

The Privilege of Probity: Forgotten Foundations of the Attorney-Client Privilege

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ABSTRACT

In its modern formulation, the attorney-client privilege is justified only insofar as it promotes compliance with law. As the Supreme Court emphasized at the outset of its analysis in Upjohn v. United States, 449 U.S. 383 (1981), the purpose of the privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” The Court repeated this formulation in the course of reducing the burden of proof necessary to establish the crime-fraud exception and suggesting that the exception may apply to future wrongdoing beyond crime or fraud. See Zolin v. United States, 491 U.S. 554 (1989). Many state courts rely on the same justification for the privilege, and a growing number of jurisdictions apply the crime-fraud exception to future wrongdoing beyond crime or fraud. The drift is understandable—if law compliance is the primary justification for the privilege, there is no reason to recognize the privilege when the client intends to resist or defy the law.

In early American cases, however, the privilege was treated as fundamental not just to encouraging law compliance, but to the client’s right to know the law and to make an informed decision about whether or not to comply. Indeed, the privilege was regularly upheld in contexts where the modern crime-fraud exception would preclude its application because the client sought advice with respect to future fraud or other wrongdoing. In expanding the crime-fraud exception and reducing the burden to establish it the Supreme Court and many state courts have simply ignored these early American cases. Courts have instead relied on a tendentious history of the privilege provided by John Henry Wigmore in his famous evidence treatise, first published in 1904. Wigmore, however, was influenced by English precedent that played almost no role in the development of

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the privilege in early American practice. Based on a survey of all attorney-client privilege cases published between 1789 and 1904, this article recovers early American understandings of the privilege and situates them in the context of changing views about the adversary system as well as the growth, authority, and probity of the legal profession at a time when access to law increasingly required access to a legal expert. The article contends that Wigmore's approach to the privilege, and hence the approach of modern courts, is not merely inconsistent with the early American cases, it obscures the tension in a democratic society between promoting law compliance and protecting the right of citizens (rather than elite professional advisers) to decide whether and on what terms to comply with law.

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I. “A DELICATE QUESTION”

The charges were perfectly clear: knavery, chicanery, pettifogging, mendacity, hypocrisy, barratry, elitism, and lawlessness. Popular frustration with the cost, delay, and complexity of litigation in late eighteenth- and early nineteenth-

century America explains some of the charges. But the indictment was not just handed up against the adversary system as an institution. It was handed up against lawyers who, as a professional class, were seen not merely to have profited from these defects in the adversary system, but to have created them. As P.W. Grayson, who had been a lawyer himself but “renounced the detestable calling forever,”¹ lamented:

Gain, I assert, is their animating principle They go on, emptying volume after volume of all their heterogeneous contents, till they become so laden with other men’s thoughts, as scarce to have any of their own. Seldom do their sad eyes look beyond the musty walls of authority, in which their souls are perpetually immured Now, indeed are they ready to execute any prescription of either justice or injustice—to lend themselves to any side—to advocate any doctrine, for they are well provided with the means in venerable print. Eager for employment, they pry into the business of men, with snakish smoothness slip into the secrets of their affairs, discern the ingredients of litigation, and blow them up into strife. *This is, indeed, but laboring in their vocation.*²

By the 1830s, when Grayson’s pamphlet was published, a robust public debate about professional power and role morality had emerged in America.³ Lawyers, William Manning complained in *The Key of Liberty* “have become the most influential and powerful of any order among us. And our laws have become so numerous and intricate that it is impossible for a common man to know what is law and what is not.”⁴ Populist reformers sought not only to substitute legislatively endorsed rules for common law adjudication,⁵ to render judges more democratically accountable,⁶ and to simplify the technical nuances of procedure,⁷ they sought to reduce the power of the bar by eliminating formal restrictions on the practice of law.⁸

1. P.W. Grayson, *Vice Unmasked, An Essay: Being a Consideration of the Influence of Law Upon the Moral Essence of Man, With Other Reflections*, in *THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR* 191, 200 (Perry Miller ed., 1962).

2. *Id.* at 194–95.

3. See MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY 1776–1876* (1976).

4. WILLIAM MANNING, *THE KEY OF LIBERTY* 146 (1799). For these reasons, Manning concluded lawyers were “the most dangerous to liberty and the least to be trusted of any profession whatever.” *Id.* at 141.

5. See generally CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* (1981).

6. See generally Jed Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 *HARV. L. REV.* 1061 (2010).

7. See generally COOK, *supra* note 5; SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD (A.P. Sprague ed., 1884).

8. “In 1800, fourteen of the nineteen states or organized territories prescribed a definite period of preparation for the bar. In 1840, only eleven out of thirty jurisdictions did so.” LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 277 (1973). Several states, including Maine and New Hampshire, went on to “eliminate *all* requirements for admission to the bar, except good moral character,” *id.*, and in 1851 Indiana did so in its state constitution. See JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 250 (1950).

At least as early as Shays Rebellion and Benjamin Austin's 1786 *Observations on the Pernicious Practice of the Law*,⁹ elites in the bar recognized the threat and began to respond. Whig-Federalist lawyers, who saw the courts and common law as necessary checks on democratic excess and lawyers as indispensable defenders of republican virtue (public "sentinels" was Joseph Story's oft repeated term¹⁰), mounted an aggressive public relations campaign. There were no fewer than 150 responses in the Boston press to Austin's incendiary pamphlet,¹¹ many written by lawyers who bristled (and surely trembled a bit) at Austin's assertion that it has "become necessary for the welfare and security of the Commonwealth, that this 'order' of men should be ANNIHILATED."¹² Austin's pamphlet and the responses of the local bar were but opening salvos. Throughout the antebellum period Whig-Federalist lawyers produced a steady stream of pamphlets, bar speeches, lyceum discourses, teaching materials, and law magazine articles—what Perry Miller has described as "a constant barrage of propaganda"—in an effort to rebut the charges made by the likes of Austin and Grayson and to protect the authority and autonomy of the legal profession.¹³

The reformist literature and Whig-Federalist rejoinders can teach us something about what lawyers and non-lawyers thought about professional identity and role morality in the antebellum period.¹⁴ There were no ethics codes, few formal bar associations, and professional standards regulating entry and discipline were enforced almost exclusively through local, informal, and (unfortunately, from the historian's perspective) oral means. Debates about the adversary system therefore provide important evidence of popular and professional images of the practice of

9. Although first published in 1786, Austin's pamphlet was reprinted in new editions as late as 1819. See BENJAMIN AUSTIN, OBSERVATIONS ON THE PERNICIOUS PRACTICE OF THE LAW, AS PUBLISHED OCCASIONALLY IN THE INDEPENDENT CHRONICLE, IN THE YEAR 1786, AND REPUBLISHED AT THE REQUEST OF A NUMBER OF RESPECTABLE CITIZENS: WITH AN ADDRESS NEVER BEFORE PUBLISHED, BY HONESTUS; WITH REMARKS ON THE RIGHTS OF JURY AS JUDGES OF LAW AND EVIDENCE (1819).

10. See, e.g., Joseph Story, Address Before the Members of the Suffolk Bar (September 4, 1821), in THE LEGAL MIND IN AMERICA *supra* note 1, at 71 ("Lawyers are here, emphatically, placed as sentinels upon the outposts of the constitution.")

11. AUSTIN, *supra* note 9, at 29 (noting the difficulty of responding individually to the "multiplicity of opponents that surround me . . . to answer them separately, would be too tedious both for myself and the public"); see also Frederic Grant, Jr., *Benjamin Austin, Jr.'s Struggle with the Lawyers*, 25 BOS. BAR J. 19, 19 (1981). On the relationship between post-revolutionary anti-lawyer sentiment and debtor-creditor suits in Massachusetts, see generally GERARD W. GAWALT, THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760–1840 (1979); ROBERT A. GROSS, IN DEBT TO SHAYS: THE BICENTENNIAL OF AN AGRARIAN REVOLUTION (1993); and DAVID P. SZATMARY, SHAYS' REBELLION: THE BICENTENNIAL OF AN AGRARIAN REVOLUTION (1980).

12. AUSTIN, *supra* note 9, at 5.

13. THE LEGAL MIND IN AMERICA, *supra* note 1 at 41.

14. See generally Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001 (2005) [hereinafter Spaulding (2005)]; Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397 (2003) [hereinafter Spaulding (2003)].

law.¹⁵ At the same time, however, these debates can give the impression that there were no formal, court-enforced standards governing the practice of law.

Nothing could be further from the truth. Late eighteenth- and nineteenth-century case reports reveal that lawyers were not infrequently plaintiffs against former clients in libel suits brought to protect their professional reputation.¹⁶ They were sometimes held in contempt for defiance of court orders and other contumacious behavior.¹⁷ They were “strike[n] from the roll” of attorneys entitled to practice before the courts for professional misconduct.¹⁸ And they were disqualified from appearing in litigation against current and former clients.¹⁹ Taken together, these cases suggest that, notwithstanding the absence of enforceable ethics codes,²⁰ there was indeed a “law of lawyering” in the nineteenth century.

Little attention has been paid to these sources even though, in many respects, they provide the most direct evidence of professional identity and professional norms. Most surprisingly, almost no attention has been paid to the hundreds of early American cases interpreting and applying the attorney client privilege—a rule nineteenth-century lawyers understood to be *fundamental* to the professional role.

15. For earlier studies of the early American legal profession, see generally BLOOMFIELD, *supra* note 3; ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* (1965); and GAWALT, *supra* note 11. Elites openly defended zealous, client-centered advocacy against charges of moral bankruptcy, sometimes even co-opting the public “sentinel” metaphor first used by Joseph Story to demonstrate the profession’s steadfast commitment to moral probity and statesmanship. See Spaulding (2003), *supra* note 14, at 1424, n.110 (discussing James Jackson, *Law and Lawyers: Is the Profession of the Advocate Consistent with Perfect Integrity?*, 28 *THE KNICKERBOCKER* 49 (1846)). This casts doubt on the common assumption that the bar adopted an ideology of zealous client-centered representation only after elites began to represent increasingly powerful corporate clients during the massive industrial expansion of the Gilded Age. *Id.*

16. See, e.g., *Riggs v. Denniston*, 3 Johns. Cas. 198 (N.Y. Sup. Ct. 1802).

17. See *State v. Keene*, 11 La. 596, 600–01 (1837) (rejecting counsel’s claim of immunity from contempt for “abusive epithets” made toward judge “out of court” where statements were included in papers filed with the court); *Strother v. State*, 1 Mo. 605, 605 (1826) (fines imposed against attorney for “frequent interruptions of the counsel of the opposite side” and for threatening judge); *People ex rel. Johnson v. Nevins*, 1 Hill 154, 154 (N.Y. Sup. Ct. 1841) (upholding detention of attorney for contempt where attorney refused clerk’s order to pay over money collected from client); *Yates v. Lansing*, 9 Johns. 395, 398 (N.Y. Sup. Ct. 1811) (“Any corrupt practices in subordinate officers of a court are contempts.”); *Wallace v. Scoles*, 6 Ohio 428, 428 (1834) (attorney’s violation of rule of court punishable by contempt).

18. See generally *Attorney: Authority of a Court Over*, 1 J. JURISPRUDENCE 428 (1821); see also *People ex rel. Munford v. Turner*, 1 Cal. 143, 143 (1850); *In re Mills*, 1 Mich. 392, 399–400 (1850). Lawyers were also sued by third parties for abusive litigation tactics. See, e.g., *Mussina v. Clark*, 17 Abb. Pr. 188, 188 (1863) (complaint for \$100,000 in damages against two lawyers for “an alleged conspiracy to delay and defeat the plaintiffs” in a separate suit where the lawyers represented defendants).

19. See, e.g., *Wassell v. Reardon*, 11 Ark. 705, 707 (Ark. 1851); *Valentine v. Stewart*, 15 Cal. 387, 388 (Cal. 1860); *Warren v. Sprague*, 11 Paige Ch. 200, 200–01 (N.Y. Ch. 1844); see also *Solicitors Acting Professionally Against Former Clients*, 16 CENT. L.J. 185, 185 (1883).

20. Individual elite lawyers offered ethical prescriptions—see Hoffman and Sharswood, discussed *infra* note 28, and Spaulding (2003), *supra* note 14—but the first statewide ethics code did not emerge until after the Civil War. See Spaulding (2005), *supra* note 14; Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 472 (1998).

Much like the profession itself, the privilege was both an object of desire and obloquy. It lay at the very core of popular and professional ambivalence about the increasing power of American lawyers during the late eighteenth and nineteenth centuries. Still, we know remarkably little about how the privilege operated in American courts during this period. This is due in no small measure to the influence of John Henry Wigmore's treatise on evidence.²¹ First published in 1904, Wigmore's treatise not only displaced theretofore well known nineteenth-century American treatises, particularly Simon Greenleaf's, its synthesis of privilege doctrine and the pride of place given to English cases obscured important variations in the approach of early American courts. When the early American cases are examined free from interpretive pressure to reflect "correct" reception of evolving English common law doctrine, or the modern "natural limits" of the rule advocated by Wigmore,²² the cases open a fascinating window into ideals and anxieties about lawyers' professional role in the period. They also draw into sharp relief just how far modern courts, relying on Wigmore, have drifted from the approach and justification for the privilege offered by early American courts.

My argument proceeds in three parts. First, in Part II I explain how central the attorney-client privilege was to professional identity and perceptions of professional power in the antebellum period. Wigmore's synthesis and histories of the privilege written after its publication are also briefly examined. I argue that Wigmore's synthesis, especially with respect to the crime-fraud exception and the justification of the privilege, rather badly distorts the run of nineteenth-century American cases, and I show that his error has influenced modern privilege doctrine. The handful of historical studies after Wigmore's treatise was published also fail to consider important early American cases.²³ As in Wigmore's treatise, they emphasize one English case in particular (*Annesley v. Anglesea*) to frame the rule and its most important exception even though almost

21. See 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2297 at 34 (2d ed. 1923). The relevant text of the first and second editions is nearly identical. I cite the second edition to give Wigmore's historical research the most generous treatment—the case references in the notes are more detailed, presumably reflecting his effort to document the argument presented in the first edition.

22. See *id.*

23. There are only a few of histories of the privilege written after Wigmore's treatise, and they suffer from the same distortions. By far the most cited, and the only genuine attempt at a history of the privilege for decades, is Geoffrey Hazard's *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978). See also James A. Gardner, *A Re-Evaluation of the Attorney-Client Privilege (Part I)*, 8 VILL. L. REV. 279 (1963) (relying heavily on WIGMORE, *supra* note 21); Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1927) (relying heavily on WIGMORE, *supra* note 21). On the influence of Wigmore's treatise on the law of evidence, see WILLIAM TWining, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* 111 (1985) ("[O]ne of the difficulties of debating with Wigmore was that, so great was his influence, once he had perpetrated a doctrine on the basis of little or no authority, precedents would soon follow to fill the gap. Great treatise writers are among those who can pull themselves up by their own bootstraps.").

no early American cases cite or discuss that precedent. The overall effect is to suggest either i) that nineteenth-century American courts slavishly but in some instances incompetently sought to track the gradual evolution of English doctrine, or ii) to suggest that early American cases are irrelevant or incoherent except insofar as they demonstrate courts groping toward the rule Wigmore's synthesis provided.

In Part III I explore some of the most important variations in the justification and scope of the privilege in nineteenth-century American cases to demonstrate the preoccupation of early American courts with the reputation and probity of the legal profession, the right of the people in a democratic society to know what the law is, and the risk of lawlessness in protecting the secrecy of attorney-client communication. Courts and lawyers sometimes referred to the tension between fidelity to client and fidelity to the law (which the attorney-client privilege both creates and mediates), as "a question of great *delicacy*."²⁴ A lawyer's disclosure of confidences was, according to the first published American attorney-client privilege case, an "indelicacy."²⁵ Reading these cases outside Wigmore's synthesis draws into relief the delicacy of reconciling clients' interests, the rule of law, and personal and professional integrity. The scope and justification of the privilege remain delicate questions today. But in contrast to modern courts, which increasingly justify the privilege by its ability to promote compliance with law,²⁶ early American courts entertained privilege claims when all concerned would have understood that doing so would sanction the evasion of legal obligations.

Finally, in Part IV I consider the profession's response to extra-judicial calls to abolish the privilege altogether. As with other responses to the populist legal reform movement, lawyers used law magazines and general periodicals to defend the privilege and professional honor against charges of lawlessness, moral bankruptcy, and anti-democratic elitism. The profession's out-of-court responses were particularly strident about the right of clients to know the law and to enjoy zealous representation under the cover of the privilege. Wigmore's approach to the privilege, and hence the approach of modern courts, is not merely inconsistent with the early American cases, it obscures the tension in a democratic society between promoting law compliance and protecting the right of citizens (rather

24. See *Ex parte Maulsby*, 13 Md. 625, 640 (1859) ("It is sometimes a question of great delicacy for counsel to determine between his obligations to the public and his solemn and sworn duty to his client, and in such cases the counsel can seldom form an impartial judgment; and if mistaken, he is not to be harshly or severely dealt with."); *id.* (attorney held in contempt for refusing to produce clients' "notes and single bills" to a grand jury; attorney's habeas petition granted because grand jury was discharged before the attorney, who claimed papers were privileged, had purged his contempt); see also *Illinois v. Barker*, 56 Ill. 299, 302 (1870) ("The position of an attorney [called to testify regarding confidential communications with a client] is a delicate one."); *Vermont v. Truman Squires*, 11 Tyl. 147, 148 (Vt. 1891) (Attorney who refused to produce client's promissory notes for the inspection of a grand jury argued "he felt himself delicately situated between the duties to his client and the government").

25. *Morris's Lessee v. Vanderen*, 1 Dall. 64, 66 (Pa. 1782).

26. See *infra* note 65.

than elite professional advisers) to decide whether and on what terms to comply with law.²⁷

II. FORGOTTEN FOUNDATIONS

A. THE ATTORNEY-CLIENT PRIVILEGE AS A SOURCE OF ANTEBELLUM PROFESSIONAL IDENTITY AND POWER

Timothy Walker, a disciple of Joseph Story who moved west to Ohio in 1830 to set up his law practice, offered the following argument on the importance of the privilege in his inaugural lecture to students enrolled at a law school he helped found at Cincinnati College in 1837:

[T]he employment of the lawyer is pre-eminently one of *trust* and *confidence*. The *law* itself so regards it; for it exempts the lawyer from revealing what his client has confided to him, while it compels a disclosure from even a religious confessor. But what is still more to the purpose, *men* so regard it. The province of a lawyer is to vindicate rights and redress wrongs; and it is a high and holy function. Men come to him in their hours of trouble. Not such trouble as religion can solace, or medicine cure; but the trouble arising from innocence accused, confidence betrayed, reputation slandered, liberty assailed, property invaded, promises broken, domestic relations violated, or life endangered.²⁸

Lest his students suffer from any misimpression that a relationship of confidence should be established exclusively on behalf of the wronged and the innocent, Walker was quick to add that “[t]he guilty and the innocent, the upright and the dishonest, the wronging and the wronged, the knave and the dupe, alike consult him, and with the same unreserved confidence.”²⁹ The practice of law, Walker emphasized, “affords the best possible opportunity for the study of human

27. A brief word on methodology is in order. This article reports the results of a state-by-state survey of all published privilege decisions. However, the reader should bear in mind that the vast majority of published American privilege cases from the late eighteenth and early nineteenth century were appellate level decisions. Initial privilege decisions would have been made at the trial level, and given the interlocutory nature of privilege disputes, it's safe to assume that a great number of those were never appealed. A complete appendix of cases reviewed is on file with the author.

28. Timothy Walker, *Introductory Lecture*, in *THE LEGAL MIND IN AMERICA* *supra* note 1, at 250–51. Both Hoffman and Sharswood's guides on professional ethics recognize the connection between the privilege and professionally competent representation. See David Hoffman, *50 Resolutions on Professional Deportment*, Resolution XXXV, in *COURSE OF LEGAL STUDY* 752–55 (2d ed. 1836) (stating “I shall never voluntarily be called as a witness, in any cause in which I am counsel”; then discussing exceptions); GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* 85–87 (1854) (“A counsel, attorney, or solicitor, will in no case be permitted, even if he should be willing to do so, to divulge any matter which has been communicated to him in professional confidence. This is not his privilege, but the privilege of the client, and none but the client can waive it. It will be found in some . . . cases that though the counsel declined to be engaged for the client, yet the facts communicated were held confidential; the only exception recognized being where a purpose to perpetrate *in futuro* a felony, or an action *malum in se*, was disclosed.” (citations omitted)).

29. Walker, *supra* note 28, at 251.

nature . . . no diary could be more interesting and instructing, than that of an eminent lawyer's experience."³⁰

Of what fearful secrets he has been the depository, when the murderer, the robber, or the incendiary, have been his clients. What a deep insight has he gained into the dark caverns of the human heart, from the plots, conspiracies, and stratagems, which have been laid open to his view . . . It is not given to man to see the human heart completely unveiled before him. But the lawyer perhaps comes more nearly to this, than any other; for there is no aspect in which the character does not present itself, in his secret consultations. All the passions, all the vices, all the virtues, are by turns subjected to his scrutiny . . . But his diary may not be published. His secrets must be buried with him. His honor is pledged never to violate professional confidence.³¹

Walker selects these two propositions (that the privilege defines the attorney-client relationship, and that secrets learned in the course of representing innocent and guilty clients, and forever held in trust, give lawyers singular insight into human nature) to lead off his defense of Blackstone's claim that the law "exerts in its practice the cardinal virtues of the heart."³² These propositions are offered before he turns to the cultivation of eloquence and reputation by skill in courtroom advocacy,³³ before he mentions the path to "civil office" opened by developing a broad law practice,³⁴ and before he borrows from Story to associate lawyers with the "sleepless vigilance" of a "sentinel . . . station[ed] on the watch towers of society" to protect liberty from "licentiousness" and stifle the infinite "augmentation" of power.³⁵ His defense of the privilege is all the more striking given that many jurisdictions did not permit testimony of parties to the case at the time.³⁶ The evidentiary consequences of excluding attorney-client communication were thus considerably more acute than they are now.

For critics of the adversary system and the legal profession, by contrast, the attorney-client privilege was conclusive proof of lawyers' depravity—their willingness to subordinate justice, truth, and integrity to the interests of their clients. James Jackson, an Athens, Georgia lawyer who would later rise to the state's Supreme Court, aptly summarized the critique in an 1846 essay defending the profession in the style of refutation: "Another objection not unfrequently urged against the profession of the advocate is, that he keeps within his own bosom facts which the confidence of his client has entrusted to him, and thus

30. *Id.* at 250–51.

31. *Id.* at 251.

32. *Id.* at 250.

33. *Id.* at 252.

34. *Id.* at 253.

35. *Id.* at 254.

36. See *infra* text accompanying notes 58, 167.

cheats the law out its proper victim.”³⁷ An anonymous contributor to the *American Jurist and Law Magazine* stated this critique directly in an 1837 essay calling for the abolition of the privilege. The common law privilege, the author argued, flatly contradicts the oath of admission passed by the legislature requiring lawyers to swear “*to do no falsehood . . . and that if he know of an intention to commit any he will give knowledge thereof to the justices of the court that it may be prevented.*”³⁸ Professional duty may require fidelity to the client, the author continued, “but is it not fidelity in asserting his *honest* claims?”

Is *more* than this his duty? Fidelity to the court too is required; and . . . it would seem that the duty one owes to the court, as the guardian of the great interests of the public, would be paramount to any duty one could possibly owe to a client seeking to defeat those greater interests—to evade the laws or commit fraud . . . [B]ut from some supposed great principle of public policy the attorney is not merely exempted from, but the court refuse, even if he be willing, to receive his disclosure. *The sworn officer of the court is the only citizen, into whose not reluctant ears, all fraud and crime may be poured with impunity.*³⁹

This essay, to which we will return, was written by Maine lawyer John Appleton, a reformer seeking to import Jeremy Bentham’s famous critique of the English privilege in the *Rationale of Judicial Evidence*, first published in 1827. Bentham (another disgruntled lawyer turned reformer) argued that the privilege benefitted only the guilty, and was categorically indefensible on utilitarian grounds:

But if such confidence, when reposed, is permitted to be violated . . . the consequence will be that no such confidence will be reposed. Not reposed? Well; and if it be not, wherein will consist the mischief? The man by the supposition is guilty; if not, by the supposition there is nothing to betray; let the law adviser say everything he has heard, everything he can have heard from his client, the client cannot have anything to fear from it. That it will too often happen that in the case supposed no confidence will be reposed, is natural

37. James Jackson, *Law and Lawyers, 1846*, in *THE LEGAL MIND IN AMERICA* *supra* note 1, at 282. As *The Southern Review* put it in an 1830 article reviewing Bentham’s *Rationale of Judicial Evidence*, under the protection of the privilege, “*the lawyer and client join to cheat public justice.*” 5 S. REV. 381, 401 (1830) (emphasis added). “A contract between a rogue and his lawyer, to avoid the punishment of roguery, is not such a contract as need be treated with much respect. Is not the mis-prison of a crime, a crime? No wonder the exclusion is defended by the legal profession; it is a fruitful source of causes and fees. The true question is not what it does the interest of the profession, but what does the interest of the public require?” *Id.*; see also AUSTIN, *supra* note 9 (advocating free proof guided by judges taking testimony).

38. *Rules of Evidence No. IX: Attorney and Client*, 17 AM. JURIST AND L. MAG. 304, 305 (1837). The reference to the legislative origins of the oath was intended to signal the author’s disapproval of the common law being read by courts to override democratically enacted legal duties. See *id.* at 319 (“Judge-made law, overruling the statute of the legislature, veils from the public eye all communications for whatever purpose made.”).

39. *Id.* at 306 (emphasis added).

enough . . . What, then, will be the consequence? That a guilty person will not in general be able to derive quite so much assistance from his law advisor, in the way of concerting a false defense, as he may do at present.⁴⁰

P.W. Grayson more bluntly protested that “an honest lawyer, if in strictness, there be such a phenomenon on earth, is . . . a *violent* exception.”⁴¹ Lawyers cannot possibly be honest, Grayson argued, because they hold themselves obliged “to be true to their clients, at whatever cost of principle,” and they solemnly assert that this duty “sufficiently cancels all the claims of morality, and amply atones for every obliquity they may find it convenient to practice.”⁴² Grayson didn’t name the privilege, but he didn’t need to for readers to understand that the privilege licensed lawyers’ “obliquity” by forbidding the disclosure of what the lawyer knows to be true. Worse still, he continued, the profession twists becoming an accomplice to the client’s deception into a point of honor: “To be true and faithful to [the client], through all the stages and colors, lights and shades, of his knavery, and even to thunder long and loud in the arduous defense of his most wicked pretensions, is at once to lay the sure foundation of all their happiest fame, and brightest prosperity too.”⁴³

And yet, once involved in litigation, laypeople not only insisted on the protection of the privilege, they complained bitterly when their own lawyers followed Appleton’s reasoning and placed duty to the court over the client. In *Riggs v. Denniston*, a New York case from 1802, a lawyer sought damages in libel against the publisher of a former client’s accusation that the lawyer had voluntarily disclosed confidences. The article claimed that the lawyer was a “misanthropist” unfit “to intrust the liberties of our fellow citizens with” because he had taken \$50 “as a counselor” from the client, and then proceeded to “offer himself as an evidence against his client, in order to divulge the secrets he received as counselor.”⁴⁴

Debates about the privilege thus distilled popular ambivalence about the power of the legal profession. If the role of these debates and their affect on the scope of

40. 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE: SPECIALLY APPLIED TO ENGLISH PRACTICE* 303–04 (Rothman & Co. 1995) (1827) (emphasis added). On Bentham’s antipathy toward the legal profession, see *infra* note 152.

41. Grayson, *supra* note 1, at 195.

42. *Id.* at 197.

43. *Id.* It is a point of “high professional honor . . . to go all lengths that are possible—snatch all advantages, too, in their crafty endeavors to gain even the most unrighteous ends of their clients.” *Id.*

44. *Riggs v. Denniston*, 3 Johns. Cas. 198, 198–99 (N.Y. Sup. Ct. 1802). The client told his lawyer that he had “concealed himself to avoid being arrested” in a lawsuit brought to collect debts he owed. The client was also upset about other actions by the lawyer in his capacity as a bankruptcy commissioner, including denying the client the protection of the bankruptcy act. See *id.* at 200–01; see also *Illinois v. Barker*, 56 Ill. 299, 301 (1870) (application by former client to disbar attorney for violating attorney-client privilege by offering himself as a witness against client); *Garr v. Selden*, 6 Barb. 416, 416 (N.Y. Gen. Term 1849) (it is actionable to charge an attorney with revealing and disclosing confidential communications made to him by his client).

the privilege has been forgotten it is due in no small degree to the way in which John Henry Wigmore reframed the history of the privilege in his 1904 treatise.

B. “THE PRIVILEGE REMAINS AN ANOMALY” . . . WIGMORE’S REVERSE
INCORPORATION OF BENTHAM

Wigmore’s famous treatise on evidence set out to resolve the following contradiction in the history of the attorney-client privilege. On the one hand the privilege was “unquestioned” as early as the reign of Elizabeth, and is “therefore the oldest of the privileges for confidential communications.”⁴⁵ On the other hand, English courts had produced a “turbid and confused volume of rulings” on the details and practical application of the doctrine running well into the nineteenth century.⁴⁶ Why should a privilege the English courts had recognized time out of mind have been so opaque in its basic doctrinal contours for so long?

Wigmore contends that the underlying problem was ambiguity in the justification of the privilege. The justification shifted from protecting the attorney against the dishonor of disclosing a confidence reposed by the client, to ensuring that the client felt safe to communicate instructions about pending litigation in the eighteenth century, to ensuring that the client felt safe to communicate about legal matters in and out of court in the mid-nineteenth century. He then parses key English cases from the 1700s forward to show that seemingly disparate conclusions about the scope of the privilege can be explained by this ambiguity of justification, especially as courts clung to “the older notion” grounded in professional honor.⁴⁷

But having acknowledged this dissonance, Wigmore promptly diminishes it by endorsing the “modern” theory that clients need to be able to communicate fully and frankly with counsel to exercise their legal rights.⁴⁸ As he puts it: “In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the legal advisors must be removed; and hence the law must prohibit such disclosure except on the client’s consent. Such is the modern theory.”⁴⁹ It is “plainly grounded, since the latter part of the 1770s, on [these] subjective considerations.”⁵⁰ And “all four of the elements” he previously set out “as essential” to the privilege “are here deemed to exist.”⁵¹ Wigmore’s narrative framework is both naturalistic and synthetic. The rule “finds” its proper theory and the theory sets the proper contours of the rule via common law elaboration:

45. 5 WIGMORE, *supra* note 21, § 2290, at 11.

46. *Id.* at § 2290, at 12.

47. *Id.* at § 2290, at 12–13 nn.3–9.

48. *Id.* at § 2291, at 14.

49. *Id.*

50. *Id.*

51. *Id.* The elements are (i) a confidential, (ii) communication, (iii) between attorney and client, (iv) for the purpose of legal advice. *See id.* at 1–2.

“the newer theory met the older one at several points of conflict; and it is no wonder that the development of the new and ousting of the old came to be a process of many decades, and brought a residuum of trouble and confusion into the precedents of the 1800s.”⁵²

Two difficulties remained for Wigmore to address. First, on its face the “modern theory” of inducing full and frank communication by the client does not distinguish between clients whose ends are lawful and clients whose ends are unlawful, nor does it distinguish between clients based on the social or moral worth of their ends. Indeed, if Jeremy Bentham’s critique is correct,⁵³ clients with illicit ends have a greater incentive to claim the benefit of secret communication than the righteous. The modern theory thus risks endorsing a lawyer’s complicity in lawlessness and iniquity.⁵⁴ Second, early American cases reflected a broader approach to the privilege decades before the English cases began to express the modern theory with any consistency. These facts complicate Wigmore’s synthetic history as well as his choice to emphasize English cases in setting out a properly synthesized rule for American lawyers and judges.

On the first point, Wigmore quotes Bentham’s “incisive arguments” against the privilege at length and develops a five point response for civil cases⁵⁵: (i) culpability (legal and moral) is often difficult to ascertain, so it is not as obvious as Bentham assumes that one side or another in any given case must be abusing the legal process by seeking counsel and asserting her rights under the protection of the privilege; (ii) culpability is quite often shared between litigation opponents; (iii) Bentham wrongly assumes that lawyers will not simply decline a reprehensible cause, “persuade the client that the cause is hopeless to support,” or help the client “secure a settlement . . . in which the client’s interests are satisfied to the extent that there is any moral justice in them;”⁵⁶ (iv) lawyers would be demoralized by the “disagreeable inconsistency of being at the same time the solicitor and revealer of the secrets of the cause;”⁵⁷ and (v) “the loss to truth is comparatively small in modern times” because parties to litigation are now permitted to testify in trials at common law (until the mid-nineteenth century parties were deemed incompetent to testify on grounds of interest in the matter).⁵⁸

52. *Id.* at 13–14.

53. *See supra* text accompanying note 40.

54. Wigmore was well aware of the difficulty: “It has not always been kept in mind that the privilege, in its very fundamentals, presupposes what Bentham so drastically censured—the furnishing of legal advice to the culpable client, as well as the worthy one, i.e., to a client who, if the law were duly enforced, would lose in the litigation.” 5 WIGMORE, *supra* note 21, § 2298 at 34.

55. *Id.* at § 2291, at 17.

56. *Id.* at § 2291, at 20.

57. *Id.* at § 2291, at 21. Wigmore adds that “[t]his double-minded attitude would create an unhealthy moral state in the practitioner.” *Id.*

58. *Id.*

With respect to criminal matters, Wigmore argues that the privilege is necessary to protect the defendant's right against self-incrimination, and to prevent the prosecution from "degenerat[ing] into a reliance upon that mode [namely, forced confession] to the neglect of others."⁵⁹ Moreover, guilty clients would simply withhold incriminating statements from counsel, thus leaving the prosecution in no better position to make its case, while compromising the competence and discretion of defense counsel.⁶⁰

But having just set out all of these arguments, and having insisted that "[r]arely indeed has any question been made of the soundness of this privilege,"⁶¹ Wigmore strikingly shifts position and embraces Bentham's critique. He observes that the privilege "remains an anomaly" because it is "an obstacle to the investigation of truth."⁶² It therefore "ought to be *strictly confined within the narrowest possible limits consistent with the logic of its principle*."⁶³ And Wigmore is deadly serious about narrow construction. He argues that the crime-fraud exception should apply whenever the client seeks advice of counsel with respect to *any* future illegal act:

The decisions . . . [reflect] an inclination to mark the line at crime and civil fraud. Yet it is difficult to see how any moral line can properly be drawn at that crude boundary, or how the law can protect a deliberate plan to defy the law and oust another person of his rights, *whatever the precise nature of those rights may be*. The law, in its endeavor to maintain abstract fundamentals, is already sufficiently callous to concrete failures of justice, and needs rather to cultivate greater sensitiveness in such matters.⁶⁴

This is not an argument to abolish the privilege, tout court, but it redefines the rule by its most important exception and it is more expressive of Bentham's overall theory of evidence than the precedent from which Wigmore purported to draw the "modern theory." Modern American courts have increasingly adopted Wigmore's approach and taken his historical analysis at face value.⁶⁵

59. *Id.* at § 2291, at 20.

60. *Id.*

61. *Id.* at § 2291, at 17.

62. *Id.* at § 2291, at 21. The term "anomaly" is drawn from an 1828 English case. *See id.* at § 2291, at 21 n.6 (citing *Broad v. Pitt* (1828), 1 M. & M. 233 (Eng.) ("The privilege is an anomaly, and ought not to be extended.")).

63. *Id.* at § 2291, at 21 (emphasis added).

64. *Id.* at § 2298, at 39 (emphasis added). Wigmore's framing further expanded the crime-fraud exception by making it appear uncontroversial that seeking advice in furtherance of fraud destroyed the privilege. *See* David J. Fried, *Too High A Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 451-53 (1986) (concluding, primarily upon survey of English cases that "the exception applied only to crimes *mala in se* Only one pre-1884 case applied the exception to civil wrongdoing.").

65. Although early twentieth-century cases appear to have treated Wigmore's claims skeptically, modern cases generally begin from Wigmore's premise that privilege claims should be narrowly construed because the privilege operates in derogation of truth and is subject to abuse. A good example of more skeptical early

references to Wigmore is *Emerson v. Western Automobile Indemnity Association*, in which the Kansas Supreme Court expressed doubt about whether Wigmore's theory was grounded in precedent:

Authorities are cited to the effect that privilege may not be urged respecting communications relating to perpetration of fraud. That is true in the case of actual fraud involving moral turpitude. Professor Wigmore is of the opinion the line should not be drawn so closely. He may be correct, *although the weight of authority seems to be otherwise*. 4 Wigmore on Evidence, § 2298, p. 3218. It is difficult to draw any hard and fast line; but there would be little left of the privilege if, in a doubtful case, communications between attorney and client, relating to the best way to protect the client's interests, could be inquired into, although the final conclusion, perhaps on appeal to this court, might be that fraud in law was involved.

182 P. 647, 650 (Kan. 1919) (emphasis added); *see also* *Cummings v. Commonwealth*, 298 S.W. 943, 947 (Ky. 1927).

Modern state and federal courts are divided about many features of the privilege, but there is a clear trend toward liberal application of the crime-fraud exception. Along the lines Wigmore advocated, full and frank communication between attorney and client is to be promoted only insofar as it promotes compliance with law. Even courts that have protected or expanded the traditional scope of the privilege nevertheless begin their analyses from Wigmore's premises about the dangers of broad application of the privilege. The privilege is maintained or expanded in these jurisdictions on the assurance (however fanciful in fact) that doing so will promote law compliance.

Several jurisdictions have expanded the crime-fraud exception to conduct such as torts, other civil wrongs, and litigation misconduct. *See In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982) (the exception applies to communications made in furtherance of a "crime, fraud, or other type of misconduct fundamentally inconsistent with the basic premises of the adversary system"); *Pfizer Inc. v. Lord*, 456 F.2d 545, 550 (8th Cir. 1972); *Chevron U.S.A., Inc. v. United States*, 80 Fed. Cl. 340 (Ct. Cl. 2008) (in breach of contract action, court held that crime-fraud exception could be invoked for wrongdoing other than criminal and fraudulent conduct); *Rambus, Inc. v. Infineon Techs., AG*, 222 F.R.D. 280, 288 (E.D. Va. 2004) ("The term 'crime/fraud exception,' however, is 'a bit of a misnomer,' as many courts have applied the exception to situations falling well outside of the definitions of crime or fraud"; collecting cases) (quoting *Blanchard v. EdgeMark Fin. Corp.*, 192 F.R.D. 233, 241 (N.D. Ill. 2000)); *Cleveland Hair Clinic, Inc. v. Puig*, 968 F. Supp. 1227, 1237 (N.D. Ill. 1996) (bad faith litigation justified application of the crime-fraud exception); *Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Grp., Inc.*, 116 F.R.D. 46, 52–53 (M.D.N.C. 1989) (privilege waived for crime, fraud, and "other misconduct"); *Leybold-Heraeus Techs., Inc. v. Midwest Instrument Co., Inc.*, 118 F.R.D. 609, 615–16 (E.D. Wis. 1987) (conspiracy to monopolize and restrain trade; suit on invalid patent is fraud within the exception); *Horizon of Hope Ministry v. Clark Cnty, Ohio*, 115 F.R.D. 1, 5 (S.D. Ohio 1986) ("Attorney/client communications which are in perpetuation of a tort are not privileged."); *Irving Trust Co. v. Gomez*, 100 F.R.D. 273, 277 (S.D.N.Y. 1983) ("The interests furthered by the privilege—full and frank discussions between an attorney and his client for the purpose of promoting observance of the law are not impinged upon by compelling discovery of communications . . . in furtherance of what is known or reasonably should be known to be unlawful conduct regardless of whether such conduct constitutes fraud or any other intentional tort."); *Diamond v. Stratton*, 95 F.R.D. 503, 505 (S.D.N.Y. 1982) ("To deny the protection of the privilege to communications in aid of fraud while granting it to communications in aid of another intentional tort would draw a too 'crude boundary' as characterized by Wigmore."); *Int'l Tel. & Tel. Corp. v. United Tel. Co. of Fla.*, 60 F.R.D. 177, 180 (M.D. Fla. 1973) ("The privilege may be overcome, not only where fraud or crime is involved, but also where there are other substantial abuses of the attorney-client relationship."). State cases have held similarly. *See Cent. Const. Co. v. Home Indem. Co.*, 794 P.2d 595, 598 (Alaska 1990) ("We do not now, nor have we ever deemed it permissible for a client to use the attorney-client privilege to exclude from discovery 'advice in aid of future wrongdoing.'"); *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 487 (Ky. 1991) (breach of fiduciary duty and tortious interference with performance of contract fall within scope of exception if accomplished by "fraud, deceit, or coercion"); *State ex rel. Humphrey v. Philip Morris Inc.*, No. C1-94-8565, 1998 WL 257214, at *8 (Minn. Dist. Ct. Mar. 7, 1998) (fraud on the public); *Fellerman v. Bradley*, 493 A.2d 1239, 1245 (N.J. 1985) (in the attorney client privilege "context our courts have generally given the term 'fraud' an expansive reading"; exception applies to litigation misconduct); *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 349

The shift from doctrinal synthesis and endorsement of the privilege to normative plea on behalf of narrowing the rule can be explained by the fact that Wigmore, much like Bentham, was “firmly committed to the view that the overriding objective of fact-finding in adjudication is the pursuit of truth as a means of achieving rectitude of decision.”⁶⁶ His commitment to rectitude of decision also explains the distortions in his reading of early American cases. In the first place, the American decisions Wigmore cites are systematically subordinated to the dominant narrative of the development of English doctrine. Where they cohere with English cases there are parallel references. Where they do not, American cases are either ignored or casually dispensed with on speculation.⁶⁷ We are told that “[t]he reasons for this contrast in the American history, and for the easy acceptance of the broader rule with us, may be imagined without much risk of error.”⁶⁸ American courts, Wigmore hypothesizes, were unburdened by the “older theory” of protecting professional honor because the legal profession in America “was in many of our colonies for a long time unrecognized.”⁶⁹ Nor did American lawyers follow the English division of labor between solicitor and barrister according to which a written statement of the facts was made by the client for submission to the barrister. As a result, there may have

(Ohio 1994) (“Documents and other things showing the lack of a good faith effort to settle by a party or the attorneys acting on his or her behalf are wholly unworthy of the protections afforded by any claimed privilege.”); *State v. Doster*, 284 S.E.2d 218, 220 (S.C. 1981) (“the privilege does not extend to communications in furtherance of criminal, tortious or fraudulent conduct.”); *Volcanic Gardens Mgmt. Co. v. Paxson*, 847 S.W.2d 343, 348 (Tex. 1993) (fraud includes “all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another . . . and includes all surprise, trick, cunning dissembling, and any unfair way by which another is cheated”); *Barry v. USAA*, 989 P.2d 1172, 1175–76 (Wash. Ct. App. 1999) (exception to privilege recognized for failure to comply with insurance regulations forbidding “unfair claim settlement practices”); see also Fried, *supra* note 64 at 456–61 (linking the expansion of the crime-fraud exception to late nineteenth-century English precedent).

For cases approving a light burden to establish the crime-fraud exception, see *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1039 (2d Cir. 1984) (“The crime or fraud need not have occurred for the exception to be applicable; it need only have been the objective of the client’s communication. And the fraudulent nature of the objective need not be established definitively; there need only be presented a reasonable basis for believing that the objective was fraudulent.”). For the approval of new, flexible procedures to establish the crime-fraud exception, see generally *United States v. Zolin*, 491 U.S. 554 (1989) (citing and relying on Wigmore); and Fried, *supra* note 64 at 461–70. On the obligation to narrowly construe the privilege, see *Fisher v. United States*, 425 U.S. 391, 403 (1976) (“[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose.”) (citing and relying heavily on Wigmore).

The most prominent example of a court relying on Wigmore’s premises even in expansive treatment of the privilege is of course *Upjohn v. United States*, 449 U.S. 383 (1981) (expanding the privilege to communications between corporate counsel and lower level employees on the theory that it will promote law compliance) (citing and relying on Wigmore).

66. TWINING, *supra* note 23, at 117. See also *id.* at ix (Bentham and Wigmore “share almost identical assumptions about the nature of proof and similar, but not identical, views on the nature and purposes of adjudication”); *id.* at 111–12 (discussing differences).

67. See *infra* Part III.

68. 5 WIGMORE, *supra* note 21, § 2294, at 28.

69. *Id.*

been less incentive to litigate broad assertions of privilege—piercing the privilege would not lead to disclosure of a comprehensive written summary of the client’s case.⁷⁰

Even if these speculations are accurate, they are surely incomplete. Neither addresses deeper contextual differences between American and English attitudes toward the adversary system. To begin with, in the 1820s and 1830s, Bentham’s views were radical and unfamiliar to most American lawyers and judges.⁷¹ Second, early American courts appear to have treated the right to counsel and the privilege protecting it as complementary, if not superior, to rectitude of decision. We know, for instance, that the right to counsel formalized earlier in America than in England.⁷² American courts also relied more heavily than English courts (or the courts of any other country, for that matter) on the uncertainties and biases of jury trial. So their attitudes about appropriate methods of truth-finding and what constituted rectitude of decision would likely have been influenced by a parallel commitment to decentralized rights definition.⁷³ There is also the basic fact that debtor-creditor litigation in the United States provided a powerful incentive for debtors to find ways (sometimes desperate, sometimes quite creative) to conceal assets throughout the nineteenth century.⁷⁴ Indeed, a substantial number of the published American decisions on the attorney-client privilege in the late eighteenth and nineteenth centuries involved attempts, typically by a creditor, to compel testimony of counsel for debtors, usually on a claim that the debtor had sought the advice or assistance of counsel in avoiding liability on debts.⁷⁵ It is therefore quite striking that early American courts endorsed a broader theory of the privilege.

The best history of the privilege written after Wigmore’s treatise is equally

70. *Id.*

71. On the publication history of Bentham’s *Rationale in America* and the relative inattention of American lawyers to his views on evidence, see *infra* Part IV.A.

72. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1205 (2002); see also Brief for Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410); JOHN LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2003); Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323 (2009); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77 (1995).

73. This is not the place for an extended discussion of jury trial, but it is well established that early American juries served purposes other than rectitude of decision—for example, separation of powers, community-based articulation of law, etc. See FRIEDMAN, *supra* note 8, at 65–105.

74. See generally BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* (2002); James A. Henretta, *The “Market” in the Early Republic*, 18 J. EARLY AM. REPUBLIC. 289 (1998); Thomas D. Russell, *The Antebellum Courthouse as Creditors’ Domain: Trial-Court Activity in South Carolina and the Concomitance of Lending and Litigation*, 40 AM. J. LEGAL HIST. 331 (1996); see also EDWARD J. BALLEISEN, *NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA* (The Univ. of North Carolina Press 2001) (1865); TONY A. FREYER, *PRODUCERS VERSUS CAPITALISTS: CONSTITUTIONAL CONFLICT IN ANTEBELLUM AMERICA* (1994); DAVID A. SKEEL JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* (2001); Tony Freyer, *Debt Failure and the Development of American Capitalism: Bruce Mann’s Pro-Debtor Republic*, 30 LAW & SOC. INQUIRY 739 (2005).

75. See *infra* Part III.

indifferent to these early American cases. Geoffrey Hazard correctly finds much more ambiguity in the English precedent than Wigmore did—indeed, his objective is to show, against Wigmore’s synthesis, that there is ambiguity running back into the deep history of the privilege.⁷⁶ But he incorrectly claims there were no published American decisions prior to 1820,⁷⁷ and, much like Wigmore, he reads all the cases with Benthamite skepticism. Most revealingly, Hazard gives a notorious seventeenth-century English case, *Annesley v. Anglesea*, pride of place.⁷⁸ As *Annesley* is repeatedly cited by Wigmore as well⁷⁹—giving the impression that it is the single most significant authority on the subject—a word about the nearly operative facts of the case is in order before turning to the early American cases.

The plaintiff claimed certain lands as the lessee of James Annesley. The defendant, the Earl of Anglesea, claimed title by inheritance from Arthur, Baron of Altham. As the brother of the Baron of Altham, the Earl’s claims appeared unimpeachable. But James Annesley alleged that he was the long lost (and legitimate) son of the Baron of Altham, and that he had been banished from home and hearth by a jealous step-mother, “left penniless to fend for himself in Dublin and London after his father’s death, transported to a remote colony under indenture from which he could not escape for some 13 years, prosecuted (falsely and unsuccessfully) for murder at the instance of his scheming uncle, the defendant, and finally rescued and enabled to assert his rightful claims by the loyal testimony of old nurses and retainers.”⁸⁰

The attorney-client privilege became an issue when the plaintiff offered to show, via John Gifard, counsel for the Earl, that the Earl was responsible for the false prosecution of James Annesley for murder and that the Earl had set the prosecution in motion with the aim of ensuring Annesley’s death by capital punishment in order to prevent him from ever claiming his inheritance from his father’s estate. *Voir dire* established that Mr. Gifard had represented the Earl in a range of matters over twenty years and was asked by the Earl in the spring of 1742 to initiate the false murder prosecution. *Voir dire* further established that the Earl knew Annesley was a legitimate heir and told Gifard he “would give £10,000 to have him hanged.”⁸¹

The court denied any privilege in the conversation between Mr. Gifard and

76. See Hazard, *supra* note 23, at 1070, 1087 n.120.

77. *Id.* at 1087. There are in fact about two dozen, a significant number for a period in which reporters were just emerging. David Drystale’s history in Rice’s modern treatise on the privilege cites many of these cases, but his treatment of them is glancing. See PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 1:12, 38 n.2 (1993).

78. See Hazard, *supra* note 23, at 1073–80, 1087 (discussing *Annesley v. Earl of Anglesea*, (1742) 17 How. St. Tr. 1229 (Ex.)).

79. See 1 WIGMORE, *supra* note 21 at § 273, at 555 n.3, § 278, at 556–67, § 278, at 569 n.3, § 280, at 572 n.1.

80. Hazard, *supra* note 23, at 1074.

81. *Id.*

the Earl and allowed Gifard's testimony on the ground that the communication was not related to representation in any pending litigation, but rather to a "highly criminal" act.⁸² Hazard carefully presents the arguments made by counsel in the case for and against the attorney-client privilege to show "how unformed the rule of privilege was at the time and because the [arguments] anticipate substantially everything that has since been said on the subject."⁸³

It's a fascinating case involving a brazen attempt to use counsel in furtherance of a dastardly crime, and everything Hazard says about the case itself is true. But what neither he nor Wigmore mention in their analysis of *Annesley* is that the case was largely irrelevant to the privilege as it developed in early American courts. By the end of the nineteenth century just thirteen American cases had cited the case for any proposition, and only *seven* on an issue going to the attorney-client privilege. Of those seven, two are from New York, the jurisdiction that most closely followed English precedent and most narrowly construed the privilege; two others contain citations to the case excerpting arguments of appellate counsel, not the court's opinion; two are from states that later spurned *Annesley* in favor of a broader privilege; and the final case is an obscure federal decision in which the attorney actually became an interested party in his client's fraudulent transaction.⁸⁴ This is not to say that early American courts generally ignored English precedent, or that all early American courts took a broad view of the

82. *Id.* at 1078–79.

83. *Id.* at 1075; cf. Fried, *supra* note 64, at 446–50 (discussing *Annesley*).

84. See *infra* Part III.A, for a discussion of the narrowness of New York's approach to the privilege. The two New York cases citing *Annesley* are *Whiting v. Barney*, 30 N.Y. 330, 333 (1864), and *Rochester City Bank v. Suydam, Sage & Co.*, 5 How. Pr. 254, 259 (N.Y. Sup. Ct. 1851). One case from Vermont, *Dixon v. Parmelee*, 2 Vt. 185, 188 (1829), cites it for the proposition that the privilege only applies to communications in pending litigation, but just three years later the Vermont Supreme Court reversed course and held that "the better law" is for the privilege to apply to "any communication to an attorney professionally." *Durkee v. Leland*, 4 Vt. 612, 614–15 (1832). The same thing occurred in Pennsylvania over a longer time horizon. *Annesley* was cited in dictum in an 1800 case where the client expressly waived privilege, allowing his attorney to testify. *Heister v. Davis*, 3 Yeates 4, 6 (Pa. 1800). By 1850, however, the Pennsylvania Supreme Court had shifted to a broader rule. See *Moore v. Bray*, 10 Pa. 519, 524 (1849) ("Though, at one time, a doubt seems to have been entertained, it is now fully established, that it is not essential to the protection of professional communications, that a judicial proceeding should be actually pending, or even contemplated."); *Beeson v. Beeson*, 9 Pa. 279, 301 (1848) ("[I]t is not requisite . . . that there should be . . . a suit pending or in contemplation"). The remaining three nineteenth-century cases citing *Annesley* are a federal decision from 1869 in which the attorney became a party to a fraudulent transaction, buying property from his client and selling it back to his client's wife, *In re Bellis*, 3 F. Cas. 132 (S.D.N.Y. 1869) (compelling testimony of attorney on ground that the communication was not received in a professional capacity), and two cases in which *Annesley* is cited by appellate counsel, not the court: an 1848 Mississippi case in which the court upholds the privilege, *Crisler v. Garland*, 19 Miss. 136, 138 (1848), and an 1878 Illinois case where the court denies any privilege in lay-persons appearing on behalf of parties, *McLaughlin v. Gilmore*, 1 Ill. App. 563, 565 (Ill. App. Ct. 1878). Hazard cites and discusses *Whiting* and *Rochester City Bank*, as well as *Dixon* but he ignores *Durkee* and all the others. Hazard, *supra* note 23, at 1088–90. This gives the incorrect impression that the approach of New York courts was typical in early American privilege cases.

privilege.⁸⁵ Here, as in other areas of common law adjudication, reception was selective, partial, and not infrequently resisted.⁸⁶ But by any measure the reception of *Annesley* was tepid at best.

As the next section shows, a rather broad privilege rule guided law practice and shaped understandings of professional identity in most American jurisdictions over the nineteenth century. From the perspective of American judges and lawyers, their courts were not rendering merely provisional decisions in the hope that English courts would eventually identify the proper rule of decision for them to adopt. Although the cases evince some confusion and ambivalence on points of policy and detail,⁸⁷ that is to be expected given the “delicacy” of the questions the privilege presents. Whatever else may be said about these decisions, American courts were not writing Bentham’s critique into precedent along the lines of Wigmore’s reverse incorporation, nor were they treating the privilege as “an anomaly.”⁸⁸ Hazard’s conclusion that “‘tradition,’ both English *and American* . . . clearly sustained a privilege confined to those communications that are related directly to pending or anticipated litigation,” is simply indefensible.⁸⁹ To understand the actual development of the privilege in America, the early cases require fresh study, and less with an eye to synthesis or reception than to the distinctive concerns that animated American law practice, debtor-creditor relations, and the rising but contested power of American lawyers.

III. EARLY AMERICAN PRIVILEGE DOCTRINE

A. LITIGATION NECESSITY: THE NARROW APPROACH OF NEW YORK

Early New York and Virginia cases reveal the range of approaches taken by American courts.⁹⁰ New York courts rather consistently gave a narrow construction of the attorney-client privilege. The 1802 libel case *Riggs v. Denniston* is the first published New York decision interpreting the privilege. The lawyer, Riggs,

85. If any English case deserves pride of place in the history of the development of American privilege doctrine, it is Lord Brougham’s capacious treatment of the privilege in the 1833 case of *Greenough v. Gaskell*, (1883) 39 Eng. Rep. 618 (Ch.). For prominent English treatises on evidence in the United States, see *infra* note 150.

86. On the general hostility of courts, counsel, and the public to common law reception, see COOK, *supra* note 5; PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* (1965); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* (1975).

87. See, e.g., *Foster v. Hall*, 29 Mass. (12 Pick.) 89 (1831); *Crisler*, 19 Miss. at 139; *Brown v. Payson*, 6 N.H. 443, 448 (1833); *Matthews v. Hoagland*, 48 N.J. Eq. 455, 464–474 (Ch.1891); *March v. Ludlum*, 3 Sand. Ch. 35, 46 (N.Y. Ch. 1845); *Durkee*, 4 Vt. at 614 (“[T]here seems to be some discrepancy in the authorities” about whether the privilege covers communication if litigation is not pending.).

88. I have found no reference to Bentham on the attorney-client privilege in a nineteenth-century American case. For a further discussion of Bentham’s *Rationale*, see *infra* Part IV.

89. Hazard, *supra* note 23, at 1091.

90. I concentrate on New York and Virginia in the text because they are states in which early, carefully constructed opinions on the justification and scope of the attorney client privilege were published. I offer parallel citations to significant decisions from other states throughout the Part.

sued Denniston, the publisher of an article accusing Riggs, *inter alia*, of disclosing client confidences in a debt collection proceeding. The court recognized that such an attack on Riggs' professional character was libelous,⁹¹ but Denniston had entered a plea of justification, so that left the court to consider whether the published accusations were true. James Kent, then an associate judge on the New York Supreme Court, held that there is no privilege in communications voluntarily made to counsel. Instead, the privilege applies only to communications *necessary* to further representation in a *pending* litigation. The client's statement that he had absconded to avoid arrest was, on this view, a mere "gratis dictum":

What the law understands by secrets between the attorney and his client, are communications made, as instructions, for conducting the cause, and not any extraneous or impertinent communications; (4 Term. Rep. 432) and it does not appear that the fact in question had any pertinency to the merits of the cause in which the plaintiff [Riggs] was employed. Whether [the client] had or had not concealed himself to avoid the process, could not be any matter of instruction in the defence. It had no relation to it, and was, as Lord Kenyon observes, a mere gratis dictum, which the plaintiff was under no obligation to keep secret, in his character as counsel.⁹²

This is roughly the approach one would expect to find if American courts were hostile to the privilege and following the trend of contemporaneous English precedent restricting the privilege to communications strictly necessary to representation in court.⁹³

The irony in *Riggs* is that Kent adopted a narrow privilege rule on the way to upholding a *lawyer's* right to recover against a former client for injury to his professional reputation. Kent ordered judgment on the pleadings for Riggs, and on remand a jury assessed damages at \$500.⁹⁴ Riggs' former client and other debtors would surely have found the irony cruel. Indeed, the libelous publication at issue in the case suggests the intensity of popular animosity toward lawyers and public officials who put the interests of creditors over debtors. We know the charges against Riggs regarding his decision to break confidence. But there was an additional charge running to Riggs' public role as bankruptcy commissioner:

He has defeated nearly one third of all the unfortunate debtors that have been before him, first stripping them of every cent they have in the world, then depriving them of the benefit of the act made for their relief, under the most

91. *Riggs v. Denniston*, 3 Johns. Cas. 198, 202 (N.Y. Sup. Ct. 1802) ("There can be no doubt but that the charges contained in the declaration are libelous, and actionable. They were published of the plaintiff, in relation to his profession and office, and tended to injure and disgrace him. They charged him with a want of fidelity in his profession, and with partial and oppressive conduct, as a [bankruptcy] commissioner.").

92. *Id.* at 203–04.

93. See RICE, *supra* note 77, at § 1:10, at 29 (describing approach of English courts).

94. *Riggs*, 3 Johns. Cas. at 205 n.1.

trifling pretenses; . . . that by property being taken from them, they have no way of bringing their creditors to a settlement; and, in that embarrassed situation, they can follow no business, and, perhaps, thrown into a gaol, and there expire for want.⁹⁵

Tellingly, the former client was among the debtors who had appeared before Riggs in his capacity as a bankruptcy commissioner.⁹⁶

From the perspective of lawyers such as Riggs, however, the case reveals not the corruption of the legal profession, but rather the precariousness of becoming a repository of client secrets. A lawyer who breaks confidence and discloses a client's secrets as Riggs did risks public ridicule and censure for infidelity to that client; but a lawyer who keeps confidence risks public and judicial censure for infidelity to the law—a delicate position indeed.⁹⁷

B. A GENUINELY CLIENT-CENTERED PRIVILEGE: THE BROADER APPROACH OF VIRGINIA

For decades, the New York courts adhered to a relatively narrow privilege rule concentrating on communications necessary to representation in court. They expressed ambivalence about even modest expansions.⁹⁸ However, the more

95. *Id.* at 198.

96. Kent found these charges “clearly libelous, because they threw contumely and odium” onto Riggs, and Kent intimated that no justification short of a showing that Riggs had committed an indictable offense would defeat his right to recover. *Id.* at 205; *see id.* (noting that Denniston had failed to answer or justify the broadsides against Riggs’ performance as commissioner).

97. I do not, however, share Kent’s sympathy for Riggs. The decision contains no reference whatsoever to the conflict of interest Riggs must have had if, as alleged in the defendant’s answer, he served as counsel to debtors in litigation and then refused the same debtors’ certificates when they appeared before him as bankruptcy commissioner.

98. *See Mitchell’s Case*, 12 Abb. Pr. 249 (N.Y. Sup. Ct. 1861); *Coveney v. Tannahill*, 1 Hill 33, 33 (N.Y. Sup. Ct. 1841) (concluding that an attorney present when defendant signed an “account stated” with plaintiff may be called to testify where partners of defendant alleged fraudulent transfer of partnership assets); *McTavish v. Denning*, Ant. N.P. Cas. 113, 113 (N.Y. Sup. Ct. 1809) (concluding that terms of compromise offered to creditors are not confidential communications; attorney is only “excemted from disclosing any confidential communications made to him as counsel in any cause then actually commenced or expected to be commenced”); *Hoffman v. Smith*, 1 Cai. R. 157, 160 (N.Y. Sup. Ct. 1803) (denying privilege in an action on promissory note where attorney received information “in the character of a friend and not of counsel”); *Haulenbeek v. McGibbon*, 60 Hun 26, 26 (N.Y. Gen. Term 1891) (same); *cf. Bank of Utica v. Mersereau*, 3 Barb. Ch. 528 (N.Y. Ch. 1848); *Jackson ex dem. King v. Burtis*, 14 Johns. 391 (N.Y. Sup. Ct. 1817); *Baker v. Arnold*, 1 Cai. Rep. 258 (N.Y. Sup. Ct. 1803). Recognizing the drift of English and American cases toward protection of communication between attorney and client before litigation, however, the New York Chancery court expanded the rule in 1845 to cover consultations with an attorney “where there is a dispute . . . already in existence” and litigation can be anticipated. *See March v. Ludlum*, 4 Sand. Ch. 35, 35 (N.Y. Ch. 1845) (excluding testimony of defendant’s counsel regarding consultations on how to protect land from creditors. The defendant allegedly conspired to have his farm sold to his neighbor at a public auction and have neighbor enter a lease-back agreement); *see also Williams v. Fitch*, 18 N.Y. 546 (1855).

Narrow construction of the privilege did not always favor creditors. It occasionally worked to the advantage of debtors seeking to establish the defense of usury. *See Whiting v. Barney*, 30 N.Y. 330, 341–42 (1864) (reversing trial court decision for excluding testimony of defense counsel offered to show bond and mortgage

common approach was to treat privilege claims generously. Courts in other states began from the broader premise that in both litigation and transactional matters, clients have a right to communicate openly with counsel to learn their rights free from concern that the lawyer will make any subsequent disclosure of confidences reposed. Although not the earliest published case in point, *Parker v. Carter* reveals the extent to which early American courts appreciated the precariousness of the lawyer's position.⁹⁹

The facts of this 1814 Virginia case are nearly as operatic as those in *Annesley*. As with many early American cases, the underlying issue was whether a debtor's attempt to avoid liability and shield assets from creditors was legitimate. Appia Fauntleroy married "a very extravagant dissipated young man" named John Carter in the late 1700s. Her father, William Fauntleroy, allegedly gave John Carter ten or twelve slaves as a dowry. Part of Carter's extravagance was gambling and sometime in the spring of 1784 he signed a fraudulent bond to settle his losses to one Lieutenant Crane. The bond was eventually assigned to Thomas Parker, who obtained a judgment on the bond and sought to enforce it by seizing the slaves. To avoid the loss, Mr. Fauntleroy sought out Richard Parker at the bar of the Richmond courthouse and implored him to draw up a deed of trust to protect the slaves from John Carter's creditors. According to the attorney's subsequent deposition, William Fauntleroy told the attorney that he knew Carter was "[C]onsiderably involved in debt to a large amount . . . and that he was afraid the slaves he *had given him*, would be taken to pay his debts; in order therefore to secure them for the benefit of his daughter, he requested the [attorney] to draw the deed before mentioned."¹⁰⁰ The attorney at first advised against it, indicating that "a deed made so long after he had possessed the said Carter with the said slaves, and as a marriage portion too, would not cover them from creditors."¹⁰¹ Upon Fauntleroy's insistence, however, the attorney relented and drew up the deed on the spot. The trustee was to be Appia's adult son, Edward, though he never signed the deed.¹⁰²

In Thomas Parker's suit to set aside the deed of trust as fraudulent, the defendants, John and Appia Carter and their sons, answered that there was no fraud in the deed, that Fauntleroy had retained possession of the slaves until the deed of trust was made, that the deed was made before the judgment on John Carter's gambling debt, and hence the slaves were immune from seizure to satisfy

were usurious and void); *Yourdan v. Hess*, 13 Johns. 492, 494 (N.Y. Sup. Ct. 1816) (finding no privilege in voluntary communications of client, acknowledging loan was usurious, where made after representation concluded even if identical to statements made to counsel during representation).

99. *Parker v. Carter*, 4 Munf. 273 (Va. 1814).

100. *Id.* at 274–75. There is no known relation between plaintiff Thomas Parker and Fauntleroy's attorney Richard Parker.

101. *Id.*

102. *Id.* at 278.

the judgment.¹⁰³ The trial court admitted the deposition testimony of Fauntleroy's attorney over the defendants' objection. To establish that he did not believe himself to be bound by the privilege, the attorney stated that he considered himself merely a conveyancer in the matter, not counsel for Fauntleroy, and that there was no privilege in the communication anyway because it took place in public, no litigation was pending, he took no fee, and he was well aware of the pertinent facts since Carter's "extravagance," his debts, and Fauntleroy's gift, were facts "generally believed, and known by many . . ."¹⁰⁴

Each of the attorney's points fit recognized grounds in contemporaneous English cases for denying the privilege.¹⁰⁵ Some early English cases also refused the privilege where the client sought the assistance of counsel in serious wrongdoing.¹⁰⁶ This makes what occurred in each subsequent step of the case all the more surprising and instructive regarding the attitude of American courts toward the privilege. First, to reject the plaintiff's claim that the deed of trust was signed *after* he secured judgment on Carter's gambling debt,¹⁰⁷ the trial court discounted everything the attorney said about the circumstances in which Fauntleroy approached him, and everything Fauntleroy said to him. Instead, the court accepted the attorney's blanket assurance that Fauntleroy intended no fraud in the deed, and that the attorney would have refused to draft it if he suspected fraud. Going out of its way to note that the attorney had since become a judge, the trial court emphasized that "*every one who knows that gentleman, will believe him when he says,*" that no fraud was contemplated.¹⁰⁸ The plaintiff's bill was thus dismissed on the attorney's assurance.

Even on a liberal construction of the attorney-client privilege, one would have expected the Court of Appeals to agree that there was no privilege in Fauntleroy's courthouse conversation with the attorney. Surely even a court predisposed to uphold the privilege where the lawyer did not consider himself professionally engaged, where the lawyer prepared a simple document non-lawyers could draft, where the communication was neither relevant nor necessary to pending litigation, where the communication occurred in public, and where the information

103. *Id.* at 277–80.

104. *Id.* at 274–75.

105. See generally RICE, *supra* note 77; WIGMORE, *supra* note 21.

106. There is, of course, *Annesley v. Earl of Anglesea*, (1743) 17 How. St. Tr. 1229 (Ex.). But see *Rothwell v. King*, (1673) 2 Swanst. 221 (Ch.).

107. If the deed of trust had been signed afterwards, the slaves would have been Carter's property for purposes of satisfying liability on the judgment. See *Parker*, 4 Munf. at 274–75.

108. *Id.* at 279 (emphasis added). The attorney's testimony that he and the community at large knew John Carter received the slaves as a dowry from Fauntleroy was nevertheless deemed insufficiently weighty to controvert the defendants' allegation that Fauntleroy never surrendered possession of the slaves as a dowry. *Id.* at 280–81. The trial judge reasoned that, if possession had been given to Carter upon his marriage with Appia, "[i]t must have been a matter of some notoriety among their friends and near neighbors," but the plaintiff "has taken no depositions, but that of Judge Parker, to support the fact of possession in the defendants charged in the bill." *Id.* at 282.

conveyed was already in the public domain, would draw the line if the client sought assistance in making an obviously fraudulent transfer. But with Judge Roane writing for a 6-1 majority, the court of appeals held just the opposite. The *entire* conversation between Fauntleroy and the attorney was privileged, as was the attorney's knowledge about the deed he drafted and when it was signed. Having thus deprived the plaintiff of his best evidence of fraud, the trial court's dismissal was affirmed.

The plaintiff creditor must have felt as hard done by the courts as the debtor in *Riggs*—he lost both when the attorney's deposition was admitted in the trial court *and* when it was excluded by the appellate court. The Court of Appeals' decision to exclude the deposition, replete as it was with evidence of Fauntleroy's fraudulent intent, must have been particularly grating. What mattered to the application of the privilege, Judge Roane insisted, was: (i) that Fauntleroy "applied to and retained" the attorney in his professional character, not whether the attorney believed himself professionally engaged or whether he received a fee, (ii) that crafting "such a deed necessarily required some degree of professional knowledge," (iii) that even if the attorney was sought out in public, Fauntleroy had not "vaunt[ed] his disclosures to the public" or "challenge[d] the by-standers to hear them," and, most importantly, (iv) that when clients are obliged to obtain counsel in order to learn, protect, or assert their rights, their conversations with counsel should not be compromised by fear of subsequent disclosure.¹⁰⁹ As Judge Roane reasoned:

This court understands it to be the settled law, that counsel and attorneys ought not to be permitted to give evidence of facts imparted to them, by their clients, when acting in their professional character; that they are considered as identified with their clients, and, of necessity, entrusted with their secrets, which, therefore, without a dangerous breach of confidence, cannot be revealed; that this obligation of secrecy continues always, and is the privilege of the client and not the attorney.¹¹⁰

He then flatly rejected the narrower approach covering only communications necessary to litigation:

The court is also of the opinion, that this restriction is not confined to facts disclosed, in relation to suits actually depending at the time, but extends to all cases in which a client applied, as aforesaid, to his counsel or attorney, for his aid in the line of his profession. If the principle was confined to causes actually depending at the time, there would be no safety for a person consulting as to the expediency of bringing a suit, or of compromising one which is contemplated to be brought against him. When such suit should be afterwards instituted, all his disclosures . . . made with a view to obtain counsel and avoid litigation,

109. *Id.* at 285–86.

110. *Id.* at 286–87.

would be given in evidence against him! The same necessity exists in both cases; and there is in principle, no difference between them.¹¹¹

Judge Roane seemed particularly moved by the fact that people must rely upon the “probity and legal knowledge” of lawyers in order to understand their rights.¹¹² The privilege, he summarized, “only arises from the necessity men are under to act, in their legal concerns, through skilful and qualified agents.”¹¹³ There is not even glancing recognition of the fraud contemplated in Fautleroy’s discussions with the attorney.¹¹⁴

The case raises many questions: what role did the attorney’s reputation play in the result of the trial and appellate courts?¹¹⁵ Was it equally decisive for both courts? Were the courts influenced by the fact that the attorney had ascended to the bench? Did it matter that he had initially counseled the client against making the deed? Did it matter to the appellate court that the attorney (and the trial court) seemed to be swayed by Fautleroy’s paternal distress over the fate of his daughter (and slaves) now in the hands of an “extravagant” young man?¹¹⁶ What role did race, racism, and concern about seizing slaves to satisfy other debts play?¹¹⁷ What role was played by popular and judicial attitudes about the procedures authorized for executing judgments on bonds? The trial record and papers of counsel involved in the case may offer answers.¹¹⁸

But there is insight to be drawn from the decision as reported. First, notice that Judge Roane’s justification of a broad rule parallels the general defense of the profession’s prestige and power repeated by legal elites throughout the late eighteenth and nineteenth century: social action and the law have become sufficiently complex that experts in the law are necessary, and lawyers can be trusted because their long, rigorous training cultivates higher virtues and the bench screens for moral probity.¹¹⁹ Joseph Story hoped to create a dead metaphor

111. *Id.* at 287.

112. *Id.*

113. *Id.*

114. One judge, without writing separately, concurred in the judgment but dissented on the issue of privilege. *Id.* at 289.

115. See 2 LYON GARDINER TYLER, *The Biography of Richard E. Parker*, in ENCYCLOPEDIA OF VIRGINIA BIOGRAPHY 65 (1915).

116. In his second deposition the attorney stated that

[He did not] believe Col. Fautleroy had the least idea that, in making the settlement, he was committing a fraud, but that he thought he was acting the part of the provident father, in securing to his daughter the portion he had given her in her marriage; nor could this deponent believe his intention was fraudulent; if that had been his opinion, he would never had been aiding in the fraud.

Parker v. Carter, 4 Munf. 273, 275–76 (Va. 1814).

117. See *id.* at 284 (finding a statute to prevent fraudulent gifts of slaves made any transfers prior to 1787 void in the absence of a written deed even where the donee had possession of the slaves).

118. Unfortunately, as of this writing it appears that records of the trial were not preserved.

119. See *infra* Part IV; see generally BURTON BLEDSSTEIN, *THE CULTURE OF PROFESSIONALISM* 80–128 (1976); Spaulding (2005), *supra* note 14; Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the*

when he referred to lawyers as public “sentinels”—an image that would make the justification for professional power seem obvious and provoke patriotic associations strong enough to quell popular resentment about that power. Judge Roane’s argument resonates with this ideology of professionalism and suggests the extent to which the attorney–client privilege and professional power were intertwined.

Second, Roane made no reference to precedent or treatises in his analysis of what he takes to be “settled law” regarding the scope of the privilege. This gives the impression that the rule was quite well settled.¹²⁰ Even more significant, however, is his argument grounding the privilege in a principle broader than the client’s need to convey facts and instructions to trial counsel in pending litigation. Communication with counsel is “necessary” for Judge Roane in the more protean sense that people in a democratic society need to know what the law is and how it may apply to their actions. Where the right to practice is restricted to members of the bar, that knowledge can only come from “free intercourse” with lawyers.¹²¹ The earliest published American judicial statement of the privilege, a 1782 case from Pennsylvania, relies on precisely the same principle.¹²²

Judge Roane’s decision also antedates by two decades the famous attempt by Lord Brougham to expand the foundation of the English attorney–client privilege in *Greenough v. Gaskell*.¹²³ Lord Brougham’s synthesis of English precedent has

Ideology of Antebellum Legal Ethics, in LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER (Susan D. Carle ed., 2005).

120. The Virginia Court of Appeals was not bereft of English reporters. Three years earlier in *Clay v. Williams*, Judge Roane wrote separately on the attorney–client privilege after the majority upheld the admissibility of an attorney’s testimony against his client where the attorney had been employed to draft a fraudulent bond. In a practice run of his decision in *Parker*, Roane cited an English legal digest by Matthew Bacon to support his conclusion that the privilege should bar all of the testimony. See 16 Va. 105, 122 (1811) (Roane, J., concurring) (“All these positions are to be found in 2 Bac. 579, and the cases there cited: they are bottomed upon the soundest propriety, and go to the utter exclusion of the testimony . . . in the case before us.”); MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 579 (6th ed. 1807) (“It seems agreed, that counsellors, attornies, or solicitors are not obliged to give evidence, or to discover such matters as come to their knowledge in the way of their profession; for by the duty of their offices they are obliged to conceal their clients’ secrets . . .”).

121. *Parker*, 4 Munf. at 286. For Virginia cases following *Parker*, see generally *Nw. Bank v. Nelson*, 42 Va. 108 (1844); *Lyle v. Higginbotham*, 37 Va. 63 (1839); *Stowers v. Smith’s Ex’x*, 19 Va. 401 (1817). For evidence of *Parker*’s influence in other jurisdictions, see generally *Oliver v. Pate*, 43 Ind. 132 (1873); *Foster v. Hall*, 29 Mass. 89 (1831); *Crisler v. Garland*, 19 Miss. 136 (1848); *Hull v. Lyon*, 27 Mo. 570 (1858); *Johnson v. Sullivan*, 23 Mo. 474 (1856); *Williams v. Fitch*, 18 N.Y. 546 (1855); and *State v. Douglass*, 20 W. Va. 770 (1882) (attorney cannot be forced to testify to location of murder weapon revealed to attorney by client). For cases distinguishing *Parker*, or narrowly construing the privilege while citing the justification of the privilege offered in *Parker*, see generally *State v. Marshall*, 8 Ala. 302 (1845); *Hager v. Shindler*, 29 Cal. 47 (1865); *Barnes v. Harris*, 61 Mass. 576 (1851); and *Sanford v. Sanford*, 61 Barb. 293 (N.Y. Gen. Term. 1871).

122. *Morris’ Lessee v. Vanderen*, 1 Dall. 64, 66 (Pa. 1782) (“[T]he reason why the law will not allow a counsel, or attorney, to reveal his client’s secrets, is because a man is obliged to have recourse to professional characters in matters of law; and, therefore, the law protects the client against the danger, and the counsel or attorney against the indelicacy, of a disclosure.”).

123. *Greenough v. Gaskell*, (1883) 39 Eng. Rep. 618 (Ch.) (upholding attorney client privilege where attorney assisted client in obtaining loan on false representations about surety for the loan and then, when the

been roundly criticized by historians of the privilege as “a substantial departure from precedent” that “wholly disconnect[ed] the privilege from its point of origin.”¹²⁴ We have been instructed that Lord Brougham’s reformulation “was not fully accepted as an authoritative statement of the law in subsequent cases.”¹²⁵ But in American courts of the nineteenth century his “reformulation” was received with open arms—*Greenough* became the most commonly cited English case on the justification of the attorney-client privilege. Unlike *Annesley* and countless other English cases to which American courts might have turned, Lord Brougham’s argument fit the protean principle American courts had already endorsed.

There was still variation in specific applications of the rule, and some cases turned on particular facts revealing the “delicacy” of privilege questions, but with only a few exceptions,¹²⁶ nineteenth-century American cases reflect general consensus on the core principle elaborated by Judge Roane in *Parker*.¹²⁷ Before

client was imprisoned for failure to repay the debt when the defect in surety was discovered, the attorney secured a second loan on false assurances about the financial condition of the client who promptly filed for bankruptcy). The case was frequently cited and discussed along with Lord Brougham’s opinion the same year in *Bolton v. Liverpool*, (1833) 39 Eng. Rep. 614 (Ch.).

124. Hazard, *supra* note 23, at 1085.

125. *Id.*

126. In addition to the New York cases discussed in Part III.A of Hazard, *supra* note 23, there are several early Connecticut cases in which the privilege was narrowly construed in dicta to support rejection of privilege claims by non-attorneys. See *Calkins v. Lee*, 2 Root 363, 363 (Conn. Super. Ct. 1796); *Sherman v. Sherman*, 1 Root 486, 486 (Conn. Super. Ct. 1793) (following *Griswold* and rejecting doctor-patient privilege); *Mills v. Griswold*, 1 Root 383, 383 (Conn. Super. Ct. 1792) (holding that only attorneys may claim privilege, and only then for communications “necessary” to the representation). An early New Hampshire case also narrowly construed the privilege. See *Bean v. Quimby*, 5 N.H. 94 (1829). There are a few other states such as Kentucky, Michigan, and Tennessee where the privilege was regularly denied on terms that suggest narrow construction of the privilege. See, e.g., *Ellis v. State*, 20 S.W. 500 (Tenn. 1892). Finally, see the cases citing *Annesley*, discussed *supra*, note 84.

127. Dozens of jurisdictions cited, discussed or followed *Greenough*. For examples of cases other than *Parker* taking a broad approach prior to *Greenough*, see *Chirac v. Reinicker*, 24 U.S. 280, 294 (1826) (stating that privilege protects against disclosure of subject matter for which attorney is retained: “[C]onfidential communications between attorney and client are not to be revealed at any time Whatever facts . . . are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose”); *Brown v. Payson*, 6 N.H. 443, 448 (1833) (distinguishing narrower New York precedent and holding that attorney could not be compelled to disclose notes in his possession or to reveal whether notes had been endorsed upon being put in his possession; no attorney-client privilege in client’s identity: “The situation and contents of a paper, delivered to an attorney for inspection, in the course of employment as attorney, is as much a matter of professional confidence as an oral statement of its contents or condition can be. An attorney is not at liberty to disclose what is communicated confidentially by a client, although the latter is not in any shape before the court.”); and *Durkee v. Leland*, 4 Vt. 612 (1832) (rejecting English precedent limiting privilege to communications necessary to litigation; reversing trial court for admitting testimony of plaintiff’s lawyer, called by the defendant, in an action of assumpsit on a promissory note, to prove the defense of payment where plaintiff had given his lawyer receipts showing payment in order to seek advice).

For cases taking a broad approach and citing *Greenough*, see *Blackburn v. Crawford’s Lessee*, 70 U.S. 175, 192–93 (1865); *Denver Tramway Company v. Owens*, 36 P. 848, 855 (Colo. 1894) (referencing *Greenough*’s language about the purposes of the privilege in ensuring access to justice and articulating the broad form of the

leaving Judge Roane's analysis in *Parker* to consider extra-judicial debates on the privilege, it is worth pausing to consider what the case reveals about the limits of this principle. To insist on the principle of democratic access to law on facts suggesting rather powerfully that the client sought and obtained the assistance of counsel in making a fraudulent conveyance is either to repose extraordinary trust in the probity of lawyers to counsel obedience to law (to believe, as the trial court apparently did, the attorney's self-serving post hoc assurances that no fraud was

rule, based in part on a state statute codifying the privilege); *People ex rel. Shufeldt v. Barker*, 56 Ill. 299, 301 (1870); *Aiken v. Kilburne*, 27 Me. 252, 262–63 (1847) (“But whether they must be regarded as matters of professional confidence, and therefore privileged communications, does not depend upon their importance or materiality in the defense of that suit.”); *Foster v. Hall*, 12 Pick. 89, 99 n.1 (Mass. 1831) (adopting the broad rule, this case is cited often by other American cases); *State v. Dawson*, 1 S.W. 827, 829 (Mo. 1886) (holding that the privilege covers the type of money with which the client paid the lawyer, which was apparently relevant because the case involved prosecution for stealing silver coins); *Moore v. Bray*, 10 Pa. 519, 524 (1849) (adopting very broad rule covering all professional communication, regardless of connection to suit); *Chahoon v. Commonwealth*, 62 Va. 822, 837 (1871); *Hartness v. Brown*, 59 P. 491, 493 (Wash. 1899) (adopting broad rule upholding privilege in debt collection case involving fraudulent conveyance); and *Selden v. State*, 42 N.W. 218, 220 (Wis. 1889) (upholding privilege in letters from husband to wife in possession of wife's attorney under spousal privilege and attorney client privilege).

Although not citing *Greenough*, *Connecticut Mutual Life Insurance Co. v. Schaefer*, 94 U.S. 457, 458 (1876), adopts a theory of the privilege as broad as that in *Greenough*: “The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy. If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced in the courts, the law would be little short of despotic. It would be a prohibition on professional advice and assistance.” See also *Glover v. Patten*, 165 U.S. 394, 406–07 (1897); *Alexander v. United States*, 138 U.S. 353, 358–59 (1891); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

For cases beginning from *Greenough's* broad statement of principle but drawing exceptions, see *Parish v. Gates*, 29 Ala. 254, 260 (1856) (citing *Greenough* extensively for its broad rule and purpose, but holding that it does not apply where two parties together engaged an attorney to draw up a contract for their transaction and had no interactions with him outside of each other's presence), *O'Brien v. Spalding*, 31 S.E. 100, 101 (Ga. 1897) (citing *Greenough* but concluding that the purposes of the privilege don't apply in a dispute over a will; the testatrix's attorney can testify), *Doherty v. O'Callaghan*, 31 N.E. 726, 727 (Mass. 1892) (citing *Greenough* for broad purpose of the privilege in assuring access to justice, but then holding that it does not apply to conversations had with a now-deceased testator who employed attorney to draw his will to establish that the will was genuine, as the purposes are not implicated), *Beeson v. Beeson*, 9 Pa. 279, 301 (1848) (citing *Greenough* for the proposition that the communications need not be in furtherance of a pending suit, but nonetheless concluding that the privilege does not attach unless the attorney is acting in his capacity as an attorney at the time), *Brayton v. Chase*, 3 Wis. 456, 460 (1854) (citing *Greenough* but then holding that the privilege does not extend to someone who “was merely employed by the plaintiff to assist him at the trial before the justice, and was not an attorney, counselor, or solicitor”), and *Crosby v. Berger*, 11 Paige Ch. 377, 379 (N.Y. Ch. 1844) (citing *Greenough*). See also *Barnes v. Harris*, 61 Mass. 576, 576 (1851).

For treatises adopting Lord Brougham's analysis of the theory of the privilege, see SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 237–41, at 272–77 (Boston, C.C. Little & J. Brown eds., 1842); JOSEPH STORY, COMMENTARIES ON EQUITY PLEADING § 599, at 457–59 (C.C. Little & Brown eds., 2d. ed. 1840). Greenleaf's was by far the most successful nineteenth-century evidence treatise in America. It went through sixteen editions over sixty years and “made an impact in England through Taylor on Evidence (first edition 1848), a highly successful practitioner's treatise that was so close to Greenleaf as to invite charges of plagiarism.” TWINING, *supra* note 23, at 5. Greenleaf's endorsement of Lord Brougham's analysis is thus powerful evidence of the balance of opinion on the proper scope and justification of the privilege in the nineteenth century. See also Note, *Evidence—Privileged Communications—Attorney and Client*, 11 HARV. L. REV. 128 (1897) (citing broad approach to privilege in *Greenough* and *Parker* with approval).

contemplated), or to brush up against the very contradiction that so infuriated critics of the profession (that by combining a client-centered professional ethic with the privilege clients were empowered to “cheat” the law).

The former construction of Judge Roane’s opinion is alluring. He is at pains to emphasize the conjunction of professional “probity and legal knowledge” after dismantling the narrow approach to the privilege.¹²⁸ “[T]he high privilege,” he insists, “only arises from the necessity men are under to act, in their legal concerns, through skillful and qualified agents.”¹²⁹ Members of the bar are “the only safe depositories of a client’s interests.”¹³⁰ All safety for clients and presumably the law would be lost “were any citizen to be permitted to invest *ad libitum*, and without necessity, any other citizen, however corrupt or unqualified, with the functions [of legal representation].”¹³¹

The implication is that lawyers can be trusted to dissuade clients who seek the assistance of counsel for improper ends. But it remains an implication. Notwithstanding the evidence of fraud in the case, Judge Roane refuses to distinguish, as some courts did, between proper and improper client ends.¹³² He also uses the capacious term “legal concerns” instead of terms expressly confining the privilege to communication about the client’s “lawful” objectives. And he insists that lawyers are “considered as *identified* with their clients” even in representation outside the courts.¹³³ The disclosure of client confidences would be, he warns, a “dangerous breach.”¹³⁴

Why the charged term “dangerous”? Clients may want and need the shield of the privilege to support candor in communication with counsel, but what makes a breach of confidence “dangerous”—especially a breach made to prevent or correct fraud? In criminal cases concerning past wrongdoing, there may be a

128. *Parker v. Carter*, 4 Munf. 273, 287 (Va. 1814).

129. *Id.*

130. *Id.*

131. *Id.*

132. See for example Massachusetts Chief Justice Shaw’s formulation in *Foster v. Hall*, 12 Pick. 89, 98 (Mass. 1831) (The privilege extends “to include communications made by one to his legal adviser, whilst engaged and employed in that character . . . when the object is *to get legal advice and opinion as to legal rights and obligations* . . . to ascertain what acts are necessary to constitute a legal compliance with an obligation, and thus avoid a forfeiture or claim for damages, *or for other legal and proper purposes* [even if] not connected with a suit in court.” (emphasis added)).

133. *Parker*, 4 Munf. at 286 (emphasis added).

134. *Id.* For similar language, see *Moore v. Bray*, 10 Pa. 519 (1849); *Morris Lessee v. Vanderen*, 1 Dall. 64, 66 (Pa. 1782) (“[T]he reason why the law will not allow a counsel, or attorney, to reveal his client’s secrets, is because a man is obliged to have recourse to professional characters in matters of law; and, therefore, the law protects the client against the danger, and the counsel or attorney against the indelicacy, of a disclosure.”); *Wilson v. Troup*, 7 Johns. Ch. 25, 39 (N.Y. Ch. 1823) (concluding letters given to attorney by client are inadmissible: “I should deem it a dangerous precedent, and one that would impair the good faith that ought to be observed, and which the public good, and those valuable interests which clients must confide to their counsel, require to be observed, to lend the sanction of this Court to the disclosures in question.”); and LIVINGSTON’S CRIMINAL CODE OF LOUISIANA 277 (“It would be most mischievous if it could be doubted whether or not an attorney, consulted upon a man’s title to an estate, was at liberty to divulge a flaw.”).

danger of vicarious self-incrimination. But *Parker* is no such case—it is a civil action and the attorney-client communication concerned a proposed fraudulent act, not one completed prior to the representation. Judge Roane does not elaborate on the fraud (indeed, he says nothing about the attorney’s suspicious assurances), but the “danger” must be that the client will lie to the lawyer, omit key facts, or fail to seek counsel at all. And once bereft of counsel the client may forbear from acting even when justice is on her side, or worse still, she may take the law into her own hands.¹³⁵ In the first two scenarios (lying and omission), the lawyer is prevented from competently representing the client. Frivolous suits might be filed, improper defenses raised, fraudulent contracts drawn, all without the lawyer’s knowledge. In the latter scenario the lawyer is precluded altogether from advising forbearance or disobedience as the case may require. The lawyer’s expertise is rendered irrelevant and, crucially, there is no opportunity for the probity of counsel to be brought to bear upon the client.¹³⁶ These are dangers not just to clients, but, as Lord Brougham explicitly insisted in *Greenough*, to the administration of justice.¹³⁷

135. It is also possible that the appellate court thought, but could not expressly hold, that Fautleroy’s fraud was justifiable. The presentation of the facts supports this conclusion.

136. For example, in a decision upholding the privilege where a debtor sought advice from a lawyer who declined the representation, the Missouri Supreme Court observed:

The rule should be universal, and apply to all who communicate facts, expecting professional advice, or it will fail to answer its ends. Its limitations may be unknown to laymen, and without feeling perfect freedom in all cases, *instead of the perfect confidence that should exist, the intercourse may be restrained by fear and marred by dissimulation on the part of the client, and the object of the rule be defeated*; and besides, a door would be opened to fraud. One might seek advice, expecting not only to pay but to retain in an anticipated litigation, and, after his story has been heard, the retainer might be declined and the information used against him; also an obstacle would be thrown in the way of the settlement of disputes. *The noblest office of the lawyer is to heal difficulties, and far more is done in that direction in the higher walks of the profession than is known to the public.*

Cross & Rippey v. Riggins, 50 Mo. 335, 337 (1872) (emphasis added).

In one of only two cases I have found citing both *Annesley* and *Greenough*, the High Court of Appeals in Mississippi followed *Greenough* and ignored references to *Annesley* in the attorney’s briefs. The court refused to create a crime-fraud exception to the privilege at least in part on the ground that the lawyer had the integrity to decline representation where the client proposed a fraudulent conveyance. *Crisler v. Garland*, 19 Miss. 136, 139–40 (1848) (declining to follow *Annesley* and upholding privilege where client expressed desire to conceal property from creditors and lawyer declined representation; noting “great want of harmony both in English and American decisions,” especially in cases involving allegations of fraud, but concluding that “the privilege is founded upon a great public policy . . . [and] it is better . . . to adhere to the rule, in a broad and liberal sense, than to weaken its force by exceptions”); *id.* (“*Matters which come to the knowledge of the attorney . . . in his professional capacity . . . ought not to have the seal of secrecy removed, because he may not agree to undertake the case. It may often happen, that the attorney does not decline the case, until its weakness has been unfolded to him.*” (emphasis added)). In the other, *Whiting v. Barney*, 30 N.Y. 330, 338–39 (1864), the New York court takes a narrow approach and concludes there is no privilege if third parties are present.

137. See Joseph Story’s detailed quotations from *Greenough* on the threat to administration of justice in JOSEPH STORY, COMMENTARIES ON EQUITY PLEADING § 599, at 457–59 (2d ed. 1840). These are also the arguments Wigmore cites and then rejects in his reverse incorporation of Bentham. See WIGMORE, *supra* note 21, § 2291, at 19–21.

Still, no rule for the attorney-client privilege can avert these dangers without presenting others—most immediately, the danger of converting the lawyer into an accomplice in the client’s lawlessness. Judge Roane’s argument is nevertheless all on the side of the client’s right to know the law as it applies to his “concerns.”¹³⁸ Later courts would develop the crime/fraud exception. But even this exception was, on the whole, rather narrowly applied—precious few nineteenth-century American cases applied the exception in the absence of communication regarding obviously fraudulent or criminal conduct, or evidence that the attorney had become an interested party to the transaction.¹³⁹ Moreover, as we have seen, some courts upheld the privilege notwithstanding evidence that the client intended fraud, and evidence that the lawyer provided assistance to that end.

Perhaps nineteenth-century courts had too much faith in the probity of the profession. Perhaps they were too quick to assume that, by virtue of the privilege, lawlessness would be checked by lawyers because clients could repose complete trust and confidence in them. Perhaps they too quickly assumed that the “intimacy” of the attorney-client relationship and the lawyer’s expertise would provide enough leverage to lawyers to steer their clients away from wrong-

138. Other early cases appear to recognize that clients have a right, derived from the principle of democratic access to law, to make their own decision about whether to obey the law safe in the knowledge that communications with counsel—necessary to ascertain what the law is—will not be used against them. In an 1811 Massachusetts case, the prosecutor called an attorney to be examined as a witness before a grand jury. *See generally* Anony., 8 Mass. 370, 370 (1811). When it appeared that the attorney was in possession of a forged promissory note that would be sufficient grounds for an indictment against his client, the prosecution sought its production. The attorney asserted that the document had been given to him by the client “to be used in the defense of an action now pending” and was therefore privileged. *Id.* The court upheld the privilege, observing that the attorney’s possession was the same as if the client had it “in his own pocket *Non constat* that it will ever be produced.” *Id.* The court then observed that the client “may repent of his ill intention, and any crime contemplated may never be committed.” *Id.* The case is criminal, so the right against self-incrimination lends weight to the court’s treatment of the privilege. But the observation that control of the privilege rests exclusively with the client, even where the client contemplates crime, takes the principle of democratic access to law to its very limit in lawlessness. *See also* Parkhurst v. McGraw, 24 Miss. 134, 137–38 (1852) (“Admit the force of the proof . . . that the conveyances were a mere sham transaction to defraud creditors . . . then, the complainant, so far from presenting a case entitling him to use the testimony of the attorney, certainly presents a strong one to induce a court to exclude it; *for the more plainly the [attorney’s testimony] makes the fraud appear, the greater, we must suppose, was the confidence reposed by the client, and his reliance upon the law to protect him against an abuse of the confidence, or the bad faith of the attorney.*” (emphasis added)).

139. *See* Alexander v. United States, 138 U.S. 353, 359–60 (1891); Conn. Mutual Life Ins. Co. v. Schaefer, 94 U.S. 457, 458 (1876) (upholding privilege and disregarding evidence client committed fraud in filing for divorce); *see generally* People v. Van Alstine, 23 N.W. 594 (Mich. 1885); Hamil v. England, 50 Mo. App. 338 (Ct. App. 1892); Matthews v. Hoagland, 21 A. 1054 (N.J. Ch. 1891); Coveney v. Tennahill, 1 Hill 33 (N.Y. Sup. Ct. 1841); Bank of Utica v. Merereau, 3 Barb. Ch. 528 (N.Y. Ch. 1848); *In re* Cole, 7 W.N.C. 114 (Pa. 1879); Jeanes v. Friedenbergh, 5 Pa. Law J. 65, 71 (1845) (Sharswood, J.); Everett v. State, 18 S.W. 674 (Tex. Ct. App. 1892); Hartnes v. Brown, 59 P. 491 (Wash. 1899); Dudley v. Beck, 3 Wis. 274 (1854); JOSEPH STORY, COMMENTARIES ON EQUITY PLEADING § 601 at 460 (2d. ed. 1840); *see also* Fried, *supra* note 64.

doing.¹⁴⁰ As the next section reveals, elite lawyers off the bench shared this faith, or they at least saw the rhetorical advantage in claiming it in response to popular and Benthamite criticism of the privilege. But these lawyers were also willing to defend the privilege on the broader ground of the citizen's right to know the law *and* the citizen's corresponding responsibility for his choice to obey or defy the law.

IV. EXTRAJUDICIAL COMMENTARY: CRITIQUES AND REJOINDERS

A. JOHN APPLETON: BENTHAM'S AMERICAN IMPORTER

The strongest and most prolific American advocate of Bentham's argument to abolish the attorney-client privilege was Maine lawyer John Appleton. Politically, Appleton was a moderate. Like other American critics of the profession in the period, Appleton favored codification, and he shared the anti-bank sentiments of Jacksonian Democrats.¹⁴¹ But he supported the Whig party, "played a very modest role in local Whig politics," and was eventually appointed as a reporter of decisions and then Justice of the Maine Supreme Court by a Whig governor during the party's brief mid-century ascendancy in the state.¹⁴²

In 1837, Appleton anonymously published an article responding to Edward Livingston's endorsement of the privilege in the criminal codes of Louisiana, to Lord Brougham's decision just four years earlier in *Greenough*, and to earlier American cases such as *Parker*.¹⁴³ The article was one of eleven he published for the *American Jurist and Law Magazine* on the reform of evidence before the journal folded in 1841.¹⁴⁴ He published several other essays with different journals over the next decade, and in 1860, he included his earlier critique of the privilege almost verbatim in his general treatise on evidence.¹⁴⁵

As with Bentham, Appleton's criticism of the privilege was but one part of a larger assault on the iniquities of the common law rules of evidence. Appleton charged that both the attorney-client privilege and the rules of evidence appeared

140. Early cases and commentary analogized the intimacy protected by the spousal privilege to the disclosure of confidences between attorney and client. *See* *State v. Truman Squires*, 1 Tyl. 147, 149 (Vt. 1891) (quoting counsel's argument "from the intimacy subsisting between persons in the relation of attorney and client, which in many cases amounted to almost personal identity in the contemplation of law. This intimacy, like that between husband and wife, was highly respected in judicial proceedings"); *see also* *Selden v. State*, 42 N.W. 218, 219 (Wis. 1889); *Privileged Communications in Equity*, 8 MONTHLY L. REP. 61, 68 (1855) (equity recognizes that privilege protects "a peculiarly intimate and close connection").

141. DAVID M. GOLD, *THE SHAPING OF NINETEENTH-CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM* 20–23, 42 (1990).

142. *Id.* at 26.

143. *See* John Appleton, *Rules of Evidence—Attorney and Client*, 17 AM. JURIST & L. MAG. 304, 308–09, 311, 312, 316 (1837) (citing and seeking to rebut arguments of Livingston, Lord Brougham, and Judge Roane).

144. GOLD, *supra* note 141, at 42.

145. JOHN APPLETON, *THE RULES OF EVIDENCE STATED AND DISCUSSED* (Philadelphia, T. & J.W. Johnson & Co 1860).

designed to give aid and comfort to the lawless rather than to ensure rectitude of decision.¹⁴⁶ The 1837 article attempted both to refute the principal reasons offered in support of the privilege and to demonstrate the hypocrisy of lawyers who defended it. Against the claim, central to *Parker* and *Greenough*, that the privilege arises from the indispensability of confiding in counsel in order for citizens to know the law and assert their rights, Appleton insisted with Bentham that only those with something to hide will refuse to share the facts with counsel in the absence of the privilege.

[T]here would seem to be no legitimate ground for exclusion [of attorney-client communication], unless there should be found some great principle of public policy, in concealing falsehood and protecting injustice. True there would be no safety to the corrupt, and why should there be? The honest, having nothing to conceal, would be safe . . . Whose safety *should be preferred? Whose is?*¹⁴⁷

Far from inhibiting the administration of justice, Appleton claimed that abolishing the privilege would restore the integrity of the profession and the rule of law:

The objection relied on is, that each party will be enabled to know the case of his opponent. Were it so, the advantage or disadvantage would be equal and reciprocal . . . [W]ould not innumerable lawsuits be prevented? Would it not be infinitely more conducive to the ends of justice, that parties should litigate understandingly, than at every step of the proceedings to incur the risk of injustice by the introduction of some unexpected and perhaps untrue evidence? Were the attorney examinable, the relation either would not exist, or it would exist within the bounds of integrity, and of an enlightened policy.¹⁴⁸

How influential Appleton's arguments were is difficult to assess. To begin with, although elite American lawyers who kept up with English periodicals most likely would have been aware of the arguments in Bentham's *Rationale on Judicial Evidence*, there is no American edition of the *Rationale*.¹⁴⁹ The absence of an American edition is significant given that popular English treatises on evidence were regularly republished in the United States before and after the

146. See GOLD, *supra* note 141, at 42; Appleton, *supra* note 143, at 321.

147. Appleton, *supra* note 143, at 314 (footnote omitted). See also *id.* at 318 ("Were the law changed, . . . [t]he communications of clients would be unreserved or not. If unreserved, so far as regards the intercourse between client and attorney, it would remain unchanged. If all facts were *not* disclosed, it would be because the client, being guilty, would not dare tell all."); *id.* at 319 ("The rule contended against is bad, in every aspect in which it can be viewed . . . adverse to the best interests of the public, by fostering a spirit of unscrupulous and reckless litigation—encouraging the commission and facilitating the escape of crime—dishonorable to the bar as making them the recipients of dishonest secrets—diminishing the confidence of the public in their integrity, and by concealing from public scrutiny all intercourse between client and attorney, it shields him from that public reprobation, which would follow the avowed accomplice.").

148. Appleton, *supra* note 143, at 316–17, 319.

149. See TWINING, *supra* note 23, at 100–08 (discussing series of lengthy reviews of the *Rationale* published in the *Edinburgh Review*).

publication of the *Rationale* in London in 1827.¹⁵⁰ The *Rationale* appears in the 1834 catalogue of the Harvard University Library as well as the 1850 catalogue of the Mercantile Library Association of the City of New York. There was also a classified advertisement in the National Daily Intelligencer (Washington, D.C.) in 1840 announcing that a D.C. bookseller had copies for sale.¹⁵¹ The Carolina Observer in Fayetteville, North Carolina carried a brief squib on the *Rationale*, but it quoted just a few of Bentham's choice sobriquets for lawyers, presumably for the amusement of its readers.¹⁵² Finally, the Southern Review printed a brief, largely critical, review of the *Rationale* in 1830.¹⁵³ But there are no American cases citing the *Rationale*'s critique of the attorney-client privilege, and only three prior to 1900 citing the book for any reason.¹⁵⁴

The law magazines contain an interstitial flow of articles, case reports, and reviews of treatises on the attorney-client privilege; general periodicals even less. There are only two published responses to the section of Appleton's treatise setting out his critique of the privilege—neither is favorable.¹⁵⁵ In addition, the

150. See RICHARD NEWCOMBE GRESLEY, A TREATISE ON THE LAW OF EVIDENCE IN THE COURTS OF EQUITY (Philadelphia, T. & J. W. Johnson, Law Booksellers 1837) (1836); THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE, (Josiah Randall ed., Philadelphia 1812) (1804); SAMUEL M. PHILLIPPS, TREATISE ON THE LAW OF EVIDENCE (Albany, Gould, Banks & Gould, & W. Gould & Co. 1816) (1814) (was published "with notes and references to American authorities by John A. Dunlap"); HENRY ROSCOE, A DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES (Philadelphia, T. & J. W. Johnson, Law Booksellers 1840) (1835); see also TWINING, *supra* note 23, at 3. See generally FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS (New York, At the Bible 1788) (1785); Robert M. Pitler, *Crawford and Beyond: Revisited in Dialogue*, 15 J.L. & POL. 333, 409 (2007).

151. See Advertisement, DAILY NAT'L INTELLIGENCER, Apr. 19, 1840, at 1.

152. CAROLINA OBSERVER, July 16, 1829, at 1. (quoting Bentham's reference to lawyers as "a partnership of leeches, of whom different orders, from the attorney upwards, are fastened iniquitously on a client"; the "advocate is a shark; the judge with a sword, called the sword of justice, forces the suitor into his mouth"; "The special pleader and the equity draughtsman should take for their amoral bearing the cuttlefish, that original manufacturer of troubled waters").

153. See S. REV., *supra* note 37.

154. See *Gaines v. Hennen*, 65 U.S. 553, 589 (1860); *Hurlburt v. Bellows*, 50 N.H. 105, 107–08 (1870); *Hurley v. State*, 21 N.E. 645, 653–54 (Ohio 1889). The latter two cases also cite Appleton's treatise. *Hulbert*, 50 N.H. at 108; *Hurley*, 21 N.E. at 654. See also Paul A. Palmer, *Benthamism in England and America*, 35 AM. POL. SCI. REV. 855 (1941). An 1868 essay in the American Law Register praises Bentham as the leading advocate of law reform in the nineteenth century and argues that David Dudley Field's mid-century codification efforts in New York reflected similar reform principles. See *Law Reforms and Law Reformers*, 12 AM. L. REGISTER 513 (1868). But other than letter correspondence between Bentham and a few American public officials—Bentham wrote of law reform to President Monroe in 1811—the article concedes that in the early nineteenth century "[t]he doctrines of Jeremy Bentham . . . met with but a very limited degree of attention, and still more limited acceptance." *Id.* at 520.

155. See *Confidential Communications Between Client and Attorney*, ALBANY L.J. (Jan. 6, 1872), at 1; George S. Hillard, *Appleton on the Rules of Evidence*, 92 N. AM. L. REV. 515, 527 (1861) (praising the work overall, but arguing against abolition of spousal and attorney-client privilege on the ground that "[t]he harmony of domestic life, and the unreserved freedom of communication between counsel and client, are matters of primal importance in the organization of society and the conduct of life; quite as much so as [the principle of rectitude of decision]"). Of course, the paucity of reviews may have been on account of Appleton's unfortunate timing—the treatise was published just before the Civil War.

only nineteenth-century case discussing Appleton's views on the attorney-client privilege, *Penn Mutual Life Insurance Co. v. Wiler*, does so on the way to emphasizing that Indiana had not only codified the privilege, but *expanded* privilege doctrine in confidential communications to cover disclosures from patients to doctors.¹⁵⁶

None of this is to suggest that criticism of the privilege was marginal to debates about professional reform in America. Popular hostility to the profession and the incidents of adversary adjudication is well documented.¹⁵⁷ Moreover, the closest discussions among lawyers about professional morality would most likely have occurred orally, in the setting of local courthouses and nearby taverns, not in print. The tone of published rejoinders to criticism of the privilege, however few, reveals that professional sentiment on the subject was intense—the critiques plainly struck nerves already frayed by popular agitation against the profession and the adversary system. The point, for present purposes, is that Wigmore's reverse incorporation of Bentham at the turn of the century was not well grounded either in the nineteenth-century American cases or commentary.¹⁵⁸

B. PROFESSIONAL REJOINDERS

Elite nineteenth-century lawyers made three principal replies to the charge that the privilege undermined the administration of law and promoted lawlessness. The first mirrored Judge Roane's faith in the probity of professional advocates. One of Appleton's reviewers insisted that he wrongly assumed lawyers lack the integrity to refuse or settle a bad case: "The standard of professional honor can hardly be so low as his argument assumes; if, indeed, human nature itself be quite so bad On the contrary, the very sanctity of the relation between a lawyer and his client is chiefly instrumental in preserving that honor in its purity."¹⁵⁹ Tracking the theory of *Parker*, the reviewer insisted that only by learning the whole of a client's case could a lawyer arrive at the position of trust required to successfully steer the client toward compliance with law. The privilege creates the necessary leverage, the necessary intimacy, to persuade clients anxious not to see the law defeat their interests. "The attorney must know the whole of his client's case. *The more nearly he succeeds in possessing himself of the secrets of*

156. See *Penn Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92, at 100–04 (1885) (recognizing privilege for doctor-patient communications).

157. See BLOOMFIELD, *supra* note 3.

158. On the success of Bentham's more general reform proposals in the law of evidence, particularly regarding the competence of parties to testify, see TWINING, *supra* note 23, at 3–4. On Thayer's extension of Bentham's argument to expand the discretion of trial judges, see Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CALIF. L. REV. 2437, 2439–42 (2000).

159. *Confidential Communications Between Client and Attorney*, *supra* note 155, at 1.

his client's mind, motives, and thoughts, the better he can do justice not only to the client, himself, but to the court and the community."¹⁶⁰

Second, as if they knew the first answer was not fully convincing, elite lawyers trotted out their standard defense against all charges of professional corruption and misconduct: any blame for abuse of the privilege lies with the unscrupulous "few [who] yield to temptation, and become, instead of lawyers, usurers and gamblers and sharks and thieves."¹⁶¹ By "what rule of logic," Georgia lawyer James Jackson queried, does it "follow[] that the whole class must be stigmatized as rogues unwhipped of justice, unbranded felons, uncaged wolves?"¹⁶² Appleton's reviewer took the argument a step further, suggesting that if lawyers were as unscrupulous as Bentham and Appleton assumed, "the same inordinate love of law suits, for the sake of the emoluments" would induce them to "pervert their testimony if called to the stand," rather than betray their clients' secrets.¹⁶³

Third, elite lawyers protested that compelling counsel to disclose a client's secrets would be tantamount to "inquisitorial tyranny."¹⁶⁴ If the lawyer "stands in the very place of the accused," then he can no more be required to disclose the client's secrets than the client.¹⁶⁵ And "a system of law so weak as to require, in order to sustain itself, the confession of the accused, would be too contemptible to be dignified with the name of law."¹⁶⁶ Jackson confined his argument of strict identification between lawyer and client to criminal cases, but because parties were traditionally incompetent to testify in civil trials at common law on grounds of interest in the matter, lawyers at the time would have quickly grasped the relevance of the argument to civil representation.¹⁶⁷

160. *Id.* at 2–3 (an honorable lawyer will advise "a speedy settlement" when the client concedes his liability in a civil case). See also Jackson, *supra* note 37, at 283. (The lawyer is a "public sentinel . . . [t]he vindicator of the laws of GOD and man; a guardian of morality and conservator of right . . . His profession is one of transcendent dignity."). The argument closely parallels the claim in James Richardson's 1837 answer to the charge that "attention to nice distinctions" in litigation, along with arguing any side irrespective of its worth, may "contract" the mind of the lawyer. "On the contrary," Richardson claims, "it is this very practice which tends to enlarge the mind, as well as to render it more acute and discriminating, and more capable of arriving at correct results." James Richardson, *An Address Delivered Before the Members of the Norfolk Bar, at Their Request, February 25, 1837*, in *THE LEGAL MIND IN AMERICA*, *supra* note 1.

161. Jackson, *supra* note 37, at 283. For use of the answer in general defenses of the profession, see Richardson, *supra* note 160, at 232: "[W]here is the justice of pointing the finger of scorn, or aiming the shaft of ridicule, at a whole profession, many of whom have been, and are the very glory of their country—the safe expounders of her laws, the guides of her councils, and the champions of her rights and liberties, because all its members are not learned, eloquent, sagacious, and honorable."

162. Jackson, *supra* note 37, at 283.

163. *Confidential Communications Between Client and Attorney*, *supra* note 155, at 1–2.

164. Jackson, *supra* note 37, at 282.

165. See *id.* ("[U]pon what principles of reasons or justice can a man be made to testify against himself; or by what right can the advocate, standing in the place of the accused, be compelled to do the same?"). This parallels Judge Roane's discussion of identity between lawyer and client in *Parker v. Carter*. See *Parker v. Carter*, 4 Munf. 273, 287 (Va. 1814). See also *supra* note 120 for Judge Roane's language in *Parker*.

166. Jackson, *supra* note 37, at 282.

167. See RICE, *supra* note 77 (discussing the competency rule).

The suggestion that the “system of law” would be weaker without the privilege addresses the underlying source of tension between Benthamite critics and defenders of the privilege. If the exclusive purpose of counseling and adjudication were rectitude of decision, the privilege might indeed be an “anomaly.” But if there are other purposes served by legal representation (in criminal cases, holding the state to its proof and checking the state’s temptation to use investigative techniques that infringe civil liberties), the privilege serves core constitutional values superior to rectitude of decision. It prevents the Sixth Amendment right to counsel from destroying the Fifth Amendment right against self-incrimination, and promotes separation of powers.¹⁶⁸ Jackson was equally explicit that within a system designed to vindicate these rights, it is “consistent with perfect integrity” for a lawyer to defend a client “whom he knows to be morally guilty.”¹⁶⁹

What about civil cases? Jackson claimed that legal and factual indeterminacy made it “palpably absurd for the advocate to prejudge the question.”¹⁷⁰ For “it often happens that the advocate is unable to see the justice of his client’s cause until it is brought before the court.”¹⁷¹ And in any case, it is for the judge, not the lawyer, “to say whether a cause is just or unjust.”¹⁷² In his introductory lecture at the new law school at Cincinnati College, Timothy Walker added that clients share responsibility for abuses of the privilege and adversary process. He offered the standard argument that there are “some unworthy members” of the profession.¹⁷³ But he quickly added that lawyers “lay no claim to superhuman virtue. We see unworthy members in every other profession, and therefore take no shame to ourselves that they are sometimes to be found in ours.”¹⁷⁴ More than that, lawyers can “take refuge in the principle that supply corresponds to demand. *If there were no dishonest or knavish clients, there would be no dishonest or knavish lawyers. Our profession, therefore, does but adapt itself to circumstances; and it depends upon the community, whether it shall be elevated or degraded . . .*”¹⁷⁵

168. See Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 486 (1977) (“But when the fifth and sixth amendments are considered together, the individual accused of crime does seem to have a right to attorney-client privilege. Without a right to privilege, the exercise of either constitutional right would require waiver of the other.”).

169. Jackson, *supra* note 37, at 279–80 (“The only way [the law] can ascertain crime and award justice is by a fair hearing of both parties. No matter how certain the community may be of the criminal’s guilt, it would be a palpable subversion of law to allow this fact to detract one iota from his privilege of defense. Without this faithful scrupulousness of the law it would lose its authority and we [must lose] its protection. And this same glorious caution must also be exercised in determining the degree of guilt . . .”).

170. Jackson, *supra* note 37, at 278.

171. *Id.*

172. *Id.*

173. Walker, *supra* note 28, at 255.

174. *Id.*

175. *Id.* (emphasis added).

This is not an argument that clients have an unqualified right to counsel for illicit ends, and Walker would surely have rejected that claim,¹⁷⁶ but his statement bluntly exposes the fallacy in expecting legal representation to produce rectitude of decision if clients only want rectitude when it serves their interests. It is tempting to read a recognition of increasing moral pluralism and acquisitiveness (in antebellum lawyers *and* clients) in Walker's statement. The more reasonable construction, however, is that he sensed the contingencies, the pressures—in a word—the delicacy of questions faced by lawyers seeking to establish and maintain a lively practice in a period of rapid social and economic change.¹⁷⁷ If those pressures did not excuse the abuses of “unworthy” lawyers, Walker nevertheless sought to reverse the charge of hypocrisy leveled against the profession and throw it back on the clients and communities who wanted the law both to restrain and to liberate, both to express universal values, and to vindicate personal interests.

V. CONCLUSION

Early American privilege doctrine was significantly broader than the doctrine endorsed in the English cases that Wigmore and Hazard gave pride of place in their histories. Most prominently, communication between attorney and client was covered irrespective of the pendency or prospect of litigation and the crime-fraud exception was narrowly applied. The early American theory of the privilege was more expansive as well. Courts and legal commentators believed in the client's right to know the law, as well as the client's right to secrecy in what was communicated in order to obtain the insight of legal counsel and make a free, informed choice about whether and how to comply with law. Significantly, the privilege was regularly upheld even in circumstances in which it was clear that the client had sought the advice of counsel in order to *avoid* legal obligations—circumstances in which the modern crime-fraud exception would plainly apply. Early American judges and commentators thus appear to have endorsed a kind of “creative deviance” under the cover of the privilege. The privilege provided space for lawyer and client to think creatively about whether and how to comply with law, and there were instances in which judicial recognition of privilege claims appeared, at least tacitly, to acknowledge the defiance of law as acceptable behavior.

Judges and commentators expressed both sincere and strategic confidence in the probity of the profession to allay popular and professional concerns about

176. See Spaulding (2003), *supra* note 14, at 1439 (discussing Walker's general views on professional responsibility); Walker, *supra* note 28, at 242 (perversion).

177. On debtor-creditor litigation generated by shifts in national banking policy and economic instability, see Henretta, *supra* note 74, at 299. Perhaps Walker's argument is best read as a novel twist on Montesquieu's position that law must be designed in accordance with the nature of the communities to be governed. See generally MONTESQUIEU, *THE SPIRIT OF THE LAWS* 8 (Alford et al. eds., 1984) (1748).

abuse of the privilege. But relatively narrow construction of the crime-fraud exception and a conviction that the privilege belonged to the client, not the lawyer, left the ultimate decision about what ends to seek with the client. Responsibility for doing justice in any given case was thus highly decentralized and the proper administration of justice and compliance with law cannot be seen as reciprocally reinforcing objectives. Indeed, compliance with law gave way with some frequency to administration of justice on terms that fostered democratically decentralized modes of asserting and defining rights.

The lawyer might refuse the representation or withdraw. He might remonstrate with the client and then relent. Alternatively, he might decide that the client had equities, if not the letter of the law, on his side, and counsel deviance to vindicate well settled or contested social values. There are clues to suggest that the attorney in *Parker* had something like this latter option in mind—a fraudulent conveyance to spare loss to Fauntleroy and his daughter for liabilities not of their making. (The underlying equities and legal merit of countless other debtor-creditor cases that became the subject of privilege litigation were equally vexed.) Finally, the lawyer might, as James Jackson insisted, hold the law to its letter, quite irrespective of the claims of justice and the client's obvious liability.

With the exception of clear future crime or fraud (and even in some cases where the fraud was painfully clear), the privilege protected, indeed encouraged, intimate discussion with the client about which of these paths to take. The lawyer's leverage came precisely from knowing not only the desires and interests, but also the true circumstances, of the client. And the idea of the lawyer as public "sentinel" appears to have been pliable enough to allow lawyers (however strategically) to frame any of these choices as consistent with what James Jackson called the "transcendent dignity" of the profession.¹⁷⁸

178. Jackson, *supra* note 37, at 283.