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The Parent-Child Privileges: Hardly a New or Revolutionary Concept

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THE PARENT-CHILD PRIVILEGES: HARDLY A NEW OR REVOLUTIONARY CONCEPT

WENDY MEREDITH WATTS*

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We know that one of the horrors of Nazi Germany was children snitching on their parents. It seems to me common decency that you don't put a child before a grand jury on her mother's conduct.¹

I. INTRODUCTION

In 1983, the Defense Function Committee of the American Bar Association-Criminal Justice Section decided that it would draft a model parent-child privilege statute. This decision was based in part on the committee's concern over prosecutors calling children to testify against their parents before grand juries and at trials. The committee was further concerned that prosecutors were not addressing the issue of the future welfare of child witnesses. The committee took the position that an ABA-sanctioned model statute was needed to provide guidance to courts and legislatures faced with the privilege issue.

The committee prepared the first draft of the statute in 1983² and presented it to the Criminal Justice Section Council for com-

1. Burke, *Nevada Girl, 16, Ordered to Testify Against Mother*, Nat'l L.J., Mar. 9, 1981, at 3, col. 2 (quoting Irving Younger).

2. The statute was only a page and a half in length, addressing only a confidential communication privilege.

ment in the spring of 1984. In a concise brief³ the prosecutors took issue with and rejected the whole notion of a new privilege. The Defense Function Committee then decided to reevaluate its approach to the situation. In the fall of 1984, the incoming chairman of the Defense Function Committee reassigned the responsibility for the drafting of the statute to a new subcommittee.⁴

The research for the project began in January 1985. The subcommittee drafted a statute and presented it with a supporting document in April 1985 to a joint meeting of the Defense and Prosecution Function Committees. The prosecutors, although generally opposed to the idea of a new privilege, were willing to discuss the issue because it involved children. However, when the privilege was presented to a meeting of the entire Prosecution Function Committee in San Francisco a month later, the committee was not at all receptive. The committee took a hard, uncompromising stand against the privilege.⁵ At this point, the battle began.

Since the May 1985 meeting, the privilege has been presented to the prosecutors for information or discussion on three separate occasions. Again, the prosecutors were uncompromising and encouraged the Defense Function Committee to drop the whole project. The proposed privilege, then in its fourteenth draft, was presented for action to the Criminal Justice Section Council on August 9, 1986. Although lengthy debate preceded the vote, the Council adopted the statute.⁶

Before the statute was presented to the American Bar Association House of Delegates for action in February 1987, as originally scheduled, the National Conference of Commissioners on Uniform State Laws argued that the ABA should not take action on the

3. The Prosecution Function Committee filed a response brief to the proposed statute. In essence, the brief stated that such a statute was unnecessary. The committee argued further that no legal basis for the creation of such a statute existed.

4. Defense Function Committee Chairman E.E. "Bo" Edwards appointed the author as chairperson of the subcommittee responsible for drafting the parent-child privilege statute. Research assistants for the original report were Mercer law students Mark Gager, Chris Shuman, and Don Clark. Alice Waller, Jim Williams, and Dee Hill, also of Mercer Law School, participated as research assistants in 1986.

5. Four members of the Prosecution Function Committee not only opposed the privilege but made clear in voicing their opinions that the issue would continue to be highly controversial and emotional.

6. The Criminal Justice Section Council vote was 12-7.

statute because it involved a matter that impacted on state laws of evidence. The N.C.C.U.S.L. requested that they be given time to study the statute. The Criminal Justice Section agreed to withdraw the statute from the House of Delegate's action calendar until the August 1987 annual ABA meeting to afford the N.C.C.U.S.L. the time they requested.

When the actual drafting process began in February 1985, the politics of the voting audience had to be taken into account. The first draft was actually a family privilege and was intended to be very broad; the draft left ample room to accommodate all the prosecutors' remarks about how the statute should be changed. As the next thirteen versions were redrafted and fine tuned, the statute became more and more narrow. This fact has been a source of disagreement among the members of the Defense Function Committee.⁷ However, in the interest of a favorable outcome in the August 1987 voting, the final version of the statute contained in this Article was presented to the Criminal Justice Section Council in its narrow form.

This Article is the supporting document for the parent-child privilege project. This Article is not intended to be an in-depth treatise on privilege law, but is intended solely to document and support an innovative approach to the need for the adoption of a parent-child privilege. The Article concludes with the proposed model statute and official comment designed to accomplish that goal.

II. HISTORICAL OVERVIEW OF THE DEVELOPMENT OF EVIDENTIARY PRIVILEGES IN AMERICAN LAW

The privilege has long been one of the most controversial subjects within the body of American evidence law. Unlike other evidentiary rules aimed at ascertaining the truth by excluding unreliable evidence,⁸ privileges preclude compelled testimony from individuals who are participants in protected relationships. Be-

7. Several members of the Defense Function Committee continue to feel strongly that the statute should be written as a broad family privilege. The author believes that such a statute would never have been seriously entertained by the Criminal Justice Section Council.

8. Examples include the exclusionary rules, including the hearsay rule, the opinion rule, the best evidence rule, and the rule rejecting proof of bad character as evidence of crime.

cause privileges can impede both the fact finding process and the search for truth, they are often viewed as being contrary to the centuries-old common law principle that "the public has a right to every man's evidence."⁹ Society, however, although aware of the potential disadvantages associated with privileges, recognizes the occasional protection of privileged relationships as more valuable than the goal of seeking the ultimate truth.

The concept of privilege law dates back to ancient Rome.¹⁰ Evidentiary privileges were first recognized at common law during the Elizabethan period.¹¹ The first specific evidentiary privilege protected the attorney-client relationship, with cases addressing the attorney-client privilege dating back to 1577.¹² Not long after, the common law recognized a spousal privilege.¹³ This broad privilege protected communications between spouses. It was premised on the beliefs that husband and wife were a single entity before the law and that one could not be forced to testify for or against her or himself.¹⁴ By the middle of the seventeenth century the spousal privilege was established in both civil and criminal law.¹⁵ Courts developed exceptions to the attorney-client and spousal privileges through the seventeenth and eighteenth centuries,¹⁶ but by the early years of the nineteenth century common law evidentiary privileges were firmly established in English law.¹⁷

The development of evidentiary privileges in American law was rather slow. Prior to the early nineteenth century, American judges faced with privilege issues had no choice but to be guided by the

9. See *Branzburg v. Hayes*, 408 U.S. 665, 674 (1972) (quoting *In re Pappas*, 358 Mass. 604, 607, 266 N.E.2d 297, 299 (1971)); see also 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 70 (McNaughton rev. ed. 1961).

10. See Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 488 (1928).

11. See 1 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 8, at 607 (Tillers rev. ed. 1983).

12. See *Berd v. Lovelace*, 21 Eng. Rep. 33 (1577); *Dennis v. Codrington*, 21 Eng. Rep. 53 (1580).

13. See *Bent v. Allot*, 21 Eng. Rep. 50 (1580).

14. Project, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 NW. U.L. REV. 208, 208 (1961); Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 675 (1929).

15. See W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 126-222 (7th ed. 1956).

16. See, e.g., H. BATHURST, THE THEORY OF EVIDENCE (London 1761).

17. See 1 J. WIGMORE, *supra* note 11, § 8a, at 607.

English common law. Congress and state legislatures left alone the issues of privilege law well into the nineteenth century. Faced at that time with the codification movement and enthusiastic scholars forcing it along,¹⁸ state legislatures began the attempt to codify evidence codes. The codification movement prompted state legislatures to adopt privilege statutes to replace the common law privileges. New privileges were a subject of legislative action as early as 1828 when New York adopted a physician-patient privilege statute.¹⁹ Missouri adopted a very similar privilege statute seven years later.²⁰

The states continued to replace the common law of evidence with new statutes. By 1860 a great disparity existed among the states' laws of evidence. By the late nineteenth century, American lawyers, legal scholars, and jurists began to express concern about these disparities. James Bradley Thayer, in his treatise on evidence, stated that existing state evidence laws were a patchwork "of confused doctrines, expressed in ambiguous phrases, Latin or English, half understood, but glibly used"²¹

Continuing concern about the confusion within the law of evidence prompted a group of legal scholars to form the Committee to Propose Specific Reforms in the Law of Evidence.²² Formed in 1922, the group worked for five years before suggesting various needed changes in the law of evidence.²³ The group stated that its ultimate goal was unification.²⁴

In 1942, the American Law Institute published the Model Code of Evidence.²⁵ The model code, however, failed to gain wide support. In 1949, the National Conference of Commissioners on Uniform State Laws also began drafting rules of evidence; the Uniform

18. See D. FIELD, CENTENARY ESSAYS (A. Peppy ed. 1949).

19. See 8 J. WIGMORE, *supra* note 9, § 2380, at 819-20.

20. See *id.*, §2380, at 820.

21. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 512 (1898).

22. See E. MORGAN, Z. CHAFEE, R. GIFFORD, E. HINTON, C. HOUGH, W. JOHNSTON, E. SUNDERLAND, & J. WIGMORE, THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM (1927).

23. *Id.* at xix-xx.

24. *Id.*

25. MODEL CODE OF EVIDENCE (1942). Despite their general aversion to privileges, see *id.* at 2231, the authors included the attorney-client (Rule 26), spousal (Rule 28), priest-penitent (Rule 29), physician-patient (Rule 27), and government informant (Rule 36) privileges.

Rules of Evidence were completed and approved in 1953.²⁶ The Uniform Rules explicitly recognized the attorney-client, physician-patient, clergy-communicant, and informer identity privileges.²⁷ Despite initial enthusiasm for the Uniform Rules, however, only two states adopted the rules in the next fifteen years.²⁸

In 1974, the National Conference revised its rules. Since then, many states have adopted at least major portions of the document.²⁹ The National Conference again is revising its rules, including the lawyer-client, physician- and psychotherapist-patient, husband-wife, and religious privileges.³⁰

Until the 1975 enactment by Congress of the Federal Rules of Evidence, much confusion surrounded the issue of the application of privilege law in federal courts. Courts were split over civil matters, with some courts thinking state statutes applied and others taking the position that state court decisions controlled.³¹ Criminal cases posed less of a problem after the Supreme Court held in 1934 that in criminal cases the federal courts were free to apply "common law principles as interpreted . . . in light of reason and experience."³² This holding, codified as Rule 26 in the 1946 Federal Rules of Criminal Procedure,³³ explicitly included a reference to witnesses' privileges.

After years of confusion surrounding issues of evidence law, the American Bar Association urged the Judicial Conference of the United States to create and adopt rules of evidence for the federal district courts.³⁴ In 1973, the Supreme Court transmitted the pro-

26. UNIF. R. EVID. 23-39 (ed. 1974).

27. *Id.*

28. Kansas and New Jersey were the only two states to adopt the first Uniform Rules of Evidence.

29. See generally 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶¶ 501(07), 502(05), 503(03), 504(08), 506(06), 507(05), 508(05), 509(12), 510(08), 511(03), 512(03), 513(03) (1986).

30. See UNIF. R. EVID. (Unpublished Draft 1986).

31. See COMM. ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, RULES OF EVIDENCE: A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE U.S. DISTRICT COURTS, *reprinted in* 30 F.R.D. 73, 82-89 (1962) [hereinafter *FEASIBILITY STUDY*].

32. *Wolfe v. United States*, 291 U.S. 7, 12 (1934) (citing *Funk v. United States*, 290 U.S. 371 (1933)).

33. FED. R. CRIM. P. 26.

34. See *FEASIBILITY STUDY*, *supra* note 38, 30 F.R.D. at 113.

posed Federal Rules of Evidence to Congress.³⁵ The rules included nine specific privileges.³⁶ After much discussion, debate, and input from affected persons, the nine privileges were replaced with Rule 501, which gave the federal courts power to expand privilege law on a case-by-case basis based on the principles of common law.³⁷

III. HISTORICAL OVERVIEW OF PARENT-CHILD PRIVILEGES

"Privilege" is derived from the Latin phrase, "*privata lex*."³⁸ It has been defined as a private law applicable to a small group of persons as their special prerogative,³⁹ or as a particular and peculiar benefit or advantage enjoyed by a person, company, or class beyond the common advantages of others.⁴⁰ Although *privata lex* was a term developed in the days of ancient Rome, privileges protecting special relationships existed centuries before Rome coined a term for them.

The rule of privilege must be distinguished from the rule of exclusion. While both serve to block the introduction of probative facts,⁴¹ the rationale for each is quite different. Rules of exclusion include the hearsay rule, the opinion rule, the rule rejecting proof of bad character as evidence of crime, and the best evidence rule.⁴² All were designed to preclude the introduction of unreliable or untrustworthy information which could cloud the fact finding process.⁴³ The rules of privilege have an equally noble purpose. Although privileges may impair and in rare circumstances even completely stifle the fact finding process,⁴⁴ they guard and foster relationships that society deems desirable and worthy of protec-

35. See S. REP. NO. 1277, 93d Cong., 2d Sess. 4, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7052.

36. *Id.* at —, 1974 U.S. CODE CONG. & ADMIN. NEWS at 7058. Included were the attorney-client, psychotherapist-patient, clergy-communicant, and husband-wife adverse testimonial privileges. Neither the physician-patient nor the husband-wife confidential communications privileges were included.

37. FED. R. EVID. 501.

38. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1805 (1986).

39. Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 181 (1960).

40. BLACK'S LAW DICTIONARY 1077 (5th ed. 1979).

41. See C. McCORMICK, EVIDENCE § 72, at 171 (E. Cleary 3d ed. 1984).

42. *Id.* at 170-71.

43. *Id.* at 171.

44. See 8 J. WIGMORE, *supra* note 9, § 2192, at 72-73.

tion. One noted commentator has stated that "[t]heir warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice."⁴⁵

The rules of privilege fall into three categories.⁴⁶ The first includes privileges designed to protect the rights of the individual, such as the exclusionary rule or the privilege against self-incrimination.⁴⁷ The second includes "privileges designed to protect the integrity of the system of government,"⁴⁸ such as the privilege that accompanies government secrets. The third includes privileges designed to protect individuals as participants in relationships which the state deems worthy of special protection and nurturing.⁴⁹

Many of our common law principles and many of the legal forms and customs which we find difficult to explain have their origins in the Written and Oral Law of Judaism.⁵⁰ Jewish law is founded upon two major sources: the legal elements contained in the *Five Books of Moses*, also known as the *Pentateuch*, or in Hebrew, the *Torah*; and the development of the Law known as the *Tradition*. The *Tradition* was the Judaic "common law" and served as an authoritative interpretation of the *Five Books of Moses*.

Jewish law was further developed by scholars and courts, who based their opinions and decisions on the laws contained in the *Five Books of Moses*. They were compiled in the *Talmud*, which is considered the basic source of Jewish Law.⁵¹ The *Talmud* was completed in 557 A.D.⁵² It contains all the opinions, discussions, and Biblical interpretations of Jewish scholars and courts from the

45. C. McCORMICK, *supra* note 41, § 72, at 171.

46. Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 602-03 (1970).

47. *Id.*

48. Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 609-10 (1964).

49. Coburn, *supra* note 46, at 602-03.

50. Auerbach, *The Talmud—A Gateway to the Common Law*, 3 W. RES. L. REV. 5, 8 (1951).

51. Comment, *The Privilege Against Self-Incrimination in Anglo-American and Jewish Law*, 5 AM. J. COMP. L. 115, 117 n.14 (1956).

52. *Id.*

Biblical era until the fifth century A.D.⁵³ One rule of ancient Jewish Law specifically "forbids a parent from testifying against his or her children."⁵⁴

Like the Jews before them, the Romans understood that the foundation of society was built upon the family. The idea that the state could reach intra-familial communications to ensure effective law enforcement was never accepted by Roman law.⁵⁵ Early Roman law recognized the rule of *testimonium domesticum*, which mandated that parents, children, patrons, freedmen, and slaves could not be compelled to give testimony against each other.⁵⁶ The Romans had several justifications for the exclusions. First, the Romans believed that every citizen had a duty not to violate the *fides* or faith on which the family rested. Second, the Romans believed that the testimony of family members was valueless either for or against a litigant; if members of a family testified, they could not be believed because of the strong motive for misstatement or perjury.⁵⁷ Further, if witnesses violated group solidarity by testifying against a family member, they were disreputable persons, unworthy of belief.⁵⁸ The rule also helped to prevent erosion of family relationships.⁵⁹

Perhaps the most famous application of the Roman parent-child privilege, or *testimonium domesticum*, was in a case tried by the great orator Cicero. Cicero was prosecuting the Roman governor of Sicily on charges of bribery.⁶⁰ Under the rule of *testimonium domesticum*, Cicero was prevented from calling the governor's *patronus*⁶¹ as a witness, a move which would have been favorable to

53. *Id.*

54. *In re Greenberg*, 11 Fed. R. Evid. Serv. 2d (Callaghan) 579, 581 n.6 (D. Conn. 1982) (Rabbi Hirsch Joseph Simckes, a graduate of the Jewish Theological Seminary of America, Rabbi Seymour Siegel, a professor at the Jewish Theological Seminary of America, and Rabbi David Novak, a distinguished author of texts on Jewish law and theology, agreeing that the privilege is a rule of the Jewish religion, citing Sanhedrin 27B of the *Babylonia Talmud*).

55. *See generally* Radin, *supra* note 10.

56. *Id.*

57. *Id.* at 488.

58. *Id.* at 488-89 (citing Licinius Rufus 22, 5, 6, at n.9).

59. *Id.* at 488.

60. *Id.*

61. A *patronus* was a father or a person corresponding in some respects to a father. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1315 (3d ed. 1986).

his case. Cicero regretted not being able to call the *patronus* but understood and advocated the potential social policy considerations for the exclusions of the testimony.⁶²

Roman law was finally codified during the reign of Emperor Justinian the Great, who ruled from 527-565 A.D. The resulting codification of Roman law was *Corpus Juris Civilis*. It became the basis for the laws of the emerging nation-states of Europe during the Renaissance period.

The Code Napoleon, completed at the order of Napoleon Bonaparte, was largely founded on Roman law. It included the Roman rule of law that "no one may be required to disclose confidences between himself and a family member."⁶³ The Code Napoleon spread across Europe during the Napoleonic Wars, for with Napoleon's legions came Napoleon's law. Although Napoleon's armies were driven back to France, the Code Napoleon remained a dominant legal influence in continental Europe.

Article 248 of the French Civil Code states, "[n]o one can be summoned as a witness if he is a blood relation, or a relative by marriage in direct line, or husband and wife of one of the parties, even although divorced."⁶⁴ The relations included under Article 248 are: father, mother, grandfather, grandmother, son, daughter, grandson, granddaughter, brothers, sisters, brothers- and sisters-in-law, and the husband or wife of the accused, even if divorced. The law of West Germany has a similar provision that prevents what the Germans call *unbefugt*, or unauthorized disclosure.⁶⁵ Swedish law also embodies a parent-child privilege.⁶⁶ Additionally, the prevailing view in the civil law countries of Western Europe is that no person will be forced to divulge confidences between him or herself and another family member.

This historical overview of the concept of the parent-child privilege suggests that it is hardly a new or revolutionary one. The idea has existed for approximately 3,500 years. It is interesting to note that parent-child privileges, and the testimonial privileges in gen-

62. Radin, *supra* note 10, at 488.

63. Quick, *Self-Incrimination Under the Uniform Rules of Evidence*, 3 WAYNE L. REV. 1 (1950).

64. C. PR. CIV. art. 248, § 336 (G. Koch trans. 1963).

65. See ZPO § 52(3) (H. Niebler trans. 1965).

66. SWED. CODE JUD. P. ch. 36, § 3 (A. Bruzelius & R. Ginsburg trans. 1967).

eral, are conspicuously absent in totalitarian regimes. Nazi Germany had no such privileges. Today, the Soviet Union has no parent-child or family type privilege.⁶⁷ Perhaps in totalitarian regimes not even family relationships are deemed private and free from the state's intense scrutiny. Without adoption of a parent-child privilege in the United States, we face a similar intrusion into the privacy of the family. In this time of unstable family relationships, it is important that we prevent any further harm to the individual's integrity and the family's autonomy.

IV. EXISTING PRIVILEGES IN AMERICAN LAW

It is generally agreed that certain relationships are vital to society. It is also agreed that these relationships cannot exist in absence of confidentiality. In the United States, five privileges currently are designed to protect such relationships. Firmly established in American law, they are: the attorney-client privilege, the physician-patient privilege, the priest-penitent privilege, the psychotherapist-patient privilege, and the husband-wife privilege.⁶⁸

A. Attorney-Client Privilege

The attorney-client privilege originated in the law of ancient Rome and, oddly enough, was an outgrowth of the Roman family privilege.⁶⁹ The attorney-client privilege also was present in common law and was established firmly by the reign of Elizabeth I.⁷⁰ The common law basis for this privilege was the "point of honor" involved in the gentleman attorney's holding of the secrets of his client.⁷¹ The "point of honor" was the basis for the privilege until the nineteenth century, when the focus turned to the preservation of the client's right to communicate in confidence with his attorney.⁷² This new rationale was designed to remove the client's apprehension of compelled disclosure of his attorney-client confi-

67. V. GSOVSKI, *SOVIET CIVIL LAW* 118-19 (1948) (noting that Soviet law provides no privilege to refuse to testify against close relatives).

68. See, e.g., Coburn, *supra* note 46, at 601-12.

69. Radin, *supra* note 10, at 488.

70. 8 J. WIGMORE, *supra* note 9, § 2290, at 542.

71. *Id.*, § 2286, at 530-31.

72. *Id.*, § 2290, at 543.

dences.⁷³ An 1846 case gives perhaps the most concise yet complete rationale for the privilege:

Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much. And, surely the meanness and the mischief of prying into a man's confidential consultations with his legal advisor, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for the truth itself.⁷⁴

The sixth amendment's requirement of the right to counsel in criminal cases and the fourteenth amendment's due process requirement provide further bases for the attorney-client privilege. In *Caldwell v. United States*,⁷⁵ for example, the United States Court of Appeals for the District of Columbia Circuit held that the interception of attorney-client conferences violated those constitutional guarantees.⁷⁶ If the client's conversations with his attorney were subject to disclosure, the client could be discouraged from revealing essential information to his attorney.⁷⁷ Without a privilege to shield these confidences, a system of justice based upon fairness and democratic principles could not exist.

B. Physician-Patient Privilege

Unlike the attorney-client privilege, the physician-patient privilege did not develop at common law, but was created statutorily. In 1828, New York became the first state to enact a physician-patient privilege.⁷⁸ Missouri followed New York's lead in 1835.⁷⁹ Today, more than two-thirds of the states recognize the privilege by statute.⁸⁰

73. *Id.*

74. *Pearse v. Pearse*, 1 De G. & Sm. 3809, 16 L.J. Ch. 153 (1846).

75. 205 F.2d 879 (D.C. Cir. 1953).

76. *Id.* at 881.

77. Comment, *From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?*, 1978 B.Y.U. L. REV. 1002, 1006.

78. 8 J. WIGMORE, *supra* note 9, § 2380, at 819.

79. *Id.* §2380, at 820.

80. See Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. REV. 893, 907-11 (1982).

The privilege is based upon a legal and an ethical "duty" not to reveal confidences.⁸¹ The important policy consideration supporting the privilege is that if patients fear their confidential communications with the physician might later be revealed, they will be hesitant to disclose all the facts necessary to treat their illness.⁸² Furthermore, the privilege has the immediate effect of shielding the patient from embarrassment and invasion of his privacy.⁸³

C. Priest-Penitent Privilege

The priest-penitent privilege did not exist at common law,⁸⁴ but it has been sanctioned by the legislatures of most states.⁸⁵ The clergyman is a spiritual and personal counselor, and the relationship arising from that role therefore is one founded upon an atmosphere of confidence and moral trust. Perhaps the most reasonable justification for the privilege is that compelling clergymen to divulge the substance of communications is so repugnant that it has been forbidden.⁸⁶

D. Psychotherapist-Patient Privilege

Next to the attorney-client privilege, the psychotherapist-patient privilege is the most widely accepted professional privilege in America.⁸⁷ This privilege is based on the premises that confidentiality is necessary for effective treatment of emotional disorders and that "every person needs the opportunity for intimate and trusting relationships in which highly personal information can be freely communicated."⁸⁸ One commentator has stated, "Among physicians, the psychiatrist has a special need to maintain confidential-

81. Coburn, *supra* note 46, at 607.

82. C. McCORMICK, *supra* note 41, § 98, at 244.

83. *Cf. Falkinburg v. Prudential Ins. Co.*, 132 Neb. 831, ___, 273 N.W. 478, 480-81 (1937) (analyzing physician-patient privilege in context of insurance company's request to prove insured's mental state).

84. See 8 J. WIGMORE, *supra* note 9, § 2394, at 869; Regan & Macartney, *Professional Secrecy and Privileged Communications*, 2 CATH. LAW. 3, 4 (1956).

85. 8 J. WIGMORE, *supra* note 9, § 2395, at 873.

86. Coburn, *supra* note 46, at 609-10.

87. Comment, *The Child-Parent Privilege: A Proposal*, 47 FORDHAM L. REV. 771, 779 (1979).

88. Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1, 10 (1982).

ity. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely A threat to secrecy blocks successful treatment."⁸⁹

E. Husband-Wife Privilege

Marital privileges have existed since ancient times. They were present in Jewish and Roman law, as well as at common law. The common law rationale for these privileges was that interested parties were not credible witnesses in their own causes.⁹⁰ This theory stems from Coke's metaphysical conception of the husband and wife as one legal entity.⁹¹

Parliament abolished the disqualification of husbands and wives in the English Act of 1853⁹² and replaced it with a rule that sought to prevent compelled disclosure of communications made between husband and wife during marriage.⁹³ The basis for the new rule was that protection of confidential communications between spouses promotes trust and reliance between the two. Some critics argue that few couples are aware of this privilege and that therefore it does not influence their conduct.⁹⁴ Professor Stanton responded to this argument by noting that "[t]he fact that most couples may be unaware of the privilege does not contradict their expectation of complete confidentiality and presumed abhorrence of compulsory disclosure of marital secrets."⁹⁵ In a unique unanimous decision in *Trammel v. United States*,⁹⁶ the United States Supreme Court modified its decision in *Hawkins v. United States*⁹⁷ to allow the witness-spouse alone a privilege to refuse to

89. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT No. 45, reprinted in COMM. ON RULES OF PRAC. AND PROC., JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES (March 1969).

90. See 1 W. BLACKSTONE, COMMENTARIES *443. As Blackstone observed, "[I]f they were admitted to be witnesses for each other, they would contradict one maxim of law, *Nemo in propria causa testis esse debet*" *Id.* This maxim is translated as: "No one ought to be a witness in his own cause." See Coburn, *supra* note 46, at 610 n.73.

91. See Coburn, *supra* note 46, at 610 n.74.

92. C. McCORMICK, *supra* note 41, § 78, at 189.

93. *Id.*

94. See, e.g., Hutchins & Slesinger, *supra* note 14, at 682.

95. Stanton, *supra* note 88, at 6 (footnote omitted).

96. 445 U.S. 40 (1980).

97. 358 U.S. 74 (1958).

testify adversely.⁹⁸ The Court reasoned that the justification for the privilege against adverse spousal testimony lies in the privilege's perceived role in fostering harmony and sanctity of the marriage relationship.⁹⁹ If the witness-spouse voluntarily testified against the other about adverse acts, however, the harmony of the relationship was probably destroyed, and no privilege should block the testimony.¹⁰⁰

V. LEGAL ARGUMENTS IN SUPPORT OF PARENT-CHILD PRIVILEGES

The ancient Romans and Jews recognized that the progress of civilization depended upon the protection of society.¹⁰¹ The most efficient and desirable means to protect society was to protect the sanctity of the family and to foster strong family relationships.¹⁰² This remains true, for the husband-wife and parent-child relationships have the most enduring bonds and are not conditioned solely upon economic relationships. Although special professional relationships, such as the attorney-client or priest-penitent relationships, are also vital to the existence of society, the family unit existed eons before any form of professional relationship.¹⁰³

Rules of privilege are established firmly in American law to guard relationships which society deems desirable and worthy of protection. Although such rules protect the priest-penitent, psychotherapist-patient, attorney-client, and husband-wife relationships, the majority of American jurisdictions do not afford similar protection to the parent-child relationship.

The courts have wrestled with this issue for at least ten years with tremendous disparity in opinion.¹⁰⁴ The erratic and inconsis-

98. *Trammel*, 445 U.S. at 53.

99. *Id.*

100. *Id.* at 52. A husband-wife confidential communications privilege embraces similar policy considerations. *Blau v. United States*, 340 U.S. 332, 333-34 (1951).

101. See E. KESSLER, *ANTHROPOLOGY, THE HUMANIZING PROCESS* 34 (1974).

102. *Id.*

103. *Id.*

104. See *United States v. Davies*, 768 F.2d 893 (7th Cir.), *cert. denied*, 106 S. Ct. 553 (1985); *United States v. Ismail*, 756 F.2d 1253 (6th Cir. 1985); *In re Santarelli*, 740 F.2d 816 (11th Cir. 1984); *United States v. Jones*, 683 F.2d 817 (4th Cir. 1982); *United States ex rel. Riley v. Franzen*, 653 F.2d 1153 (7th Cir. 1981); *In re Starr*, 647 F.2d 511 (5th Cir. Unit A May 1981); *United States v. Penn*, 647 F.2d 876 (9th Cir.), *cert. denied*, 449 U.S. 903 (1980); *Port v. Heard*, 594 F. Supp. 1212 (S.D. Tex. 1984), *aff'd*, 764 F.2d 423 (5th Cir. 1985); *In re*

tent pattern of the court decisions makes it appropriate for the courts and state legislatures to consider seriously the adoption of the parent-child privileges.¹⁰⁵

The parent-child privileges can be adopted in all jurisdictions. The federal courts, under Federal Rule of Evidence 501, can adopt the parent-child privileges on a case-by-case basis.¹⁰⁶ The Federal District Courts of Nevada¹⁰⁷ and Connecticut¹⁰⁸ have taken this approach. The states are free to adopt the parent-child privileges by statute. A number of state courts faced with the responsibility of deciding the parent-child privilege issue have suggested and urged this approach.¹⁰⁹ In addition, statutory modification is the only avenue afforded some states which prohibit common law expansion of existing privilege law.¹¹⁰

Agosto, 553 F. Supp. 1298 (D. Nev. 1983); *In re Greenberg*, 11 Fed. R. Serv. 2d (Callaghan) 579 (D. Conn. 1982); *In re Terry W.*, 59 Cal. App. 3d 745, 130 Cal. Rptr. 913 (1976); *Hunter v. State*, 172 Ind. App. 397, 360 N.E.2d 588 (1977); *Gibbs v. State*, 426 N.E.2d 1150 (Ind. App. 1981); *State v. Gilroy*, 313 N.W.2d 513 (Iowa 1981); *Three Juveniles v. Commonwealth*, 390 Mass. 357, 455 N.E.2d 1203 (1983), *cert. denied*, 465 U.S. 1068 (1984); *State v. Bruce*, 655 S.W.2d 66 (Mo. App. 1983); *In re Mark G.*, 65 A.D.2d 917, 410 N.Y.S.2d 464 (Sup. Ct. 1978); *People v. Fitzgerald*, 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979); *In re Ryan*, 123 Misc. 2d 854, 474 N.Y.S.2d 931 (Fam. Ct. 1984); *In re Gloria L.*, 124 Misc. 2d 50, 475 N.Y.S.2d 1000 (Sup. Ct. 1984).

105. This Article proposes a model parent-child privileges statute. The statute embodies two privileges: the parent-child privilege as to adverse testimony, and the parent-child privilege as to confidential communications. In order to understand clearly the issues raised in this Article, one must delineate the difference between these two privileges.

Three separate privileges are part of the statute. They are: (1) the privilege held by the witness which allows the witness to decide whether or not to testify adversely; (2) the privilege held by the witness which prevents the witness from being compelled to testify as to a confidential communication; and (3) the privilege held by the defendant which allows the defendant to foreclose the disclosure of a confidential communication.

106. See FED. R. EVID. 501. The rule allows the federal courts to adopt new privileges on a case-by-case basis "in light of reason and experience." *Id.*

107. *In re Agosto*, 553 F. Supp. 1298, 1325 (D. Nev. 1983).

108. *In re Greenberg*, 11 Fed. R. Serv. 2d (Callaghan) 579, 584-85 (D. Conn. 1982).

109. See *People v. Sanders*, 99 Ill. 2d 262, 457 N.E.2d 1241 (1983); *State v. Gilroy*, 313 N.W.2d 513 (Iowa 1981); *Three Juveniles v. Commonwealth*, 390 Mass. 357, 455 N.E.2d 1203 (1983), *cert. denied*, 465 U.S. 1068 (1984); *State v. Bruce*, 655 S.W.2d 66 (Mo. App. 1983); *In re A & M*, 61 A.D.2d 426, 403 N.Y.S.2d 375 (1978).

110. At least 11 states have precluded statutorily the judicial expansion of their existing privilege law: Arkansas, ARK. R. EVID. 501 (1947), California, CAL. EVID. CODE § 911 (1967), Florida, FLA. STAT. § 90.501 (1976), Maine, ME. R. EVID. 501 (1976), Montana, MONT. CODE ANN. § 28-10-501 (1985), Nebraska, NEB. REV. STAT. § 27-501 (1985), Nevada, NEV. REV. STAT. § 49.015 (1986), New Mexico, N.M. STAT. ANN. § 11.501 (1978), North Dakota, N.D.R.

Continuity and predictability are necessary in law, but neither exist in the issue of parent-child privileges. The states are in a better position to create some measure of continuity and predictability by adopting the parent-child privileges by statute. The federal courts do not share this advantage, however, because they must adopt privileges on a case-by-case basis. The leeway in this process allows continued erratic and inconsistent decisions among the different federal courts. This situation can be remedied in only two ways. First, Federal Rule of Evidence 501 must be replaced with specific privileges, including the parent-child privileges. Second, the United States Supreme Court must sanction the parent-child privileges in a decision, giving the federal courts the green light to proceed in the same direction.

In addition, state codification of the parent-child privileges is desirable because it would promote legislative uniformity and control. Codification would preclude useless litigation concerning the application of the privileges. When a parent-child privilege has been asserted in the recent past, the hearings and arguments consumed anywhere from two hours to a day and a half.¹¹¹ Statutory codification of the privileges would allow judges and lawyers to determine in advance whether or not the privileges would apply in a certain situation, thus allowing for more efficient proceedings.

A. Constitutional Arguments in Support of Parent-Child Privileges

Over the years, the United States Supreme Court has recognized a number of fundamental rights involving the family. Some argue that these rights stem directly and explicitly from the Constitution,¹¹² while others argue that they fall within the constitutionally protected penumbral rights.¹¹³ Whatever the source, the Court con-

EVID. 501 (1977), Oklahoma, OKLA. STAT. ANN. tit. 2, § 2501 (West 1980), and Wisconsin, WIS. STAT. ANN. § 905.01 (West 1975).

111. Telephone interviews with nine attorneys from different U.S. cities (February 1985 to May 1986).

112. Cf. Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U.L. REV. 417, 419 (1976).

113. See, e.g., Comment, *Parent-Child Testimonial Privilege: Preserving and Protecting the Fundamental Right to Family Privacy*, 52 U. CIN. L. REV. 901, 905 (1983).

sistently has been hesitant to intervene in family affairs,¹¹⁴ recognizing that familial autonomy and privacy are at the very heart of the existence of a democratic society. Several cases establish the constitutional rights of family autonomy and the right of privacy.

In *Meyer v. Nebraska*,¹¹⁵ for example, in which a public school teacher taught German in violation of a state statute that prohibited teaching young people foreign languages,¹¹⁶ the Court held that parents have a right to direct the education of their children.¹¹⁷ Justice McReynolds, reasoning that the "liberty" guaranteed by the due process clause of the fourteenth amendment encompasses personal rights, stated that "liberty"

denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹¹⁸

In *Pierce v. Society of Sisters*,¹¹⁹ an Oregon statute required parents, guardians, or any other persons who controlled children between the ages of eight and sixteen to send those children to the local public schools.¹²⁰ The Court, however, held that parents have a constitutionally protected right to decide which school their children should attend.¹²¹ Applying the reasoning in *Meyer*, the Court held that the statute in question interfered with the "liberty" of

114. See Comment, *supra* note 77, at 1022.

115. 262 U.S. 390 (1923).

116. *Id.* at 396-97.

117. *Id.* at 399.

118. *Id.* Justice McReynolds continued to note that the Constitution rejects Plato's idea that the state could intervene in the autonomy of the family:

Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

Id. at 402.

119. 268 U.S. 510 (1925).

120. *Id.* at 511.

121. *Id.* at 534-35.

parents to direct and control the rearing and education of their children.¹²² The Court further stated:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹²³

In *Griswold v. Connecticut*,¹²⁴ the Court established the ancient right of familial privacy in American law.¹²⁵ The Court recognized that securing specific guarantees of the Bill of Rights required it to recognize the penumbras of those rights.¹²⁶ Under the newly recognized fundamental right to privacy, the Court struck down a Connecticut statute that prohibited the use of contraceptives by married couples.¹²⁷ Justice Douglas, summarizing the Court's holding, stated:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.¹²⁸

Today, this landmark decision remains the foundation of the right to privacy within the family setting.¹²⁹

122. *Id.*

123. *Id.* at 535; see also *People v. Fitzgerald*, 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979). In *Fitzgerald*, the court stated that "it is clear that our courts recognize that parents have not only the right but the obligation to provide moral supervision and guidance for their children." *Id.* at 715, 422 N.Y.S.2d at 311.

124. 381 U.S. 479 (1965).

125. *Id.* at 485-86.

126. See *id.*

127. *Id.* at 485.

128. *Id.* at 486.

129. Samuel Warren and Louis Brandeis may have introduced the concept of a right of privacy in an 1890 law review article. See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). From this beginning, *Griswold* and its progeny have developed the

The Court continued to strengthen its judicial recognition of familial autonomy in *Wisconsin v. Yoder*.¹³⁰ In that case, the Court again held that parents have the right to assume the primary role in decisions concerning the rearing of their children, and upheld the right of Amish parents to refuse to send their children to state schools beyond the eighth grade.¹³¹ The Court reasoned, "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now well established beyond debate as an enduring American tradition."¹³²

The Court's present view of familial autonomy is stated best in *Moore v. City of East Cleveland*.¹³³ In *Moore*, the Court struck down a local zoning ordinance that prohibited an extended family from living together in the same house.¹³⁴ The Court stressed that the fourteenth amendment long has protected individual liberties regarding marriage and family life.¹³⁵ The Court pointed out that a number of cases consistently have acknowledged a "private realm of family life which the state cannot enter."¹³⁶ The Court agreed with the rationale applied in *Meyer*, *Pierce*, *Griswold*, and *Yoder*, and held that the due process clause of the fourteenth amendment sheltered familial autonomy.¹³⁷ Justice Powell, writing for the Court, stated, "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."¹³⁸

right to privacy into a strong fundamental right guaranteed by the Constitution. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972).

130. 406 U.S. 205 (1972).

131. *Id.* at 232.

132. *Id.*

133. 431 U.S. 494 (1977).

134. *Id.* at 506.

135. *Id.* at 499.

136. *Id.*

137. *Id.* at 500-01.

138. *Id.* at 503-04.

The Court long has recognized that fundamental familial rights are essential to the preservation of a democratic society.¹³⁹ Careful consideration of these familial rights in the context of the parent-child relationship shows clearly that the Constitution provides a firm basis for the establishment of the parent-child privileges.¹⁴⁰ As one commentator has stated, "Since parent-child communications are at the very heart of family life and relationships, they can properly be classed as fundamental along with those familial rights that the autonomy strand of the right of privacy is designed to protect."¹⁴¹

In order for parents to exercise their rights to raise their children and instill in them morals and values, society must encourage a mutual trust between parent and child. If the state is allowed, as it presently is, to intrude upon the parent-child relationship by compelling parents and children to testify adversely about one another, the mutual trust will be replaced by suspicion and disharmony.¹⁴² The potential harm to the family unit is obvious. As a New York court asked: "Shall it be said . . . 'listen to your son at the risk of being compelled to testify about his confidences?'"¹⁴³ The court stressed the negative implications of compelling testimony by parents and children against each other by stating:

Having established that the integrity of family relational interests is clearly entitled to constitutional protection, we turn to an examination of the nature of the interest asserted in the case before us. The role of the family, in establishing a child's emotional stability, character and self-image is universally recognized. The erosion of this influence would have a profound effect on the individual child and on society as a whole. Child psychologists and behavioral scientists generally agree that it is essen-

139. See generally *id.* at 502-03. Commentators have stated that the failure and decay of the family would affect all of society. See, e.g., Comment, *supra* note 113, at 917.

140. See, e.g., *In re Agosto*, 553 F. Supp. 1298 (D. Nev. 1983); *In re A & M*, 61 A.D.2d 426, 403 N.Y.S.2d 375 (1978); *People v. Fitzgerald*, 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979). Although the constitutional basis for the parent-child privileges as to confidential communications is particularly strong, the Constitution also supports the parent-child privileges as to adverse testimony.

141. Comment, *supra* note 77, at 1016. For a discussion of the autonomy strand of the right of privacy, see *id.* at 1015-17.

142. See, e.g., Comment, *supra* note 113, at 917.

143. *In re A & M*, 61 A.D.2d at 429, 403 N.Y.S.2d at 378.

tial to the parent-child relationship that the lines of communication remain open and that the child be encouraged to "talk out" his problems. It is therefore critical to a child's emotional development that he know that he may explore his problems in an atmosphere of trust and understanding without fear that his confidences will later be revealed to others.¹⁴⁴

The Supreme Court has established firmly that the family occupies a position deserving of constitutional protection. The Court specifically has recognized that the parent-child relationship is at the core of American society.¹⁴⁵ The Court's decisions make clear that the Constitution provides a firm cornerstone upon which the parent-child privileges can be built.

B. Federal Rule of Evidence 501

Federal Rule of Evidence 501 gives the federal courts a statutory guide to use when dealing with claims for the adoption of a new privilege.¹⁴⁶ Prior to the adoption of the Federal Rules in 1975, state courts and legislatures largely dictated American privilege law.¹⁴⁷

The adoption of Federal Rule of Evidence 501 was less than smooth. In March 1968 Chief Justice Earl Warren appointed an advisory committee to formulate rules of evidence for the federal courts. The advisory committee's report contained thirteen rules that applied in different privileged situations.¹⁴⁸ Only two rules set forth broad privileges: the priest-penitent confidential communica-

144. *Id.* at 432, 403 N.Y.S.2d at 380.

145. *See, e.g., supra* note 133 and accompanying text.

146. FED. R. EVID. 501 reads as follows:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rules of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

147. *See* Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L.J. 613, 614 (1976).

148. *See* FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 202-34 (1984).

tions privilege and the attorney-client confidential communications privilege. The report reduced the scope of the marital privileges to criminal matters in which the accused's rights needed protection. Numerous attacks on the Proposed Rules came not only from the House and Senate but from special interest groups who were not protected by the privilege rules.¹⁴⁹

Perhaps more important than the very narrow scope of the confidential communications privileges contained in the Proposed Rules was the fact that the Rules provided for no testimonial privilege that was not already contained in the statute itself, or unless a statute or the Constitution could be construed to allow a privilege. In effect, this provision was an attempt by the Supreme Court to limit privilege law and preclude its common law expansion. Although the purposes behind this limitation—uniformity and judicial economy—were worthy causes, Congress recognized the difficulties present in the Proposed Rules on privilege and acted to prevent them from being adopted. Professor Krattenmaker noted:

The intense public controversy over these privilege provisions led Congress to take the unprecedented step of acting to prevent the *Rules* from becoming effective until Congress had given them plenary review. That action effectively transformed the Advisory Committee's *Proposed Rules* into little more than a preliminary congressional draft of a bill.¹⁵⁰

Congress rejected the Proposed Rules' narrow approach to privilege, and instead passed Federal Rule of Evidence 501, which allows and provides for the creation of new privileges. Rule 501 was not intended to reduce the scope of testimonial privileges as they had been developed up to that point. In essence, rule 501 left the door open for the judicial adoption of privileges such as the parent-child privileges. The legislative history behind rule 501 supports this proposition. Immediately preceding the passage of the bill that proposed the Federal Rules, Representative Hungate stated:

149. See S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 331-46 (4th ed. 1982).

150. See Krattenmaker, *supra* note 147, at 638 (footnotes omitted).

Rule 501 is not intended to freeze the law of privilege as it now exists. The phrase "governed by the principles of the common law as they may be interpreted . . . in light of reason and experience" is intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.¹⁵¹

Although rule 501 allows the federal courts to adopt new privileges, the courts remain hesitant. Some courts apparently do not interpret rule 501 expansively and decline to examine it carefully. Only two federal courts have thoroughly examined the adoption of parent-child privileges under the rule.¹⁵²

C. The Wigmore Test

Dean Wigmore proposed four fundamental conditions for the existence of a privilege.¹⁵³ These four conditions are:

- (1) The communications must originate in a *confidence* that they will not be disclosed;
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and
- (4) The *injury* that would inure to the relation by disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of the litigation.¹⁵⁴

These conditions have been widely accepted as the basis for both scholarly and judicial analyses of the application of a privilege in a given factual context.¹⁵⁵ The Wigmore "test," however, only applies to confidential communications, and not to testimonial privileges. This Article, therefore, analyzes only the proposed parent-child confidential communications privilege under the test. Upon

151. 120 CONG. REC. 40,891 (1974).

152. See *In re Agosto*, 553 F. Supp. 1298 (D. Nev. 1983) (in a lengthy opinion, the court adopted a parent-child privilege); *In re Greenberg*, 11 Fed. R. Serv. 2d (Callaghan) 579 (D. Conn. 1982).

153. 8 J. WIGMORE, *supra* note 9, § 2285, at 527.

154. *Id.*

155. See *Stanton*, *supra* note 88, at 3.

examination, the proposed parent-child confidential communications privilege satisfies each condition of the Wigmore test.

With regard to the first condition, all parent-child communications clearly originate in confidence; the parent-child relationship naturally breeds that type of communication.¹⁵⁶ Parents and children typically participate in conduct which they presume will remain private.¹⁵⁷

With regard to the second condition, confidentiality is obviously essential to the parent-child relationship. Such relationships are built on mutual love and trust. An atmosphere of confidentiality coupled with the child's dependency upon the parent allows the child to admit wrongdoings to the parent in search of guidance.

The parent-child privilege also satisfies the third condition. As previously discussed,¹⁵⁸ society is based on the family unit, and the heart of the family unit is the parent-child relationship. Few would argue that society should not sedulously foster the parent-child relationship.

The parent-child privilege also satisfies Wigmore's final condition. The potential injury to the parent-child relationship clearly would be greater than the benefit gained by the correct disposal of the litigation. If a parent or his child were compelled by the state to testify, each thus betraying the other, the trust that existed between the two would cease, possibly never to be regained.

D. Existing Privileges in American Law Support the Adoption of the Parent-Child Privileges

The attorney-client, priest-penitent, husband-wife, and psychotherapist-patient privileges are firmly rooted in American law. The professional privileges are based on common policy grounds.¹⁵⁹ The benefits derived from protecting the confidentiality of communications made in the course of seeking the services of the privileged professionals are generally agreed to far outweigh the inconvenience or obstacles that may arise during any legal fact finding process. The two existing American privileges most similar to the

156. See Connery, *The Right To Silence*, 39 MARQ. L. REV. 180 (1956).

157. See *supra* notes 68-100 and accompanying text.

158. See *supra* notes 51-67 and accompanying text.

159. See *supra* notes 69-89 and accompanying text.

parent-child privilege are the psychotherapist-patient and spousal privileges. Both relationships are dependent on a free flow of highly personal information. Both situations need privacy and confidentiality to function properly. Society protects these relationships from intrusion by the state because it recognizes they could not exist if they were not shrouded in confidentiality. One commentator, writing in support of a parent-child privilege, stated:

It is anomalous that the . . . [parent-child] relationship . . . has not been accorded the same protection from compelled disclosure as has the professional relationship. It may be a recent phenomenon that one pays for services that used to be provided and promoted within the traditional family context, but it is illogical to require . . . [a parent or child to] turn to outside professionals in order for his private communications to be protected.¹⁶⁰

Its similarities to the psychotherapist-patient relationship and its stronger similarities to the marital relationship make the parent-child relationship a perfect candidate for a privilege. Indeed, the benefits to be derived from protecting the parent-child relationship reasonably could be greater than those associated with the other relationships. In adopting the marital privileges, state legislatures surely did not intend to suggest that the parent-child relationship is less deserving of protection by the law. The parent-child relationship is life-long. Unlike the other relationships, it is terminated only upon the death of the parent or the child, and not merely by the payment of a fee or by a judicial decree.

VI. SOCIAL POLICY ARGUMENTS IN SUPPORT OF THE PARENT-CHILD PRIVILEGE

A number of social policy arguments can be advanced in support of the parent-child privileges. These social policies arguably cannot stand as the sole basis for adoption of the privileges.¹⁶¹ When the parent-child privilege is at issue, however, these policy arguments do *not* stand alone; the aforementioned constitutional arguments are a necessary companion.

160. Stanton, *supra* note 88, at 13.

161. See, e.g., Comment, *supra* note 77, at 1011.

A. Family Harmony

The protection of peace and harmony within the family is a major social policy rationale underlying the parent-child privileges.¹⁶² A wholesome family relationship is something society should continue to promote. Indeed, in expressing its concern about the state of the family, one court said:

In a democracy or a polity like ours, the government of well-ordered home is one of the surest bulwarks against the forces that make for social disorder and civil decay. It [the family] is the very cradle of civilization, with the future of the commonwealth dependent, in a large measure, upon the efficacy and success of its administration.¹⁶³

Inherent in this passage is the fact that the failure and decay of the family unit has a corresponding effect on society as a whole.¹⁶⁴ Positive family interaction has been credited with playing a significant role in the development of positive values, attitudes, and behavior.¹⁶⁵ Empirical evidence suggests strongly that families that emphasize open communication and active decision making and problem solving produce members of society who are considered more productive.¹⁶⁶

Although the arguments for preventing compelled adverse testimony and the arguments for preventing compelled disclosure of confidential communications vary slightly,¹⁶⁷ they share the same ultimate goal of upholding the position of the family. Even those who oppose adoption of the parent-child privileges cannot argue that this is not a noble goal. The parent-child privileges against

162. See, e.g., *In re Agosto*, 553 F. Supp. 1298, 1325 (D. Nev. 1983). This rationale also underlies the spousal privileges. See, e.g., *Trammel v. United States*, 445 U.S. 40, 44 (1980); *Hawkins v. United States*, 358 U.S. 74, 77-79 (1958).

163. *Small v. Morrison*, 185 N.C. 577, 584, 118 S.E. 12, 15 (1923).

164. See Furlong, *Youthful Marriage and Parenthood: A Threat to Family Stability*, 19 HASTINGS L.J. 105, 114 (1967).

165. See, e.g., R. CAVAN & T. FERDINAND, *JUVENILE DELINQUENCY, CRIME AND DELINQUENCY* ch. 16 (3d ed. 1978).

166. *Id.*

167. Forced disclosure of adverse facts, acts, or observations would disrupt family peace and harmony. Forced disclosure of confidential communications would foster disloyalty and distrust and shut down communication channels. In both instances, the parent-child relationship would be destroyed. This Article makes a general argument in favor of the needed privileges. Without them this destruction of the family will continue.

compelled disclosure of confidential communications seek to preserve the sense of trust that forms the basis of a parent-child relationship. The law cannot conclude that the absence of this trust would not impact on the ability of individuals to function within the social context of democracy.

Critics argue that some unacceptable behavior may already have occurred when these privileges are sought to be invoked and, therefore, that the adoption of the privileges would serve to shield unlawful or wrongful acts.¹⁶⁸ Although some unacceptable or anti-social behavior may indeed have occurred when the privileges are asserted, to reach the truth at the cost of the parent-child relationship would be to win the battle and lose the war.¹⁶⁹ The proposed model statute addresses these concerns and provides exceptions to deal with violent, unlawful, or wrongful acts within the family.¹⁷⁰

The time-honored goal of preserving family harmony and peace is more important today than it ever has been. If a parent or child is forced to testify against the other, whether the testimony concerned adverse conduct or disclosure of a confidential communication, a socially essential relationship would be severely harmed, if not destroyed.

B. Natural Repugnancy

In addition to disrupting family harmony and peace within the parent-child relationship, compelled adverse testimony or compelled disclosure of a confidential communication would be repugnant to social sensibilities.¹⁷¹ Indeed, one court has commented that "forcing a mother and father to reveal their child's alleged misdeeds . . . is shocking to our sense of decency, fairness, and propriety."¹⁷²

Although some critics have dismissed the repugnancy argument as sentimental,¹⁷³ the facts and feelings underlying the argument are very real. The actions of totalitarian governments should serve

168. See, e.g., Note, *Questioning the Recognition of a Parent-Child Testimonial Privilege*, 45 ALB. L. REV. 142, 154 (1980).

169. See Coburn, *supra* note 46, at 632.

170. See app. *infra*.

171. Cf. 8 J. WIGMORE, *supra* note 9, § 2228, at 217 (discussing marital privileges).

172. *In re A & M*, 61 A.D.2d 426, —, 403 N.Y.S.2d 375, 380 (1978).

173. C. MCCORMICK, *supra* note 41, § 86, at 202.

as adequate reminders of the horrors which thrive when certain relationships are deemed subordinate to the state.¹⁷⁴ A young Soviet youth, for example, became a national hero because he placed the interests of the Communist Party above family loyalty:

Few Westerners would recognize the name, but Pavlik Morozov is a household word to Russians, who know his story from their schooldays as well as Americans know the legend of George Washington's felling of the cherry tree.

The difference is that in the morality tale of Pavlik Morozov, the son didn't run to his father to forthrightly admit his own misdeeds. Thirteen-year-old Pavlik ran instead to Communist Party officials in 1932 to denounce his father as an enemy of the state, an act that in Stalin's time was tantamount to signing his father's death warrant.¹⁷⁵

This story provides a classic example of the way a government with unbridled power influences and intrudes upon family loyalty and privacy.

Examples of undue intrusion by the government appear in the history of our country. One of the most frightening was an early Louisiana law that established a government informant system.¹⁷⁶ In speaking out against the law, Edward Livingston, an eighteenth century jurist, voiced his repugnance by stating:

The ferocious legislation . . . demands . . . the sacrifice of all feelings of nature, of all the sentiments of humanity; breaks the ties of gratitude and honor; makes obedience to the law consist in a dereliction of every principle that gives dignity to man Dreadful as this picture is, the original is found in the law of accessories after the fact. If the father commits treason, the son must abandon, (the country) or deliver him up to the executioner (if he later learns about it) [M]en are required to be faithless, treacherous, unnatural, and cruel, in order to prove that they are good citizens¹⁷⁷

174. See *supra* text accompanying note 1.

175. See Gillette, *The Informer: To A Russian, He's A Hero*, L.A. Times, Sept. 11, 1982, at 1, col. 1.

176. Franklin, *The Encyclopédiste Origin and Meaning of the Fifth Amendment*, 15 LAW GUILD REV. 41, 46 (1955).

177. *Id.* (quoting E. LIVINGSTON, A SYSTEM OF PENAL LAW FOR THE STATE OF LOUISIANA 14 (1833)).

The natural repugnancy argument has existed for centuries and is accepted commonly by society and the courts as a supporting rationale for the spousal privileges.¹⁷⁸ Some believe that this same argument should apply to the parent-child relationship, because it is a relationship that is in need of, and possibly more deserving of, protection and nurturing.¹⁷⁹

C. Witnesses' Dilemma

The last social policy has been referred to as the "no-win argument."¹⁸⁰ This situation places the witness in the ultimate tight spot. Parents and children presently may be called to testify against one another in many state and federal jurisdictions. Such persons face three unpleasant courses of conduct. First, the parent or child witness can comply and testify, thus condemning his or her parent or child. Second, the witness can refuse to testify, thus risking contempt of court. Finally, the witness can deliberately lie under oath to protect the relative, thus breaking the law him or herself.

The first course of conduct places the family harmony in serious jeopardy. If the parent or child witness chooses voluntarily to testify then, of course, there is arguably no family harmony to protect.¹⁸¹ The second course of conduct forces the witness into committing contempt.¹⁸² In one case, for example, a father and mother were incarcerated for refusing to testify against their son.¹⁸³ The

178. See 8 J. WIGMORE, *supra* note 9, § 2228, at 217.

179. See, e.g., Comment, *supra* note 77, at 1009-10.

180. Kraft, *The Parent-Child Testimonial Privilege: Who's Minding the Kids?*, 18 FAM. L.Q. 505, 515 (1985).

181. See *Trammel v. United States*, 445 U.S. 40, 52 (1980) (marital privilege). To accommodate the voluntary witness situation, the Court held that the marital adverse testimonial privilege is a witness-held privilege. *Id.* at 53.

182. *In re A & M*, 61 A.D.2d 426, 433, 403 N.Y.S.2d 375, 380 (1978) (discussing the risk of prosecution for contempt if the parent-child witness refused to comply with a disclosure request); see also *State v. Delong*, 456 A.2d 877 (Me. 1983); Smith, *Silence on Dad Lands Son in Jail*, *Ariz. Republic*, June 17, 1987, at B4, col. 1.

183. See, *Port v. Heard*, 594 F. Supp. 1212 (S.D. Tex. 1984), *aff'd*, 764 F.2d 423 (5th Cir. 1985). This decision involved the celebrated case in which 17-year-old David Port was charged with murder. Mr. and Mrs. Port refused to testify before the grand jury, and subsequently were jailed for contempt. Mr. Port was released after two months in jail, but Mrs. Port was not released for four-and-one-half months. Both were in jail while their son was free on \$20,000 bond. Both were freed before the trial began, but neither was subpoenaed to

social values advanced or the lessons learned by the imprisonment of the parents in such cases are difficult to discern. If nothing else, the cases point to the value in and need for adoption of the parent-child privileges.

The final option, lying under oath, forces the witness into a position where he or she could be charged with perjury, a felony in many jurisdictions. The ancient Romans anticipated this very predicament when they fashioned their family privilege, which rendered family members incompetent to testify against one another due to the possibility for perjury.¹⁸⁴

Exactly how many witnesses have perjured themselves to protect their parents or children is difficult to determine. The dilemma, however, is very real, as documented by the facts in *United States v. Ismail*.¹⁸⁵ In that case, the defendant's son was called before a grand jury to testify against him. The son had such anxiety and guilt feelings about testifying against his father that he lied and stated that he knew nothing about his father's business.¹⁸⁶ After admitting his perjury to the United States Attorney and knowing that he would be compelled to testify at trial, he contemplated suicide.¹⁸⁷ After he did testify, the witness was ostracized from his community.¹⁸⁸

The state's interest in ascertaining the truth is certainly not at all advanced by creating a situation which invites perjury. Because the interests of adjudication are not furthered when the witness is forced to commit perjury, some commentators argue that privileges actually aid the ascertainment of truth by eliminating those situations in which perjured testimony is more likely.¹⁸⁹ The perjury dynamic also damages the integrity of the court system; a defendant who has already committed an unlawful or wrongful act might be encouraged to try to avoid the penalty with perjury—another un-

testify. After a three-week trial, jury deliberations lasted two-and-one-half hours. David was found guilty and was sentenced to 75 years in prison. In this case, it can hardly be said that his parents' testimony was needed.

184. See, e.g., Radin, *supra* note 10, at 487-89.

185. 756 F.2d 1253 (6th Cir. 1985).

186. *Id.* at 1256.

187. *Id.* at 1256 n.3.

188. *Id.*

189. See, e.g., Louisell, *Confidentiality, Conformity, and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 109-10 (1956).

lawful act. Such a person could reasonably begin to think that "two wrongs do make a right."¹⁹⁰

The adoption of the parent-child privileges could eliminate the witness's dilemma. Parents or children should not be incarcerated for what could be interpreted as the crime of family loyalty. According to one court, we should avoid placing the government in the inconsistent position of having to actively punish unselfishness and loyalty, values which are instilled by the family, the church, and even the state itself.¹⁹¹

VII. RECENT DECISIONS IN PARENT-CHILD PRIVILEGE CASES

No parent-child privilege existed at common law. To date, two states have recognized such a privilege by statute.¹⁹² New York was the first state to adopt judicially the concept of a parent-child privilege.¹⁹³ In *People v. Fitzgerald*,¹⁹⁴ the court found the privilege was based on the right of privacy "flowing directly" from the United States and New York constitutions.¹⁹⁵ A year earlier, the same court held in *In re A & M*¹⁹⁶ that a parent-child confidential communications privilege fell within the constitutional protection of privacy.¹⁹⁷ The court did not, however, extend the same protection to a parent-child adverse testimonial privilege, stating that it could only be created by the legislature.¹⁹⁸

Two federal district courts also have upheld assertions of parent-child privilege. In *In re Agosto*,¹⁹⁹ the court upheld both adverse testimonial and confidential communications parent-child privileges. The court based its decision on the first amendment's free

190. See, e.g., Coburn, *supra* note 46, at 629; see also Kraft, *supra* note 180, at 515. Dr. Kraft stated that the defendant "stands to suffer a 'distorted perspective' of a justice system which is rigid to the point of fostering falsified testimony or compromising natural loyalties." *Id.*

191. *In re Agosto*, 553 F. Supp. 1298, 1326 (D. Nev. 1983).

192. See IDAHO CODE § 9-203(7) (Supp. 1986); MINN. STAT. ANN. 595.02(i) (West Supp. 1987).

193. See *People v. Fitzgerald*, 101 Misc. 2d 712, 724-25, 422 N.Y.S.2d 309, 317 (Westchester County Ct. 1979).

194. 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979).

195. *Id.* at 716-17, 422 N.Y.S.2d at 312.

196. 61 A.D.2d 426, 403 N.Y.S.2d 375 (Westchester County Ct. 1978).

197. *Id.* at 430-31, 403 N.Y.S.2d at 378-79.

198. See *id.* at 434-35, 403 N.Y.S.2d at 381.

199. 553 F. Supp. 1298 (D. Nev. 1983).

exercise clause, a right to privacy, and the social policy of promoting family harmony.²⁰⁰ The decision in *Agosto* has met with a tremendous amount of criticism. The most common attack is based on the fact that the child who refused to testify was thirty-two years old.²⁰¹

Several reasons support the decision in *Agosto* recognizing the parent-child privileges, but *In re Greenberg*²⁰² acknowledges the existence of a parent-child privilege for two very specific points: the free exercise clause and ancient Jewish law that forbids parents and children from testifying against one another.²⁰³ This decision has met with criticism not only from lawyers or judges, but from Jewish law scholars and rabbis who claim that the court misrepresented the ancient rule.²⁰⁴

Although a number of federal courts have refused to recognize a parent-child privilege,²⁰⁵ no court has abandoned the idea entirely nor has any court clearly stated that the privilege should never apply. As the following cases demonstrate, the federal courts may still be receptive to the concept when the fact situation is appropriate.

The United States Court of Appeals for the Second Circuit, for example, is often credited mistakenly with refusing to recognize a parent-child privilege in *In re Matthews*.²⁰⁶ What the court refused to uphold, however, was not a parent-child privilege but an in-law privilege.²⁰⁷ The United States Court of Appeals for the Fourth Circuit addressed the issue of a parent-child adverse testimonial privilege in *United States v. Jones*.²⁰⁸ In *Jones* a twenty-nine-year-old son refused to testify before a grand jury about his father. The court declined the opportunity to recognize the privilege, but

200. *Id.* at 1310-27.

201. *Id.*

202. 11 Fed. R. Serv. 2d (Callaghan) 579 (D. Conn. 1982).

203. *Id.* at 587.

204. Discussion with Rabbi Goldstein of the Temple Beth Israel in Macon, Georgia.

205. See, e.g., *In re Santarelli*, 740 F.2d 816 (11th Cir. 1984); *United States v. Jones*, 683 F.2d 817 (4th Cir. 1982); *In re Starr*, 647 F.2d 511 (5th Cir. Unit A May 1981); *United States ex rel. Riley v. Franzen*, 653 F.2d 1153 (7th Cir.), cert. denied, 454 U.S. 1067 (1981); *United States v. Penn*, 647 F.2d 876 (9th Cir.), cert. denied, 449 U.S. 903 (1980).

206. 714 F.2d 223 (2d Cir. 1983).

207. *Id.* at 224.

208. 683 F.2d 817 (4th Cir. 1982).

left open the possibility that a privilege might exist under a different fact pattern, particularly if the child were unemancipated.²⁰⁹ The United States Court of Appeals for the Sixth Circuit relied on a similar rationale in *United States v. Ismail*.²¹⁰ The court denied an emancipated child's claim to a parent-child privilege, but left open the possibility for a parent-child privilege between a parent and an unemancipated child.²¹¹

The United States Court of Appeals for the Seventh Circuit rejected the application of a parent-child privilege in *United States v. Davies*,²¹² where the issue arose in the context of a police investigation. The court stated that if a privilege did exist, it would apply only in judicial proceedings.²¹³

The United States Court of Appeals for the Ninth Circuit addressed the issue briefly in *United States v. Penn*.²¹⁴ Although the court declined to apply a privilege, it did not address the merits in any detail. The facts of the case involved no disclosure of a confidential communication or adverse testimony on the part of the child witness; the privilege was asserted during a suppression hearing to block the introduction of physical evidence.²¹⁵

VIII. CONCLUSION

The official comment explains the proposed model parent-child privileges statute in detail. The model statute is similar in basic concept to the existing spousal privileges in that it addresses both adverse testimony and confidential communications. The exceptions to the privileges are stated clearly, and a close reading of the statute demonstrates its narrow scope. It should be noted that the model statute is unique in many respects, but most particularly in that it carries a penalty section for violations.

Recent news reports telling the emotional stories of children turning in their parents to the authorities for drug use demon-

209. *Id.* at 819.

210. 756 F.2d 1253 (6th Cir. 1985).

211. *Id.* at 1258; see also *In re Santarelli*, 740 F.2d 816 (11th Cir. 1984) (court denied the existence of a parent-child privilege in one sentence; "child" was an emancipated adult).

212. 768 F.2d 893 (7th Cir.), *cert. denied*, 106 S. Ct. 553 (1985).

213. *Id.* at 900.

214. 647 F.2d 876 (9th Cir.), *cert. denied*, 449 U.S. 903 (1980).

215. *Id.* at 885.

strate in one particularly vivid context the need for the parent-child privileges. These children have been portrayed to others as young heroes, and have been applauded for their brave actions. But what about the hero's brother or sister? The proposed model statute would allow the hero to testify under the adverse testimonial privilege, but would protect the hesitant or fearful brother or sister.

Although given the opportunity, many courts have neither sanctioned nor rejected the adverse testimonial and confidential communications privileges within the parent-child context. In fact, many courts have taken the position that both privileges may be viable, albeit under circumstances different than those presented to them.

The courts' hesitance to recognize either privilege appears to be based on four common themes. First, in several cases the "child" has been an emancipated adult. Second, the federal courts seem to be confused as to the proper application of Federal Rule of Evidence 501. Third, the state courts believe that it is the task of the legislature to develop the privileges. Fourth, courts and legislatures presently have no comprehensive guidelines to follow when considering the concepts of one or both privileges. The adoption of the model parent-child privilege statute would clarify the issues and provide the necessary guidance to the courts and legislatures.

PARENT-CHILD PRIVILEGES STATUTE

101. *Definitions*

As used in this statute, the following words and phrases have the meanings indicated:

- (a) “*Adverse*” means incriminating or which has a substantial likelihood of incriminating.
- (b) “*Child*” means a person who has not reached the age of majority.
- (c) “*Confidential communication*” means a message intended to convey a meaning, made between a parent and the parent’s child with the reasonable expectation its content not be made known by anyone except family members. The message may be made by any means including oral, written or sign language or assertive conduct.
- (d) “*Family member*” means a parent or the parent’s child.
- (e) “*Parent*” means a birth, adoptive or step-parent or legal guardian. It also means any person the court recognizes to have acquired a right to act as a parent, such as a foster parent or relative having long term custody of a child.
- (f) “*Party to a confidential communication*” means a parent or the parent’s child who makes a confidential communication or who was intended to receive that confidential communication.
- (g) “*Proceeding*” means any matter pending before any judicial or administrative body where testimony under oath is required.

102. *Adverse Testimonial Privilege*

- (a)(1) *Privilege Created.* There is an adverse testimonial privilege.
- (2) The privilege is delineated by this Section.
- (b)(1) *Scope.* The adverse testimonial privilege exists when either a parent or the parent’s child is:

- (i) a defendant in a criminal proceeding or the subject of a juvenile delinquency proceeding, and the other is called to give testimony; or
 - (ii) called to give testimony concerning the other in a grand jury proceeding.
- (2) (i) Neither a parent nor the parent's child who validly asserts the adverse testimonial privilege in a criminal proceeding may be compelled to provide an answer to a question if it would be adverse to the other.
- (ii) However, a parent or a child who is a witness may not assert the privilege in response to a question about a matter that occurred at a time when the relationship of parent and child did not exist between the defendant and the witness.
- (c) *Witness Held.* The adverse testimonial privilege is held by the parent or the child who is a witness.
- (d) *Exceptions.* There is no adverse testimonial privilege:
 - (1) When a defendant is charged with a crime against the person or property of the witness or a family member; or
 - (2) When the witness is involved with the defendant in any criminal activity.

103. *Confidential Communications Privilege.*

- (a)(1) *Privilege Created.* There is a confidential communications privilege.
- (2) It is delineated by this Section.
- (b)(1) *Scope.* The confidential communications privilege may be asserted by a parent or the parent's child when either of them is:
 - (i) a party to any proceeding and the other is called to give testimony; or
 - (ii) called to give testimony concerning the other in a grand jury proceeding.
- (2)(i) Neither a parent nor the parent's child may be compelled to answer a question concerning

confidential communications if the confidential communications privilege is validly asserted in a proceeding.

- (ii) However, the witness may be compelled to answer a question if at the time the confidential communication was made the parent-child relationship did not exist.

(c) *Jointly Held.*

- (1) The confidential communications privilege is jointly held by each party to a confidential communication.
- (2) Any party to a confidential communication may raise the privilege and thereby prevent the communication from being disclosed by the other party in any proceeding.

(d) *Exceptions.* There is no confidential communications privilege in any proceeding in which:

- (1) A parent and the parent's child are opposing parties;
- (2) A child's parents are opposing parties;
- (3) A parent or the parent's child is a party, if the parent and the child were jointly involved in the activity giving rise to the proceeding;
- (4) A parent or the parent's child is a party, in any criminal or juvenile proceeding if the basis of the proceeding is alleged acts committed against the person or property of a family member;
- (5) An action is brought to commit a parent or child because of alleged mental incompetence or a mental disorder or to establish a parent or child's mental competence;
- (6) An action is brought to place the person or property of a parent or the parent's child in the custody or control of another because of alleged mental or physical incompetence;
- (7) The neglect, dependency, deprivation, abandonment or nonsupport of a child's parent or a parent's child is at issue;

- (8) The mental, physical or sexual abuse of a parent or the parent's child is at issue; or
- (9) Termination of parental rights is at issue.

104. *Penalties.*

(a) *Penalty for Nondisclosure of Testimony.*

- (1) If no adverse testimonial privilege or confidential communications privilege exists, the court shall require the person to testify provided no other rule or law prevents the compelled disclosure of that testimony.
- (2) Refusal to testify is punishable by the court as contempt.
- (3) If the witness refuses to disclose the compelled testimony in violation of paragraph (2), the court, in determining the appropriate penalty, shall consider among other factors:
 - (i) The age, and the mental and physical condition of the witness; and
 - (ii) The present and future welfare and protection of the witness.

(b) *Penalty for Unauthorized Disclosure of a Privileged Confidential Communication.*

- (1) If a confidential communication is held to be privileged, the witness shall not disclose the confidential communication in a proceeding.
- (2) A parent or child who discloses in a proceeding a privileged confidential communication which has been validly raised may be punishable by the court for contempt.
- (3) If a witness discloses the confidential communication in violation of paragraph (1), the court, in determining the appropriate penalty, shall consider among other factors:
 - (i) The age, and the mental and physical condition of the witness; and
 - (ii) The present and future welfare and protection of the witness.

COMMENT

Introduction

During the 1983-84 Association Year, the Defense Function Committee was requested to consider the issue of the need for a parent-child privilege. The request was prompted by a case that gained national attention because a child was held in contempt by a court for failure to testify against her parents. It was requested that the Defense Function Committee consult with the Prosecution Function Committee in assessing this situation.

The Defense Function Committee has concluded that there is a need for a privilege. The most expeditious way to create the privilege is through legislation. To facilitate this, the model statute has been drafted.

The Prosecution Function Committee has been consulted during the course of drafting the model statute. Its advice has regularly been solicited.

The statute is narrow in scope. It protects only the relationship between parents and their minor children. It does not extend to all members of the family.

This relationship is protected in two respects. First, an adverse testimonial privilege is created to prohibit parents and minor children from being forced to give incriminating testimony against each other. It is not an "automatic" privilege. It must be affirmatively raised. Neither is it a "blanket" privilege precluding any testimony. It relates solely to testimony that has the potential of being incriminating. However, it does not apply if the parent and child have been "partners in crime," or if one has used the other as an unwitting accomplice.

Second, a confidential communications privilege is created. It protects parents and their minor children from being forced to divulge in any proceeding (civil or criminal) communications between them that were intended to be confidential. This privilege is jointly held. Once the privilege is asserted, the parents and the children between whom the confidential communication took place may not divulge the contents of it in any proceeding. Various exceptions are recognized in the statute to cover situations where the parents and children are opposing parties or have competing interests.

Definitions (Section 101)

- (a) *Adverse*: One of the principle purposes of the parent-child privileges statute is to prevent parents and their children from being forced to give incriminating testimony against each other. The word "adverse" is used to describe questions, the answer to which would be "incriminating or have a substantial likelihood of being incriminating." The defined word "adverse" is used principally in subsection 102(b)(1).

It may not be possible to determine that the answer to the question would absolutely be incriminating. Therefore, a lesser standard of "substantial likelihood" is provided that permits testimony to be precluded on that basis.

- (b) *Child*: The age by which a person is determined to be a "child" is determined by each State's law on the age of majority. This definition does not provide for a mentally defective person to be considered a "child" once that person has reached the age of majority. Therefore, in rare instances when a person's chronological age has reached the age of majority but the mental age is in question, it shall be left to the court to determine if that person falls within the definition of "child" as used in this statute.
- (c) *Confidential Communication*: The definition of "confidential communication" is intended to be broad. It gives recognition to the fact that children often communicate with their parents by means other than the spoken word. Young children are especially prone to communicate confidentially with their parents by gestures, expressions of emotion, unique mannerisms or other behavior, the meaning of which is clearly understood by the parent and the child.

The presence of a family member when a confidential communication is made between parent and child will not void the privilege. This is a recognition of the closeness of persons living in family units. It may not be possible for a parent and a child to communicate with each other without some other family member being

privity to the communication. In addition, the closeness of the family unit may negate the parents' and children's perception of a need to communicate secretly among themselves. The statute does not seek to punish parents and children who have this kind of open relationship within their family. However, any family member who is present when the confidential communication is made cannot raise the privilege to preclude being required to testify.

- (d) *Family Member*: The definition of "family member" is limited to the nuclear family (i.e. parents and their children). The term is used in the definition of "confidential communication" to restrict this term to the select communications that are made within the family unit with the expectation that it will be known only to parents and siblings. It is also used in subsections 102(c)(1) and 103(d)(4). These subsections create exceptions to the raising of the adverse testimonial privilege when the parent and the child have competing interests.
- (e) *Parent*: The definition of "parent" includes those persons who most commonly have a parental relationship with a child. It is possible that a child could at different times have all categories of these parents (i.e. birth parents, adoptive parents, step-parents and legal guardians). However, the confidential communication privilege and the adverse testimonial privilege may only be asserted with regard to communications that occurred at the time the parent and child relationship existed. Therefore, a communication made between a child and someone who has not yet become the child's step-parent (or who has ceased to be a step-parent due to divorce) would not be subject to either of the privileges. (See subsections 102(b)(2)(ii) and 103(b)(2)(iii)).

Whether or not it includes foster parents (and thereby extends the privileges to foster parents and children in their care) is left to the discretion of the court. The court also would have the discretion to recognize the existence of a parent-child relationship between a child and other persons. Typical examples would be grand-

parents or an aunt and an uncle who are raising the child. It could also include situations where a parent-child relationship exists but there is no biological or legal relationship between the two parties.

- (f) *Party to a Confidential Communication:* The definition limits this phrase to a parent and the parent's child. In addition, the parent or the child must have been intended to be the recipient of the communication. Therefore, if a child confides something to one parent with the intent that it not be known by the other parent, the privilege cannot be raised to foreclose testimony by the parent who was not the intended recipient of the communication.

The phrase does not include family members. The present of a family member during the making of a confidential communication does not make the family member a "party to the confidential communication" as defined by the statute. In this situation, the privilege does not extend to the family member.

- (g) *Proceeding:* This definition is consistent with Rule 1101 of the Federal Rules of Evidence. It guarantees that the privileges apply at all stages of actions, cases and proceedings, including grand jury proceedings.

Adverse Testimonial Privilege (Section 102)

Section 102 addresses the first of the two privileges created by this statute. It is known as the "adverse testimonial privilege."

- (a) This subsection contains the operative language that creates the privilege. The privilege is described in subsection (b).
- (b) The parent-child adverse testimonial privilege is similar to the testimonial marital privilege articulated in *Trammel v. United States*, 445 U.S. 40 (1980). As stated in subsection (b), the privilege may be asserted only by the parent or child who is a witness. It may only be asserted in criminal proceedings, juvenile delinquency proceedings, or grand jury proceedings.

Paragraph (2) contains the critical language that vests a parent or a child with the right to raise the privilege only if the question

relates to a matter that occurred at the time when the parent-child relationship existed. (See discussion under definition of "parent.")

- (c) This subsection states the exceptions to the adverse testimonial privilege. Paragraphs (c)(1) and (c)(2) recognize necessary exceptions to the adverse testimonial privilege when full disclosure in the fact finding process outweighs the policy of promoting family harmony.

Paragraph (c)(1) is necessary to permit family members to testify concerning acts of violence on the part of a parent or a child against other family members. This exception is made because the safety of family members and the security of their property is regarded as being paramount to protecting the relationship between a parent and a child. In addition, the existence of violence and property destruction within the family is strong evidence that one of the primary reasons for the privilege (i.e. protecting the unity of the family) has ceased to exist.

Paragraph (c)(2) is necessary to protect society from criminal activity on the part of a parent and the parent's child. This exception is created in recognition that the privilege should not be permitted to be used as a shield to protect parents and children who jointly commit crimes.

Confidential Communications Privilege (Section 103)

Section 103 addresses the second of the two privileges created by this statute. It is known as the "confidential communications privilege."

- (a) This subsection contains the operative language that creates the privilege. The privilege is described in subsection (b).
- (b) There are a number of differences between the adverse testimonial privilege outlined in Section 102 and the confidential communications privilege. These differences are created through the divergent provisions in subsections 102(b) and 103(b).

Subsection 103(b) provides that the confidential communications privilege applies in "any proceeding" (see subsection 103(b)(1)(i)). Unlike the adverse testimonial privilege, it is not limited to proceedings that are criminal in nature. This distinction between the

privileges arises because the adverse testimonial privilege only seeks to protect parents and their children from being compelled to make statements that may be directly "incriminating" to each other, hence surfacing in the context of a criminal proceeding. It acts as a bar to the State abusing its authority to force parents and children to testify against each other.

The confidential communications privilege has a broader purpose. It is not intended merely to prevent abuse by the prosecutorial authorities. It seeks to grant sanctity and protection to all communications between parents and their children that those parties intend to be confidential. For this reason, the privilege acts as a shield to preclude these communications from being disclosed in any forum, whether it be criminal or civil.

Another distinction is created by paragraph 103(b)(1). It provides that the confidential communication privilege may be asserted by either a parent or the parent's child. Unlike the adverse testimonial privilege, it need not be asserted by the witness. The rationale of allowing either party to the communication to assert the privilege is based on the fact that the communication is a confidence between them. Since both of them have an interest in it, both of them should be able to invoke the privilege. This concept is amplified by subsection (c).

Subsection (b)(2) explains the result of the confidential communications privilege being asserted. When it is validly asserted in a proceeding (and no exception in subsection (d) applies) the witness may not be compelled to disclose, nor voluntarily disclose, the confidential communication.

- (c) This subsection amplifies this concept by stating that the privilege is jointly held. Under its provisions, either the parent or the child can raise it to preclude the other from disclosing, through testimony, the nature of the communication.

The phrase "party to a confidential communication" is defined by the statute. The implications of its meaning should be noted when used in paragraph (c)(2). As discussed in the comment to this defined phrase, the presence of a family member when a confidential communication is made between a parent and the parent's child will not void the privilege. However, as is true with the adverse testimonial privilege, the family member is not covered by

the privilege. This is in keeping with the fact that the statute does not create a family or sibling privilege.

- (d) This subsection outlines nine exceptions to the confidential communications privilege. Each situation covers an instance where the parent and the child have competing interests, they are jointly involved in some criminal activity, or it would not promote the purpose of family harmony for the privilege to be exercised.

Paragraph (d)(1) applies to situations in which the parent and child are opposing parties. Since this suggests that the parent and child voluntarily placed themselves in this adversarial position, the policies behind the statute of preserving and fostering family harmony fail. In addition, it would be unfair to permit one of the parties to use the privilege to silence the other's testimony about a confidential communication that could contain exculpatory evidence.

Paragraph (d)(2) serves to prevent collusions between a child and one of the parents against the other parent. It is intended to cover those situations where the interests of the child could be affected. In addition, it covers situations in which one parent may unduly influence a child and seek to use the child to the detriment of the other parent.

Paragraph (d)(3) applies to civil and criminal proceedings. The determination of whether the parent and child were jointly involved in the activity which gave rise to the proceeding is left to the court. In situations where a parent and a child are together involved in illegal activity or wrongful conduct the fact finding process outweighs the policy considerations of preserving and promoting family harmony. This is particularly true when either the parent or the child is using the other as an unwitting accomplice.

Paragraph (d)(4) is necessary to prevent the possibility of the privilege being used as a shield when innocent family members' person or property has been victimized by a parent or child.

Paragraphs (d)(5) and (6) apply in situations where mental competency is at issue. In order for the court to protect the rights of the person who is the subject of the proceeding, it is necessary that full disclosure of communications between parents and their chil-

dren be engendered. The need for truth in the fact finding process is the overriding consideration in such matters.

Paragraphs (d)(7), (8), and (9) state nine specific situations in which no privilege exists under the statute. These are situations into which the court must often step to protect not only the individual's rights but the individual himself from harm from a parent or child. It should be noted that paragraph (8) is intended to cover not only mental, physical, and sexual abuse inflicted by parents on children, but also inflicted by children on a parent (e.g. elderly, disabled, etc.). The exceptions are created by paragraphs (7), (8), and (9), because there should be no obstacles in the path of the fact finding process.

Penalties (Section 104)

Section 104 states the penalties for noncompliance with the provisions of the statute.

- (a) Paragraph (a)(1) creates a penalty for failure to provide testimony when an adverse testimonial privilege or confidential communications privilege does not exist, or when "no other rule of law" would prevent compelled disclosure of the witness's testimony. Paragraph (a)(2) states that a court's inherent contempt powers should be used to punish failures to testify. Paragraph (a)(3) sets out factors the court should consider in fashioning the appropriate penalty. Since a child could be the one charged with contempt, the court should take the factors in subparagraphs (3)(i) and (ii) into consideration when fashioning a penalty.
- (a) This subsection applies only to the confidential communications privilege. It gives an incentive for these communications to be held in confidence by providing penalties when they are disclosed in testimony in a way that violates the statute. Paragraph (2) states that the court should use its inherent contempt powers to punish unauthorized disclosures. Subparagraphs (3)(i) and (ii) set out factors the court should consider when deciding the penalty for

unauthorized disclosure of a privileged confidential communication.