# TWO RIGHTS COLLIDE: DETERMINING WHEN ATTORNEY-CLIENT PRIVILEGE SHOULD YIELD TO A DEFENDANT'S RIGHT TO COMPULSORY PROCESS OR CONFRONTATION

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ABSTRACT

*In a criminal trial, the Sixth Amendment's Compulsory Process Clause protects a defendant's right to gather evidence in his favor. Similarly, the Confrontation Clause guards a defendant's right to effectively cross-examine those who bear witness against him. At times, however, these rights collide with a witness's assertion of the attorney-client privilege. The Supreme Court declined to decide how to handle such a collision in* Swidler & Berlin v. United States. *And the courts that have answered this question have fractured. Some suggest the attorney-client privilege yields to a defendant's Sixth Amendment rights. Some hold that the attorney-client privilege is always impenetrable. Finally, others conduct fact-specific balancing tests to determine whether the information at issue is sufficiently probative to justify piercing the privilege. This Note contends that each of these approaches misses the mark. It first argues that the categorical approaches to this conflict ignore the Supreme Court's direction to balance a defendant's Sixth Amendment interests against an evidentiary rule's purpose when the two collide. It then contends that fact-specific balancing tests disregard a client's need for certainty regarding the attorney-client privilege's scope.*

*After critiquing current approaches, this Note provides a new standard for resolving conflicts between a defendant's Sixth Amendment rights and the attorney-client privilege. Under the proposed standard, the attorney-client privilege will be penetrable unless the relevant communication would subject the privilege-holder to criminal liability. Such a standard both provides a client with certainty regarding when the privilege may be pierced and respects the need to balance a defendant's Sixth Amendment interests against an evidentiary rule's purpose. This, in turn, protects the defendant's constitutional right to put forth probative evidence, while simultaneously ensuring that the attorney-client relationship does not unduly suffer.*

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## INTRODUCTION

Imagine that a man is on trial for a murder he did not commit.[1] As the prosecution builds its case, the man's conviction becomes almost a foregone conclusion. The evidence appears so damning that it would take another person's confession to convince a reasonable jury of the defendant's innocence. Imagine that such a confession exists, and that it falls squarely within a hearsay exception. The defendant would undoubtedly seek to introduce it as evidence, and his Sixth Amendment right to compulsory process would almost always enable him to do so.[2]

But assume the true murderer's confession was covered by the attorney-client privilege. Communications covered by this privilege generally enjoy unquestioned secrecy and are not subjected to a balancing test of any kind.[3] The defendant's right to compulsory process thus collides with the attorney-client privilege. When this collision occurs, a court must decide which right triumphs, and which must yield.

Next consider *Murdoch v. Castro*.[4] In 1983, four men robbed a California bar, shooting and killing a bystander in the process.[5] The murder went unsolved for eleven years until the police used fingerprint technology to identify Dino Dinardo.[6] Dinardo initially denied any involvement in the crime, but later confessed, implicating Charles Murdoch and eventually testifying against him.[7] Following that

1. This hypothetical situation is based on the facts of *Morales v. Portuondo*, 154 F. Supp. 2d 706 (S.D.N.Y. 2001).

2. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.").

3. Swidler & Berlin v. United States, 524 U.S. 399, 408–09 (1998) (holding that the attorney-client privilege is absolute and survives a client's death).

4. 365 F.3d 699 (9th Cir. 2004).

5. *Id.* at 701.

6. *Id.*

7. *Id.*

testimony, a privileged letter from Dinardo to his attorney surfaced.[8] The prosecutor informed the judge that he had not seen the letter's contents, but that there was a chance the letter would exonerate Murdoch entirely.[9] If such a letter existed, Murdoch would undoubtedly seek to use it to impeach Dinardo's testimony. And absent privilege, it is unquestionable that his Sixth Amendment right to confrontation would enable him to do so. Murdoch's right to confrontation thus collided head on with Dinardo's attorney-client privilege. When such a collision occurs, courts again must decide which interest prevails.

The law governing when a defendant can use his confrontation or compulsory process rights to pierce the attorney-client privilege remains unsettled. The Supreme Court specifically left the question open in *Swidler & Berlin v. United States*,[10] and courts that have answered the question have reached different conclusions. Some suggest that a defendant's right to compulsory process or confrontation overrides the evidentiary privilege.[11] Others hold that the privilege is impenetrable.[12] Finally, some conduct a fact-specific balancing test to determine whether the Sixth Amendment or attorney-client privilege prevails.[13]

This Note contends that each of these approaches misses the mark. It then crafts a coherent standard for when attorney-client privilege should yield to the Sixth Amendment. Part I examines the current landscape of attorney-client privilege and

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8. Murdoch became aware of the privileged materials when the prosecutor informed the trial judge and Murdoch's counsel that Dinardo told her he had written his counsel a letter concerning Murdoch's involvement. *Id.* at 701–02. The prosecutor had not seen the letter, but believed that it potentially exonerated Murdoch. *Id.*

9. *Id.* at 702.

10. 524 U.S. 399, 408 n.3 (1998) (holding that the attorney-client privilege survives a client's death, but leaving open the question whether "exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege").

11. *See, e.g.*, State v. Hoop, 731 N.E.2d 1177, 1187 (Ohio Ct. App. 1999) (noting that the attorney-client privilege must yield if invocation of the privilege unduly burdens the defendant's right to compulsory process); United States v. Romano, 46 M.J. 269, 274 (C.A.A.F. 1997) ("The defendant's constitutional right to produce evidence under the [C]ompulsory [P]rocess [C]lause may overcome the attorney-client privilege."); United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994) (finding that the attorney-client privilege may have to yield "if the right of confrontation . . . would be violated by enforcing the privilege").

12. *See, e.g.*, United States v. Scheffer, 523 U.S. 303, 308 (1998) (noting that rules limiting the accused's ability to present relevant evidence do not violate the accused's right to compulsory process unless they are "arbitrary" or "disproportionate to the purposes they are designed to serve" (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987))); Valdez v. Winans, 738 F.2d 1087, 1089 (10th Cir. 1984) (noting that the attorney-client privilege did not have to yield to the Compulsory Process Clause because "the Sixth Amendment usually has been forced to yield when a testimonial privilege is asserted"); United States *ex rel.* Abramov v. Chandler, No. 05 C 4795, 2006 WL 1371456, at *7 (N.D. Ill. May 17, 2006) ("[T]he attorney-client privilege is designed 'to promote the judicial process itself.' Thus, unlike some privileges deemed to be of secondary importance, the attorney-client privilege does not give way to a defendant's right under the [C]onfrontation [C]lause." (citation omitted)).

13. *See, e.g.*, United States *ex rel.* Blackwell v. Franzen, 688 F.2d 496, 501 (7th Cir. 1982) (holding that the trial court's refusal to allow defense counsel to ask whether the prosecution witness had recanted his confession in a conversation with his attorney did not violate the defendant's Sixth Amendment right to confrontation because the probative value of testimony did not outweigh the interests served by the privilege); United States v. W.R. Grace, 439 F. Supp. 2d 1125, 1142–43 (D. Mont. 2006) (balancing the probative value of privileged information against the privilege's justifications and holding that at least some of the documents at issue required piercing the privilege under the Compulsory Process Clause).

Sixth Amendment jurisprudence.[14] Part II asserts that current approaches to conflicts between the attorney-client privilege and Sixth Amendment are inapt. Part III argues that the Compulsory Process and Confrontation Clauses entitle a defendant to pierce the attorney-client privilege unless the relevant information would subject the privilege-holder to criminal liability. The Note concludes that this approach strikes the proper balance.

## I. SHAPING THE LEGAL LANDSCAPE

This Part sketches the legal landscape for each doctrine this Note explores. Section A outlines the attorney-client privilege doctrine; Section B addresses Confrontation Clause jurisprudence; and Section C examines Compulsory Process Clause jurisprudence.

### *A. Attorney-Client Privilege*

The attorney-client privilege has been essential to the adversarial system since the Elizabethan era.[15] For an adversarial system to function effectively, free communication between attorney and client is imperative.[16] Absent the attorney-client privilege, however, such communication is impossible. As the Supreme Court has explained, "if the client knows that damaging information could more readily be obtained from [his] attorney following disclosure . . . the client would be reluctant to confide in his lawyer."[17] The privilege thus serves the distinct purpose of ensuring "full and frank communication between attorneys and their clients."[18] This enables attorneys to give more accurate advice, helping the client better comply with the law, empowering the attorney to represent the client effectively, and ultimately aiding the decision-maker in reaching the optimal outcome.[19]

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14. Some defendants might also seek to pierce the attorney-client privilege by arguing that the privilege deprives them of their due process right to present a complete defense. *See, e.g.*, Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (holding that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'" (citation omitted)). For a defendant to use this right to invalidate a rule of evidence, he must show that the evidentiary rule "infring[es] upon a weighty interest of the accused" and is "'arbitrary' or 'disproportionate to the purposes it is designed to serve.'" *Id.* (citing *Scheffer*, 523 U.S. at 308). This standard is identical to the standard a defendant is required to overcome to show a rule of evidence violates his right to compulsory process. *See* Virgin Islands v. Mills, 956 F.2d 443, 446 (3d Cir. 1992). Because discussing both rights would be duplicative, this Note does not discuss the defendant's right to present a complete defense.

15. *See* 8 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 2290–91 (3d ed. 1940).

16. *See* Monroe H. Freedman, *Lawyer-Client Confidences and the Constitution*, 90 YALE L.J. 1486, 1492 (1981) (explaining that the attorney-client privilege is necessary to ensure the adversarial system functions properly, and is "rooted in the imperative need for confidence and trust" between lawyer and client).

17. Fisher v. United States, 425 U.S. 391, 403–04 (1976) (holding that documents which would not have been attainable in the hands of a defendant cannot be obtained from his attorney).

18. Upjohn v. United States, 449 U.S. 383, 389 (1981) (describing the attorney-client privilege's purpose).

19. *See* Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should be Abolished*, 47 DUKE L.J. 853, 858 (1998) (discussing benefits the attorney-client privilege has on the attorney-client relationship).

While these benefits are tangible, they come with costs. A basic maxim of America's justice system is that it uncovers the truth, but it cannot be doubted that the attorney-client privilege often stands as an obstacle to that goal.[20] That obstacle has led to both wrongful convictions and unjust acquittals.[21] Because of that cost, the privilege "applies only where necessary to achieve its purpose."[22] Therefore, the privilege cannot be used to perpetuate a crime or fraud,[23] applies only to confidential communications,[24] and does not extend to communications when the client is not seeking legal advice.[25]

Though the privilege is construed narrowly, it is typically impenetrable when it applies.[26] The privilege is generally not subjected to a balancing test of any kind,[27] which assures clients that confidential communications with their attorney will not be discovered.[28] Such certainty is essential to protecting a client's constitutional rights in the criminal context because the privilege is "indispensable to the fulfillment of the constitutional security against self-incrimination and the right to make defense with the aid of counsel."[29]

The connection between the attorney-client privilege and the Fifth Amendment privilege against self-incrimination has been recognized since early American jurisprudence.[30] The privilege against self-incrimination provides a witness with confidence that the government cannot compel him to incriminate himself.[31] It is also a basic maxim of the attorney-client relationship that an attorney cannot represent his client if he is not apprised of all relevant facts.[32] Thus, absent the privilege,

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20. *See* Freedman, *supra* note 16, at 1489–90.

21. *See, e.g.*, Alton Logan & Berl Falbaum, *I Served 26 Years for Murder Even Though the Killer Confessed*, MARSHALL PROJECT (Oct. 19, 2017), https://www.themarshallproject.org/2017/10/19/i-served-26-years-for-murder-even-though-the-killer-confessed (describing a case where an innocent man was convicted of murder even though the true killer had confessed to murder to his attorney).

22. *Fisher*, 425 U.S. at 403.

23. United States v. Zolin, 491 U.S. 554, 562–63 (1989) (discussing the attorney-client privilege's crime-fraud exception).

24. PAUL F. ROTHSTEIN, FEDERAL TESTIMONIAL PRIVILEGES § 2.1 (2d ed. Supp. 2020).

25. *Id.*

26. Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998) (noting that the attorney-client privilege should not be subjected to a balancing test because it would "introduce[] substantial uncertainty into the privilege's application").

27. *Id.*

28. *In re* Pub. Def. Serv., 831 A.2d 890, 900 (D.C. 2003) ("[C]lients would be reluctant to share confidences 'if their lawyers could be turned into witnesses against them or if they could be forced to disclose their conversations with their lawyers.'" (citation omitted)).

29. People v. Knuckles, 650 N.E.2d 974, 979 (Ill. 1995) (noting that the attorney-client privilege is "'essentially interrelated' with the right to counsel and immunity from self-incrimination" (citation omitted)).

30. Kristen V. Cunningham & Jessica L. Srader, *The Post 9-11 War on Terrorism . . . What Does It Mean for the Attorney-Client Privilege?*, 4 WYO. L. REV. 311, 338 (2004) ("Early American jurisprudence viewed the attorney-client privilege as an extension of the Fifth Amendment privilege against self-incrimination.").

31. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself.").

32. *In re Pub. Def. Serv.*, 831 A.2d at 900.

a criminal defendant would be in a precarious position.[33] Assuming that the defendant had not confessed to a third party, the government would not be able to use the defendant's own words to convict him. But if the defendant informed his attorney of the facts crucial to his case, the prosecution could use the defendant's own statements to convict him by simply subpoenaing his attorney and forcing the attorney to repeat the statements his client told him.

The Supreme Court recognized this tension in *United States v. Fisher*.[34] There, the IRS sought to compel a taxpayer's attorney to provide the taxpayer's documents.[35] In reaching its decision, the Court discussed the relationship between the Fifth Amendment and the attorney-client privilege. The Court recognized that "if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."[36] The Court then noted that the core purpose of the privilege is to protect a client's disclosures that are "necessary to obtain informed legal advice—which might not have been made absent the privilege."[37] Accordingly, the Court found that information that is undiscoverable because of a legitimate assertion of the privilege against self-incrimination cannot be discovered merely because it is in the attorney's possession.[38]

The *Fisher* Court expressly left open whether an attorney can assert the privilege against self-incrimination on his client's behalf.[39] But most circuits that have considered the question have held that *Fisher* effectively incorporates a client's Fifth Amendment privilege against self-incrimination into privileged information in the attorney's possession.[40] Under this approach, the privilege against self-incrimination "must protect at least incriminating conversations and documents produced

33. *Id.* (noting that clients will "be reluctant to share confidences if their lawyers could be turned into witnesses against them or if they could be forced to disclose their conversations with their lawyers").

34. 425 U.S. 391 (1976).

35. *Id.* at 394, 414 (holding that the documents were discoverable because they could have been discovered if they were in the client's possession).

36. *Id.* at 403.

37. *Id.*

38. *Id.* at 404.

39. *Id.* at 402 n.8 ("The parties disagree on the question whether an attorney may claim the Fifth Amendment privilege of his client. We need not resolve this question.").

40. *See, e.g.*, *In re* Foster, 188 F.3d 1259, 1271 (10th Cir. 1999) ("Under *Fisher*, [the attorney-client] privilege effectively incorporates a client's Fifth Amendment right; it prevents the court from forcing Reinhart to produce documents given it by Foster in seeking legal advice if the Amendment would bar the court from forcing Foster himself to produce those documents."); *In re* Grand Jury Subpoenas Dated Oct. 22, 1991 & Nov. 1, 1991, 959 F.2d 1158, 1163 (2d Cir. 1992) (noting that documents in an attorney's possession could be discovered as though the client himself were holding those documents); *In re* Feldberg, 862 F.2d 622, 629 (7th Cir. 1988) (observing that documents "protected in the client's hands by the privilege against self-incrimination because of their contents [do] not become available merely because [they are] temporarily in the lawyer's hands for the purposes of obtaining legal advice").

for the purpose of representation, whether held by the attorney or client."[41]

The attorney-client privilege is connected not only to the privilege against self-incrimination, but also the Sixth Amendment right to counsel.[42] It is connected to the latter right in two ways. First, the government violates the defendant's Sixth Amendment right to counsel if it invades the defendant's attorney-client privilege after his Sixth Amendment right to counsel attaches.[43] That right to counsel attaches "when a defendant proves that, at the time of the procedure in question, the government had crossed the constitutionally-significant divide from fact-finder to adversary."[44]

The second way the attorney-client privilege is connected to the Sixth Amendment right to counsel is less direct but equally consequential. "The fundamental justification for the [S]ixth [A]mendment right to counsel is the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense."[45] But for the attorney to effectively prepare and conduct that defense, "[f]ree two-way communication between client and attorney is essential."[46] Such communication is essential because lawyers are unable to give effective legal advice "without being apprised of 'all pertinent facts, no matter how embarrassing or inculpating those facts may be.'"[47] When the attorney-client privilege is uncertain, however, those facts are impossible to uncover. This makes it more difficult for counsel to prepare an effective defense, thus decreasing the practical value of the Sixth Amendment right to the effective assistance of counsel.[48]

Absent the privilege, the client is placed in a constitutional dilemma.[49] When a client's communications are discoverable, he is "forced to choose between free communication with an attorney or complete silence based on the Fifth Amendment."[50] Free communication would render the client's Fifth Amendment

41. United States v. White, 879 F.2d 1509, 1516 (7th Cir. 1989) (Will, J., concurring in part) ("Although there is apparently no general Fifth Amendment protection for papers . . . that amendment must protect at least incriminating conversations and documents produced for the purpose of representation, whether held by the attorney or client.").

42. Neku v. United States, 620 A.2d 259, 262 (D.C. 1993) ("In the criminal context the privilege acquires Sixth Amendment protection.").

43. Partington v. Gedan, 961 F.2d 852, 863 (9th Cir. 1992) ("[A] violation of the attorney-client privilege implicates the Sixth Amendment right to counsel . . . when the government interferes with the relationship between a criminal defendant and his attorney.").

44. United States *ex rel*. Hall v. Lane, 804 F.2d 79, 82–83 (7th Cir. 1986) (holding that the Sixth Amendment right to counsel did not attach when a defendant was required to appear in a lineup).

45. United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978).

46. *Id*. ("Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the [S]ixth [A]mendment is to be meaningful.").

47. *In re* Pub. Def. Serv., 831 A.2d 890, 900 (D.C. 2003) (citation omitted).

48. United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994) (stating that an uncertain attorney-client privilege will make it "more difficult for [the defendant] to prepare an effective defense; [and] the practical value of his Sixth Amendment right to the effective assistance of counsel will therefore be less").

49. *See* Freedman, *supra* note 16, at 1490 ("Clients seeking to exercise their right to counsel would be able to do so only at the risk of compromising their privacy, autonomy, and privilege against self-incrimination.").

50. United States v. White, 879 F.2d 1509, 1516 (7th Cir. 1989) (Will, J., concurring in part).

privilege against self-incrimination toothless. But failing to provide his attorney with all pertinent information would hamstring the attorney and diminish the Sixth Amendment right to counsel's value. In the criminal context, the privilege thus serves not only to protect the adversarial system, but also to safeguard the client's constitutional rights.

### *B. Confrontation Clause*

The Sixth Amendment guarantees that a criminal defendant will "enjoy the right . . . to be confronted with the witnesses against him."[51] At English common law, a criminal defendant was often prohibited from cross-examining the prosecution's witnesses.[52] Instead, courts examined a witness *ex parte* and read the witness's testimony to the jury.[53] The Framers recognized that this procedure was incongruous with the adversarial justice system they sought to implement, so they adopted the Sixth Amendment's Confrontation Clause to ensure criminal defendants had the opportunity to cross-examine those who testified against them.[54] By the late 1800s, the Supreme Court viewed this right as one that guarantees criminal defendants "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him."[55]

Consistent with this understanding, a defendant's right to confrontation is violated in two instances. First, it is violated when the government offers an out-of-court statement for the truth of the matter asserted and the defendant does not have an opportunity to confront the statement's declarant in court.[56] Under this category, the Confrontation Clause is only implicated if the out-of-court statement is deemed testimonial.[57] This bar is met when the statement arises under "circumstances [that] objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[58] Once the court determines that the out-of-court statements are testimonial, they are inadmissible unless the declarant is available at trial for cross-examination or the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant.[59]

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51. U.S. CONST. amend. VI.

52. Crawford v. Washington, 541 U.S. 36, 50 (2004) (discussing the Confrontation Clause's history).

53. *Id.*

54. *Id.*

55. Mattox v. United States, 156 U.S. 237, 242 (1895).

56. *Id.*

57. *Crawford*, 541 U.S. at 53–54, 68 (holding that the Confrontation Clause is violated if a court admits prior testimonial statements of witnesses who have since become unavailable and there was no prior opportunity for cross-examination).

58. Davis v. Washington, 547 U.S. 813, 822 (2006) (holding that a portion of the victim's 911 conversation in which she identified the defendant was not testimonial).

59. *Crawford*, 541 U.S. at 53–54.

The Confrontation Clause also covers a second category of rights. Under this category, the right to confrontation is violated when the witness is physically present, but "opportunity for cross-examination has been restricted by law or by a trial court ruling."[60] To prove a violation under this category, the defendant must show that the evidentiary rule robbed him of the opportunity "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."[61] This encompasses both the right to determine whether the defendant is biased or otherwise unreliable, and the right to build a record that will enable the defendant to argue why the witness should not be trusted.[62]

The scope of the defendant's right to cross-examine, however, remains limited. It is true that *Crawford v. Washington* established a right to cross-examine a declarant that proffered testimonial evidence where the "exceptions established at the time of the founding" are not present,[63] but there is no right to cross-examine that declarant in any way the defendant might choose.[64] The clause is only violated when the excluded evidence might have given a reasonable jury "a significantly different impression of [the witness's] credibility."[65] Therefore, trial judges retain wide latitude under the Confrontation Clause to limit cross-examination.[66] That latitude includes the power to impose limits "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant."[67]

### *C. Compulsory Process Clause*

The Sixth Amendment guarantees that the "accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[68] At English common law, felon defendants were often prohibited from calling witnesses or presenting evidence in their defense.[69] In order to end that practice and ensure the adversarial system functioned fairly, the Framers adopted the Sixth Amendment's

60. Kentucky v. Stincer, 482 U.S. 730, 738 (1987).

61. *Id.* (quoting Davis v. Alaska, 415 U.S. 308, 318 (1974)).

62. Hayes v. Ayers, 632 F.3d 500, 518 (9th Cir. 2011) (quoting *Davis*, 415 U.S. at 318) (noting that the right to cross-examination includes the right to introduce evidence discounting a witness's credibility).

63. *Crawford*, 541 U.S. at 54.

64. *See* Delaware v. Fensterer, 474 U.S. 15, 19–20 (1985) (noting that the admission of expert testimony where the expert could not recall the basis for his opinion did not violate the defendant's right to confrontation).

65. Delaware v. Van Arsdall, 475 U.S. 673, 679–80 (1986) (holding that the trial court's ruling prohibiting the defendant's inquiry into the possibility that a witness was biased as a result of his pending public drunkenness charge violated the defendant's rights secured by the Confrontation Clause).

66. *Id.* at 679.

67. *Id.*; *see also* Maryland v. Craig, 497 U.S. 836, 849 (1990) (holding that a child witness was not required to stand face-to-face with the person she accused of assaulting her because preference for face-to-face confrontation "must occasionally give way to considerations of public policy and the necessities of the case" (quoting Mattox v. United States, 156 U.S. 237, 243 (1895))).

68. U.S. CONST. amend. VI.

69. Washington v. Texas, 388 U.S. 14, 19–20 (1967) (discussing the Compulsory Process Clause's history).

Compulsory Process Clause.[70] At the time of the founding, the Clause ensured defendants had the right to use the state's subpoena power to compel witness testimony and gather evidence, but did not displace common-law evidentiary rules.[71]

*United States v. Reid* is a strong illustration of the right's limitation during the founding era.[72] There, two defendants were jointly indicted for murder, and one sought to call the other as a witness.[73] But a common-law rule of evidence prohibited defendants who were indicted together from testifying in each other's trials.[74] Though the Supreme Court noted that this was the specific form of evil the Compulsory Process Clause was meant to abrogate, it refused to displace the common-law rule of evidence.[75]

As the nation progressed, however, the *Reid* Court's limited view of the right's utility began to falter. By 1918, the Court noted that "the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case."[76] And by 1967, the right grew into one that could displace evidentiary rules.[77]

The right has thus expanded from a shallow promise into one that protects the right to offer the testimony of witnesses, to compel their attendance, and to present the defendant's version of the facts.[78] That right, however, does not empower a defendant to simply cast aside all of the rules of evidence.[79] Rather, for a defendant to show that a rule of evidence deprived him of his right to compulsory process, he must prove that: (1) the excluded evidence was "material and favorable to his defense"; and (2) the deprivation of the evidence was "arbitrary or disproportionate to any legitimate evidentiary or procedural purpose" the evidentiary rule served.[80]

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70. *Id.*

71. *See* United States v. Chagra, 669 F.2d 241, 260 (5th Cir. 1982) ("[T]he clause was designed to ensure that a defendant would have the subpoena power available for his defense rather than to guarantee a defendant the unlimited right to present a defense without regard for the rules of evidence or the procedures governing a criminal trial.").

72. 53 U.S. 361 (1851).

73. *Id.* at 361. It is also worth noting that this case was heard in federal court, making the Compulsory Process Clause's incorporation to the states inapplicable.

74. *Id.* at 362.

75. *Id.* at 366.

76. Washington v. Texas, 388 U.S. 14, 22 (1967) (quoting Rosen v. United States, 245 U.S. 467, 471 (1918)).

77. *See id.* at 19.

78. *Id.*

79. *See* Taylor v. Illinois, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.").

80. *See* Virgin Islands v. Mills, 956 F.2d 443, 444–46, 448 (3d Cir. 1992) (citing Rock v. Arkansas, 483 U.S. 44, 56 (1987)) (holding that the trial court violated the defendant's Sixth Amendment right to compulsory process by not permitting a hotel guard to testify that the man he had observed near the scene shortly after the incident was not the defendant).

To satisfy the first prong of the compulsory process analysis, the defendant must first show that the excluded evidence was favorable.[81] This standard is often and easily met but requires proof that the evidence would provide some benefit to the defendant's case.[82] The defendant must then show that the excluded evidence was material, which is a much higher bar than mere relevance.[83] To prove excluded evidence is material, a defendant must show that "there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact."[84] Though this is a malleable standard, a defendant must show the evidence was likely to cast "the whole case in such a different light as to undermine confidence in the verdict."[85] For example, the defendant satisfied this standard in *Harris v. Thompson*, where an evidentiary rule prohibited her from putting an alibi witness on the stand.[86] Conversely, in *United States v. Ladoucer*, the defendant failed to overcome the materiality threshold when the court excluded evidence that was consistent with the defendant's theory of the case but insufficient to exonerate him.[87]

Under the second prong of this analysis, even if evidence is both material and favorable to a defendant's case, he must also show that the deprivation of the evidence was either arbitrary or disproportionate to the evidentiary or procedural purpose the rule served.[88] This standard requires the court to weigh the defendant's need for the evidence against the state's legitimate interests justifying its evidentiary rule.[89] This analysis not only requires the court to find that the rule is generally justifiable, but also that it withstands "particularized scrutiny of the application of the rule in each case."[90]

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81. *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982) (holding that for a defendant to demonstrate that the exclusion of evidence violated his right to compulsory process, he must show "that the evidence lost would be both material and favorable to the defense").

82. *See* Orie v. Sec'y Pa. Dep't of Corr., 940 F.3d 845, 855 (3d Cir. 2019) (holding that the exclusion of proffered testimony from the defendant's expert on state senate rules did not violate the Compulsory Process Clause).

83. *See id.* ("Not all relevant evidence is material. To be material, it must be reasonably likely to affect the trial's outcome.").

84. *Valenzuela-Bernal*, 458 U.S. at 873–74 (noting that the exclusion of evidence violates the Compulsory Process Clause only if "there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact").

85. Harris v. Thompson, 698 F.3d 609, 629 (7th Cir. 2012) (quoting Cone v. Bell, 556 U.S. 449, 470 (2009)) (holding that disqualifying an alibi's testimony deprived the defendant of evidence "favorable and material to her defense").

86. *Id.*

87. United States v. Ladoucer, 573 F.3d 628, 635 (8th Cir. 2009) (holding that testimony that would mitigate the defendant's motive was not sufficiently material to prove a compulsory process violation).

88. *See* United States v. Scheffer, 523 U.S. 303, 308 (1998) (noting that rules limiting the accused's ability to present relevant evidence do not violate the accused's right to compulsory process unless they are "arbitrary" or "disproportionate to the purposes they are designed to serve" (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987))).

89. *See Harris*, 698 F.3d at 633 ("[P]recedents from the Supreme Court, this court, and other circuits teach that we should apply a balancing test, weighing the value of the excluded evidence to the criminal defendant against the state's legitimate interests in the criminal trial process that are implicated by the exclusion.").

90. *Id.* at 635.

The Seventh Circuit case *Harris v. Thompson* again usefully illustrates how courts apply this standard.[91] There, a woman was convicted in state court for murdering her four-year-old son and was sentenced to thirty years in prison.[92] The prosecution's theory of the case was that the mother wrapped a cord around her son's neck and choked him to death in his bottom bunk while her six-year-old son slept on the top bunk.[93] At trial, the defense attempted to call the six-year-old son, who had consistently stated that the mother was innocent.[94] His testimony was excluded, however, because he was considered an incompetent witness under the state's witness competency statute.[95] Without that testimony, the mother was convicted of murder.[96]

The mother then brought a habeas petition, alleging that the statute violated her compulsory process right to present witnesses in her own defense.[97] The court quickly found that the lone eyewitness testimony exculpating the mother was both material and favorable.[98] The court then moved on to weigh the value of the excluded evidence against the state's legitimate interests in the witness competency statute.[99] The court found that competency requirements serve legitimate and important state interests, but held that "where the challenged witness is critical to the defense's case, the state must have some 'plausible reason for believing that' the witness would be 'so unreliable as to justify denying [the defendant] the right to introduce the only evidence of [her] innocence that [s]he had.'"[100] The court examined a plethora of facts showing that the son was of minimal competence before finding that the harm caused to the mother by the evidentiary rule was disproportionate to its justifications.[101] Thus, while the court acknowledged that witness competency statutes serve legitimate functions, it still held that the statute violated the mother's right to compulsory process.[102]

## II. CHALLENGING CURRENT APPROACHES

Before explaining how courts handle conflicts between the attorney-client privilege and the Confrontation and Compulsory Process Clauses, it is important to define what constitutes a conflict. For a conflict to arise, the court must first find that a witness validly invoked the attorney-client privilege. The court must then

91. *Id.* at 632.
92. *Id.* at 612.
93. *Id.*
94. *Id.*
95. *Id.* at 612–13.
96. *Id.* at 612.
97. *Id.* at 613.
98. *Id.* at 632.
99. *Id.* at 633–36.
100. *Id.* at 635 (first alteration in original) (quoting Rivera v. Dir., Dep't of Corr., 915 F.2d 280, 283 (7th Cir. 1990)).
101. *Id.* at 636–39.
102. *Id.* at 639.

find that a defendant would be unable to exercise his right to compulsory process or confrontation unless that privilege is pierced. For compulsory process, this means the defendant must show that the evidence would be reasonably likely to affect the fact-finder's judgment.[103] For the Confrontation Clause, he must show the excluded evidence would have given the jury "a significantly different impression of [the witness's] credibility."[104]

This Part explains why courts' current approaches to these conflicts miss the mark.[105] Current approaches to this issue can be categorized in three groups: (a) those that contend the attorney-client privilege must categorically yield to the Sixth Amendment; (b) those that contend the Sixth Amendment must categorically yield to the attorney-client privilege; and (c) those that conduct a fact-specific balancing test to determine which interest prevails.

### *A. The Sixth Amendment Categorically Controls*

A small number of courts require the attorney-client privilege to categorically yield when it clashes with the Compulsory Process and Confrontation Clauses.[106] This does not mean that any time a defendant asserts a Sixth Amendment right, the attorney-client privilege falls away.[107] Rather, it treats the evidence that would be excluded as if it weren't privileged at all.[108] The court thus conducts a one-step analysis.[109] When the Confrontation Clause is involved, the court determines whether the privileged evidence would cause the jury to have a significantly different impression of the witness.[110] If it would, then the privilege is pierced, and the evidence is included. Similarly, under this approach, the Compulsory Process

103. *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982) (requiring evidence to be material and favorable to the defense before the Compulsory Process Clause is implicated).

104. Delaware v. Van Arsdall, 475 U.S. 673, 679–80 (1986) (holding that the trial court's ruling prohibiting the defendant's inquiry into the possibility that a witness was biased as a result of his pending public drunkenness charge violated the defendant's rights secured by the Confrontation Clause).

105. *See, e.g.*, Swidler & Berlin v. United States, 524 U.S. 399, 408 n.3 (1998) (declining to decide whether "exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching [the attorney-client] privilege").

106. *See, e.g.*, State v. Hoop, 731 N.E.2d 1177, 1187 (Ohio Ct. App. 1999) (noting that the attorney-client privilege must yield if invocation of the privilege unduly burdens the defendant's right to compulsory process); United States v. Romano, 46 M.J. 269, 274 (C.A.A.F. 1997) ("The defense's constitutional right to produce evidence under the [C]ompulsory [P]rocess [C]lause may overcome the attorney-client privilege."); United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994) (finding that the attorney-client privilege may have to yield "if the right of confrontation . . . would be violated by enforcing the privilege").

107. *See* Murdoch v. Castro, 365 F.3d 699, 705 (9th Cir. 2004) (analyzing whether the Confrontation Clause requires the attorney-client privilege to be pierced).

108. *See id.*

109. *See Hoop*, 731 N.E.2d at 1186–87 ("The protections of the attorney-client privilege and the work product doctrine will yield to the right to confront witnesses when that right is violated by enforcing privilege. The right to compulsory process will also outweigh privilege when enforcing privilege prejudices the right." (internal citations omitted)).

110. *See Murdoch*, 365 F.3d at 705 (noting that "[a] reasonable jury might have received a significantly different impression of [Dinardo's] credibility had [Murdoch's] counsel been permitted to pursue his proposed line of cross-examination").

Clause requires the privilege to be pierced if the excluded evidence would affect the judgment of the trier of fact.[111] At its most basic level, this position is premised upon the truism that a constitutional right prevails over a common law privilege when the two collide.[112] It thus follows that the Sixth Amendment, a constitutional right, must prevail over the attorney-client privilege, which, standing alone, is a mere common-law or statutory privilege.[113]

While this approach remains the minority, it has gained some traction in the courts. The Ninth Circuit case *Murdoch v. Castro* provides an example of its application.[114] There, the district attorney informed the court of a privileged letter written by the prosecution's star witness that potentially exonerated the defendant.[115] The Ninth Circuit examined whether the defendant's right to confrontation required the court to pierce the witness's attorney-client privilege so that the defendant could use the letter's contents to cross-examine the witness.[116] The court stated that "the attorney-client privilege 'must fall before the right of petitioner to seek out the truth in the process of defending himself.'"[117] It then held that Murdoch arguably established a Confrontation Clause violation because "[a] reasonable jury might have received a significantly different impression of [Dinardo's] credibility had [Murdoch's] counsel been permitted to pursue his proposed line of cross-examination."[118] Because the Ninth Circuit had not examined the letter's actual contents, however, it remanded the case to the district court to determine in the first instance whether the letter's contents were sufficiently probative to compel a new trial.[119]

This approach has been endorsed in other courts. While these courts have formulated different tests, the result is the same: the privilege yields to the right. Some courts hold that "[t]he right to compulsory process will . . . outweigh privilege when enforcing privilege prejudices the right."[120] Others note the attorney-client

111. *See Hoop*, 731 N.E.2d at 1187 (noting that a defendant's right to compulsory process requires piercing the attorney-client privilege when the information the defendant seeks is material).

112. *Id.* at 1186 ("The protections of the attorney-client privilege and the work product doctrine will yield to the right to confront witnesses when that right is violated by enforcing privilege.").

113. *See* Howell v. Trammell, 728 F.3d 1202, 1222 (10th Cir. 2013) ("[S]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." (citation omitted)).

114. 365 F.3d at 705 (holding that the Confrontation Clause overcomes the attorney-client privilege when the information is sufficiently probative).

115. *Id.* at 701.

116. *Id.* at 705.

117. *Id.* at 706 (quoting Davis v. Alaska, 415 U.S. 308, 320 (1974)).

118. *Id.* at 705 (alteration in original).

119. *Id.* at 706.

120. State v. Hoop, 731 N.E.2d 1177, 1187 (Ohio Ct. App. 1999) (citation omitted); *see also* United States v. Coven, 662 F.2d 162, 170–71 (2d Cir. 1981) (stating that direct testimony may have to be stricken if invocation of the privilege unduly burdens the defendant's cross-examination); United States v. Romano, 46 M.J. 269, 274 (C.A.A.F. 1997) ("The defense's constitutional right to produce evidence under the [C]ompulsory [P]rocess [C]lause may overcome the attorney-client privilege.").

privilege might have to yield "if the right of confrontation . . . would be violated by enforcing the privilege."[121]

This categorical approach ignores the qualified nature of the Compulsory Process and Confrontation Clauses.[122] The right to confrontation is not absolute.[123] Trial judges retain broad latitude to impose reasonable limits on cross-examination,[124] and the right to confrontation "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial."[125] Therefore, "the Confrontation Clause does not trump established rules of evidence, but rather must yield to such rules when their application is reasonable."[126] This is why the Confrontation Clause does not eviscerate rape shield laws,[127] past bad acts limitations,[128] and some evidentiary privileges.[129]

The Compulsory Process Clause is similarly qualified. In *Taylor v. Illinois*, the Supreme Court noted that "[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."[130] It is only when a rule of evidence is "arbitrary" or "disproportionate" and "infringe[s] upon a weighty interest of the accused" that a witness can show a compulsory process violation.[131] This, in turn, requires the court to

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121. United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994) (explaining in dicta that the attorney-client privilege "might have to yield" when enforcing it would violate a defendant's right of cross-examination, before holding that the excluded evidence was not sufficiently probative to trigger the defendant's right to confrontation).

122. As explained, while *Crawford v. Washington* provides an absolute right to the opportunity for cross-examination, it does not provide an absolute right to cross-examine a witness in any way the defendant might choose. 541 U.S. 36, 54 (2004). The defendant's right to confrontation is thus qualified in scope. *See supra* Section I.B.

123. *See* Maryland v. Craig, 497 U.S. 836, 849 (1990) (holding that a child witness was not required to stand face-to-face with the person she accused of assaulting her because preference for face-to-face confrontation "must occasionally give way to considerations of public policy and the necessities of the case" (quoting Mattox v. United States, 156 U.S. 237, 243 (1895))).

124. *See* Delaware v. Van Arsdall, 475 U.S. 673, 679–80 (1986) (holding that the trial court's ruling prohibiting the defendant's inquiry into the possibility that a witness was biased as a result of his pending public drunkenness charge violated the defendant's rights secured by the Confrontation Clause).

125. Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

126. Quinn v. Haynes, 234 F.3d 837, 847, 852 (4th Cir. 2000) (holding that the Confrontation Clause does not require the invalidation of a state law that prohibited cross-examination of an alleged sexual abuse victim as to allegations of sexual assault by others).

127. *See id.* at 848.

128. *See* Rogers v. Kerns, 485 F. App'x 24, 30 (6th Cir. 2012) (holding that the Confrontation Clause did not require the invalidation of a state's evidence rule that limited cross-examination of a witness's past bad acts).

129. *See* United States v. Abu Ali, 528 F.3d 210, 248 (4th Cir. 2008) (holding that evidentiary privileges, in this case classified information, need not always yield to the Confrontation Clause).

130. 484 U.S. 400, 410, 414–16 (1988) (holding that the Compulsory Process Clause is not violated by state law that authorizes the exclusion of a witness as a sanction for discovery violations).

131. United States v. Scheffer, 523 U.S. 303, 308 (1998) (noting that rules limiting the accused's ability to present relevant evidence do not violate the accused's right to compulsory process unless they are "arbitrary" or "disproportionate to the purposes they are designed to serve" (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987))).

balance the defendant's interest in the evidence against the state's legitimate justifications for the evidentiary rule.

While the Court has conducted this balancing test in several contexts, *Taylor* is particularly illustrative.[132] In that case, the defendant was on trial for attempted murder.[133] In advance of trial, the prosecutor filed a discovery motion requesting a list of defense witnesses.[134] After the prosecution presented its case, defense counsel attempted to add witnesses to its list in violation of the state's discovery rules.[135] At that time, the trial judge elected to impose discovery sanctions on the defense that forbade the newly-listed witnesses from testifying.[136] The defendant appealed the ruling, contending that the Compulsory Process Clause "bars a court from ever ordering the preclusion of defense evidence as a sanction for violating a discovery rule."[137] The Court balanced the "defendant's right to offer the testimony of witnesses in his favor" against the "countervailing public interests," which included "the presentation of reliable evidence and the rejection of unreliable evidence," and "the interest in the fair and efficient administration of justice."[138] After balancing those interests, the Court held that the Compulsory Process Clause permits preclusion of a defense witness when a discovery violation is sufficiently serious.[139]

As *Taylor* shows, the qualified nature of the Sixth Amendment requires it to be balanced against legitimate rules of evidence. Failing to conduct that balancing test is itself a flaw. And if the proponents of this approach did conduct such a test, it would expose inherent problems. For categorically requiring attorney-client privilege to yield in the criminal context would both harm the attorney-client relationship and inhibit the client from fully exercising his constitutional rights.

A hypothetical illustrates these flaws. Suppose two men were involved in a robbery. Robber #1 took the position that he drove the car, but was coerced by Robber #2. Robber #2 claimed that he was not present during the robbery. Suppose next that Robber #2 confidentially informed his lawyer during trial preparation that he forced Robber #1 to commit the robbery. If Robber #1 called Robber #2 to testify at his trial, Robber #2 likely would invoke the privilege against self-incrimination. Robber #1 might then call Robber #2's attorney to reveal Robber #2's confession. Assuming that this testimony was material and favorable to Robber #1's case, a

132. 484 U.S. at 414 (noting the balance between the defendant's right to offer favorable witness testimony and the public interest).
133. *Id.* at 402.
134. *Id.* at 403.
135. *Id.*
136. *Id.* at 405.
137. *Id.* at 406.
138. *Id.* at 414–15.
139. *Id.* at 416.

categorical rule in favor of the Sixth Amendment would permit Robber #1 to pierce Robber #2's attorney-client privilege.[140]

This categorical rule would force an attorney to testify about the statements his client made to him in confidence. Such a result would unquestionably harm the attorney-client relationship. An attorney's ability to effectively represent his client hinges on his client entrusting him with all relevant information.[141] For that trust to exist, a client must be able to freely communicate with his attorney without fear his confidences will be revealed.[142] If the privilege may be forced to yield, however, that trust vanishes and the attorney-client relationship is harmed.

When that relationship is harmed, America's criminal justice system suffers. The Framers believed the most effective check on government overreach to be a fairly balanced adversarial system.[143] The Framers also recognized that for this system to function fairly, a defendant needs the "guiding hand of counsel" to help him navigate its intricacies.[144] For that guiding hand to be useful, however, an attorney must be equipped with all relevant facts. But a client will be less likely to provide his attorney with every relevant fact if he knows those facts may later be divulged to the public.[145] When an attorney cannot obtain all relevant facts from his client, his ability to provide counsel is hampered.[146] This both hamstrings an attorney's ability to competently represent his client and leads to sub-optimal outcomes based on speculative facts.

This situation not only harms the adversarial system, but also places a client in a constitutional dilemma.[147] Under this categorical approach, one would be forced to elect between his Sixth Amendment right to counsel and Fifth Amendment privilege against self-incrimination. For the Sixth Amendment right to counsel to retain its practical value, a client must be able to communicate freely with his attorney.[148] But the privilege against self-incrimination protects the client's right not to incriminate himself with his own words. When a client's communications with his

140. It is true that this confession would be hearsay. However, the statement-against-interest exception to the hearsay rule permits the admission of an unavailable declarant's out-of-court statement when that declarant is unavailable and the statement is against the declarant's penal interest. FED. R. EVID. 804(b)(3). The invocation of the privilege against self-incrimination renders the declarant unavailable for purposes of the statement-against-interest exception. *See* United States v. Piper, 912 F.3d 847, 855–56 (5th Cir. 2019). And an admission of crime is clearly against one's penal interest. Though corroborating circumstances must still present themselves, they will arise in numerous cases.

141. *See* Cunningham & Srader, *supra* note 30, at 338.

142. *See* Fisher v. United States, 425 U.S. 391, 403 (1976) ("The purpose of the [attorney-client] privilege is to encourage clients to make full disclosure to their attorneys.").

143. *See* Eve Brensike Primus, *Disentangling Miranda and Massiah: How to Revive the Sixth Amendment Right to Counsel as a Tool for Regulating Confession Law*, 97 B.U. L. REV. 1085, 1092 (2017).

144. *Id.* at 1101 (quoting Escobedo v. Illinois, 378 U.S. 478, 486 (1964)).

145. *See* Cunningham & Srader, *supra* note 30, at 319.

146. *See* United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994) (explaining that the practical value of the effective assistance of counsel is diminished when the attorney is not apprised of all relevant facts).

147. For a discussion on this tension, see Michael B. Dashjian, Note, People v. Meredith: *The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights*, 70 CALIF. L. REV. 1048, 1064–65 (1982).

148. *See Rainone*, 32 F.3d at 1206.

attorney can be discovered, he must either refrain from informing his attorney of all relevant facts or sacrifice the certainty that his own words will not incriminate him. This rule thus forces the client "to choose between free communication with an attorney or complete silence based on the Fifth Amendment."[149]

By ignoring the requirement to balance a defendant's Sixth Amendment rights against an evidentiary rule's legitimate purpose, a court adopting this approach neglects to consider these costs. It is true that, at times, this error will be inconsequential. A defendant's Sixth Amendment interests might supersede the privilege's justifications where a client seeks advice in a civil matter and the privilege is unmoored from its constitutional underpinnings. But, as described in Part III, *infra*, there are times where these costs outweigh the defendant's interests in confrontation and compulsory process. When such a situation arises, the error is far from inconsequential. It harms the attorney-client relationship and undercuts a client's constitutional rights in an unjustified way.

### *B. The Attorney-Client Privilege Categorically Controls*

Other courts never require the attorney-client privilege to yield to a defendant's rights to compulsory process and confrontation.[150] While similar considerations guide how courts analyze each right under this approach, this Note discusses the Confrontation Clause and the Compulsory Process Clause separately.

Courts holding that a defendant's right to confrontation can never require a witness's attorney-client privilege to be pierced typically emphasize either the Confrontation Clause's qualified nature or the attorney-client privilege's strength. While the Confrontation Clause provides a right to cross-examination, it does not provide an unfettered right to examine a witness to any extent the defendant desires.[151] To that end, multiple courts have held that "[i]t is within the court's discretion to limit cross-examination to the extent that it would violate the witness's

149. *See* United States v. White, 879 F.2d 1509, 1516 (7th Cir. 1989) (Will, J., concurring in part) ("Absent [the attorney-client privilege], a party is forced to choose between free communication with an attorney or complete silence based on the Fifth Amendment, a choice which one should not have to make and which the decided cases make clear one does not have to make."); *cf.* Clutchette v. Rushen, 770 F.2d 1469, 1473 (9th Cir. 1985) (discussing the implications of being forced to choose between the Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel).

150. *See e.g.*, Valdez v. Winans, 738 F.2d 1087, 1089 (10th Cir. 1984) (noting that the attorney-client privilege did not have to yield to the Compulsory Process Clause because "the Sixth Amendment usually has been forced to yield when a testimonial privilege is asserted").

151. *See* Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) ("[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."); *see also* United States v. Owens, 484 U.S. 554, 562–64 (1988) (holding that the Confrontation Clause was not violated, even though the witness could not recall the events that took place, because the Confrontation Clause requires only an *opportunity* for effective cross examination); Maryland v. Craig, 497 U.S. 836, 849 (1990) (holding that a child witness was not required to stand face-to-face with the person she accused of assaulting her, because preference for face-to-face confrontation "must occasionally give way to considerations of public policy and the necessities of the case" (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895))).

attorney-client privilege."[152] Other courts focus on the attorney-client privilege's strength. At least one court has held that, because the attorney-client privilege "promote[s] the judicial process itself" by encouraging full and frank communication between attorney and client, the Confrontation Clause will never require it to yield.[153] The Second Circuit takes this approach further, holding that requiring the attorney-client privilege to yield to the Confrontation Clause "would destroy" the attorney-client privilege because "[a] client could hardly confide in counsel if this result were sanctioned."[154]

Similarly, the categorical rejection of the Compulsory Process Clause stems both from the right's purported limitations and the attorney-client privilege's strength. The defendant's right to compulsory process must, at times, yield to legitimate assertions of evidentiary privilege.[155] For that reason, many courts hold that the right to compulsory process does not displace traditional testimonial privileges, including the attorney-client privilege.[156] Further, the right to compulsory process only displaces privileges when the purpose served by the privilege is arbitrary or the harm from excluding the evidence is disproportionate to the rule's justifications.[157] Because the attorney-client privilege is often deemed sacrosanct[158] and is integral to the judicial process itself, many courts hold that assertion of the privilege is neither arbitrary nor disproportionate.[159] Therefore, when courts are forced

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152. United States v. Lin, Nos. 00-1020, -1021, -1022, 2000 WL 1340361, at *2 (2d Cir. Sept. 12, 2000) (citation omitted); *see also* Hardiman v. Curtin, No. 1:06-cv-177, 2009 WL 2616259, at *9 (W.D. Mich. Feb. 13, 2009) (permitting the court to bar defense counsel from pursuing privileged testimony on cross-examination).

153. United States *ex rel.* Abramov v. Chandler, No. 05 C 4795, 2006 WL 1371456, at *7 (N.D. Ill. May 17, 2006) ("[T]he attorney-client privilege is designed to promote the judicial process itself. Thus, unlike some privileges deemed to be of secondary importance, the attorney-client privilege does not give way to a defendant's right under the [C]onfrontation [C]lause." (internal quotations omitted)).

154. United States v. Sindona, 636 F.2d 792, 805 (2d Cir. 1980) (holding that the exclusion of evidence obtained from the witness's attorney on cross-examination did not violate the defendant's Sixth Amendment right to confrontation).

155. *See* Taylor v. Illinois, 484 U.S. 400, 414–16 (1988) (holding that the Compulsory Process Clause is not violated by state law that authorizes the exclusion of a witness as a sanction for discovery violations).

156. *See, e.g.*, United States v. Serrano, 406 F.3d 1208, 1215 (10th Cir. 2005) ("The right to present a defense . . . does not displace traditional testimonial privileges."); *see also* People v. Gonzalez, 465 N.Y.S.2d 471, 473–74 (N.Y. Sup. Ct. 1983) (holding that the Compulsory Process Clause did not require the government to give witnesses immunity to compel them to testify and stating that "there is no compulsory process violation where the witness has disappeared or is otherwise unavailable; nor is there a compulsory process right to compel testimony over a claim of recognized privilege, such as attorney-client"); Valdez v. Winans, 738 F.2d 1087, 1089 (10th Cir. 1984) (noting that the attorney-client privilege did not have to yield to the Compulsory Process Clause because "the Sixth Amendment usually has been forced to yield when a testimonial privilege is asserted"); Cooper v. State, 661 P.2d 905, 907 (Okla. Crim. App. 1983) ("[T]he right to compulsory process does not negate traditional testimonial privileges such as the attorney-client privilege.").

157. *See* United States v. Scheffer, 523 U.S. 303, 308 (1998) (holding that rules limiting the accused's ability to present relevant evidence do not violate the accused's right to compulsory process unless they are "arbitrary" or "disproportionate to the purposes they are designed to serve" (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987))).

158. *See, e.g.*, Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1386 n.13 (3d Cir. 1972) ("The sacrosanct nature of the attorney-client privilege dictates that an attorney not disclose the confidences of his client no matter how heinous they may be.").

to confront a collision between a defendant's right to compulsory process and the attorney-client privilege, the right to compulsory process categorically yields.

This approach takes a stiff reading of the Sixth Amendment as it is applied to the attorney-client privilege. Proponents of the approach contend that, because the privilege serves the judicial decision-making process, the Sixth Amendment never requires it to be pierced.[160] But the Supreme Court has made clear that Sixth Amendment rights and evidentiary privileges do not operate in such rigid boxes. Instead, the Court balances the defendant's Sixth Amendment interest against the need for the evidentiary rule.

The Supreme Court used this balancing test in *Davis v. Alaska*.[161] There, the Court weighed the defendant's right to confrontation against the state's interest in the confidentiality of adjudications of juvenile delinquency before holding that the defendant's right to confrontation prevailed.[162] The Court first stated that privileging the delinquency hearings prevented the defendant from probing the witness's bias and that such a limitation constituted an invasion into the defendant's right to confrontation.[163] The Court then evaluated the state's interest in protecting the anonymity of a juvenile offender's record and held that the "policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."[164]

Such balancing also occurred in *Washington v. Texas*, where the Supreme Court held that a defendant's right to compulsory process required one of Texas's evidentiary rules to yield.[165] There, Washington was on trial for murder.[166] He testified that a co-defendant had actually fired the weapon and sought to call him to testify.[167] But a Texas statute provided that persons charged or convicted as co-participants in the same crime could not testify for one another.[168] Washington claimed that this statute violated his Sixth Amendment right to compulsory process.[169]

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159. *See, e.g.*, Revels v. Diguglielmo, No. Civ. A. 03-5412, 2005 WL 1677951, at *7 (E.D. Pa. July 18, 2005) (holding that excluding statements was not arbitrary or disproportionate because the statements were protected by the attorney-client privilege).

160. United States *ex rel.* Abramov v. Chandler, No. 05 C 4795, 2006 WL 1371456, at *7 (N.D. Ill. May 17, 2006) ("[T]he attorney-client privilege is designed 'to promote the judicial process itself.' Thus, unlike some privileges deemed to be of secondary importance, the attorney-client privilege does not give way to a defendant's right under the [C]onfrontation [C]lause." (citation omitted)).

161. 415 U.S. 308, 319 (1974).

162. *Id.* at 318–19.

163. *Id.* at 318.

164. *Id.* at 320.

165. 388 U.S. 14, 20, 22–23 (1967) ("[T]he Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury.").

166. *Id.* at 15.

167. *Id.* at 16.

168. *Id.* at 16–17.

169. *Id.* at 17.

The Court then balanced the purported purpose of the rule—to prevent testimony that is particularly likely to be perjured—against the defendant's right to obtain witnesses in his favor.[170] The Court held that the rule violated the defendant's right to compulsory process because "the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying."[171]

These examples are illustrative. The Court balanced interests when the Confrontation Clause conflicted with the privilege against self-incrimination,[172] when the Confrontation Clause conflicted with state voucher rules,[173] and when the Compulsory Process Clause conflicted with an evidentiary rule excluding polygraph evidence.[174] Each of these cases shows that the Confrontation and Compulsory Process Clauses are not required to categorically yield to evidentiary privileges. By summarily holding that the Sixth Amendment does not permit a defendant to displace the attorney-client privilege and failing to conduct the requisite balancing test, this categorical approach fails to adhere to Supreme Court precedent.

This failure has consequences. There are situations where a defendant's Sixth Amendment interests outweigh the policy justifications for the attorney-client privilege. Take, for example, a situation where a criminal defendant seeks to pierce the attorney-client privilege of a witness who sought the advice of counsel in a civil suit. In that situation, the Sixth Amendment interest in the evidence would be great: the defendant would be attempting to utilize her constitutional rights to prove her innocence. On the other side of the coin, the interest justifying the attorney-client privilege is less important. In the civil context, the privilege is disconnected from its constitutional underpinnings. No longer is there a collision between constitutional rights. Rather, a mere evidentiary privilege prevents a defendant from utilizing his constitutional right to confrontation or compulsory process. It is true that that evidentiary privilege has value. It protects the attorney-client relationship and prevents a civil client from facing embarrassment or civil liability based on his conversations with counsel. It is also true that opening up a client to civil liability or embarrassment has costs. But in America, a criminal conviction is uniquely punitive. It is the lone manner in which one can be stripped of his freedom, and it carries consequences that extend far beyond the release from prison. In such a situation, the defendant's constitutional interest in defending his

170. *Id.* at 22.

171. *Id.* at 23.

172. *See* Douglas v. Alabama, 380 U.S. 415, 419 (1965) (holding that the witness's invocation of the Fifth Amendment privilege against self-incrimination denied the defendant an opportunity for effective cross-examination).

173. *See* Chambers v. Mississippi, 410 U.S. 284, 298 (1973) (holding that the state's voucher rule interfered with the defendant's rights under the Confrontation Clause). State voucher rules prevent a party from impeaching his own witness based upon the premise that a party who presents a witness vouches for that witness's credibility. *Id.* at 296.

174. *See* United States v. Scheffer, 523 U.S. 303, 309 (1998) (holding that the Compulsory Process Clause does not require the introduction of polygraph evidence).

freedom outweighs the civil client's interest in privileged communication. Therefore, while it is true that the attorney-client privilege has strong policy justifications, those justifications will not always outweigh a defendant's Sixth Amendment interests. By setting forth a categorical rule, one ignores the need to balance Sixth Amendment interests against the policies justifying evidentiary rules and that, as explained in Part III, *infra*, at times that balance will tip in favor of piercing the attorney-client privilege.

### *C. Balancing Tests*

Other courts employ a fact-specific balancing test to decide whether to pierce the attorney-client privilege. The Seventh Circuit, for instance, looks at the record as a whole and decides "whether the probative value of the alleged privileged communication was such that the defendant's right to effective cross-examination was substantially diminished."[175] Similarly, the D.C. Court of Appeals calls for balancing the privileged statement's "probative value" against the interests the privilege serves and to pierce the privilege when the statement's probative value is "clear and substantial."[176]

Though various jurisdictions apply this balancing approach differently, *United States v. W.R. Grace* is illustrative.[177] There, individual defendants intended to rely upon an advice of counsel defense and filed pre-trial motions to pierce the corporation's attorney-client privilege.[178] To determine whether the privilege must give way to the individual defendant's rights to compulsory process, the court examined *Washington v. Texas*,[179] *Chambers v. Mississippi*,[180] *Davis v. Alaska*,[181] *Rock v. Arkansas*,[182] and *Taylor v. Illinois*.[183] The court then noted that in each case where a defendant's Sixth Amendment right to confrontation or compulsory process conflicted with an evidentiary rule, the Supreme Court applied a balancing test.[184] The

175. United States *ex rel*. Blackwell v. Franzen, 688 F.2d 496, 501 (7th Cir. 1982) (holding that a trial court's refusal to allow defense counsel to ask whether the prosecution's witness had recanted his confession in a conversation with his attorney did not violate the defendant's Sixth Amendment right to confrontation because the probative value of the testimony did not outweigh the interests served by the privilege).

176. Neku v. United States, 620 A.2d 259, 263 (D.C. 1993) (holding that the defendant's right to confront a witness with an alleged inconsistent statement made to the witness's attorney did not prevail over the witness's assertion of the attorney-client privilege).

177. 439 F. Supp. 2d 1125, 1136–37 (D. Mont. 2006).

178. *Id*. at 1136.

179. 388 U.S. 14, 20 (1967) ("[T]he Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury.").

180. 410 U.S. 284, 302 (1973) (holding that the Sixth Amendment and Fourteenth Amendment create a right to present a defense).

181. 415 U.S. 308, 318–19 (1974) (holding that the defendant's right to confrontation required privilege guarding juvenile proceedings).

182. 483 U.S. 44, 62 (1987) (holding that Arkansas's per se rule excluding all hypnotically refreshed testimony infringed impermissibly on a criminal defendant's right to testify on her own behalf).

183. 484 U.S. 400, 414–16 (1988) (holding that the Compulsory Process Clause is not violated by state law that authorizes the exclusion of a witness as a sanction for discovery violations).

court replicated those tests by balancing "the evidence or testimony sought to be introduced . . . against the policy behind the rule requiring that the evidence be excluded,"[185] to determine if the evidence was sufficiently probative or exculpatory to overcome the need for the privilege.[186] The court ultimately held that, at the time of trial, the documents could prove to "be of such probative and exculpatory value as to compel admission of the evidence over [the corporation's] objection as the attorney-client privilege holder,"[187] but left the determination of which specific documents would be entered into evidence for trial.[188]

This balancing test comports more closely with Supreme Court precedent than a categorical approach. A fact-specific balancing test, however, remains flawed. Because a statement's future probative value cannot be predicted, and because the determination of what is probative is subjective, the client will be unable to predict whether the information he provides to his attorney will eventually be disclosed to the public. The Supreme Court has already warned against this practice, stating that "[b]alancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the [attorney-client] privilege's application," and therefore must be rejected.[189] And "[a]n uncertain [attorney-client] 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."[190]

This lack of certainty places a client in a precarious position. The client will need to divulge potentially incriminating information to his attorney to ensure that he receives adequate representation. But under the fact-specific test, the attorney will not be able to tell him with any confidence whether the information he provides will remain private. This rule thus places a client in no better position than he is in when the rights to compulsory process and confrontation categorically control. The client is again forced to elect between his Fifth Amendment and Sixth Amendment rights, and the privilege's penetrable nature again harms the attorney-client relationship and adversarial system as a whole.[191]

184. United States v. W.R. Grace, 439 F. Supp. 2d 1125, 1139–42 (D. Mont. 2006) (balancing the probative value of privileged information against the need for privilege and holding that at least some of the documents at issue may require piercing privilege under the Compulsory Process Clause).

185. *Id.* at 1140.

186. *Id.* at 1142.

187. *Id.*

188. *Id.*

189. Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998).

190. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

191. For a detailed discussion of why these harms cannot be justified, see *supra* Section II.A.

## III. THE PROPOSED STANDARD

This Part contends that the attorney-client privilege should be impenetrable when the relevant communication would subject the declarant to criminal liability. Section A balances the defendant's interest in compulsory process or confrontation against the client's interest in an impenetrable attorney-client privilege. Section B sets forth a proposed standard. Section C applies the proposed standard to concrete examples.

### *A. Balancing Interests*

Categorical approaches to the Compulsory Process and Confrontation Clauses are in tension with each right's qualified nature. But the need for certainty governing the scope of the attorney-client privilege makes fact-specific balancing tests a poor fit. The proper solution is a balancing test that weighs the interests served by the attorney-client privilege against those served by the Sixth Amendment, as opposed to a test that evaluates the probative value of the privileged communication. Because the attorney-client privilege protects different interests in the civil and criminal contexts, the defendant's Sixth Amendment interests should be balanced against the interests served by the attorney-client privilege both (i) when the communication *would not* subject the client to criminal liability; and (ii) when the communication *would* subject the client to criminal liability.

#### 1. Non-Incriminating Statements

When the client's statements would not incriminate the client, the balance of interests tilts in favor of a penetrable privilege. The defendant's interests in confrontation and compulsory process are strong. America has "elected to employ an adversary system of criminal justice in which the parties contest all issues before a court."[192] This system relies on the parties to develop all relevant facts.[193] For such a system to function fairly, however, it is imperative that criminal defendants have the necessary resources to discover the facts that are most crucial to their cases.[194] Seeking to ensure that criminal defendants have such resources, the Sixth Amendment's framers adopted the Confrontation and Compulsory Process Clauses.[195] The right to confrontation is the defendant's essential tool for testing

192. Taylor v. Illinois, 484 U.S. 400, 408–09 (1988) (citation omitted) (discussing the importance of the Compulsory Process Clause to the adversarial system of justice).

193. *Id.*

194. *See* Jacob D. Briggs, Gonzalez-Lopez *and Its Bright-Line Rule: Result of Broad Judicial Philosophy or Context-Specific Principles?*, 2007 BYU L. REV. 531, 571 (2007) (discussing the American adversarial system and need for similar resources as part of a right to counsel).

195. *See* Washington v. Texas, 388 U.S. 14, 19–20 (1967) (discussing the Compulsory Process Clause's history); Crawford v. Washington, 541 U.S. 36, 50 (2004) (discussing the Confrontation Clause's history).

the credibility of the prosecution's evidence,[196] and "it is imperative to the function of courts that compulsory process be available for the production of evidence."[197] Without these tools, defendants would be hindered from setting forth the facts most crucial to their case. This would force judges and juries to make decisions premised upon "partial or speculative presentation of the facts."[198] When decisions are reached on these grounds, they are less well-reasoned than they otherwise would be. At best, this infringes upon a defendant's right to access evidence to defend his case. At worst, it leads to wrongful convictions.

But penetrating the privilege—even when limited to non-incriminating communications—has costs too. "[T]he attorney-client privilege is a necessary foundation for the adversarial system of justice."[199] In civil and criminal contexts alike, a lawyer's ability to effectively advocate for his client's interests is premised upon being privy to all available information.[200] That information, even if non-incriminating, is often highly personal, embarrassing, or creates the risk of civil liability.[201] A client may be chilled from providing his lawyer with damaging facts when he knows they may later be disclosed to the public.[202] This too hinders a lawyer's ability to adequately represent his client and erodes the public's confidence in the adversarial system.[203]

It is unclear, however, how often this result will actually deter a privilege-holder from communicating with his attorney. A witness is generally required to testify about all admissible and relevant facts that are not privileged.[204] And it is black letter law that the attorney-client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."[205] Thus, under most circumstances, if the privilege-holder is available, he will be required to testify about the non-incriminating facts he communicated to his attorney.

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196. *See* Sira v. Morton, 380 F.3d 57, 78 (2d Cir. 2004) ("In our adversarial system, confrontation and cross-examination are the usual tools used to test credibility." (citation omitted)).

197. *Taylor*, 484 U.S. at 409 (citation omitted).

198. *Id.*

199. *In re* Lott, 424 F.3d 446, 450 (6th Cir. 2005).

200. *See* Freedman, *supra* note 16, at 1492 ("[T]he lawyer-client privilege rests on the need for the lawyer—not only as advocate, but as counsellor—to know all that relates to the client's reasons for seeking representation.").

201. *See* Swidler & Berlin v. United States, 524 U.S. 399, 407–08 (1998) ("Clients consult attorneys for a wide variety of reasons, only one of which involves possible criminal liability.").

202. *See id.* (explaining that a privilege that does not survive a client's death will chill the client from divulging embarrassing, but non-incriminating, information).

203. *See Taylor*, 484 U.S. at 409 (explaining that the public confidence in the adversarial system will be eroded when decisions are made based upon speculative facts).

204. *See* FED R. CIV. P. 26(b)(1) (describing how the deponent may be examined regarding any non-privileged matter that is relevant to the subject matter involved in the pending action).

205. Upjohn Co. v. United States, 449 U.S. 383, 395, 397 (1981) (holding that the attorney-client privilege protects communications between corporate employees and in-house counsel, but not the facts underlying those communications).

An attorney will likely only be asked to testify about his communications with his client if the client-witness is unavailable. Unless the privilege-holder makes his confession on his deathbed, it is unlikely that he will be able to predict he will be unavailable to testify about non-incriminating facts in the future.[206] Therefore, a client-witness gains little by withholding such information from his attorney if the privilege is penetrable. Because the privilege-holder would likely believe the facts at issue were discoverable, it is unlikely that a penetrable privilege would deter the client from sharing such information with his attorney. A penetrable privilege in this context thus does little to inhibit "full and frank communication" between attorney and client.[207]

The interests in an impenetrable privilege do not increase where a defendant seeks to introduce an attorney's communications to the client. It is unlikely that a client will be deterred from providing his attorney with all pertinent facts because of the advice his attorney may provide. Thus, possible discovery of these communications places minimal strain on the adversarial system.

This minimal strain does not outweigh the defendant's Sixth Amendment interests.[208] The attorney-client privilege—just like the Confrontation and Compulsory Process Clauses—protects the adversarial system. But the attorney-client privilege, when raised in the civil context, remains a mere evidentiary rule that is unmoored from any of its constitutional underpinnings.[209] It is certainly an important evidentiary rule, but not one that can justify severely infringing on a defendant's constitutional rights.

There are reasons such rights attach only in criminal cases. In America, there is a significant distinction between criminal punishment and civil liability.[210] Such a distinction is set out primarily as one that attempts to divide public wrongs from private.[211] While civil law seeks primarily to "force defendants to internalize the social costs that their conduct imposes on others," criminal law sets out to define

206. Under Federal Rule of Evidence 804(a), a declarant is considered unavailable as a witness if the declarant: (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies; (2) refuses to testify about the subject matter despite a court order to do so; (3) testifies to not remembering the subject matter; (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance. FED R. EVID. 804(a).

207. *Upjohn*, 449 U.S. at 389 (describing the attorney-client privilege's purpose).

208. *See supra* Section III.B (explaining why a balancing test is required).

209. *See* Howell v. Trammell, 728 F.3d 1202, 1222 (10th Cir. 2013) ("[S]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." (citation omitted)).

210. *See* Nowakowski v. New York, 835 F.3d 210, 221 (2d Cir. 2016) ("The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as community, in its social aggregate capacity." (citation omitted)).

211. *Id.*

conduct that society believes is morally reprehensible, and to "inflict punishment in a manner that maximizes stigma and censure."[212]

As a result of this distinction, the censure that attaches to a criminal conviction typically outweighs that which comes with civil liability. Generally speaking, it is only a criminal conviction that brings about the possibility of imprisonment. And "as legally and socially significant as a term in prison is, for most people convicted of crimes, collateral consequences will generate the most significant effects."[213] These consequences are "the indirect consequences of criminal convictions," comprised of "a mixture of federal and state statutory and regulatory law, as well as local policies."[214] The ABA has estimated that there are as many as 30,000 of these consequences.[215] And while no individual could possibly face all 30,000 of them, a convicted individual must fear being disenfranchised; being unable to hold federal or state office; being barred from obtaining various licenses or entering certain professions; being subject to impeachment when testifying as a witness; being disqualified from serving as a juror; being stripped of the right to keep and bear arms; and, for non-citizens, being deported.[216]

These consequences reflect the social stigma that accompanies a criminal conviction. When one is convicted of a crime, the law, and often society, views that person as having a "shattered character."[217] Because of that view, a criminal conviction permanently impairs the quality of a defendant's life in a way that is rarely matched by a civil judgment.[218] This stigma has concrete impacts on nearly every facet of a convict's life. For instance, while employers typically consider a potential employee's criminal background when making hiring decisions, they almost never ask whether she has been subject to civil liability.[219] And a criminal conviction often results in "the disintegration of social and familial support [that] may impose psychological burdens on the convict, degrading his or her self-conception in a way no adverse civil award could."[220]

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212. John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1878 (1992).

213. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1805–06 (2012).

214. Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634 (2006).

215. Colleen F. Shanahan, *Significant Entanglements: A Framework for the Civil Consequences of Criminal Convictions*, 49 AM. CRIM. L. REV. 1387, 1396 (2012) ("The American Bar Association—funded by the 2007 Court Security Act—has undertaken this effort and, after its first year, had identified more than 30,000 [collateral] consequences in a wide breadth of areas." (footnotes omitted)).

216. *See* Chin, *supra* note 213, at 1799–1800.

217. *Id.* at 1790–91 (citation omitted).

218. *See* Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 2–3 (2005) ("Adverse civil and criminal judgments can deprive defendants of valued liberties and property, but a criminal conviction—or even a mere indictment—may impose a social stigma that permanently impairs the defendant's quality of life in a manner rarely equaled by a civil judgment.").

219. *See id.* at 3.

220. *Id.*

Thus, while it is true that civil liability has consequences, those consequences are typically less stigmatic, and less severe, than a criminal conviction. Therefore, when one's need to utilize the attorney-client privilege to avoid civil liability collides with one's need to utilize her Sixth Amendment right to avoid conviction, the Sixth Amendment must prevail. For when compared to civil liability, the consequences of a criminal conviction are too long-lasting, too stigmatic, and too severe to justify infringing upon a defendant's constitutional rights.

The defendant's Sixth Amendment right to confrontation or compulsory process still must prevail when a privilege-holder makes a non-incriminating statement in a criminal context. It is true that weighing these interests becomes murkier after the privilege-holder's Sixth Amendment right to counsel attaches. It is a truism that a lawyer must be apprised of all facts to prepare an effective defense, and that without all facts "the practical value of [the] Sixth Amendment right to the effective assistance of counsel will therefore be less."[221] It is also true that a client may be reluctant to reveal embarrassing, though non-incriminating, facts to his attorney if another defendant's Sixth Amendment rights may require those communications to be divulged.[222]

But one might question how often the privilege-holder will be chilled from providing those facts in practice. These are facts that a defendant could call the client to testify about as a witness. The client is thus in no worse position by providing his attorney with the information than he would otherwise be in. Because the client-witness could still be compelled to divulge the information if he were called to testify at the relevant defendant's trial, it makes little sense for him to hinder his own case by failing to provide his counsel with relevant information.

Even if a client were chilled from providing his lawyer with non-incriminating information, the harm of that chilling effect would be minimal. In a criminal matter, the crux of the case is typically the client's criminal actions. While a client's peripheral acts may provide helpful color as the attorney builds his case, it is substantially less likely that such information will make or break a verdict. Therefore, the impact that a penetrable attorney-client privilege will have on a client's Sixth Amendment right to counsel in this context does not justify infringing upon a defendant's right to compulsory process or confrontation.

2. Incriminating Statements

When a client's communications with his attorney would incriminate the client, the balance shifts in favor of an impenetrable privilege. In this context, the defendant's Sixth Amendment interests remain the same: the Confrontation and

221. United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994).

222. *See* Swidler & Berlin v. United States, 524 U.S. 399, 407–08 (1998) (explaining that a privilege that does not survive a client's death will chill the client from divulging embarrassing, but non-incriminating, information).

Compulsory Process Clauses protect the adversarial system itself, ensure that defendants are not wrongfully convicted, and are enshrined in the Constitution.

In this context, however, the attorney-client privilege plays a stronger role in safeguarding the adversarial system. Recognizing that a layperson often has trouble navigating the adversarial system, the Framers ratified the Sixth Amendment to ensure that criminal defendants have a right to the assistance of counsel.[223] The effectiveness of that right hinges on the client's ability to communicate freely with his attorney.[224] But a client is unable to do so if he is placed in a worse position by providing his attorney with information than he would be by remaining silent.[225] If called to the stand, the client can assert the privilege against self-incrimination when asked about incriminating facts. If the attorney-client privilege is penetrable, however, and a client communicates with his attorney, the client's statements could be discovered by simply subpoenaing the attorney. The client would thus have "walked into his attorney's office unquestionably shielded with the [Fifth] Amendment's protection, and walked out with something less."[226] Before the right to counsel attaches, discovery of these statements removes all teeth from the privilege against self-incrimination. After the right to counsel attaches, it creates a constitutional dilemma.[227]

The costs of this dilemma are systemic. Defendants are disincentivized from communicating their case's most crucial details to their attorneys. This requires attorneys across the criminal justice system to advocate for their client's interests without the facts they need to be effective. This hinders the lawyer's ability to adequately represent his client, which in turn will undermine the public's confidence in the criminal justice process and lead to unjust outcomes.[228]

It is true that an impenetrable privilege does some harm to the integrity of the justice system it is designed to protect. The adversarial system is designed to expose all relevant facts,[229] and an impenetrable attorney-client privilege impedes that objective. At times, that will lead to the guilty client enjoying the privilege's benefits, while the innocent defendant is wrongfully convicted. Such a result is not

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223. *See* Briggs, *supra* note 194, at 538–41.

224. *See* Freedman, *supra* note 16, at 1492.

225. *See* Michael Jay Hartman, *Yes, Martha Stewart Can Even Teach Us About the Constitution: Why Constitutional Considerations Warrant an Extension of the Attorney-Client Privilege in High-Profile Criminal Cases*, 10 U. PA. J. CONST. L. 867, 876–77 (2008).

226. United States v. Judson, 322 F.2d 460, 466 (9th Cir. 1963).

227. *See* United States v. White, 879 F.2d 1509, 1516 (7th Cir. 1989) (Will, J., concurring in part) ("Absent [the attorney-client privilege], a party is forced to choose between free communication with an attorney or complete silence based on the Fifth Amendment, a choice which one should not have to make and which the decided cases make clear one does not have to make."). For a detailed description of this dilemma, see *supra* Part I.

228. *See* Freedman, *supra* note 16, at 1494.

229. Taylor v. Illinois, 484 U.S. 400, 408–09 (1988) ("The need to develop all relevant facts in the adversarial system is both fundamental and comprehensive.").

in harmony with the "twofold aim of criminal justice . . . that guilt shall not escape or innocence suffer."[230]

One cannot doubt that such a cost is real. But the construction of America's adversarial system makes it a cost that is necessary. At its core, "[t]he very premise of [America's] adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."[231] To ensure that such a system functions fairly, the Framers set forth a number of pre-conviction constitutional rights that protect both the innocent and the guilty.[232] In early American courts, those rights were considered to be so integral to the adversarial system that scrupulously honoring them justified an errant decision in an individual case.[233]

Chief amongst those rights is the Sixth Amendment right to the effective assistance of counsel. The Sixth Amendment right to counsel "plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution.'"[234] And such a right can "be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private."[235] The most private and important of these communications are the ones that tend to incriminate the defendant. Regardless of whether that defendant is innocent or guilty, it is essential to the functioning of America's adversarial system that the defendant be able to communicate potentially incriminating facts to his attorney without fear of disclosure. That free communication might lead to injustice in an individual case, but it is necessary to ensure that criminal defendants across the justice system are able to adequately discuss their case's most crucial details with their attorney.

And if the privilege were penetrable, one might question how often a client would actually confess to his attorney. Most often, a client is only willing to confess to his attorney because he believes that confession will not be discoverable in the future.[236] If the privilege were penetrable, any prudent attorney would inform his client that another defendant's Sixth Amendment rights might require the

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230. Swidler & Berlin v. United States, 524 U.S. 399, 413 (1998) (O'Connor, J., dissenting) ("[O]ur historic commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer." (quoting United States v. Nixon, 418 U.S. 683, 709 (1974))).

231. Herring v. New York, 422 U.S. 853, 862 (1975).

232. *See* Briggs, *supra* note 194, at 538–41.

233. *See* Norman W. Spaulding, *The Privilege of Probity: Forgotten Foundations of the Attorney-Client Privilege*, 26 GEO. J. LEGAL ETHICS 301, 317 (2013) ("[E]arly American courts appear to have treated the right to counsel and the privilege protecting it as complementary, if not superior, to rectitude of decision.").

234. United States v. Beltran-Moreno, 556 F.3d 913, 918 (9th Cir. 2009) (emphasis omitted) (citation omitted).

235. Weatherford v. Bursey, 429 U.S. 545, 554 n.4 (1977) (citation omitted).

236. *See* Admiral Ins. Co. v. U.S. District Court, 881 F.2d 1486, 1494 (9th Cir. 1989) (rejecting a rule that would enable a party to pierce the attorney-client privilege if the opposing party's witness invoked the privilege against self-incrimination).

information to be divulged to the public.[237] In most circumstances, this would lead a client to refrain from confessing to his attorney. The defendant is thus in the same position regardless of whether the privilege is penetrable or impenetrable. If it is impenetrable, the defendant will not have access to the confession because of the privilege's nature. If, on the other hand, it is penetrable, the defendant generally will not have access to the confession because the client will refrain from confessing to his attorney in the first place.[238]

Exceptions to the general rule that incriminating statements are per se undiscoverable can also temper the rule's harshness. The first exception applies to the Confrontation Clause. If the judge finds that the privileged information the defendant is attempting to include would lead the jury to have "a significantly different impression of [the witness's] credibility,"[239] the judge should give the client the option to waive the privilege. If the client declines to waive the privilege, the judge should strike the witness's direct testimony. This will prevent the witness from harming the defendant on direct examination and then escaping any attack on his credibility by invoking the attorney-client privilege. This rule already exists when a witness attempts to invoke the privilege against self-incrimination on cross-examination.[240] And there is no distinguishing principle that justifies allowing a witness to weaponize the attorney-client privilege in a way that cannot be done with the privilege against self-incrimination.

Other exceptions can temper the rule's harshness when it infringes upon a defendant's compulsory process right. The privilege should be penetrable, for example, when the client receives use or transactional immunity for the relevant testimony.[241] Just as a witness no longer may invoke the privilege against self-incrimination if he is granted use or transactional immunity,[242] a defendant's right to compulsory process should prevail when the client has immunity. The costs of

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237. *See id.* (noting, in the Fifth Amendment context, that "[a]n unavailability exception to the privilege would force counsel to warn their clients against communicating sensitive information for fear of subsequent forced disclosure").

238. *See* Spaulding, *supra* note 233, at 314 (explaining that in the absence of the attorney-client privilege, "guilty clients would simply withhold incriminating statements from counsel, thus leaving the prosecution in no better position to make its case, while compromising the competence and discretion of defense counsel").

239. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (providing the standard for when the Confrontation Clause is implicated).

240. *See* Douglas v. Alabama, 380 U.S. 415, 419 (1965) (holding that the Confrontation Clause prevents a witness from testifying if he or she will invoke the Fifth Amendment when cross-examined).

241. *See* Furs v. Superior Court, 3 A.3d 912, 915 (Conn. 2010) ("Use immunity is defined as '[i]mmunity from the use of the compelled testimony (or any information derived from that testimony) in a future prosecution against the witness.' Transactional immunity 'protects a witness from prosecution for the offense to which the compelled testimony relates.'" (internal citations omitted)).

242. *See* Kastigar v. United States, 406 U.S. 441, 448 (1972) (holding that the government can require a witness to testify in spite of the witness's assertion of the privilege against self-incrimination if it grants either use or transactional immunity). Immunity can often be granted by a prosecutor at will. A judge might also order a prosecutor to provide a potential witness with immunity when the prosecutor "deliberate[ly] [denies] immunity for the purpose of withholding exculpatory evidence and gaining a tactical advantage through such manipulation." Blissett v. Lefevre, 924 F.2d 434, 442 (2d Cir. 1991) (citation omitted).

such an exception would be minimal. The client no longer risks conviction because of the communication. And the client could be required to provide the facts underlying his communications if he were available. Therefore, a penetrable privilege no longer places the client in a worse position by communicating with his attorney.

When the client does not receive immunity, an exception allowing incriminating statements to be discovered after the client's death provides some relief.[243] It is true the attorney-client privilege applies with full force after a client's death.[244] However, even the party that advocated for that position before the Supreme Court conceded that there may be times when that privilege must yield to a defendant's constitutional rights.[245] Such circumstances arise when a client dies and no longer faces criminal liability for his communications with his attorney. While the fear of post-mortem embarrassment may chill a client from incriminating himself to his attorney, the cost of that chilling effect is outweighed by the defendant's Sixth Amendment interest in obtaining facts that are significantly probative or exculpatory to his case. Therefore, when a client dies, the balancing of the interests again weighs in favor of a penetrable privilege.

Ultimately, this balancing test results in a penetrable privilege when the information the defendant seeks to discover would not tend to incriminate the privilege-holder. If, on the other hand, the relevant communication would incriminate the privilege-holder, the privilege should generally be impenetrable, subject to the exceptions outlined above.

### *B. The Proper Standard*

This Section articulates a standard for when a defendant's rights to compulsory process or confrontation can pierce the attorney-client privilege. Once a court becomes aware that a privileged communication exists,[246] it should review the communication in camera and apply the following standard:

> If both of the following elements are met, the relevant communication cannot be discovered:
>
> (1) The communication falls within the attorney-client privilege; and
> (2) The declarant's statement "would furnish a link in the chain of evidence needed to prosecute" the client.[247]

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243. A similar carveout should exist where the statute of limitations has run, as the declarant would no longer face criminal liability for the incident.

244. *See* Swidler & Berlin v. United States, 524 U.S. 399, 408 (1998).

245. *Id.* at 408 n.3 (noting that the petitioners conceded that "exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the [attorney-client] privilege").

246. A defendant can learn that potentially exculpatory evidence exists in a number of ways. At times, the conflict comes out on cross examination. *See* Warzek v. Chavez, No. C 10-2632 PJH, 2013 WL 2395199, at *14 (N.D. Cal. May 29, 2013). Other times, it is brought to the defense's attention when the prosecutor alerts the court, *see* Murdoch v. Castro, 365 F.3d 699, 701 (9th Cir. 2004), or information was inadvertently overheard by the defendant, *see* United States v. Rainone, 32 F.3d 1203, 1207 (7th Cir. 1994).

247. Hoffman v. United States, 341 U.S. 479, 486 (1951) ("The [privilege against self-incrimination] not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise

> Even if each of the aforementioned elements are met, the privilege may be pierced if:
>
> (1) The client is provided with use or transactional immunity for the testimony; or
>
> (2) The client is no longer facing criminal liability for the relevant act because:
>
> (a) The statute of limitations has run; or
>
> (b) The client is deceased.

Even if the privilege is impenetrable,[248] when the witness attempts to invoke the attorney-client privilege on cross examination and the court finds that the privileged information would give the jury "a significantly different impression of [the witness's] credibility,"[249] the judge should give the privilege-holder the option to waive the privilege. If the privilege-holder refuses to waive the privilege, the judge should strike the witness's direct testimony.

If any of the above elements are not met, or the communication falls within one of the standard's exceptions, the attorney-client privilege will no longer be impenetrable. In that situation, a defendant alleging a violation of his right to confrontation can pierce the privilege when the information would give the jury "a significantly different impression of [the witness's] credibility."[250] When a defendant alleges a violation of his right to compulsory process, the privilege should be pierced when the evidence is favorable to the defendant's case and would create "a reasonable likelihood that the testimony could have affected the judgment of the trier of fact."[251]

### *C. Applying the Standard*

This Section applies the proposed standard to concrete examples. The first example comes from the Seventh Circuit case *United States v. Rainone*.[252] There, four men were charged under the Racketeer Influenced and Corrupt Organizations statute for running a "protection racket."[253] The racket required small business owners to make cash payments to the defendants in order to avoid substantial harm to themselves and their families.[254] Before trial, the group's leader—Leonard

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embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.").

248. There is admittedly some tension in calling a privilege that has exceptions impenetrable. However, the use of the term is designed to capture the notion that the privilege cannot be pierced regardless of how probative the communication at issue might be.

249. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (providing the standard for when the Confrontation Clause is implicated).

250. *Id.*

251. United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982) (citation omitted).

252. 32 F.3d 1203 (7th Cir. 1994).

253. *Id.* at 1205.

254. *Id.*

Patrick—agreed to testify against the other defendants.[255] When the other defendants cross-examined him at their trial, they sought to introduce privileged notes that Patrick wrote to his attorney.[256] The notes stated that "an FBI agent told Patrick that if he didn't cooperate[,] the government would imprison him with former accomplices who would kill him for having ratted on them."[257]

Under the proposed rule, the other defendants would have the right to introduce the note if it would give the jury a significantly different impression of Patrick's credibility.[258] For the privilege to be impenetrable, the privileged communication must "furnish a link in the chain of evidence" necessary to prosecute the client.[259] Here, the note merely shows the potential consequences that might arise if Patrick failed to cooperate with the government. Because the government could not use those consequences to help establish Patrick's guilt, the other defendants could pierce Patrick's attorney-client privilege.

The Northern District of California case *Warzek v. Chavez* also demonstrates how the privilege may be penetrable.[260] There, a man was on trial for allegedly sexually assaulting his fourteen-year-old daughter.[261] The man's wife testified that she saw the defendant "viewing a picture of a naked girl who was approximately the victim's age."[262] On cross-examination, the man sought to pierce the wife's attorney-client privilege.[263] The wife previously hired an attorney in order to file a civil lawsuit on behalf of her daughter.[264] The defendant contended that piercing the attorney-client privilege would show that the wife "was the 'driving force' behind the civil case to obtain a money judgment against [the] defendant, [and] that [she] was using her daughter to accomplish that goal."[265]

Under the proposed standard, the defendant would be able to pierce the wife's attorney-client privilege. The wife's specific statements to her attorney were never disclosed. However, assuming they were of the ilk alleged by the defendant, they merely show her motivation for bringing a civil suit and impeach her credibility. Because the wife's statements did not "furnish a link in the chain necessary to prosecute" the wife, the defendant could have pierced the privilege if he was able to

255. *Id.*
256. *Id.* at 1206.
257. *Id.* at 1207.
258. *See* Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (providing the standard for when the Confrontation Clause is implicated).
259. *See* Hoffman v. United States, 341 U.S. 479, 486 (1951) ("The privilege [against self-incrimination] not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.").
260. No. C 10-2632 PJH, 2013 WL 2395199, at *13 (N.D. Cal. May 29, 2013).
261. *Id.* at *8.
262. *Id.* at *1.
263. *Id.* at *14.
264. *Id.*
265. *Id.*

show that the statements would "give the jury a significantly different impression" of the wife's credibility.

Finally, the Southern District of New York case *Morales v. Portuondo* shows where the privilege is impenetrable.[266] There, Jose Morales was tried and convicted for murder.[267] But a third party, Jesus Fornes, confessed to his attorney that Morales was innocent and that Fornes was the true killer.[268] When Morales attempted to call Fornes, he asserted his Fifth Amendment privilege against self-incrimination.[269] Morales's attorney then might have attempted to call Fornes's attorney to testify about the confession his client made to him. Under this rule, however, the attorney-client privilege would have been impenetrable because the confession would have incriminated Fornes and fallen squarely within the privilege's parameters. Therefore, unless Fornes was granted immunity for the attorney's testimony, Morales would have been unable to access Fornes's confession.

## CONCLUSION

The Sixth Amendment rights to confrontation and compulsory process are necessary to prevent wrongful convictions and ensure that a defendant has the necessary tools to litigate his case. At the same time, the attorney-client privilege is necessary to maintain the integrity of the adversarial system and enable a defendant to fully exercise his Fifth Amendment privilege against self-incrimination and Sixth Amendment right to the effective assistance of counsel. When these interests collide, courts have fractured in determining which should prevail. Some craft a rule that categorically requires the attorney-client privilege to yield. Some cast a per se bar on discovering the privileged communications. Others engage in fact-specific balancing tests. All miss the mark.

The new standard provided by this Note resolves conflicts between a defendant's Sixth Amendment rights and the attorney-client privilege. Under this proposed standard, the attorney-client privilege will be penetrable unless the relevant communication would subject the client to criminal liability. This standard provides certainty about which communications may cause the privilege to be pierced, while simultaneously respecting the need to balance a defendant's Sixth Amendment interests against an evidentiary rule's purpose. This, in turn, protects the defendant's constitutional right to put forth probative evidence, while simultaneously ensuring that the attorney-client relationship does not unduly suffer.

266. 154 F. Supp. 2d 706 (S.D.N.Y. 2001).
267. *Id.* at 709.
268. *Id.* at 710.
269. *Id.*