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Swidler & Berlin v. United States: Ye Shall Know the Truth If the Truth Shall Set Ye Free

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The Client

Vincent F. Foster, Jr. was a sheltered man. Each day, he carpooled to his office at Little Rock's Rose law firm, often remaining silent during the fifteen-minute drive. But suddenly, Foster found himself far from his native Arkansas—the new deputy White House Counsel to a young, scandal-plagued Clinton administration.

Soon, Foster verged on emotional collapse. Haunted by "immense" time pressures and by culture inside the Beltway, where "ruining people [was] considered sport," Foster increasingly worried that the White House might have acted unlawfully when it dismissed its Travel Office staff; perhaps, he thought, even he had violated the law. "Travelgate," as the controversy came to be called, received a lot of media attention, and in its midst, the President invited Foster to join him at a screening of *In the Line of Fire.* The film

... starr[ed] Clint Eastwood as a Secret Service agent who fails to protect the president. . . .

[He]‘d seen enough stressful movies, having recently watched *A Few Good Men,* starring Tom Cruise and Jack Nicholson. In the movie, lieutenant colonel Matthew Markinson conspires to cover up the circumstances of the death of a young soldier. As an investigation progresses, the colonel is called to testify at upcoming hearings against his commander, an old friend. Torn by guilt over his role in the soldier’s death and over the prospect of incriminating his com-

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3 See Stewart, *supra* note 1, at 287.
4 See id.
manding officer, Markinson puts a revolver into his mouth and pulls the trigger.5

Foster did not attend the screening. The next day, he was found dead in Fort Marcy Park, Virginia, the victim of an apparent suicide.6

Just days before, Vince Foster had sought legal representation from James Hamilton, a lawyer at the Washington, D.C., firm of Swidler & Berlin, apparently in relation to the Travel Office controversy. During the meeting, Foster sought and received Hamilton's assurances that the secrecy of their conversation would be protected by the attorney-client privilege.7

Foster's death did nothing to quell the Travel Office scandal;8 more than two years later, Hamilton's notes of the meeting were subpoenaed by the Office of the Independent Counsel (OIC) investigating the matter. Seeking to protect Foster's secrets under the attorney-client privilege, Hamilton eventually argued his own case before the Supreme Court.9 In Swidler & Berlin v. United States,10 the Court held

5 Id. at 287-88.
7 See Petitioners' Brief at 2, Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998) (No. 97-1192). The nature of the conversation was reflected by an entry near the top of Hamilton's notes. They were labeled "Privileged." See Swidler & Berlin, 118 S. Ct. at 2083.
8 Following Foster's death, various conspiracy theories emerged in certain circles. Apparently, some theories were more incredible than others; consider the following:

Researcher Sherman Skolnick, who has been prominent in conspiratorial circles since Watergate, insists Foster died trying to prevent a CIA-aided assassination of Saddam Hussein in July. Such a plot, but not a supposed Foster connection, was later reported upon in the London Sunday Times. Foster did not attempt to do this out of love for Saddam or even to make tomorrow better than today, according to Skolnick's scenario. He did it to prevent Saddam's half-brother from releasing bank records revealing Clinton and Bush involvement with BNL.

9 See Marcia Coyle, Two Stars Make Privilege Arguments, Nat'l J., June 22, 1998, at A10:

Although not unprecedented, it is unusual to see a lawyer representing himself in arguments before the U.S. Supreme Court. But while the old adage often may be true—that the lawyer who represents himself has a fool for a client—it couldn't have been more misplaced than on June 8 in the arguments over attorney-client privilege... Mr. Hamilton has written a book on congressional investigations and a score of articles on, among other things, attorney-client privilege issues.
that the notes were privileged despite Foster's death, assuring that the client and his secrets would rest in peace.

I. PROBLEM: THE PRIVILEGED AND THE DAMNED

Your client is on trial for double-homicide. Two lawyers, following an informal opinion by the State Ethics Committee, have stated their willingness to testify before the court that their client, now deceased, had confessed to the killings when they had represented the third party for an unrelated murder committed in the same vicinity as the murders for which your client is prosecuted. The trial court rules, on its own motion, that the lawyers' testimony, which would likely exculpate your client, is shielded by the attorney-client privilege. Your client is convicted and sentenced to two life sentences. On appeal, what ruling and why?11

A. Privilege at a Price

That the laws of evidence seek to realize conflicting objectives—truth, justice, and efficiency, for instance—is at once their bane and glory.12 Reconciling different doctrines is an exercise in compromise, albeit a purely academic exercise, at least when undertaken by students. In the hands of a judge, however, the effects of such exercises are real. The guilty may escape unpunished, or the innocent may wind up in jail—or worse.

Testimonial privileges are especially intriguing because they so clearly stifle courts' truth-seeking mission.13 The attorney-client privilege, which protects confidential communications between lawyers...
and their clients, is the oldest of these privileges. The doctrine originally recognized the importance of a lawyer's oath and honor, but the device survives under the rhetoric of protecting the needs of clients.

The classic definition of the attorney-client privilege is credited to Professor Wigmore. As restated by Judge Wyzanski in United States v. United Shoe Machinery Corp.,

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

B. Strict Construction

Also credited to Wigmore is the view that the privilege should be strictly construed. He wrote:

Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.
Courts have generally agreed.19

How has the principle that the attorney-client privilege should be strictly confined within narrow limits affected its development? For example, what should a lawyer do in the case of a client who seeks the lawyer's services in furtherance of a crime? Or when a client sues the lawyer for malpractice? Or when the lawyer's disclosure of a conversation could resolve a controversy involving a will prepared for a now-deceased client? For each of these scenarios, the law has created an exception.20 But what about the lawyer, as in the problem, with information shared by a now-deceased client that is important to a criminal

19 See Rice, supra note 13, § 2:3, at 55. Consult the following two examples: United States v. Tedder, 801 F.2d 1437, 1441 (4th Cir. 1986) ("We have stated repeatedly that the attorney-client privilege is to be strictly construed, in order to harmonize it, to the extent possible, with the truth-seeking mission of the legal process.") (citations omitted); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977) (privilege is strictly construed because of its "adverse effect" on disclosure of truth).


(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of Crime or Fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants Through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of Duty by a Lawyer or Client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) Document Attested by a Lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) Joint Clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients; or

(6) Public Officer or Agency. As to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

Id.
proceeding? After all, subject to the limits of the Fifth Amendment privilege against self-incrimination, the client, if alive, could be compelled to testify before a grand jury or a court. That conversations between clients and lawyers are not absolutely shielded from compelled disclosure merely illustrates what is obvious. At some point, the policy of fostering lawyer-client relationships must give way to other values. When this should occur is not so obvious.

C. Defendant's Constitutional Rights

The problem, *The Privileged and the Damned*, raises several constitutional concerns. In the problem, evidence that could exculpate the defendant has been ruled inadmissible. In *United States v. Nixon*,21 the Supreme Court acknowledged: “The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right ‘to be confronted with the witnesses against him’ and ‘to have compulsory

21 418 U.S. 683 (1974). *United States v. Nixon* was not an attorney-client privilege case. President Richard Nixon had moved to quash a subpoena that required production of certain tapes and writings “relating to certain precisely identified meetings between the President and others.” *Id.* at 688. The President argued, in part, that the communications were shielded from disclosure by an “executive privilege.” The Court rejected this argument.

The Court acknowledged the existence of important policies that are furthered by recognition of an executive privilege, see *id.* at 706 (“The President’s need for complete candor and objectivity from advisers calls for great deference from the courts.”), but given the existence of other important values, the privilege was not absolute, see *id.* Furthermore, qualification would not render the privilege ineffective. The Court said:

Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all of the protection that a district court will be obliged to provide.

*Id.*

Although the confidentiality of Presidential communications historically had been given judicial protection when the communications involved diplomatic and military secrets, “[n]o case of the Court, ha[d] extended this high degree of deference to a President’s generalized interest in confidentiality.” *Id.* at 711. Still, the Court was moved by the privilege’s constitutional underpinnings. See *id.* (“[T]o the extent this interest related to the effective discharge of a President’s powers, it is constitutionally based.”).

But despite the privilege’s constitutional character, the court found it proper to “weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice.” *Id.*
process for obtaining witnesses in his favor.” In order to guarantee these rights, the Court continued, “it is essential that all relevant and admissible evidence be produced.” Unfortunately for the criminal defendant in the problem, Sixth Amendment rights and the right to due process of law are not absolute. The rules of evidence are trumped only if policies embodied in the rules of evidence are outweighed by the limitation of the defendant’s rights, whatever that means.

D. Thesis and Roadmap

This Note is an exercise to analyze posthumous application of the attorney-client privilege and to isolate the point at which the privilege’s justifications no longer support shielding conversations from disclosure. There are two prevailing (and polar) views. At one pole are those (arguably, Professor Wigmore is among them) who believe that the privilege should protect absolutely lawyer-client conversations after the death of the client. At the opposite pole are those (Judge Learned Hand is one) who believe that the privilege should automatically terminate at death. In Swidler & Berlin, the Supreme Court held that the venerable privilege prevented disclosure to a criminal grand jury of notes taken by a lawyer during a conversation with a now-deceased client. The decision was immediately hailed as a tri-

22 Id. (emphasis added).
23 Id.
24 See Rock v. Arkansas, 483 U.S. 44, 55–56 (1987). Unlike privilege cases, this case involved a rule that did not allow a defendant to testify, even if she wanted to. Vickie Lorene Rock was convicted of manslaughter for shooting her husband Frank after he had refused to let her eat some pizza. “A dispute had been simmering about Frank’s wish to move from the couple’s small apartment adjacent to Vickie’s beauty parlor to a trailer she owned outside town.” Id. at 45. In preparation for trial, Vickie’s lawyer suggested hypnosis, since she could not remember the details of the shooting, and when the prosecutor learned of the sessions, he moved to exclude her posthypnotic testimony. See id. at 46–47.

The United States Supreme Court rejected Arkansas’ per se rule excluding posthypnotic testimony. It said:

Of course, the right to present relevant testimony is not without limitation. The right “may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.” But restrictions of a defendant’s right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant’s constitutional right to testify.

Id. (citations omitted).
26 See id. at 2088.
umph for the legal profession and is now the subject of this Case Comment. My thesis is that, in light of Swidler & Berlin, neither of the polar positions is tenable. Specifically, footnote 3 in Swidler & Berlin indicates that there could be constitutional limits to the attorney-client privilege.

Swidler & Berlin reversed a court of appeals decision, In re Sealed Case, which held that in criminal proceedings, the attorney-client privilege should cease to operate posthumously if the relative importance of the communications is substantial. The majority's test, which was assailed as vague, was supported by a convoluted opinion. Nevertheless, Sealed Case has been revived for this Comment. Using it as a foundation, I argue for posthumous qualification of the attorney-client privilege (Part III-A). Once I've made these arguments, I review their rejection by the Supreme Court (Part III-B). Despite the Court's opinion in Swidler & Berlin, however, I conclude that the door is open for posthumous limits to the attorney-client privilege when a defendant's constitutional rights are at stake; such an "exception" would be consistent with the policies furthered by the privilege and could set free the criminal defendant in The Privileged and the Damned (Part IV).

First, however, the Case Comment outlines the history and theory of the attorney-client privilege (Part II).

II. ATTORNEY-CLIENT PRIVILEGE FOR UTILITARIANS, DEONTOLOGISTS, AND LAWYERS

The attorney-client privilege shields from disclosure communications between lawyers and clients. Along with a lawyer's duty of confidentiality, the privilege is a defining characteristic of the client-
lawyer relationship. Although the rule reflects ancient ideals—with roots in Roman law and in Elizabethan England—it was retarded until the last two centuries. At Roman law, the privilege manifested a general moral duty, but it was rationalized as facilitating the determination of truth.

The theory seems to have been that if a member of a family testified in behalf of another—or an advocate on behalf of his client—he could not be believed because he had a strong motive for misstate-

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Id.

33 See Geoffrey C. Hazard, Jr., An Historical Perspective on the Attorney-Client Privilege, 66 Cal. L. Rev. 1061, 1061 (1978) ("The attorney-client privilege may well be the pivotal element of the modern American lawyer's professional functions."); see also CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.1.1, at 242 (1986) ("By turns both sacred and controversial, the principle of confidentiality of client information is well-embedded in the traditional notion of the Anglo-American client-lawyer relationship."); James A. Gardner, A Re-Evaluation of the Attorney-Client Privilege, 8 Vill. L. Rev. 279, 284 (1963) ("In our adversary system of administering justice, the lawyer occupies a central position as investigator, adviser, manager, and repository of facts and law. This makes the attorney-client privilege the most important of the personal privileges. . . .").

34 See Max Radin, The Privilege of Confidential Communication Between Lawyer and Client, 16 Cal. L. Rev. 487, 488 (1928) ("Cicero in prosecuting the Roman governor of Sicily regrets that he cannot summon the latter's patronus, Hortensius . . . and the matter had received statutory regulation in the Acilian law on bribery of 123 B.C. . . . By later imperial mandate, advocates and attorneys . . . were made completely incompetent as witnesses in the case in which they acted.").

35 See 8 WIGMORE, supra note 14, § 2290, at 542 ("The history of this privilege goes back to the reign of Elizabeth I, where the privilege already appears as unquestioned."). Whether the emergence of the attorney-client privilege in England was owed to the Roman law is a matter that has not been proven. See Radin, supra note 34, at 489.

36 See 8 WIGMORE, supra note 14, § 2290, at 543 ("[D]etailed rules of this privilege . . . were still in the formative stage in the first half of the 1800s."); Hazard, supra note 33, at 1070 ("[R]ecognition of the privilege was slow and halting until after 1800.").

37 See Radin, supra note 34, at 488.
ment. If he violated group solidarity by testifying against him, he was a disreputable person and unworthy of belief. 38

Like the Roman rule, the English “point of honor” realized a moral obligation—the lawyer’s “solemn pledge of secrecy.” 39 And like its Roman counterpart, this rhetoric eventually gave way to instrumental concerns—“providing subjectively for the client’s freedom of apprehension in consulting his legal advisor.” 40

Universally recognized in American courts, the privilege furthers policies at the expense of the paramount value of truth. 41 In theory, the privilege results in a net societal gain. It encourages disclosure, and thus lawyers are able to offer effective representation, furthering observance of the law and the administration of justice—or so the utilitarian theory goes. Still another popular justification focuses on the client’s rights. Under the rights-based (or deontological) rationale, confidentiality rules exist to promote the individual’s autonomy and private character.

A. The Utilitarian

Utilitarianism is a theory about rightness, according to which the only good thing is welfare (wellbeing or ‘utility’). Welfare should, in some way, be maximized, and agents are to be neutral between their own welfare, and that of other people and other sentient beings.

Utilitarianism has usually focused on actions. The most common form is act-utilitarianism, according to which what makes an action right is its maximizing total or average utility. 42

The utilitarian justification for the attorney-client privilege begins by recognizing “that society has an interest in the fair administration of justice and that the fact-finding process in adversary litigation can be accurately administered only when the lawyer involved is entirely familiar with the client’s cause.” 43 Wigmore concludes: “In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client’s consent.” 44

38 Id. at 488–89.
39 8 Wigmore, supra note 14, § 2290, at 543.
40 Id.
41 See supra notes 13–15, 18–19 and accompanying text.
43 Gardner, supra note 33, at 292.
44 8 Wigmore, supra note 14, § 2291 at 545. Utilitarianism’s heyday occurred during the nineteenth century, and it is not surprising that the first modern examination
The utilitarian justification has been the dominant defense of the privilege, but the theory is by no means unsinkable. The first attack is predictable—that the privilege makes courts' mission to ascertain truth more difficult. A second attack questions the accuracy of the premise that clients will not engage in "full and frank" communication with their lawyers unless secrecy is guaranteed. The most fa-

of the attorney-client privilege rested on such analysis. See Gardner, supra note 33, at 285.


[The purpose of the attorney-client privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the clients.

Id.; see also Mueller & Kirkpatrick, supra note 12, § 5.8, at 359 n.14 (quoting ALI Model Code of Evidence Rule 210 cmt. a, at 147 (1942)). Mueller & Kirkpatrick observed:

To induce clients to make . . . 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.

Id.

For a summary of the utilitarian justification for the attorney-client privilege (and attacks on this justification) see Lee A. Pizzimenti, The Lawyer's Duty to Warn Clients About the Limits on Confidentiality, 39 Cath. U. L. Rev. 441, 448–51 (1990).

See Mueller & Kirkpatrick, supra note 12, § 5.8, at 360; 8 Wigmore, supra note 14, § 2291, at 554 ("[T]he privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of general policy, but it is nonetheless an obstacle to the investigation of the truth."); see also McCormick, supra note 20, § 87, at 205 ("If one were legislating for a new commonwealth, without history or customs, it might be hard to maintain that a privilege for lawyer-client communications would facilitate more than it would obstruct the administration of justice.").

See Fred C. Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 351, 386–87 (1989) (figures from a Yale Law Journal study "support the notion that confidentiality rules have some impact on the way clients use attorneys. But they also cast doubt on whether the effect is as substantial as proponents of confidentiality presume."). Zacharias presented the results of his more recent survey: "Most lawyers surveyed believed that they would get the same information from clients even if they never informed the clients about confidentiality. A higher percentage, 85.9%, believed they would get enough information to represent clients competently." Id.; see also Wolf- ram, supra note 33, § 6.1.3, at 243.
mous rebuke was issued by Jeremy Bentham, who in 1827 argued that the attorney-client privilege produced a net societal loss; he argued that the rule protected only the guilty, since the innocent would have nothing to hide. For the most part, however, the attorney-client privilege has not been overwhelmed, and Bentham’s argument, in particular, has been dismissed as overly simplistic.

B. The Deontologist

Deontology asserts that there are several distinct duties. Certain kinds of act are intrinsically right and other kinds intrinsically wrong. The rightness or wrongness of any particular act is thus not (or not wholly) determined by the goodness or badness or its consequences.

49 Bentham’s argument has been called “slashing,” McCormick, supra note 20, § 87, at 205, and “acidly worded,” Wolfram, supra note 33, § 6.1.4, at 246.

50 See Jeremy Bentham, Rationale of Judicial Evidence (1827), 7 The Works of Jeremy Bentham 474, in 8 Wigmore, supra note 14, § 2291, at 549:

The man by the supposition is guilty; if not, by the supposition there is nothing to betray; let the law adviser say every thing he has heard, every thing he can have heard from his client, the client cannot have any thing to fear from it...[t]he first thing the advocate or attorney will say to his client will be,—Remember that, whatever you say to me, I shall be obliged to tell, if asked about it. What, then, will be the consequence? That a guilty person will not in general be able to derive quite so much assistance form his law adviser, in the way of concerting a false defence, as he may do at present. Id.

51 See Wolfram, supra note 33, § 6.1.4, at 247:

[Defenders of the privilege] respond in kind that the harm from the concealment of truth caused by the privilege is more than offset by the good of assisting the innocent victim of suspicious circumstances. On those terms, it is by no means clear whether Bentham or his utilitarian critics have the better of the empirical argument."

Id. Most recently, the Supreme Court in Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998), repeated that “[t]he privilege is intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.” Id. at 2084. See generally Part III-B of this Note.

52 See 8 Wigmore, supra note 14, § 2291, at 552-53 (suggesting that argument was overly simplistic since (1) in many civil cases, it is impossible to distinguish between the truly innocent and the truly guilty; (2) even the innocent, if victim of suspicious circumstances, may fear disclosure of client-lawyer communications; (3) the argument that the privilege encourages concerting a “false defence” suggests that the bar is unprincipled, in which case denial of the privilege would have little effect; and (4) if lawyers were compelled to disclose, talented individuals would refrain from practicing law, “for it must be repugnant to any honorable man to feel that the confidences which his relation naturally invites are liable at the opponent’s behest”).

53 2 Routledge Encyclopedia of Philosophy, supra note 42, at 551.
Immanuel Kant framed the categorical imperative: “Act as if the maxim of your action were to become through your will a UNIVERSAL LAW OF NATURE.” It followed that “persons must always be treated as ends in themselves and not as means to ends,” and that “conduct is to be judged moral only if it protects the autonomy of individuals.”

According to the rights-based justification for the attorney-client privilege, effective representation by attorneys is essential if an individual is to protect her individual autonomy in an increasingly complex society, and clients will not tell their attorneys all of the facts necessary for effective representation unless they believe that the lawyer will hold such information in confidence. “[T]herefore, confidentiality is essential to the preservation of individual autonomy.”

Not nearly as popular as the utilitarian theory, deontological analysis suffers from its complexity. It cannot be said that autonomy is always justified. When a client’s interest in autonomy conflicts with others’ rights, “a careful review of the legitimacy and weight of competing claims must be undertaken to determine the moral validity of an act.” At least it can be said that the argument does not support an unqualified attorney-client privilege.

C. The Lawyer

In their Evidence casebook, Professors Eric Green and Charles Nesson asked the following question about privileges in general: “[D]oes the existing system of privileges simply reflect ad hoc policy judgments on specific issues or, more cynically, the relative power of various economic or social interests?” Of course, most lawyers do not cite the theories of Bentham or Kant when invoking the attorney-

55 WOLFRAM, supra note 33, § 2.7, at 75.
56 Id. at 72.
58 For example, “sophisticated deontological arguments recognize that, although increasing individual autonomy is good in the abstract, it is not justified in cases where autonomous decisionmaking leads to immoral acts and results.” Pizzimenti, supra note 46, at 448.
59 Id.
60 See WOLFRAM, supra note 33, § 6.1, at 245; Pizzimenti, supra note 46, at 448.
61 ERIC D. GREEN & CHARLES R. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 689 (2d ed. 1994).
client privilege on behalf of their clients. "From a political point of view, the vigor of the attorney-client privilege is palpably owed to the fact that lawyers make such laws and are benefited by them." 62 These benefits include (1) decreased psychological costs of making difficult ethical choices; (2) financial gains; and (3) protection of the lawyer’s reputation. 63 However, strict confidentiality also exacts costs on the bar. “[O]verstated claims for the confidentiality principle have caused it to come under suspicion[,]” 64 and it has been said that strict confidentiality perpetuates the lawyer’s image as a hired gun. 65

D. Conclusion

Neither of the prevailing theories convincingly supports absolute protection of lawyer-client communications. The utilitarian argument favors secrecy, but only because (read “insofar as”) the fair administration of justice and observance of the law are furthered. 66 Furthermore, a rights-based approach has to take into account the rights of all citizens, not just the right to privacy of a particular client. 67

Because both utilitarian and deontological arguments rely on the premise that clients will confide fully in their lawyers only if they believe their lawyer will keep their secrets, any account of the merits and demerits of a particular exception to the attorney-client privilege must consider the possibility that lawyer-client communications will be chilled. In Upjohn v. United States, 68 the Supreme Court rejected the court of appeals’ use of a so-called control group test, which would have applied the corporate attorney-client privilege only to communications between lawyers and corporate officers who played a substantial role in formulating the corporation’s legal strategy. The Court said:

The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying “test” will necessarily enable to courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some

62 Wolfram, supra note 33, § 6.1, at 247.
63 See Zacharias, supra note 48, at 359–60; see also Wolfram, supra note 33, § 6.1, at 247.
64 Wolfram, supra note 33, § 6.1, at 247.
65 See Zacharias, supra note 48, at 360.
66 See supra notes 42–52 and accompanying text.
67 See supra notes 53–60 and accompanying text.
degree of certainty whether particular discussions will be protected.\textsuperscript{69} In \textit{Jaffee v. Redmond},\textsuperscript{70} the Seventh Circuit had recognized a federal psychotherapist-patient privilege, except "if in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests."\textsuperscript{71} Affirming the Seventh Circuit's holding, the Supreme Court nevertheless "parted company" on the court of appeals' balancing test: "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."\textsuperscript{72}

If qualification of the attorney-client privilege should be done with great care, the same can be said of its application. To the extent that lawyer-client secrecy defines the lawyer-client relationship, inappropriately broad application of the doctrine may perpetuate harmful images of lawyers.\textsuperscript{73}

\section*{III. \textit{Swidler & Berlin v. United States}}

In \textit{Swidler & Berlin}, the Supreme Court held that notes taken by a lawyer during a conversation with a now-deceased client were protected from disclosure to a federal grand jury by the attorney-client privilege.\textsuperscript{74} On the facts discussed above,\textsuperscript{75} the Court reversed the court of appeals' holding that in criminal proceedings, the attorney-client privilege should cease to operate posthumously if the relative importance of the communications is substantial. There, the Independent Counsel had conceded that the notes would have been

\begin{itemize}
  \item \textsuperscript{69} \textit{Id.} at 393. The majority conceded that Federal Rule of Evidence 501 requires privilege rules to be established on a case-by-case basis, thus undermining the overall "certainty" of the privilege's application. \textit{See id.} at 396–97.
  \item \textsuperscript{70} 518 U.S. 1 (1996).
  \item \textsuperscript{71} \textit{Id.} at 7 (quoting \textit{Jaffee v. Redmond}, 51 F.3d 1346, 1357 (7th Cir. 1995)).
  \item \textsuperscript{72} \textit{Id.} at 17. The Court said:
  \begin{quote}
    These considerations are all that is necessary for the decision in this case. A rule that authorized the recognition of new privileges on a case-by-case basis [FRE 501] makes it appropriate to define the details of new privileges in a like manner. Because this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would "govern all conceivable future questions in this area."
  \end{quote}
  \textit{Id.} at 18 (quoting \textit{Upjohn}, 449 U.S. at 386).
  \item \textsuperscript{73} \textit{See supra} notes 61–65 and accompanying text.
  \item \textsuperscript{74} \textit{See} \textit{Swidler & Berlin v. United States}, 118 S. Ct. 2081, 2088 (1998).
  \item \textsuperscript{75} \textit{See supra} notes 1–10 and accompanying text.
\end{itemize}
covered by the privilege if Foster were still alive, but he argued that the "client's death call[ed] for a qualification of the privilege."\(^7\)

A. *In re Sealed Case\(^77\)*

In federal courts, the attorney-client privilege is governed by Federal Rule of Evidence (FRE) 501, which states in relevant part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.\(^78\)

FRE 501 was enacted in 1975 instead of thirteen proposed rules that would have supplanted the common law of privileges. The rule empowered federal courts to continue development of the federal common law of privileges\(^79\) in light of experience and reason.\(^80\) Experience shed little light on this matter because few cases had explicitly held that the attorney-client privilege survived the death of the cli-

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\(^7\) *In re Sealed Case*, 124 F.3d 230, 231 (D.C. Cir. 1997).

\(^77\) As mentioned earlier, the court of appeals' majority decision serves as a framework to argue for posthumous qualification of the attorney-client privilege. This subsection, therefore, summarizes and elaborates on the court's discussion. Passages that merely summarize the opinion are credited to the opinion, and extraneous materials are cited to proper authorities.


\(^78\) *Fed. R. Evid.* 501 (emphasis added), *quoted in Sealed Case*, 124 F.3d at 231.

\(^79\) *See supra* note 72; *see also* University of Pennsylvania v. EEOC, 493 U.S. 182, 189 (1990) ("Moreover, although Rule 501 manifests a congressional desire 'not to freeze the law of privilege' but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis, we are disinclined to exercise this authority expansively.") (citation omitted).

\(^80\) *See Sealed Case*, 124 F.3d at 231: The court said:

> We take this to be a mandate to the federal courts to approach privilege matters in the way that common law courts have traditionally addressed any issue—observing precedent but at the same time trying, where precedents are in conflict or not controlling, to find answers that best balance the purposes of the relevant doctrines.

*Id.*
ent. The court’s decision appropriately turned on reason—analysis of the competing policy interests.

1. Experience

The federal courts’ experience with the issue was, at the time of this case, nonexistent. Nonetheless, that the attorney-client privilege survived a client’s death was viewed as a general rule by courts, commentators, and modern evidence codes. Of the cases in which federal or state courts had mentioned this “general rule,” however, the vast majority (about ninety-five percent) had involved testamentary disputes, which, as mentioned above, are subject to a well-known exception to the privilege. “Thus holdings actually manifesting the posthumous force of the privilege [were] relatively rare.”

Nevertheless, at least two state experiences were relevant: a 1990 Massachusetts case, In re John Doe Grand Jury Investigation, and the California Evidence Code attorney-client privilege provisions.

a. In re John Doe Grand Jury Investigation

Many of the facts in this highly-publicized case were not included in that court’s opinion. We benefit from Frances Jewels’ Case Comment:

On October 23, 1989, Carol DiMaiti Stuart was fatally shot after she and her husband, Charles Stuart, attended a birthing class at a Boston hospital. Charles later told police that a robber entered his car

at a red light... [and] shot his wife in the head and then shot him in the abdomen before fleeing with their jewelry.

Three months later, Charles' brother, Matthew Stuart, told authorities... that he had been an unwitting accomplice to Carol's murder.

On January 3, 1990, after Matthew had gone to the police and implicated his brother in the murder, Charles met with his attorney, John T. Dawley. In the early morning hours of the next day, Charles apparently committed suicide.91

The commonwealth wanted disclosure of the substance of Charles Stuart's meeting with his attorney, arguing that justice required an exception to the attorney-client privilege.92 Predictably, the administratrix of Charles Stuart's estate, as well as all of his heirs, objected to the request.93

In its decision, the Massachusetts Supreme Judicial Court acknowledged that "the attorney-client privilege may serve as a mechanism to frustrate the investigative or fact-finding process."94 Focusing on the importance to the administration of justice of the right of citizens to obtain advice from a fully informed lawyer, the court concluded:

A rule that would permit or require an attorney to disclose information given to him or her by a client in confidence, even though such disclosure might be limited to the period after the client's death, would in many instances, we fear, so deter the client from "telling all" as to seriously impair the attorney's ability to function effectively. We think that that potential is inconsistent with the traditional value our society has assigned, in the interests of justice, to the right to counsel and to an effective attorney-client relationship.95

This was the entirety of the court's analysis. In applying the privilege posthumously, the majority rejected a balancing test approach suggested in the dissent.96 The court did not consider that Charles Stuart's interests in maintaining the privilege were insignificant, both because he was dead and therefore not subject to criminal prosecution and because another significant interest, his reputation among the community, had already been destroyed by the publicity surrounding the homicide. Furthermore, the court refused to consider soci-

91 Id. at 1260-61 (footnotes omitted).
92 See John Doe, 562 N.E.2d at 69.
93 See id.
94 Id. at 70.
95 Id. at 71.
96 See id. at 72-73 (Nolan, J., dissenting).
ety's compelling interest in administering justice—that is, by prosecuting criminals.\textsuperscript{97} Unfortunately, it cannot be said that the Massachusetts Supreme Judicial Court's summary rejection of these arguments was unique.\textsuperscript{98}

b. California Evidence Code

Under the California Evidence Code's attorney-client privilege provisions,\textsuperscript{99} "the privilege ceases to exist when the client's estate is finally distributed and his personal representative is discharged."\textsuperscript{100} The framers of the Code commented that, "[a]lthough there is good reason for maintaining the privilege while the estate is being administered—particularly if the estate is involved in litigation—there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is winded up and the representative is discharged."\textsuperscript{101}

\textsuperscript{97} Matthew Stuart eventually was indicted, along with an accomplice. See Fraternal Aid, Time, Oct. 7, 1991, at 27.

\textsuperscript{98} See, e.g., Arizona v. Macumber, 544 P.2d 1084, 1086 (Ariz. 1976) (rejecting similar arguments in three paragraphs, with little analysis).

\textsuperscript{99} See CAL. EVID. CODE § 954 (West 1995). Section 954 provides:

- § 954. Lawyer-client privilege
  
  Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:
  
  (a) The holder of the privilege;
  
  (b) A person who is authorized to claim the privilege by the holder of the privilege; or
  
  (c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

\textsuperscript{100} Id. Section 953 provides:

- § 953. Holder of the privilege
  
  As used in this article, "holder of the privilege" means:
  
  (a) The client when he has no guardian or conservator.
  
  (b) A guardian or conservator of the client when the client has a guardian or conservator.
  
  (c) The personal representative of the client if the client is dead.

\textsuperscript{101} Id. § 953. See also 24 WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5498, at 486 (1986) ("Though the California Code does not define 'personal representative,' it seems reasonable to suppose that it embodies the view . . . that the phrase covers both an executor and an administrator.").
The California Evidence Code's treatment of the attorney-client privilege reflects a judgment that a dead client's right to fully informed counsel is outweighed by other societal goals. In fact, commentators have observed that Rejected FRE 503 would have followed the California limitation, "personal representative," as a limit on the duration of the federal attorney-client privilege, but, as mentioned earlier, the proposed rule was rejected in favor of the common law approach.

c. Conclusion

Two things can be said about the light that experience sheds on the issue of posthumous application of the attorney-client privilege. First, very few state cases (and no federal cases) had tackled the issue of to what extent the attorney-client privilege shields communications after the death of the client in the criminal context, and those that had gave "little revelation of whatever reasoning may have explained the outcome." Second, California's Code of Evidence illustrates the view that it is not universally held that the attorney-client privilege should last forever. The Supreme Court itself had expressed the same view more than one hundred years ago, as discussed below.

2. Reason

The court of appeals' analysis was shaped primarily by utilitarian analysis of the privilege. It took great care to avoid the dilemma of which Upjohn warned. There, the Supreme Court had said, "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." The court of appeals said the holding in this case, therefore, would be limited to the criminal context.

The important question was whether, and to what extent, client-lawyer communications would be chilled by the prospect of post-death disclosure in a criminal investigation. The Court introduced a parade of commentators, all of whom ("with one distinguished exception")

102 See 24 WRIGHT & GRAHAM, supra note 99, ¶ 5498, at 486.
104 See infra notes 137-42 and accompanying text.
105 See Sealed Case, 124 F.3d at 233. For a summary of utilitarian justifications for the attorney-client privilege, see supra notes 42-52 and accompanying text.
106 See supra notes 68-69 and accompanying text.
107 Sealed Case, 124 F.3d at 234 (quoting Upjohn, 449 U.S. at 393).
favored post-death qualification of the attorney-client privilege.\textsuperscript{108} For example, Wright and Graham stated in part:

One would have to attribute a Pharaoh-like concern for immortality to suppose that the typical client has much concern for how posterity may view his communications. On the other hand, imposing the privilege after the death will often result in a loss of crucial information because the client is no longer available to be asked what he knows when the privilege conceals what he told his attorney.\textsuperscript{109}

Mueller and Kirkpatrick similarly argued:

It has been suggested that the privilege of a deceased client be qualified in cases where extreme injustice would be done to a party deprived of critical evidence. For example, if a deceased client has confessed to criminal acts that are later charged to another, surely the latter's need for evidence sometimes outweighs the interest in preserving the confidences.\textsuperscript{110}

In addition, Judge Learned Hand had proposed that the privilege not apply at all after the client's death,\textsuperscript{111} and McCormick thought that termination of the privilege at death "could not to any substantial degree lessen the encouragement for free disclosure."\textsuperscript{112} The distinguished exception is none other than Professor Wigmore, who stated in his classic treatise that the attorney-client privilege survived the death of the client.\textsuperscript{113} But even Wigmore conceded that this view had never been questioned, and he did not specifically consider what effects a posthumous exception limited to criminal proceedings would have on client-lawyer communications.\textsuperscript{114}

The court addressed what it perceived as clients' fears of post-death revelation. It reasoned that although the possibility of criminal liability is foreclosed upon death, the risk of civil liability continues.\textsuperscript{115} Concern for one's reputation was the other important factor.\textsuperscript{116} Since the court limited its discussion to the criminal context, the first of these fears—civil liability—did not matter.\textsuperscript{117} The court's determina-

\textsuperscript{108} See id. at 232–33.
\textsuperscript{109} 24 WRIGHT & GRAHAM, supra note 99, § 5498, at 484 (citations omitted), quoted in Sealed Case, 124 F.3d at 232.
\textsuperscript{110} MUELLER & KIRKPATRICK, supra note 12, § 5.26, at 431–32 (citations omitted).
\textsuperscript{111} See Sealed Case, 124 F.3d at 232–33.
\textsuperscript{112} Id. at 232 (quoting 1 Mccormick on Evidence § 94, at 350 (4th ed. 1992)).
\textsuperscript{113} See 8 WIGMORE, supra note 14, § 2323, at 630–31, cited in Sealed Case, 124 F.3d at 232.
\textsuperscript{114} See id.
\textsuperscript{115} See Sealed Case, 124 F.3d at 233.
\textsuperscript{116} See id.
\textsuperscript{117} See id. at 234.
tion would properly turn on the question of to what extent a client's communications with her lawyer would be chilled by reputational concerns. The majority argued:

In the sort of high-adrenalin situation likely to provoke consultation with counsel, . . . we doubt if these . . . interests will be very powerful; and against them the individual may even view history's claims to truth as more deserving. To the extent, then, that any post-death restriction of the privilege can be confined to the criminal realm of criminal litigation, we should expect the restriction's chilling effect to fall somewhere between modest and nil.  

The court said that an exception limited to the criminal context would not overly complicate what lawyers must tell their clients about the confidentiality of their conversations, since the attorney-client privilege, far from being an absolute privilege, is already riddled with exceptions.  

The costs of applying the attorney-client privilege posthumously were high, since the client himself could no longer be called as a witness, thus eliminating a vital source of information. Eliminating the source would lead to unjust determinations, at least in some cases, and this toll, along with the impossibility that the deceased client

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118 Id. at 233; accord Mueller & Kirkpatrick, supra note 12, § 5.26, at 431-32. Mueller & Kirkpatrick write:

A rule requiring occasional disclosure in [the criminal] setting would not seriously undercut the utilitarian basis of the privilege, which emphasizes the importance of candor between client and lawyer in securing adequate legal representation. Few clients are much concerned with what will happen sometime after the death that everyone expects but few anticipate in an immediate or definite sense.

Id.

119 See Sealed Case, 124 F.3d at 234. Exceptions to the attorney-client privilege are discussed above. See supra note 20 and accompanying text.

In a strong dissent, Judge Tatel observed:

After this decision, lawyers will have to add an important caveat to what they advise their clients about confidentiality:

I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. But when you die, I could be forced to testify—against your interests—in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution. Now, please tell me the whole story.

Id. at 239 (Tatel, J., dissenting).

120 See id. at 233–34. Even when a potential witness' Fifth Amendment right against self-incrimination could be invoked, prosecutors may grant the witness immunity from prosecution. In that case, the witness could be compelled to testify, notwithstanding the Fifth Amendment right.
would be subject to criminal liability, guided the court in crafting the following test limited to criminal proceedings:\textsuperscript{121} (1) "[t]he statements must bear on a significant aspect of the crimes at issue...");\textsuperscript{122} (2) with respect to that significant aspect, there must be "a scarcity of reliable evidence";\textsuperscript{123} (3) finally, in camera review is permissible, and "[t]o the extent that the court finds an interest in confidentiality, it can take steps to limit access to these communications in a way that is consonant with the analysis justifying relaxation of the privilege."\textsuperscript{124}

\textbf{B. Swidler & Berlin v. United States}

The Supreme Court agreed to review the court of appeals' decision in \textit{In re Sealed Case}\textsuperscript{125} and two months later heard oral arguments on the matter. The decision reversing the court of appeals' opinion was announced just two weeks later.\textsuperscript{126} On a day that saw the Supreme Court, in separate cases, declare unconstitutional the line-item veto law\textsuperscript{127} and constitutional the denial of grants by the National Endowment for the Arts for "indecent" art,\textsuperscript{128} the decision in \textit{Swidler & Berlin} was labeled the day's "Dog bites Man" story.\textsuperscript{129} In fact, the majority opinion roughly occupies a mere five pages in the Supreme Court Reporter. On the last of those pages, Chief Justice Rehnquist stated his conclusion that "the Independent Counsel has simply not made a sufficient showing to overturn the common law rule embodied in the \textit{prevailing caselaw}."\textsuperscript{130}

While the Independent Counsel, according to the Court, had failed to make a sufficient showing, it is clear that he deserved an "A" for effort. The Independent Counsel reminded the Court that privi-

\begin{footnotes}
\item[121] See \textit{Sealed Case}, 124 F.3d at 235.
\item[122] Id.
\item[123] Id.
\item[124] Id.
\item[130] \textit{Swidler & Berlin}, 118 S. Ct. at 2088 (emphasis added). When the Court said "\textit{prevailing caselaw}," it meant cases in which the general rule was assumed, but not expressly held. Cases actually passing on the question are extremely rare.
\end{footnotes}
Leges are to be strictly construed. In its brief, the Office of the Independent Counsel (OIC) had argued that the matter was one of construction, not of narrowing, the attorney-client privilege, since it was "not aware of any . . . reported federal case addressing whether the attorney-client privilege applies in criminal proceedings when the client is deceased." Distinguishing Supreme Court precedent, United States v. Nixon and Bransburg v. Hayes, on the ground that those cases involved creation of a privilege, Rehnquist characterized the issue in this case as whether to narrow the oldest of all privileges, "contrary to the weight of the existing body of caselaw." On this point, however, minds can differ.

First, at least in federal courts, a posthumous attorney-client privilege had never been constructed. The Court said that in one 1897 case, Glover v. Patten, it had "expressly assumed" posthumous continuation of the privilege. This statement was misleading, since in Glover the Court had said merely that "[w]hile such communications might be privileged if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin." Con-
trary to the Court’s assertion, *Glover*, at most, expressly assumed that the privilege survived for the duration of the client’s estate, not indefinitely. In this sense, the *Glover* assumption was like the durational limits in the California Evidence Code. 140 Oddly enough, the Court itself characterized the California rules as “exceptional” in the sense that the “privilege terminates when the estate is wound up.” 141 “[N]o other State has followed California’s lead,” the Court noted. 142 But long before the California rule was enacted, the Court in *Glover v. Patten* had “expressly assumed” the lead itself.

A second reason to disagree with the Court on the issue of strict construction is that cases expressly *holding* that the attorney-client privilege survived indefinitely after the death of the client are extremely rare. 143 And even when state courts have considered the issue, they have said little to justify their position. 144 As has already been discussed, 145 state decisions concluding that the attorney-client privilege applied posthumously were unaccompanied by sufficient support for these conclusions. When the Court cited these cases to support *its* conclusion, 146 it inadvertently illustrated both the high costs that the privilege, when applied broadly, can exact on society, and the tendency by courts to apply the privilege broadly without reason.

Perhaps anticipating the Court’s judgment on this country’s experience with the privilege, the Independent Counsel also argued that posthumous qualification of the attorney-client privilege was logically supported by the recognized testamentary exception. 147

The public’s need for determining whether a crime has been committed (and if so, by whom) warrants at least parity of treatment to that afforded the interest in resolving will contests with precise accuracy. If “who gets Blackacre” is sufficient to trump the privilege after the client’s death, then questions raised in the criminal process—who gets indicted, who gets convicted, who gets pun-

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140 See supra notes 99–102 and accompanying text.
141 Swidler & Berlin, 118 S. Ct. at 2085 n.2.
142 Id.
143 See generally supra notes 85–87 and accompanying text. See also Frankel, supra note 82, at 58 n.65.
144 See 24 WRIGHT & GRAHAM, supra note 99, § 5498, at 484 (“Those who favor an eternal duration for the privilege seldom do much by way of justifying this in terms of policy.”).
145 See supra notes 95, 98 and accompanying text.
146 See Swidler & Berlin, 118 S. Ct. at 2085.
147 For a brief discussion of exceptions to the attorney-client privilege, see supra note 20 and accompanying text.
ished—are surely sufficient to trump the privilege after the client’s death.\textsuperscript{148}

The Court dismissed this argument, since the testamentary exception was justified as furthering the intent of the client. “There is no reason to suppose as a general matter that grand jury testimony about confidential communications furthers the client’s intent,” said the Court.\textsuperscript{149} When, at oral argument, the Independent Counsel argued that if it is every citizen’s duty to testify truthfully in criminal matters and if the Fifth Amendment privilege against self-incrimination did not apply, then the law should presume that every citizen’s intent would be to disclose relevant matters, the Court responded skeptically:

MR. KAVANAUGH: ... [P]resume that a person near death would want to fulfill what this court has called his basic obligation as a citizen to provide information to a grand jury?

And even on the facts of this case—

[COURT]: Because there are a great number of people who know they have that obligation, or at least that there is a general theory that they have that obligation, but they do not, in fact, want to fulfill it.

I mean, we’re being realistic, I think.\textsuperscript{150}

How unlikely the court of appeals’ limited exception would make the occurrence of “full and frank” communication was the issue at the heart of the case. The Court acknowledged that the rule limited to criminal proceedings would not render the privilege totally ineffective.\textsuperscript{151} It quickly followed, however: “While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether.”\textsuperscript{152} The Court was apparently concerned about clients’ worries about their reputation, civil liability, or harm to friends and family.\textsuperscript{153} The test adopted by the court of appeals, if only in criminal proceedings, introduced too much uncertainty into the privilege’s application for the Court’s taste, especially since a client may not always


\textsuperscript{149} Swidler & Berlin, 118 S. Ct. at 2086.


\textsuperscript{151} See Swidler & Berlin, 118 S. Ct. at 2086.

\textsuperscript{152} Id.

\textsuperscript{153} See id.
know if disclosed information will become relevant to a future civil or criminal matter.\textsuperscript{154}

The Court did not foreclose the possibility that the privilege would be limited in the future. In footnote 3, the Court spoke of "exceptional circumstances" that could warrant departure from its holding. "Petitioner, while opposing wholesale abrogation of the privilege in criminal cases, concedes that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege. We do not, however, need to reach this issue, since such exceptional circumstances clearly are not presented here."\textsuperscript{155}

Footnote 3 may be the most telling passage in \textit{Swidler \& Berlin}. Professor Charles Wolfram, chief reporter for the American Law Institute's Restatement of the Law Governing Lawyers, suggested shortly after the opinion was issued that the ruling was "not the devastating blow to critics of an absolute privilege that many are calling it."\textsuperscript{156} He speculated that the footnote was the price for winning over one or more Justices for the majority.\textsuperscript{157} Otherwise, those Justices may have joined Justice O'Connor, who issued a striking dissent.\textsuperscript{158}

O'Connor's dissent was "striking" because of its concern for defendants' rights.\textsuperscript{159} The dissenters' position was that the attorney-client privilege should not be an "absolute bar to the disclosure of a deceased client's communication."\textsuperscript{160} Instead, "[w]hen the privilege is asserted in the criminal context, and a showing is made that the communications at issue contain necessary factual information not otherwise available, courts should be permitted to assess whether interests of fairness and accuracy outweigh the justifications for the privilege."\textsuperscript{161}

In my view, the paramount value that our criminal justice system places on protecting an innocent defendant should outweigh a deceased client's interest in preserving confidences. . . . "Our historic commitment to the rule of law . . . is nowhere more profoundly

\begin{footnotes}
\item[154] See id.
\item[155] See id. at 2087 n.3.
\item[156] France, $supra$ note 129 (quoting Prof. Charles Wolfram).
\item[157] See id.
\item[158] See id.
\item[160] \textit{Swidler \& Berlin}, 118 S. Ct. at 2089.
\item[161] Id.
\end{footnotes}
manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer."162

In the end, the Foster notes were protected. The Supreme Court, in a very short opinion, had confirmed what most lawyers already suspected. They would take their clients' secrets to the grave—at least for now.

IV. SOLUTION: CONSTITUTIONAL LIMITS TO POST-DEATH SECRECY

The problem in Section 1, The Privileged and the Damned,163 was based on a 1976 case, Arizona v. Macumber.164 In that case, the Arizona Supreme Court held that the confession by the now-deceased client was privileged and, in effect, damned William Macumber to two life sentences, although he was probably innocent. Macumber speaks volumes about prosecutorial discretion in America,165 but it also speaks volumes about the judiciary. The majority in Macumber dismissed arguments raised by the defendant's lawyer in three simple paragraphs, never addressing the wisdom of a rule that absolutely shields from disclosure lawyer-client communications after the death of the client.

In The Privileged and the Damned, as in Macumber, the costs of honoring the privilege are high—the defendant will potentially spend the rest of his life in prison. Furthermore, as in In re Grand Jury Investigation,166 the privilege is asserted in the name of a client with little, if anything, to lose from disclosure. First, his death has foreclosed any possibility of criminal prosecution; second, his reputation has already been damaged by the first murder trial. Curiously, in Macumber, the privilege was neither invoked by the deceased client's lawyers nor by his friends and family. Instead, the issue was raised by the trial court sua sponte.

In Macumber, Justice Holohan argued in a special concurrence that a criminal defendant's constitutional right to present a defense and to compel witnesses also required admission of the lawyers' testimony.167 This question was not addressed by the majority. Justice Holohan was onto something, however. Swidler & Berlin's footnote 3

163 See supra text accompanying note 11.
165 The attorney-general of Arizona at the time was Bruce Babbit. Coincidentally, the defendant's counsel in Macumber was named James Hamilton. See Macumber, 544 P.2d at 1085.
166 See generally supra notes 90–98 and accompanying text.
167 See Macumber, 544 P.2d at 1088.
hinted of a future exception to posthumous application of the attorney-client privilege, possibly arising when a criminal defendant's constitutional rights are implicated. Justice O'Connor's dissent emphasized that "the paramount value [the] criminal justice system places on protecting an innocent defendant should outweigh a deceased client's interest in preserving confidences." For all of its faults, the holding in Swidler & Berlin was wisely limited to its facts. If, as Professor Wolfram suggests, footnote 3 was the price for winning over votes from the dissent, the future will probably hold that the attorney-client privilege is trumped if the client is dead and the limitation on the defendant's rights outweigh the policies furthered by application of the privilege.

Thus, today the problem would probably yield a different result from the case on which it is based. In the problem, the client's constitutional rights of confrontation and compulsory process are clearly invoked. Furthermore, a strong argument exists that the policies embodied by post-death application of the attorney-client privilege are outweighed by the limitation on the defendant's rights. First, although utilitarian explanations for the privilege favor secrecy, they do so for the sake of fair administration of justice and observance of the law. If the rule were limited to cases in which the dead client's statements might exonerate a criminal defendant, chilling of client-lawyer communications would be minimal. Of California, where a broader limitation has been in place for decades, it cannot be said that the judicial system has come to a halt. Most importantly, the drastic results produced by the current rule cannot be said to promote the fair administration of justice. In The Privileged and the Damned, for example, absolute fidelity to the rule will result in a wrongful conviction and sentencing. Rights-based analysis recognizes that when a client's interest in autonomy conflicts with others' rights, "a careful review of the legitimacy and weight of competing claims must be undertaken to determine the moral validity of an act." In the problem, "careful review" shows that the defendant's constitutional rights

168 See supra notes 155-62 and accompanying text.
169 Swidler & Berlin, 118 S. Ct. at 2089.
170 See supra text accompanying notes 130.
171 See supra notes 42-52 and accompanying text.
172 Recall that cases facing this issue are extremely rare. See supra notes 85-87 and accompanying text.
174 See supra notes 53-60 and accompanying text.
175 Pizzimenti, supra note 46, at 448.
to confront witnesses, compulsory process, and due process of law trump dead client’s interest in autonomy, especially since the evidence could exonerate the defendant.¹⁷⁶

The Lawyer

Swidler & Berlin's five pages did not cover ethical issues at the heart of attorney-client privilege issues. I repeat the assertion that inappropriately broad application of the privilege may perpetuate harmful images of the bar,¹⁷⁷ and what better way to illustrate the point than to recall the abusive use of prosecutors’ discretion in cases like Macumber.¹⁷⁸

I also argued above that any qualification of the attorney-client privilege must be narrow enough to preserve the image of lawyer-client loyalty. Public perception of lawyers was, after all, an essential premise in the dominant theoretical justifications for the privilege. According to Model Rule of Professional Conduct 1.6, “A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation....” Society admires a lawyer’s loyalty to his or her clients, dead or alive, and it is every lawyer’s ethical duty to assert the privilege whenever it is applicable, if only arguably.¹⁷⁹ If and when absolute application of the posthumous privilege dies, this ethical duty will survive.

Isaac Ruiz*

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¹⁷⁶ For a brief discussion of these Constitutional issues, see supra notes 21–24 and accompanying text.
¹⁷⁷ See supra notes 61–65 and accompanying text.
¹⁷⁸ See supra text accompanying note 165.
¹⁷⁹ See MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.6 commentary 20 (1983).

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