Compliance, Creative Deviance, and Resistance to Law: A Theory of the Attorney-Client Privilege

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Non pudeat dicere, quod non pudet sentire. ¹

I. Candor about Confidentiality

The legal profession has not been candid about the purpose of the attorney-client privilege. Our lack of candor now verges on duplicity. We seem to be ashamed to admit what we do for our clients under cover of the privilege. And with our shame and circumlocution, confusion and controversy about the doctrine has multiplied.

We should not be ashamed. The time has come to be “full and frank,” as the saying goes. In this essay I present a critique of the most prominent modern justification of the attorney-client privilege: the idea that the privilege promotes law compliance. I explain why both critics and proponents of the privilege converged on the compliance theory toward the end of the twentieth century even though the theory was not recognized in earlier American precedent. I then explore some of the deleterious consequences of adhering to the compliance theory. These include persistent doctrinal confusion about the scope of the privilege and its exceptions, duplicity on the part of the bar about the responsibilities of lawyers who represent clients contemplating action at and beyond the boundaries of legal compliance, and displacement of traditional principles governing the administration of justice. Early American privilege cases tended to ground the privilege in the client’s right to know the law and to make an informed, independent decision about compliance. I conclude by offering some preliminary thoughts about the implications of applying this alternative theory of the privilege to modern practice. The crime-fraud exception should be narrower, as it was for most of our history, but refinements in the scope of the privilege, particularly for entities, are warranted. At a minimum, I contend, the false comfort of the compliance theory must be

* © Sweitzer Professor of Law, Stanford Law School. Special thanks to Art Garwin and Peter Margulies for helping to bring this essay into print, to Bob Gordon and Stephen Bundy for invaluable comments on drafts, and to the participants in the Bay Area Legal Ethics Forum for insightful suggestions and criticism. I am grateful to Rebecca Maurer, Lila Miller, and Thomas Rubinsky for exceptional assistance with research.

¹ “Let no man be ashamed to speak what he is not ashamed to think.” 3 THE ESSAYS OF MICHAEL DE MONTAIGNE 57 (Pierre Coste, trans., 9th ed. 1811).
renounced. Counseling resistance to law is a core function of law practice in a pluralistic society committed to decentralized, participatory legal decision-making.

In *Upjohn Co. v. United States*, the Supreme Court declared that 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.”  

2  *Upjohn* was, in certain respects, an attractive case to hold that the purpose of the privilege is to promote compliance with law. Upon learning that foreign subsidiaries had engaged in bribery to secure business from foreign governments, the company instructed its general counsel to investigate. Following its internal investigation, the company voluntarily disclosed the illicit payments to the Securities and Exchange Commission and made its employees available for interviews with government agents. The company’s cooperation ended only when faced with an IRS summons seeking documents prepared by counsel in the course of the company’s internal investigation.  

3  In concluding that the privilege should be expanded to cover conversations between corporate counsel and lower level employees like those interviewed by *Upjohn*’s general counsel, the Supreme Court repeatedly emphasized a complementary relationship between law compliance and the free flow of information to counsel:

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem, but also threatens to limit the valuable efforts of corporate counsel to ensure their client’s compliance with law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, “constantly go to lawyers to find out how to obey the law,” Burnham, The Attorney-Client Privilege in the Corporate Arena, 24 Bus. Law. 901, 913 (1969), particularly since compliance with the law in this area is hardly an instinctive matter, see, e.g., *United States v. United States Gypsum Co.*, 438 U.S. 422, 440-41 (1978) (“the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct”).  

4  Although the attorney-client privilege is “the oldest of the privileges for confidential communications known to the common law,”  *Upjohn* is the first case to ground the privilege squarely in a supposed nexus between law compliance and law
“full and frank communication.” In its earliest iterations in English common law, the privilege recognized a point of gentlemanly honor: the unseemliness of forcing an attorney to disclose information reposed in confidence by the client. Early American courts tended rather to ground the privilege in the client’s right to know the law and the testimonial identity of lawyer and client. The rule that a party could not be a witness in his own case, prevalent in the early nineteenth century, would have been undercut by permitting a lawyer to testify to what the client had communicated in confidence. By the twentieth century American courts focused more on the subjective apprehension of the client—fear that disclosures to an attorney could become disclosures in court—and the attendant inhibition in communication with counsel.


Early influential articles on the attorney client privilege did not mention the compliance theory. See David Simon, The Attorney-Client Privilege As Applied to Corporations, 65 Yale L.J. 953 (1956); Note, Attorney-Client Privilege for Corporate Clients: The Control Group Test, 84 Harv. L. Rev. 424, 425 (1970); Note, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 Yale L.J. 1226 (1962). As I discuss in Part III, infra, those few articles that mentioned the idea before Upjohn promoted the justification with little critical analysis. See Bryson P. Burnham, The Attorney-Client Privilege in the Corporate Arena, 24 Bus. Law. 901, 913 (1969) (stating that the, “value of promoting voluntary compliance with the law through free interchange between clients and attorneys” has been largely ignored in previous discussions); Note, The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 Harv. L. Rev. 464, 470 (1977) (noting that it would be beneficial to “insure that clients know and remain within the bounds of their legal autonomy”). Even after Upjohn the validity of the compliance theory has not been questioned when it has been discussed. See John E. Sexton, A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege, 57 N.Y.U.L. Rev. 443, 470 (1982) (discussing the implications of the Court’s “emphasis” of the compliance model in Upjohn, but not taking a normative stance on it or discussing it as an historical anachronism); Michael L. Waldman, Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context, 28 Wm. & Mary L. Rev. 473, 496 (1987) (same). Nor have critiques of the development of privilege doctrine included significant discussion of the compliance theory. See Lance Cole, Revoking Our Privileges: Federal Law Enforcement’s Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided), 48 Vill. L. Rev. 469 (2003); 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 (1986). Even Elizabeth Thornburg’s trenchant attack on the attorney-client privilege in the corporate context—in which she seeks to identify and discredit prominent justifications of the privilege—does not address the compliance theory as a purpose of the privilege. Elizabeth G. Thornburg, Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege, 69 Notre Dame L. Rev. 157 (1993).


Since *Upjohn* was decided, however, at least twenty-four jurisdictions have adopted the law compliance theory.\(^9\) And an unprecedented expansion of the

\[^9\] Wigmore on Evidence], emphasized this subjective theory of the privilege and many courts adopted it. See, e.g., Prichard v. United States, 181 F.2d 326, 328 (6th Cir. 1950) ("The privilege . . . is a salutary rule designed to secure the client's freedom of mind in committing his affairs to the attorney's knowledge . . . to influence him when he may be hesitating between the positive action of disclosure and the inaction of secrecy.");) (quoting 5 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 2306 (2d ed. 1923)); State v. Kociolek, 129 A.2d 417, 425 (N.J. 1957) ("The essential policy of the privilege is grounded in the subjective consideration of the client's freedom from apprehension in consulting his legal advisor, assured by removing the risk of disclosure by the attorney even at the hands of the law."); (citing 8 Wigmore on Evidence, supra § 2291); Baum v. Denn, 211 P.2d 478, 480 (Or. 1949) (The privilege "is solely for the protection of the client who is enabled thereby to disclose to his lawyer matters of utmost confidence and importance without fear of having his trust violated."). There are of course nineteenth century antecedents to the subjective theory. See Bacon v. Frisbie, 80 N.Y. 394 (1880) ("The principle upon which these communications are protected from disclosure . . . is, that he who seeks aid or advice from a lawyer ought to be altogether free from the dread that his secrets will be uncovered; to the end that he may speak freely and fully all that is in his mind. . . . [T]he foreseen possibility [of subsequent disclosure] would press upon his lips, when in consultation with his legal advisor. . . .").


crime-fraud exception toward the end of the twentieth century reveals that the law compliance theory is no mere abstraction or felicitous dictum. It has become the primary measure of the limits of the privilege. Traditionally, the exception applied only to crimes mala in se, and it was available only upon making out a prima facie case that advice of counsel had been sought in furtherance of such crimes. In its modern formulation, however, wrongdoing well short of crime and common law fraud triggers the exception. Criminal sanctions for regulatory violations have been expanded, putting the exception in play at the discretion of prosecutors in a broad class of cases. And courts have dramatically reduced the evidentiary threshold for applying the exception. Thus while the

10. Fried, supra note 6, at 451-53 (“Only one pre-1884 case applied the exception to civil wrongdoing. . . . [T]he limitation of the exception to crimes was so well established that even a judge who disapproved of it as a cloak for fraud felt himself bound by it.”). On the standard of proof to make out the exception, see id. at 462.

11. On expansion of the exception beyond crime and fraud, see 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 8:11 at 8-84 n.85 (2d ed. 2009) (gathering cases expanding crime-fraud exception to other forms of wrongdoing); Fried, supra note 6, at 469-70 (“[T]he overwhelming modern tendency is to extend the exception to all crimes, without regard to the blameworthiness of the client’s exploitation of the attorney’s advice.”); and id. at 477 (discussing expansion of exception beyond common law fraud). On the lowering of the evidentiary threshold, see id. at 462 (discussing lower evidentiary threshold); and Clark v. United States, 28 U.S. 1 (1933).
scope of the privilege has been expanded in order to promote law compliance, it increasingly contracts on the suggestion that the attorney’s services have been sought to defy the law.\textsuperscript{12}

Notwithstanding this superficial symmetry, the law compliance theory is at best incomplete and at worst contradictory. It is incomplete because it disregards in principle the circumstances in which a client has a legitimate interest in non-compliance.\textsuperscript{13} It is contradictory because, despite the expansion of the crime-fraud exception beyond crimes mala in se and common law fraud, there remain circumstances in which it is perfectly appropriate (and sometimes necessary) for a lawyer to counsel disobedience to specific legal obligations under cover of the privilege. Breach of contract, some violations of administrative and constitutional law, violations of real and intellectual property rights, and many torts fall into this category.\textsuperscript{14} Moreover, it is not clear that the social cost incident to such disobedience is lower than the social cost of offenses that now trigger the crime-fraud exception.\textsuperscript{15}

The contradiction can of course be resolved, but to do so the exception must swallow the rule. Indeed, if the primary objective of the privilege is to promote law compliance, counseling disobedience should rarely, if ever, be protected from disclosure in subsequent litigation. Evidence of any wrongful purpose on the part of a client consulting a lawyer must trigger the exception. Ambiguity about the relative social costs of crime, fraud, and other wrongdoing, from this perspective, provides further reason for the exception to define the rule.

A narrow privilege might survive under a law compliance theory for communications strictly necessary to conduct litigation over past wrongdoing on the ground that adjudication in an adversary mode would not otherwise be possible. For without the privilege counsel would too easily be converted into a witness against her client. But even this narrowest of approaches to the privilege

\textsuperscript{12.} See Zolin v. United States, 491 U.S. 554, 562 (1989) (quoting Wigmore on reducing the threshold of proof to establish crime or fraud exception, and suggesting that the exception applies to future “wrongdoing” short of crime or fraud); cf. Alexander v. United States, 138 U.S. 353 (1891). A parallel movement has occurred with respect to the scope of and exceptions to the ethical duty of confidentiality. See infra note 56 and accompanying text.

\textsuperscript{13.} My use of the term “legitimate” is not intended to suggest a moral limitation on counseling disobedience. In most cases, the only limitation should be whether the client’s position is legally non-frivolous. See infra note 68 and accompanying text.


would have to meet Bentham’s charge that it is the guilty, indeed the most guilty, who benefit from a rule that prevents a lawyer from revealing a client’s confession to past wrongdoing.\textsuperscript{16} Add to that the many criticisms of the efficiency and accuracy of the adversary system, leveled by Bentham and a parade of other skeptics,\textsuperscript{17} and it is not clear that the privilege should survive in any form if law compliance is truly the goal.

Worse than tilting at windmills then, adherence to a law compliance theory is destructive of the very doctrine it purports to justify. How has the profession become attached to such an embarrassingly self-defeating conceit?

\section*{II. A Convergence of Critics and Proponents}

The most proximate cause is the profession’s extended and largely unsuccessful effort to answer Bentham’s charge after it had been imported into American privilege analysis by John Henry Wigmore.\textsuperscript{18} Prior to Wigmore’s famous 1904 treatise on evidence, American courts and legal commentators simply ignored Bentham’s critique.\textsuperscript{19} In a democratic society in which access to law turned on access to an attorney, the privilege was most commonly justified by the client’s right to know the law and to make an informed decision about whether or not to comply. Courts generally did not see the proper administration of justice (through either counseling or advocacy) as demanding ex ante law compliance. The privilege created space in which the lawyer might so advise, and knowledge of the client’s secrets gave the lawyer unique leverage to so advise, but the purpose of secret communication was rather a fully informed decision by the client about what course of action to take.\textsuperscript{20}

\begin{footnotes}
\footnotetext[16]{Bentham argued that if the privilege were eliminated “a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defence, as he may do at present.” 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 304 (Rothman & Co. 1995) (1827). Given the existence of work product protection in anticipation of and during litigation, it’s not even clear that the attorney-client privilege is necessary to prevent counsel from being converted into a witness. See FED. R. CIV. P. 26(b)(3).}
\footnotetext[18]{See Spaulding, supra note 7.}
\footnotetext[19]{Spaulding, supra note 7. One prominent Maine lawyer took up Bentham’s critique in a series of essays published in the middle of the nineteenth century, and a few jurisdictions narrowly restricted the scope of the privilege without citing or relying on Bentham’s critique. See id. (discussing writings of John Appleton and jurisdictions, such as New York, that narrowly construed the privilege). But these were exceptions to the general rule of broad construction and application of the privilege. See id.}
\footnotetext[20]{Id.}
\end{footnotes}
Given Bentham’s antipathy to lawyers\textsuperscript{21} and the adversary system\textsuperscript{22} his initially chilly reception by the legal profession in the United States is understandable. Wigmore nevertheless labored to reconcile privileges in general, and the attorney-client privilege in particular, with Bentham’s principle of rectitude of decision: the idea that the law of evidence should aid courts in “getting at the truth.”\textsuperscript{23} He fretted about the obstructive qualities of the privilege in fact-finding, demurred to its benefits,\textsuperscript{24} and his analytic framework ultimately subordinated the privilege to the principle of rectitude of decision. The privilege was primarily justified, he concluded, by the need to overcome a client’s subjective fear of subsequent disclosure (implying that the privilege might not apply when an intrepid client consults a lawyer, when a client has independent incentives to be forthcoming, when the lawyer is speaking to the client, or when the client is an entity). And because it operated in derogation of truth, he insisted that the privilege be narrowly construed.\textsuperscript{25} Finally, he argued, the crime-fraud exception should not be limited to crime and fraud:

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 sensitivity in such matters.\textsuperscript{26}

\begin{itemize}
  \item \textsuperscript{21} He referred to them variously as “shark[s],” “orders of leeches,” and “manufacturer[s] of troubled waters.” \textit{Id.} (quoting 2 BENTHAM, \textit{supra} note 16 at 197-205).
  \item \textsuperscript{22} He referred to the adversary system as a “radically vicious,” “sinister . . . technical system of procedure,” “favorable to incorrectness, to incompleteness, to mendacity, to consequent deception and misdirection,” “contrary to the merits,” “repugnant to common sense as well as common honesty,” causing “factitious delay, vexation, and expense.” 1 BENTHAM, \textit{supra} note 16 at 35, 287, 444, 456, 536.
  \item \textsuperscript{24} “Its benefits are all indirect and speculative; its obstruction is plain and concrete.” 8 WIGMORE ON EVIDENCE, \textit{supra} note 8, \S\ 2291, at 557.
  \item \textsuperscript{25} 8 WIGMORE ON EVIDENCE, \textit{supra} note 8, \S\ 2192, at 73 (“The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.”). Wigmore did not invent the principle of narrow construction, but earlier courts generally gave it less weight if they referred to it at all. See, \textit{e.g.}, Foster v. Hall, 12 Pick. 89, 98 (Mass. 1831) (stating that “this rule of privilege, having a tendency to prevent the full disclosure of the truth, ought to be construed strictly” but then rejecting strict limitation of privilege to “communications made for the purpose of enabling an attorney to conduct a case in court”; extending privilege to ordinary counseling about “legal rights and obligations”).
  \item \textsuperscript{26} 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW \S\ 2298, at 39 (2d ed. 1923).
\end{itemize}
He ignored much of the early American precedent in drawing these conclusions, looking instead to English cases that reflected concern over the obstructive capacities of the privilege.

It was not until the latter half of the twentieth century, particularly after 1970, that Wigmore’s framework began to take hold in American courts.27 There are antecedents in some of the mid-century academic commentary,28 and in the Model Code of Evidence produced by the American Law Institute in 1942. Wigmore was the chief consultant for the Model Code, but it was Edmund Morgan, the Reporter, who railed most openly against the privilege in his Foreword: “There are no data to furnish a reasoned support for the privilege in general. The reason for its creation is exploded: the system into which it fitted as a rational part is gone.”29 Only “strenuous opposition from the Bar,” he

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27. A Kansas Supreme Court decision from 1919 provides evidence of early resistance to Wigmore’s approach:

 Authorities are cited to the effect that the 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. 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.


There is scant evidence of discussion of what the Model Code called the “crime or tort” exception in the ALI Council Meeting records, particularly whether the use of the term “tort” instead of fraud was intended to endorse an expansion of the exception. Cf. E.M. Morgan, Discussion of Code of Evidence Proposed Final Draft, 19 A.L.I. Proc. 74, 162-63 (1941-42) (discussing a “crime or tort” exception to attorney-client privilege, and evidentiary threshold to establish
lamented, made efforts either to abolish the privilege altogether, or to reduce it to the contours of the constitutional privilege against self-incrimination, “futile.”

Ambiguity in the justification and scope of the privilege rather naturally flowed from such an ambivalent stance toward the privilege on the part of the profession. And there is some evidence of the ambiguity seeping into judicial interpretation. Take, for instance, the account of the privilege given in one of the most commonly cited mid-century privilege cases, *United States v. United Shoe Machinery Corp.*

The attorney-client privilege, the trial judge stated:

> is founded upon the belief that it is necessary “in the interest and administration of justice.” Hunt v. Blackburn, 128 U.S. 125, 127. As stated in comment to Rule 210 of the A.L.I. Model Code of Evidence: “In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity. The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases.” [Emphasis added.] But the privilege should be strictly construed in accordance with its object. People’s Bank v. Brown, 3 Cir., 112 F. 652.

Although the *United Shoe* court went on to apply the privilege in a plausible manner (this was not a judge who shared Morgan’s hostility to the privilege) the underlying theory of the privilege is muddled. First, with respect to the justification of the privilege, vague conjunctions such as “the interest and administration of justice,” and equally vague expressions such as “the social good,” surround the

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31. 89 F. Supp. 357 (D. Mass. 1950). Westlaw Keycite shows more than two thousand citing references to *United Shoe*.
32. Id. at 358.
subjective theory that the privilege induces clients to freely disclose facts their lawyers need to formulate accurate legal advice.\textsuperscript{33}

Second, although the undefined “social good” of the privilege “is believed to outweigh the harm” to rectitude of decision, rectitude of decision nevertheless demands “strict” construction of the privilege.\textsuperscript{34} Third, the court’s emphasis on inducing “clients” to speak freely introduces Wigmore’s ambiguity about whether and to what extent the privilege should apply to confidential communication from the lawyer to the client.\textsuperscript{35} Finally, the court goes on to restate the Model Code of Evidence’s expansive account of the crime-fraud exception as a “crime or tort”

\textsuperscript{33} Id. at 358. Many modern decisions rely upon these vague conjunctions. Compare the unequivocal endorsement of the privilege given by the Virginia Supreme Court in the 1814 case of Parker v. Carter:

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.

4 Munf. 273, 286-87 (1814).

\textsuperscript{34} See In re Selser, 105 A.2d 395, 402-07 (N.J. 1954) (following United Shoe’s and Wigmore’s rule of narrow construction, and stating that “[t]he privilege is an anomaly and ought not to be extended” (quoting Broad v. Pitt, (1828) 1 M.&M. 233, 234 (Eng.)). The accusation that the privilege is an “anomaly and ought not to be extended” was picked up by Wigmore. See Spaulding, supra note 7. However, it is not clear that the M.&M. reporter provides an accurate quotation of the court’s opinion Broad v. Pitt. The M.&M. reporter was published three years after the case was decided. An alternative reporter published the year after the case was decided quotes the court as saying only: “I think this confidence in the case of attorneys is a great anomaly in the law.” Broad v. Pitt, (1828), 3 Carr. & Payne 518, 519. The Carr. & Payne version was selected for reprinting in the definitive English Reports. See Broad v. Pitt, 172 Eng. Rep. 528, 528.

For other endorsements of the rule of narrow construction in mid-twentieth century cases, see In re Richardson, 157 A.2d 695, 698-99 (N.J. 1960) (concluding that the “policy of full disclosure is the more fundamental”); and Prichard v. United States, 181 F.2d 326, 328-29 (6th Cir. 1950) (stating both that the privilege is “salutary” and that the court must follow a rule of narrow construction). But see Rigolfi v. Superior Court, 30 Cal. Rptr. 317, 320 (Dist. Ct. App. 1963) (qualifying the rule of narrow construction).

35. For example, the court refused to apply the privilege to advice given by attorneys in letters, reports or opinions delivered to the corporation on the basis of facts conveyed to the attorney by third parties, contained in public documents (such as patents at issue in the litigation), or judicial opinions. At the same time, the court concluded that the privilege “is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.” United Shoe, 89 F. Supp. at 359-60. Compare 1 Rice, supra note 11, at § 5:2, at 5-42 to -43 (describing communication from attorney to client as warranting merely “derivative” protection “to the extent that the responsive attorney communications reveal the substance of [directly] protected client communications” and citing range of approaches to the rule in federal cases), with id. at § 5.2, at 5-86 (“A significant number of courts have held that an attorney’s advice or opinions are protected without regard to the information revealed by the communication.”). See also Gillard v. AIG Ins. Co., 15 A.3d 44 (Pa. 2011).
exception without defining the qualifying torts. And it does so on terms that pre-
view the law compliance theory.\textsuperscript{36}

None of these corporations or their officers or employees consulted

counsel with the purpose of seeking assistance in committing a crime
or a tort. Mistaken or not, the officers and employees believed they

were acting according to law. Unlike the persons referred to by Mr. Justi-

care Cardozo in Clark v. United States, 289 U.S. 1, they sought advice

so that they might continue to act according to law. And counsel gave

advice in the same spirit.\textsuperscript{37}

This expansive view of the crime-fraud exception was mere dicta in United
Shoe. But by the late 1960s and early 1970s courts began to extend the crime-

fraud exception to other forms of wrongdoing, sometimes relying explicitly on

Wigmore’s capacious view that any contemplated wrongdoing should trigger

the exception.\textsuperscript{38} On a roughly parallel track, courts were confronted with two

other claims to limit the privilege: first, following the expansion of the adminis-

trative state in the New Deal, some federal agencies insisted that their legisla-

tively authorized powers of investigation “abrogated the attorney-client privilege

of the entities subject to [their] jurisdiction”; second, both private and public

plaintiffs suing corporate entities contended that communications by counsel

with lower level employees should not be privileged given the rule of narrow

construction.\textsuperscript{39}

When these two issues converged in \textit{Upjohn},\textsuperscript{40} the Court did not invent
the law compliance theory on its own. The elite bar paved the way in extensive

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\item \textsuperscript{36} See \textit{Model Code of Evidence R. 212} (1942); Morgan, \textit{Discussion, supra} note 29, at 162-

63 (discussing a “crime or tort” exception to attorney-client privilege, and evidentiary threshold to

establish exception).
\item \textsuperscript{37} \textit{United Shoe}, 89 F. Supp. at 359 (citations omitted).
\item \textsuperscript{38} See \textit{1 RICE, supra} note 11, at § 8:11, at 8-84 (discussing the influence of Wigmore’s view

of the exception and citing cases relying on Wigmore); \textit{Zolin v. United States}, 491 U.S. 554, 562-63

(1989). Uncertainty about the proper boundaries of the crime-fraud exception is vividly dem-

onstrated in a 1969 debate about how to state the exception in the Federal Rules of Evidence, then

in draft. See \textit{A Discussion of the Proposed Federal Rules of Evidence}, 48 F.R.D. 39, 52 (1969) (evid-

cencing confusion about whether the exception extends beyond misrepresentations “of a known

criminal character”).
\item \textsuperscript{39} Charles A. Miller, \textit{The Challenges to the Attorney-Client Privilege}, 49 VA. L. REV. 262,

263 (1963) (discussing both claims); \textit{cf. Kenneth Culp Davis & Richard J. Pierce, Jr., Administra-

tive Law Treatise} § 10.1 (3d ed. 1994) (stating that the privilege is not abrogated). On the second


that corporations are not entitled to the attorney-client privilege), \textit{rev’d}, 320 F.2d 314 (7th Cir.

1963).
\item \textsuperscript{40} Although the government conceded the applicability of the attorney-client privilege in

\textit{Upjohn} and focused on the scope in its briefing before the Supreme Court, the Sixth Circuit had

held in \textit{Upjohn} that the “work-product doctrine . . . is not applicable to administrative summonses

issued” by the IRS. \textit{United States v. Upjohn Co.}, 600 F.2d 1223, 1228 n.13 (6th Cir. 1979). The

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amicus briefing.41 The basic strategy displayed in the briefing was to turn the law compliance theory, which had been responsible for contraction of the scope of the privilege via the crime-fraud exception, into a reason to expand the scope of the privilege for corporations—the most common repeat litigants. Defenders of the privilege had already made this turn in commentary in the 1960s. Writing in 1963 against the claim that federal agencies’ “right to know” trumped the privilege, Charles Miller insisted:

There are . . . significant countervailing justifications for putting an administrative agency to the increased investigative efforts that respect for the attorney-client privilege necessitates. The justifications are bottomed not only on the desire to afford clients the full benefit of uninhibited legal advice, but on the respect for and adherence to the law that such unfettered legal advice induces. These are considerations of the first importance. The complex regulation of business that currently prevails in our society can succeed only through voluntary submission to the regulation. To obey the law one must know what it is.42

In a 1967 address to the Fellows of the American College of Trial Lawyers, a former federal judge, Simon H. Rifkind, lamented that the attorney-client privilege “is under attack.”43 He resisted even labeling the confidentiality of attorney-client communication a privilege rather than a “tool” enabling “uninhibited access of the lawyer to his client.”44 “In my view, easy access to a client does not represent a privilege any more than the dentist’s right to look into a patient’s mouth is a privilege; but if it need be called a privilege, at least we ought to observe that it goes back to the year 1280.”45 He also preferred the feudal justification that refusal to testify to a confidence reposed by the client was a point of

Sixth Circuit concluded that “[t]he IRS simply must show that the inquiry is relevant to a good faith investigation conducted pursuant to a legitimate purpose, that the information sought is not in the IRS’ possession and that proper administrative procedures have been followed.” Id. Before the Supreme Court, the IRS conceded that work product protection “is applicable to IRS summons enforcement proceedings,” arguing only that the government “showed ample necessity” for the evidence. See Brief for the United States and the Federal Respondent at 36, United States v. Upjohn Co., 449 U.S. 383 (1981) (No. 79-886), 1980 U.S.S. Ct. Briefs LEXIS 2147.

41. Amici included the ABA, the ATLA, the Federal Bar Association, the Center for National Litigation of the Chamber of Commerce, the Committee on Corporate Law Department of the Association of the Bar of the City of New York, the Chicago Bar Association, and the New England Legal Foundation.
42. Miller, supra note 39, at 270 (emphasis added); see also id. at 274 (emphasizing that the “social good worked by the privilege is too important to be . . . ignored”).
44. Id. at 566.
45. Id. at 567.
honor. But if the privilege required a modern justification, he continued, it should be law compliance:

A very large area of regulation by law would today be impossible of enforcement were it not for the services of a highly sophisticated, well-informed and highly principled Bar. I do not mean to suggest that lawyers are surrogates for policemen; but I do mean to say that without the Bar, enforcement would not be manageable in many areas of the law.  

Rifkind offered tax, antitrust, and securities laws as examples of areas in which the advice of attorneys encourages self-regulation. He then continued:

I suggest that for every police action taken by agencies of the government in these fields, either to prevent or punish infractions, there are a thousand preventive steps which are taken at the instance of, on the advice of, and under the supervision of private lawyers. The reason is simple enough. Compliance with these laws is not the mere activation of the “do right” ethics that businessmen have learned at their mothers’ knees. Nothing in the moral code learned at home teaches a business executive what reports he should file with the SEC. . . .

Of course, the lawyer performs that function because he wants to keep his client out of trouble. Nonetheless, the service he renders makes enforcement in these areas of regulation manageable at all.

But in order to discharge this important function, the lawyer must enjoy the unlimited confidence of his client and unrestrained freedom to inquire of his client. These he will not achieve . . . unless he rests secure in the so-called lawyer’s privilege . . . .

Perhaps the most influential argument was presented by Chicago attorney Bryson P. Burnham at the Seventh Annual Corporate Counsel Institute in 1968, sponsored by Wigmore’s beloved Northwestern University Law School. After suggesting that confusion among the courts over the proper scope of the corporate attorney-client privilege arose from judicial “suspicion” about the “significance and value” of the privilege “in the corporate context,” Burnham hypothesized that the problem was that “the rationale for the privilege has generally been developed with individuals.” The result,” he continued, “is that the common law rationale constantly stresses that individual ‘rights’ are at stake.”

46. Id. at 567-68 (emphasis added).
47. Id. at 568.
48. Burnham, supra note 6, at 913.
49. Id.
While this rationale certainly may be applied to corporations . . . it undoubtedly has considerably less emotional force and may even sound unnatural and inappropriate in the corporate context. Corporate ‘rights’ tend to be thought of in a much more impersonal and detached way as raising questions of policy but not really of principle. On the other hand, the emphasis on individuals has caused an important social policy relating to the privilege to be very largely ignored—that is, the value of promoting voluntary compliance with the law through free interchange between clients and attorneys.  

Individuals, he posited, typically do not consult lawyers ex ante “to find out how to comply with the law. Rather, they go to lawyers when they are in trouble with the police, or are sued, or themselves want to bring a lawsuit. Corporations, however, do constantly go to lawyers to find out how to obey the law.”

A more complete history would of course be necessary to explain precisely how and why the law compliance theory emerges in the 1960s and becomes the centerpiece of *Upjohn* just as modern courts were beginning to embrace Wigmore’s expansive view of the crime-fraud exception in earnest. At least as early as the mid-1970s, for instance, both courts and federal regulators were themselves admonishing corporate counsel about the importance of their role in promoting law compliance. The bar was quick to point this out in the *Upjohn* amicus briefing. More immediately, there was the apparent success of the

50. Id.


53. Amici in *Upjohn* relied heavily on Burnham, Miller, and Rifkind. See id. at 14 n.7 (“Corporations . . . constantly go to lawyers to find out how to obey the law.”) (quoting Burnham, *supra* note 6, at 913)); id. at 10 n.6, 15, 16 n.9, 17, 19 (citing and quoting Rifkind, Burnham and Miller); Brief of the Am. Bar Ass’n as Amicus Curiae at 15, *Upjohn*, 449 U.S. 383 (No. 79-886), 1980 WL 339283 (“The full disclosure promoted by the attorney-client privilege serves the important societal goal of ‘encourag[ing] adherence to the law.’ This is especially true with regard to corporate clients.” (quoting Miller, *supra* note 39, at 270 )); Brief Amici Curiae on Behalf of the American College of Trial Lawyers and 33 Law Firms in Support of Petitioners at 24, 24 n.23, *Upjohn*, 449 U.S. 383 (No. 79-886), 1980 WL 339284 (“Governmental agencies admit that they lack the manpower required to enforce multifarious laws and regulations falling under their jurisdiction and that they are dependent upon voluntary compliance efforts of corporations, aided by knowledgeable, responsible, well-informed legal advisors, to achieve such enforcement. . . . [P]rivate attorneys are ‘the primary agents of law enforcement.’”) (quoting Burnham, *supra* note 6, at 913-14.)); Brief Amicus Curiae of the Chamber of Commerce of the United States at 2, *Upjohn*, 449 U.S. 383 (No. 79-886), 1979 WL 199520 (“Corporations, perhaps more than other entities, require legal advice on a daily basis to comply with the myriad of legal requirements which permeate every aspect of their operations, from the mundane to the very complex.”); id. at 4 (The lower court decision “totally ignores the societal interest in encouraging citizens, including corporations, to comply
SEC’s voluntary compliance program in response to widespread evidence of foreign bribery by American companies. The Advisory Committee’s work on the Federal Rules of Evidence, the final version of which ambiguously endorsed Wigmore’s view of the crime-fraud exception, also would have to be considered; as would Congress’s decision in 1975 to reject the Advisory Committee’s entire formulation of privilege doctrine in Rule 501 in favor of a default to common law doctrine. Finally, the bar was itself in the midst of intense debate about the scope of the ethical duty of confidentiality as weaknesses in the approach of the Model Code of Professional Responsibility of 1969 became glaringly evident. Notably, the Comment to Model Rule 1.6 of the 1983 Model Rules of Professional Conduct expressly grounded its new formulation of the duty of confidentiality in the compliance theory. The Comment admonished that:

with ever changing, complex laws.”); Memorandum of the Chicago Bar Ass’n as Amicus Curiae at 11,Upjohn, 449 U.S. 383 (No. 79-886), 1980 U.S.S. Ct. Briefs LEXIS 1883 (“Compliance programs and similar internal examinations cannot be conducted with confidence in their confidentiality in a ‘control group’ jurisdiction and therefore may well be less frequently or thoroughly done. Discouraging self-policing efforts is not of benefit to the public since the practice is generally considered beneficial, and perhaps is an essential adjunct to official enforcement of laws governing corporate conduct.”); Brief of the Federal Bar Ass’n as Amicus Curiae at 13,Upjohn, 449 U.S. 383 (No. 79-886), 1980 U.S.S. Ct. Briefs LEXIS 2149 (“A relatively unimpeded flow of information and legal advice is critical to the lawful conduct of modern business. The complexity and wide-ranging scope of laws intended to regulate business affairs necessitate the rendering of uninhibited legal counsel to assure that the day-to-day operation of the business is in full compliance with the law.”); Brief of Amicus Curiae New England Legal Foundation in Support of Petitioners at 9,Upjohn, 449 U.S. 383 (No. 79-886), 1979 WL 199521 (“[T]he primary purpose of the privilege is to facilitate the giving of reasoned, effective legal advice, necessary to insure compliance with the myriad laws affecting corporations.”); id. at 20 (“The control group test threatens the ability of corporations to comply with all regulation.”).

54. The government asserted in its briefing that general counsel for Upjohn “was aware that other companies were making similar disclosures and that the SEC had indicated a policy of more lenient treatment of corporations which voluntarily disclosed such questionable payments. Upjohn made these voluntary disclosures in the hope of obtaining lenient treatment by the SEC.” Brief for the United States and the Federal Respondent at 4,Upjohn, 449 U.S. 383 (No. 79-886), 1980 WL 339280. See also Peter W. Schroth, The United States and the International Bribery Conventions, 50 AM. J. COMP. L. 593, 595 (2002) (discussing history of bribery uncovered in the wake of the Watergate scandal and the implementation of the Foreign Corrupt Practices Act); David C. Weiss, The Foreign Corrupt Practices Act, Sec Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence, 30 MICH. J. INT’L L. 471, 477 (2009) (discussing the history of the FCPA as well as recent developments in increased enforcement from the SEC).

55. In 1973 the crime-fraud exception in proposed federal rule of evidence 503(d)(1) referred to “crime or fraud” but the comment restated Wigmore’s broader view. See PROPOSED FED. R. OF EVID. 503(d)(2), reprinted in 56 F.R.D. 183, 236-240 (1972) (“The privilege does not extend to advice in aid of future wrongdoing.”) (citing 8 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2298 (McNaughton Rev. 1961))). For discussion of the reasons the privilege rules were rejected by Congress, see GEORGE FISHER, EVIDENCE 930-34 (3d ed. 2013).
The lawyer is part of a judicial system charged with upholding the law. One of the lawyer’s functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights. . . . Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client’s confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The influence of these and other events on the development of the compliance theory need to be more fully explored.

For present purposes, however, what matters is that the compliance theory appears to have risen to prominence in the second half of the twentieth century precisely because it appeared felicitous both to critics and proponents of the privilege. This odd convergence accounts not only for the proliferation of the compliance theory but also for the attendant incoherence of modern privilege doctrine.

III. Counseling Creative Deviance and Resistance to Law

Even if lawyers frequently do counsel their clients to obey the law, confidential attorney-client communication is not, strictly speaking, essential to law com-
plianc. Contrary to Rifkind’s argument, clients ordinarily would be safe, as far as compliance with law goes, if they adhered to the ethics they learned at home and in the sandbox at school. And absent concern about revealing trade secrets or other private facts, clients should not fear the disclosure of conversations with counsel in which all expressed a heartfelt desire to comply with the law. Burnham’s claim that corporations “constantly go to lawyers to find out how to obey the law” is an equally beguiling conceit, offered less for its veracity than to supply the “emotional force” he could not find in an argument from rights.

The truth is that individuals and organizations who can afford to seek advice before the assistance of counsel becomes imperative to adversary proceedings generally do so because: (i) they are taking or wish to take risks the legality of which is not obvious, (ii) they believe, but wish to confirm, that the benefits of risks they want to take outweigh the costs of relevant legal penalties discounted by the probability of enforcement, (iii) they want to modify the architecture of legal constraints to legitimate a course of conduct that is presently risky because of the relevant legal penalties, or (iv) they cannot, as a matter of conscience or survival, obey the law. It is in these instances, at the margins of compliance and beyond them, that confidential access to a lawyer’s expertise becomes truly indispensable. As Elihu Root, one of the most famous Gilded Age corporate lawyers, conceded in a moment of professional candor, “The client never wants to be told he can’t do what he wants to do; he wants to be told how to do it, and it is the lawyer’s business to tell him how.”}

Root is of course also known to have said that “About half the practice of a decent lawyer consists in telling would-be clients they are damned fools and should stop.” But it’s perfectly clear from his representation of clients such as Jay Gould, “Boss” Tweed, Thomas F. Ryan, and the Havemeyer sugar refining companies that “half” was a bit of hyperbole—telling a corporate client how to get what it wanted was his practice, counseling forbearance the exception.

58. ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS, 1819-1947, at 667 (1946). The point is not that lawyers should assume all clients always want to go to the limit of the law or beyond it. That would be a dangerous assumption for any lawyer to make, see Simon, supra note 16, at 53-59. The point is rather that individuals and entities come to lawyers because they want to do things in the world. They are paying the lawyer to help them figure out how to take that action, rather than merely compile a list of legal reasons to forebear.


60. Research into Root’s private practice appears to be somewhat obscured by his prominent role in public service. See Jessup, supra note 59, at 80-93 (discussing contempt finding against Root for misconduct in trial of Tweed); id. at 177-78 (describing Root’s zealousness on behalf of his clients); cf. id. at 187 (denying that Root meant to say he would go beyond legal limits for a corporate client even as examples suggestive of that are discussed); William Manz, Tammany Hall Had A Right to Expect Proper Consideration, 81 N.Y. St. B.J. 10, 18-23 (2009) (discussing Root’s work against Tammany Hall in his capacity as Chairman of the N.Y.C. Bar Association Judicial Nominations Committee). The most astute and careful legal historian of the period, Robert Gordon, observes that Root and other corporate lawyers who helped organize the Association of the Bar of
If Root’s understanding of the nature of legal representation is generalizable, then grounding the privilege in a theory of law compliance really is duplicitous.

Miller, Rifkind, Burnham, the amici in *Upjohn*, and the Supreme Court, had not forgotten what Elihu Root knew. They just quailed at the prospect of the City of New York “wanted to redeem their own practices from degradation.” Robert W. Gordon, *The Citizen Lawyer*, 50 WM. & MARY L. REV. 1169, 1191 (2009). For general discussion of Root’s private practice, see Morton Keller, *The Life Insurance Enterprise: 1885-1910* 22 (1999) (discussing association with corruption of life insurance industry); George Martin, *Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York* 198 (1970) (same); Richard Hofstadter, *The Age of Reform* 162 (1955) (describing attributes of the Gilded Age “corporation lawyer” and his commitment to “defending, legalizing, and maintaining [the] exploitative development” of big business) (internal quotations omitted); Richard W. Leopold, *Elihu Root and the Conservative Tradition* 15-19 (1954) (discussing Root’s representation of the Havermeyer Sugar Trust and the Whitney-Ryan railroad syndicate); id. at 18 (quoting Root’s statement to President Roosevelt that “It is not a function of law to enforce the rules of morality. . . . There is altogether too general an impression that it is immoral to acquire wealth, and far too little appreciation of the fact that the vast preponderance of the grand fortunes which now exist in this country have been amassed, not by injuring any living being, but as incident to the conferring of great benefits on the community.”’); Gustavus Myers, *History of the Supreme Court of the United States* 681-683 n.39 (1912) (discussing Root’s role in scandal involving “manipulations” of financier Thomas F. Ryan).

Root plainly understood the developing regulatory system his corporate clients were resisting. Elihu Root, *Public Service by the Bar: Address by Elihu Root as President of the American Bar Association at the Annual Meeting in Chicago, August 30, 1916* at 17-18 (1916) (“We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts.”). On Root’s distinguished career in public service, see 2 Phillip C. Jessup, *Elihu Root* (1938).

61. Significantly, firms that represented tobacco companies were among the amici in *Upjohn* arguing that expanding the privilege would promote law compliance. The Legacy Tobacco Documents Library housed at the University of California, San Francisco, show that firms like Arnold & Porter, Kirkland & Ellis, Jones Day, and White & Case were counsel for tobacco companies on various transactional and litigation issues prior to the *Upjohn* decision in 1981. See Legacy Tobacco Documents Library, http://legacy.library.ucsf.edu/action/search/basic (last visited Jan. 11, 2012). Having survived the first wave of consumer tort litigation from 1954-1973, the tobacco industry was bracing for the next wave by using counsel to help structure its research on the health effects of smoking so as to maximize opportunities to assert the attorney-client privilege and thwart disclosure in discovery. It was an outrageous abuse of the privilege and has invited expansion of the crime-fraud exception. See American Tobacco Co. v. State, 697 So.2d 1249 (Fla. Dist. Ct. App. 1997); State v. Philip Morris, Inc., 606 N.W.2d 676 (Minn. 2000). See infra, text accompanying note 92-94. For background on the stages of the tobacco litigation, see Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 854, 867 (1992). Even if the Supreme Court had no reason to know about these specific tactical shifts in tobacco litigation, the Court was surely aware of the possibilities for abuse of privilege doctrine. See Fisher v. United States, 425 U.S. 391 (1976); United States v. Nixon, 418 U.S. 683 (1974). Moreover, transactional approaches to the duty to comply with law were well entrenched in legal thought. See Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).
defending the privilege on the ground that it enables lawyers to counsel non-compliance. We should not.

Seeking legal advice at and beyond the margins of compliance is neither exceptional, nor anathema in our society. An honest theory of the privilege should be sensitive to this as long as we can imagine reasons to conclude that counseling resistance to law is salutary. Consider three alternative propositions:

1) taking risks of doubtful legality can be socially valuable,
2) taking risks of clear illegality can be socially valuable,
3) clients are generally entitled to know what the law is and to make independent choices about compliance.

If either of the first two propositions is true, the attorney-client privilege can be justified on the ground that it promotes what we might call creative deviance. The client may decide to comply with the law after consulting with counsel, and counsel may so advise, but the privilege does not exist to ensure that the client errs in the direction of risk aversion. Rather, it exists to ensure that clients make informed choices about how risk-seeking to be. A variety of diffuse social benefits may flow from decentralized legal decision-making—most obviously the enhanced perception of legitimacy of a legal system that is genuinely participatory—and these benefits should not be underestimated. But the argument in favor of the privilege turns heavily on the assumption that at least some risk-seekers are innovative and produce other valuable social goods.

If the third proposition is true, the attorney-client privilege can be justified on the broader ground that it promotes, or at least protects, something like a right of resistance to law. The specific source of the right and its

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63. They surely also cause social harm. Indeed, their lawlessness in particular may cause harm. The question is whether those harms are outweighed by the benefits, the extent to which the distribution of benefits and harms is even or unbalanced, and of course the effectiveness of available systems of cost internalization.

64. See sources cited, infra note 99; see, also, In re Primus, 436 U.S. 412 (1978) (“[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.”) (quoting United Transp. Union v. State Bar of Mich., 401 U. S. 576, 585 (1971))); Walters v. Nat’l Ass’n of Radiation Survivors, 473 U.S. 305, 371 (1985) (Stevens, J., concurring) (“In my view, regardless of the nature of the dispute between the sovereign and the citizen . . . the citizen’s right to consult an independent lawyer and to retain that lawyer to speak on his or her behalf is an aspect of liberty that is priceless.”). On the First Amendment right to
limits are, for the moment, less relevant than the idea that the relationship between legal subjects and the law in a pluralistic, democratic society is not, as the compliance theory assumes, one of submission. Wigmore’s condemnation of “de-liberate” plans to “oust another person of his rights”—his handwringing about the “callous[ness]” of the law to “concrete failures of justice”—is just so much sentimental cant on this view. We are all realists now, or at least sufficiently realistic about the nature of rights definition to understand that the assertion and defense of legal rights quite often operate to “oust” others of what would otherwise be their rights. We know too that what defines a “concrete failure of justice” is contested in many cases. Substantive rights and obligations take their shape in and through resistance to competing assertions about rights and obligations, and the process of adjudication in an adversary system invites resistant participation by parties at every stage. Obedience, from this perspective, is not the measure of fidelity to law. Ex ante compliance and rectitude of decision in subsequent litigation are not the only, let alone the primary, interests relevant to the administration of justice.

The promise of the first two approaches is that the scope of the privilege might be calibrated to apply in circumstances where risk-taking is socially advantageous and take flight where it is not. The legality or illegality of the client’s objective would not dominate privilege analysis as it must under the law compliance theory. The difficulty, of course, is that consensus on the merits of risk-taking is often elusive. Information about the costs and benefits of risk-taking sufficiently detailed and comprehensive to produce consensus can be equally elusive. It can be especially elusive at the moment a decision has to be made about risk-taking—the moment one would most benefit from confidential communication with counsel. For these reasons, neither of the first two approaches is administrable—a lawyer would have to guess whether a future court would agree with her and her client’s risk assessment before inviting the client to convey the facts most relevant to the risk assessment. Unfortunately, the problem would be most acute with respect to new forms of risk-taking where confidential access to a lawyer’s expertise would be most useful.

Two observations nevertheless follow from identifying the phenomenon of creative deviance. First, at least in hindsight, creative deviance has deep cultural

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65. See infra Part IV.

66. See People v. Madera, 112 P.3d 688, 690 n.2 (Colo. 2005) (“Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much. And, surely the meanness and the mischief of prying into a man’s confidential consultations with his legal advisor, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place . . . are too great a price to pay for the truth itself.”) (quoting Pearse v. Pearse, (1846) 63 Eng. Rep. 950 (V.C.)).
salience. In our histories of westward expansion, artistic and political expression, industrial growth and technological innovation, advancements in medicine, the labor movement, the expansion of civil rights, social reform, and the exercise of executive power, many of the heroes (and none too few villains) are innovators who took risks that appeared irresponsible and were, in many cases, at or beyond the margins of compliance with law at the time. 67 That we may harbor feelings of ambivalence about these innovators (admiring their pluck but wishing it had been dedicated to causes we favor, or eagerly consuming the things produced but deploiring the means of production) takes nothing away from their cultural salience. Ambivalence is part of what deepens that salience—there is little risk, and usually less to admire, in a course of action that is uncontroversial. Second, the ideological diversity of legal, economic, social, and political innovators we retrospectively lionize, and the diverse distribution of our feelings of ambivalence, should give us pause about restricting access to confidential legal advice at and beyond the limit of compliance to clients whose ends satisfy a pre-set standard of morality or justice. 68 That would reintroduce the compliance theory into the even more ambiguous and contested terrain of “higher law.”

The third proposition—that the client has a right to know the law and make an independent choice about compliance—does not depend as much on consensus about specific types of risk-seeking or low information cost regarding new


68. Here I part company with Bill Simon, who has argued that it is sometimes proper to nullify law, but makes natural law theory the measure of propriety, see William H. Simon, The Practice of Justice 77-108 (1998), and with Alexandra Lahav, who has examined lawyers’ resistance in cases of procedural injustice. See Alexandra D. Lahav, Portraits of Resistance: Lawyer Responses to Unjust Proceedings, 57 UCLA L. Rev. 725 (2010). Both approaches treat resistance as an exceptional rather than standard practice, and both seem to privilege left-liberal forms of resistance, though Lahav is somewhat more sensitive to the problem of value pluralism in placing normative limits on resistance. For carefully elaborated reasons extending beyond value pluralism to promote informed decision making about compliance with legal mandates, see Stephen McG. Bundy & Einer Elhauge, Knowledge About Legal Sanctions, 92 Mich. L. Rev. 261 (1993).
risks. But for these very reasons a privilege grounded in the client’s right to know
the law could not readily be calibrated to apply exclusively to advice regarding
socially valuable conduct. That leaves either a broad but blunt privilege—subject
to exceptions and the discretion of lawyers to counsel obedience and/or withdraw
in appropriate cases—or a balancing of the right to resistance against other rights
and social values.69

Balancing social values in individual cases suffers from the very indetermin-
cacies that make the creative deviance approach administratively infeasible—
though that has not stopped some modern courts from adopting this approach.
As one might expect, the general tendency of courts engaged in this sort of bal-
ancing is to give more weight to the interests in law compliance and rectitude of
decision.70 Getting at the truth almost invariably appears the more valuable inter-
est once courts are faced with a concrete injury and incomplete facts. Act utili-
tarian balancing is perhaps most appropriate in determining the scope of the
attorney-client privilege for government entities and officers. In this setting, sig-
nificantly, the interest of the public in more or less strict compliance with law and
transparency are at their peak.71

Early American courts generally did not apply a balancing test. They en-
dorsed a surprisingly broad privilege on terms consistent with a right to know
the law and make an informed choice about compliance. The privilege was stron-
gest where clients sought the advice of counsel regarding past wrongdoing, as it
is now. But even when the client sought advice with respect to illicit future con-
duct, the privilege generally protected the confidentiality of that advice (as well
as the attendant fact-gathering by the lawyer) in subsequent litigation. Looking to
the underlying conduct and the courts’ narrow construction of the crime-fraud ex-
ception, it is difficult to avoid the conclusion that the privilege was predicated on
a right of resistance to law. But courts were reluctant to state this explicitly.72

69. As this point makes clear, the distinction between utilitarian and deontological analysis
suggested by my framing of the creative deviance and resistance options is superficial. The
“right” to resistance might be framed by balancing relevant social values.
(O’Connor, J., dissenting).
71. See Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612 (7th Cir. 2009); In re Grand
Jury Investigation, 399 F.3d 527 (2d Cir. 2007); In re Lindsey, 158 F.3d 1263 (D.C. Cir. 1998);
In re Grand Jury Subpoena, 112 F.3d 910 (8th Cir. 1997). On the compliance obligations of gov-
ernment officers, see Olmstead v. United States, 277 U.S. 438 (1928). For discussion of the role
of government lawyers in executive branch resistance to law, see Spaulding, supra note 67.
72. See Fried, supra note 6, at 446-61; Spaulding, supra note 7 (discussing nineteenth century
cases and commentary). Some courts were explicit about the costs of a broad privilege and relied
upon rule utilitarian balancing to justify those costs. People ex rel. Vogelstein v. Warden of County
Jail, 270 N.Y.S. 362, 367 (Sup. Ct. 1934) (“A review of the decisions clearly indicates that it was
not the purpose of the privilege to shield guilt . . . [t]o be sure the exercise of the privilege may at
time result in concealing the truth and in allowing the guilty to escape. That is an evil, however,
Their reluctance to be completely frank not only allowed the reservations of Bentham and Wigmore to take hold, it invited the false piety of the law compliance theory.

IV. Preventive and Adversarial Justice

What is the risk to the profession in renouncing this false piety? Why should we be embarrassed to admit that we use the privilege to counsel resistance to law?

There is, of course, the professional failure of lawyers in recent corporate scandals. But counseling resistance to law is not the same thing as lending the color of law to actions of doubtful legality from a position of deliberate, or near deliberate, ignorance. In the savings and loan scandals of the late 1980s and early 1990s, the corporate bankruptcies arising from deceptive financial accounting in the early 2000s, and the recent mortgage backed securities crisis, three elements commonly combined to produce professional failure. The first was a conflation of self-centered and genuinely client-centered representation. Crudely put, alluring fees and the promise of future fees (or moving in-house) corrupted independent professional judgment regarding the scope of representation. Although this role confusion may have made inadequate due diligence appear rational at the time, the services provided look considerably less client-centric in retrospect when the client has gone out of business, filed for bankruptcy, or become mired in litigation. Second, legal and regulatory standards courted creative deviance on the part of regulated entities. In particular, deregulation in the banking and finance sectors of the economy had profound effects—enhancing conflicts of interest while simultaneously reducing structural and professional incentives for risk aversion among bankers, accountants, and CFO’s. Third, and perhaps most importantly, lawyers repeatedly failed to use the assurance of confidentiality and the attorney-client privilege to ascertain relevant facts before offering legal advice endorsing their clients’ legally questionable plans. The problem was not, in many cases, that counsel failed to advise compliance after pressing clients to be full and frank about the particulars of the transactions at issue.

which is considered to be outweighed by the benefit which results to the administration of justice generally.


Why then, have academic critics of the privilege, courts, Congress, and the Department of Justice, all converged on limiting the privilege and the duty of confidentiality? For one thing, they have been impressed, as anyone by now must be, by the magnitude of harm that can be caused by conduct at or beyond the margins of compliance, particularly when the client is a large corporation. The 1990s cases against tobacco companies, in which particularly odious abuses of the privilege were exposed, provide sobering proof of the social cost of counseling resistance to law.

Rifkind’s dentist metaphor, offered to make corporate counseling seem no more problematic than individual client counseling, appears quaint and misleading from this vantage. Indeed, if one concentrates on the magnitude of harm that can be caused when large entities engage in resistance to law, the proper metaphor is that any patient who eases back into the dentist’s chair not only may have a cavity or two, but an infectious disease for which there is no quick cure or method of containment. Whether the patient is more or less likely to be forthcoming about the infectious disease because of any assurance of confidentiality is less important than the fact that, if the patient is symptomatic, the disease should be noticed by a competent professional. More than that, because the patient cannot hope to receive adequate treatment without revealing her symptoms, she is obliged to be full and frank in order to receive effective services irrespective of confidentiality rules. If the privilege is grounded in a conjunction of the compliance theory and Wigmore’s “subjective considerations” (the assumption that assurances of confidentiality are justified where they are necessary to induce the client to be full and frank) there is simply no reason to respect confidentiality in these circumstances.

Indeed, at the limit, the compliance theory inverts Root’s observations about the nature of the practice of law. The lawyer’s primary obligation is to stop the client from engaging in wrongdoing. And not merely wrongdoing that could harm the client (which is likely what Root had in mind when he talked about advising the client he is “a damned fool and should stop”), but wrongdoing that could...
harm others even if the client would benefit from taking the action. The client does not have a right to know what the law is and make an independent choice about compliance on this view; she has a non-defeasible duty to comply with the law. The only appropriate access to counsel is access in furtherance of compliance—access to a lawyer who will solemnly counsel compliance, monitor the client’s degree of compliance, and, where necessary, report non-compliance and cooperate with regulators seeking to verify whether wrongdoing has occurred. From this perspective, the privilege and the duty of confidentiality are merely barriers to vindicating the lawyer’s higher duties as a “compliance officer” on behalf of the law, regulators, and, by extension, third parties who may be harmed by the client’s non-compliance.

This is not hyperbole. It is generally the view of regulators overseeing entities that have statutory reporting and auditing obligations. The client must retain counsel to meet these mandatory duties, so, as Edmund Morgan put it, “the reason for [the] creation [of the privilege] is exploded.”76 It is also the position underlying the Department of Justice’s practice of demanding advance waivers of the privilege in investigations that may lead to corporate criminal charges—a practice that appears to have developed to deal with the barriers to fact-finding posed by the breadth of the corporate privilege under the subject matter test adopted in Upjohn.77 It is the position of counter-terrorism officials in the investigation and surveillance of suspects and detainees.78 And it is the position of

76. See Upjohn v. United States, 449 U.S. 383, 393 n.2 (1981); In re Grand Jury Invest., 599 F.2d 1224, 1237 (3d Cir. 1979) (upholding the control group test in government investigation into illegal foreign payments; “We do not doubt that the ability to conduct a confidential investigation would make ‘compliance with the complex laws governing corporate activity’ more palatable . . . we do doubt, however, that a corporation would risk civil or criminal liability under those complex laws by foregoing introspection.”) (quoting Report of the Committee on the Federal Courts of the New York County Lawyers’ Association 7-10 (April 1970)). Roger C. Cramton, George M. Cohen & Susan P. Koniak, Legal and Ethical Duties of Lawyers After Sarbanes-Oxley, 49 VILL. L. REV. 725 (2004) (discussing the debate on the reporting obligations of securities lawyers in the drafting of Sarbanes-Oxley).


courts that treat the client’s intent in seeking legal advice, not whether the client actually pursues a wrongful course of conduct or what advice the lawyer gives, as dispositive under the crime-fraud exception.  

As these examples draw into relief, the ultimate goal of the compliance theory is preventive justice—avoiding the downside risks of counseling resistance to law. Traditionally, however, when courts spoke of the privilege serving “the administration of justice,” they were not referring to this theory of justice. They were referring (i) to the administration of justice via ex post litigation over harms flowing from primary social action taken on the advice of counsel, and (ii) to the fact that limitations on the authority to practice law to licensed professionals make access to a lawyer necessary to ascertain one’s rights. These are the structural features of what we conventionally call adversarial justice, though the term can deflect attention from the standard operation of the privilege in counseling out of court.

Early courts working from the premises of adversarial justice more or less took for granted that clients would have to disclose relevant facts to counsel—they recognized that unauthorized practice laws, licensing rules, and the complexity of law force clients to go to lawyers and disclose facts necessary to ascertain, protect, or extend their legal interests. Anyone who needs a lawyer, on this view, already has some incentive to be forthcoming. As the Virginia Supreme Court emphasized in an 1814 case, “This court understands it to be settled law that counsel and attorneys [are], of necessity, entrusted with their [clients’] secrets. . . . [T]he high privilege . . . only arises from the necessity men are under to act, in their legal concerns, through skillful and qualified agents.”

Without the privilege the very act of retaining and communicating with counsel

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79. See 1 Rice, supra note 11, at § 8.5 (gathering cases and discussing conflicting authority).


81. Parker v. Carter, 4 Munf. 273, 286-87 (1814) (emphasis added). The Court in Upjohn obliquely recognized the problem with grounding the privilege in subjective considerations. The government had raised the argument that “civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege.” Upjohn Co. v. United States, 449 U.S. 383, 393 n.2 (1981). In a footnote the Court first offered the bar’s preferred response drawn from Wigmore’s theory of subjective considerations—the argument that corporate clients would not be fully forthcoming, or counsel reluctant to probe, without the privilege. Id. But the Court then turned to a broader argument that conceded the government’s position and insisted it “proves too much, since it applies to all communications covered by the privilege”: “[A]n individual trying to comply with the law or faced with a legal problem also has strong incentive to disclose information to his lawyer, yet the common law has recognized the value of the privilege in further facilitating communications.” Id. Having tied its analysis to the law compliance theory, however, the Court could not explore why the common law recognized the privilege even in circumstances where the client had an independent incentive to be forthcoming.
to learn, protect, or extend one’s legal interests would compromise those interests in subsequent legal proceedings. Notably, the compromising effects would be most acute when what the client wanted to do was legally controversial and her statements to counsel inculpatory—in short, when the client came to counsel for advice about how to minimize compliance, avoid compliance, or “oust” another of her rights.

The primary incentive provided by the privilege, if subjective considerations have a place in this theory, is the assurance that retaining counsel will not be self-defeating. The privilege confirms that the lawyer is the client’s agent in the first instance, not an agent of the state, the law, the court, or her adversaries, even if what the client wants the lawyer to assist with is at or beyond the margins of compliance. The privilege thus sets the conditions of genuine fidelity in the attorney-client relationship. Greater candor may of course flow from this trust, particularly with respect to private, proprietary, and inculpating facts. And that trust may give the lawyer unique leverage to counsel compliance. But recognition of the privilege does not turn on the client’s incentive to be candid any more than it turns on the lawyer’s duty to counsel compliance. Notwithstanding *Upjohn* and the proliferation of the compliance theory, traces of this broader theory of the privilege can be found in a few jurisdictions.

82. This can be shown, from a different angle, in conflicts of interest cases in which the court disqualifies counsel if there is a risk that confidences of another client will be compromised in the representation. *Model Rules of Prof’l Conduct* R. 1.7, R. 1.9 (2012); see Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1266 (7th Cir. 1983) (“[A] lawyer may not represent an adversary of his former client if the subject matter of the two representations is ‘substantially related.’’’); T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268 (S.D.N.Y. 1953) (“[W]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited.”).

83. California is one of the more clear examples. *See Costco Wholesale Corp. v. Superior Court*, 219 P.3d 736, 741 (Cal. 2009) (“The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence.”) (quoting Mitchell v. Superior Court, 691 P.2d 642, 646 (1984)). *Mitchell* emphasizes that the privilege exists to protect discussion not only of facts but “tactics surrounding individual legal matters.” *Mitchell*, 691 P.2d at 646. *See also* People v. Flores, 71 Cal. App. 3d 559, 565 (1977) (“The privilege of confidential communication between client and attorney should not only be liberally construed, but must be regarded as sacred. Courts should not whittle away at the privilege upon slight or equivocal circumstances.”); *id.* (recognizing exceptions to the duty of confidentiality when, “the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual”).

There are many California cases referring to the need to promote full and frank communication, and three California Supreme Court cases that quote the *Upjohn* compliance theory, see *Wells Fargo Bank v. Superior Court*, 22 Cal. 4th 201 (2000); *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 380 (1993); *Welfare Rights Org. v. Crisan*, 33 Cal. 3d 766 (1983); but as the cases cited above suggest, the underlying theory of the privilege in California appears to be broader. *Wells Fargo Bank* passively states that the privilege is “thought to ‘promote broader public interests in the observance of law and administration of justice,’” 22 Cal. 4th at 207 (emphasis added); *Roberts* involves the
Grounding the privilege in a client’s right to know the law and make an informed, independent choice about compliance does not mean that lawyers can be cavalier about assisting a client in a course of action that is unlawful. Even in a theory of the privilege that takes counseling resistance to law seriously, there are many circumstances in which the lawyer would be obliged to counsel forbearance and foolish not to withdraw if the client persists. In other circumstances the lawyer ought to be at her discretion to counsel forbearance and withdraw if the client persists.84

In representing a client who wishes to pursue a course of conduct of doubtful legality or to modify the architecture of legal constraints it faces, the lawyer must determine whether or not the position is frivolous.85 In representing a client who wants to pursue a clearly illicit objective and is willing to pay legal penalties discounted by the probability of enforcement, the law of remedies also provides important signals about which laws invite a transactional approach to disobedience.86 Moreover, irrespective of the type of resistance to law contemplated by the client, the lawyer must ascertain as precisely as circumstances permit what the client’s objectives require of the lawyer. The range includes: (i) merely

government attorney-client privilege; and Crisan merely notes that the United State Supreme Court had endorsed the compliance theory. 33 Cal. 3d at 770-71. On the reluctance of the California courts to expand exceptions to the privilege, see Wells Fargo Bank, 22 Cal. 4th at 207; Nowell v. Superior Court, 36 Cal. Rptr. 21 (1963). On the duty of confidentiality in California, see Cal. R. PROF. CONDUCT 3-100(b); John W. Amberg and Jon L. Rewinski, Ethics Roundup, Los Angeles Lawyer, March 2012 (discussing California Supreme Court’s review of revised rules of conduct).

84. The ABA’s Model Rules of Professional Conduct addressing the duty to withdraw are, regrettably, as duplicitous as the compliance theory of the attorney-client privilege. Compare the unqualified endorsement of the compliance theory in Model Rules of Prof’l Conduct R. 1.16 (a)(1) (2012) (“[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from representation of a client if the representation will result in violation of the rules of professional conduct or other law.”), and Model Rules of Prof’l Conduct pmbl. (2012) (“A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs.”), with Model Rules of Prof’l Conduct R. 1.2(d) (2012) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”). For different attempts to provide guidance in the face of these contradictory injunctions, see Stephen McG. Bundy and Elhauge, supra note 68; Hazard, supra note 14; Stephen L. Pepper, Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering, 104 Yale L.J. 1545 (1995). For an argument that the bar’s endorsement of a strict duty to counsel obedience to law is duplicitous, see Simon, supra note 68, at 77-108.

85. See Fed. R. Civ. P. 11; Model Rules of Prof’l Conduct R. 1.2(d) (2012); Treasury Department Circular No. 230, 31 C.F.R. pt. 10 (2011) (establishing limitations for the advocacy of tax attorneys, requiring that they present non-frivolous arguments in trying to avoid tax liability for their clients). It may also be relevant whether the position is likely to be tested in adversary adjudication.

86. See Calabresi & Melamed, supra note 61.
informing the client what the law is, (ii) providing legal advice tailored to the client’s situation, 87 (iii) encouraging or taking actions to assist disobedience to law, (iv) counseling or assisting crime or fraud, 88 and (v) action that

87. See Model Rules of Prof’l Conduct R. 1.2 cmt. 9-13 (2012) (stating that even in possibly criminal transactions the Model Rules do “not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client’s conduct”). Although the First Amendment right to disseminate legal information is not, in many jurisdictions, given proper weight, the law of unauthorized practice offers some guidance on the distinction between legal information and legal advice. Compare Lowell Bar Ass’n v. Loeb, 52 N.E.2d 27, 31 (Mass. 1943) (finding that the preparation of some tax returns did not constitute practice of law, since the furnishing of “advice that involves some element of law” is not necessarily legal advice), State v. Winder, 348 N.Y.S.2d 270, 272 (N.Y. App. Div. 1973) (finding that the sale of The Divorce Yourself Kit did not constitute practice of law but that offering to tailor advice for an additional price did), and Or. State Bar v. Gilchrist, 538 P.2d 913, 916-17 (Or. 1975) (finding that the production and sale of do-it-yourself divorce materials did not constitute practice of law), with Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. Civ.A. 3:97CV-2859H, 1999 WL 47235 at *4, *11 (N.D. Tex. Jan. 22, 1999), vacated and remanded, 179 F.3d 956 (5th Cir. 1999) (finding that the Quicken Family Lawyer program furnished legal advice).

88. The attorney-client privilege and the rules of professional conduct treat counseling crime or fraud as particularly opprobrious. On the crime-fraud exception, see Fried, supra note 6, at 456-80; 1 Rice, supra note 11, at §§ 8.2-8.16; see also Model Rules of Prof’l Conduct R.1.2(d) (2012). As a general matter, however, formal legal categories (crime, fraud, tort, contract, etc.) provide only limited guidance. Although many sanctions become more severe and certain with respect to a lawyer providing advice or legal assistance relating to criminal or fraudulent conduct on the part of the client, the mere fact that what a client initially proposes is criminal or fraudulent is not necessarily dispositive of a lawyer’s duty to withdraw. And there are circumstances in which a lawyer reasonably could conclude to continue representing such a client. A lawyer might, for example, conclude that there are non-frivolous grounds to believe that criminal charges likely to be filed and convictions likely to follow are themselves legally unjustified. Or the lawyer might conclude that the client’s right to know the law and make a decision about whether to comply deserve recognition notwithstanding the parlous nature of the conduct contemplated. Consider the decision of lawyers to counsel Dr. King, the Southern Christian Leadership Conference, and the Alabama Christian Movement for Human Rights, once a white supremacist Birmingham court enjoined Good Friday and Easter Sunday marches in 1963. For the historical context of the events leading up to the well-known Supreme Court decisions, see David Benjamin Oppenheimer, Martin Luther King, Walker v. City of Birmingham, and the Letter from Birmingham Jail, 26 U.C. Davis L. Rev. 791 (1993). The lawyer could conclude that the First Amendment rights of the protesters trumps the criminal prohibitions on breach of the peace contempt, though the road from conviction in Alabama state court to appellate review by the Supreme Court in the hope of vindicating the constitutional rights is long and uncertain. Compare Walker v. City of Birmingham, 388 U.S. 307 (1967) (upholding the convictions for contempt of court based on a refusal to follow the city ordinance requiring protesters to obtain a permit), and Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (finding unconstitutional the city ordinance). The conventional narratives emphasize the moral, not merely the legal, superiority of Dr. King’s position. See Simon, supra note 68, at 77-108; Lahav, supra note 68, at 732-37. They tend to ignore or downplay the respects in which matters became more complicated when bail funds ran out for adult protesters and Dr. King had to decide whether to allow children to march out and face Bull Connor’s attack dogs and water canons. See Oppenheimer, supra at 818. For a fascinating examples of entity representation in which the clients’ interests may have been purely selfish, lofty, or a mix of the two, see, for example, In re Callan, 300 A.2d 868 (N.J. 164 JOURNAL OF THE PROFESSIONAL LAWYER
goes beyond legal services or advice and rises to the level of direct complicity or participation in the client’s deviant behavior. 89

Only then can a decision to continue the representation be made in light of the risks of reputational harm, contempt, other judicial sanctions, malpractice liability, loss of or ineligibility for malpractice insurance, third party liability to intended beneficiaries harmed by the client’s conduct, professional discipline, and prosecution as a party or accomplice to the wrongdoing. Active complicity is almost never appropriate. Merely informing a client what the law says is almost always appropriate. In the intermediate positions contextual judgments must be made about whether and on what terms to assist a client. As a general matter, a lawyer’s willingness to provide legal services beyond saying what the law is should diminish as doubt that the conduct is lawful or defensible and the severity and certainty of penalties increase. Crucially, in any subsequent litigation implicating the lawyer, the self-defense exception to the attorney-client privilege promotes unfettered access to the facts necessary to determine whether the client abused the attorney-client relationship and whether the lawyer exercised independent judgment and provided sound advice. 90 There are, in sum, rules other than the scope of the privilege and the crime-fraud exception designed to ensure that lawyers are appropriately circumspect about counseling resistance to law. One might even say that these laws define or regulate a client’s right to the assistance of counsel in resistance to law.

With these limitations in mind, we can now return to the privilege in large entity representation and the problem of how to manage the greater magnitude of harm large entities can cause when they act at or beyond the margins of compliance with law. First, nothing in a resistance theory requires that the privilege extend beyond the control group and other employees whose actions or omissions are legally binding on the entity. Decisions about compliance or resistance are ordinarily made by those who have authority to commit the entity to new risks and are responsible for any failure to minimize the risks of loss. It is

89. The classic example of complicity is In re Ryder, 263 F. Supp. 360 (E.D. Va. 1967) (attorney agreed to take possession of “hot” evidence, including a sawed off shot gun and cash, from a client who had committed bank robbery). Cf. United States v. Kelllington, 217 F.3d 1084 (9th Cir. 2000); Hazard, supra note 14; Pepper, supra note 84.

their communications with counsel, as well as the communication with counsel of employees whose implementation of control group decisions can render the entity liable, that require protection. Indeed, the Court’s extension of the privilege in *Upjohn* to communications between counsel and employees who are merely percipient witnesses to wrongdoing while acting within the scope of their employment is indefensible on this view of the privilege. 91

Second, the broad subject matter test the Court adopted in *Upjohn* does not automatically convert underlying facts into protected attorney-client communications in ex post internal investigations such as those conducted by Upjohn’s general counsel. But it is of course possible to do so. The Court failed to mention that the lawyer can use the no contact rule to inhibit access to employee-witnesses, that she can prepare employee witnesses to resist disclosure in the course of granting access to potential adversaries, and that the corporation’s lawyer enjoys a unique form of early, potentially uninhibited access to employee-witnesses. 92 Nor did the Court recognize that substantial “zones of silence” can result from the ex ante intervention of counsel in the creation of what would otherwise be underlying facts. The “coordination” of research on the health of smoking by tobacco lawyers is an egregious example of abuse of the privilege in the ex ante setting. 93 This conduct, along with so-called “silent” assertions of privilege, go beyond “catch me if you can” resistance—which the adversary system permits in everything from service of process to the enforcement of judgments94—to vanishing acts that make adjudication on the merits impossible.


92. These barriers are very likely part of the reason the Department of Justice developed its advance waiver policies. On the no contact rule, see Niesig v. Team I, 558 N.E.2d 1030, 1031-34 (N.Y. 1990); MODEL RULES OF PROF’L CONDUCT, R. 4.2 (2012). When litigation is anticipated, work product protection provides additional barriers. See Fed. R. Civ. P. 26(b)(3).

93. See Geraint G. Howells, *The Tobacco Challenge: Legal Problems and Consumer Protection* 6, 42-47; Martha Derthick, *Up in Smoke: From Legislation to Litigation in Tobacco Politics* 38-46 (2d ed. 2011); Christine Hatfield, *The Privilege Doctrines*, 16 PACE L. REV. 525 (1996); see also United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006), aff’d in part, vacated in part, 566 F.3d 1095 (D.C. Cir. 2009). Although it is useful, heuristically, to identify the practical difference between seeking advice of counsel before making a decision on a course of conduct and seeking advice after having taken actions that may give rise to liability, I concur with Bundy and Elhauge that there is no categorical difference between the two. See Bundy and Elhauge, supra note 68.

94. See Mid-Continent Wood Prods. v. Harris, 936 F.2d 297 (7th Cir. 1991) (vacating default judgment for breach of promissory note for improper service where defendant had conceded actual notice of suit and liability on claim in settlement negotiations); see also People v. Riel, 998 P.2d 969, 1013 (Cal. 2000) (“Although attorneys may not present evidence they know to be false or assist in perpetrating frauds on the court, they may ethically present evidence that they suspect, but do not personally know, is false.”); State v. Chambers, 994 A.2d 1248 (Conn. 2010) (reviewing autho-
Such abuse should not be tolerated. Some entities may have become too big to fail, but no industry or entity should be too big to lose in litigation. Even so, expansion of the crime-fraud exception (the response of courts that decided the tobacco cases) was not necessary to address this abuse. No exception need be reached if the elements of the privilege are not met. Scientific research on the health effects of smoking cannot be converted into communication for the purpose of legal advice by instructing lawyers to oversee the research. Even on a resistance theory of the privilege, retention of counsel must be for the purpose of legal advice.

There are other ways to mitigate the risk of harm flowing from counseling resistance to law in large entity representation. For example, the no contact rule could be relaxed to expand access to lower level employees. Moreover, the Court has never offered a persuasive reason why communications with lower level employees should fall within the privilege even though the corporation’s control group has exclusive control over voluntary waivers. Put differently, the “client” includes the control group and lower level employees acting within the scope of their duties under Upjohn, but for purposes of voluntary waiver the “client” is restricted to the control group. That means that a voluntary disclosure by an employee outside the control group does not waive the privilege for the corporation in subsequent litigation. The corporation can exploit this asymmetry by preventing a whistleblower’s disclosures of communication with corporate counsel from being revealed in litigation over the very corporate misconduct the whistleblower has publicly revealed. It also means that the corporation

95. Put differently, a right of resistance to law is not equivalent to immunity from liability. The tradition of participatory, decentralized rights definition needs consistent defenders. I am accordingly suspicious of the sincerity of proponents of the privilege who invoke the traditions of adversarial justice to oppose judicial and legislative narrowing of the privilege but stand mute or promote judicial and legislative incursions on other core features of adversarial justice such as trial by jury, pleading standards that promote access to discovery and decision on the merits, class action procedures that promote aggregation of claims and cost internalization for widespread injuries, and judicial review of arbitration clauses for unconscionability. Compare Brief Amicus Curiae of the Chamber of Commerce of the United States, Upjohn, 449 U.S. 383 (No. 79-886), 1979 WL 199520, with positions taken by the Chamber on the right to jury trial, punitive damages, and tort reform in the Chamber’s Institute for Legal Reform and the activities of the National Chamber Litigation Center. See http://www.uschamber.com/legalreform. See also Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011); Rent-A-Center, West v. Jackson, 130 S.Ct. 2772 (2010); Iqbal v. Ashcroft, 556 U.S. 662 (2009); Twombly v. Bell Atlantic, 550 U.S. 544 (2007); Norman W. Spaulding, The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial, 24 YALE J.L. & HUM. 311 (2012).

96. See Dodd-Frank Act § 922, 124 Stat. at 1841–49 (codified at 15 U.S.C. § 78u-6) (creating financial incentives for whistleblowers to make disclosures to regulators); 2 Rice, supra note 11 at
can conduct an internal investigation and then choose which employees it wants to hand over to government officials in exchange for relief from broader sanctions against the corporation for any misconduct. A more symmetrical rule would expand waiver doctrine to make voluntary waivers by any employee as to whom the corporate privilege extends binding on the entity (or limit the privilege in communications with corporate counsel to employees whose voluntary disclosures currently waive the corporate privilege). The practical effect of either approach, other things being equal, would be to discourage operating at or beyond the boundaries of compliance with law, at least where members of the control group cannot be confident that employees responsible for implementation of the policy (and employee-witnesses to such implementation) approve of the policy. Consensus on the benefits of a risky policy would have to be shared broadly within the entity for the policy to be implemented without voluntary disclosures.

My purpose in stating these alternatives to the *Upjohn* framework for privilege analysis in entity representation is not to advocate any specific combination for adoption by courts. It is rather to show that ad hoc balancing tests and expansion of the crime-fraud exception are not the only means to address abuse of the privilege or to prompt lawyers to counsel forbearance. Far from being indifferent to the greater risks of harm flowing from non-compliance by large entities, a resistance theory of the privilege supports limitations even though its justification of the privilege is broader than *Upjohn*’s.

V. Conclusion

Preventive and adversarial justice are not irreconcilable in every legal setting. But in privilege doctrine one set of premises must govern. Although each has its pathologies, I worry more about the pathologies of preventive justice than I do those of adversarial justice. That is so in part because I believe that we are resistant subjects in relation to the law, not submissive subjects, and in...
part because I respect our pluralism and our longstanding commitment to participatory, decentralized rights definition.\footnote{See Norman W. Spaulding, \textit{The Historical Consciousness of the Resistant Subject}, 1 U.C. Irvine L. Rev. 677 (2011); Norman W. Spaulding, \textit{The Rule of Law in Action: A Defense of Adversary System Values}, 93 Cornell L. Rev. 1377 (2008).}

In any event, we cannot have an honest conversation about the relationship between the privilege and counseling resistance to law if we begin from the premises of the compliance theory. Honesty within the profession is surely also a condition of expecting the public to be honest with itself about its desire to have lawyers counsel creative deviance or resistance when their own rights are at stake, but strict compliance with law in the representation of others.