COMMENTS

Parent-Child Privilege: Constitutional Right Or Specious Analogy?

I. INTRODUCTION

To avoid reaching incorrect verdicts as a result of insufficient evidence, courts generally require witnesses to testify to all relevant facts within their knowledge.1 Two important exceptions to this general rule,2 incompetency and privilege, rest on very different rationales. Developed at common law to exclude unreliable evidence, rules of competency disqualify certain untrustworthy witnesses from testifying.3 To promote extrinsic public policies, however, privileges excuse competent witnesses from providing what may be highly probative and reliable evidence.4

1. For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.


2. Most exceptions to the general rule of admitting all relevant evidence actually aid in the determination of truth by excluding evidence that is unreliable or calculated to prejudice or mislead. Prominent examples of such rules of exclusion include the hearsay rule, the opinion rule, and the rule rejecting proof of bad character as evidence of crime. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 72 (2d ed. E. Cleary 1972).

3. Examples include the rules disqualifying witnesses because of mental incapacity, conviction of crime, or interest in the outcome of the litigation. Most common law rules of competency have been abandoned, existing today merely as grounds for impeaching a witness's testimony. See generally B. JONES, JONES ON EVIDENCE §§ 20.1-.61 (6th ed. S. Gard 1972); C. McCORMICK, supra note 2, §§ 61-71; 2 J. WIGMORE, supra note 1, §§ 483-620. At one time, spouses were disqualified from testifying for or against one another on the basis of incompetency. Funk v. United States, 290 U.S. 371 (1933); C. McCORMICK, supra note 2, §§ 66-67; 8 J. WIGMORE, supra note 1, § 2334.

In the past decade there have been calls for legislative or judicial recognition of a parent-child privilege, similar to the mar-

Most privileges are designed to foster important relationships. Among this group of privileges, the marital, lawyer-client, priest-penitent, and doctor-patient privileges traditionally have been recognized by American courts. See 8 J. Wigmore, supra note 1, § 2286; Louisell & Crippin, Evidentiary Privileges, 40 MINN. L. REV. 413, 414 (1956). The marital and lawyer-client privileges are recognized today in all fifty states. See Note, Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend, 38 VA. L. REV. 359, 360 (1952) [hereinafter cited as Modern Trend]; Note, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 YALE L.J. 1226, 1227 & n.7 (1962) [hereinafter cited as Functional Overlap]. The priest-penitent privilege is recognized by statute in all but four states. C. McCormick, supra note 2, § 77. Approximately three-fourths of the states recognize some form of doctor-patient privilege. Id. § 98; see Chafee, Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor’s Mouth on the Witness Stand?, 52 YALE L.J. 607 (1943).

Several new interpersonal privileges have appeared in recent years. Approximately half the states now recognize a newsman-source privilege. See Murasky, The Journalist’s Privilege: Branzburg and Its Aftermath, 52 TEX. L. REV. 829, 871 n.134 (1974). Other less widely recognized privileges include those protecting confidential communications between psychotherapists and patients, see, e.g., CAL. EVID. CODE §§ 1010-1028 (West 1966 & Supp. 1979); accountants and clients, see, e.g., ARIZ. REV. STAT. ANN. § 32-749 (Supp. 1979); school guidance counselors and students, see, e.g., ME. REV. STAT. ANN. tit. 20, § 806 (Supp. 1979); and social workers and clients, see, e.g., N.Y. CIV. PRAC. LAW § 4508 (McKinney Supp. 1979).

Privileges promoting other public policies include the privilege against self-incrimination, U.S. CONST. amend. V, and the governmental secrets privilege, see United States v. Reynolds, 345 U.S. 1 (1953); C. McCormick, supra note 2, §§ 106-113.

5. Commentators are in general agreement that the creation of new privileges is properly the province of the legislature. See, e.g., C. McCormick, supra note 2, § 77; Slovenko, Psychiatry and a Second Look at the Medical Privilege, 6 WAYNE L. REV. 175, 181 (1960). But see Binder v. Ruvel, No. 52C2535 (Cir. Ct. Cook County, Ill., June 24, 1952), noted in 150 J.A.M.A. 1241 (1952); Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976); In re Kryschuk & Zulynik, 14 D.L.R.2d 676 (Police Magis. Ct., Sask. 1958).

6. Edinburgh, 30th April 1838—[W]e had an example of that horrid piece of nonsense, invented within these twenty years by the Court of Justiciary, and called by the inventors “The option.” The absurdity cannot possibly last long, and for the edification of posterity it may be as well to tell what it was.

Some people think it cruel, and conducive to perjury, to compel parents or children to give evidence against each other; . . . [I]t occurred to some of the judges, about twenty years ago, that, as the indulgence was granted solely from delicacy to these relations, it was competent to them to reject it if they chose.

They therefore introduced The option, by which parents and children might hang each other or not, just as they pleased . . . .

This tissue of necessary nonsense is no part of the law of Scotland. The fear of perjury,—a foolish principle, but one that was not unnatural to superstitious barbarians, played on by cunning churchmen,—made our old law reject such testimony altogether and without distinction. But the option, by which its reception is made to depend on the pleasure or profligacy of each witness, is the production of a few judges, not at all qualified to legislate on such a subject,
tual privilege,\(^7\) that would excuse parents from testifying against their offspring.\(^8\) In contrast to the virtually universal recognition within these few years.

The true principle is, to disregard relationship, except that of husband and wife, as an objection to the competency of any witness. . . .

Bonaly, 11th May 1840.—. . . Four people were under trial for theft, and two for reset [harboring a criminal]. A villain, who would have cut the throats of all his relations for a shilling, was called as a witness by the prosecutor. It was objected that, being the son of one of the thieves, he was not bound to give evidence. . . . So I was obliged to disgrace the law by explaining to him the respect paid to his sensibilities, and that in order to spare his filial piety, he had the option of defeating justice by telling the truth or not, just as he chose.

No censure of this modern piece of judge-made legal nonsense could be severer than the grotesque and villainous leer with which he said: "Odd! 'a' like that hoption, ma Lord!" on which he retired amidst the laughter of the prisoners, and the amazement of the jury, and saved the two resetters.


7. See generally C. McCormick, supra note 2, §§ 66, 78-86; 8 J. Wigmore, supra note 1, §§ 2227-2245, 2332-2341. Many of the criticisms this comment directs at the parent-child privilege also apply to some degree to the marital privilege. The two relationships are not identical, however, and an evaluation of the marital privilege is beyond the scope of this comment. Nevertheless, it should be noted that the marital privilege has received less than universal praise. See, e.g., Wells v. Commonwealth, 562 S.W.2d 622, 624 (Ky.), cert. denied, 439 U.S. 861 (1978) (marital testimonial privilege described as "one of the most ill-founded precepts to be found in the common law"); Ontario Law Reform Commission, Report on the Law of Evidence 141 (1976) (recommending abolition of the privilege) [hereinafter cited as Ontario Evidence Report]; Comment, The Husband-Wife Evidentiary Privileges: Is Marriage Really Necessary?, 1977 Ariz. St. L.J. 411 [hereinafter cited as Husband-Wife Evidentiary Privileges]; Comment, Questioning the Marital Privilege: A Medieval Philosophy in a Modern World, 7 Cum. L. Rev. 307 (1976) [hereinafter cited as Medieval Philosophy].


Lindsay v. People, 66 Colo. 343, 181 P. 531 (1919), appeal dismissed, 255 U.S. 560 (1921), might also be viewed as a case in which a parent-child privilege claim was raised. In Lindsay, a boy privately confessed to a juvenile court judge that he had killed his father. The judge refused to testify at a subsequent trial, arguing that in his official position he stood in place of the boy's parents. The court rejected this argument, noting that a natural parent would be denied such a privilege.

The Law Reform Commission of Canada has proposed a qualified privilege for family
of the marital privilege, however, among common law jurisdictions only Idaho recognized a parent-child privilege until a New


9. Note, Spousal Testimony, 28 Brooklyn L. Rev. 259, 293-96 (1962); Modern Trend, supra note 4, at 360; Alternative Means, supra note 8, at 223 n.11.

10. Civil law jurisdictions adopt widely differing approaches to the problem of testimony by relatives. Germany recognizes an extremely broad family privilege extending to "whoever is related directly by blood, marriage or adoption, or collaterally related by blood to the third degree or by marriage to the second degree, to the accused . . . ." The German Code of Criminal Procedure § 52, in 10 The American Series of Foreign Penal Codes (H. Niebler trans. 1965). If such relatives choose to testify, they may refuse to take an oath on their testimony. Id. § 63. In addition, any witness may refuse to answer questions which would place him or any of his relatives in danger of criminal prosecution. Id. § 55. Turkish law contains nearly identical provisions, The Turkish Code of Criminal Procedure arts. 47, 50, 53, in 5 The American Series of Foreign Penal Codes (1962), as does Swedish law, except that a relative of a criminal defendant may not testify under oath in Sweden, The Swedish Code of Judicial Procedure ch. 36, §§ 3, 6, 13, in 24 The American Series of Foreign Penal Codes (A. Bruzelius & K. Thelin eds. & trans. 1979). Similarly, under Japanese law, a witness can refuse to give testimony which will, or is feared likely to, incriminate certain close relatives or others standing in a close personal relationship to the witness. S. Dando, Japanese Criminal Procedure 280-81 (1965). Israeli law prevents the calling of parent and child as witnesses against each other in criminal proceedings. In civil cases the court must give its reasons for relying on the testimony of a party's relatives, unless the testimony is corroborated. Livneh, The Law of Evidence (Amendment) Law, 1968, 5 Israel L. Rev. 268, 272, 277 (1970). In French criminal cases, ascendants, descendants, brothers and sisters, and persons similarly related by affinity to the accused may not testify, except to give general information, not under oath, in the discretion of the court. The French Code of Criminal Procedure arts. 335-336, in 7 The American Series of Foreign Penal Codes (G. Kock trans. 1964). In civil cases, a witness cannot testify if he is a blood relation, or related by marriage in direct line, to one of the parties. O. Bodington, French Law of Evidence 118 (1904). The French rules appear to be rules of competence rather than privileges. See notes 2-4 supra and accompanying text; Comment, The Husband-Wife Privileges of Testimonial Non-Disclosure, 56 Nw. U.L. Rev. 208, 210 n.16 (1961). Philippine law, on the other hand, provides that no person can be compelled in a criminal case to testify against his parents or other ascendants. Rules of Court 130, § 20(c) (Philippines), reprinted in The Revised Penal Code 192 (Rex comp. & ed. 1972). The Soviet Union recognizes no privilege to refuse testimony against close relatives; indeed, persons may be prosecuted for failure to report a crime committed by a close relative. V. Gsovski, Soviet Civil Law 118-19 (1948).
York appellate court did so on federal constitutional grounds.\textsuperscript{12}

This comment, in three parts, evaluates the propriety of recognizing a parent-child privilege. First, scrutiny of the general policy arguments advanced in support of the privilege and an analysis of the privilege in light of Wigmore’s conditions precedent to establishing any interpersonal privilege illustrate that sound public policy does not support recognition of a parent-child privilege. Second, despite the reasoning of the New York appellate court, the constitutional right of privacy does not encompass a parent-child privilege. Finally, the impossibility of fashioning an acceptable form of the privilege further demonstrates that a parent-child privilege should not be recognized.

II. PARENT-CHILD PRIVILEGE AS A MATTER OF PUBLIC POLICY

Proponents of a parent-child privilege advance four general policy arguments supporting its recognition: (1) the public interest in privacy; (2) the danger of destroying an important relationship; (3) the natural repugnance to compelling family members to testify against one another; and (4) the invitation to perjury or contempt that results from compelling testimony.

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Some ancient civilizations also recognized evidentiary privileges for family members. The ancient Athenian courts apparently could not compel relatives to testify. R. Bonner, Evidence in Athenian Courts 45 (1906). In ancient Rome, relatives apparently were incompetent witnesses in civil cases, and could not be compelled to give testimony in criminal cases except those charging treason, although they could testify if they so chose. Radin, The Privilege of Confidential Communication Between Lawyer and Client, 16 CALIF. L. REV. 487, 488, 490-91 (1928).

Continental legal systems recognizing broad privileges compensate by admitting other kinds of evidence, such as hearsay statements. Ontario Evidence Report, supra note 7, at 3; Hammelmann, Hearsay Evidence, A Comparison, 67 LAW Q. REV. 67, 71 (1951). This is why Professor Quick concluded that “[t]he continental privilege . . . not to inform on members of the family unit is workable only because of continental procedure.” Quick, Self-Incrimination Under the Uniform Rules of Evidence, 3 WAYNE L. REV. 3, 5 (1956).

11. See Idaho Code § 9-203(7) (1979) (enacted 1972). No reported case has interpreted the Idaho parent-child privilege, and the statute’s enactment has escaped the attention of the commentators, see, e.g., 3 Wharton’s Criminal Evidence § 578 (13th ed. C. Torcia 1973 & Supp. 1979); Mouths of Babes, supra note 8, at 1003; Child-Parent Privilege, supra note 8, at 774; Parent-Child Testimonial Privilege, supra note 8, at 689.

“[T]he practice of the Chancellor and of the common law judges never disqualified any [family members] but the wife, and never privileged any but the wife.” 8 J. Wigmore, supra note 1, § 2227.

A. Invasion of Privacy

Commentators have defended a parent-child privilege by arguing that privacy is the paramount interest privileges promote and that privileges are important barriers to official invasions of privacy. 13 According to this view, privacy is an important end in itself—an essential condition of political liberty and of our very humanity. 14 Recognition of privileges, allowing the individual to strike a balance between total secrecy and total exposure, indicates the high value a society places on privacy. 15 Privileges protect privacy by recognizing a right to be let alone, a right to unfettered freedom, in certain relationships, from the state’s coercive or supervisory powers. 16 Because one of the most important relationships is that between parent and child, courts should respect the privacy of that relationship.

The mere assertion of a privacy interest, however, is not sufficient justification for granting a parent-child privilege. In general, privileges should not be recognized automatically whenever privacy is at stake. 17 Even though our society holds privacy in high regard, not every privacy interest is sufficiently important to warrant a privilege, which results in the loss of relevant evidence. If privacy claims alone were enough justification for privileges, virtually all testimony would be privileged. Indeed, an invasion of privacy arguably occurs whenever a witness is sub-

13. "The rejection of a claim of privilege destroys the claimant’s control over the breadth of the audience receiving personal information as well as his control over the timing and conditions of its release. Clearly, then limitations on testimonial privileges are invasions of privacy." Krattenmaker, Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence, 62 Geo. L.J. 61, 86 (1973); see Bloustein, Group Privacy: The Right to Huddle, 8 Rut.-Cam. L.J. 219, 222, 227-29 (1977); Alternative Means, supra note 8, at 234.


15. See Bloustein, supra note 13, at 225-27; Krattenmaker, supra noté 13, at 88.


17. [P]ersonal privileges might be defended as important protectors of individual privacy in modern society. Because claims of privacy can be asserted all too easily, because the values sacrificed by a decision to uphold . . . privilege claims conceded are substantial and because it is difficult to conceive of an interest in privacy paramount to every imaginable countervailing societal goal, such a defense commands careful scrutiny.

Krattenmaker, supra note 13, at 86.
poenaed to testify, in that the witness is forced to disclose information in his possession.\textsuperscript{18} Privacy is not an absolute right, but rather must be balanced against other important societal interests, such as the fundamental interest in accurate adjudication.\textsuperscript{19}

\textbf{B. Family Relationship}

The next justification for a parent-child privilege closely parallels the rationale of the marital privilege: that compelled testimony threatens an important relationship. Actually, this argument takes two forms: one supporting a general testimonial privilege,\textsuperscript{20} the other supporting a confidential communications privilege.\textsuperscript{21} The first argument is that any testimony of one family member against another will cause dissension in the family. This argument primarily supports a testimonial privilege\textsuperscript{22} but can also support a communications privilege.\textsuperscript{23} The second argument, used primarily to justify a communications privilege, is that compelled disclosure discourages future communications.\textsuperscript{24}

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\item Lora v. Board of Educ., 74 F.R.D. 565, 576 (E.D.N.Y. 1977); Ravin v. State, 537 P.2d 494, 504 (Alaska 1975) (“[O]ne aspect of a private matter is that it is private, that is, that it does not adversely affect persons beyond the actor, and hence is none of their business. When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated.”); 8 J. WIGMORE, supra note 1, § 2192 (“When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private.”)
\item A general testimonial privilege would excuse the witness parent from giving any testimony against his child. This would be analogous to what Wigmore calls the “anti-marital facts” privilege, which excuses spousal testimony. See 8 J. WIGMORE, supra note 1, §§ 2227-45.
\item A confidential communications privilege would prevent only testimony concerning secrets confided by the child to the parent. This would be analogous to the marital confidential communications privilege and all professional privileges.
\item See Hawkins v. United States, 358 U.S. 74, 77 (1958); 8 J. WIGMORE, supra note 1, § 2228; Ladd, Privileges, 1969 LAW. & SOC. ORD. 555, 558; Reutlinger, supra note 4, at 1359, 1370; Note, Privileges, 27 ARK. L. REV. 200, 202-03 (1973).
\item “Surely the compelled revelation of confidences entrusted in the privacy of the marital relationship... would create at least as much ‘dissension’ in the home as would any other adverse spousal testimony covered by the testimonial privilege.” Reutlinger, supra note 4, at 1370. See Child-Parent Privilege, supra note 8, at 787.
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This argument rests on the assumptions that communication is essential for a successful relationship and that confidentiality is essential for communication.

The essence of the "dissension" rationale is that adverse parental testimony is so traumatic to the child that the parent-child relationship may be damaged irreparably. Some proponents further suggest that compelled parental testimony will result in strained relations among the entire family. According to this view, recognition of a parent-child privilege would contribute to family harmony.

The dissension argument is unconvincing, however, because court-compelled testimony simply is not a major source of parent-child conflict. As Dean Wigmore states, responding to the dissension argument in the context of the marital privilege, "The peace of families does not essentially depend on this immunity from compulsory testimony." Most statements of the dissension rationale present an idealized and unrealistic picture of family relationships. Parent-child relationships are not inherently peaceful and harmonious, particularly in the typical delinquent's family, and would not be significantly more tranquil if


27. 8 J. Wigmore, supra note 1, § 2228. See C. McCormick, supra note 2, § 66; Husband-Wife Evidentiary Privileges, supra note 7, at 427.


29. J. Bossard & E. Boll, The Sociology of Child Development 328-29 (4th ed. 1966); Family in Transition 307-08 (A. Skolnick & J. Skolnick eds. 1971) (editors' introductory material) (parent-child relationship inevitably involves a conflict of interest and impulse); T. Gordon, Parent Effectiveness Training 148 (1970) ("All parents encounter situations when neither confrontations nor changes in the environment will change the behavior of their child; the child continues to behave in a way that interferes with the needs of the parent. These situations are inevitable in the parent-child relationship because the child 'needs' to behave in a certain way even though he has been made aware that his behavior is interfering with his parent's needs."); Cohen & Balikov, On the Impact of Adolescence Upon Parents, in 3 Adolescent Psychiatry 217 (S. Feinstein & P. Giovacchini eds. 1974). See generally Davis, The Sociology of Parent-Youth Conflict, 5 Am. Soc. Rev. 523 (1940), reprinted in Youth and Sociology 93 (P. Manning & M. Truzzi eds. 1972).

the privilege were recognized. Furthermore, in a healthy parent-child relationship, any detrimental effects of the adverse parental testimony could be lessened by explaining to the child that the testimony was given only under compulsion.\footnote{31} Moreover, if a parent could waive the privilege, as many proposed forms of the privilege provide, recognition of the privilege perhaps could create more dissension in the family. Recognition would increase the child’s expectation that the parent would not testify, even though in some instances a parent might decide to testify after an honest assessment of the child’s best interests. Most importantly, however, the destructive effect on the administration of justice of recognizing yet another privilege simply outweighs any risk of possible lingering resentment in the child.

The second “relationship” argument suggests that the primary justification for a parent-child privilege is the child’s essential need to communicate with parents in a confidential setting.\footnote{32} According to this view, positive family interaction plays a significant role in the prevention of delinquency and the development of a well-adjusted child.\footnote{33} The therapeutic nature of parent-child

\footnote{31. Cf. E. Morgan, The Law of Evidence xv (1921) (impossible to determine injury from adverse spousal testimony); Comment, Privileged Testimony of Husband and Wife in California, 19 Calif. L. Rev. 390, 413 (1931) (disclosure of marital confidences would be neither anticipated by the parties nor regarded as a voluntary breach of confidence by either). A child does not always think rationally, however, and might expect parents at least to color the truth on his behalf. See Child-Parent Privilege, supra note 8, at 786 n.136.}

\footnote{32. Child psychologists and behavioral scientists generally agree that it is essential 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.

If we accept the proposition that the fostering of a confidential parent-child relationship is necessary to the child’s development of a positive system of values, and results in an ultimate good to society as a whole, there can be no doubt what the effect on that relationship would be if the State could compel parents to disclose information given to them in the context of that confidential setting.


\footnote{33. Child-Parent Privilege, supra note 8, at 782-84. But see A. Jersild, The Psychology of Adolescence (2d ed. 1963): While it is valuable for an adolescent to have someone with whom to share his perplexities, it cannot always be assumed that persons who are most intimate and confiding will face the hurdles of adolescent development most success-}
communications plays an important role in the child's emotional growth. A child's knowledge that his parents may be compelled to reveal confidential communications may seriously impair his willingness to confide in his parents, thus preventing them from providing guidance and support. Furthermore, according to this theory the child most in need of parental guidance and family interaction, a juvenile accused of crime or delinquency, will be the very one whose confidences are revealed.

In the context of parent-child relations, however, the "communications" rationale is unpersuasive. First, the sharing of confidences between parent and child, although desirable, is not nearly as crucial as proponents of a parent-child privilege suggest. Although a successful marriage may require the mutual surrender of individual privacy, parents and children usually do not reveal themselves to each other to the same degree that husbands and wives do. Shared confidences are not an invariable

fully. The person who is confiding may be one who is depending to an undue degree on his parents and is prolonging his dependency on them.

Id. at 248-49.

34. Coburn, supra note 8, at 615-21 ("Therapy results from a child-parent relationship when the disturbed person (child) is seeking help because he fears the social consequences (punishment) of his behavior."); Child-Parent Privilege, supra note 8, at 784. But see Allred v. State, 554 P.2d 411, 425 n.3 (Alaska 1976) (Rabinowitz, J., concurring) ("'Everyone' should not be able to assert a privilege merely because a conversation with an acquaintance can arguably be styled as 'therapeutic.'").

35. Coburn, supra note 8, at 619-20, 632; Child-Parent Privilege, supra note 8, at 785; Parent-Child Testimonial Privilege, supra note 8, at 687.


37.

Lovers give themselves up to each other. They lay bare their innermost feelings to each other, they are lewd and foolish with each other, they stand naked before each other. Between themselves, there is no individual privacy, nothing is held back. But the premise for giving up individual privacy in love is the feeling that what is shared so intimately will not be broadcast to the world at large. Indeed, this is the very condition for achieving intimacy. If love did not promise, and most often provide for, such protected intimacy, falling in love would be rare indeed.


38.

The Law Reform Committee also noted that other family relationships, such as that between parent and child, were "equally close," yet it has never been suggested that communications between parent and child should be privileged. It is at least debatable whether the parent-child relationship is in fact "equally close." A man and wife are joined together in one body; they remain united for life. Intimate though the relationship between parents and their children may be, it lacks that quality and degree which in the past has given spouses a privilege denied their offspring.
characteristic of successful parent-child relationships. Most of the important societal functions of the parent-child relationship can be fulfilled without the sharing of confidences.\textsuperscript{39} Second, children may be less likely to confide in parents than in some persons outside the family.\textsuperscript{40} Few jurisdictions, however, grant privileges to other adults, such as teachers, school counselors, and social workers,\textsuperscript{41} in whom many children routinely confide. This illustrates that the crucial factor encouraging confidences by a child is not a courtroom privilege but rather the trust the child has in an understanding adult.\textsuperscript{42} Third, the absence of a privilege

Koroway, Confidentiality in the Law of Evidence, 16 Osgoode Hall L.J. 361, 388 (1978). See 8 J. WIGMORE, supra note 1, § 2337. But see Alternative Means, supra note 8, at 238 ("Confidentiality would seem to be as essential to the parent-child relationship as it is to the husband-wife relationship.")\textsuperscript{39}

39. The family community benefits a child in at least eight fundamental ways. The family (1) serves as a culture carrier, (2) interprets and simplifies a complex world, (3) disciplines, (4) protects, (5) gives freedom to explore, (6) helps solve problems, (7) provides pleasant family living, and (8) develops personalities. O. RITCHE & M. KOLLER, SOCIOLOGY OF CHILDHOOD 85 (1964). But see Confidential Communication, supra note 8, at 828-29; Parent-Child Testimonial Privilege, supra note 8, at 688 ("The role of parent ceases and that of custodian begins when the parent can provide nothing beyond financial backing, food, and laundry services.").

40. See E. DUVALL, FAMILY DEVELOPMENT 347 (4th ed. 1971) ("There is some normal slackening off of telling parents everything as children get into their teens. Then it is normal for intimate confidences to be shared first with close friends within the peer group, and only secondarily with parents and other significant adults.")\textsuperscript{41}; Gilbert, supra note 37, at 225 (children learn not to disclose to parents perceived as nonaccepting); Rosenheim, Privilege, Confidentiality, and Juvenile Offenders, 11 WAYNE L. REV. 660, 672 (1965) ("[T]een-age students may wish devoutly that their unguarded remarks in bull sessions with a congenial teacher never reach parental ears. . . ."); Smith, Youth-Adult Conflict in American Society, in ISSUES IN ADOLESCENT PSYCHOLOGY 477-83 (D. Rogers ed. 1969); Note, Testimonial Privileges and the Student-Counselor Relationship in Secondary Schools, 56 IOWA L. REV. 1323, 1337 & n.111 (1971) (potential disclosure to parents is certain to inhibit the student from freely discussing matters of either a personal or incriminating nature with the school counselor). Indeed, one authority argues that it is often more valuable for adolescents to confide in an outsider than to try to confide in a parent. A. JERSILD, supra note 33, at 250.

41. By 1973, only two states (New York and California) recognized a privilege for social workers. Comment, Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers, 61 CALIF. L. REV. 1050, 1052 n.11 (1973). Thirteen states (Connecticut, Idaho, Indiana, Maine, Michigan, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, and South Dakota) accord a statutory privilege to school counselors. Robinson, Testimonial Privilege and the School Guidance Counselor, 25 SYRACUSE L. REV. 911, 918-24 (1974). From the student's perspective, however, most of these statutes offer very little protection because they contain exceptions or limitations, or allow persons other than the student to waive the privilege. Id. Three states (Connecticut, Montana, and Oklahoma) apparently also protect communications to teachers under the same statutes. Id.

42. C. MCCORMICK, supra note 2, § 88 (communications to juvenile court judge); cf. id. § 86 (marital communications); 8 J. WIGMORE, supra note 1, § 2332 (marital communications); Krattenmaker, supra note 13, at 91 (confidential communications in general);
does not prevent parents from keeping the vast majority of children's confidences that are shared,\textsuperscript{43} nor would recognition of a privilege prevent parents from freely cooperating with police or prosecutors outside the courtroom.\textsuperscript{44} Fourth, recognizing a privilege probably would have little effect on whether children would confide in their parents\textsuperscript{45} because most children simply would be unaware of the rule.\textsuperscript{46} Fifth, if the ultimate rationale behind the parent-child privilege is emotional adjustment in children and the prevention of delinquency,\textsuperscript{47} the only families to enjoy the privilege's direct benefits would be those least likely, based on past performance, to fulfill the privilege's promise. Parent-witnesses, according to the communications rationale, would tend not to have communicated effectively with their children in the past, thus producing delinquent behavior.\textsuperscript{48} Suppressing their testimony would do nothing to change this pattern in the future, unless the mere recognition of a parent-child privilege would significantly reduce juvenile crime—a dubious proposition.

\textit{Medieval Philosophy, supra} note 7, at 318, 320 (marital communications).

\textsuperscript{43} [M]ost confidences are maintained without any reference to law at all. Among other factors, a sense of good faith, the fear of reprisal or loss of face, traditional practice, religious or ethical compunctions and the intricacies of bureaucratic or organizational structure are important to the support of a system of confidences. Law acts as only one influence among many. Bloustein, \textit{supra} note 13, at 224. See Note, \textit{Privileged Communications: A Case by Case Approach}, 23 Ms. L. Rev. 443, 447-48 (1971).

\textsuperscript{44} Of course, this feature of limited efficacy, common to all privileges, is one reason why privilege claims should be carefully scrutinized. Codes of ethics, however, backed by disciplinary proceedings, deter professionals such as doctors or lawyers from breaking confidences received in the professional relationship. See, e.g., ABA \textit{CODE OF PROFESSIONAL RESPONSIBILITY} Canon 4 (1977).


\textsuperscript{47} \textit{Child-Parent Privilege, supra} note 8, at 783.

\textsuperscript{48} \textit{Id.} at 783-84. On the other hand, the assumption that the parent-child relationship is the principal factor in either the genesis or the prevention of delinquency may be erroneous. Vincent, \textit{Expanding the Neglected Role of the Parent in the Juvenile Court}, 4 Pepperdine L. Rev. 523, 525-26 (1977).
C. Natural Repugnance

Another unsatisfactory reason advanced for recognizing a parent-child privilege is societal repugnance toward forcing parents to testify against their offspring.49 Recognizing that the "repugnance" argument underlies the marital testimonial privilege, Wigmore notes the apparent inconsistency of granting a marital privilege while not granting a similar privilege among parents and children or among siblings.50 He correctly insists, however, that the repugnance argument is nothing more than an appeal to sentiment51 inasmuch as it does not depend on any direct and practical harm.52 Emotion alone should not obstruct

49. Surely the thought of the State forcing a mother and father to reveal their child's alleged misdeeds, as confessed to them in private, to provide the basis for criminal charges is shocking to our sense of decency, fairness and propriety. It is inconsistent with the way of life we cherish and guard so carefully and raises the specter of a regime which encourages betrayal of one's offspring.

In re A & M, 61 A.D.2d 426, 433, 403 N.Y.S.2d 375, 380 (1978). "This method of circumventing a juvenile's privilege against self-incrimination is repugnant to our system of justice and fair play." Coburn, supra note 8, at 617. See Mouths of Babes, supra note 8, at 1009-10; Child-Parent Privilege, supra note 8, at 788-89; Parent-Child Testimonial Privilege, supra note 8, at 687-88; Alternative Means, supra note 8, at 235.

50. 8 J. Wigmore, supra note 1, § 2228, at 217 n.2; cf. Connor, The Qualification of Defendant's Spouse as a Witness in Criminal Cases, 9 Notre Dame Law. 272, 274 (1934) (security and peace of the family jeopardized as much by damaging testimony of defendant's child as by that of defendant's spouse).

51. [L]itigation is not a game, and . . . the law can never afford to recognize it as such; . . . the law, moreover, does not proceed by sentiment, but aims at justice. This generality would perhaps never be disputed, but in actual argument the constant tendency is to confuse sentiment with reason. . . . Let us face the fact that when a party appears in a court of justice, charged with wrong or crime, the unavoidable and solemn business of the court and the law is to find out whether he has been guilty of the wrong or the crime; that the state and the complainant have a right to the truth; and that this high and solemn duty of doing justice and of establishing the truth is not to be obstructed by considerations of sentiment, in this respect any more than in others.


In re A & M, 61 A.D.2d 426, 403 N.Y.S.2d 375 (1978), provides a good example of the confusion of sentiment with reason:

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 these parents, "Listen to your son at the risk of being compelled to testify about his confidences?"

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

52. 8 J. Wigmore, supra note 1, § 2228. "The 'natural repugnance' one feels at the
the administration of justice. Moreover, the suggestion that the public is shocked and outraged at the thought of forcing family members to testify against one another is questionable when only a single state has enacted a parent-child privilege through the legislative process.

D. Futility of Attempts to Compel Testimony

Finally, proponents of a parent-child privilege argue that most parents called upon to testify either would refuse, even in the face of contempt proceedings, or would commit perjury if forced to testify. Accordingly, recognizing the privilege would result in no loss of reliable evidence and, by removing the temptation of perjury, would advance rather than impede the ascertainment of truth. Proponents further suggest that parents who successfully commit perjury would teach children that punishment can be avoided by further unlawful conduct.

These reasons, however, are insufficient to support recognition of a parent-child privilege. Basing recognition of privileges merely on the stubborn refusal of some witnesses to testify would necessitate granting privileges to most professional groups, to distant relatives and even friends of criminal defendants. All

thought of one spouse being the tool of the other's defeat may not greatly outweigh the 'natural repugnance' one feels at letting a guilty person be shielded." Comment, supra note 45, at 88 (footnote omitted).

53. C. McCormick, supra note 2, § 86; 8 J. Wigmore, supra note 1, § 2228; see In re Kinoy, 326 F. Supp. 400, 406 (S.D.N.Y. 1970). But see Comment, supra note 10, at 231.

54. "[I]f, as seems likely, the parents refuse to divulge their child's confidences, the alternatives faced by the parents, i.e., risk of prosecution for contempt or commission of perjury, could seriously undermine public trust in our system of justice." In re A & M, 61 A.D.2d 426, 433, 403 N.Y.S.2d 375, 380 (1978).

There are two other courses of conduct open to the parent upon his being called to testify against his child. . . . First, the parent may refuse to testify and, therefore, be subject to contempt proceedings. A second alternative is for the parent to deliberately lie and thereby assume the risk of subsequent criminal prosecution for perjury. This latter course of conduct may be appealing to a dedicated parent who is aware that there is no other practical or factual basis for an adverse decision other than his testimony.

Coburn, supra note 8, at 628-29. See Mouths of Babes, supra note 8, at 1010-11; Child-Parent Privilege, supra note 8, at 790-91; Parent-Child Testimonial Privilege, supra note 8, at 687.

55. Child-Parent Privilege, supra note 8, at 790-91; cf. Louisell, supra note 4, at 109-10 (European legal view that privileges help avoid perjury); Comment, supra note 10, at 210 (courts may have created the marital privilege to protect against perjured testimony).

56. In re A & M, 61 A.D.2d 426, 433 n.6, 403 N.Y.S.2d 375, 380 n.6 (1978); Coburn, supra note 8, at 629; Mouths of Babes, supra note 8, at 1011.
these groups have risked contempt citations by refusing to testify\(^5^7\) and could be expected to refuse more frequently in the future if a parent-child privilege were recognized for this reason.\(^5^8\) Basing recognition on fears of perjury is equally unsound. Perjury is fairly common, particularly in criminal trials.\(^5^9\) Under our judicial system, however, a witness's demeanor and answers under cross-examination, influenced by his oath of truthfulness, generally enable the trier of fact to accurately gauge the credibility of his testimony.\(^6^0\) Moreover, parents testifying as defense witnesses might be no less tempted to falsify an alibi for their child than to commit perjury as compelled prosecution witnesses. Thus, the perjury rationale, if convincing, would seemingly require disqualification of parents as witnesses rather than recognition of a parent-child privilege.\(^6^1\)

**E. Wigmore's Test**

In light of the foregoing discussion, a test proposed by Wigmore may be used to evaluate the wisdom of recognizing a parent-child privilege. The test sets forth four requirements that must be satisfied before a privilege should be recognized:

1. The communications must originate in a *confidence* that they will not be disclosed.

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1961) (grand jury target's friend); In re Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal.

Rptr. 829 (1970) (psychotherapist); People v. Schultz, 380 Ill. 539, 44 N.E.2d 601 (1942)
(cousin of criminal defendant); In re Murtha, 115 N.J. Super. 380, 279 A.2d 889, cert.


58. Professional groups in particular could be expected to urge members on the basis of ethical considerations to refuse to testify. See, e.g., Robinson, supra note 41, at 930-31.

59. "It is indeed unlikely that many men who commit serious offenses would balk on principle from lying in their own defense. The guilty man may quite sincerely repent his crime but yet, driven by the urge to remain free, may protest his innocence in a court of law." Scott v. United States, 419 F.2d 264, 269 (D.C. Cir. 1969). See President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 141 (1967); Hibschman, You Do Solemnly Swear! or That Perjury Problem, 24 J. Crim. L. & P.S. 901, 901 (1934); Whitman, A Proposed Solution to the Problem of Perjury in Our Courts, 59 Dick. L. Rev. 127, 127 (1955); Comment, Perjury: The Forgotten


60. See 3A J. Wigmore, supra note 1, § 946; 5 id. § 1367; 6 id. §§ 1816, 1827, 1831.

The Supreme Court necessarily expressed confidence in this ability by permitting a judge, in sentencing, to consider a defendant's perjury that the judge had observed during the trial. See United States v. Grayson, 438 U.S. 41 (1978).

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.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposition of the litigation.62

Although some courts and commentators have criticized Wigmore's test,63 it is widely recognized as a useful means of evaluating proposed privileges.64

The proposed parent-child privilege probably satisfies the test's first requirement. Although most communications between parent and child are not as confidential as those, for example, between priest and penitent,65 some sensitive parent-child discussions undoubtedly take place.66 A child's admission of wrongdoing, the parent-child communication most likely to be the object of court inquiry, generally would originate in at least an implied confidence that it would not be disclosed.

The parent-child privilege, however, probably fails to satisfy the test's second requirement. According to Wigmore, the second requirement reflects the view that privileges are not intended to protect secrecy as an end in itself, but are intended to guarantee secrecy when without it the parties would not fulfill the essential demands of the relationship.67 The attorney-client and psychotherapist-patient relationships are perhaps the best examples of relationships in which secrecy truly is essential.68

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62. 8 J. Wigmore, supra note 1, § 2285.
63. See Allred v. State, 554 P.2d 411, 429-30 (Alaska 1976) (Dimond, J., concurring) (would dispense with Wigmore's third requirement); Louisell, supra note 4, at 111 (criticizes Wigmore for his emphasis on strictly utilitarian bases for privileges, arguing that such bases are sometimes highly conjectural and defy scientific validation); Functional Overlap, supra note 4, at 1229-31 (the test allows recognition of too many privileges).
64. See, e.g., Falsone v. United States, 205 F.2d 734, 740 (5th Cir. 1953); United States v. Funk, 84 F. Supp. 967, 969 (E.D. Ky. 1949); Allred v. State, 554 P.2d 411, 417 (Alaska 1976); State v. Bixby, 27 Wash. 2d 144, 177 P.2d 689 (1947); Coburn, supra note 8, at 622-32; Fisher, The Psychotherapeutic Professions and the Law of Privileged Communications, 10 WAYNE L. REV. 609, 611-12 (1964); Reutlinger, supra note 4, at 1359.
65. See generally C. McCormick, supra note 2, § 77; 8 J. Wigmore, supra note 1, §§ 2394-2396; Reese, Confidential Communications to the Clergy, 24 OHIO ST. L.J. 55 (1963).
66. Coburn, supra note 8, at 623; Alternative Means, supra note 8, at 236.
67. 8 J. Wigmore, supra note 1, § 2380a.
68. M. Guttmacher & H. Weihofen, Psychiatry and the Law 272 (1952) (psychotherapist-patient relationship); Note, supra note 40, at 1335 (attorney-client and psychotherapist-patient relationships as best examples of relationships in which confidentiality is essential).
these relationships, complete candor and full disclosure by the client or patient are vital if the professional is to perform his function effectively.\textsuperscript{69} In addition, much of the information necessarily communicated in these relationships is potentially damaging or embarrassing.\textsuperscript{70} Under such circumstances, one can reasonably conclude that the attorney-client and psychotherapist-patient relationships would not function effectively without the guarantee of an evidentiary privilege.\textsuperscript{71} In contrast, confidentiality, although certainly desirable, is not really essential to the parent-child relationship.\textsuperscript{72} Realistically, children often are much more reluctant to discuss private matters with their parents than with other trusted adults or with friends.\textsuperscript{73} Children are seldom completely candid with their parents about their misdeeds, largely because they view parents as authority figures, a role that society demands of parents.\textsuperscript{74} Typically, bonds other than shared secrets hold a parent-child relationship together. Proponents of parent-child privilege can point to no evidence that its general nonrecognition has appreciably affected parent-child ties.\textsuperscript{75}

\begin{itemize}
\item \textsuperscript{69} See Lora v. Board of Educ., 74 F.R.D. 565, 571 (E.D.N.Y. 1977) (psychotherapist-patient); C. McCormick, supra note 2, §§ 87-88 (lawyer-client); Note, supra note 40, at 1335.
\item \textsuperscript{70} Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955); Lora v. Board of Educ., 74 F.R.D. 565, 571 (E.D.N.Y. 1977) (psychotherapist-patient relationship); M. Guttmacher & H. Weishofen, supra note 68, at 272; Louisell, supra note 14, at 745; Slovenko, supra note 5, at 184-85.
\item \textsuperscript{71} C. McCormick, supra note 2, § 99, at 213 n.9 (psychotherapist-patient relationship); 8 J. Wigmore, supra note 1, § 2291 (attorney-client relationship); Guttmacher & Weishofen, Privileged Communications Between Psychiatrist and Patient, 28 IND. L.J. 32 (1952); Louisell, supra note 14, at 744-45 (psychotherapist-patient relationship); Sterk, Testimonial Privileges: An Analysis of Horizontal Choice of Law Problems, 61 MINN. L. REV. 461, 471 (1977) (attorney-client relationship). But see Morgan, Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence, 10 U. CHI. L. REV. 285, 288-90 (1943) (theory that attorney-client privilege is necessary to ensure that attorney gets all essential information is sheer speculation); Functional Overlap, supra note 4, at 1232; cf. Black, supra note 16, at 51 (no ground for singling out psychotherapy over other medical treatment; would extend privilege to all doctors).
\item \textsuperscript{72} See A. Jersild, supra note 33, at 250. But see Alternative Means, supra note 8, at 236.
\item \textsuperscript{73} See A. Jersild, supra note 33, at 249-50; Rosenheim, supra note 40, at 672.
\item \textsuperscript{74} See Loevinger, Patterns of Child Rearing as Theories of Learning, in FAMILY IN TRANSITION 345 (A. Skolnick & J. Skolnick eds. 1971) ("[T]he child's impulse gratification conflicts with the needs of society, represented by parents, to socialize him . . . ."); Shong, The Legal Responsibility of Parents for Their Children's Delinquency, 6 FAM. L.Q. 145, 156-66 (1972); cf. Note, supra note 40, at 1327 (school counselors' ability to establish confidential relationship is undermined if students view them as a part of school authority structure).
\item \textsuperscript{75} "[O]ne may seriously doubt that the law of evidence had any formative effect on family life in general." Hutchins & Slesinger, supra note 46, at 677.
\end{itemize}
The parent-child privilege clearly satisfies Wigmore’s third requirement since community opinion obviously favors fostering the parent-child relationship. Community opinion, however, would not necessarily favor fostering confidentiality in the relationship by means of an evidentiary privilege.

Deciding whether the parent-child privilege satisfies the fourth requirement is somewhat conjectural because both injury and benefit are difficult to quantify, but the privilege probably fails this prong of Wigmore’s test. The present injury to the parent-child relationship from general nonrecognition of the privilege appears to be insignificant. If recognized, the privilege would be unlikely to actually encourage parent-child communication because few children would be aware of the rule. All privileges are inefficient devices to promote the policies they profess to serve but are extremely effective as obstructions to accurate adjudication. In litigation the truth is seldom manifest, and the danger of an erroneous verdict increases whenever the trier of fact must reach a decision with less than all available relevant evidence. Thus, every privilege impairs the administration of justice, and this burden is tolerable only when the corresponding benefit is clear. The benefit to be gained from recognition of a parent-child privilege, however, is uncertain at best.

Recognition of a parent-child privilege is unwarranted as a matter of public policy. None of the rationales advanced by proponents of the privilege are particularly persuasive. The proposed privilege probably satisfies only two of the four requirements of Wigmore’s test. Merely because the parent-child relationship shares certain characteristics with other relationships that generally enjoy evidentiary privileges is not a sufficient reason to keep even additional relevant evidence out of trials.

76. "Ultimately, the evaluation of the social and moral importance . . . of any confidential communication privilege, in relation to the significance at a trial of foreclosing ascertainment of the full facts, involves value judgments, the testing of which . . . is presently subject to no scientific technique." Louisell, supra note 14, at 750.
77. See notes 45-46 supra.
78. C. McCormick, supra note 2, § 79.
79. "The recognition of a privilege to withhold from a trial evidence having a real probative value should occur only when the need of the privilege and the purpose served by it are so great that the truth may be sacrificed with the consequent impairment of the administration of justice." Ladd, supra note 22, at 557 (footnote omitted). See Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).
III. PARENT-CHILD PRIVILEGE AND THE CONSTITUTIONAL RIGHT OF FAMILY AUTONOMY

Currently, only one legislature has accepted the policy arguments of parent-child privilege proponents by enacting a statutory privilege. This fact, coupled with a general recognition by courts and commentators that policy questions such as the creation of new privileges are best left to legislatures, has forced parties wishing to block familial testimony to develop alternative constitutional arguments. The most common of these constitutional arguments is based on the constitutional right of privacy.

In *In re A & M*, the New York Appellate Division held that the federal constitutional right of privacy protects confidential communications between minor child and parent from compelled disclosure to a grand jury. Seeking testimony concerning incriminating statements by a sixteen-year-old arson suspect to his parents, the prosecutor in *A & M* issued grand jury subpoenas to the suspect's parents. The *A & M* court recognized a constitutional right of the parents to refuse to testify about admissions made to them by their son in seeking their support, advice,

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80. See note 11 *supra* and accompanying text.

Griswold v. Connecticut, 381 U.S. 479 (1965), was the first Supreme Court decision to recognize a discrete constitutional right of privacy. For contemporaneous assessments of the significance of *Griswold*, see *Comments on the Griswold Case*, 64 Mich. L. Rev. 197 (1965).
or guidance.85 Employing a substantive due process analysis,86 the court concluded that the integrity of family relational interests is constitutionally protected.87

Weighing the competing family and state interests, the

85. Id. at 433-34, 403 N.Y.S.2d at 380. In a subsequent case, In re Mark G., 65 A.D.2d 917, 410 N.Y.S.2d 464 (1978), the same court denied a claim of privilege when it determined that the child's admission was not made "for the purpose of obtaining support, advice or guidance." Id. at 918, 410 N.Y.S.2d at 465.

In In re Terry W., 59 Cal. App. 3d 745, 130 Cal. Rptr. 913 (1976), a California appellate court rejected a similar claim of privilege, although the court dealt with the right of privacy claim in a rather unsatisfactory manner. See id. at 748-49, 130 Cal. Rptr. at 914-15.

Although the A & M court limited its holding to "communications made by a minor child to his parents within the context of the family relationship," 61 A.D.2d at 435, 403 N.Y.S.2d at 381 (emphasis added), a New York trial court, relying on A & M, recently ruled that admissions a 23-year-old negligent homicide defendant made to his father were privileged, even though the defendant was no longer living with his parents when the conversation occurred. People v. Fitzgerald, — Misc. 2d —, 422 N.Y.S.2d 309 (Westchester County Ct. 1979).


87. 61 A.D.2d at 433-34, 403 N.Y.S.2d at 380. The court cited Note, The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudications, 44 Brooklyn L. Rev. 63 (1977), for the historical development of the legal principles supporting family integrity. That note, however, is concerned exclusively with child custody. Indeed, the author of the note nowhere addresses the confidentiality of parent-child communications, apparently not considering it a significant aspect of family integrity. The note describes family integrity as "the parents' rights to the physical custody of and decision-making concerning their children, the mutual rights of parents and children to one another's care and companionship and to a continuing family heritage, and various secondary, inchoate rights . . . when the family members are separated from one another." Id. at 63.

If this is all that is meant by family integrity, few would quarrel with its legal protection.

We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."

A & M court apparently used the Supreme Court's method of adjudication in *Roe v. Wade*. In *Roe*, the Court initiated the use of the "compelling state interest" test in substantive due process cases. The first step in this analysis is to determine whether the asserted individual interest constitutes a fundamental right: one "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." Although the A & M court


Conflicting language in A & M creates uncertainty over whether the court merely balanced the competing interests or instead subjected the state action to strict scrutiny. The two methods of adjudication are somewhat different. See United States v. Robel, 389 U.S. 258, 268 n.20 (1967). For a succinct discussion of the dangers of balancing as a method of constitutional adjudication, see Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1047-48 (1978). This comment will assume that the court applied strict scrutiny, the method more highly protective of the family interest asserted in the case.


89. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), four members of the Court, in concurring opinions, used the compelling state interest test, id. at 496-98 (Goldberg, J., concurring); id. at 503-07 (White, J., concurring), but not until *Roe* was it clear that a majority of the Court would adopt this method of adjudication in right of privacy cases. Justice Rehnquist recognized the significance of this aspect of the *Roe* opinion:

[T]he Court adds a new wrinkle to [the compelling state interest] test by transposing it from the legal considerations associated with the Equal Protection Clause. . . . Unless I misapprehend the consequences of this transplanting of the [test], the Court's opinion will accomplish the seemingly impossible feat of leaving a portion of the law more confused than it found it.


91. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion). This test derives from *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), in which the Court spoke of rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental." The *Snyder* test has appeared in previous privacy cases. See *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring). The Court has employed other similar tests of fundamentality as well. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) ("fundamental to the American scheme of justice"); *Powell v. Alabama*, 287 U.S. 45, 67 (1932) ("fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"). Some commentators have questioned the usefulness of such tests. See, e.g., McWhinney, *The Supreme Court and the Dilemma of Judicial Policy-Making*, 39 MINN. L. REV. 837, 860 (1955) ("Concepts such as these are so vaguely and loosely worded as to allow almost any content to be poured into them.").
concluded that the family interest warranted classification as a fundamental right, close analysis of Supreme Court precedents indicates that the court's conclusion was probably erroneous. Under the second part of the test, if the individual interest qualifies as fundamental, the state must demonstrate that any infringement of the interest is necessary to achieve a compelling state interest. The A & M court concluded that the state interest in accurate adjudication in insufficient to overcome "the interest of society in protecting and nurturing the parent-child relationship," although that conclusion was unwarranted in light of recent Supreme Court decisions.

In effect creating a new constitutional privilege analogous to the fifth amendment privilege against self-incrimination, the

In Griswold, Justice Douglas used a somewhat different approach, discovering the fundamental right of privacy in the "penumbras" of specific Bill of Rights guarantees. Lately, however, the Court has avoided using the penumbral analysis, see Whalen v. Roe, 429 U.S. 589, 598 n.23 (1977); Roe v. Wade, 410 U.S. at 153, which in practice imposes no greater checks on judicial discretion than other tests of fundamentality, see Beaney, The Griswold Case and the Expanding Right to Privacy, 1966 Wis. L. Rev. 979, 993.

92. 61 A.D.2d at 431-32, 403 N.Y.S.2d at 378-79.
93. See text accompanying notes 99-146 infra; Krattenmaker, supra note 13, at 97 n.134.

Moreover, some commentators question the utility of a fundamental rights analysis when dealing with "privacy" rights. See Antieau, The Jurisprudence of Interests as a Method of Constitutional Adjudication, 27 Case W. Res. L. Rev. 823, 845 (1977) (Court's explanations of fundamentality either conclusory or unacceptably vague); Goodpaster, The Constitution and Fundamental Rights, 15 Anz. L. Rev. 479, 482-83 (1973) (limiting fundamental rights to first amendment rights, political participation rights, and rights to procedural due process and equal protection); Wellington, supra note 88, at 299 (asserts that it is misleading to describe interest in abortion as fundamental).

95. 61 A.D.2d at 434, 403 N.Y.S.2d at 380.
96. See notes 147-59 infra and accompanying text. Furthermore, by approving and sending to Congress the Proposed Federal Rules of Evidence, 56 F.R.D. 183 (1973), which did not contain a parent-child privilege, the Court probably prejudged the constitutionality of not recognizing the privilege. See United States ex rel. Edney v. Smith, 425 F. Supp. 1038, 1046 (E.D.N.Y. 1976), aff'd, 556 F.2d 556 (2d Cir. 1977); Krattenmaker, supra note 13, at 94-96.
A & M court extended the constitutional right of privacy far beyond the boundaries previously marked by the Supreme Court. The court's treatment of Supreme Court precedents was marked by careless scholarship, selective quoting of dicta, disregard for case holdings, and semantic sleight of hand. The principal cases cited by the court do not support a right of family privacy of the sort identified in A & M.

Meyer v. Nebraska and Pierce v. Society of Sisters, both frequently cited as authority by the Supreme Court in recent privacy cases, illustrate that there are constitutional limits to state interference with certain parental child-rearing decisions. In Meyer, the Court struck down a statute prohibiting the teaching of modern foreign languages earlier than the eighth grade; in Pierce, the Court invalidated a statute requiring parents to send their children to public schools. According to the A & M court, Meyer and Pierce "were based on the principle that 'the parental

Rules of Evidence, 26 U. CINN. L. REV. 493, 495 (1957); see Stoyles, The Dilemma of the Constitutionality of the Priest-Penitent Privilege—The Application of the Religion Clauses, 29 U. Prrr. L. Rev. 27 (1967). Any other constitutional privilege would have to be derived from broadly worded provisions of the Constitution such as the ninth or fourteenth amendments.

The court insisted that it was not creating a privilege despite recognizing certain communications between parent and child as protected by the constitutional right of family privacy. 61 A.D.2d at 434-35, 403 N.Y.S.2d at 381. Even commentators who look with favor upon the decision, however, conclude that the court did in effect create a narrow privilege. See Child-Parent Privilege, supra note 8, at 799.


100. 268 U.S. 510 (1925).
right to guide one's child intellectually and religiously is a most substantial part of the liberty and freedom of the parent."

For several reasons, however, Meyer and Pierce are questionable authority for strict scrutiny of the state action in A & M. Both cases are products of the now discredited era of economic substantive due process. In Meyer, although the holding was predicated in part on parental rights, the Court framed the issue as whether the challenged statute unreasonably infringed the liberty the fourteenth amendment guaranteed to the appellant teacher to pursue his chosen occupation. Similarly, in Pierce, the appellee private schools sought and received protection from interference with their patrons and the consequent destruction of their business and property. In neither case were parents parties to the legal action. When the Court abandoned any serious review of social and economic legislation, cases like Meyer and Pierce also had to be abandoned unless they could be justified on some other basis. The Court has failed to enunciate a consistent theory of why Meyer and Pierce are still good law.1 Furthermore, although the A & M court

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102. 61 A.D.2d at 430, 403 N.Y.S.2d at 378. The A & M opinion creates the impression that this language comes from the Court's opinion in Pierce when, in fact, it comes from the brief for appellee Society of Sisters. See 269 U.S. at 518.


104. 262 U.S. at 399.

105. 268 U.S. at 536.


107. Wellington, supra note 88, at 278.

107.1. Meyer and Pierce were first reinterpreted as cases involving "statutes directed at particular religious . . . or national . . . minorities." United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (citations omitted). Indeed, the cases have aspects supporting this "discrete and insular minorities" interpretation of the holdings. See Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U. Pa. L. Rev. 1293, 1306 n.42 (1976); Alternative Means, supra note 8, at 227 n.41; cf. Perry, supra note 86, at 431 n.89 (citing Meyer and Pierce as examples of the "seemingly inherent tendency of the state to impose cultural conformity").

More recently, at least prior to Roe, the Court has tended to treat Meyer and Pierce as essentially first amendment cases. Tribe, supra note 88, at 8 n.39; see Wisconsin v. Yoder, 406 U.S. 205, 213-14, 233 (1972); Epperson v. Arkansas, 393 U.S. 97, 105-06 (1968);
purported to balance two legitimate but competing interests, the Court in *Meyer* and *Pierce* concluded that the statutes in question were arbitrary and not reasonably related to a legitimate state purpose. The *A & M* court conceded that the state has a "legitimate interest in the process of fact-finding necessary to discover, try and punish criminal behavior" and could not characterize the state action as arbitrary or unrelated to that interest. Thus, *Meyer* and *Pierce* cannot satisfactorily support the result in *A & M*.

The *A & M* court selectively quoted dicta from another Supreme Court opinion as support for a family privacy right but ignored more authoritative language in the same opinion limiting that right. In *Prince v. Massachusetts*, the Court upheld criminal laws forbidding parents or guardians to permit their children to sell merchandise in public places and forbidding anyone to furnish such merchandise to children. The *A & M* court quoted language in *Prince* declaring that "the custody, care and nurture of the child reside first in the parents" and acknowledging "a private realm of family life which the state cannot enter." In the next two sentences of the opinion, however, the

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Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (Douglas, J.); id. at 516 (Black, J., dissenting); Poe v. Ullman, 367 U.S. 497, 543-44 (1961) (Harlan, J., dissenting); Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. Cal. L. Rev. 769, 806 (1978). Justice Powell's statement that *Meyer* and *Pierce* have survived because they built on the traditions of this country, Moore v. City of E. Cleveland, 431 U.S. 494, 501 n.8 (1977) (plurality opinion), is consistent with this view of those cases. First amendment freedoms are among the most basic of our traditions.

The first amendment values protected in *Meyer* and *Pierce*, free exercise of religion and access to ideas protected by the free speech clause, are noticeably absent in *A & M*. Professor Tribe argues, however, that the first amendment right of association extends protection to the family. Tribe, *supra* note 88, at 34-38. *But see* Moore v. City of E. Cleveland, 431 U.S. 494, 534-36 (1977) (Stewart, J., dissenting); Whalen v. Roe, 429 U.S. 589, 604 n.32 (1977) (both opinions rejecting right of association argument because claimed invocation not for the purpose of advancing ideas or airing grievances).

In the most recent opinions, the Court has treated *Meyer* and *Pierce* as "family privacy" cases, due in part no doubt to the renewed respectability of substantive due process.

108. 61 A.D.2d at 433-34, 403 N.Y.S.2d at 380. The court cited *Roe v. Wade* as an example of a case in which the Supreme Court had balanced two competing legitimate interests. *Id. But see* Perry, *supra* note 86, at 421 (arguing that the *Roe* Court did not really balance two competing legitimate interests, but rather concluded that the objective of the Texas abortion statute was illegitimate according to conventional morality).

109. 268 U.S. at 535-36; 262 U.S. at 403.

110. 61 A.D.2d at 433, 403 N.Y.S.2d at 380.


112. 61 A.D.2d at 430, 403 N.Y.S.2d at 378 (quoting 321 U.S. at 166).
Prince Court stated that "the family itself is not beyond regulation in the public interest" and "rights of parenthood are [not] beyond limitation." These latter passages much more accurately reflect the Prince Court's holding that the state could enforce its statutes against the guardian of a child distributing religious literature.

Without citing Prince or any other authority, the A & M court conceded later in its opinion that the state may regulate the family but insisted that when the state does so, its interests must be carefully examined "to insure that there exists a legitimate purpose in abridging this familial interest." The court, however, seemingly proceeded to ignore its own statement of the applicable test when it acknowledged a legitimate state purpose but nevertheless invalidated the state action.

The A & M court also cited Smith v. Organization of Foster Families for Equality and Reform (OFFER) for language acknowledging the importance of emotional attachments in the family and of the socializing function of the family, but the court apparently ignored the holding in that case. In OFFER, the Supreme Court held that New York's informal procedures for removing children from foster homes provided sufficient due process protection to any possible fourteenth amendment liberty interests involved. OFFER was decided not on substantive, but rather on procedural due process grounds; the close emotional ties potentially present in a foster family formed the only possible basis for recognition of even this limited protection.


114. 61 A.D.2d at 430, 403 N.Y.S.2d at 378.
115. Id. at 433-34, 403 N.Y.S.2d at 380.
117. "'[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children.'" 61 A.D.2d at 430, 403 N.Y.S.2d at 378 (quoting 431 U.S. at 844 (citation omitted)).

118. A substantive due process issue was not raised in OFFER. The foster parents argued not that the state was without authority to remove the children, but rather that a prior hearing satisfying due process was a necessary requirement. 431 U.S. at 820. See generally P. Brest, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 679-93 (1975).

119. 431 U.S. at 839. A majority of the Court was willing to assume, without deciding, that the foster family was entitled to procedural due process protection because the
Consequently, OFFER does not support a substantive due process challenge to any state action with a potential adverse impact on the parent-child relationship.\textsuperscript{120}

Finally, the A \& M court cited as authority Justice Powell's plurality opinion in Moore v. City of East Cleveland,\textsuperscript{121} but Powell's approach in Moore indicates that A \& M was probably wrongly decided. The Moore plurality concluded that a zoning ordinance limiting occupancy of a dwelling unit essentially to members of a nuclear family violated the substantive protections of the due process clause.\textsuperscript{122} Justice Powell sought appropriate limits on substantive due process in history and tradition.\textsuperscript{123} He concluded that the state cannot deny an extended family the right to live together because the extended family has venerable roots in our history.\textsuperscript{124} The parent-child privilege can hardly be described as "deeply rooted in this Nation's history and tradition,"\textsuperscript{125} however, because prior to 1972 no American court or leg-

intimacy of its daily interaction constituted a "liberty" interest. \textit{Id.} at 847. Justice Stewart could not accept this approach: "Rather than tiptoeing around this central issue, I would squarely hold that the interests asserted by the [foster parents] are not of a kind that the Due Process Clause . . . protects." \textit{Id.} at 857-58 (Stewart, J., concurring). In Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200 (5th Cir. 1977) (en banc), \textit{cert. denied}, 437 U.S. 910 (1978), the Fifth Circuit addressed the question the OFFER majority avoided, holding that "there is no liberty interest . . . of full-fledged constitutional magnitude" in the foster family. \textit{Id.} at 1209.

120. In fact, the Court explicitly cautioned against reading OFFER too broadly: "Of course, recognition of a liberty interest in foster families for purposes of the procedural protections of the Due Process Clause would not necessarily require that foster families be treated as fully equivalent to biological families for purposes of substantive due process review." 431 U.S. at 842 n.48. See Moore v. City of E. Cleveland, 431 U.S. 494, 545-47 (1977) (White, J., dissenting).

121. 431 U.S. 494 (1977) (plurality opinion). Moore was a 4-1-4 decision, Justice Stevens agreeing with the plurality's result, although not joining in Justice Powell's opinion.

122. \textit{Id.} at 506.

123. \textit{Id.} at 503-05. "[A]n approach grounded in history imposes limits on the judiciary that are more meaningful than any based on the abstract formula taken from Palko v. Connecticut, . . . and apparently suggested as an alternative." \textit{Id.} at 503 n.12 (citations omitted). See Zablocki v. Redhail, 434 U.S. 374, 395 (1978) (Stewart, J., concurring); notes 90-91 \textit{supra} and accompanying text.


124. 431 U.S. at 504-05.

125. \textit{Id.} at 503. Defenders of the A \& M decision might respond that although tradition does not support a parent-child privilege, our society has traditionally fostered the parent-child relationship. Indeed, Moore and several previous decisions of the Court contain broad rhetoric of this sort. See id. at 503 n.12. By characterizing a particular interest in sufficiently general terms, however, one can find a general American tradition to support virtually any interest. See Ely, \textit{supra} note 123, at 39 n.148, 40-41 & n.156.
islature ever had recognized a parent-child privilege.126 According to the Moore plurality, the liberty protected by the due process clause includes "freedom from all substantial arbitrary impositions and purposeless restraints" and assures that fundamental interests receive "particularly careful scrutiny of the state needs asserted to justify their abridgement."127 The plurality concluded that only a tenuous relation existed between the challenged ordinance and the goals advanced to justify its enactment.128 Clearly, this is not a reasonable description of the state action challenged in A & M. Furthermore, although the A & M opinion obviously is modeled closely on the Moore plurality opinion,129 the Moore opinion gives no indication that the family interest in A & M deserves substantive due process protection. Although it contains broad language reaffirming earlier family cases such as Meyer and Pierce, the Moore opinion merely concludes that when the state intrudes on choices concerning family living arrangements, substantive due process review is appropriate.130 The Moore opinion, therefore, does not suggest that every state action affecting family interests will call for strict scrutiny of the state's justifications.

A more general examination of previous right of privacy cases underscores the conclusion that A & M was wrongly decided. By speaking in broad terms of a monolithic right of

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126. See note 11 supra and accompanying text. "If a thing has been practised for two hundred years by common consent, it will need a strong case for the 14th Amendment to affect it . . . ." Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922) (Holmes, J.). The liberty protected by the due process clause denotes rights "long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. at 399. See Antieau, supra note 93, at 850-51, 854, 876.


128. Id. at 500. Indeed, Justice Stevens voted to invalidate the ordinance under the limited standard of City of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), because it had not "been shown to have any 'substantial relation to the public health, safety, morals or general welfare.'" 431 U.S. at 520 (Stevens, J., concurring) (quoting Euclid, 272 U.S. at 395). Justice Brennan, joined by Justice Marshall, noted that "the zoning power is not a license for local communities to enact senseless and arbitrary restrictions which cut deeply into private areas of protected family life." Id. at 507 (Brennan, J., concurring).


130. 431 U.S. at 499.
family privacy or family integrity, the A & M court created an illusion of precedent when none existed. Although right of privacy claims have proliferated in recent years, \textsuperscript{131} analytically the concept of privacy is still rather amorphous. \textsuperscript{132} In \textit{Whalen v. Roe}, \textsuperscript{133} however, the Supreme Court recognized at least two distinct meanings of privacy as the term had been used in previous cases: "the individual interest in avoiding disclosure of personal matters" (selective disclosure) and "the interest in independence


\textsuperscript{132} "[O]nly personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' ... are included in this guarantee of personal privacy. [It is also] clear that the right has some extension to activities relating to marriage, ... procreation, ... contraception, ... family relationships, ... and child rearing and education ..." \textit{Roe v. Wade}, 410 U.S. at 152-53 (emphasis added) (citations omitted). Reflecting on the Court's work in this area, Professor Henkin concluded that "we will know which rights are and which are not within the zone [of privacy] only case by case, with lines drawn and redrawn, in response to individual and societal initiatives and imaginativeness of lawyers." Henkin, supra note 18, at 1425-26. \textit{See Note, Due Process Privacy and the Path of Progress, 1979 U. Ill. L.F. 469, 501.} The Court has offered only undifferentiated string cites or equally unhelpful explanations such as that in \textit{Roe} to indicate what makes the right of privacy a unit. Ely, supra note 123, at 11 n.40. Several lower courts have expressed uncertainty over the scope of the right of privacy. \textit{See, e.g.}, McKenna \textit{v. Fargo}, 451 F. Supp. 1355, 1379 (D.N.J. 1978); \textit{Lora v. Board of Educ.}, 74 F.R.D. 555, 570 (E.D.N.Y. 1977). Indeed, Justice Rehnquist, writing for the Court in \textit{Paul v. Davis}, 424 U.S. 693, 713 (1976), referred to the right of privacy cases as "defying categorical description." More than one commentator has suggested that the Court's obfuscation in this area may be intentional, to hide what is really going on. \textit{See Gross, The Concept of Privacy, 42 N.Y.U.L. Rev.} 34, 42 (1967); \textit{Perry, supra} note 86, at 441.

\textsuperscript{133} 429 U.S. 589 (1977).
in making certain kinds of important decisions" (autonomy).\textsuperscript{134} The distinction between selective disclosure and autonomy is crucial because the different meanings of privacy call for quite different judicial responses.\textsuperscript{135} Because the parents in A \& M sought to prevent the state from gaining access to personal and damaging information, their asserted privacy interest was principally one of selective disclosure.\textsuperscript{136} The Supreme Court decisions the A \& M court relied upon, however, all were based on the interest in autonomy.\textsuperscript{137} The issue in each of those cases was

\textsuperscript{134} Id. at 598-600. The Court characterized two previous Court opinions, Griswold v. Connecticut, 381 U.S. 479 (1965), and Stanley v. Georgia, 394 U.S. 557 (1969), as concerned with selective disclosure. As Justice Stewart noted, however, Stanley's holding was based on the first amendment, and "[w]hatever the ratio decidendi of Griswold, it does not recognize a general interest in freedom from disclosure of private information." Whalen v. Roe, 429 U.S. at 609 (Stewart, J., concurring).

Griswold clearly was not a selective disclosure case, even though Justice Douglas spoke rhetorically of police searching marital bedrooms. The issue in Griswold was whether the state could bar the use of contraceptives. See, e.g., Henkin, supra note 18, at 1424; Krattenmaker, supra note 13, at 95. Thus, no Court opinion has recognized an interest in selective disclosure protected by the constitutional right of privacy, as distinct from the protection of privacy by the first, third, fourth, and fifth amendments. See Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977).

The third amendment was obviously inapplicable in A \& M, and recent Supreme Court decisions would preclude fourth or fifth amendment protection under the circumstances of that case. See, e.g., Fisher v. United States, 425 U.S. 391, 400-01 (1976). The first amendment right of association, although an arguable ground for protection, probably also would fail. See note 107 supra.

For a well-reasoned district court opinion attempting to clarify this difficult area of constitutional law, see Crain v. Krehbiel, 443 F. Supp. 202, 207-10 (N.D. Cal. 1978).

\textsuperscript{135} Note, supra note 89, at 1163. "Great care is necessary in determining which zone [of privacy] is at issue in any given case, since the mode of analysis, type of proof, standards, and source of protection vary between the zones." Comment, A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision, 64 CALIF. L. REV. 1447, 1482 (1976). See Henkin, supra note 18, at 1425; Mouths of Babes, supra note 8, at 1015 & n.93. But see Confidential Communication, supra note 8, at 824-26.

\textsuperscript{136} An argument could be made that the parents have an autonomy interest in deciding how their child should be punished for antisocial acts. The state must take action to protect the public, however, when serious delinquent acts are committed. The dispositional decision in such cases is not one that can conveniently be left to parents because of the presumed bias generated by family ties and parental concern with their own child's best interests. Garvey, supra note 107, at 805. See Sims v. Wain, 536 P.2d 686 (6th Cir. 1976); Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.) (three-judge court), aff'd mem., 423 U.S. 907 (1975) (both cases holding corporal punishment in schools not forbidden merely because it interferes with right of parental control).

\textsuperscript{137} The right of privacy that emerges from Griswold, Eisenstadt, and Roe is a right to engage in conduct or undergo experiences without governmental interference, when the conduct or experiences do not implicate the public morals or any other aspect of the public welfare. This right of privacy, privacy-as-autonomy if you will, is distinct from that other right of privacy whose referents are secrecy and seclusion.

Perry, supra note 86, at 440. See Dixon, supra note 86, at 84; Krattenmaker, supra note
whether the individual or the state should make fundamental decisions that shape family life: whom to marry or live with,\(^{138}\) whether or when to have children,\(^{139}\) or with what values to raise those children.\(^{140}\) The issue was not whether information about family members may be withheld from the state.

The A & M court’s use of strict scrutiny also is questionable in light of the Supreme Court’s distinction between direct and incidental interference with interests protected by the Constitution. The Court has strongly suggested that only direct and substantial interference with protected interests will subject state action to rigorous scrutiny.\(^{141}\) *Branzburg v. Hayes*,\(^{142}\) another case

\(^{13}\) at 96 (the *Roe* Court used *privacy* in a sense other than that which would necessarily imply a constitutionally compelled marital privilege); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 Hastings L.J. 957, 973 n.73, 1017 (1979); Silver, *supra* note 97, at 254-55. *But see* Tribe, *supra* note 88, at 17 n.83.


The distinction between direct interference and incidental burdening may have developed in response to what one commentator calls the “canonization problem” inherent in a double standard of judicial review. *See* Goodpaster, *supra* note 93, at 505. Declaring a right to be fundamental appears to give the right a nearly inviolable sanctity, for state authority cannot regulate or burden its exercise without showing a compelling need to do so. The interests subsumable under any given right, however, may range from the trivial to the extremely important. If the right is declared fundamental, the state may be precluded from regulating even the trivial instances of its exercise. On the other hand, strained analysis may be required to show that the claimed right is not really in issue, or that the state actually has a compelling interest, or that the exercise of the right is not really burdened in the particular case. *Id.*

Whether the distinction between direct and indirect interference provides a principled means of deciding cases is questionable. *See* Zablocki v. Redhall, 434 U.S. at 396-97 (Powell, J., concurring). The Court earlier found a similar direct-indirect distinction
involving an alleged constitutional privilege, illustrates this principle well. The issue in Branzburg was whether the first amendment exempts journalists from divulging to a grand jury the confidential sources of news stories about criminal activities. In the Court's view, the challenged state action was not a direct restraint on press freedom but rather a law of general application that might incidentally burden the press.\textsuperscript{143} The Branzburg Court acknowledged the rationality of the argument that the flow of news would be diminished by compelling reporters to aid grand juries in criminal investigations and noted evidence in the record supporting that argument.\textsuperscript{144} The Court found the argument speculative and unpersuasive, however, and accordingly concluded that the case did not present a substantial first amendment question.\textsuperscript{145}

The Branzburg Court's reasoning is equally applicable to the facts in A & M. The state in A & M did not attempt to forbid or restrict confidential parent-child communications, nor did it indiscriminately require parents to disclose them. The sole issue in A & M was whether parents of a criminal suspect must respond to subpoenas as other citizens do and answer questions relevant to a criminal investigation. No convincing evidence exists that nonrecognition of a parent-child privilege significantly discourages parent-child communications.\textsuperscript{146}

Even if the state action in A & M directly interfered with a fundamental right, Branzburg and another recent evidentiary privilege decision, United States v. Nixon,\textsuperscript{147} indicate that the state still satisfied the compelling state interest test. The Supreme Court's evaluation of competing interests in Branzburg

\textsuperscript{142} 408 U.S. 665 (1972). For a detailed commentary critical of the Branzburg decision, see Murasky, supra note 4.

\textsuperscript{143} 408 U.S. at 681-83, 691. Some commentators, however, believe the press deserves far more protection than the Branzburg Court was willing to grant it. See, e.g., Murasky, supra note 4.


\textsuperscript{145} 408 U.S. at 693-97.

\textsuperscript{146} See notes 32-48 supra and accompanying text. "Empirical proof of the precise nature and extent of the impact testimonial privileges have on individual privacy probably does not exist." Krattenmaker, supra note 13, at 97. But see Mouths of Babes, supra note 8, at 1018-20 (rejecting comparison between newsman-source and parent-child privileges).

\textsuperscript{147} 418 U.S. 683 (1974).
and Nixon clearly indicates that the Constitution does not mandate a parent-child privilege.

The Branzburg Court stressed the importance of the testimonial duty in a manner that reveals a decided hostility to all privileges.\(^{148}\) Rejecting the claim of a qualified journalist’s privilege,\(^{149}\) the Court held that the public interest in law enforcement is sufficiently important to override the interest in news gathering.\(^{150}\) The Court also stated that “[c]itizens generally are not constitutionally immune from grand jury subpoenas, and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.”\(^{151}\) Although technically dictum, this passage certainly suggests a reluctance to recognize any constitutionally-based evidentiary privilege other than the fifth amendment privilege against self-incrimination. In addition, the Court rejected the journalists’ argument that the infringement of their first amendment interest was broader than necessary to achieve the state’s purpose, stating that the investigative power of the grand jury must necessarily be broad if it is to fulfill adequately its public responsibility.\(^{152}\) Because constitutional authority underlying the parent-child privilege is doubtful at best,\(^{153}\) in contrast to the explicit constitutional protection accorded the press,\(^{154}\) surely the Constitution does not provide

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148. It is apparent . . . that concealment of crime and agreements to do so are not looked upon with favor. Such conduct deserves no encomium, and we decline now to afford it First Amendment protection by denigrating the duty of a citizen . . . to respond to grand jury subpoena and answer relevant questions put to him.

408 U.S. at 697. See Krattenmaker, supra note 13, at 97.

149. In Branzburg, the journalists argued that the state could obtain information from them only by first demonstrating that: (1) probable cause existed to believe that they had information relevant to a grand jury’s investigation; (2) the information could not be obtained from alternative sources; and (3) the grand jury had a compelling need for the information. 408 U.S. at 680.

150. Id. at 690-91.

151. Id. at 682 (emphasis added).

152. Id. at 688.

153. The constitutional authority for the parent-child privilege in fact is nonexistent, as indicated by this comment’s treatment of the constitutional right of family autonomy. See notes 99-146 supra and accompanying text.

parents a special testimonial status denied to journalists.\textsuperscript{155}

The Court in \textit{Nixon} further indicated that the state's interest in the production of evidence would be regarded as "compelling" in the context of \textit{A & M}. In \textit{Nixon}, the President asserted a claim of absolute executive privilege when he was subpoenaed to produce tape recordings and documents relating to his conversations with aides and advisors. Although acknowledging that a President has far greater claim to the confidentiality of his conversations and correspondence than has an ordinary citizen,\textsuperscript{156} the Court rejected the claim of absolute privilege.\textsuperscript{157} The Court reasoned that presidential advisors' candor would not be inhibited by the possibility that their remarks might be called for in a criminal prosecution.\textsuperscript{158} On the other hand, the Court concluded that withholding evidence relevant in a criminal trial would gravely impair the basic function of the courts.\textsuperscript{159}

The Constitution does not mandate recognition of a parent-child privilege. The right of privacy line of cases gives no indication that the interest in confidential communications between parent and child qualifies as a fundamental right for the purpose of substantive due process analysis. Any infringement of this interest caused by nonrecognition of a parent-child privilege is indirect and incidental. At any rate, the fundamental state interest in the integrity of the fact-finding process is sufficiently compelling to override the interest in the privacy of parent-child


\textsuperscript{156} See \textit{Krattenmaker}, supra note 13, at 95-96.

\textsuperscript{157} \textit{Id.} at 706-07. The Court held that presidential communications are "presumptively privileged." If the prosecutor or defendant can demonstrate that the presumptively privileged materials are essential to the just resolution of a criminal case, however, the President must surrender the materials for in camera inspection by the judge. The judge would then excuse any materials that are irrelevant, inadmissible, or that would threaten national security.

\textsuperscript{158} \textit{Id.} at 712.

\textsuperscript{159} \textit{Id.}
Important public policies support most widely recognized evidentiary privileges, yet very few of these privileges have a basis in the Constitution. Although the Supreme Court has recognized “a private realm of family life which the state cannot enter,” this realm does not extend so far as to encompass a privilege that is unwarranted as a matter of public policy.

IV. Present and Proposed Forms of the Parent-Child Privilege

Even if recognition of a parent-child privilege could be justified on policy or constitutional grounds, devising an acceptable form of the privilege is virtually impossible. Control over whether the privilege is to be invoked must be given either to the child, the parent, or the court. None of these choices, how-

160. Alternative Means, supra note 8, at 231-32; see Henkin, supra note 18, at 1429-30; cf. Caesar v. Mountainos, 542 F.2d 1064, 1069 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977) (psychotherapist-patient privilege). But see Mouths of Babes, supra note 8, at 1022; Child-Parent Privilege, supra note 8, at 801-02 (state interest not overriding, but acknowledging that the A & M court’s analysis of the competing interests was “somewhat cursory”).


162. Cf. United States ex rel. Edney v. Smith, 425 F. Supp. 1038, 1044 (E.D.N.Y. 1976), aff’d, 556 F.2d 556 (2d Cir. 1977) (doctor-patient privilege) (“It is implausible that a privilege that has almost uniformly been found to be practically undesirable and burdensome should nonetheless be constitutionally compelled.”).

163. A New York county court recently recognized a constitutionally-based parent-child privilege for confidential communications. People v. Fitzgerald, Misc. 2d at ___, 422 N.Y.S.2d 309 (Westchester County Ct. 1979). The court, relying on and probably misreading A & M, see note 164 infra, required both parent and child to consent to divulgence of confidential communications between them. Compare Misc. 2d at ___, 422 N.Y.S.2d at 315-16, ___ A.D.2d at 435 n.9, 403 N.Y.S.2d at 381 n.9. Thus, the court gave effective control of the privilege to the child. Most notably, the court refused to set any age limit on the privilege. Misc. 2d at ___, 422 N.Y.S.2d at 313-14.

A commentator has proposed a statutory privilege, apparently controlled by the child, extending to “[a]ny juvenile who is a party to a confidential communication with a member of his family.” Coburn, supra note 8, at 632. The proposal defines “family members” covered by the privilege as: (1) parents, or those stepparents living in the same household as the child; and (2) siblings, including stepbrothers and stepsisters living in the same household as the child. Id. at 633. Coburn’s inclusion of a sibling privilege is questionable because he underscores the unique nature of the parent-child relationship in his defense of the proposed statute. See id. at 616-21.

164. Idaho’s statutory privilege provides that parents “shall not be forced to disclose any communication made by this minor child . . . to them concerning matter[s] in any civil or criminal action” to which the child is a party. IDAHO CODE § 9-203(7) (1979). The privilege apparently belongs only to the witness parents; therefore, they presumably could waive the privilege without their child’s consent. No reported case, however, has yet interpreted Idaho’s parent-child privilege.

The New York Appellate Division’s constitutional privilege requires a confidential
communication made by a minor child to his parent for the purpose of obtaining support, advice, or guidance. In re A & M, 61 A.D.2d at 433-34, 403 N.Y.S.2d at 380. Despite problems of proving subjective intent, the privilege at first glance appears to be consistent with its underlying rationale of allowing the child to explore problems in an atmosphere of trust and understanding without fear that confidences will later be revealed. Id. at 432, 403 N.Y.S.2d at 380. As a condition to recognition, however, the court required that both parent and child invoke the privilege because children might abuse a privilege that they could invoke unilaterally. Id. at 435 n.9, 403 N.Y.S.2d at 381 n.9.

One student commentator has proposed a statutory privilege similar to the foregoing constitutional privilege. The proposed statute would protect a minor child’s confidential communications, either by words or communicative acts, in all proceedings where testimony under oath is required. Like the A & M constitutional privilege, either child or parent could waive the privilege. The presence at the time of the communication of other family members, such as siblings, would not nullify the privilege but they could be forced to testify. Child-Parent Privilege, supra note 8, at 807-09.

A second student commentator has proposed a similar statutory privilege. Differing only slightly from the foregoing proposed statute, the privilege would apply only to children of an age subject to the jurisdiction of the juvenile court. Furthermore, the presence of third parties at the time of the communication would preclude a claim of privilege. Parent-Child Testimonial Privilege, supra note 8, at 689-90.

A third student commentator, although failing to draft a concrete statutory proposal, also has suggested a privilege that could be waived by either parent or child. This proposal would apply only in criminal cases, however, and would be limited to unemancipated children. Mouts of Babes, supra note 8, at 1024-29.

165. The Canadian Law Reform Commission’s proposed evidence code, see generally Brooks, The Law Reform Commission of Canada’s Evidence Code, 16 OSGOODE HALL L.J. 241 (1978), would extend a discretionary form of the traditional marital privilege to persons “related . . . by family or similar ties,” Proposed Evid. Code tit. IV, pt. I, § 40 in LAW REFORM COMMISSION OF CANADA, supra note 8; id. tit. V, pt. II, § 57, a phrase apparently meant to include parent-child, sibling, and common law marital relationships, id. § 57, Commissioners’ Comment. But see id. § 40, Comment by Commissioner La Forest. The Commission proposes two privileges: § 40 modeled after the marital communications privilege, § 57 modeled after the marital testimonial privilege. See notes 20-21 supra. In deciding whether to allow the communications privilege under the Canadian proposal, the trial judge, having regard for the nature of the relationship, would weigh the probative value of the evidence and the importance of the question being litigated against the public interest in privacy, the possible disruption of the relationship, and the harshness of compelling testimony. In deciding whether to allow the testimonial privilege, the judge would weigh the probative value of the evidence and the seriousness of the charged offense against the possible disruption of the relationship and the harshness of compelling testimony. The proposed communications privilege would be available in both civil and criminal proceedings, while the proposed testimonial privilege would be limited to criminal proceedings. Like the European privileges, see note 10 supra, both privileges would protect communications from parent to child in addition to those from child to parent. A privilege scheme similar to that of the Canadian Law Reform Commission has been proposed in criminal cases in the Australian state of Victoria. VICTORIAN LAW REFORM COMMISSIONER, REPORT ON THE LAW OF EVIDENCE RELATING TO THE COMPETENCE AND COMPPELLABILITY OF SPOUSE WITNESSES (1976), noted in 51 AUSL. L.J. 3 (1977).

In addition, some commentators have proposed general discretionary confidential communication privileges that would encompass the parent-child relationship. These general approaches all decline to specify in advance which relationships might qualify for a privilege. Therefore, courts would determine privilege on a case-by-case basis, giving trial courts even greater discretion than would the Canadian proposal.

One proposal would give qualified protection to confidential communications between individuals “intimately related or in a position of close personal trust.” Krat-
that the privilege should not be recognized.

Having the child decide whether to invoke the privilege would be thoroughly unacceptable. Unless effective control over the privilege were held by an adult, privilege claims not in the child’s best interest would inevitably result. In serious matters of this kind, generally a parent can determine better than a child what serves the child’s best interest. A privilege

tenmaker, supra note 13, at 94, 119. This proposal would specifically protect communications between parent and child, id. at 83, 93-94, and would require trial courts to make a case-by-case determination, considering the necessity for the testimony and the availability of other techniques to better protect the interests of all litigants, id. at 94. The witness apparently would have to claim the privilege. Id. at 119.

A second general confidential communications proposal would have courts apply Wigmore’s test on a case-by-case basis. McLachlin, Confidential Communications and the Law of Privilege, 11 U. Brit. Colum. L. Rev. 266 (1977). The author of the proposal calls this the “principle” approach, in contrast to the “category” approach, which lists specific relationships that qualify for a privilege. This “principle” approach would include a qualified parent-child privilege similar to the Canadian Law Reform Commission’s communications privilege. Id. at 278.

Wigmore’s test, however, clearly was not designed to be used in this manner. In fact, Wigmore used the test to determine whether certain relationships warrant absolute privileges—what McLachlin would call the “category” approach. See Note, supra note 43, at 446. Moreover, the “principle” approach distorts Wigmore’s test by applying it too loosely. Wigmore believed that the four requirements of the test are absolute prerequisites to proper recognition, see 8 J. Wigmore, supra note 1, § 2285, while the “principle” approach treats them as merely suggestive guidelines, McLachlin, supra, at 277-78.

A third general confidential communications proposal would abolish all present privilege statutes and give trial courts virtually unlimited discretion in ruling on privilege claims, directing the courts to consider “the common law, current privilege law, and their own experience.” Parent-Child Testimonial Privilege, supra note 8, at 690. The proposal’s author suggests that factors courts could consider include constitutional ramifications, the general policy behind privileged communications, and the importance of the communication as evidence in the litigation. Id. at 691-92.

166. Of course, much of this paragraph’s “best interest” analysis would not apply if the privilege were claimed by a child above the age of majority. See People v. Fitzgerald, — Misc. 2d —, 422 N.Y.S.2d 309 (Westchester County Ct. 1979) (extending privilege to 23-year-old son).

167. See In re A & M, 61 A.D.2d at 435 n.9, 403 N.Y.S.2d at 381 n.9; Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum. L. Rev. 281, 331-32 (1967); cf. Parham v. J. R., 442 U.S. 584, 603 (1979) (parental decision to admit child to state mental hospital) (“Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.”).

168. Mouths of Babes, supra note 8, at 1027; Child-Parent Privilege, supra note 8, at 805; cf. In re Gault, 387 U.S. 1, 55 (1967) (validity of juvenile’s waiver of the privilege against self-incrimination depends not only on the age of the child, but on the presence and competence of parents); Commonwealth v. McCutcheon, 463 Pa. 90, 343 A.2d 669 (1975) (juvenile’s confession inadmissible if parent not present).

Letting the child control the privilege would also be inconsistent with state laws disabling minors to contract, marry, request medical assistance, or buy liquor, see Planned Parenthood v. Danforth, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part
allowing the child to prevent his parent from testifying would prevent the parent from providing guidance, discipline, and direction to the child. In addition, when a parent is willing to testify, the dissension and repugnance rationales for recognizing the privilege lose most of whatever validity they otherwise have.

Giving control over the privilege to the parent, however, would lead to equally unsatisfactory consequences. Commentators generally agree that only the communicator should be able to waive a confidential communications privilege. A privilege could not effectively encourage open and honest communications by children when parents may waive the privilege at will. Giving the child control over the privilege would be necessary to preserve any hope of encouraging parent-child communication through the privilege. A privilege waivable by the parent thus would accomplish nothing except to keep additional relevant evidence out of trials.

The third possible solution, giving the trial court discretion to recognize the privilege on a case-by-case basis after weighing factors such as the quality of the particular parent-child relationship and the need for the evidence, would be perhaps worst of all. A discretionary privilege would encourage confidential communications even less than would an absolute privilege waivable by the parent. With an absolute privilege, a child,

and dissenting in part), and the purpose behind the legal protection of parental authority.

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More importantly, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.


169. Mouths of Babes, supra note 8, at 1028; Child-Parent Privilege, supra note 8, at 804; see Garvey, supra note 107, at 820-22; Parent-Child Testimonial Privilege, supra note 8, at 685 n.48.

170. Child-Parent Privilege, supra note 8, at 806; cf. Reutlinger, supra note 4, at 1384-85 (same point with regard to marital testimonial privilege).

171. See, e.g., C. McCormick, supra note 2, § 83; 8 J. Wigmore, supra note 1, § 2340; Reutlinger, supra note 4, at 1385 n.144; Comment, supra note 10, at 220.

172. Mouths of Babes, supra note 8, at 1027.

173. Cf. Korowy, supra note 38, at 362 (police-informer relationship); Reutlinger, supra note 4, at 1391 (marital relationship); Robinson, supra note 41, at 923 (discussing North Carolina's school counselor privilege, under which the judge may compel disclosure, if he believes it necessary to a proper administration of justice) ("The discretionary feature of this statute does much to negate the value of the privilege granted . . . . Such a qualified privilege . . . creates uncertainty in the mind of the counselee with respect to the confidentiality of his communications and thus may serve to undermine the coun-
knowing his parent, at least could attempt to predict whether the parent would voluntarily testify. In contrast, with a discretionary privilege a child could not even guess whether an unknown judge at some future time would require disclosure of the communication.  

V. Conclusion

Although our system of law accords deference to the family, societal interests at times transcend family interests. Family members other than spouses traditionally have the same duty as every other citizen to testify before a grand jury or a court. Although privacy interests are implicated when the state seeks access to the content of parent-child communications, neither sound public policy nor the constitutional right of privacy compels recognition of a parent-child privilege. The testimony of parents against their children may seem indelicate, especially when the law exempts spouses from this burden. The available privilege alternatives, however, are unattractive. An absolute privilege held by the child surely would be abused, to the ultimate detriment of the child, while an absolute privilege held by the parent would give the child no sense of security. A discretionary privilege would lead to unequal justice, and any form of parent-child privilege would frustrate the search for the truth. The benefits to be gained from recognition of a parent-child privilege are simply not worth their price.

Donald Cofer

174 A discretionary rule would have several additional undesirable effects. First, by requiring collateral inquiry into matters such as the quality of the particular parent-child relationship, a discretionary privilege would tend to slow trials when court calendars are already clogged. See Anderson, A Criticism of the Evidence Code: Some Practical Considerations, 11 U. B. R. C. L. Rev. 163, 176-77 (1977). Next, trial preparation would be more difficult because attorneys would not know whether witnesses would be required to testify until after a pretrial hearing to resolve the privilege issues. Id. at 175. Finally, because the court’s privilege determination would be completely ad hoc, effective judicial review would be difficult, if not impossible, inviting arbitrary and inconsistent decisions on privilege questions. See Field, A Code of Evidence for Arkansas?, 29 Ark. L. Rev. 1, 5 (1975); Walinski & Abramoff, The Proposed Ohio Rules of Evidence: the Case Against, 28 Case W. Res. L. Rev. 344, 379-82 (1978). With experience, attorneys might “shop” for a particular judge. Thus, although a discretionary rule in theory would allow the trial court to maximize justice by examining unique factors in each case, such a rule in practice likely would bring about less justice than would an absolute rule.