

April 1986

## Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context

Michael L. Waldman

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Business Organizations Law Commons](#)

---

### Repository Citation

Michael L. Waldman, *Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context*, 28 Wm. & Mary L. Rev. 473 (1987), <https://scholarship.law.wm.edu/wmlr/vol28/iss3/4>

Copyright c 1986 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.  
<https://scholarship.law.wm.edu/wmlr>

## BEYOND *UPJOHN*: THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT

MICHAEL L. WALDMAN\*

### I. INTRODUCTION

The federal courts have experienced great difficulty determining which employees in a corporation who reveal information to the corporation's lawyer are entitled to invoke the attorney-client privilege. In its first attempt at resolving this question, an equally divided Supreme Court merely affirmed the lower court's judgment without opinion.<sup>1</sup> Rather than settle the differences among the circuit courts, the Supreme Court left the lower courts to continue interpreting the proper scope of the attorney-corporate client privilege without the benefit of the Supreme Court's guidance or reasoning.<sup>2</sup>

In 1981, the Supreme Court was more successful. In *Upjohn Co. v. United States*,<sup>3</sup> the Court unanimously rejected the "control group" test then favored generally in the federal courts.<sup>4</sup> The Court ruled that limiting the privilege to those who control or take a substantial part in corporate decisions restricted the privilege too severely. Justice Rehnquist, writing for the Court, reasoned that the "control group" test hindered corporate attorneys' efforts to formulate sound legal advice and to ensure their clients' compliance with the law.

---

\* Law clerk to Judge Robert Vance, United States Court of Appeals for the Eleventh Circuit. J.D., Harvard Law School, 1986; A.B., Harvard University, 1982.

1. *Decker v. Harper & Row Publishers, Inc.*, 400 U.S. 348 (1971) (per curiam), *aff'g by an equally divided Court* 423 F.2d 487 (7th Cir. 1970).

2. "It is impossible to tell whether the four Justices who voted to reverse did so on the merits or because they believed that the case was an inappropriate one for using the extraordinary writ of mandamus." Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 453 n.38 (1982).

3. 449 U.S. 383 (1981).

4. The "control group" test had also been favored during the period when *Harper & Row* was before the Court. See Note, *The Corporate Attorney-Client Privilege: Culpable Employees, Attorney Ethics, and the Joint Defense Doctrine*, 58 TEX. L. REV. 809, 817 (1980); Sexton, *supra* note 2, at 451.

Besides striking down the "control group" test as improperly restrictive, however, the *Upjohn* opinion gave lower courts little guidance. Over a pointed concurrence from Chief Justice Burger, the Court explicitly declined to provide any rules or guidelines on the proper scope of the attorney-corporate client privilege.<sup>5</sup> The Court again left lower courts to strike their own balance between the need to discover truth and the desire to preserve adequate legal representation in the corporate context. Since 1981, the lower courts have granted the privilege to corporate employees on a case-by-case basis whenever appropriate under "the principles of the common law as . . . interpreted . . . in light of reason and experience."<sup>6</sup>

This Article examines some of the reasons why determining the proper scope of the attorney-client privilege in the corporate context has proved so nettlesome. Part II traces the historical development of the attorney-corporate client privilege in the courts. This historical analysis focuses on the initial challenges to extending the privilege to corporations and on the emergence in the 1960s and early 1970s of the two major tests, the "control group" test and the "subject matter" test. The development of these different tests highlights the different justifications for the attorney-client privilege and their applicability to the fiction of the corporate form. In Part III, a study of the *Upjohn* opinion explicates the current state of the case law. Part IV scrutinizes the policy assumptions underlying *Upjohn* and the visions of privilege law and corporations that *Upjohn* represents. Building on the theoretical and practical flaws in *Upjohn* outlined in Part IV, Part V presents new tests for the attorney-corporate client privilege. The tests offered in this final section are both consistent with the traditional purposes of general privilege law and calculated to overcome the present problems plaguing the privilege in the corporate context.

---

5. 449 U.S. at 386 ("We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area . . .").

6. *Id.* at 397 (quoting Fed. R. Evid. 501).

## II. THE DEVELOPMENT OF THE PRIVILEGE IN THE CORPORATE CONTEXT: THE QUESTION PRESENTED

The privilege granted to employee communications with company lawyers grew out of the law's traditional deference to the attorney-client relationship. Wigmore traces the history of the attorney-client privilege "back to the reign of Elizabeth I, where the privilege already appears as unquestioned."<sup>7</sup> Others have reached farther back, finding the notion that a lawyer cannot be a witness against his client deeply rooted in Roman law.<sup>8</sup> The sanctity of communications between client and attorney has remained firmly established despite the preeminence since the late eighteenth century of "the judicial search for truth" and its demand for every man's evidence.<sup>9</sup> Extension of the privilege to corporate clients, however, has strained this longstanding tradition. Courts developed the attorney-client privilege for the individual client. The rise of the corporate form destroyed the paradigm case of an individual seeking legal advice and created the problem of identifying the "client" for purposes of the privilege.<sup>10</sup>

The corporate client differs from the individual client in important ways. The most obvious but critical difference is that corporations are inanimate, artificial entities created by the state; they lack the human qualities—the basic human dignity and rights—that our legal system recognizes and respects. Secondly, while attorneys generally can rely on the individual client as the sole source of information about the case, "the corporate client may have to summon a vast array of spokesmen—from upper management to 'blue collar' employees—in order to communicate such

---

7. 8 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2290, at 542 (McNaughton rev. ed. 1961) (footnote omitted).

8. C. MCCORMICK, *MCCORMICK ON EVIDENCE* § 87, at 204 (3d ed. 1984).

9. 8 J. WIGMORE, *supra* note 7, § 2290, at 543.

10. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977). In *Diversified Industries*, the court stated:

A problem arises, however, where the client is a corporation that can communicate or receive communications only by or through its human agents. In such a case the question arises as to whether the privilege extends to all communications by or to classes of corporate agents or employees or whether the privilege is limited to communications by or to only limited classes of such agents or employees.

*Id.* at 602.

relevant information to counsel.”<sup>11</sup> This dispersal of information usually is matched by a dispersal of responsibility. The complexity of the modern corporation dictates that the tasks of supplying information, receiving legal advice, and acting on that advice be spread among a large number of employees at different levels of the corporation.<sup>12</sup> These fundamental differences serve as grounds for attacking the extension of a broad privilege to corporate employees.

#### A. Radiant Burners: *The Privilege Under Attack*

Chief Judge Campbell of the United States District Court for the Northern District of Illinois launched the modern debate over the scope of the attorney-corporate client privilege in 1962. In *Radiant Burners, Inc. v. American Gas Association*,<sup>13</sup> Judge Campbell “suggest[ed] to the profession and adopt[ed] as the law . . . that a corporation is not entitled to make claim for the privilege.”<sup>14</sup> Stating that no previous court had decided the issue expressly, he ruled that letters from corporate officers and employees to the corporation’s lawyers were not privileged and must be produced in discovery.

Judge Campbell isolated two reasons for not extending the attorney-client privilege to corporations. First, “the attorney-client privilege, analogous to the privilege against self-incrimination, is historically and fundamentally personal in nature.”<sup>15</sup> Campbell cited Supreme Court cases which had held that the fifth amendment privilege was inherently personal and therefore unavailable to corporations.<sup>16</sup> He stated that the abhorrence with which the legal system views forcing individuals to choose between convicting

---

11. Note, *Privileged Communications—Inroads on the “Control Group” Test in the Corporate Area*, 22 SYRACUSE L. REV. 759, 762 (1971).

12. Marketing officials know only selling, plant supervisors understand only production, and financial departments dominate their specialty. Although each reports to senior management, much is filtered out through the chain of command. See, e.g., *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164-65 (D.S.C. 1974).

13. 207 F. Supp. 771 (N.D. Ill.), *aff’d on reh’g*, 209 F. Supp. 321 (N.D. Ill. 1962), *rev’d*, 320 F.2d 314 (7th Cir.) (en banc), *cert. denied*, 375 U.S. 929 (1963).

14. *Id.* at 773.

15. *Id.*

16. *Id.* at 775 (citing *United States v. White*, 322 U.S. 694 (1944); *Wilson v. United States*, 221 U.S. 361 (1911)).

themselves or lying, and forcing lawyers to choose between convicting their clients or lying, loses its force when extended to a corporation. The moral dilemma and personal anguish which accompany the disclosure of a client's confidences appear less distressing when the client is a corporate fiction, "a mere creature of the state and not a natural entity."<sup>17</sup>

Second, Judge Campbell argued that the lack of confidentiality intrinsic in the corporate hierarchy would diminish the force of the privilege. Confidentiality, he noted, is "[o]ne of the fundamental, universally accepted and most generally stated common law elements" of any privilege.<sup>18</sup> This fundamental element of privilege, Campbell wrote, is incompatible with the natural flow of information within a corporation. Officers, directors, supervisory personnel, office staff, other employees, and shareholders all have access to files and could possibly "profan[e]" the confidence.<sup>19</sup> Because the personal relationship and personal confidences of the individual client and his attorney do not characterize the attorney-corporate client relationship, a corporation should not be afforded the privilege.

Judge Campbell's decision, announced by a distinguished jurist in a huge utilities antitrust case,<sup>20</sup> sparked a rash of commentary.<sup>21</sup> One can understand the opinion's impact only when the opinion is considered in light of the long history of unquestioned acceptance of the privilege. As Judge Campbell noted, "the privilege ha[d] somewhat generally been taken for granted by the judiciary."<sup>22</sup> Indeed, prior to Judge Campbell's decision courts made no distinction between individuals and corporations in applying the attorney-client privilege. The then-prevailing federal test for corporate officers and employees, enunciated in *United States v. United Shoe Machinery Corp.*,<sup>23</sup> deviated little from the basic require-

---

17. *Id.* at 773.

18. *Id.* Confidentiality is one of Wigmore's requirements for finding the privilege. See *infra* note 24 and accompanying text.

19. 207 F. Supp. at 773-75.

20. The complaint named more than 20 corporate defendants, including divisions of General Electric, General Motors, and Midland-Ross Corp. *Id.* at 771-72.

21. See *Radiant Burners*, 320 F.2d 314, 321 n.9 (7th Cir.) (en banc) (citing 15 commentaries on the case published in the brief period prior to the appeals court's ruling).

22. 207 F. Supp. at 772.

23. 89 F. Supp. 357 (D. Mass. 1950).

ments for the attorney-client privilege that Wigmore delineated.<sup>24</sup> The privilege protected information furnished to the attorney by *any* officer or employee if furnished in confidence and without the presence of third persons; the privilege left open only communications with persons outside the corporate organization.

The United States Court of Appeals for the Seventh Circuit authoritatively quashed Judge Campbell's attempt in *Radiant Burners* to eliminate the unlimited *United Shoe* privilege for corporate employees. Sitting en banc, the circuit court unanimously reversed; it held that "[a] corporation is entitled to the same treatment as any other 'client'—no more and no less."<sup>25</sup> The opinion included a lengthy footnote listing dozens of federal, state, and English cases dating back to the early nineteenth century in which courts had applied the attorney-client privilege to corporations.<sup>26</sup> The court described a number of these opinions in greater detail, placing particular weight on a 1915 Supreme Court decision, *United States v. Louisville & Nashville Railroad*,<sup>27</sup> which permitted a railroad to assert the attorney-client privilege.<sup>28</sup> With these cases as background, the court rejected Judge Campbell's emphasis on the per-

24. Dean Wigmore's widely cited formulation of the rule states that:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 J. WIGMORE, *supra* note 7, § 2292, at 554 (footnote omitted).

The formulation in *United Shoe* is only slightly different:

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.

89 F. Supp. at 358-59; *see also* Note, *supra* note 4, at 812 n.12.

25. 320 F.2d 314, 324 (7th Cir.) (en banc), *cert. denied*, 375 U.S. 929 (1963).

26. *Id.* at 319 n.7.

27. 236 U.S. 318 (1915).

28. 320 F.2d at 319. As the Seventh Circuit pointed out, however, "[i]n that case [*Louisville & N.R.R.*], the Government did not contest the right of a railroad corporation to invoke the attorney-client privilege." *Id.* at 320.

sonal character of the privilege: "We believe this is a misconception of the principle underlying the privilege. Our conclusion is that the privilege is that of a 'client' without regard to the non-corporate or corporate character of the client, designed to facilitate the workings of justice."<sup>29</sup>

The court focused on utilitarian justifications for the privilege, stressing that the need to foster attorney effectiveness by encouraging full disclosure by clients is essential in both the individual and corporate contexts. The privilege's benefits—promoting free and open exchanges between attorney and client—play as necessary a part in the corporate context as they do for the individual client. The utilitarian justifications for the system, therefore, and not personal rights, formed the basis for the Seventh Circuit's solicitude toward the privilege.<sup>30</sup> Although the court acknowledged that "several noted scholars" such as Dean McCormick and Professor Morgan had reached a contrary utilitarian balance in the attorney-corporate client area, the Seventh Circuit elected to "follow Wigmore" in recognizing and applying the privilege to corporate employees as well as to individuals.<sup>31</sup>

Even though Judge Campbell's opinion in *Radiant Burners* was overturned on appeal and subsequent courts and legislatures have shown no inclination to embrace its holding,<sup>32</sup> his opinion has had significant doctrinal consequences. In the short run, Judge Campbell's reexamination of the policies underlying the privilege led other federal judges to do the same. His incisive refutation of the confidentiality rationale weakened the justification for the privilege in the corporate context and made courts wary about unthinkingly applying the unlimited *United Shoe* approach. Although rejecting his conclusions, courts could not fail to be impressed by Judge Campbell's reasoning. As one judge stated, for example: "To

---

29. *Id.* at 322.

30. The court concluded that "since the privilege does not exist out of deference to any personal right, but rather because of policy considerations designed to facilitate the workings of justice, it is fully applicable in the broad sense to corporations." *Id.* at 321 (citations omitted).

31. *Id.* at 322-23.

32. See C. MCCORMICK, *supra* note 8, § 87, at 207 ("There seems to be little reason to believe the issue will arise soon again."); see also 2 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 503(b)[04] (1980).



the extent that the learned judge [Campbell] recognizes that application of the immunity to the corporation is problematical, I concur . . . . [However,] the proper approach lies in tailoring the ordinary rules to the peculiar cloth of this legal entity."<sup>33</sup> Another judge began a leading case that revised the scope of the privilege by conceding that "[Judge Campbell's] opinion is supported by a good deal of history and sound logic, but the availability of the privilege to corporations has gone unchallenged so long and has been so generally accepted that I must recognize that it does exist."<sup>34</sup>

Campbell's exposure of the difficulties in extending the privilege thus engendered a new skepticism toward the attorney-client privilege. That courts developed the narrow control group test less than a year after Judge Campbell's opinion appeared is far from coincidental.<sup>35</sup>

Judge Campbell's long run doctrinal impact was to head off any attempt to justify the attorney-corporate client privilege in non-utilitarian terms. Individual autonomy and human dignity, rather than any beneficial effect on people's behavior or the administration of justice, underlie most privileges.<sup>36</sup> Judge Campbell argued forcefully against the application of these privacy/rights-based justifications in the corporate context. The moral imperatives against disclosing intimacies and breaching confidences lack force when

---

33. *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85, 88 n.12 (D. Del. 1962) (Wright, C.J.).

34. *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 484 (E.D. Pa. 1963) (Kirkpatrick, J.).

35. See *infra* notes 40-51 and accompanying text.

36. The scholarly literature recognizing a privacy/rights-based justification for privilege is extensive. See, e.g., Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61 (1973); Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597 (1980). See generally Sexton, *supra* note 2, at 480 n.133; *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1480-83 (1985) [hereinafter *Privileged Communications*]. Notably, the attorney-client privilege arose out of "the oath and the honor of the attorney," embodying the notion that a gentleman never revealed confidences. See 8 J. WIGMORE, *supra* note 7, § 2290, at 543. The idea of personal treachery still lingers over violations of the privilege; yet the origin of privileges is surely a far cry from the utilitarian justification courts rely on today.

applied to a monolithic corporation.<sup>37</sup> As one commentator noted, "the strongest of the nonutilitarian arguments . . . relies upon the existence of a personal relationship between the lawyer and her client and is therefore difficult to advance in relation to a corporate attorney-client privilege."<sup>38</sup> By contrasting the inanimate, artificial corporation with the "fundamentally personal" nature of the attorney-client privilege, Judge Campbell forced the Seventh Circuit and future courts to fall back entirely on the Wigmorean utilitarian rationale.<sup>39</sup> The total reliance on utilitarian justifications is, in part, a legacy of Judge Campbell's cogent attack on any privacy/rights-based justification for the attorney-client privilege in the corporate context.

### *B. The Control Group Test: Narrowing the Privilege*

The control group test developed in response to Judge Campbell's trenchant analysis of the inapplicability of the attorney-client privilege in the corporate setting. Challenged by Campbell's reasoning, courts were forced to fall back on Wigmore's utilitarian rationale. Wigmore had described various preconditions for a privilege, stating, among other things, that "the injury that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of the litigation,"<sup>40</sup> and that the privilege must be "strictly confined within the narrowest possible limits consistent with the logic of its principle[s]."<sup>41</sup> The result of the courts' new interest in Wigmore was the control group test, first enunciated in *City of Philadelphia*

---

37. See *Privileged Communications*, *supra* note 36, at 1482; *cf. id.* at 1482 n.68 ("arguing that it is difficult to apply noninstrumental arguments to institutions") (citing 23 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5422, at 673 (1980)).

38. Sexton, *supra* note 2, at 480 n.133 (citing Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1068-73 (1976)).

39. The leading example of this strictly utilitarian analysis is the Supreme Court's opinion in *Upjohn*, which is completely devoid of any discussion of privacy interests or any other non-"systems policy" interest. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

40. 8 J. WIGMORE, *supra* note 7, § 2285, at 527. For a discussion of Judge Campbell's influence on the development of the control group test, see Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 362 (1972).

41. 8 J. WIGMORE, *supra* note 7, § 2292, at 554. Wigmore stated that the privilege should be drawn strictly because it obstructs the search for truth and because its benefits are "indirect and speculative." *Id.*

v. *Westinghouse Electric Corp.*<sup>42</sup> The test was developed only months after Judge Campbell's decision, and it quickly gained acceptance around the country. The control group test enabled courts to extend the privilege to corporations, albeit in a sharply circumscribed form.

The control group test rejected the expansive *United Shoe* approach of privileging exchanges between any employee and the corporation's lawyers; instead, it required that the communicant be "in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney," or that the communicant be a member of a group having such authority.<sup>43</sup>

Courts developed the more limited control group test after expressing three concerns about a pure Wigmorean cost/benefit analysis of the attorney-corporate client privilege. The first concern, relied on explicitly in *City of Philadelphia*, was that extending the privilege to statements made by witnesses would be contrary to the Supreme Court's decision in *Hickman v. Taylor*.<sup>44</sup> According to the court in *City of Philadelphia*, *Hickman* "settle[d] . . . that a statement given by a witness to a lawyer who is collecting information in order to prepare for litigation pending against the lawyer's client is not privileged."<sup>45</sup> Although *Hickman* protects attorneys' mental impressions and free exchanges between clients and lawyers, it makes clear that the preeminent need for full disclosure requires that all witnesses furnish relevant and material information to the court. To find that all employees are, by virtue of nothing more than their employee status, the "corporate client" would be to ignore the Supreme Court's teachings in *Hickman*. Given the structure of a modern corporation, employees with relevant information often more closely resemble accidental, unrelated witnesses

---

42. 210 F. Supp. 483 (E.D. Pa.), *mandamus denied sub nom. General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

43. *Id.* at 485.

44. 329 U.S. 495 (1946).

45. 210 F. Supp. at 485. In *Hickman*, the Supreme Court held that statements by tugboat workers to the tugboat company's lawyers were not privileged. The Court assumed, however, that the tugboat workers were third party witnesses and never addressed the attorney-corporate client privilege. In addition, the client in *Hickman* was an individual, not a corporation. *Hickman v. Taylor*, 329 U.S. 495 (1946).

than responsible, informed clients.<sup>46</sup> Consequently, *City of Philadelphia* set out a more restrictive test which extended the privilege only to those "clients" who could act on the attorney's advice rather than those who merely supplied basic information.

The second and related concern was that corporations would manipulate an expansive attorney-corporate client privilege so as to privilege all embarrassing or incriminating documents. Images abounded of a corporation using the privilege "to funnel its papers and documents into the hands of its lawyers . . . [to] avoid disclosure"<sup>47</sup> and using its corporate counsel as "the exclusive repository of unpleasant facts."<sup>48</sup> Unlike an individual, a corporate client could structure its procedures so as to privilege much of its routine transactions through transmittal to counsel. As one court noted, "in the corporate context, given the large number of employees, frequent dealings with lawyers and masses of documents, the 'zone of silence grows large.'"<sup>49</sup> The control group test met this concern by ensuring removal of routine intra-corporate communications from the privilege's protection.

The third concern involved the need for certainty in the identification of communications within the privilege's protection. The attorney-client privilege is supposed to induce a client to communicate more freely with his or her attorney, thereby promoting more effective legal representation.<sup>50</sup> An uncertain privilege, however, will inhibit communications because clients will fear the eventual public disclosure of their conversations. A proper application of the privilege, therefore, requires a bright line in order to reassure attorneys and corporate managers of the secrecy of their communications. Proponents of the control group test believed it to be such a bright line, lauding it for its "predictability and ease of applica-

---

46. 210 F. Supp. at 485; see also *Sexton*, *supra* note 2, at 451.

47. *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 324 (7th Cir.) (en banc), *cert. denied*, 375 U.S. 929 (1963).

48. *United States v. Upjohn Co.*, 600 F.2d 1223, 1227 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981); see also *Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968).

49. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 118, 432 N.E.2d 250, 257 (1982) (citation omitted).

50. See Note, *The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement*, 91 HARV. L. REV. 464, 468 (1977) [hereinafter Note, *Attorney-Client Privilege*]; Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 426 (1970) [hereinafter Note, *The Control Group Test*].

tion.”<sup>51</sup> By limiting the privilege to the small group of senior managers who control decision making, the control group test allowed corporations to identify easily who could speak as the client.

*C. The Subject Matter Test: The Need for Effective Advice*

Until 1970, the control group test reigned supreme; all federal courts utilized the test, and the drafters recommended it in their original proposals for the Federal Rules of Evidence.<sup>52</sup> The United States Court of Appeals for the Seventh Circuit first challenged this dominance in *Harper & Row Publishers, Inc. v. Decker*<sup>53</sup> by adopting a broader test for determining the scope of the attorney-corporate client privilege. In *Harper & Row*, the court focused on the subject matter of the employee's communications rather than on the nature of the employee who was communicating the information. Under this “subject matter” test, an employee's

communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.<sup>54</sup>

Although the court's per curiam opinion was somewhat short on explanation, the reasoning behind a broader privilege was readily apparent. Opponents of the control group test argued that only by extending the privilege to low-level employees could attorneys advise their corporate clients adequately. To restrict the privilege to communications of top-level executives was to ignore “the realities of corporate life”<sup>55</sup> because control group members often lack the

---

51. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 118, 432 N.E.2d 250, 257 (1982); see also *infra* notes 121-23 and accompanying text.

52. See 2 J. WEINSTEIN & M. BERGER, *supra* note 32, ¶ 503(b)[04], at 503-47; Sexton, *supra* note 2, at 453 n.38.

53. 423 F.2d 487 (7th Cir. 1970) (per curiam), *aff'd by an equally divided Court*, 400 U.S. 348 (1971); see *supra* note 1 and accompanying text.

54. 423 F.2d at 491-92.

55. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 608 (8th Cir. 1977) (en banc). As one court noted:

[T]aking a common sense look at the practicalities of the “control group” test and its applicability in the day-to-day workings of a lawyer, it is obvious that

information needed by attorneys to formulate sound legal advice. Because the critical flow of information often begins with the low-level employees who actually possess the hard facts, the control group test inhibited attorney communications with these knowledgeable employees. Under the control group test, an attorney

is thus faced with a "Hobson's choice." If he interviews employees not having "the very highest authority," their communications to him will not be privileged. If, on the other hand, he interviews only those with "the very highest authority," he may find it extremely difficult, if not impossible, to determine what actually transpired.<sup>56</sup>

The more expansive subject matter test was designed to avoid these dilemmas. The subject matter test as expounded by *Harper & Row* extends the privilege to all information employees convey, with the exception of information obtained "almost fortuitously" and not related to their on-the-job activity.<sup>57</sup> The test's emphasis on ensuring effective legal advice won many adherents. After an equally divided Supreme Court summarily affirmed *Harper & Row*,<sup>58</sup> the drafters removed the control group test from the proposed rules and left further development in the corporate client privilege area to the case law.<sup>59</sup>

Federal courts in the 1970s usually adopted one of the two established tests, although some attempted variations or syntheses of these tests. For example, in *Duplan Corp. v. Deering Milliken, Inc.*,<sup>60</sup> a district court held that communications must meet *both* the control group and subject matter tests in order to be privi-

---

. . . [a corporation] cannot deal solely through the chairman of the board of directors. There has to be a sufficient number of persons within a corporation who are authorized on behalf of the corporation to seek advice, to give information with respect to the rendition of advice and to receive advice.

*Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164 (D.S.C. 1975).

56. Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. INDUS. & COM. L. REV. 873, 876 (1971).

57. 423 F.2d at 491. This exemption for "fortuitous" witnesses is probably an attempt to reconcile the case with *Hickman v. Taylor*, 329 U.S. 495 (1947). These "fortuitous" witnesses are analogous to the tugboat employees in *Hickman*.

58. 400 U.S. 348 (1971).

59. For a discussion of the aftermath of *Harper & Row*, see J. WEINSTEIN & M. BERGER, *supra* note 32, ¶ 503(b)[04], at 503-47.

60. 397 F. Supp. 1146 (D.S.C. 1974).

leged.<sup>61</sup> In *In re Ampicillin Antitrust Litigation*,<sup>62</sup> another district court attempted to modify the breadth of the *Harper & Row* test. The fear that the privilege would extend to routine reports and everyday exchanges led this district court to "focus on the relationship between the subject matter of the particular communication and the decisionmaking process regarding the corporation's legal problem."<sup>63</sup> The privilege attached only if, among other things, the "communication of information . . . was reasonably believed to be necessary to the decision-making process concerning a problem on which legal advice was sought."<sup>64</sup>

The best known variation on the subject matter test appeared in *Diversified Industries, Inc. v. Meredith*.<sup>65</sup> In that case, the United States Court of Appeals for the Eighth Circuit modified the subject matter test along the lines suggested by Judge Weinstein in his treatise on evidence.<sup>66</sup> In addition to requiring that the communication be made at the direction of superiors and that it cover information within the employee's duties, the court in *Diversified Industries* required that the communication be made for the purpose of obtaining legal services for the corporation and that it be kept confidential within the corporation.<sup>67</sup> The court reasoned that these further requirements would restrict the privilege to legitimate attorney-client exchanges, rather than ordinary business

---

61. *Id.* at 1165 (citing *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491-92 (7th Cir. 1970) (per curiam), *aff'd by an equally divided court*, 400 U.S. 348 (1971)); see also Sexton, *supra* note 2, at 454.

62. 81 F.R.D. 377 (D.D.C. 1978).

63. Sexton, *supra* note 2, at 455.

64. 81 F.R.D. at 385.

65. 572 F.2d 596 (8th Cir. 1977) (en banc), *aff'd on reh'g*, 572 F.2d 606 (8th Cir. 1978).

66. See 2 J. WEINSTEIN & M. BERGER, *supra* note 32, ¶ 503(b)[04], at 503-47 to -50. The court extended the privilege where:

(1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

572 F.2d at 609. Many commentators see this variation as merely a gloss on the Wigmorean rules already incorporated into the control group test. See, e.g., *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 432 N.E.2d 250 (1982); Sexton, *supra* note 2, at 455 n.49.

67. 572 F.2d at 609.

records. Under the *Diversified Industries* test, the mere receipt of routine reports by corporate counsel would not make the communication privileged because such routine communications ordinarily are available widely and are not made for the purpose of securing legal advice. These modifications would "substantially limit whatever potential for abuse the *Harper & Row* [subject matter] test presents"<sup>68</sup> and would "better protect the purpose underlying the attorney-client privilege."<sup>69</sup> Some courts in the late 1970s nonetheless continued to view the control group test as "the rule most likely to obtain the greatest discovery, the rule more easily applied by the Court . . . the rule more likely to be recognized as reasonable by the parties, and the rule most consonant with the purposes of the attorney-client privilege."<sup>70</sup>

### III. *Upjohn Co. v. United States*: THE SUPREME COURT SPEAKS

*Upjohn Co. v. United States* presented the Supreme Court with an archetypical set of facts.<sup>71</sup> In 1976, auditors alerted Upjohn to the possibility that certain of its subsidiaries were making improper payments to foreign government officials. Because of a heightened awareness in the post-Watergate era of the problems posed by secret domestic political contributions, corporate payoffs to foreign officials, and commercial bribery, Upjohn's general counsel launched an internal investigation. Corporate counsel sent out confidential questionnaires and conducted interviews with "all foreign general and area managers" as well as more than thirty other members of senior management.<sup>72</sup>

---

68. *Id.* (citation omitted).

69. *Id.*

70. *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 400 (E.D. Va. 1975); see *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979); *United States v. Upjohn Co.*, 600 F.2d 1223 (6th Cir. 1979), *rev'd and remanded*, 449 U.S. 383 (1981); cf. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 118, 432 N.E.2d 250, 257 (1982) (electing to adopt control group test for Illinois state law even after *Upjohn*).

71. 449 U.S. 383 (1981). *Upjohn*, like *Diversified Industries*, involved a report rendered by a law firm engaged to investigate whether corporate employees had been bribing purchasing agents with which the corporation dealt. *Id.* at 386-87; 572 F.2d at 600-01.

72. 449 U.S. at 386-87. Corporate counsel interviewed 86 employees. *Id.* at 394 n.3.



When the company voluntarily disclosed certain questionable payments to the Securities and Exchange Commission,<sup>73</sup> the Internal Revenue Service issued a summons for the production of all documents gathered during Upjohn's internal investigation. Upjohn offered to make all of its officials available for interrogation but declined to produce the questionnaires and interview notes, claiming that the attorney-client privilege and attorney work product immunity protected the documents. The district court enforced the summons, and the company appealed.<sup>74</sup>

The United States Court of Appeals for the Sixth Circuit affirmed the district court's order of production. In its opinion, the court propounded a classic defense of the control group test. The court first pointed out the problematic nature of extending to a corporation a privilege based partly on the "privacy" and "loyalty" of the "intimate relationship" between an individual and his lawyer.<sup>75</sup> The court also questioned the efficacy of the subject matter test, worrying that the corporate counsel would become "the exclusive repository of unpleasant facts"<sup>76</sup> and that "corporate managers [would] shield themselves from information about possibly illegal transactions."<sup>77</sup> The court finally noted the severe burden that the questioning of large numbers of foreign citizens would entail for the IRS.<sup>78</sup> Concluding that the subject matter test would inflict significant costs on the IRS investigation and create the potential for a broad "zone of silence," the court applied the narrower control group test. The court ruled that the communications by Upjohn employees could not meet this stricter test.<sup>79</sup> Upjohn again appealed.

---

73. *Id.* at 387. The company's disclosures appeared to be motivated by an SEC policy which promised more lenient treatment for companies that voluntarily disclosed violations. This SEC policy, and recent court opinions finding such voluntary reports to constitute a waiver for all purposes, may have a dramatic impact on corporations' use of the attorney-client privilege in the future. See, e.g., *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984); *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982); *In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982). See generally *Privileged Communications*, *supra* note 36, at 1650-59.

74. 449 U.S. at 386-89.

75. 600 F.2d 1223, 1226-27 (6th Cir. 1979), *rev'd and remanded*, 449 U.S. 383 (1981).

76. *Id.* at 1227.

77. *Id.* at 1225.

78. *Id.* at 1227.

79. *Id.* The court disposed of Upjohn's work product claim by finding the doctrine inapplicable to an Internal Revenue Service administrative summons. *Id.* at 1224.

Although *Upjohn* presented the Supreme Court with the same question that had deadlocked the Court a decade earlier and that had inspired a vociferous debate among the lower courts, the Court appeared to have little trouble reversing the Sixth Circuit. The Court unanimously and emphatically rejected the control group test, needing only eight pages of Justice Rehnquist's majority opinion to explain its position.<sup>80</sup>

In the first part of the opinion, Justice Rehnquist established the purpose of the privilege: "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."<sup>81</sup> The Court cited privilege cases dating from 1888 to support its proposition that the historical justification for the attorney-client privilege had been to promote justice by encouraging full disclosure.<sup>82</sup> The Court concluded that this reasoning applied equally when the client is a corporation.<sup>83</sup>

Next, the Court held that the control group test failed to further the original aims of the attorney-client privilege. The Court explained that the control group test's emphasis on the employee's ability to act on legal advice *from* the counsel did not provide enough protection to encourage a flow of information *to* the lawyer.<sup>84</sup> By restricting the privilege to a small group within the corporation, the control group test inhibited the flow of important information to the attorney. The Court opined that "[m]iddle-level—and indeed lower level—employees . . . have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential [legal] difficulties."<sup>85</sup> Without the vital facts possessed by noncontrol group employees, the corporation would be deprived of effective legal advice concerning "the vast and complicated array of regulatory legislation confronting [it]."<sup>86</sup>

---

80. 449 U.S. 383 (1981).

81. *Id.* at 389.

82. *Id.* (citing *Trammel v. United States*, 445 U.S. 40, 51 (1980); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)).

83. *Id.* at 390.

84. *Id.*

85. *Id.* at 391.

86. *Id.* at 392.

The Court also criticized the control group test's "Hobson's choice" of either interviewing noncontrol group employees without the protection of the attorney-client privilege or not interviewing such employees and thus giving advice with only a partial understanding of the facts.<sup>87</sup> Justice Rehnquist pointed out that even if the attorney could formulate a legal opinion without talking to low-level employees, "the control group test ma[de] it more difficult to convey full and frank legal advice" to the lower level employees who would put the policy into effect.<sup>88</sup> The Court also criticized the control group test for its unpredictability. Noting that some degree of certainty is essential to encourage the free flow of information that the attorney-client privilege prizes, the Court stated that "[d]isparate decisions in cases applying [the control group] test illustrate its unpredictability."<sup>89</sup>

The final part of the Court's analysis applied the principles of the privilege to the facts in the case. The Court restated what it considered to be the salient facts: the communications were made by Upjohn employees to counsel at the direction of corporate superiors; Upjohn needed the communications as a basis for legal advice; the employees, because of a letter from an Upjohn senior manager, were "sufficiently aware" that they were being questioned so that the corporation could receive legal advice; the communications concerned matters within the scope of the employees' duties; and Upjohn kept the communications "highly confidential."<sup>90</sup> Given these facts, the Court concluded that protecting the communications was "[c]onsistent with the underlying purposes of the attorney-client privilege."<sup>91</sup>

Lest lower courts read his opinion as implicitly embracing the modified subject matter test of *Diversified Industries*,<sup>92</sup> Justice

---

87. *Id.* at 391-92 (citing *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 608-09 (8th Cir. 1978) (en banc)); see *supra* note 56 and accompanying text.

88. 449 U.S. at 392.

89. *Id.* (comparing *Hogan v. Zletz*, 43 F.R.D. 308, 315-16 (N.D. Okla. 1967), *aff'd in part sub nom.* *Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968), with *Congoleum Indus., Inc. v. GAF Corp.*, 49 F.R.D. 82, 83-85 (E.D. Pa. 1969), *aff'd*, 478 F.2d 1398 (3d Cir. 1973)).

90. *Id.* at 394-95.

91. *Id.* at 395.

92. See *supra* notes 65-70 and accompanying text. Nonetheless, a number of commentators have noted that the Supreme Court referred to *Diversified Industries* frequently in the opinion and that the facts emphasized by the Court parallel some of the criteria of the

Rehnquist emphasized that the Court was deciding one case only. The Court explicitly and repeatedly disavowed any attempt to promulgate rules or guidelines<sup>93</sup> and never even mentioned the subject matter test by name. Although Chief Justice Burger urged the Court to adopt a modified subject matter test,<sup>94</sup> and despite the test's place in the federal courts as the chief alternative to the control group test, the Court was content to hold that the control group test was too narrow to govern the development of the law of attorney-corporate client privilege. The Court left such future development to the wisdom of the lower courts, applying the principles of the common law.<sup>95</sup>

#### IV. *Upjohn Co. v. United States*: THE SOUNDS OF SILENCE

After the epic battles fought in courtrooms and law reviews for almost twenty years, the Supreme Court's decision in *Upjohn* seemed almost anticlimatic. The opinion's conclusory tone and the Court's refusal to set out any definitive guidelines exacerbated this disappointment. Justice Rehnquist's discussion of the issue, meeting no dissent, was striking for its cursory treatment of the concerns of the lower courts and commentators.<sup>96</sup> This section discusses some of the important issues that the Supreme Court brushed aside in its rush to invalidate the control group test.

First, the Supreme Court failed to address the legacy of Judge Campbell's *Radiant Burners* opinion. Although the circuit court's opinion in *Upjohn* had noted that the "privacy" and "intimate relationship" rationale underlying the attorney-client privilege was

---

*Diversified Industries* modified test. See, e.g., J. WEINSTEIN & M. BERGER, *supra* note 32, ¶ 503(b)[04], at 503-54; Sexton, *supra* note 2, at 461; Note, *Attorney-Client Privilege*, 19 AM. CRIM. L. REV. 251, 257 (1981); Note, *The Implications of Upjohn*, 56 NOTRE DAME L. REV. 887, 892-94 (1981).

93. See *supra* note 5. "[T]o draft a set of rules . . . [to] govern challenges to investigatory subpoenas . . . would violate the spirit of Federal Rule of Evidence 501." 449 U.S. at 396.

94. *Id.* at 403 (Burger, C.J., concurring).

95. *Id.* at 397. The Court also took an expansive view of the attorney work-product doctrine, requiring a stronger showing of necessity than that provided by the government and assuming that preliminary investigations such as *Upjohn's* were in anticipation of litigation. See *id.* at 397-402.

96. See Sexton, *supra* note 2, at 444 (describing *Upjohn* as "an opinion largely characterized by unexplicated conclusory language").

problematic when applied to corporations,<sup>97</sup> the Supreme Court did not confront this threshold question. The Court made no attempt to justify its primary assumption that the attorney-client privilege should apply in the corporate context, but merely stated:

Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation, . . . and the Government does not contest the general proposition.<sup>98</sup>

Such cavalier treatment was unfortunate. A privacy/rights-based rationale historically has played an important role in justifying the attorney-client privilege. As Judge Campbell pointed out in *Radiant Burners*, the inapplicability of this rationale to the corporate context has significant implications.<sup>99</sup> The Supreme Court had an obligation to confront these implications.<sup>100</sup>

To the extent that the Court offered an explanation for its willingness to extend the protection of the attorney-client privilege to corporations, it relied on a "voluntary compliance" model.<sup>101</sup> This model rested on the premise that a free flow of communications between corporate employees and attorneys would promote voluntary compliance with the law. The attorney, if given all relevant information, could inform corporate officers of their legal duties; these corporate officers, as law-abiding citizens, then would conform their behavior to their legal obligations.<sup>102</sup> This model led the

---

97. 600 F.2d 1223, 1226-27 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

98. 449 U.S. at 389-90 (citation omitted).

99. *See supra* notes 37-39 and accompanying text.

100. One student commentator hypothesized that the Court may have suffered from the lack of true adversaries on this issue. The government may have been unwilling to argue that the privilege did not apply to corporations because this contention might have undermined the government's own institutional privilege. *The Supreme Court 1980 Term*, 95 HARV. L. REV. 91, 273 n.20 (1981) [hereinafter Note, 1980 Term].

101. For a more detailed discussion of the "voluntary compliance" model, *see* Sexton, *supra* note 2, at 463-73; *see also infra* note 111 and accompanying text.

102.

[T]he nature of an attorney as an arm of law enforcement lends support to the legitimacy of the corporate need for legal counsel. The probability of bringing corporations into compliance with the law is enhanced by the greater access of corporations to counsel resulting from the availability of the privilege. There-

Court in *Upjohn* to bestow preeminent value upon fostering the flow of information between corporate clients and their attorneys. This justification seemed particularly suited to the facts in *Upjohn*, where the corporation aimed its investigation at achieving compliance with SEC and other federal regulations. Unfortunately, the Court never considered the darker side of corporate behavior. The Court singlemindedly concentrated on the benefits of the privilege and ignored the accompanying costs. For a decision based on the utilitarian cost/benefit balancing approach, this was a fundamental flaw.<sup>103</sup>

By focusing on the benefits of the privilege, the Court missed the special costs inherent in applying the privilege to corporations. One such ignored cost is that the corporation is more likely than an individual client to manipulate the privilege to conceal information used for nonlegal purposes.<sup>104</sup> The division of corporate responsibility that requires attorneys to go beyond the control group for vital information also requires the control group to look to lower levels in order to formulate business decisions. Employing lawyers to serve as the conduits keeps the information secret from potential legal adversaries while allowing management to take the necessary business actions. As communications move through the informational and decision-making structure, the motives for the

---

fore, corporations need effective legal counsel, perhaps even more than do individual clients, to advise them in their varied and complex array of activities.

Note, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation*, 50 S. CAL. L. REV. 303, 309 (1977) (footnotes omitted).

103. The Court did not even make a pretense of using the privacy rationale, but relied solely on the Wigmorean utilitarian rationale. See 449 U.S. at 389-90. The Court examined the costs of the privilege only once, however, stating that the privilege placed the adversary in "no worse position than if the communications had never taken place." *Id.* at 395. The Court went on to note that the privilege did not protect the underlying facts communicated by the client and that "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." *Id.* at 396 (citation omitted). This scanty reasoning does not answer adequately the questions raised concerning the costs of the attorney-client privilege in the corporate context.

104. An individual also may manipulate the privilege for nonlegal purposes. Courts deny the privilege's protection when lawyers are giving business advice, rather than legal counsel, or when they conspire in criminal activity. The corporate context is qualitatively different, however, because it is by nature a business situation, lawyers often are tied intimately to the business side, and the structural setting requires movement of information among decision makers within the corporation. These additional characteristics of corporations create an enormous potential for abuse of the privilege.

communications can be mixed: the company may want its lawyers to gather information to aid in the preparation of legal advice, while it needs the information collected for more general business purposes. An expansive attorney-corporate client privilege may encourage corporations to conduct legal investigations into the details of any potentially embarrassing incident, not as a result of legal need, but because of the secrecy the privilege provides to business decisions.

The subject matter test, especially as modified by *Diversified Industries*,<sup>105</sup> theoretically should exclude from the privilege all communications made for the purpose of obtaining nonlegal advice. In practice, however, courts are unable to discern whether the lawyer's role was solely, predominantly, or marginally for legal purposes. The pervasive involvement of in-house and regular counsel in corporate affairs makes such a distinction difficult to perceive; lawyers are involved intimately with company management and operations.<sup>106</sup> The ease with which potential legal questions can be imaginatively created after the fact makes claims of legal purpose nearly unimpeachable. Every transaction from personnel changes to corporate contracts has some possible legal ramification.<sup>107</sup> An

---

105. See *supra* notes 65-70 and accompanying text.

106. See 2 J. WEINSTEIN & M. BERGER, *supra* note 32, ¶ 503(b)[04], at 503-43 ("In the case of corporations, . . . particularly when house counsel is involved, the boundary between legal advice and business advice grows too dim for the privilege to apply."); Sexton, *supra* note 2, at 493 n.158 ("determining whether an attorney is acting in a legal or nonlegal capacity is quite difficult, and . . . turns on fine distinctions"); Note, *Attorney-Client Privilege*, *supra* note 50, at 473 n.37 (emphasizing "problematic status of in-house counsel").

107. This constant connection between the corporation and its legal counsel also can mean that the attorney-corporate client privilege is not justified as an inducement to promote attorney-client communication. Many observers assert that corporations will undertake investigations and seek advice whether or not the investigations or communications are privileged. As one writer put it, "[I]nvestigations would continue even in the absence of the privilege—although they might be performed by someone other than the attorney—because corporate management needs the information to correct past inefficiencies, to reward and reprimand employees, and to file appropriate governmental documents." Note, *1980 Term*, *supra* note 100, at 277; see also Note, *Attorney-Client Privilege*, *supra* note 50, at 473-74. The Third Circuit stated similarly that a "corporation would [not] risk civil or criminal liability . . . by foregoing introspection. In our opinion, the potential costs of undetected noncompliance are themselves high enough to ensure that corporate officials will authorize investigations regardless of an inability to keep such investigations completely confidential." *In re Grand Jury*, 599 F.2d 1224, 1237 (3d Cir. 1979). Faced with treble damages for anti-trust violations, extensive state and federal reporting requirements, and the legal demands of loan underwriters and proxy statements, corporations may have no choice but to commu-

expansive attorney-corporate client privilege thus might enable corporate management to institute needed business measures in secret, allow company lawyers to collect lucrative fees for their "legal" investigations, and force any eventual government or civil investigators to probe the slippery memories of any available employees they might discover.

The Court in *Upjohn* also ignored the special obstacles that the modern corporation poses to information gathering. Although the Court held that the privilege does not protect underlying facts,<sup>108</sup> this concession provides cold comfort to litigants confronted with the byzantine, multilayered structure of many corporations. The Court itself recognized this dilemma in an earlier case, and refused to extend the fifth amendment to corporations:

The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible.<sup>109</sup>

A litigant generally may discover information from an individual opponent as easily as from the opponent's attorney, but the corporate lawyer may serve as a nerve center for corporate information gathered from many sources, often from around the world. Without access to the corporate attorney's reports, an adversary must

---

nicate with their attorneys—making the benefits of the privilege more illusory than *Upjohn* contemplates.

Whether investigations would take place in the absence of the attorney-corporate client privilege is one of the great imponderables surrounding the privilege. The Court in *Upjohn* dealt with this issue in a footnote. The Court argued that the notion that corporations would conduct investigations and seek legal advice even without a privilege "ignores the fact that the depth and quality of any investigations, to ensure compliance with the law would suffer, even were they undertaken." 449 U.S. at 393 n.2. The Court also noted that such an argument "proves too much, since it applies to all communications covered by the privilege: an 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.* With these conclusory statements, the Court sidestepped the issue of whether the special characteristics of corporations limit the additional communication the privilege induces to such a degree that the privilege's costs outweigh its benefits.

108. 449 U.S. at 395.

109. *United States v. White*, 322 U.S. 694, 700 (1944).



attempt to track down this widely dispersed information. Such tracking is a costly, difficult, and, especially if done years later when memories have faded or conformed, often fruitless task. Not only may the privilege force an adversary to duplicate the questioning of vast numbers of individuals scattered around the country or world, but it also may prevent the best evidence from ever coming to light. The "paper trail" can provide the most effective means of understanding and attacking a corporate action. As discussed earlier, however, the "paper trail" can be funnelled through an attorney and structured to fit the mold of an expansive attorney-corporate client privilege. With these contemporaneous records enveloped in "the zone of silence," the corporation may frequently prove a black hole from which no incriminating information will escape.<sup>110</sup>

The Supreme Court's opinion in *Upjohn* also neglected the costs of allowing some measure of corporate misconduct to go unpunished. The Court envisioned voluntary compliance with government regulation, but much regulation of business is still founded upon the threat of judicial and administrative penalties.<sup>111</sup> The IRS, for example, was unwilling to accept the voluntary disclosures of *Upjohn* and demanded further information on the corporation's activities. An expansive corporate client privilege can hamper effective law enforcement to an extent which outweighs the benefits of voluntary compliance. Nevertheless, after *Upjohn*, government agencies and prosecutors are limited in the information available to them in the discovery and prosecution of criminal behavior; the

---

110. For example, *Upjohn* involved hundreds of written questionnaire responses and 86 interviews with employees. The probe investigated payments to officials in many of the 136 foreign countries in which *Upjohn* did business. 600 F.2d at 1225. In another major case, the SEC would have been forced to duplicate an internal probe which received questionnaires from 1,877 managerial employees. See *In re Grand Jury*, 599 F.2d 1224, 1227 (3d Cir. 1979); see also Sexton, *supra* note 2, at 477 (If privilege protects the paper trail, no "effective alternative source of proof" may exist.); Note, *Evidence: Federal Rules of Civil Procedure: Attorney-Client Privilege as Applied to Corporations*, 48 CORNELL L.Q. 551, 563 (1963) (adversaries would be stymied if corporation could protect "paper trail").

111. See *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1229 (1979) ("[I]n areas ranging from tax, securities and antitrust to the newer fields of environmental control, safety regulation, and the prevention of 'corrupt practices,' the federal government has come to rely more and more on the deterrent effect of criminal punishment to shape corporate action."); see also Note, *supra* note 4, at 809 n.1; cf. Sexton, *supra* note 2, at 469 n.107.

Supreme Court has determined that the voluntary compliance model is more efficacious than deterrent enforcement. The empirical data or logical basis for this decision remains illusive, however.

The Court's attitude toward unpunished corporate misconduct likely was influenced by its perception of the nature of these misdeeds.<sup>112</sup> In the years immediately preceding *Upjohn*, the corporate activities under review were the post-Watergate problems of foreign payoffs and illegal campaign contributions. The Court understandably found such activities troubling but not of sufficient magnitude to justify restricting the traditionally protected activities of lawyers. Areas of corporate misconduct today appear qualitatively different, however. Today's corporate misdeeds—financial institutions laundering money for organized crime, fraudulent securities schemes on a huge scale, massive overcharges by defense contractors, and illegal handling and dumping of toxic materials—inflict a much higher cost on society.<sup>113</sup> The *Upjohn* opinion's broad corporate privilege reflects an inadequate consideration of the potential for a new view of corporate criminality, which should lead to a greater stress on enforcement and a more restrictive privilege.

Finally, commentators have criticized *Upjohn* for its failure to provide the certainty needed to achieve the purposes of the privi-

---

112. The cost-benefit calculus looks to the *magnitude* of the cost discounted by its probability. Thus, the costs will weigh more heavily against the privilege in instances of vile and heinous crimes with high social costs, rather than in instances of misdemeanors or victimless crimes. See *Privileged Communications*, *supra* note 36, at 1507-08.

113. See, e.g., N.Y. Times, Apr. 1, 1986, at D9, col. 3 (Bank of New England fined \$1.24 million for criminal violations of currency laws); Bus. Wk., Sept. 9, 1985, at 31 (fourteen bankers arrested at numerous Puerto Rican banks for laundering narcotics money); N.Y. Times, Feb. 8, 1985, at A1, col. 5 (Bank of Boston fined \$500,000 for failure to report \$1.2 billion in overseas cash transfers); N.Y. Times, Dec. 14, 1985, at 42, col. 1 (three officials of failed Ohio Bank, including owner, indicted on more than 45 counts of fraud, theft, and securities violations); Boston Globe, Apr. 23, 1985, at 43, col. 1 (bank fraud left FDIC with \$600 million in uncollectable loans); N.Y. Times, Aug. 14, 1985, at D4, col. 1 (investment firm pleads guilty to 2,000 counts of wire and mail fraud); Wash. Post, June 20, 1985, at A17, col. 1 (nine of nation's 10 largest defense contractors investigated for bribery, kickbacks, and false claims); NEWSWEEK, Aug. 26, 1985, at 21 (defense contractor involved in foreign bribes and fraudulent overcharges). See generally FORTUNE, July 22, 1985, at 90 (describing scope and range of white collar crime); Bus. Wk., Mar. 18, 1985, at 74 (describing complicity of banks and legitimate enterprises in money laundering schemes); N.Y. Times, Mar. 12, 1985, at A24, col. 3 (citing criticism of "renegade attorneys" who provide illegal support for criminal organizations).

lege. The Court brought much of this criticism upon itself by an internal inconsistency in its opinion. In arguing that the control group test is inadequate due to its unpredictability, Justice Rehnquist stated:

[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. 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.<sup>114</sup>

In spite of this strong affirmation of the need for certainty, *Upjohn* failed to set forth any test or standard to guide corporations, attorneys, and courts. Instead, the Court left the development of the privilege to the vagaries of the common law, which inevitably will lead to "widely varying applications by the courts" which is "little better than no privilege at all."<sup>115</sup> Even Justice Rehnquist conceded that the case-by-case approach might "to some slight extent undermine desirable certainty."<sup>116</sup> In a concurrence which urged that the Court adopt a uniform standard, Chief Justice Burger noted sardonically that Justice Rehnquist's concession "neither minimizes the consequences of continuing uncertainty and confusion nor harmonizes the inherent dissonance of acknowledging that uncertainty while declining to clarify it within the frame of issues presented."<sup>117</sup>

The Court's criticism of the control group test as inherently uncertain and unpredictable also is highly suspect. The *Upjohn* opinion first stated its conclusion that "the very terms of the [control group] test suggest the unpredictability of its application."<sup>118</sup> To

---

114. 449 U.S. at 393.

115. See Sexton, *supra* note 2, at 471 ("By declining to promulgate a broad rule . . . the Justices adopted a course that arguably will occasion unpredictability and confusion for corporate attorneys, their clients, and the courts."); Note, 1980 Term, *supra* note 100, at 273 ("If the attorney-client privilege is to serve any purpose, both attorney and client must know with certainty the limits of the privilege—something a case-by-case determination will not accomplish."); *Privileged Communications*, *supra* note 37, at 1486-87 ("Certainty [is believed] necessary to modify the behavior of communicators and thereby serve the supposed benefits of privilege law.").

116. 449 U.S. at 396.

117. *Id.* at 404 (Burger, C.J., concurring).

118. *Id.* at 393.

support this proposition, the Court then stated that "disparate decisions illustrate its unpredictability" and cited two cases: a 1967 Oklahoma case which included the leaders of a corporate research and development division as members of the control group, and a 1969 Pennsylvania case which excluded the research and development division heads from the control group.<sup>119</sup> Two cases seem flimsy evidence on which to indict a test that had been applied countless times over twenty years. More significantly, the Court also failed to understand that these two decisions may well be consistent. The meaningful criteria are not the labels or titles used to designate various individuals, but those persons' actual duties and responsibilities.<sup>120</sup> The "disparate decisions" may have been in fact the correct and predictable results of applying the control group test to the different organizational structures of different corporations.

Moreover, many courts and commentators dispute *Upjohn's* contention that the control group test is unpredictable in application. In most cases, determining whether an individual is a member of the senior management team is a clear cut decision. The United States Court of Appeals for the Third Circuit found that the control group test "draws as bright a line as any of the proposed approaches,"<sup>121</sup> and one commentator concluded that the test "provides an easily applicable bright line rule to facilitate judicial decisionmaking."<sup>122</sup> The Illinois Supreme Court, in rejecting *Upjohn* and adopting the control group test to govern Illinois law, relied on the fact that "the control group test has been noted for its predictability and ease of application."<sup>123</sup> The *Upjohn* opinion's

---

119. *Id.* The Court contrasted *Hogan v. Zletz*, 43 F.R.D. 308, 315-16 (N.D. Okla. 1967), *aff'd in part sub nom. Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968), with *Congoleum Indus., Inc. v. GAF Corp.*, 49 F.R.D. 82, 83-85 (E.D. Pa. 1969), *aff'd*, 478 F.2d 1398 (3d Cir. 1973).

120. *Congoleum Indus., Inc. v. GAF Corp.*, 49 F.R.D. 82, 85 (E.D. Pa. 1969), *aff'd*, 478 F.2d 1398 (3d Cir. 1973); Note, 1980 *Term*, *supra* note 100, at 272 n.14, 279.

121. *In re Grand Jury*, 599 F.2d 1224, 1235 (3d Cir. 1979).

122. Note, *Control Group Test*, *supra* note 50, at 430.

123. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 119, 432 N.E.2d 250, 257 (1982). One might argue that *Upjohn* has brought certainty and ease of administration by eliminating the second-level determination of whether the employee had control group status. This view, however, neglects the bright line that the control group test provides. Most communications were determined quickly to be by noncontrol group employees. If the employee was a control group member, a strong presumption held that the other prerequisites

criticism of the control group test's "unpredictability" and "uncertainty" is questionable, especially when the Court refused to set out an alternative test.

### V. TOWARD A NEW TEST

As the Supreme Court demonstrated in *Upjohn*, cataloguing the shortcomings of proposed tests is relatively easy; the true challenge is developing an attorney-corporate client privilege test that will withstand such scrutiny. This section sets out two possible tests and argues that either test is superior to the subject matter test that courts have followed since *Upjohn*. The first proposal calls for a return to the control group standard. Although the control group test is, in itself, superior to the subject matter test, an unlimited privilege for all employee communications occurring *after* a lawsuit commences would further augment the control group test's advantages. Under the second proposal, courts which continue to follow the *Upjohn* opinion could qualify the absolute nature of the subject matter test by permitting a showing of special need to overcome the attorney-corporate client privilege. With such a test, courts would no longer lose the especially probative evidence that *Upjohn* presently shields.

#### A. A Representational Privilege

The Supreme Court in *Upjohn* failed to undertake a comprehensive examination of the costs and benefits associated with the more expansive privilege it established. A more thorough examination shows the merits of the control group test to be a close question which the Court wrongly decided. The costs incurred by the Court's voluntary compliance model are substantial. The specter of corporations cloaking incriminating records in the privilege is a troubling one. The often insurmountable problems posed when attempting to discover information from large corporations further

---

were met. Today, the arena of battle has shifted to complex questions of waiver, confidentiality, and scope of employment. *Upjohn* has led to much stricter and more time-consuming scrutiny of background requirements. See, e.g., *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1 (N.D.N.Y. 1983) (legal advice requirement); *Eglin Federal Credit Union v. Cantor, Fitzgerald Securities Corp.*, 91 F.R.D. 414 (N.D. Ga. 1981) (confidentiality); see also *supra* note 73 (waiver).

warrant restricting the privilege. The Court also should have noted the ineffectiveness of voluntary compliance as opposed to the deterrent effect of enforcement, and should have been more concerned about the harms caused by corporate criminality. Moreover, whether a more expansive privilege actually will lead corporations to confide more readily in their attorneys or, rather, will induce corporate management to use the privilege improperly as protection for business decisions surely remains open to question.<sup>124</sup>

The cost/benefit calculus tilts most strongly against an expansive privilege when one recognizes that the privacy/rights-based rationale does not apply in the corporate context.<sup>125</sup> As a recent study of the theories of privilege demonstrates, this privacy/rights-based rationale not only has independent force in justifying a privilege but also plays an important role in bolstering the utilitarian justifications of a privilege.<sup>126</sup> The utilitarian and privacy/rights-based justifications "can be incorporated within a broad utilitarian framework . . . [which] is consistent with non-utilitarian principles because it takes account of the relative weight of the various rights with which non-utilitarians are concerned."<sup>127</sup> This collapsing of rationales, however, does not support the attorney-corporate client privilege because intimacy and privacy concerns are not present in the inanimate corporate form.<sup>128</sup> Without the support of a strong privacy/rights-based rationale, an expansive privilege loses a key justification under this utilitarian analysis.<sup>129</sup>

---

124. See *supra* notes 71-95 and accompanying text.

125. That the courts uphold a privilege which can derive no sustenance from the privacy/rights-based rationale is ironic when scholarly literature increasingly cites that justification as the foundation of the privilege. See *supra* note 36.

126. See *Privileged Communications*, *supra* note 36, at 1483-86, 1504-05.

127. *Id.* at 1504-05.

128. See *supra* notes 13-39 and accompanying text.

129. One could extend this reasoning to argue that no privilege should attach to any communications between corporate managers and attorneys, regardless of the managers' positions. This position has the virtue of logical consistency, but it seems unduly harsh. At some level, corporate officials should be able to speak freely with their attorneys. Such communications will center less on disclosing facts to the attorney and more on planning strategy and goals. The privilege should protect these free-wheeling discussions. In any event, the need for some privilege in the corporate arena is a view shared widely within the legal system, which appears unwilling to eliminate all attorney-corporate client privilege. Cf. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1062 (1978) (the present day issue "is not whether [the attorney-client privilege] should exist, but precisely what its terms should be").

At a fundamental level, the Court in *Upjohn* took issue with what it perceived to be the control group test's approach to defining the privilege—namely, an attempt to identify those corporate actors who so personified the corporation as to be deemed the corporate "client."<sup>130</sup> The Court maintained that by attempting to isolate and privilege those who "can be said to possess an identity analogous to the corporation as a whole,"<sup>131</sup> the control group test overlooked the very purpose of the privilege, which is to protect certain types of communications, not people. The Court apparently found the subject matter test better suited to ferret out those communications consistent with the purposes underlying the privilege because the test avoided the control group test's focus on which corporate employees resemble an individual client.

The Court, however, misperceived the nature of the control group test. The test does not seek to protect the individuals within the control group itself, but rather seeks to encourage the type of confidential, top-level communications that typically flow from such personnel.<sup>132</sup> In this regard, it is significant to note that the modified subject matter test presented in *Diversified Industries*<sup>133</sup> consists largely of background rules of privilege that apply even under the control group test. The requirements of confidentiality and a legal purpose are readily implied from Wigmore and *United Shoe*.<sup>134</sup> The control group test therefore possesses the same functional concerns and minimal standards as the subject matter test, but the control group test also applies a stricter requirement concerning the nature of the employee's responsibilities. This further requirement serves as a proxy, narrowing the area of protected communications while allowing the judge to determine quickly which among the hundreds or even thousands of documents before

---

130. 449 U.S. at 390 (citing *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962)).

131. *Id.*

132. The control group designation differs little from the role played by a marriage certificate, a doctor's degree, or religious orders in validating other types of privileged communications. See, e.g., *Trammel v. United States*, 445 U.S. 40 (1980) (marital privilege); *Edington v. Mutual Life Ins. Co.*, 67 N.Y. 185, 194 (1876) (doctor-patient privilege).

133. 572 F.2d 596 (8th Cir. 1977) (en banc), *aff'd on reh'g*, 572 F.2d 606 (8th Cir. 1978).

134. See 8 J. WIGMORE, *supra* note 7, § 2292, at 554; *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

him are likely to involve especially valuable communications that the privilege seeks to encourage.

The control group test prevents corporate officials from manipulating the privilege to suppress embarrassing documents or cloak nonlegal decisions in secrecy. By its restrictive nature, the control group test inevitably sacrifices some measure of useful communication between employees and their company's lawyers. Courts might achieve the advantages of the restrictive control group test with less loss of useful communications by allowing the privilege to cover any employee communications to the corporation's attorneys that take place after the initiation of a legal action.<sup>135</sup>

Practical and theoretical considerations argue for an unlimited attorney-corporate client privilege only when the attorney is representing the corporation in pending litigation. The practical argument is relatively simple: the corporation is less likely to manipulate the privilege if the communications protected are generated in response to an existing lawsuit. One of the chief fears associated with an expansive privilege is that the corporation will structure normal business transactions and records through the lawyer in order to benefit from the privilege.<sup>136</sup> Funneling documents through a lawyer will not avail the corporation under a control group test that expands only after legal representation has begun. The representational privilege will not shield normal business transactions and records because the corporation cannot "plan" an existing lawsuit. The "zone of silence" surrounding the primary events which usually will be the source of the lawsuit thereby remains small; only the later employee-attorney discussions about those events earn the privilege. These latter discussions might not have occurred absent the lawsuit, will be of less probative value than di-

---

135. Expanding the scope of the privilege upon the initiation of a suit would operate in a manner similar to the attorney work-product doctrine. Work-product immunity applies only when the attorney acts in anticipation of litigation. Although this proposed privilege is consistent with an "anticipation of litigation" test, the "play" in such a test might prove dangerous; this exception could swallow the restrictions of the control group test. "Anticipation of litigation" has been interpreted loosely by the courts, and likely would be found to cover any internal investigation. See, e.g., 2 J. WEINSTEIN & M. BERGER, *supra* note 32, ¶ 503(b)[04], at 503-56.2 nn.54 & 55. Waiting until a lawsuit is initiated is undoubtedly a crude test, but it is a bright line which would privilege some additional communications without completely vitiating the control group test.

136. See *supra* notes 47-49, 104 & 105 and accompanying text.



rect testimony, and presumably will inform the lawyer about the lawsuit rather than suppress unpleasant facts.

The control group test, if augmented by an unlimited representational privilege, not only prevents the suppression of valuable information but also reinforces the requirement that the privilege be used exclusively for legal advice. The requirement that the communications be for legal advice is present in the background rules of the privilege, and is emphasized in the modified subject matter test.<sup>137</sup> Nonetheless, management officials may abuse the privilege by using confidential information they receive from lawyers for business decisions. If executives cannot initiate privileged communications through counsel, however, they will be less able to base necessary business decisions on secret data collected by lawyers. When a lawsuit is pending, communications between employees and corporate attorneys are more likely to serve a legitimate legal purpose. In this way, the control group test, expanded with an unlimited representational privilege, will ensure that legal investigations are not initiated solely for nonlegal purposes.

The right to an effective defense also suggests an unlimited representational privilege. The right to retain legal assistance is constitutionally mandated in both criminal and civil actions.<sup>138</sup> The Supreme Court has stated that "[t]he assistance of counsel is often a requisite to the very existence of a fair trial."<sup>139</sup> This right to counsel includes the right to a confidential relationship with one's attorney. Uninhibited communication with employees aids the corporate counsel's preparation and is an important part of this relationship. The Court stated in another context:

Counsel is provided to assist the defendant in presenting his defense, but in order to do so effectively . . . may require the defendant to disclose embarrassing and intimate information to his attorney. In view of the importance of uninhibited communication between a defendant and his attorney, attorney-client communications generally are privileged.<sup>140</sup>

---

137. See *supra* notes 24 & 67.

138. See *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932); *Postashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1117-18 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980).

139. *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972).

140. *Morris v. Slappy*, 461 U.S. 1, 21 (1983) (citation omitted).

The attorney-client privilege protects the right to counsel and the ability to present a full defense to unjust charges.<sup>141</sup> Moreover, as Professor Nesson has illustrated, the privilege plays an important role in strengthening the legitimacy of the legal system. The privilege allows litigants to test fully their opponent's case, thus enhancing the credibility of the eventual verdict.<sup>142</sup>

Although the Supreme Court in *Upjohn* stressed a corporation's need for legal advice in order to enable corporations to obey "the vast and complicated array of regulatory legislation confronting the modern corporation,"<sup>143</sup> a corporation's right to uninhibited communications is less compelling in the advice context. When a corporation seeks legal advice unrelated to litigation, it is attempting to push out on its own into the gray areas of the law. The corporation should bear the risks when it does so.<sup>144</sup> That the law is "vast and complicated" certainly justifies a right to *counsel* but not necessarily a right to the *privilege*. An unlimited advice privilege serves to encourage marginal, possibly illegal, activity in the gray areas by shielding these questionable decisions from scrutiny. Such a privilege is especially undesirable because these communications occurring in the advice context between corporate managers and attorneys are likely to go to the heart of a later lawsuit. To extend a privilege to such advice thus would shield much probative evidence involving activities of marginal social utility.

---

141. See *Privileged Communications*, *supra* note 36, at 1506.

142. See Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985). Although the argument for a representational privilege no doubt is stronger when criminal sanctions are involved, the same basic principle should apply in the civil context. The threat of civil penalties is serious enough to merit a full and fair defense and to warrant public acceptance of the verdict.

143. 449 U.S. at 392; see also *Privileged Communications*, *supra* note 36, at 1505-07 (laymen's right to know the law and abide by its complexity).

144. The Court in *Upjohn* seemed to take a contrary view. Justice Rehnquist appeared to want to encourage "gray area" activity. He wrote that "[C]ompliance with the law [in the corporate] area is hardly an instinctive matter," and pointed to the antitrust laws where "the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." 449 U.S. at 392-93 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 440-41 (1978)).

### *B. A Qualified Privilege*

This Article argues that adopting a control group test modified by an unlimited representational privilege would enable courts to protect only the attorney-corporate client communications most valuable to effective legal representation and would prevent widespread abuse. Courts can achieve much the same result, however, by adopting an expansive privilege and carving out exceptions for information which is especially probative and necessary to truth seeking. If the Supreme Court prefers the subject matter test, the attorney-corporate client privilege should be a qualified one which parties may overcome by a showing of special need for the protected communications. The correct balancing of costs and benefits necessitates that the privilege be subject to an exception that allows discovery of critical communications in those rare cases where no adequate substitute exists.

A qualified privilege would not be unprecedented. Although the attorney-corporate client privilege always has been assumed to be absolute, other related evidentiary privileges contain exceptions based on substantial need.<sup>145</sup> The attorney work-product rule, for example, protects information gathered by an attorney in anticipation of litigation and rests, as does the attorney-corporate client privilege, on a desire to foster effective legal advice and representation. Work-product immunity is not absolute, though. A party can overcome the immunity "upon a showing that the party seeking discovery has substantial need of the materials in preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."<sup>146</sup>

---

145. For a more extensive discussion of this approach of arguing by analogy from other privileges, see *Privileged Communications*, *supra* note 36, at 1491-93. "Functionalism is a theory arguing that privilege law, if it is to be consistent, should accord similar treatment to relations that are functionally similar." *Id.* at 1491.

146. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); FED. R. CIV. P. 26(b)(3). One type of work product, however, the "opinion work product," which consists of attorneys' mental impressions, conclusions, opinions, or legal theories, appears to be protected absolutely against disclosure. See *Hickman*, 329 U.S. at 511-12; see also *Upjohn Co. v. United States*, 449 U.S. 383, 398-99 (1981); *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977); *Duplan Corp. v. Moulinage Et Retorderie De Chavanoz*, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

This Article suggests that courts should apply a similar exception to the attorney-corporate client privilege.

The presidential privilege presents another example of a qualified judicial privilege. The Supreme Court has noted that confidentiality of presidential communications deserves the greatest respect because such confidentiality is essential to fulfilling the awesome responsibilities of the presidency.<sup>147</sup> In *United States v. Nixon*, however, the Court held that a claim of absolute privilege for presidential communications would not "prevail over the fundamental demands of due process of law in the fair administration of criminal justice."<sup>148</sup> Faced with a showing of specific need in a criminal trial, the Court stated that even the presidential privilege must give way. Other privileges running in favor of the government, such as the informer's privilege, also have been qualified to accommodate defendants' due process rights.<sup>149</sup>

Courts already have developed similar exceptions for certain specialized areas of the attorney-corporate client privilege. The prevailing rule today in shareholder derivative suits, for example, grants the corporation only a qualified privilege. In *Garner v. Wolfenbarger*,<sup>150</sup> the United States Court of Appeals for the Fifth Circuit held that when stockholders sue a corporation for acting inimically to shareholder interest, "the availability of the privilege [should] be subject to the right of the stockholders to show cause why it should not be invoked in a particular instance."<sup>151</sup> In balancing the interests of the shareholders, the corporation, and the general public, the court in *Garner* listed several indicia of "good cause," including the discovering party's need for the evidence, the information's availability from other sources, the claim's legitimacy

---

147. See, e.g., *United States v. Nixon*, 418 U.S. 683, 708 (1974).

148. *Id.* at 713. The Court doubted that a narrow exception would unreasonably chill communications: "[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." *Id.* at 712.

149. See *Rovario v. United States*, 353 U.S. 53 (1957). Similarly, the government frequently has been precluded from relying upon the testimony of a witness whose invocation of the privilege against self-incrimination prevented effective cross-examination. See *C. McCormick*, *supra* note 8, § 74.2, at 179.

150. 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

151. *Id.* at 1103-04.

and the risk of revealing corporate trade secrets.<sup>152</sup> The crime/fraud exception is another instance where courts will override the attorney-corporate client privilege in the interest of social utility.<sup>153</sup> In such cases courts will withdraw the privilege upon a prima facie showing that the client sought the lawyer's advice or representation for the purpose of furthering wrongful conduct.<sup>154</sup>

The arguments against a qualified attorney-corporate client privilege center upon the need for certainty. In order to achieve the privilege's purpose of inducing open communication, the attorney and client must be assured of confidentiality.<sup>155</sup> The goal of achieving certainty in the attorney-corporate client privilege, however, may be little more than wishful thinking. A variety of factors undermine the ideal of certainty regardless of which test courts use for the attorney-corporate client privilege.

Few would claim, for example, that either the subject matter test or the control group test is overly precise. The subject matter test, even in its modified form, requires that courts decide what "the scope of an employee's duties" includes, what "the direction of a superior" means, and what constitutes "legal advice." The control group test requires that courts identify those persons who "control or take a substantial part in a decision." These tests employ somewhat amorphous criteria at best. The variety of different state law tests for the attorney-corporate client privilege also prevents uniformity. Some states have maintained the control group test de-

---

152. *Id.* at 1104.

153. See, e.g., *In re Doe*, 551 F.2d 899 (2d Cir. 1977) (communication about bribery plan); *United States v. Gordon-Nikkar*, 518 F.2d 972 (5th Cir. 1975) (communication about perjury); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974) (communication about fraud against patent office).

154. See *Clark v. United States*, 289 U.S. 1, 15 (1933). See generally *Privileged Communications*, *supra* note 36, at 1511-12.

155.

Although a more flexible approach, where the magnitude of the harm of suppression might be considered in each case, would have the advantage of minimizing the suppression of evidence, this needed element of certainty logically requires a privilege against disclosure governed by a standard rule and not by ad hoc determinations.

Note, *supra* note 102, at 308.

spite the Supreme Court's opinion in *Upjohn*.<sup>156</sup> Most states have opted for a broader test, often echoing the unlimited *United Shoe* protections.<sup>157</sup> The extent of the attorney-corporate client privilege, therefore, will depend largely on the jurisdiction in which the action is brought, especially because state rules of privilege govern federal court actions brought in diversity.<sup>158</sup> These varying tests do not engender certainty and confidence among large national companies subject to multiple jurisdictions. Finally, corporate employees may be reluctant to reveal embarrassing or incriminating information to the corporate attorney out of fear that the company will decide not to assert the privilege and will elect to disclose the information. No test will provide the corporate executive in such a situation with the "certainty" needed to guarantee free attorney-client communication.<sup>159</sup> Under these circumstances, the adoption of a qualified privilege would hardly have cataclysmic consequences on the goal of "certainty."

The facts of *Upjohn* illustrate some of the advantages of a qualified privilege. *Upjohn* wished to keep confidential the questionnaire responses and interview summaries of its foreign managers and senior executives. Under a qualified privilege, the IRS would have been required to show a "substantial need" to breach the privilege protecting those documents. The IRS would have had difficulty making such a showing because it had ready access to the American-based *Upjohn* employees. If an important *Upjohn* employee had died or become otherwise unavailable prior to direct

---

156. See, e.g., *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 432 N.E.2d 250 (1982); ARK. R. EVID. 502(a)(2); ME. R. EVID. 502(a)(2); NEV. REV. STAT. § 49.075 (1979); N.D. R. EVID. 502(a)(2); OKLA. R. EVID. 502(a)(2); S.D. R. EVID. 502(a)(2).

157. See, e.g., *Lindberg v. Safeway Stores, Inc.*, 525 S.W.2d 571, 572 (Mo. Ct. App. 1975); *State ex rel. Union Oil Co. v. District Court*, 160 Mont. 229, 503 P.2d 1008, 1012 (1972); *Ford Motor Co. v. O.W. Burke Co.*, 59 Misc. 2d 543, 545, 299 N.Y.S.2d 946, 949 (Sup. Ct. 1969); see also *Sexton*, *supra* note 2, at 456 n.50.

158. See FED. R. EVID. 501; see also *Krizak v. W.C. Brooks & Sons, Inc.*, 320 F.2d 37, 42-43 (4th Cir. 1963); *Palmer v. Fisher*, 228 F.2d 603, 608 (7th Cir. 1955), *cert. denied*, 351 U.S. 965 (1956).

159. See Note, *The Attorney-Client Privilege: A Look at its Effects on the Corporate Client and the Corporate Executive*, 55 IND. L.J. 407, 408-09 (1980). "As corporate executives begin to realize that they cannot predict whether the corporation will hold their communications to be privileged . . . 'the predictive certainty needed to induce disclosure by the client . . . is effectively vitiated.'" *Id.* at 409 n.14 (quoting Note, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation*, 50 S. CAL. L. REV. 303, 322 (1977)).

examination,<sup>160</sup> however, the need for his or her questionnaire responses might have warranted breaking through the privilege. Similarly, if the IRS could have shown that questioning foreign managers was impossible or prohibitively expensive and that their knowledge was indispensable, the Court might have overridden the privilege. Although courts will have to decide how high a standard of "substantial need" parties must meet, at least in extreme cases the qualified subject matter test would allow courts to overcome the privilege. In these rare instances of true substantial need, the benefits of fair adjudication clearly outweigh the marginal chill on future attorney-corporate client communications caused by overriding the privilege.<sup>161</sup>

## VI. CONCLUSION

*Upjohn* has been a growth industry for lawyers.<sup>162</sup> The eagerness of corporations to avail themselves of the expansive attorney-client privilege has made for a troubling spectacle. Contrary to the rosy expectations expressed in *Upjohn*, corporations seem to be employing the privilege more to evade the law than to comply with it. Cases abound of corporations quickly switching the handling of embarrassing and potentially incriminating matters to lawyers for no other apparent reason than the advantage of the secrecy provided by the attorney-corporate client privilege.<sup>163</sup> This Article

---

160. Cf. *In re Grand Jury*, 599 F.2d 1224 (3d Cir. 1979) (admitting dead worker's communications on different grounds).

161. This clash between an absolute rule and a qualified standard has much deeper jurisprudential roots. See Note, *supra* note 50, at 464; *Privileged Communications*, *supra* note 36, at 1486-90.

162. One explanation for the attorney-client privilege in general, and the attorney-corporate client privilege in particular, posits that attorneys and judges are safeguarding the privilege in order to gain the monopoly profit it produces. Note, 1980 Term, *supra* note 100, at 279 n.57; *Privileged Communications*, *supra* note 36, at 1493-98 (power theory). The proliferation of "special counsel" in the wake of *Upjohn* provides a further reason for reexamining the scope of the attorney-corporate client privilege. See, e.g., *infra* note 163. Regardless of whether the expanded post-*Upjohn* privilege caused the numerous internal investigations recently launched by corporate counsel, the effect of a broad attorney-corporate client privilege on this phenomenon bears scrutiny. See, e.g., *Special Counsel: Ticklish Role*, N.Y. Times, Apr. 8, 1986, at D1, col. 3; *Hutton-Type Investigations*, N.Y. Times, Sept. 10, 1985, at D2, col. 1.

163. See, e.g., *In re Grand Jury Subpoena*, 599 F.2d 504 (2d Cir. 1979) (investigation by senior management held subject to discovery, but once counsel was hired to investigate,

questions the justifications for this phenomenon, arguing that the utilitarian balance struck by *Upjohn* was incomplete and one-sided. The control group test, particularly if augmented by an unlimited representational privilege, better accounts for the narrower set of benefits and the fuller range of costs associated with the attorney-client privilege in the corporate context. Alternatively, *Upjohn*'s broad subject matter test might achieve this same balance if the privilege is a qualified one, capable of being overcome by a showing of substantial need. Although these proposed changes in the attorney-corporate client privilege would cut back on the lucrative opportunity that *Upjohn* created for lawyers, they would enhance the goals of truth seeking and a fair legal system.

---

their communications with employees and their report were privileged); *In re Grand Jury Investigation*, 599 F.2d 1224 (2d Cir. 1979) (investigation by corporation's Audit Committee was not protected, but counsel's investigation was privileged); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) *aff'd on reh'g*, 572 F.2d 606 (8th Cir. 1978) (counsel's investigation was privileged when authorized by resolution of board of directors). *See generally* 2 J. WEINSTEIN & M. BERGER, *supra* note 32, ¶ 503(b)[04], at 503-56.3 ("[*Upjohn*] makes it highly advantageous to use lawyers, or paraprofessionals acting under their direction, for investigations with possible governmental regulatory impact on the corporation."); N.Y. Times, Apr. 8, 1986, at D1, col. 3 (discussing widespread hiring of special counsel to investigate corporate wrongdoing); N.Y. Times, Sept. 10, 1985, at D2, col. 1 (discussing special corporate investigations).