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## THE JUDICIAL DEVELOPMENT OF THE PARENT-CHILD TESTIMONIAL PRIVILEGE: TOO BIG FOR ITS BRITCHES?

Despite a substantial body of commentary favoring a parent-child testimonial privilege,<sup>1</sup> the privilege has been recognized only by the state courts of New York<sup>2</sup> and the federal district courts of Connecticut and Nevada.<sup>3</sup> Two New York cases<sup>4</sup> developed a narrow privilege that allows parents to refuse to testify about confidential communications from their children. Both decisions based this limited privilege primarily on the familial right to privacy,<sup>5</sup> although one of the courts also suggested that the privilege resembles the widely recognized husband-wife testimonial privilege.<sup>6</sup> In a more recent case, *In re Agosto*,<sup>7</sup> the United States District Court

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1. See, e.g., Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599 (1970); Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1 (1982); Comment, *From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?*, 1978 B.Y.U. L. REV. 1002 [hereinafter cited as Comment, *Constitutional Privilege*]; Comment, *The Child-Parent Privilege: A Proposal*, 47 FORDHAM L. REV. 771 (1979) [hereinafter cited as Comment, *A Proposal*]; Comment, *Recognition of a Parent-Child Testimonial Privilege*, 23 ST. LOUIS U.L.J. 676 (1979) [hereinafter cited as Comment, *Recognition of Privilege*]; Comment, *Confidential Communication Between Parent and Child: A Constitutional Right*, 16 SAN DIEGO L. REV. 811 (1979) [hereinafter cited as Comment, *Confidential Communication*]; Comment, *Underprivileged Communications: The Rationale for a Parent-Child Testimonial Privilege*, 36 SW. L.J. 1175 (1983) [hereinafter cited as Comment, *Underprivileged Communications*]. But see Note, *Questioning the Recognition of a Parent-Child Testimonial Privilege*, 45 ALB. L. REV. 142 (1980) [hereinafter cited as Note, *Questioning the Privilege*].

2. New York was the first jurisdiction to recognize the privilege. See *In re A and M*, 61 A.D.2d 426, 403 N.Y.S.2d 375 (N.Y. App. Div. 1978); *People v. Fitzgerald*, 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979); see also *People v. Harrell*, 87 A.D.2d 21 (1982) (N.Y. App. Div.) (recognizing the privilege developed in *A and M* and *Fitzgerald*).

3. Federal district courts in Nevada and Connecticut have recognized a parent-child privilege. See *In re Agosto*, 553 F. Supp. 1298 (D. Nev. 1983); *In re Grand Jury Proceedings (Greenberg)*, 11 Fed. R. Evid. Serv. (Callaghan) 579 (D. Conn. 1982).

4. *In re A and M*, 61 A.D.2d 426, 403 N.Y.S.2d 375 (N.Y. App. Div. 1978); *People v. Fitzgerald*, 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979).

5. See *In re A and M*, 61 A.D.2d 426, 429-32, 403 N.Y.S.2d 375, 378-80 (N.Y. App. Div. 1978); *People v. Fitzgerald*, 101 Misc. 2d 712, 716-17, 422 N.Y.S.2d 309, 312-13 (Westchester County Ct. 1979).

6. See *People v. Fitzgerald*, 101 Misc. 2d 712, 720, 422 N.Y.S.2d 309, 315 (Westchester County Ct. 1979).

7. 553 F. Supp. 1298 (D. Nev. 1983).

for the District of Nevada recognized a much broader privilege. *Agosto* expanded the parent-child privilege to include confidential communications from parents as well as from children.<sup>8</sup> The court concluded that the privilege exempts either party from testifying against the other in criminal proceedings.<sup>9</sup>

Although both courts and commentators have recognized the need for a parent-child privilege,<sup>10</sup> no legislature has enacted one.<sup>11</sup> Similarly, many courts have declined to create a parent-child privilege.<sup>12</sup> Opponents of the privilege contend that the public interest in having access to all relevant evidence outweighs the interests protected by a parent-child testimonial privilege.<sup>13</sup>

This Note reviews the requirements for testimonial privileges and briefly discusses the purpose and history of some of the existing privileges. The Note then turns to the judicial development of the parent-child privilege, examining the major cases that have recognized this privilege. After discussing of the issues raised by these cases, the Note recommends acceptance of a limited parent-child privilege.

## BACKGROUND OF THE PARENT-CHILD PRIVILEGE

### *General Requirements for Testimonial Privileges*

Testimonial privileges are an exception to the general rule "that 'the public . . . has a right to every man's evidence.'"<sup>14</sup> Because testimonial privileges obstruct the search for truth, courts construe

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8. See *id.* at 1325.

9. See *id.*

10. See *supra* notes 1-2 and accompanying text.

11. Legislators have introduced bills to enact a parent-child privilege in both New York (H. Res. 8502/S. Res. 9965, 203d Leg., 1st Sess. (1980)) and Minnesota (S. Res. 1782, 72d Leg., 1st Sess. (1981)), but neither passed.

12. See, e.g., *United States v. Jones*, 683 F.2d 817 (4th Cir. 1982); *In re Starr*, 647 F.2d 511 (5th Cir. 1981); *United States v. Penn*, 647 F.2d 876 (9th Cir. 1980); *In re Kinoy*, 326 F. Supp. 400 (S.D.N.Y. 1970); *In re Terry W.*, 59 Cal. App. 3d 745, 130 Cal. Rptr. 913 (1976); *Cissna v. State*, 170 Ind. App. 437, 352 N.E.2d 793 (1976); *State v. Gilroy*, 313 N.W.2d 513 (Iowa 1981); *Three Juveniles v. Commonwealth*, 390 Mass. 357, 455 N.E.2d 1203 (1983) (rejecting adverse testimony privilege).

13. See, e.g., Note, *Questioning the Privilege*, *supra* note 1, at 174-77.

14. *United States v. Nixon*, 418 U.S. 683, 709 (1974) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)); see also 8 J. WIGMORE, EVIDENCE § 2192 (J. McNaughton rev. ed. 1961) (origin of the phrase).

them narrowly.<sup>15</sup> Furthermore, because the proper administration of justice depends largely on the court's ability to hear all relevant evidence, courts resist both expansion of existing privileges and creation of new ones.<sup>16</sup> Dean Wigmore stated four widely accepted prerequisites for the recognition of testimonial privileges:

- 1) the communications must originate in *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 society, ought to be sedulously *fostered*; and
- 4) the injury that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.<sup>17</sup>

Although helpful in analyzing new claims of privilege, this test cannot provide a definitive answer in any particular case. Instead, the recognition of a privilege depends largely on the decisionmaker's personal values. The subjective element of the Wigmore formula is especially evident in the part of the test that re-

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15. *Trammel v. United States*, 445 U.S. 40, 50 (1980).

16. See *supra* note 12.

17. 8 J. WIGMORE, *supra* note 14, § 2285 (emphasis in original). Another commentator has formulated a different test that focuses on whether the privilege satisfies the following emotions and desires:

- 1) Instinctive revulsion against the betrayal of a confidence.
- 2) A sense of compassion even for a transgressor, *i.e.* a feeling that there should be for every man some sanctuary beyond the reach of society's law where he may safely confide his guilty secrets in an attempt to ease his troubled spirit.
- 3) A sense of fair play related to the Norman view of a lawsuit as a species of contest or sporting event wherein it would be too easy, and hence unfair and against the 'rules of the game,' to hound a man to his doom by convicting him through the lips of his own intimate friends, family, or medical, legal, or spiritual advisors.
- 4) A desire to preserve the function of certain socially valuable relationships even at the cost of occasional suppression of the truth and injustice in such, presumably few, particular cases.
- 5) A feeling of individual and professional pride and self-importance in being the inviolable repository of others' secrets.

Manley, *Patient, Penitent, Client and Spouse in New York*, 21 N.Y. ST. B.A. BULL. 288, 290 (1949).

quires balancing injury against benefit. Comparison of the parent-child privilege with the more commonly recognized privileges provides a better analytical standard.

### *The Professional Privileges*

#### *Attorney-Client*

The attorney-client privilege existed in Roman law<sup>18</sup> and in early English law.<sup>19</sup> The early common law courts reasoned that the lawyer, as a gentleman, should not besmirch his honor by revealing his client's secrets.<sup>20</sup> This "point of honor" rationale lost favor by the early nineteenth century when the reason for maintaining confidentiality shifted to the needs of the client.<sup>21</sup> Courts came to view the privilege as a necessary device to allay the client's fears that his attorney might reveal the client's confidences.<sup>22</sup> The privilege encourages those in need of legal services to consult with attorneys and to exercise candor in dealing with them.<sup>23</sup> Without this freedom of communication, attorneys would be unable to represent their clients effectively. Indeed, the constitutional guarantees of the right to counsel in criminal cases, as well as the due process guarantees of the fifth and fourteenth amendments, seem to mandate recognition of the attorney-client privilege.<sup>24</sup>

The federal courts and each of the states recognize the attorney-client privilege.<sup>25</sup> The privilege protects communications made in confidence for the purpose of seeking legal advice from a member of the bar.<sup>26</sup> Such communications are protected permanently from

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

19. 8 J. WIGMORE, *supra* note 14, § 2290.

20. *Id.*

21. *Id.*; C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 87 (2d ed. 1972).

22. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950) (enunciating a widely accepted test for the applicability of the attorney-client privilege); C. McCORMICK, *supra* note 21, § 87; 8 J. WIGMORE, *supra* note 14, § 2290.

23. 8 J. WIGMORE, *supra* note 14, § 2291.

24. *Cf.* D. MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 149-55 (1973); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

25. *See* 8 J. WIGMORE, *supra* note 14, § 2292 (J. McNaughton rev. ed. 1961 & Supp. 1983); *see also* C. McCORMICK, *supra* note 21, § 87.

26. 8 J. WIGMORE, *supra* note 14, § 2292; C. McCORMICK, *supra* note 21, § 87.

compelled disclosure.<sup>27</sup> Only the client holds the privilege; if he waives it, the attorney has no independent claim to the privilege.<sup>28</sup>

### *Priest-Penitent*

The common law did not recognize the priest-penitent privilege.<sup>29</sup> Most states now recognize the privilege by statute,<sup>30</sup> however, although its scope varies among jurisdictions.<sup>31</sup> The privilege protects confidential communications between a clergyman acting in the capacity of a spiritual advisor and a person seeking help.<sup>32</sup> The priest-penitent privilege resembles the attorney-client privilege because the clergyman can serve the needs of those seeking his aid effectively only when full disclosure is not inhibited by the fear of a later betrayal of confidence. As with the attorney-client privilege, this privilege belongs to the person seeking the clergyman's help, but the clergyman may claim the privilege on that person's behalf.<sup>33</sup>

### *Physician-Patient*

The physician-patient privilege also was not recognized at common law.<sup>34</sup> The privilege appeared in statutory form as early as 1828,<sup>35</sup> however, and now exists statutorily in more than two-thirds of the states.<sup>36</sup> The purpose of this privilege is to encourage pa-

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27. See *supra* note 26.

28. 8 J. WIGMORE, *supra* note 14, § 2321; see also C. McCORMICK, *supra* note 21, § 92.

29. Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege—The Application of the Religion Clauses*, 29 U. PRR. L. REV. 27, 32 (1967). Most authorities maintain that the common law did not recognize this privilege. See, e.g., Coburn, *supra* note 1, at 609.

30. C. McCORMICK, *supra* note 21, § 77. All but four states—Alabama, Connecticut, Mississippi, and New Hampshire—have recognized the privilege by statute. *Id.*

31. See 8 J. WIGMORE, *supra* note 14, § 2395 (J. McNaughton rev. ed. 1961 & Supp. 1983) (collecting statutes).

32. See PROPOSED FED. R. EVID. 506(b). Although Proposed Rule 506 reflects the more progressive version of the priest-penitent privilege, there is another version of the privilege narrowly tailored to confessions that are doctrinally required. See PROPOSED FED. R. EVID. 506 advisory committee note; see also UNIF. R. EVID. 29 (exemplifying the more restrictive version of the privilege).

33. See PROPOSED FED. R. EVID. 506(c).

34. 8 J. WIGMORE, *supra* note 14, § 2380.

35. C. McCORMICK, *supra* note 21, § 98 (citing the seminal New York statute).

36. 8 J. WIGMORE, *supra* note 14, § 2380 (J. McNaughton rev. ed. 1961 & Supp. 1983).

tients to seek the help of a physician and to make available to him the facts necessary for proper treatment.<sup>37</sup> Without such a privilege, a patient might withhold private or embarrassing information essential to proper diagnosis and care.<sup>38</sup>

Despite its wide acceptance, some commentators question the need for a physician-patient privilege.<sup>39</sup> Some critics contend, for example, that the privilege is unnecessary because even if patients expect confidentiality, a privilege is not essential to the relationship because a patient's desire for treatment always will lead them to seek a physician.<sup>40</sup> Other critics maintain that the privilege is harmful because it shields the commission of medical insurance fraud.<sup>41</sup> Finally, in many jurisdictions the privilege is so riddled with exceptions that its effectiveness is questionable.<sup>42</sup>

As with other privileges, the Federal Rules of Evidence leave the existence of the physician-patient privilege to be determined by the common law of the states.<sup>43</sup> Contrary to the treatment of the other privileges, however, the physician-patient privilege is conspicuously absent from the Proposed Federal Rules of Evidence.<sup>44</sup>

### *Psychotherapist-Patient*

The psychotherapist-patient privilege has gained wide acceptance in recent years. Although some states do not recognize it as a distinct privilege, many of these grant a privilege to a broader group that subsumes psychotherapists, including psychiatrists,<sup>45</sup> psychologists,<sup>46</sup> or other counselors.<sup>47</sup> The psychotherapist-patient

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37. C. McCORMICK, *supra* note 14, § 98.

38. *Id.*

39. See, e.g., 8 J. WIGMORE, *supra* note 14, § 2380a. Wigmore asserts that the physician-patient privilege in practice results in the suppression of facts that properly should be disclosed. *Id.*; see also Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607 (1943); Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. CHI. L. REV. 285 (1943).

40. See, e.g., 8 J. WIGMORE, *supra* note 14, § 2380a.

41. See, e.g., C. McCORMICK, *supra* note 21, § 105.

42. PROPOSED FED. R. EVID. 504 advisory committee note.

43. See FED. R. EVID. 501.

44. See PROPOSED FED. R. EVID. 504 advisory committee note.

45. 8 J. WIGMORE, *supra* note 14, § 2286 n.23.

46. *Id.*

47. See Comment, *A Proposal*, *supra* note 1, at 779-80. In addition, a psychotherapist

relationship easily meets the second criterion of the Wigmore formula because extremely personal and private revelations are usually essential to the proper treatment of mental and emotional disorders. Patients would be unlikely to make these sensitive revelations without a guarantee of privacy.<sup>48</sup> This was the primary reason that the Advisory Committee offered for including a psychotherapist-patient privilege in the Proposed Federal Rules of Evidence. As the Committee explained, the psychiatrist has a special need for confidentiality beyond that of the ordinary physician.<sup>49</sup>

*Similarities Between the Professional Privileges and the Parent-Child Privilege*

The parent-child relationship is analogous to the privileged professional relationships in many respects. As the professional exercises his skills in the delicate relationship with his client, the parent plays a unique and sensitive role in the life of his "client," the child. In fulfilling this role, the parent must assume many of the same responsibilities as professionals. The parent, for example, often must serve as the child's legal advisor, spiritual counselor, and physical and emotional health expert. The necessity for confidentiality is comparable to that within the professional relationships. Like the attorney, priest, or psychiatrist, parents must establish an atmosphere of trust to facilitate free and open communication. Proponents of the parent-child privilege argue that if courts can compel parents to reveal the contents of their children's confidential communications, the family, and, ulti-

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potentially could qualify as a physician for purposes of an applicable physician-patient privilege, provided he is properly licensed or certified. See *In re Brenda H.*, 119 N.H. 382, 402 A.2d 169 (1979) (implying that a patient's communications to a therapist would have been privileged under either a physician-patient privilege or a psychologist-patient privilege had she been a licensed physician or a certified psychologist). But see 8 J. WIGMORE, *supra* note 14, § 2382 n.5 ("Psychologists (as distinguished from psychiatrists, who are professional physicians) are not included within the [physician-patient] privilege") (emphasis in original)).

48. See PROPOSED FED. R. EVID. 504 advisory committee note (quoting GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, Report No. 45, at 92 (1960)); Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 184-85 (1960).

49. PROPOSED FED. R. EVID. 504 advisory committee note.



mately, society will suffer.<sup>50</sup> An analysis of the well established husband-wife privilege exposes a similar concern for the integrity of a relationship essential to societal stability.

### *The Husband-Wife Privilege*

#### *Adverse-Testimony Privilege*

The husband-wife privilege collectively refers to two distinct privileges: a privilege for confidential marital communications, and the adverse-testimony or "anti-marital fact" privilege.<sup>51</sup> The privilege against adverse spousal testimony stems from the common law concept of the husband and wife as a single entity, as well as from the common law rule that one could not testify in any action in which he had an interest.<sup>52</sup> Thus, at early common law, husbands and wives could not testify either for or against each other. Although modern rules of evidence discourage recognition of this concept of spousal incompetency,<sup>53</sup> the adverse-testimony privilege nevertheless persists in two forms: the first variant permits a spouse to resist testifying against the other; the second variant allows a spouse to prevent the other from testifying.<sup>54</sup>

The adverse-testimony privilege serves mainly to prevent marital disharmony.<sup>55</sup> Another reason for this aspect of the husband-wife privilege is society's "natural repugnance" for using the testimony of one spouse to convict the other.<sup>56</sup> The adverse-testimony privilege exists to protect the marriage itself rather than to protect particular spousal communications. Thus, the operation of this privilege depends not on the existence of confidential communications but rather on the "anti-marital" nature of the testimony sought. Although commentators have criticized this privilege as

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50. See, e.g., Coburn, *supra* note 1, at 625-32; Stanton, *supra* note 1, at 66-67; Comment, *A Proposal*, *supra* note 1, at 806-07.

51. 8 J. WIGMORE, *supra* note 14, §§ 2333-2334.

52. Trammel v. United States, 445 U.S. 40, 44 (1980); Stanton, *supra* note 1, at 4.

53. See Trammel v. United States, 445 U.S. 40, 48 n.9 (1980) (indicating that only eight states now provide that one spouse always is incompetent to testify against the other in a criminal proceeding).

54. PROPOSED FED. R. EVID. 505 advisory committee note. See generally 8 J. WIGMORE, *supra* note 14, § 2241.

55. See Trammel v. United States, 445 U.S. 40, 44 (1980).

56. 8 J. WIGMORE, *supra* note 14, § 2228.

anachronistic and unjustified,<sup>57</sup> approximately half of the states recognize it.<sup>58</sup> When the United States Supreme Court recently reconsidered this privilege in *Trammel v. United States*,<sup>59</sup> the Court only modified it by vesting the privilege solely in the testifying spouse.<sup>60</sup> Thus, in federal criminal proceedings, the privilege against adverse spousal testimony rests entirely with the testifying spouse. The court cannot compel the witness to testify; the accused spouse cannot prevent the witness from testifying.<sup>61</sup>

### *Confidential Communication Privilege*

The husband-wife privilege for confidential communications prohibits testimony by either spouse relating to confidential communications occurring during their marriage.<sup>62</sup> The privilege encourages open communication within the marriage and thereby fosters a relationship valuable to society.<sup>63</sup> Permitting courts to compel disclosure of marital confidences might undermine the trust beneficial to marriage.<sup>64</sup> The privilege also stems from society's reluctance to force a spouse to reveal intimate or embarrassing marital confidences.<sup>65</sup> The privilege protects only communications between a lawfully married couple that originate in confidence.<sup>66</sup>

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57. Wigmore calls the privilege against adverse marital testimony an "anachronism in legal theory and an indefensible obstruction to truth in practice." *Id.*; see also Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675 (1929).

58. Besides the eight states that provide that one spouse always is incompetent to testify against another, sixteen states provide a privilege against adverse testimony that vests the privilege either in both spouses or solely with the testifying spouse. See *Trammel v. United States*, 445 U.S. 40, 48 n.9 (1980) (collecting statutes). Nine other states provide a privilege against compelled adverse testimony held by the testifying spouse alone. *Id.* The remaining seventeen states have abolished the adverse-testimony privilege in criminal cases. *Id.*

59. 445 U.S. 40 (1980).

60. *Id.* at 52-53. The Court reasoned that when one spouse is willing to testify adversely against the other, marital harmony probably no longer exists anyway. *Id.*

61. *Id.* at 53. Neither spouse, however, may reveal confidential marital communications without the other's consent. See *infra* text accompanying notes 62-70.

62. See *Trammel v. United States*, 445 U.S. 40, 51 (1980); *Blau v. United States*, 340 U.S. 332, 333 (1951); *Wolfe v. United States*, 291 U.S. 7, 14 (1934).

63. See generally 8 J. WIGMORE, *supra* note 14, § 2332.

64. *Id.*; Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 113 (1956).

65. C. McCORMICK, *supra* note 21, § 86.

66. See generally 8 J. WIGMORE, *supra* note 14, §§ 2335-37.

Commentators contend that the privilege is unnecessary because married couples generally are unaware of its existence.<sup>67</sup> Because the mutual trust probably will exist in the relationship in any case, these commentators contend that no privilege is necessary to encourage it.<sup>68</sup> Many others have defended the privilege forcefully,<sup>69</sup> however, and the privilege is in no danger. Indeed, the elimination of the confidential communications privilege in the Proposed Federal Rules of Evidence provoked a storm of controversy in Congress, causing at least in part Congress' rejection of the rules on privileges.<sup>70</sup>

### *Similarities Between the Husband-Wife and Parent-Child Privileges*

Similar policies underlie both the husband-wife and the parent-child testimonial privileges. Proponents of a parent-child privilege maintain that protecting one relationship but not the other is inconsistent.<sup>71</sup> The two relationships are difficult to distinguish within the Wigmore formula. Recent United States Supreme Court decisions protecting minors' rights<sup>72</sup> and family privacy<sup>73</sup> further

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67. See, e.g., C. McCORMICK, *supra* note 21, § 86; Hutchins & Slesinger, *supra* note 57, at 682. The Proposed Federal Rules of Evidence omitted a marital privilege for confidential communications because marital conduct was unlikely to "be affected by a privilege for confidential communications of whose existence the parties are in all likelihood unaware." PROPOSED FED. R. EVID. 505 advisory committee note.

68. See *supra* note 67.

69. See, e.g., 8 J. WIGMORE, *supra* note 14, § 2332; Stanton, *supra* note 1, at 6; Comment, *Recognition of Privilege*, *supra* note 1, at 683-84.

70. *In re Agosto*, 553 F. Supp. 1298, 1323-25 (D. Nev. 1983); Comment, *Recognition of Privilege*, *supra* note 1, at 684.

71. See, e.g., *In re Agosto*, 553 F. Supp. 1298, 1325-26 (D. Nev. 1983); Stanton, *supra* note 1, at 7; Comment, *A Proposal*, *supra* note 1, at 773-74.

72. The United States Supreme Court's holding in *In re Gault*, 387 U.S. 1 (1967), that a juvenile has a privilege against self-incrimination in a juvenile delinquency hearing was the immediate stimulus of the recent interest in a parent-child privilege. See Coburn, *supra* note 1, at 599-600. In *Bellotti v. Baird*, 443 U.S. 622 (1979), the Court upheld minors' right to abortion without parental consent. The opinion cautioned, however, that the rights of minors are not equivalent with those of adults. *Id.* at 635; see also *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (minors, as well as adults, possess constitutional rights); *In re Winship*, 397 U.S. 358 (1970) (proof beyond reasonable doubt required for conviction of juvenile); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (minors' right to freedom of expression).

73. See *infra* note 81 and accompanying text. For a thorough discussion of the constitutional bases of the parent-child privilege, see Stanton, *supra* note 1, at 13-37; Comment,

cloud any distinction. Although these two relationships are equally important, the law protects one far more than the other. This imbalance has prompted courts to recognize a parent-child privilege.

### CASES RECOGNIZING A PARENT-CHILD PRIVILEGE

#### *In re A and M*

The seminal case concerning the parent-child testimonial privilege is *In re A and M*.<sup>74</sup> State prosecutors alleged that a sixteen-year-old boy started a fire at a New York college.<sup>75</sup> The district attorney subpoenaed the boy's parents, hoping to obtain evidence against their son.<sup>76</sup> The County Court of Erie County New York quashed the subpoenas, holding that the marital privilege encompasses a parent-child privilege and that the constitutional right to privacy protects confidential intrafamilial communications.<sup>77</sup>

The Appellate Division of the New York Supreme Court rejected the portion of the trial court's reasoning that recognized a parent-child privilege within the husband-wife privilege. The court recognized that the New York statute on marital privileges restricts the privilege to communications between husband and wife.<sup>78</sup> The court affirmed, however, that compelled disclosure of these communications would compromise constitutionally protected family interests.<sup>79</sup> Although no statute protected the communications, the court held that "a host of cases which have given constitutional dimension to matters concerning the relational interests of parents and children . . . acknowledge[d] 'a private realm of family life the state cannot enter.'"<sup>80</sup> As the court observed, these cases<sup>81</sup> demon-

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*Constitutional Privilege*, *supra* note 1, at 1012-23; Comment, *Confidential Communication*, *supra* note 1, at 819-27.

74. 61 A.D.2d 426, 403 N.Y.S.2d 375 (N.Y. App. Div. 1978).

75. *Id.* at 428, 403 N.Y.S.2d at 377.

76. *Id.*

77. *Id.*

78. *Id.* (construing N.Y. CIV. PRAC. LAW § 4502(b) (McKinney 1963)).

79. *In re A and M*, 61 A.D.2d 426, 432, 403 N.Y.S.2d 375, 379-80 (N.Y. App. Div. 1978).

80. *Id.* at 429-30, 403 N.Y.S.2d at 378 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

81. The court cited the following cases: *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632 (1974) (striking down a law requiring mandatory pregnancy leave for teachers); *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion without state interference during first trimester of pregnancy); *Stanley v. Illinois*, 405 U.S. 645 (1972) (state may not interfere with un-

strated the Supreme Court's recognition of constitutional rights to marital<sup>82</sup> and familial privacy.<sup>83</sup>

In *A and M* the court stressed the importance of the parents' role in the child's development of self image, character, and emotional stability.<sup>84</sup> The court also considered the importance of trust in the family:

It would be difficult to think of a situation which more strikingly embodies the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to his mother and father. There is nothing more natural, more consistent with our concept of the parental role, than that a child may rely on his parents for help and advice. Shall it be said to those parents, 'Listen to your son at the risk of being compelled to testify about his confidences?'<sup>85</sup>

Although it stated that these circumstances pass Wigmore's four-part test,<sup>86</sup> the court declined to openly recognize a parent-child privilege because "the creation of a privilege devolves exclusively on the Legislature."<sup>87</sup> Despite this apparent deference, the decision created at least a limited privilege for children's communications to their parents for the purpose of obtaining guidance and counsel.<sup>88</sup> Because an absolute privilege might undermine parental control of children, the court carefully limited the protection

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wed father's custody rights absent neglect); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (parental right to give child religious education outweighs state interest in compulsory public education); *Ginsberg v. New York*, 390 U.S. 629 (1968) (minors and obscenity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing a constitutional right to marital privacy within the penumbra of specifically enumerated constitutional rights); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (state may intervene in parent-child relationship to enforce child labor law); *Pierce v. Society of Sisters*, 268 U.S. 510 (1923) (parental right to control child's upbringing); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (upholding right of parent to control child's education); see also *In re A and M*, 61 A.D.2d 426, 430, 403 N.Y.S.2d 375, 378 (N.Y. App. Div. 1978).

82. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); see *supra* note 81.

83. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (barring state interference with individual's choice to reside with extended family).

84. *In re A and M*, 61 A.D.2d 426, 432, 403 N.Y.S.2d 375, 380 (N.Y. App. Div. 1978).

85. *Id.* at 429, 403 N.Y.S.2d at 378.

86. *Id.* at 434, 403 N.Y.S.2d at 381; see *supra* note 17 and accompanying text.

87. *In re A and M*, 61 A.D.2d 426, 434-35, 403 N.Y.S.2d 375, 381.

88. See *id.* at 433-34, 403 N.Y.S.2d at 380.

to those cases in which both the parents and the child sought the privilege.<sup>89</sup>

*People v. Fitzgerald*

Two years after *A and M* the New York parent-child privilege entered a further stage of development. In *People v. Fitzgerald*,<sup>90</sup> the County Court of Westchester County New York recognized a parent-child testimonial privilege "grounded in law, logic, morality and ethics."<sup>91</sup> The prosecution had attempted to compel a father to testify against his twenty-three-year-old son after the son's involvement in a fatal hit-and-run accident.<sup>92</sup> The father testified about the conversations under subpoena to the grand jury.<sup>93</sup> Before trial, however, both father and son moved to suppress this compelled testimony on the ground that a parent-child privilege protected it.<sup>94</sup> The state opposed the motion, arguing that no such privilege existed, and that even if it did exist, the father's earlier testimony constituted a waiver.<sup>95</sup>

Relying on *A and M*, the constitutional right to privacy cases,<sup>96</sup> and notions of family integrity,<sup>97</sup> the court held that a parent-child testimonial privilege existed in New York despite its absence from the statutes.<sup>98</sup> The court stated that "[s]ince such a privilege flows directly from Federally protected constitutional rights of privacy,

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89. *Id.* at 435 n.9, 403 N.Y.S.2d at 381 n.9.

90. 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979).

91. *Id.* at 713, 422 N.Y.S.2d at 310.

92. *Id.* at 714, 422 N.Y.S.2d at 310. A vehicle struck two women walking at night along a snow covered road. The authorities believed that the son was the offending driver and charged him with negligent homicide. *Id.* at 713, 422 N.Y.S.2d at 310.

93. *Id.* at 714, 422 N.Y.S.2d at 310. The grand jury testimony occurred before the decision in *A and M*. *Id.* at 722, 422 N.Y.S.2d at 316. The father therefore was unaware of the existence of the privilege and asserted no claim to it. *Id.*

94. *Id.* at 712, 714, 422 N.Y.S.2d 309, 310-11 (Westchester County Ct. 1979).

95. *See id.*

96. The court cited the following cases as sources of this right: *Moore v. East Cleveland*, 431 U.S. 494 (1977); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *see also supra* note 81.

97. *People v. Fitzgerald*, 101 Misc. 2d 712, 716, 422 N.Y.S.2d 309, 312 (Westchester County Ct. 1979). The court stressed not only the need to foster ongoing communications between parent and child but also the injustice of forcing a parent to choose between his child's loyalty and the state's demands. *See infra* notes 191-193 and accompanying text.

98. *People v. Fitzgerald*, 101 Misc. 2d 712, 716-17, 422 N.Y.S.2d 309, 314 (Westchester County Ct. 1979).

it is a question of law which is appropriate for this court's decision, notwithstanding the lack of legislative recognition of such a fundamental right to date."<sup>99</sup> The court found that the likely injury to the parent-child relationship outweighed the state's interest in disposing of litigation.<sup>100</sup>

*Fitzgerald* expanded the scope of the parent-child privilege in two respects: first, by extending the privilege to adults as well as to minors; and second, by acknowledging the child's independent right to assert the privilege. Whereas *A and M* protected "communications made by a *minor* child to his parents,"<sup>101</sup> *Fitzgerald* rejected age distinctions as arbitrary and artificial.<sup>102</sup> Because the purpose of the privilege is the protection of the parent-child relationship, the court found no justification for denying the privilege to adults.<sup>103</sup> Accordingly, it ruled that the ongoing nature of the parent-child relationship demanded that the privilege "not be limited by the age of either party."<sup>104</sup>

Through an analogy to the husband-wife privilege, the court ruled that the father's testimony before the grand jury did not waive his right to avoid testifying at trial.<sup>105</sup> Because both husband and wife must consent to any disclosure of confidential communications,<sup>106</sup> disclosure of confidential communications between parent and child also required joint consent.<sup>107</sup> The court noted that parents could waive the privilege under certain circumstances, such as when they wished to divulge communications to enlist the court's aid in supervising the child.<sup>108</sup> The court would not require

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99. *Id.* at 717, 422 N.Y.S.2d at 313.

100. *See id.* at 716, 422 N.Y.S.2d at 312.

101. *In re A and M*, 61 A.D.2d 426, 435, 403 N.Y.S.2d 375, 381 (N.Y. App. Div. 1978) (emphasis added).

102. *People v. Fitzgerald*, 101 Misc. 2d 712, 718-20, 422 N.Y.S.2d 309, 313-14 (Westchester County Ct. 1979).

103. *See id.* Because the privilege flows from the constitutional right to privacy inherent in the parent-child relationship, the court held that the state was forbidden by law to impose an age limit. *Id.* at 719-20, 422 N.Y.S.2d at 314. The court also pointed out that no other privilege was restricted by age requirements. *Id.* at 720, 422 N.Y.S.2d at 314.

104. *Id.* at 720, 422 N.Y.S.2d at 314.

105. *See id.* at 720, 422 N.Y.S.2d at 315.

106. *Id.*; *see supra* note 62 and accompanying text.

107. *People v. Fitzgerald*, 101 Misc. 2d 712, 721, 422 N.Y.S.2d 309, 315 (Westchester County Ct. 1979).

108. *See id.*

joint consent in this situation because the state would be protecting the relationship rather than invading it.<sup>109</sup> Combined with parental interests, the state interests would outweigh the child's right to privacy.<sup>110</sup> In *Fitzgerald*, however, both parties opposed disclosure.<sup>111</sup>

The *Fitzgerald* opinion does not propose that a child may assert this independent privilege against his parent's wishes. Rather, the court preserves the child's privilege when the parents accidentally waive their own rights, but a parent seeking court assistance in controlling the child could override the child's privilege.<sup>112</sup> The court did not address the possibility that a parent might seek to disclose confidential information for some less noble motive, such as revenge. The opinion does not rule out a truly independent privilege in those circumstances,<sup>113</sup> but the difficulty in proving unsavory motives suggests that parents will retain effective veto power.

### *In re Grand Jury Proceedings (Greenberg)*

*In re Greenberg*<sup>114</sup> represents the first case in which a federal court recognized a parent-child privilege. In *Greenberg*, a mother sought relief from a civil contempt charge for refusing to testify against her adult daughter.<sup>115</sup> A Florida grand jury indicted the daughter on charges of importing marijuana.<sup>116</sup> Simultaneously, a grand jury in Connecticut was investigating crimes involving the same importation scheme.<sup>117</sup> The Connecticut grand jury subpoenaed the mother because she had visited her daughter at the time

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109. *See id.*

110. *Id.* The situation was different in *Fitzgerald* because both the parent and the child joined to oppose the state's interest. *Id.* at 714, 422 N.Y.S.2d at 310. Although the father did not object to testifying before the grand jury, the court found that his testimony was not voluntary. *Id.* at 722, 422 N.Y.S.2d at 316. The court decided that he simply was unaware of his right to claim the privilege and thus had not waived it by testifying before the grand jury. *See id.*

111. *Id.* at 714, 422 N.Y.S.2d at 310.

112. *See supra* notes 101-02 and accompanying text.

113. *Fitzgerald* reaches no definite conclusion regarding the parent's ability to waive the privilege, but the court indicated that it would allow parental waiver when in the best interests of the child.

114. 11 Fed. R. Evid. Serv. (Callaghan) 579 (D. Conn. 1982).

115. *See id.* at 579-80. The opinion does not indicate the age of the adult daughter.

116. *Id.* at 580.

117. *Id.* at 581.



of the alleged importation and may have had pertinent information about the operation.<sup>118</sup>

The mother supported her claim to a testimonial privilege with an affidavit stating that she and her children were conservative Jews and that the Jewish religion forbids a parent to testify against her child.<sup>119</sup> The mother submitted the affidavit of a rabbi to confirm this theological point.<sup>120</sup> The United States District Court for the District of Connecticut found that the mother's faith precluded her from testifying against her child.<sup>121</sup>

The court then analyzed two distinct parent-child privileges: a religiously based privilege against giving incriminating testimony,<sup>122</sup> and a common law privilege protecting a family's confidential communications.<sup>123</sup> Both raised constitutional issues. Denial of the religious privilege would violate first amendment rights; denial of the privilege for confidential parent-child communications might impinge on the right of family privacy.<sup>124</sup> The availability of either privilege depended on whether the individual interests outweighed the state's interest in obtaining evidence.<sup>125</sup>

Relying on the opinion of United States Supreme Court in *Branzburg v. Hayes*,<sup>126</sup> the court found that generally "the interest of the grand jury in obtaining testimony must prevail over a witness' First Amendment religious rights."<sup>127</sup> The court stated, however, that it would accommodate the mother's wishes if it could do

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118. *Id.*

119. *Id.* at 581-82. The authority adduced was Sanhedrin 27B of the Babylonian Talmud. *Id.* n.6.

120. *Id.* at 581-82.

121. *See id.*

122. *See id.* at 582-84.

123. *See id.* at 584-87.

124. *Id.* at 582.

125. *Id.*

126. 408 U.S. 665 (1972) (holding that the journalists' claim of a first amendment privilege must be subordinated to the duty of every citizen to appear before the grand jury).

127. *In re Grand Jury Proceedings* (Greenberg), 11 Fed. R. Evid. Serv. (Callaghan) 579, 583 (D. Conn. 1982). The court noted that the United States Court of Appeals for the Second Circuit rejected a similar claim of religious privilege in *Smilow v. United States*, 465 F.2d 802 (2d Cir. 1972), *vacated on other grounds*, 409 U.S. 944 (1972). Aside from the absence of any familial relationship in *Smilow*, the court distinguished the case as one in which granting the privilege would have halted the investigation. *In re Grand Jury Proceedings* (Greenberg), 11 Fed. R. Evid. Serv. (Callaghan) 579, 583 (D. Conn. 1982).

so without unduly hindering the grand jury.<sup>128</sup> Because incriminating testimony only would be testimony against the child, the court limited the mother's privilege to answers that would implicate her daughter.<sup>129</sup> Inasmuch as other witnesses were available to testify about the daughter's activities,<sup>130</sup> the court concluded that the mother's testimony was "not essential to the grand jury investigation. . . ."<sup>131</sup> The court held that the government's interest in the testimony did not outweigh the mother's first amendment rights.<sup>132</sup> Because a religiously based privilege exempted the mother from incriminating her daughter, the court had no need to decide whether a privilege based on family privacy also protected incriminating testimony.<sup>133</sup>

The remaining issue was whether a common law privilege nevertheless protected communications not incriminating to the daughter. The collision of constitutionally protected interests complicated the issue. The court stated that the grand jury investigation must take precedence unless doing so "would violate society's interest, also of constitutional magnitude, in fostering the parent-child relationship."<sup>134</sup> The court applied the Wigmore test<sup>135</sup> and found that the mother-daughter conversations met the first three requirements: the communications had originated in confidence; confidentiality was essential to the parent-child relationship; and the relationship was valuable to society.<sup>136</sup> The fourth part of the test required the court to balance the likely harm to the family against the benefit of the testimony to the state. The court pointed out that the daughter, as an adult, did not require the same degree

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128. *In re Grand Jury Proceedings (Greenberg)*, 11 Fed. R. Evid. Serv. (Callaghan) 579, 582 (D. Conn. 1982).

129. *See id.* at 584.

130. *Id.* at 584. The availability of other witnesses presumably able to supply the same information sought from Mrs. Greenberg prevented her claim of privilege from frustrating the investigation. *See supra* note 128 and accompanying text.

131. *In re Grand Jury Proceedings (Greenberg)*, 11 Fed. R. Evid. Serv. (Callaghan) 579, 584 (D. Conn. 1982).

132. *See id.*

133. *Id.* at 585.

134. *Id.*

135. *See supra* note 17 and accompanying text.

136. *In re Grand Jury Proceedings (Greenberg)* 11 Fed. R. Evid. Serv. (Callaghan) 579, 585-86 (D. Conn. 1982).

of guidance, counsel, and support as a child.<sup>137</sup> Accordingly, although compelled disclosure of nonincriminating confidences might damage the relationship, the harm would be less severe than if a minor were involved.<sup>138</sup> The court found that this lesser degree of harm did not outweigh the state's need for the testimony. The facts could not justify the creation of a common law parent-child communication privilege.<sup>139</sup>

The court was careful to limit its decision to accommodate the witness's first amendment rights. Rather than protecting all confidential intrafamily communications, the religiously based privilege exempts parents from testifying against their children only when the parents' religion prohibits such testimony.<sup>140</sup> Although the mother in *Greenberg* stated that any incriminating evidence she may have had was received in confidence, the privilege only exempted her from disclosing incriminating evidence.<sup>141</sup> Declining to create a parent-child privilege protecting all confidential communications, the court still implicitly left the issue open for future consideration. One factor that influenced the court not to create a common law privilege in *Greenberg* was the daughter's age. Citing *A and M*, the court held that confidential, non-incriminating com-

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137. *Id.* at 586-87. The court pointed out that Mrs. Greenberg's daughter did not live with her mother and maintained only sporadic contact. *Id.* at 586.

138. *Id.* at 587.

139. *See id.* Nevertheless, the court left no doubt that it had the power to create a common law testimonial privilege by relying on Rule 501 of the Federal Rules of Evidence, which provides that privileges "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." Fed. R. Evid. 501. For additional support, the court cited *Trammel v. United States*, 445 U.S. 40 (1980) (modifying the husband-wife adverse testimony privilege), and *United States v. Arthur Young & Co.*, 10 Fed. R. Evid. Serv. (Callaghan) 906 (2d Cir. 1982) (creating a limited common law accountant work-product privilege).

140. *See In re Grand Jury Proceedings (Greenberg)*, 11 Fed. R. Evid. Serv. (Callaghan) 579, 581 (D. Conn. 1982). The court's election to label the privilege recognized in this case as a "parent-child privilege" is misleading. The primary purpose of the privilege recognized in *Greenberg* is the protection of the religious rights of the witness. *See supra* notes 131-32 and accompanying text. Protection of the parent-child relationship here is merely incidental to protection of the mother's free exercise of religion. *See infra* note 141.

141. *In re Greenberg*, 11 Fed. R. Evid. Serv. (Callaghan) 579, 584 (D. Conn. 1982). The Jewish tenet forbidding testimony by a parent against his child is not limited to testimony based on confidential communications. *See id.* at 581. The court's broad grant of a privilege against compelled testimony on incriminating matters implicitly acknowledges as much.

munications from an adult offspring were not protected.<sup>142</sup> The reasoning implies that federal courts still may recognize a parent-child privilege for communications from minor children.<sup>143</sup>

*In re Agosto*

Six months after *In re Greenberg*, the United States District Court for the District of Nevada explicitly recognized an expansive common law parent-child testimonial privilege. *In re Agosto*<sup>144</sup> arose from a motion to quash a subpoena ad testificandum<sup>145</sup> issued to the thirty-two-year-old son<sup>146</sup> of an alleged tax evader.<sup>147</sup> The son argued that enforcement of the subpoena would cause impermissible harm both to his interests and to those of society. The court divided these harms into three categories.<sup>148</sup> First, compelling the son to testify against his father would harm him as an individual. Forcing a breach of confidence, the son argued, would damage his emotional, psychological, and physical health.<sup>149</sup> He also contended that compelling him to testify against his father would violate his right to the free exercise of his religion because his Roman Catholic faith required him to "honor his father and mother."<sup>150</sup> Second, the son contended that testifying would harm his family life, especially relations with his father.<sup>151</sup> He argued

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142. *Id.* at 586-87; see *supra* text accompanying notes 138-39. A possible explanation of the court's choice of the term "parent-child privilege" for the religiously based privilege recognized in *Greenberg*, as well as the court's generally favorable treatment of *A and M*, is that the court wished to lay a foundation for future recognition of a common law parent-child privilege. See *supra* note 140.

143. *Id.*

144. 553 F. Supp. 1298 (D. Nev. 1983).

145. *Id.* at 1299. Agosto moved alternatively for a protective order preventing his interrogation concerning any matter that might be presented to the grand jury against his father.

146. German, *Family Privilege Broadened*, NAT'L L.J., Jan. 24, 1983, at 3, col. 1. The court failed to indicate Charles Agosto's age.

147. *Id.* The Las Vegas strike force conducted the investigation. U.S. Justice Department attorney's intimated that the son was involved in the tax evasion schemes alleged to have been perpetrated by his father, a "reputed mob figure." See *id.* at 3-9.

148. See *In re Agosto*, 553 F. Supp. 1298, 1300 (D. Nev. 1983).

149. See *id.*

150. See *id.* Although the son advanced a religious basis for his claim to the parent-child privilege, the court did not use this rationale to justify the privilege that it created. *Agosto* does not mention *Greenberg*, probably because *Greenberg* had not been reported when the *Agosto* opinion was written.

151. See *id.*

that the parent-child relationship is at least as close and as valuable to society as the husband-wife relationship, which is protected by a privilege.<sup>152</sup> Furthermore, he contended that his age was irrelevant because the parent-child relationship continues beyond the child's minority.<sup>153</sup>

The third potential harm from compelling the son to testify concerned society itself. The son particularly relied on the United States Supreme Court's regard for the integrity and sanctity of the family, highlighted in its cases recognizing a constitutional right to family privacy.<sup>154</sup> Pointedly, the son supported his motion to quash with affidavits demonstrating that the demand for his appearance marked the third occasion in eighteen months that federal prosecutors in Nevada had subpoenaed children to testify against their parents.<sup>155</sup>

Deriving its authority from Rule 501 of the Federal Rules of Evidence,<sup>156</sup> the court recognized the parent-child privilege after an extensive analysis of commentary and caselaw,<sup>157</sup> constitutional issues,<sup>158</sup> and policy concerns.<sup>159</sup> Accordingly, the court granted the son's motion to quash the subpoena.<sup>160</sup> Noting the inconsistency of granting a privilege to husbands and wives but not to parents and children,<sup>161</sup> the court held that the government's goal of presenting all relevant evidence does not outweigh "an individual's right of privacy in his communications within the family unit, nor does it outweigh the family's interest in its integrity and inviolability."<sup>162</sup>

*Agosto* broadened the scope of the parent-child privilege by protecting communications from the parent as well as communications from the child. The court reasoned that because the privilege

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152. *See id.* at 1302.

153. *See id.*

154. *See id.*

155. *See id.* at 1299. The potential for abuse of this tactic by grand juries weighed heavily in the court's opinion. *See id.* at 1330.

156. *See id.* at 1325 ("this court is free [under Rule 501] to extend the law of privileges to deal with those situations encountered in which constitutional protection is deemed essential"); *see also supra* note 139.

157. *See In re Agosto*, 553 F. Supp. 1298, 1302-10 (D. Nev. 1983).

158. *See id.* at 1310-12.

159. *See id.* at 1312-22.

160. *See id.* at 1325.

161. *See id.* at 1325.

162. *Id.*

"springs from a relationship which is both mutual and reciprocal, it would be logically inconsistent to allow the coerced testimony of *either* parent or child against the other."<sup>163</sup> In this respect, the parent-child privilege recognized in *Agosto* is closer to of the husband-wife communications privilege than to the professional privileges. Marital communications deriving from either spouse are protected,<sup>164</sup> whereas professional privileges protect only the layperson's communications.<sup>165</sup>

Reciprocity is a feature that is new to the parent-child privilege. Earlier cases dealt only with children's communications to their parents.<sup>166</sup> The privilege developed as a means to allow the child to speak freely.<sup>167</sup> Commentators consider this the underlying policy of the privilege and reject the reciprocal privilege that protects the parent's confidences as well.<sup>168</sup> Nevertheless, the court in *Agosto* maintained that the protection of private communications within the parent-child relationship should not depend on the direction of the speech.<sup>169</sup> *Agosto* also is the first case to recognize a parent-child privilege against compelled adverse testimony not involving communications. The court ruled that the son could claim the parent-child privilege not only to protect confidential communications from his father; but also to protect "against being compelled to be a witness and testify adversely against his father in any criminal proceeding."<sup>170</sup> The court thus expanded the parent-child privilege by modeling it after the rule of spousal immunity from adverse

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163. *Id.* at 1328 (emphasis in original).

164. *See supra* text accompanying notes 62-66.

165. *See supra* text accompanying notes 18-49.

166. Some of the courts that declined to recognize a parent-child privilege did analyze factual scenarios resembling that in *Agosto*. For example, *In re Starr*, 647 F.2d 511 (5th Cir. 1981), concerned a witness's refusal to testify against her mother and stepfather. The court rejected the witness's claim of the parent-child privilege for lack of federal precedent and affirmed the civil contempt order. *Id.* at 512-13.

167. *See generally In re Grand Jury Proceedings (Greenburg)*, 11 Fed. R. Evid. Serv. (Callaghan) 579 (D. Conn. 1982); *In re A and M*, 61 A.D.2d 426, 403 N.Y.S.2d 375 (N.Y. App. Div. 1978); *People v. Fitzgerald*, 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979).

168. *See, e.g., Stanton, supra* note 1, at 64-65; Comment, *Recognition of Privilege, supra* note 1, at 685.

169. *See In re Agosto*, 553 F. Supp. 1298, 1325-28 (D. Nev. 1983).

170. *Id.* at 1325.

testimony enunciated in *Trammel*.<sup>171</sup> *Agosto* stands for the proposition that neither child nor parent can be compelled to testify adversely to the other on any matter in a criminal proceeding.<sup>172</sup>

The parent-child testimonial privilege announced in *Agosto* is the broadest and most far-reaching to date. The court placed the parent-child privilege on a par with the husband-wife privilege recognized in the federal courts. The privilege not only protects confidential communications from either party regardless of age but also prevents the compulsion of adverse testimony on any matter in a criminal proceeding.

### ISSUES AND RECOMMENDATIONS

Courts that have considered the parent-child privilege disagree on whether the privilege does or should exist. Many courts that have refused to recognize the privilege have done so without thorough analysis.<sup>173</sup> Courts are reluctant to recognize novel privileges even when persuasive justifications support the privilege.<sup>174</sup> In addition, many courts prefer to leave the issue to legislative initiative.<sup>175</sup>

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171. See *supra* text accompanying notes 59-61.

172. See *In re Agosto*, 553 F. Supp. 1298, 1325-28 (D. Nev. 1983). *Contra* *Three Juveniles v. Commonwealth*, 390 Mass. 357, —, 455 N.E.2d 1203, 1206 (1983). The Supreme Judicial Court of Massachusetts, by a 4-3 vote, held that neither the common law nor the constitutional right to privacy protects minor children from being compelled to testify, over objection of both children and parents, before a grand jury investigating the possible murder of a nonfamily member by the father. See *id.* at 1204-08. Although the court rejected the adverse testimony privilege recognized in *Agosto* as an "extreme position," it pointedly reserved judgment on recognition of a confidential communications privilege. *Id.*

173. See, e.g., *United States v. Jones*, 683 F.2d 817 (4th Cir. 1982) (refusal to consider the privilege in case of adult son's non-confidential communications); *In re Starr*, 647 F.2d 511 (5th Cir. 1981) (citing lack of federal precedent and fact that communication came from parent); *In re Kinoy*, 326 F. Supp. 400 (S.D.N.Y. 1970) (no such privilege exists).

174. See, e.g., *In re Terry W.*, 59 Cal. App. 3d 745, 748, 130 Cal. Rptr. 913, 914 (1976) (refusing to recognize the privilege, absent legislative guidance, despite recognition of persuasive arguments for creating the privilege).

175. See, e.g., *id.* at 749, 130 Cal. Rptr. at 915 ("That the problem is one which should be addressed legislatively rather than judicially is emphasized by unanswerable questions whether the 'privilege' should be that of parent, child, or both, how the 'privilege' may be waived, and what exceptions, if any, to the 'privilege' should exist"); *State v. Gilroy*, 313 N.W.2d 513 (Iowa 1981) (refusing to recognize the privilege absent statutory authority); cf. *In re A and M*, 61 A.D.2d 426, 434-35, 403 N.Y.S.2d 375, 381 (N.Y. App. Div. 1978) (recognizing a limited privilege but deferring to legislature for definitive rule).

Although many commentators have supported a parent-child privilege,<sup>176</sup> legislators have not.<sup>177</sup> Consequently, the courts must address this issue. The broad privilege allowed in *Agosto* is certain to encourage many more claims.<sup>178</sup> The courts deciding these claims will face pronounced disagreement concerning the purpose, scope, and legitimate beneficiaries of the parent-child privilege. The debate over the privilege involves conflict between several constitutionally protected interests. Values at the heart of family life collide with basic tenets of the American law. Analyzing the problems and policies of the parent-child privilege will help courts resolve these conflicts.

### *The Parent-Child Relationship and the Need for a Privilege*

The parent-child relationship is important to the societal structure. Parents bear almost complete responsibility for the early socialization of their children, and studies show that this early training is the most significant influence in the child's development of both a self image and an ability to interact with society.<sup>179</sup> Although other socializing mechanisms, such as school and peer group activities, play a larger role in children's development as they grow older, the parent-child relationship remains the most important influence. This influence often retains its importance throughout the child's adult life.

A troubled parent-child relationship is directly related to anti-social and delinquent behavior.<sup>180</sup> Children of hostile or indifferent parents often develop poor self-images and seek attention by resorting to violence.<sup>181</sup> As they grow older, they may compensate

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176. See, e.g., Coburn, *supra* note 1, at 632-33; Stanton, *supra* note 1, at 58-60; Comment, *A Proposal*, *supra* note 1, at 807-09; Comment, *Recognition of Privilege*, *supra* note 1, at 689-90; Comment, *Underprivileged Communications*, *supra* note 1, at 1195.

177. See *supra* note 11.

178. See, e.g., *In re Matthews*, Trade Cas. (CCH) ¶ 65,544 (2d Cir. 1983). Matthews wanted to withhold testimony concerning confidential communications received from his in-laws. He cited both *Greenberg* and *Agosto* but the court was not persuaded that an "in-law privilege" was justified and therefore affirmed the contempt judgment. See *id.*

179. A. COFFEY, *THE PREVENTION OF CRIME AND DELINQUENCY* 56 (1975); Clausen, *Perspectives on Childhood Socialization in Socialization and Society* 146 (Clausen ed. 1968).

180. See, e.g., S. GLUECK & E. GLUECK, *UNRAVELING JUVENILE DELINQUENCY* 125-27 (1950); R. TROJANOWICZ, *JUVENILE DELINQUENCY: CONCEPTS AND CONTROL* 76-78 (2d ed. 1978).

181. See Trojanowicz, *supra* note 180, at 80.



for their inadequate home lives by forming strong peer-group relationships. The shared attitude of the peer group may reinforce the children's antisocial tendencies.<sup>182</sup>

To effectively guide and counsel their children, parents must establish a relationship of mutual confidence and trust. If children are to discuss serious problems with their parents, they must expect complete confidence. Most jurisdictions, unfortunately, do not protect private communications between parents and children.<sup>183</sup>

Courts should not compel disclosure of confidential communications between minors and their parents concerning matters of guidance and support. This conclusion is consistent both with the Wigmore formula and the established privileges. To satisfy Wigmore's first requirement, a child must communicate with his parents in confidence.<sup>184</sup> The presence of siblings or other immediate family members, however, should not compromise the privilege.<sup>185</sup>

The second part of Wigmore's test requires that confidentiality be essential to the relationship.<sup>186</sup> One commentator has argued that the parent-child privilege does not meet this requirement. Because the average parent or child is not likely to be aware of it, the argument goes, the privilege does not encourage open communication and is unimportant to the relationship.<sup>187</sup> As noted earlier, however, commentators have made similar arguments against the husband-wife communication privilege.<sup>188</sup> Nothing suggests that married couples generally are unaware of the privilege.<sup>189</sup> The longevity of the marital privilege suggests that couples probably are aware, at least in a vague way, that marital confidences have legal protection. If courts recognize a parent-child privilege, it too will become known through its application.

The third element of Wigmore's test requires that the privileged

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182. See Stanton, *supra* note 1, at 42-43.

183. See *supra* notes 2-3, 11 and accompanying text.

184. See *supra* text accompanying note 17.

185. Coburn, *supra* note 1, at 632; Stanton, *supra* note 1, at 58; Comment, *Constitutional Privilege*, *supra* note 1, at 1025; Comment, *A Proposal*, *supra* note 1, at 690. Most commentators agree that requiring the communications to be made out of the presence of siblings simply ignores the reality of family life and unnecessarily restricts the privilege.

186. See *supra* text accompanying note 17.

187. Note, *Questioning the Privilege*, *supra* note 1, at 153.

188. See *supra* text accompanying notes 67-68.

189. See *supra* text accompanying note 69.

relationship be one that, in the opinion of the community, ought to be fostered.<sup>190</sup> The parent-child relationship easily meets this standard, as the opinions in *A and M, Fitzgerald, Greenberg*, and *Agosto* make clear.

Wigmore's fourth element presents the most difficulty. The harm to the relationship from disclosure of the communications must outweigh the importance of the information to the litigation.<sup>191</sup> Coerced disclosure could ruin the parent-child relationship by destroying the child's trust in his parents. Conversely, society may gain little from compelling parental testimony concerning conversations with the child.

A parent confronted with the government's demand for his testimony has three options.<sup>192</sup> First, he can agree to testify, contribute to his child's conviction, and possibly destroy their relationship. Second, he can refuse to testify and be subject to contempt proceedings. Third, he can agree to testify and then lie to protect his child. In the first instance, the testimony is gained only through severe damage to a socially beneficial relationship. If the parent chooses to protect his child by refusing to testify and then is jailed for contempt, the state's interest in fact-finding is blocked, and the parent becomes a prisoner of conscience. Finally, if the parent perjures himself, the state does not obtain the facts and the parent is guilty of a crime.<sup>193</sup>

As a general proposition, then, the government often has considerably more to lose than to gain when it attempts to compel parental testimony. The situation presents great potential for harm to the child, to the parent, and to the legal system. This alone indicates the need for a privilege. Nevertheless, courts should limit the

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190. See *supra* text accompanying note 17.

191. See *supra* text accompanying note 17.

192. Cf. Note, *The Husband-Wife Privilege of Testimonial Non-Disclosure*, 56 Nw. U.L. Rev. 208, 210 (1961), considering the same three options in regard to a wife called to testify against her husband.

193. In our democratic system of justice which is based in part on respect for the law, if the law places family members in a position of choosing between loyalty to a special, life-long bond as opposed to involuntarily testifying to confidential and private matters, then the law would not merely be inviting perjury, but perhaps even forcing it.

*In re Agosto*, 553 F. Supp. 1298, 1326 (D. Nev. 1983); see also *Three Juveniles v. Commonwealth*, 390 Mass. 357, —, 455 N.E.2d 1203, 1209 (1983) (O'Connor, J., dissenting).

privilege in deference to the state's need for access to evidence. Courts have not limited sufficiently four aspects of the privilege.

### *The Issue of Age*

*Fitzgerald* and *Agosto* extended the parent-child privilege to adults.<sup>194</sup> These decisions identified the policy behind the privilege to be the protection of the parent-child relationship. Because this relationship lasts as long as the parties live, age is irrelevant.<sup>195</sup> Although this argument is sentimentally appealing and follows logically from the premise that the privilege exists to protect the parent-child relationship itself, the policies favoring a privilege for unemancipated minor children do not apply to adults.

Society no doubt has an interest in protecting the relationship between parents and adult children, but the need for a testimonial privilege is not compelling. As *Greenberg* noted, an adult's need for parental guidance and support is simply not as great as that of a minor.<sup>196</sup> Adults can seek professional aid directly. Because of their lack of experience and money, children must approach their parents first. Children's statements made to their parents in seeking help deserve the same protection that the statements would have had if made to a professional.<sup>197</sup>

The courts rejecting an age limitation correctly point out that there is no particular age at which children's emotional dependence on their parents ceases.<sup>198</sup> They argue that any age limit is artificial and arbitrary.<sup>199</sup> This complaint, however, is not sufficient

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194. See *In re Agosto*, 553 F. Supp. 1298, 1329; *People v. Fitzgerald*, 101 Misc. 2d 712, 720, 422 N.Y.S.2d 309, 314 (Westchester County Ct. 1979).

195. See *In re Agosto*, 553 F. Supp. 1298, 1328-29 (D. Nev. 1983); *People v. Fitzgerald*, 101 Misc. 2d 712, 718-20, 422 N.Y.S.2d 309, 313-14 (Westchester County Ct. 1979).

196. See *In re Grand Jury Proceedings (Greenberg)*, 11 Fed. R. Evid. Serv. (Callaghan) 579, 586-87 (D. Conn. 1982); see also *Stanton*, *supra* note 1, at 63-65.

197. Cf. *De Los Santos v. Superior Ct.*, 101 Cal. App. 3d 870, 161 Cal. Rptr. 882 (1980) (allowing information disclosed by a minor to his mother to qualify as a confidential attorney-client communication because the mother asked the questions at the attorney's request). For a thorough discussion of the problems of implementing minors' rights against self-incrimination, see *Stanton*, *supra* note 1, at 27-37.

198. See *In re Agosto*, 553 F. Supp. 1298, 1329 (D. Nev. 1983); *People v. Fitzgerald*, 101 Misc. 2d 712, 718, 422 N.Y.S.2d 309, 313 (Westchester County Ct. 1979).

199. "It can even be argued that there is a role reversal in the parent-child relationship, as the parent grows older and becomes more reliant on the child." *In re Agosto*, 553 F. Supp. 1298, 1329 (D. Nev. 1983).

to allow the law to ignore the difference between children and adults. As children grow older, they develop more associations. Although these outside contacts may never supplant entirely relationships with their parents, the parents' role as the primary shaping force in the children's lives ends. As adult offspring leave home and become less dependent on their parents, they develop other financial and emotional resources. The need for parent-child confidentiality then becomes less compelling.

Courts should restrict the parent-child privilege to communications made by minor children. Although this restriction requires an arbitrary limitation on the life of the privilege, the changed circumstances of adulthood justify termination of the privilege. Some age limit is necessary, and courts reasonably can use the age of majority commonly accepted in other contexts.<sup>200</sup>

### *The Issue of Reciprocity*

*Agosto* extended the parent-child privilege to confidences revealed by either parent or child.<sup>201</sup> Because the parent-child relationship is reciprocal, the court contended that the privilege must protect both parties. *Agosto's* reasoning is not compelling on this point. The court failed to consider the differences between the husband-wife and the parent-child relationships.

Husbands and wives today generally are considered equal partners, legally and socially. A husband-wife privilege must be reciprocal to achieve its purpose because the confidential communications come from both parties. Although the parent-child relationship shares similarities with the husband-wife relationship, the nature of the two relationships is fundamentally different. The interaction between a parent and a child is in some sense mutual and reciprocal, but the parties are not equal during the minority of the child. The parent is strong, experienced, and knowledgeable;

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200. See Stanton, *supra* note 1, at 58, 64.

201. *In re Agosto*, 553 F. Supp. 1298, 1328 (D. Nev. 1983) ("This Court sees no reason to draw a distinction, affording protection for a child's communications to his parent, while yet affording no protection for a parent's communication to his child."); cf. *Three Juveniles v. Commonwealth*, 390 Mass. 357, —, 455 N.E.2d 1203, 1206 (1983) ("Because a parent does not need the advice of a minor child in the same sense that a child may need the advice of a parent, the case for a testimonial privilege as to confidential communications from parent to child seems weaker than the case as to such a communication from child to parent.").

the child comes to the parent seeking help, sympathy, and understanding. Thus, a parent stands more in the position of a professional to a client than of a spouse to another spouse.

The better approach is to make the parent-child privilege non-reciprocal because of its greater similarity to the professional privileges. The professional has no privilege on his own behalf because his role is to listen to the confidences of others; those seeking assistance need the assurance of privacy to encourage an atmosphere of free communication. Similarly, the parent-child context requires a privilege only for the child's communications and those responses of the parent that might reveal them. Communications by the parent not concerned with the guidance of the child therefore should remain unprotected. The policy underlying the privilege should not extend to communications unrelated to the child's needs.

### *The Adverse Testimony Issue*

*Agosto* also extended the parent-child privilege by exempting parents and children from testifying against each other, regardless of whether the testimony concerns confidential communications.<sup>202</sup> The rationale supporting this extension of the privilege is the need to protect the parent-child relationship itself, rather than the need to protect the privacy to communicate.<sup>203</sup>

Assuming that an adverse-testimony privilege is necessary to protect the husband-wife relationship,<sup>204</sup> such an expansion of the parent-child privilege is unwarranted. The parent-child privilege grew out of the need to prevent the parent from becoming an unwilling informant of the child's admissions.<sup>205</sup> The *Agosto* adverse-testimony privilege would give both the parent and the child the power to withhold adverse testimony on subjects unrelated to pa-

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

203. See *id.* at 1328. The court argued that a privilege against adverse testimony was necessary in addition to the communication privilege to maintain the privacy, integrity, and inviolability of the family relationship. See *id.* The court mixed its arguments for the adverse testimony privilege with its arguments for the reciprocal communications privilege. Because these privileges are not the same, the court's conclusions concerning the adverse testimony privilege are questionable.

204. See *supra* text accompanying notes 55-56.

205. See, e.g., *In re Agosto*, 553 F. Supp. 1298, 1328 (D. Nevada 1983); Coburn, *supra* note 1, at 616-17.

rental guidance. To give a parent or a child the power to withhold testimony concerning the other's actions, whereabouts, and non-confidential conversations extends the privilege far beyond its purpose and invites abuse. Although any adverse testimony can damage the parent-child relationship, courts should limit the privilege to the crucial area of communications for the emotional and disciplinary guidance of the child. The need for privacy is the greatest in this situation, and the likelihood of criminal abuse the least. A blanket adverse-testimony privilege is undesirable not only because it is unsupported by sound policy but also because it is too intrusive on the state's ability to gather evidence.<sup>206</sup>

### *The Joint Privilege-Independent Privilege Issue*

Assuming that the parent-child privilege belongs to the minor child and that a parent may claim the privilege on behalf of the child, the question remains whether both parent and child must assert the privilege. Generally the power to waive a privilege for confidential communications rests solely with the communicating party. Thus, the client may silence the attorney regardless of the attorney's willingness to testify about the client's confidences.<sup>207</sup> Similarly, either spouse may prevent the other from revealing their confidential communications.<sup>208</sup> Nevertheless, *A and M* suggested that courts should restrict operation of the parent-child privilege to those instances in which not just the child but all family members wish to assert the privilege.<sup>209</sup> *Fitzgerald* also indicated that the parent may waive the privilege over the objection of the child in some situations.<sup>210</sup> The court in *Fitzgerald* best articulated the justification for this approach, observing that a jointly held parent-child privilege is appropriate because it allows the parent to obtain the court's aid in reinforcing the parents' authority over the

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206. *Accord* *Three Juveniles v. Commonwealth*, 390 Mass. 357, —, 455 N.E.2d 1203, 1207-08 (1983).

207. 8 J. WIGMORE, *supra* note 14, § 2321.

208. *See supra* text accompanying note 62.

209. *See In re A and M*, 61 A.D.2d 426, 435 n.9, 403 N.Y.S.2d 375, 381 n.9 (N.Y. App. Div. 1978).

210. *See* *People v. Fitzgerald*, 101 Misc. 2d 712, 721, 422 N.Y.S.2d 309, 315 (Westchester County Ct. 1979).

child.<sup>211</sup> In this situation, courts should allow the parents to override the child's privilege because the state is fostering the parent-child relationship rather than invading it.<sup>212</sup>

Although the courts that have considered this issue favor a jointly held privilege, commentators are in disagreement. Some support *Fitzgerald's* position. They contend that parents should control the privilege because they are best situated to evaluate their children's interests.<sup>213</sup> Making the child the sole holder of the privilege may interfere with the parents' right to control the upbringing of the child by removing the parents' influence over the child.<sup>214</sup> Furthermore, the need for a privilege arguably diminishes when the parents' testimony is voluntary rather than compelled.<sup>215</sup>

Other authorities, however, insist that the child should hold the privilege.<sup>216</sup> The rationale is that the child's interests will receive superior protection with the assistance of counsel.<sup>217</sup> More specifically, one proponent of an independent privilege to be held solely by the child urges that the child's liberty interest outweighs the parents' interest in maintaining authority once the state charges a child with a crime.<sup>218</sup> Because only testimony concerning communications is precluded, parents still may testify to their children's whereabouts and activities. In addition, even though the parents may not force the child to waive the privilege, they still may try to persuade the child to allow their testimony.<sup>219</sup> Thus, the establishment of an independently held privilege would not eliminate wholly the parents' influence.

Because the primary purpose of the parent-child privilege is to encourage children to confide in their parents, the best course is to make children the sole holders of the privilege. If the operation of a privilege depends on someone other than the communicating party, the communicating party no longer has any assurance that

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211. See *supra* text accompanying notes 108-10.

212. See *supra* text accompanying notes 108-10.

213. See Comment, *Constitutional Privilege*, *supra* note 1, at 1027; Comment, *Recognition of Privilege*, *supra* note 1, at 685-86.

214. See Comment, *Constitutional Privilege*, *supra* note 1, at 1028.

215. Comment, *A Proposal*, *supra* note 1, at 806.

216. See, e.g., Coburn, *supra* note 1, at 632; Stanton, *supra* note 1, at 60-62.

217. Stanton, *supra* note 1, at 62.

218. See *id.* at 61-62.

219. *Id.* at 62.

others will keep their confidences. Such a contingent privilege will not adequately promote open communications. Furthermore, parents have private and public means to reassert control over their children other than by threatening to disclose confidences. Even if allowing parental disclosure might be the best solution in a particular instance, the resulting uncertainty would reduce the overall effectiveness of the privilege.

### CONCLUSION

Courts have begun to recognize a need for a parent-child testimonial privilege to prevent undue state interference in family life and to protect and encourage free communication between children and their parents. The privilege has been expanded progressively by the few courts that have recognized it. This expansion has produced a privilege removed from the policies from which it originated. As is true of all testimonial privileges, the parent-child privilege obstructs the search for truth and should be limited strictly. The privilege should be restricted to communications made by a minor child to his parents in an effort to obtain their guidance and support. Because a blanket privilege against adverse testimony would hamper the investigation of evidence in areas unrelated to the child's guidance, courts should reject an adverse-testimony privilege. The child, however, should be the sole holder of the privilege. This will ensure that the privilege shields confidential communications made by children to obtain parental guidance, which in turn will encourage the trust essential to the parent-child relationship.

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