies, pistol or shooting galleries, ten pin alleys (without regard to the number of pins used), skating rinks, roller coasters, ferris wheels, bungee jumping devices, other amusement rides and attractions, and other things of like character.” LA. R.S. 4:7 (2012). Because the statute does not include the word “ban,” Louisiana jurisdictions cannot ban these practices, but they can certainly license and tax them. *See Adams v. City of Alexandria*, 878 F. Supp. 2d 685, 687 (holding that banning of crafty sciences practices is prohibited).

320. “[T]hat there is no law or authority for the granting of license affects not the situation, for the absence of such a law or regulation eliminates the question of discrimination, and, when there is no such authority, certainly the party complaining comes within the provisions of the statute, because she has not been legally licensed, and this becomes a situation regardless of the existence or nonexistence of the law or the authority. In neither situation has the plaintiff in error been prejudiced, because in each the provisions of the statute apply to her, as she is one ‘not having been legally licensed.’ Therefore we see nothing arbitrary or unreasonable in the provisions of the statute, and the authorities are overwhelming that, where the constitutionality of the law is involved, every possible presumption in favor of its validity will be indulged, which presumption continues until the contrary is shown beyond a reasonable doubt.” *Davis*, 159 N.E. at 576.

requirement. Therefore, no one can claim discrimination. As for the defendant, she was certainly in violation since she had no license.³²¹

In order to illuminate the statute's purpose, the *Davis* court turned to legislative history, investigating the Vagrancy Act of 1824, which it incorrectly refers to as the English vagrancy bill. It notes the historical condemnation of crafty sciences practices because of the assumption that the practices are fraudulent, finding in such condemnation the justification for the legislature's action. The statute is clearly a consumer protection device.³²²

The court further gave almost no weight to Gertrude Davis' Free Exercise Claim, reasoning that "[o]ne's occupation or vocation does not destroy the applicability or effect of the statute and there is no exemption in favor of any person by reason of vocation, profession or otherwise."³²³ The Legislature's purpose was to prohibit fortune-telling, and absent overt and overwhelming evidence of what it considered an unconstitutionality, the court refused to declare the law invalid.³²⁴ The

321. *Id.* In *People v. Rosenberg*, the defendant was arrested for telling fortunes for a fee—even though the witness, an undercover policewoman, had signed a statement acknowledging that she understood the fortune telling was “for entertainment only,” and signs in the tearoom where the defendant worked also indicated that the fortune telling was “for entertainment only.” The court brushed aside both the defense of the willing participant and of performance of the act “for entertainment,” holding that the intent of the statute is to protect the consumer. *People ex rel. Emuru v. Rosenberg*, 159 N.Y.S.2d 912, 914–15 (Mag. Ct. 1957). See also *Pellman v. Valentine*, 57 N.Y.S.2d 617 (Sup. Ct. 1945) (suggesting that the objection is not to the defendant's act but to the defendant's possible motives). For more discussion of the defense of the willing participant and fortune telling for a fee, see *Corcos, Seeing It Coming, supra* note 248.

322. “Such practices have been condemned universally because they result in the perpetration of fraud, which always results in either private or public injury. Fortune telling means engaging in the practice of foretelling events, of prophesying the future, and it is an axiom of common knowledge that in practical affairs coming events cannot be foretold, even though ‘they cast their shadows before.’ Hence the wisdom of the Legislature in passing laws of this nature to protect the unwary and to prevent the poisoning of a stream that might course through the channels of the body politic. There is nothing arbitrary and unreasonable in such provisions, but, on the contrary, they are indisputably preservative of public morals and safety, and are necessary to the well-being of society.” *Davis*, 159 N.E. at 576.

323. *Id.* at 577.

324. *Id.* (“[T]hat there is no law or authority for the granting of license affects not the situation, for the absence of such a law or regulation eliminates the question of discrimination, and, when there is no such authority, certainly the party complaining comes within the provisions of the statute, because she has not been legally licensed, and this becomes a situation regardless of the existence or nonexistence of the law or the

Ohio Supreme Court focused more closely on the question of the legislature's failure to provide the appropriate apparatus for those who wished to follow the letter of the law and obtain licenses. It affirmed the lower court's decision, opining that since the Legislature had not provided for licensing, it clearly had not decided (not or least not yet) to grace fortune-telling with the title of legitimate business.³²⁵ The Supreme Court noted that the standard of review for the state's exercise of its police power is markedly lower than for a statute, which impinges on a fundamental right.³²⁶ The Court also took pains to note, quoting the trial judge's jury instructions, that the case was not one of religious freedom, but of one involving an interpretation of a law of general applicability.³²⁷

authority. In neither situation has the plaintiff in error been prejudiced, because in each the provisions of the statute apply to her, as she is one 'not having been legally licensed.' Therefore we see nothing arbitrary or unreasonable in the provisions of the statute, and the authorities are overwhelming that, where the constitutionality of the law is involved, every possible presumption in favor of its validity will be indulged, which presumption continues until the contrary is shown beyond a reasonable doubt." In 1998 U.S. District Judge Peter Economus explicitly disavowed the *Davis* court's reasoning, finding an administrative rule invalid under the First Amendment of the U.S. Constitution. See *Angeline v. Mahoning Cty. Agric. Soc'y*, 993 F. Supp. 627 (N.D. Ohio, E.D., 1998). In doing so, he followed the decision of an Ohio judge in an earlier case, *Stergo v. Highland Heights*, that "*Davis v. State* does not stand today as a controlling authority that fortune telling is inherently a fraudulent occupation. The unspoken premise of the Rule in the case at bar, that fortunetelling, phrenology, horoscope and the other practices prohibited by the Rule are inherently fraudulent, is not supported by any 'factual record' or factual statement." *Angeline*, 993 F. Supp. at 633. Here, again, the approach of legislators in Ohio, in Louisiana, and in other jurisdictions—that the state should adopt a patriarchal role by passing laws to protect residents from the "crafty sciences" because they are "inherently fraudulent occupations"—no longer receives a free pass from the courts. Instead, federal judges will submit such content-based legislation to the kind of scrutiny that other legislation potentially violating the First Amendment also receives.

325. *Id.*

326. *Davis*, 160 N.E. at 474.

327. "I charge you as a matter of law that this is not a case between any person . . . and the Spiritualist Church, or any message bearer, or any spirit medium or psychometric reader as such. It is simply a case prosecuted by the state of Ohio against the individual, Gertrude Davis; and I say to you further, as a matter of law, if it be determined by you that defendant is a minister of an organized Spiritualist Church, the Asti-Universal Church, Spiritualist, so-called by name, or a message bearer, or what not, that would not justify her to hold herself out or represent herself to be a fortune-teller, or break the provision of the statute of the state of Ohio in that respect or upon that subject. She would have no greater right as a spiritualist or as a message bearer to tell fortunes contrary to the statute than the members of any other religious or secular group or system of religion or denominational religion." *Id.* at 475.

In *Davis*, the Ohio Supreme Court cited extensively to case law and statutes in other common law jurisdictions, significantly Canada and Great Britain, apparently to demonstrate that not only had it grounded its decision in legal authority, but also that courts in other jurisdictions agreed.³²⁸ Thus, it has the accumulation of judicial authority from other jurisdictions behind it.³²⁹

In 1932, a New York district attorney brought charges against bookseller Francis Hill for the sale of a tome on astrology in conjunction with the telling of fortunes by his associate, in contravention of Section 899 of the New York Code of Criminal Procedure. The trial court convicted both, but the appellate court reversed Hill's conviction on the grounds that the mere sale of a book did not make him

“a principal as defined by *section 2 of the Penal Law*, as he was not charged with a crime. Gaynor, J, in *People v. O'Neill*. . . says that a finding that one is a disorderly person is one of these lesser things which do not amount to a crime but is only a condition.”³³⁰

In 1939, then New York County District Attorney and future Presidential candidate Thomas E. Dewey used Section 899 to bring charges of fortune-telling against one Joseph Leonard Plaskett, a practicing Spiritualist.³³¹ What made the *Plaskett* case different from

328. See also *Williams v. Jenkins*, 83 S.E.2d 614, 616 (Ga. 1954).

329. *Davis*, 159 N.E. at 577. Similarly, in 1946, a Delaware fortune teller named Madeline Ross attempted to claim that fortune telling was not a crime at common law, and that the statute under which she was charged did not therefore apply. The court, naturally enough, disagreed with her argument, saying that, even if the act had not been a crime at common law, “the Legislature creates a criminal offense when it prescribes a punishment by fine or imprisonment for the performance of an act.” *Delaware v. Ross*, 50 A.2d 410, 411 (Del. Ct. Gen. Sess. 1946). See also *Turner v. Kansas City (Mo.)*, 191 S.W. 2d 612 (Mo. 1945) (affirming a lower court decision upholding a city ordinance banning fortune telling). The *Ross* court suggests that its statute finds its origins in the Witchcraft Act of 1736: “We should, perhaps, call attention to the Act of 9 Geo. 2, Ch. 5, which apparently was the basis of our statute. See 2 *Russell on Crimes* 316.” *Ross*, 50 A.2d at 411. I respectfully disagree with the court. The more likely origin is the 1824 English Vagrancy Act, and more particularly section 4. “The Vagrancy Act, 1824, s. 4, makes punishable as a rogue and vagabond every person professing to tell fortunes ‘to deceive or impose upon any persons.’” 2 *RUSSELL ON CRIME* 1193 (1964) (footnotes omitted). Similarly, in 1931, a Birmingham fortune teller challenged the power of the city of Birmingham to prohibit fortune telling, alleging that such a prohibition was in violation of the Alabama Constitution. The Alabama Supreme Court upheld the city's ordinance. *Mitchell v. Birmingham*, 133 So. 13 (Ala. 1931).

330. *People v. Sterling*, 255 N.Y.S. 626, 627 (Sp. Sess. 1932).

331. *People v. Plaskett*, 13 N.Y.S.2d 682 (Sp. Sess. 1939).

other Spiritualist “crafty science” cases was that the Legislature had in 1914 amended the section to include an exemption for Spiritualists that seemed to allow what would have ordinarily looked like the prohibited practice.³³² The new section read, “[T]his subdivision shall not be construed to interfere with the belief, practices or usages of an incorporated ecclesiastical governing body or the duly licensed teachers or ministers thereof acting in good faith and without personal fee.”³³³

Plaskett presented as evidence of his church’s beliefs the Hymnal of the General Assembly of Spiritualists,³³⁴ which represented that prophecy and other mediumistic practices were normal parts of Spiritualist life. The court, however, failed to see the connection between “prophecy, clairvoyance, clairaudience, trance and other forms of mediumship,”³³⁵ and the exemption provided for in the statute.³³⁶ The witnesses whom Plaskett called on his behalf were less than effective in presenting a case for the link between the “good faith” of these practices in Spiritualist beliefs and the exemption requested. Further, the court sought, but failed to find, evidence of what the General Assembly of Spiritualists emphasized in its Hymnal regarding “a policy of *sharp distinction* between honest mediumship and tricky imitations . . . keeping a *clear line of distinction* between mediumship and *fortune telling*.”³³⁷ The defendant’s own witness, when asked to evaluate an account of Plaskett’s spiritual reading for a complaining witness, said, “I’d say it was against our principles, yes.”³³⁸ Had Plaskett been a more attractive, more honest defendant, the court might well have accepted a Free Exercise defense, but Plaskett might not have needed such a defense

332. *Id.* See N.Y. RELIG. CORP. LAW § 262 passim (Consol. 1918); see also *People ex rel. Mirsberger v. Miller*, 46 N.Y.S.2d 206 (Mag. Ct. 1943) (the first New York case in which a judge accepted the defense).

333. *Plaskett*, 13 N.Y.S.2d at 683.

334. The General Assembly of Spiritualists was established in 1897 in New York. It held its first convention in 1915. It represented (and still represents) Spiritualist believers in a number of U. S. states and in Canada. See generally THE GENERAL ASSEMBLY OF SPIRITUALISTS, <http://generalassemblyofspiritualists.com/index.htm> (last visited Apr. 7, 2017).

335. *Plaskett*, 13 N.Y.S.2d at 685.

336. See N.Y. RELIG. CORP. LAW §272; *Plaskett*, 13 N.Y.S.2d at 685 (“Article 13 of the Religious Corporations Law, which permits those exercising the right of worshipping as Spiritualists as a religion the right to incorporate . . . does not give any license to pretend to tell fortunes.”).

337. *Plaskett*, 13 N.Y.S.2d at 685.

338. *Id.* at 684–85.

given the exemption that the New York Legislature provided. The statute's wording was sufficiently loose to allow a trial judge to interpret "practice or usages" to mean, in particular, divination or trance, *if not done for a personal fee*.

In 1942, a practicing Spiritualist named Brossard claimed the protection of subdivision 3 of section 899 and Article 1, Section 3 of the New York State Constitution against a charge of fortune-telling. Two witnesses, one a female police officer, gave evidence that the defendant had given "readings," and made statements to the effect that someone would die "in an unnatural way," that the female police officer would remarry, and that this marriage "would be happier than the first."³³⁹ The defendant also stated that the female officer would sell her house in September, and "predicted the terms of the sale as well as predict[ed] that she was going to buy the smaller of the two cards she was looking at."³⁴⁰

The defendant admitted that telling fortunes was not part of her religious practice, but denied that she made the statements.³⁴¹ Further, she insisted that any money the complaining witnesses had given her had been turned over to the Spiritualist Church. On both issues, the court believed the witnesses who contradicted her. The court emphasized that the issue was not whether fortune telling was a legitimate practice of the Spiritualist Church, since the defendant agreed that it was not, but whether she had in fact done what she was accused of, and it affirmed her conviction.³⁴² In support of its reasoning, the court reiterated the

339. *People v. Brossard*, 33 N.Y.S.2d 369, 371 (Erie County Ct. 1942).

340. *Id.*

341. *Id.*

342. "If the defendant in truth and in fact made the above statements, she was pretending to tell fortunes. By her own admissions, the prediction of such events is not part of the tenets of her religion. She, however, denies that she made such predictions of statements. A question of fact was to be decided, and is now before this Court. . . . There is nothing in the record to indicate that the witnesses for the people are not credible witnesses and that their testimony is not believable. On the other hand, the defendant . . . in answer to the question as to what had happened to the money given her by the witnesses for the people said, 'It has been turned over to the church,' . . . However, her pastor . . . when examined . . . claimed that the last money she received from the defendant was in the month of March, and that she had received no money during April, and that the defendant was 'mixed up' . . . when she claimed she had turned it over to the church; that the practice of the church was that they (the assistant pastors) did not turn the money received over to the church until the following month. This contradiction of the testimony of the defendant can be and properly was considered by the trial court on the

traditional good government and public order analysis so familiar in cases of this kind.

It is the duty of every Court to guard jealously the great right and privilege of free exercise and enjoyment of religious profession and worship without discrimination or preference, with all the power that the Court possesses, but no person should be permitted to use that right as a cloak for acts of licentiousness or as a justification of practices inconsistent with the peace or safety of the state.³⁴³

Until 1944, most courts had taken the position that if a particular practice was not required by a religion, and if it was also a violation of the applicable state law, then the courts would not recognize a First Amendment defense. This position was entirely consistent with the line they had taken all along, and did not appear to be aimed particularly at Spiritualists, even though Spiritualist practitioners would have liked to argue otherwise. Thus, we might characterize the rulings in the *Brossard*, *Haas*, or even the *Davis* case as rulings perfectly within the mainstream of United States jurisprudence, even though the law itself seems inelastic in terms of its ability to accommodate a religion that does not “fit” within the traditional spiritual mold. But to what extent could a ministerial exemption, such as that in the New York statute, stretch to accommodate Spiritualist practitioners? The answer came a year later in the case of *Mirsberger v. Miller*.

VI. A TURNING POINT: *MIRSBERGER V. MILLER*

In the 1943 case of *People on Complaint of Mirsberger v. Miller*, a court finally recognized that the 1929 exemption provided for in the New York penal code covered the Spiritualist “divination” practice to the extent that it protected Spiritualists against a charge of fortune-telling, assuming good faith and compliance with the statute.³⁴⁴ Miller was a practicing Spiritualist who worked as a medium, accepting written questions from the sitters, claiming to communicate with spirits and then transmit their responses to the inquirers.³⁴⁵ The payments from the

question of her credibility....It appears that the defendant was conducting ‘practices inconsistent with the peace or safety of this state,’ in that she was ‘pretending to tell fortunes,’ in violation of Section 899, Subd. 3 of the Code of Criminal Procedure.” *Id.* at 371–72.

343. *Id.* at 372.

344. *People ex rel. Mirsberger v. Miller*, 46 N.Y.S.2d 206 (Mag. Ct. 1943).

345. *Mirsberger*, 46 N.Y.S.2d at 207.

sitters went directly to the church.³⁴⁶ The defendant denied that the messages she received and transmitted were in the nature of prophecies.³⁴⁷ Witnesses testified to her good faith, which was the only issue in dispute.³⁴⁸

The defendant herself seemed only to have raised the defense available under the subdivision 3 exception of Section 899. Magistrate Judge Giaccone,³⁴⁹ however, considered not only the defense Miller asserted under the statutory exemption, but also both the free exercise of religion and presumption of innocence claims available under the United States Constitution, and the freedom of religion provisions available under the New York Constitution.³⁵⁰

Further, in a few succinct paragraphs, he sketched out the reasons for which the Free Exercise Clause exists. Such paragraphs suggest why, within the next two years, the United States Supreme Court would set out the reasons that the United States Constitution forbids blasphemy trials.³⁵¹ Judge Giaccone noted that individuals tend to prefer their own religions over the religions of others, without recognizing that such preferences may easily result in prejudice against other belief systems.³⁵² What Giaccone discerned in the application of the statute to Miller's case was a discriminatory purpose.

346. *Id.*

347. *Id.*

348. *Id.*

349. Francis X. Giaccone was a former assemblyman and assistant district attorney, and he had served as deputy Fire Commissioner of New York City. *See* SALVATORE J. LAGUMINA, *THE HUMBLE AND THE HEROIC: WARTIME ITALIAN AMERICANS* 207 (2006). A Roman Catholic, he died in 1977. *See Obituaries*, N.Y. TIMES (June 18, 1977), at 17.

350. "In addition to the testimony of the witnesses from the witness stand and the concessions made, there are in this case, as there are in all cases, silent witnesses, the force of whose presence is strongly felt. These are the presumptions that are created by statute, the presumption of innocence which surrounds her from the moment the charge is made and does not leave her until the adjudication of the case. There are in her favor the constitutional provisions of the United States as well as of the State of New York which guarantee to her the right of worship and the freedom of religion. She is supported in her trial by the principles and traditions of our democratic form of government, which leave untrammled and untouched the right to the individual to observe her faith according to the dictates of her own conscience." *Mirsberger*, 46 N.Y.S.2d at 207-08.

351. *United States v. Ballard*, 322 U.S. 78, 86-87 (1944).

352. "Men accept their own religion as an act of faith and in that every faith find guidance and comfort. However, they cannot impose their faith as evidence of the truth on outsiders who have similar rights as claims as their own." *Mirsberger*, 46 N.Y.S.2d at 209.

The judge set forth the reasoning that set Mrs. Miller free as clearly as any judge with any sympathy for practitioners of non-mainstream religions could do.³⁵³ What seems to have concerned Judge Giaccone, in the midst of a world war over human rights, was what he identified as the pernicious tendency of those in power—both in the law and in society—to ingrain their own notions of what is right and moral into the legal regime in order to create a system that privileges the majority and disadvantages the minority, that upholds the traditional while discouraging or outlawing the unorthodox.³⁵⁴ Considering the power of the state and weighing it against the relatively lesser power of the defendant (combined with the sanctions facing that defendant), the judge ruled that if it were possible to find any “room . . . for belief” on the part of the defendant, and if a ministerial exception existed in the statute, then the court must rule for the defendant based not only on the wording of the statute and the intent of the legislature, but also “respect for humanity, justice and tolerance generally.”³⁵⁵

The judge then considered the effect of the Religious Corporations Law, which provided for an exception, and thus a defense. He noted that the state had granted the Spiritualist Church a charter, thus formally recognizing it as an official religious body, and recognizing its ministers with all the rights granted to ministers of other religious

353. In addition to whatever sympathy Judge Giaccone might have had for the cause of civil rights because of the wartime backdrop, his Catholic heritage, and the history of discrimination against Catholics in New York might also have played a part. On discrimination against Catholics in New York, see, for example, Ines M. Miyares, *From Exclusionary Covenant to Ethnic Hyperdiversity in Jackson Heights, Queens*, 94 GEOGRAPHICAL REV. 462, 472 (2004).

354. “[T]here is another silent witness in this case which may militate against the defendant. It may be an intruder but it is over forceful. It is prejudice. The defendant is a minister of the Spiritualist church, and in addition thereto she states that she is medium with the faculty of communicating with the spirit of the departed. That is a faculty which is recognized by her church. The community generally is skeptical as to the possession of that faculty on the part of any mortal. Religion, in the generally accepted sense, has surrounded the realm of the dead with an impenetrable wall, and with many taboos, not only because death is so totally final for all human relations but also because it is believed that an attempt to communicate with the dead would lead to madness and would trifle with the Divinity. . . . If the defendant is justified in her faith, such skepticism would amount to prejudice. If it is thrown into the balance of our judgment, prejudice falsifies the scales of justice.” *Mirsberger*, 46 N.Y.S.2d at 209.

355. *Id.* (“It was the intent of the legislature to omit from the effects of the law the beliefs, practices and usages of incorporated ecclesiastical governing bodies or their duly licensed teachers or ministers acting in good faith and without personal fee.”).

denominations.³⁵⁶ While he acknowledged that science had examined Spiritualist claims and had found them wanting, he also accepted as a matter of law that Spiritualism was a religion in the state of New York, that the testimony presented was in conflict, and that the defendant was entitled to the benefit of the doubt.³⁵⁷ He also examined prior case law, including *Brossard* and *Ashley*, as well as *Williams*, an unreported 1929 New York case, and pointed out that to categorize what the defendants in those cases did as “fortune telling” was essentially to eviscerate the ministerial exception. In recognizing Spiritualism as a legitimate religion, said Judge Giaccone, the legislature had taken the crucial step.³⁵⁸ The ministerial exception was the logical corollary.³⁵⁹

Of course if calling the messages transmitted by the medium ministers of the Spiritualist church mere fortune telling, is to place such ministers within the provisions of the law, it will amount to a nullification of the statute. It is the function of the Court to construe the intent of the legislature. The legislature obviously and apparently intended to do what it obviously and apparently says, that is, not to interfere with incorporated ecclesiastical governing bodies or their duly licensed teachers or ministers acting in good faith and without personal fee.³⁶⁰

That courts may inquire into the good faith of the defendant is clear; that they may not inquire into the truth of the beliefs is asserted in the *Supreme Court holding in Ballard*.³⁶¹ Yet, Judge Giaccone came to

356. *Id.* at 208.

357. *Id.* at 210 (“[H]owever, in this State, Spiritualism has been elevated to the dignity of a religion. The court, in weighing the testimony, must recognize that fact. Further, bearing in mind the general principles of such incorporated church, the presumption of innocence, the conflict in the testimony, the good character of the defendant, and all of these considerations generally, the defendant is entitled to the benefit of the doubt.”).

358. *Id.* at 211–12.

359. *Id.* at 211.

360. *Id.* at 212.

361. “. . . Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. . . . It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. . . . If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of

that conclusion a full year before the Supreme Court handed down the *Ballard* decision.

Judge Giaccone's interpretation of the New York City ordinance set the standard, and Judge Strong followed it in *People v. Strong* in March 1944.³⁶² In *Strong*, prosecutors charged another Spiritualist under Section 899 with telling fortunes. The defendant challenged the meaning of the word "pretend," as had the defendant in *People v. Elmer* so many decades earlier. Stated Judge Strong:

[t]he word "pretend" in the statute simply means that the Legislature was skeptical of anyone's ability to foretell future events and used the word in the sense of "make claim". In other words, the person charged with the offense may believe in his or her ability to foretell the future with or without prompting from external sources and yet be guilty of a violation.³⁶³

To an extent, the judge softened the interpretation of the word "pretend,"³⁶⁴ but still accepted the judgment of the Legislature that an individual's ability to foretell the future accurately is unlikely.

The good faith necessary to take advantage of the religious exemption applies not to one's belief in one's ability to divine the future, but in one's belief that the practice of divination is necessary to the true religious practice of one's faith. However, Judge Strong convicted the defendant (no relation) of violating the statute. In 1945, however, the Court of Appeals reversed the conviction, which had been affirmed by an appellate court,³⁶⁵ holding that "the evidence was insufficient to support a finding of guilt beyond a reasonable doubt."³⁶⁶ The facts cited that were insufficient to support the finding included the following: the

disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views." *United States v. Ballard*, 322 U.S. 78, 86–88 (1944) (footnotes omitted).

362. *People ex rel. Grunin v. Strong*, 50 N.Y.S.2d 425 (Mag. Ct. 1944).

363. *Id.* at 426.

364. *See People v. Elmer*, 67 N.W. 550, 551 (Mich. 1896).

365. *People v. Strong*, 53 N.Y.S.2d 941 (Sp. Sess. 1945).

366. *People v. Strong*, 294 N.Y. 930 (1945). That the appellate court so found is fascinating and suggests the beginnings of another trend: the protection of "fortune teller speech" under the First Amendment as early as the 1940s. Once the pendulum had begun to swing, it continued to do so.

complaining witness, a police officer, did not remember if the Lord's prayer was read before the service; the officer could not remember with much specificity the circumstances of a second service; and the police officers called to testify at trial were not experts on Spiritualist practice.

VII. CONCLUSION: AREAS OF CONTENTION: SOME RESOLVED, SOME CONTINUING

In 1944, the United States Supreme Court ruled that the First Amendment protects freedom of religion to the extent that it forbids the government from inquiring into the truth or falsity of religious views.

"[The First Amendment] embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom."³⁶⁷

With the Supreme Court's decision in *Ballard*, Spiritualists had obtained a partial victory with regard to the issue of whether Spiritualism was deemed to be a religion due the same rights as other belief systems under the United States Constitution, just as it had gained in some states.³⁶⁸

Second, with regard to laws of general applicability, the ground had also shifted. If a Spiritualist wanted to challenge a statute or ordinance that infringed upon a free exercise right, such a challenge would be easier. Cases such as *Wolf v. Ohio*, *City of Chicago v. Payne*, and *Commonwealth v. Blair* provided line of cases that demonstrated

367. *United States v. Ballard*, 322 U.S. 78, 86-87 (1944).

368. *See* N.Y. RELIG. CORP. LAW § 262 passim (Consol. 1918).

that state courts were willing to balance some First Amendment claims against laws of general applicability. If the prosecution could not make out a clear case of fraud or deceit, then a Spiritualist's First Amendment defense could—and should—prevail.

Third, because of such precedents, Spiritualists also found First Amendment defenses easier to mount in cases in which Free Exercise claims were at issue. The very reason that Spiritualism should be protected—because its practitioners were in the minority—was also easier to make.

However, even after 1945, Spiritualists and other “crafty science” practitioners still had battles to fight. Because Spiritualists still engaged in practices that legislatures had traditionally classified as deceitful, as well as some that accepted religious groups had engaged in, they continued to face disapproval. In addition, Spiritualists had often engaged in these practices for a fee, and although the money was usually directed to the Spiritualist Churches rather than to the Spiritualist ministers themselves, Spiritualist practitioners still found themselves fending off questions or outright hostility about their beliefs. Many cases raised questions about licensing and about fortune telling for a fee. Courts both then and now have offered little to no insight into what exactly constitutes the difference between religious claims that are exempt from legislative regulation and those that are not. One commentator has observed that the omission of a “religious questions” test does not simply arise from a lack of consensus regarding what the word “religion” actually means. Even when we agree that a set of beliefs constitutes a religion, we may not agree that a particular case presents a religious issue.³⁶⁹

369. “The absence of any test for determining what questions are religious derives only in part from the absence of an agreed meaning of the term ‘religion.’ Even where it is clear that a case involves religion, it is not always clear that the case raises any ‘religious questions.’ A case about the tax status of a church may involve various questions touching on religion, such as the criteria for church membership, the fundraising activities of the church, and whether the church is properly characterized as a religious entity, but not all questions involving religion are understood to be ‘religious questions’ that courts are barred from addressing. If all questions touching on religion were off-limits to judicial inquiry, religious entities and religious actions would be absolutely immune from judicial consideration. Just as the political question doctrine does not bar a court from considering actions described as ‘political,’ so a religious question doctrine cannot bar all consideration of religious practices and beliefs.” Jared A. Goldstein, *Is There a “Religious Question” Doctrine? Judicial Authority To Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 530–31 (Winter 2005); see generally

However, the *Mirsberger* and *Ballard* cases established the principles that the Spiritualists' legal standing should be no less than members of traditionally organized churches, and were thus entitled to claim the protections of the First Amendment. In addition, these cases established the principle (*Mirsberger* under New York law and *Ballard* under federal law) that Spiritualist clergy were entitled to the same protections provided for in ministerial exceptions under laws of general applicability as were clergy of other faiths, assuming they could present appropriate evidence that showed they complied with the requirements. Yet, moving forward, the Spiritualists continued the struggle to obtain both recognition and credibility, as those who adhere to some minority belief systems tend to struggle on today, and as a result of the lingering perception that they practiced fraud and the fact that their practices resemble activities traditionally classified as fraudulent.

Equally, concerns about deception in the séance room and the auditorium continue. The United States legal regime protects the rights of minority religions and minority religious believers more aggressively today than it did in 1848, but concerns continue today as they pertain to the emotional and financial vulnerability of those who follow minority religions, whether or not those concerns are fair. Many legislatures now tend to focus their attempts to protect the public from crafty science practitioners not on banning the practices but on licensing those practitioners, which in turn raises questions concerning whether we can and should evaluate those practitioners' activities.³⁷⁰ Both those who fervently accept Spiritualist tenets and those who honestly question such beliefs continue to investigate the unknown. The Free Speech and Free Exercise Clauses protect them both.

Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645 (2004) (discussing the extent of the "religious question" doctrine with regard to church property disputes).

370. See, e.g., Fremont ordinance, *supra* note 9; *Vermont Town Repeals Ban on Fortune Telling*, FOX NEWS (Sept. 1, 2008), <http://www.foxnews.com/story/0%2C2933%2C414549%2C00.html> (listing a number of jurisdictions that still maintained bans on the practice as of the date of the article).