University of Dayton Law Review

Volume 11
Number 3 *Symposium—Protecting Abused and Neglected Children in the 1980's: Is There a Need for Continuing Legal Reform?*

Article 8

5-1-1986

Parent-Child Testimonial Privilege: An Absolute Right or an Absolute Privilege?

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COMMENT

PARENT-CHILD TESTIMONIAL PRIVILEGE: AN ABSOLUTE RIGHT OR AN ABSOLUTE PRIVILEGE?

*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.**

I. INTRODUCTION

The question of whether a parent or child should be compelled to testify against the other presents a complex issue of law and involves a fundamental question of public policy. The court systems throughout the United States generally require all witnesses to testify about all relevant facts within their knowledge.[1] This policy is premised on the belief that the criminal and civil justice systems function most effectively when all relevant evidence is made available in the judicial forum.[2] There are, however, two categorical exceptions to this overall policy: The evidentiary rules governing incompetency and testimonial privileges.[3] Rules of incompetency disqualify certain witnesses' testimony because it is unreliable.[4] The particular witness is either determined to be mentally incompetent[5] or the witness is deemed to be incompetent because of past criminal activity.[6] Rules of testimonial privilege excuse competent witnesses from disclosing relevant information in order to promote and strengthen certain relationships.[7] A testi-

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* *In re* A & M, 61 A.D.2d 426, 433, 403 N.Y.S.2d 375, 380 (1978) (Denman, J.) (emphasis added).

1. *See, e.g.*, People *ex rel.* Mooney v. Sheriff of New York County, 269 N.Y. 291, 295, 199 N.E. 415, 416 (1936) ("The policy of law is to require the disclosure of all information by witnesses in order that justice may prevail.").

2. *See* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 70 (J. McNaughton rev. ed. 1961) ("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.").

3. *See* 3 S. GARD, JONES ON EVIDENCE §§ 20:1–:61 (6th ed. 1972).

4. *See id.* §§ 20:1–:14.

5. *See id.*

6. *See id.*

7. *See id.* §§ 21:1–:43.

monial privilege reflects society's preference for protecting the privacy of certain relationships over the state's fact-finding interest.[8]

The focus of this comment is on the parent-child privilege. Present law indicates that a parent-child privilege against adverse testimony is warranted in rare instances only. Currently, only two states have statutorily recognized a parent-child privilege;[9] one state[10] and two federal jurisdictions[11] have judicially recognized the privilege. It is the assertion of this comment that the judiciary ought to recognize this privilege after a proper balancing of the competing factors at stake: the need to preserve familial integrity versus the need to promote judicial integrity. This comment will explore the desirability of a parent-child privilege, and it shall evaluate the propriety of judicial and statutory recognition of such a privilege which, under certain circumstances, would preclude compelled disclosure of confidential communications made by a child to a parent. First, currently recognized testimonial privileges will be examined to determine their purpose, viability, and the extent to which they protect confidential communications from being disclosed.[12] Second, the comment will address the current status of the parent-child privilege in state and federal courts, reviewing the specific circumstances under which the privilege is recognized.[13] Third, the practicality and viability of adopting a parent-child privilege as a matter of public policy,[14] as a matter of constitutional right,[15] and as a matter of analogy to recognized testimonial privileges[16] will be discussed. Finally,

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8. *See id.* § 21:1, at 745–46. *See also In re* Agosto, 553 F. Supp. 1298, 1325 (D. Nev. 1983). As the district court judge in *Agosto* stated:

> There can be little doubt that the confidence and privacy inherent in the parent-child relationship must be protected and sedulously fostered by the courts. While the government has an important goal in presenting all relevant evidence before the court in each proceeding, this goal does not outweigh an individual's right of privacy in his communications within the family unit, nor does it outweigh the family's interests in its integrity and inviolability, which spring from the rights of privacy inherent in the family relationship itself.

Id. (Claiborne, J.)

9. In 1972, Idaho became the first state to recognize a parent-child privilege statutorily. *See* IDAHO CODE § 9-203(7) (Supp. 1985). Minnesota recognized a parent-child privilege statutorily in 1981. *See* MINN. STAT. ANN. § 595.02(1)(i) (West Supp. 1986).

10. New York judicially recognizes a parent-child privilege. *See In re* Mark G., 65 A.D.2d 917, 410 N.Y.S.2d 464 (1978); *In re* A & M, 61 A.D.2d 426, 403 N.Y.S.2d 375 (1978); *In re* Edgar Ryan, 123 Misc. 2d 854, 474 N.Y.S.2d 931 (Fam. Ct. 1984); People v. Fitzgerald, 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979).

11. *See Agosto*, 553 F. Supp. 1298 (D. Nev. 1983) (parent-child privilege recognized in full); *In re* Greenberg, 11 Fed. R. Evid. Serv. (Callaghan) 579 (D. Conn. 1982) (narrow parent-child privilege recognized based on religion).

12. *See infra* notes 24–60 and accompanying text.

13. *See infra* notes 61–74 and accompanying text.

14. *See infra* notes 75–110 and accompanying text.

15. *See infra* notes 110–42 and accompanying text.

16. *See infra* notes 143–62 and accompanying text.

this comment will propose a standard for recognizing the existence of a qualified right to a parent-child privilege under certain specified conditions, as distinguished from an absolute parent-child privilege existing under all conditions.[17] In sum, it will be shown that under specific conditions, the recognition of a parent-child privilege benefits society more by fostering an important and valuable relationship than it injures society by suppressing competent testimony.

II. BACKGROUND

A. Recognized Privileges

Two general categories of recognized privileges exist: the professional and the nonprofessional privileges. Professional privileges include the attorney-client privilege,[18] the physician-patient privilege,[19] the priest-penitent privilege,[20] and certain miscellaneous professional privileges.[21] Nonprofessional privileges include the husband-wife privilege[22] and the parent-child privilege.[23]

1. Professional Privileges

Since the attorney-client privilege was first recognized four centuries ago,[24] the rule has been that an attorney cannot, without the consent of the client, be examined as to any confidential communication made to the attorney by the client within the scope of the professional relationship.[25] In order for the privilege to exist, the attorney-client relationship must be established,[26] a communication must exist,[27] and the

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17. *See infra* notes 163–87 and accompanying text.

18. *See generally* 3 S. GARD, *supra* note 3, §§ 21:8–:22. All jurisdictions within the United States recognize the attorney-client privilege either by statute or by common law. *See id.* § 21:8, at 762. *See generally* 3 C. TORCIA, WHARTON'S CRIMINAL EVIDENCE §§ 556–561 (13th ed. 1973).

19. *See generally* 3 S. GARD, *supra* note 3, §§ 21:24–:37; 3 C. TORCIA, *supra* note 18, §§ 563–566; 8 J. WIGMORE, *supra* note 2, §§ 2380–2391. Forty states currently recognize a physician-patient privilege. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 98, at 244 n.5 (3d ed. 1984).

20. *See generally* 3 S. GARD, *supra* note 3, § 21:23; 3 C. TORCIA, *supra* note 18, § 562; 8 J. WIGMORE, *supra* note 2, §§ 2394–2396. The priest-penitent privilege is recognized by statute in 46 states and in the District of Columbia. *See* Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 108 (1983).

21. *See infra* notes 45–51 and accompanying text.

22. *See generally* 3 S. GARD, *supra* note 3, §§ 21:3–:7; 3 C. TORCIA, *supra* note 18, §§ 567–570; 8 J. WIGMORE, *supra* note 2, §§ 2332–2341.

23. *See infra* notes 61–74 accompanying text.

24. *See* 8 J. WIGMORE, *supra* note 2, § 2290, at 542. The attorney-client privilege is the oldest recognized privilege, dating back in the common law to the reign of Elizabeth I. *Id.*

25. *See* 3 C. TORCIA, *supra* note 18, § 556. *See, e.g.*, MONT. CODE ANN. § 26-1-803 (1979); N.J. STAT. ANN. § 2A:84A-20 (West 1976).

26. *See* 3 C. TORCIA, *supra* note 18, § 557. Communications by a client to an attorney prior to retention of the attorney are not privileged; communications made while negotiating a retainer are privileged. *See id.*

27. *See id.* § 556, at 72. Any method of presenting an idea constitutes a communication

communication must be confidential.[28] The privilege preventing the attorney from testifying belongs to the client, and only the client may invoke the privilege.[29] If the privilege is claimed by any other person, the claim is without merit. Because the privilege is solely for the benefit of the client, it cannot be invoked for the benefit of the attorney.[30] The most frequently asserted justifications for the attorney-client privilege are that the privilege encourages full and frank communications between attorney and client,[31] and that the privilege promotes the administration of justice and preserves the lawful rights of the individual.[32]

A second professional privilege protects communications between a physician and his or her patient. At common law, a patient could not successfully preclude a physician from disclosing confidential communications exchanged between the physician and the patient.[33] No testimonial privilege existed to prevent such disclosures. Over time, however, a need for such a privilege became apparent. Indeed, statutes in forty states currently provide that a physician may not give testimony regarding a patient's confidential communications without the patient's consent.[34] For the privilege to exist, the communication must be made in confidence while the physician is attending the patient in a professional capacity.[35] The privilege may be claimed only by the patient.[36]

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28. *See* Hurlburt v. Hurlburt, 128 N.Y. 420, 28 N.E. 651 (1891). A communication made to an attorney in the presence of a third person who is not an agent for the attorney (i.e., stenographer, interpreter, or law clerk) is not confidential, and thus the third person cannot be prevented from testifying. *See* 3 C. TORCIA, *supra* note 18, § 559. Likewise, when two parties consult an attorney for their mutual benefit, communications made between the parties and their attorney are not privileged in a subsequent suit between the clients or their representatives. In such circumstances, these communications are not intended by the parties to be confidential. *See, e.g.*, Evans v. Evans, 8 Utah 2d 26, 327 P.2d 260 (1958). The attorney, of course, is ethically prohibited from communicating to third parties the confidences and secrets revealed by both parties absent their consent. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980).

29. The privilege continues after the termination of the attorney-client relationship, and also exists after the death of either or both the client and attorney. *See* 3 S. GARD, *supra* note 3, § 21:9; 3 C. TORCIA, *supra* note 18, § 561.

30. *See* 3 S. GARD, *supra* note 3, § 21:9. If the attorney is subpoenaed to be a witness, the attorney may invoke the privilege on behalf of the client unless the attorney has secured his client's consent to testify. *See id.* § 21:9, at 766.

31. *See, e.g.*, *In re* Agosto, 553 F. Supp. 1298, 1307 (D. Nev. 1983). *See also* 3 C. TORCIA, *supra* note 18, § 556.

32. *See* 3 S. GARD, *supra* note 3, § 21:8.

33. *See, e.g.*, Franklin v. State, 8 Md. App. 134, 141, 258 A.2d 767, 771 (1969).

34. *See* E. CLEARY, *supra* note 19, § 98, at 244 n.5. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2235 (1982); NEV. REV. STAT. §§ 49.215–.245 (1986); N.H. REV. STAT. ANN. § 329:26 (1984); N.J. STAT. ANN. §§ 2A:84A-22.1 to :84A-22.9 (West 1976 & Supp. 1985).

35. *See, e.g.*, Green v. Superior Court, 220 Cal. App. 2d 121, 33 Cal. Rptr. 604 (1963). No privilege exists, however, between patients and their pharmacist regarding the disclosure of prescription records. *See* 3 S. GARD, *supra* note 3, § 21:26.

36. *See* Osborn v. Fabatz, 105 Mich. App. 450, 456, 306 N.W.2d 319, 322 (1981) ("This privilege belongs to the patient, and can be waived by him.").

Generally, only the tenor of the communication made by the patient to the physician is privileged.[37] The essential purpose of the physician-patient privilege is to foster the free flow of information between doctor and patient in order to ensure proper and efficient diagnosis and treatment.[38]

A third testimonial privilege, that existing between a priest and penitent, is purely a legislative creation as it was not recognized at common law.[39] The priest-penitent privilege prevents a clergyperson or priest from disclosing a confession received in a professional capacity without first securing the penitent's consent.[40] For the communication to be privileged, the penitent must intend that the communication be confidential,[41] and the communication must be made to an ordained pastor, priest, or rabbi.[42] In addition, the communication must be of a penitential character for it to be privileged.[43] The purpose of prohibiting disclosure of confidential communications between a clergyperson and penitent is to encourage the confessor to speak freely, without fear of public scorn.[44]

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37. *See* Padovani v. Liggett & Meyers Tobacco Co., 23 F.R.D. 255, 257 (E.D.N.Y. 1959) (dates of consultation, treatments, and diagnosis are not privileged so long as the subject matter communicated is not disclosed).

38. *See* Finney v. State, 623 S.W.2d 847 (Ark. Ct. App. 1981). The purpose of the rule prohibiting disclosure of confidential communications between a physician and patient is to prevent the physician from revealing information which might result in humiliation, embarrassment, or disgrace to the patient. *See* 3 S. GARD, *supra* note 3, § 21:24.

39. *See* Keenan v. Gigante, 47 N.Y.2d 160, 166, 390 N.E.2d 1151, 1154, 417 N.Y.S.2d 226, 229, *cert. denied*, 444 U.S. 887 (1979).

40. *See, e.g.*, N.Y. CIV. PRAC. LAW § 4505 (McKinney 1986).

41. *See* Lucy v. State, 443 So. 2d 1335, 1341 (Ala. Crim. App. 1983). The communication need not, however, be made under a sworn promise of secrecy as an express or implied understanding of confidentiality suffices. *Id.* Nevertheless, it is an implicit requirement that the communication be made with a reasonable expectation of confidentiality. *See* State v. Black, 291 N.W.2d 208 (Minn. 1980) (communication not confidential when made to a prison chaplain with request to relay it to others). *But see* People v. Brown, 82 Misc. 2d 115, 368 N.Y.S.2d 645 (Sup. Ct. 1974). In the *Brown* case, a police officer overheard the defendant's statement: " 'Bishop Hicks, praise the Lord, I need your prayers, I have killed a man.' " *Id.* at 119, 368 N.Y.S.2d at 650. The New York court held that this admission was a privileged communication because those who hold others in custody should afford privacy for communications and warn the person that overheard conversations may be repeated. *Id.* at 121, 368 N.Y.S.2d at 651. *See generally* N.J. STAT. ANN. § 2A:84A-23 (West Supp. 1985); OKLA. STAT. ANN. tit. 12, § 2505 (West 1984).

42. *See In re* Muntha, 115 N.J. Super. 380, 279 A.2d 889 (1971) (communications made to a nun are not privileged). *See also* 3 S. GARD, *supra* note 3, § 21:23; 3 C. TORCIA, *supra* note 18, § 562.

43. *See, e.g.*, Burger v. State, 238 Ga. 171, 231 S.E.2d 769 (1977) (privilege not recognized when confession was conversational in nature and the confessor was a longtime friend of the clergyman).

44. 8 J. WIGMORE, *supra* note 2, § 2396.

Recently, there has been an expansion of professional privileges to include certain miscellaneous testimonial privileges.[45] For example, although there is no common-law privilege preventing disclosure of communications between an accountant and client, several states have created such a privilege by legislative action.[46] In addition to accountants, there is a legislatively created privilege for journalists which bars compelled disclosure of communications connected with news gathering.[47] Moreover, even in the absence of such a statute, a newsperson is never required to reveal information concerning a source if the information is not relevant to the trial.[48] In addition to the aforementioned privileges, states have also occasionally granted "privileged" status to confidential communications between school guidance counselors and students,[49] between social workers and clients,[50] and between psychotherapists and patients.[51]

2. Nonprofessional Privilege—The Marital Privilege

The marital privilege, which existed at common law[52] and which is preserved by many state statutes,[53] precludes compelled disclosure by either spouse of communications made in confidence by one spouse to the other during the marital relationship.[54] To be privileged, the communication between husband and wife must be confidential; no third

45. *See Agosto*, 553 F. Supp. at 1302–03.

46. *See, e.g.*, ARIZ. REV. STAT. ANN. § 32-749 (1976); MICH. COMP. LAWS ANN. § 339.713 (West Supp. 1986); TENN. CODE ANN. § 62-143 (1982). *See generally* 3 C. TORCIA, *supra* note 18, § 571; Jentz, *Accountant Privileged Communications: Is it a Dying Concept Under the New Federal Rules of Evidence?*, 11 AM. BUS. L.J. 149 (1973); Saltzman, *Accountant and the IRS Summons: Recent Developments*, 7 TAX ADVISER 516 (1976). In the absence of such protection, if the accountant is also an attorney, the attorney-client privilege will not preclude disclosure of communications when the attorney-accountant was functioning only as an accountant. *See* 3 C. TORCIA, *supra* note 18, § 571, at 105–06 n.17.

47. *See, e.g.*, CAL. EVID. CODE § 1070 (West Supp. 1986); N.M. STAT. ANN. § 38-6-7 (Supp. 1985).

48. *See* 3 C. TORCIA, *supra* note 18, § 572.

49. *See, e.g.*, CONN. GEN. STAT. ANN. § 10-154a (West Supp. 1986); IND. CODE ANN. § 20-6.1-6-15 (West 1984); MICH. COMP. LAWS ANN. § 600.2163 (West Supp. 1986). *See generally* Robinson, *Testimonial Privilege and the School Guidance Counselor*, 25 SYRACUSE L. REV. 911 (1974).

50. *See, e.g.*, N.Y. CIV. PRAC. LAW § 4508 (McKinney Supp. 1986).

51. *See, e.g.*, CAL. EVID. CODE §§ 1010–1027 (West 1966 & Supp. 1986); COLO. REV. STAT. § 13-90-107(g) (Supp. 1985); N.C. GEN. STAT. § 8-53.3 (Supp. 1985).

52. *See* Federated Dep't Stores, Inc. v. Esser, 96 Misc. 2d 567, 409 N.Y.S.2d 353 (Sup. Ct. 1978). *See also* 3 S. GARD, *supra* note 3, § 21:4, at 748 (at common law any private, confidential communications between spouses were privileged).

53. *See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 9-105 (1974 & Supp. 1985); N.C. GEN. STAT. §§ 8-56 to -57 (Supp. 1985); OKLA. STAT. ANN. tit. 12, § 2504 (West 1980).

54. *See* Blau v. United States, 340 U.S. 332 (1951); *In re* Vanderbilt, 87 A.D.2d 528, 448 N.Y.S.2d 3, *modified on other grounds*, 57 N.Y.2d 66, 439 N.E.2d 378, 453 N.Y.S.2d 662 (1982).

party can be present when the statement is uttered.[55] The marital privilege also extends to matters learned through observation of a spouse's noncommunicative, physical acts because such acts are deemed to be communications.[56] Finally, the privilege extends only to married couples,[57] and the privilege is usually not terminated upon the death or divorce of a spouse.[58]

The policy upon which the marital privilege rests "is the protection of the marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails."[59] Quite simply, the marital privilege purports to preserve the peace, confidence, and tranquility of the marital relationship.[60]

B. The Parent-Child Privilege

The parent-child privilege, which is closely analogous to the mari-

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55. *See* North v. Superior Court, 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972); People v. Ressler, 17 N.Y.2d 174, 216 N.E.2d 582, 269 N.Y.S.2d 414 (1966); Coleman v. State, 668 P.2d 1126 (Okla. Crim. App. 1983), *cert. denied*, 104 S. Ct. 986 (1984). Not every communication made between husband and wife is confidential and therefore privileged. *See* Wilcox v. State, 250 Ga. 745, 301 S.E.2d 251 (1983) (communications concerning daily activities were impersonal and therefore were not privileged).

56. *See, e.g.*, People v. Watkins, 89 Misc. 2d 870, 393 N.Y.S.2d 283 (Sup. Ct. 1977) (privilege extends to physical acts). *See also* 3 C. TORCIA, *supra* note 18, § 568, at 101 (communications encompass oral and written acts).

57. *See, e.g.*, People v. Hunt, 133 Cal. App. 3d 543, 184 Cal. Rptr. 197 (1982) (privilege only exists in favor of legally married couples); Lane v. State, 266 Ind. 485, 364 N.E.2d 756 (1977) (legally recognized marriage required when state does not recognize common-law marriage); Hilt v. State, 91 Nev. 654, 541 P.2d 645 (1975) (privilege extends to common-law marriages); People v. Mohammed, 122 Misc. 2d 504, 470 N.Y.S.2d 997 (Sup. Ct. 1984) (marriage is prerequisite to the privilege); People v. D'Amato, 105 Misc. 2d 1048, 430 N.Y.S.2d 521 (Sup. Ct. 1980) (privilege ceases when marital relationship deteriorates beyond the point of nonexistence).

58. *See, e.g.*, Prink v. Rockefeller Center, Inc., 48 N.Y.2d 309, 398 N.E.2d 509, 422 N.Y.S.2d 911 (1979) (marital privilege survives death of either spouse). *See also* 3 C. TORCIA, *supra* note 18, § 567, at 97 (privilege survives death, annulment, or divorce). *But see, e.g.*, People v. Dorsey, 46 Cal. 3d 706, 120 Cal. Rptr. 508 (1975) (marital privilege terminates upon divorce).

59. Wolfle v. United States, 291 U.S. 7, 14 (1934).

60. *See Esser*, 96 Misc. 2d at 568, 409 N.Y.S.2d at 354. *See also* Fraser v. United States, 145 F.2d 139 (6th Cir. 1944), *cert. denied*, 324 U.S. 849 (1945). The *Fraser* court observed:

> The public policy which lies at the foundation of every rule of privileged communications, is satisfied in the privilege accorded by the law to communications between husband and wife. They originate in confidence which is essential to the relation, and the relation is a proper object of encouragement by law, for the injury that would inure to it by disclosure is greater than the benefit that would result in a judicial investigation of the truth. . . . The confidence that attaches to communications between husband and wife has for its purpose free and unrestrained privacy divested of any apprehension of compulsory disclosure.

Id. at 143 (citations omitted). Undoubtedly, however, a communication which amounts to an assault upon the institution of marriage is not privileged. *See, e.g.*, People v. Allman, 59 Misc. 2d 209, 298 N.Y.S.2d 363 (Sup. Ct. 1969) (wife allowed to testify that husband had murdered their child as it was unreasonable to believe that such an act was intended to be confidential).

tal privilege,[61] is also considered to be a nonprofessional testimonial privilege. Today, two states, Idaho and Minnesota, statutorily protect communications made in confidence by a minor to his or her parent.[62] The privilege is not recognized, however, if the communication is from parent to child.[63] In Minnesota, the communication must be made outside the presence of non-family members to be privileged; in Idaho, no such requirement exists.[64] In Idaho, the parent-child privilege extends to both criminal and civil proceedings whereas in Minnesota, the privilege does not expressly protect confidential communications in a civil proceeding.[65] In both states, the privilege is not recognized when parent and child are opposing parties in a legal proceeding, nor does it apply in child abuse cases. To date, no case has involved a claim of the parent-child privilege under the aforementioned statutes.

In addition to statutory recognition, one state, New York, judicially recognizes the parent-child privilege.[66] In upholding this testimonial privilege, New York courts have based the privilege upon the notion of personal privacy enunciated in the United States and New York Constitutions.[67] However, it appears that New York only protects confidential communications from child to parent and that the privilege must be mutually asserted by both parent and child for the privilege to become effective.[68]

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61. *See infra* notes 153–62 and accompanying text.

62. *See* IDAHO CODE § 9-203(7) (Supp. 1985); MINN. STAT. ANN. § 595.02(1)(i) (West Supp. 1986). The Idaho Code provides:

> Any parent, guardian or legal custodian shall not be forced to disclose any communication made by their minor child or ward to them concerning matter [matters] in any civil or criminal action to which such child or ward is a party. Such matters so communicated shall be privileged and protected against disclosure; excepting, this section does not apply to a civil action or proceeding by one against the other nor to a criminal action or proceeding for a crime committed by violence of one against the person of the other, nor does this section apply to any case of physical injury to a minor child where the injury has been caused as a result of physical abuse or neglect by one or both of the parents, guardian or legal custodian.

IDAHO CODE § 9-203(7) (Supp. 1985) (brackets in original).

63. *See* IDAHO CODE § 9-203(7) (Supp. 1985); MINN. STAT. ANN. § 595.02(1)(i) (West Supp. 1986).

64. *See* MINN. STAT. ANN. § 595.02(1)(i) (West Supp. 1986); IDAHO CODE § 9-203(7) (Supp. 1985).

65. *See* IDAHO CODE § 9-203(7) (Supp. 1985); MINN. STAT. ANN. § 595.02(1)(i) (West Supp. 1986).

66. *See In re* Mark G., 65 A.D.2d 917, 410 N.Y.S.2d 464 (1978); *In re* A & M, 61 A.D.2d 426, 403 N.Y.S.2d 375 (1978); *In re* Edgar Ryan, 123 Misc. 2d 854, 474 N.Y.S.2d 931 (Fam. Ct. 1984); People v. Fitzgerald, 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979).

67. *See Fitzgerald*, 101 Misc. 2d at 716–17, 422 N.Y.S.2d at 312.

68. *See* People v. Gloskey, 105 A.D.2d 871, 482 N.Y.S.2d 82 (1984) (court recognized the existence of a parent-child privilege but declined to apply it because defendant's father did not initially express a desire to remain silent); *Mark G.*, 65 A.D.2d 917, 410 N.Y.S.2d 464 (1978)

To date, no other state court has judicially recognized a parent-child privilege. Some state courts have concluded that the creation of a parent-child privilege is a legislative, not a judicial, function.[69] Other state courts, however, appear to be amenable to recognizing a parent-child privilege, depending upon different factual circumstances.[70]

Currently, two federal district courts recognize a parent-child privilege,[71] one of which recognizes the privilege even when the parent confides to the child.[72] However, no federal court of appeals has recognized the privilege,[73] although recognition has not been totally precluded under different factual conditions.[74]

III. ANALYSIS

A. *Adoption of a Parent-Child Privilege as a Matter of Public Policy*

Two standards have been developed to determine whether a testimonial privilege should be recognized as a matter of public policy. One standard was articulated by Douglas Manley[75] and the other by Dean

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(parent-child privilege recognized when mutually asserted by both parent and child).

69. *See, e.g.*, People v. Sanders, 99 Ill. 2d 262, 271, 457 N.E.2d 1241, 1245 (1985) ("The expansion of [new testimonial privileges] . . . should be left to the legislature."); Cissna v. State, 170 Ind. App. 437, 439–40, 352 N.E.2d 793, 795 (1976) ("[I]t would be presumptuous for this court to proclaim the privilege extant in the State of Indiana."); State v. Gilroy, 313 N.W.2d 513 (Iowa 1981) (absent state statute, a testimonial privilege should not be recognized); State v. Bruce, 655 S.W.2d 66, 68 (Mo. Ct. App. 1983) (creation of a testimonial privilege is "a matter for the legislature, not the courts"). *But see, e.g.*, Three Juveniles v. Commonwealth, 390 Mass. 357, 359, 455 N.E.2d 1203, 1205 (1983) ("We are, of course, free to identify a privilege of a child not to testify against his or her parent.").

70. *See* Cabello v. State, 471 So. 2d 332, 340 (Miss. 1985) (parent-child privilege denied because fact situation differed vastly from that in *Fitzgerald*) (citing *Fitzgerald*, 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979)). *In re* Frances J., ___ R.I. ___, ___, 456 A.2d 1174, 1178 (1983) (particular case not deemed "an appropiate vehicle for the consideration of adoption of a new privilege"). *See also In re* Terry W., 59 Cal. App. 3d 745, 748, 130 Cal. Rptr. 913, 914 (1976) (court noted that under different circumstances, "perhaps some sort of parent-child privilege should be created").

71. *See Agosto*, 553 F. Supp. 1298 (D. Nev. 1983); *In re* Greenburg, 11 Fed. R. Evid. Serv. (Callaghan) 579 (D. Conn. 1982).

72. *See Agosto*, 553 F. Supp. at 1329 (confidences of father to son found equally as important as those of son to father).

73. *See In re* Starr, 647 F.2d 511, 512 (5th Cir. 1981) (stating that no federal judicial foundation exists to support the parent-child privilege).

74. *See* United States v. Ismail, 756 F.2d 1253, 1258 (6th Cir. 1985) ("This court has the power to recognize new evidentiary privileges under common law principles as interpreted in light of reason and experience.").

75. *See* Manley, *Patient, Penitent, Client and Spouse in New York*, 21 N.Y. ST. B.A. BULL. 288 (1949). The Manley standard was not originally intended to be a "standard" for determining whether a testimonial privilege should be recognized. Rather, Manley merely sought to enumerate the traditional justifications supporting the various privileges. *Id.* at 290. Indeed, Manley opined that several of the enumerated justifications, see *infra* text accompanying note 77, were probably no longer valid. Manley, *supra*, at 290. Nevertheless, both the judiciary and various commentators have since elevated Manley's justifications to the "standard" level. *See, e.g., In re* Agosto, 553 F.

Wigmore.[76] The Manley standard sets forth five considerations for recognizing a testimonial privilege:

> 1. Instinctive revulsion against betrayal of a confidence.
> 2. A sense of compassion even for a transgressor, a feeling that there should be for every man some sanctuary beyond the reach of society's law where he may safely confide his guilty secrets in an attempt to ease his troubled spirit.
> 3. A sense of fair play related to the Norman view of a lawsuit as a species of contest or sporting event wherein it would be too easy, and hence unfair and against the "rules of the game," to hound a man to his doom by convicting him through the lips of his own intimate friends, family, or medical, legal, or spiritual advisers.
> 4. A desire to preserve the proper functioning of certain socially valuable relationships even at the cost of occasional suppression of truth and injustice in such, presumably comparatively few, particular cases.
> 5. A feeling of individual and professional pride and self-importance in being the inviolable repository of others' secrets.[77]

The application of this standard to communications between parent and child suggests that a parent-child testimonial privilege, under certain circumstances, should be recognized to preclude disclosure of confidential information. The first requirement—that of instinctive revulsion against betrayal of a confidence—pertained to the code of honor of a knight or gentleman and is no longer regarded as a justification for a privilege to exist.[78]

The second criterion—that a sanctuary should exist to ease troubled consciences—is quite applicable to the parent-child relationship as children rely on their parents for guidance. As stated by one court, "[t]here 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."[79] According to this view, privacy is an exceedingly important and justifiable right, essential to the individual's spiritual nature[80] and

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Supp. 1298, 1307–08 (D. Nev. 1983) (Manley standard cited favorably); *In re* A & M, 61 A.D.2d 426, 439 n.8, 403 N.Y.S.2d 375, 381 n.8 (1978) (Manley standard noted); Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 617 n.121 (1970) (Manley standard discussed with approval).

76. *See* 8 J. WIGMORE, *supra* note 2, § 2285. The Wigmore standard is cited widely. *See Agosto*, 553 F. Supp. at 1308; *A & M*, 61 A.D.2d at 432, 403 N.Y.S.2d at 381; *In re* Gloria L., 124 Misc. 2d 50, 51, 475 N.Y.S.2d 1003, 1004 (Sup. Ct. 1984).

77. Manley, *supra* note 75, at 290.

78. *Id. See also* 8 J. WIGMORE, *supra* note 2, § 2286, at 530–31. In the seventeenth century, gentlemen were permitted to decline to give testimony based upon their status as gentlemen, but by the mid-eighteenth century, this doctrine was totally abandoned. *Id.*

79. *A & M*, 61 A.D.2d at 429, 403 N.Y.S.2d at 378 (Denman, J.).

80. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). "According to Justice Brandeis, the Framers of the Constitution understood the importance of the

critical to the family's emotional well-being.[81] Without such sanctuary, the parent-child relationship could be destroyed by compelled disclosure of confidential communications.[82]

The parent-child privilege also satisfies Manley's third element which requires a sense of fair play. Under this element, to require a parent or child to reveal a conversation spoken in confidence with the other is innately unjust.[83] A "sense of fair play" adequately justifies exclusion of confidential communications between a parent and child.[84] Without such a "sense of fair play," the child may not mature into a responsible adult.[85]

The fourth criterion of the Manley standard—that of preserving a socially desirable relationship—is the element which truly justifies the creation of a parent-child privilege.[86] Unquestionably, the parent-child relationship is a socially valuable institution.[87] The state has usually

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notion of "pursuit of happiness." In drafting the Constitution, they undertook the task of protecting citizens' beliefs, thoughts, and emotions from oppression. *See id.*

81. *See* Smith v. Organization of Foster Families, 431 U.S. 816, 844 (1977) ("[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 . . . .") (quoting Wisconsin v. Yoder, 406 U.S. 205, 213 (1972)) (brackets in original).

82. *See Agosto*, 553 F. Supp. at 1326. The *Agosto* court observed:

> If the state drives a wedge between a man and his family, the state will ultimately suffer. The practical effect of allowing the government to coerce testimony by parent and child against one another is that individuals totally uninvolved in and innocent of the alleged wrongdoing will be jailed for contempt, solely because of a strong sense of family loyalty. The government, then, is essentially in a position of actively punishing selflessness and loyalty which are inculcated into the child by family, church, and even the state itself. It is inconsistent with a free society to place a child in the position of choosing between loyalty to his parent and loyalty to his state.

Id.

83. As one court has observed, a state's coercion of a parent into revealing a child's potentially incriminating statement, spoken in confidence, "is shocking to our sense of decency, fairness and propriety." *A & M*, 61 A.D.2d at 433, 403 N.Y.S.2d at 380.

84. *See* Manley, *supra* note 75, at 290.

85. *See A & M*, 61 A.D.2d at 432–33, 403 N.Y.S.2d at 380. The court observed:

> For a young person to develop into a responsible mature adult, capable of regulating his own life and attaining a sense of self-worth, it is necessary for him to perceive in his parents a sense of fairness and decency and those feelings which give him a sense of being loved and cared for. These values become especially important during turbulent times, such as ours, in which we experience rapid social change and fluctuating mores.

Id. The *A & M* court noted that if a child witnessed a parent's refusal to give testimony or the giving of false testimony, the child would question the fairness of the legal system, or learn that punishment could be avoided by committing perjury. *Id.* at 433 n.6, 403 N.Y.S.2d at 380 n.6.

86. *See id.* at 432–33, 403 N.Y.S.2d at 380.

87. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972). In striking down a state's refusal to exempt Amish students from compulsory education on first amendment grounds, the *Yoder* Court noted the significance of the familial unit:

> [T]his case involves the fundamental interest of parents . . . . The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and up-

relied upon parents to provide educational and moral values to their children, and the judicial system has been somewhat hesitant to restrain or control such a beneficial relationship.[88] Thus, recognition of the parent-child privilege will foster the vitally important parent-child relationship by preventing disclosure of potentially damaging information that might create a barrier between parent and child.[89]

The fifth criterion espoused by Manley—a feeling of self-importance in being the keeper of another's secret—accounts for the expansion of privileges to other professional areas, although it is probably no longer required for creation of a testimonial privilege.[90] Therefore, this element should not apply to a parent-child privilege. Nevertheless, even though two criteria of the Manley standard are probably no longer viable, the parent-child privilege should be recognized when evaluated under the second, third, and fourth criterion of Manley's standard. As one commentator has aptly noted, under Manley's proposal, "[t]he [parent-child] privilege would more than adequately satisfy these requirements."[91]

The second standard developed for examining proposed testimonial privileges was that enunciated by Dean Wigmore.[92] Although the test has been criticized by commentators,[93] Wigmore's test is considered by many to be a useful tool for determining the propriety of recognizing a testimonial privilege.[94] Under the Wigmore standard, the following fac-

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bringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

Id. at 232.

88. *See* Note, *The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudications*, 44 BROOKLYN L. REV. 63 (1977). By their nonrecognition of a parent-child privilege, however, many courts and legislatures are, in effect, straining and restraining the parent-child relationship. While states recognize a privilege for less noteworthy relationships (i.e. journalists and accountants), few recognize a parent-child privilege. *See supra* notes 46–51, 62–74 and accompanying text.

89. *See Agosto*, 553 F. Supp. at 1326.

90. *See* Manley, *supra* note 75, at 290.

91. *See* Coburn, *supra* note 75, at 618 n.121.

92. *See* 8 J. WIGMORE, *supra* note 2, § 2285.

93. *See, e.g.*, Lovisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956). Lovisell faults the applicability of Wigmore's test because several elements of the test are not subject to scientific validation and instead emphasize utilitarian values. *Id.* at 109–15.

94. Many courts and commentators agree that a parent-child privilege likely meets the Wigmore standard. *See, e.g., A & M*, 61 A.D.2d at 434, 403 N.Y.S.2d at 381; *Gloria L.*, 124 Misc. 2d at 1, 475 N.Y.S.2d at 1001–02; Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1, 13 (1982); Comment, *From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?*, 1978 B.Y.U. L. REV. 1002, 1010; Comment, *A Parent-Child Testimonial Privilege: Its Present Existence, Whether it Should Exist, and to What Extent*, 13 CAP. U.L. REV. 555, 602 (1984); Comment, *Recognition of a Parent-Child Testimonial Privilege*, 23 ST. LOUIS U.L.J. 676, 688

tors must exist for a testimonial privilege to be recognized:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
> (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 disposal of litigation.[95]

The first element—that of requiring confidentiality—is easily met when applied to a parent-child relationship. The parent-child privilege is not intended to protect all communications uttered between a parent and child; it is only intended to protect those communications which are considered confidential in nature. Confidentiality determinations turn on the facts of the particular case[96] and, therefore, are left to the fact-finder.

The second element—that confidentiality be essential to the maintenance of the relationship—is also satisfied by the parent-child relationship.[97] The element of confidentiality is essential to the maintenance of the parent-child relationship. Without confidentiality, the family unit could be fragmented.[98] For example, the notion of youth

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(1979); Comment, *Underprivileged Communications: The Rationale For a Parent-Child Testimonial Privilege*, 36 Sw. L.J. 1175, 1177 (1983).

95. 8 J. WIGMORE, *supra* note 2, § 2285, at 527 (emphasis in original).

96. In United States v. Jones, 683 F.2d 817 (4th Cir. 1982), the court emphasized the lack of certain factors necessary for a confidential communication, thus denying a parent-child privilege:

> Under the circumstances, namely an emancipated, adult child's testimony which only arguably would be adverse to his father, limited to questions unrelated to his familial association with his parent, and involving no communication between father and son, we are satisfied that there simply is no privilege such as Jones has asserted.

Id. at 819. A New York court, however, has upheld a parent-child privilege in a distinctly different factual situation.

> [I]f it is determined that the information sought here was divulged by the boy in the context of the familial setting for the purpose of obtaining support, advice or guidance, we believe that the interest of society in protecting and nurturing the parent-child relationship is of such overwhelming significance that the State's interest in fact-finding must give way.

A & M, 61 A.D.2d at 433–34, 403 N.Y.S.2d at 380.

97. *See A & M*, 61 A.D.2d at 432–33, 403 N.Y.S.2d at 380 (confidentiality is essential to the parent-child relationship).

98. *See Agosto*, 553 F. Supp. at 1326. *See also* Comment, *The Child-Parent Privilege: A Proposal*, 47 FORDHAM L. REV. 771 (1979). This student commentator noted:

> In his home, more than anywhere else, the child should be encouraged to communicate freely and should be made to feel that what he has shared with his parent in confidence will not be disclosed to outsiders. Without the promise of confidentiality, however, child-parent interaction will necessarily be inhibited and the parent will be unable to provide

conjures visions of naivete. When troubled, the child quite naturally turns to his or her parent for advice and wisdom.[99] If, however, a parent should betray a child's confidence, untold damage could result to the child's psyche and to the parent-child relationship.[100] The possibility of this damage occurring is real, as research has indicated that a lack of interaction between parent and child leads to abnormal behavior and juvenile delinquency.[101]

The third element of Wigmore's standard—that the relationship is one that ought to be sedulously fostered—is clearly satisfied when applied to the parent-child relationship. Confidential communications between parent and child must be protected against disclosure:

> It is said that there are certain "private realm[s] of family life which the state cannot enter." . . . Confidential communications, *by their very nature*, in order to foster the ongoing confidential parent-child communications between parent and child, must *remain* confidential and private if the parties so desire, and be without the power of the state to inquire . . . .[102]

The family unit is the cornerstone of our society.[103] It has more impact, emotionally and psychologically, upon the child than any other moti-

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salutary guidance and support. At a time when the demise of the family is being both predicted and decried, it seems anomalous to deny child-parent communications the same protection as is granted to communications arising out of other socially beneficial relationships.

Id. at 785–86.

99. *See* State v. Harrell, 87 A.D.2d 21, 24, 450 N.Y.S.2d 501, 503 (1982) ("[W]hen a minor is arrested for a crime, it is only natural that, in the first instance, he should regard his parents, rather than a lawyer, as a source of assistance and advice.").

100. *See Agosto*, 553 F. Supp. at 1326. Damage resulting from betrayal has far-reaching effects.

> [T]he child learns to relate to society and have respect for society within the initial framework of his own relationship to his parents and other family members. To damage the parent-child relationship would result in damage to the child's relationship to society as a whole. In an age in which Americans bemoan the lack of loyalty or sense of responsibility which some family members seem to exhibit toward one another, resulting in massive government support programs, it is paradoxical that, on the other hand, the government would seek to employ information-gathering tactics which further undermine the integrity and supportive structure of the family unit.

Id.

101. *See* Comment, *supra* note 98, at 782 ("[A] significant number of juvenile delinquents come from homes where there [is] inadequate interaction and little communication."). *See also* Furlong, *Youthful Marriage and Parenthood: A Threat to Family Stability*, 19 HASTINGS L.J. 105, 115 (1967) ("Studies of the growth and development of children and of the functioning of adults in society show a close relationship between the individual's functioning in society and the quality of the relationships within his family.").

102. People v. Fitzgerald, 101 Misc. 2d 712, 716, 422 N.Y.S.2d 309, 312 (Westchester County Ct. 1979) (quoting Prince v. Massachuetts, 321 U.S. 158, 166 (1944)) (emphasis in original).

103. *See* Moore v. City of East Cleveland, 431 U.S. 494, 503–04 (1977).

vating source.[104] Recognition of a parent-child privilege protects the family unit by preventing psychological harm from befalling the parent-child relationship through forced disclosures of confidential communications. Thus, the familial relationship will endure, and traits such as mutual trust and love will flourish. In short, one hardly need argue that the state has a compelling interest in fostering the parent-child relationship.

Finally, whether the fourth Wigmore element—that injury to the relationship be greater than the benefit gained by disclosing the confidential communication—is satisfied, must be judged on a case-by-case basis.[105] Harm may or may not result from every disclosure of a confidential communication. Each case, therefore, must be judged on its own merits. If the benefits of nondisclosure of the confidential communication outweigh the harm, then the privilege should be recognized.

Recognition of a parent-child privilege should result when applying either the Manley or Wigmore standard. Public policy not only favors recognition of a parent-child privilege, it demands such recognition. The role of the parent in rearing children is critical. It is universally conceded that a child's emotional well-being and psychological stability is derived through interaction with the parent.[106] Great emphasis has been placed upon the role of the family in socializing children.[107] Because the home is generally the first social organization which the child confronts, this initial interpersonal contact has the greatest impact upon the child.[108] If, however, disclosure of a confidential communication is required, children could lose respect for their family as well as for their parents.[109] Therefore, lines of communication must remain open to cultivate this highly beneficial relationship. A healthy parent-child relationship is promoted by recognizing a parent-child privilege. Nonrecognition can obstruct or close these lines of communication, thereby creating an atmosphere of distrust and possibly severing the parent-child relationship.

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104. *See* Comment, *supra* note 98, at 783–84 ("[S]ociety has such a strong interest in fostering open communication between parent and child. Studies demonstrate that children raised by parents who emphasize two-way communication and who involve the children in family decisions are well-adjusted and have a positive self-image.").

105. *See Agosto*, 553 F. Supp. at 1307 (balancing approach should be used to determine whether to recognize parent-child privilege).

106. *See supra* notes 102–05 and accompanying text.

107. *See* Furlong, *supra* note 101, at 105 ("The family is a basic institution in our society.").

108. *See id.*

109. *See* Comment, *From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?*, 1978 B.Y.U. L. REV. 1002, 1010.

B. Adoption of a Parent-Child Privilege as a Matter of Constitutional Right

The parent-child privilege can be justified on the basis that compelled disclosure of confidential communications made between a parent and his or her child is unconstitutional. Commentators have defended testimonial privileges by arguing that they protect the family's constitutional right to privacy by serving as a barrier to official invasion of privacy.[110]

The concept of the right to privacy is a century old.[111] In 1886, the United States Supreme Court first noted that a right to privacy existed through the fourth and fifth amendments to the United States Constitution.[112] The concept of the right to privacy was further advanced and strengthened four years later in an article written by Samuel Warren and Louis Brandeis,[113] wherein the right to privacy was defined as "the right to be let alone."[114] Subsequently, in a 1928 United States Supreme Court decision, Justice Louis Brandeis' dissent emphasized that privacy was an important end in itself—an essential condition of political liberty and humanity.[115] These early cases and commentary on the right to privacy established the framework for the Court's later decisions dealing with familial privacy.[116]

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110. *See, e.g.*, Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 86 (1973). Without recognition of a parent-child privilege, the state can compel testimony which, in effect, invades familial privacy, breaches familial integrity, and disrupts familial harmony. Accordingly, when the state compels parents to testify against their child, the state arguably intrudes upon the "private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Thus, as Professor Krattenmaker asserts, "limitations on testimonial privileges are invasions of privacy." Krattenmaker, *supra*, at 86.

111. *See* Boyd v. United States, 116 U.S. 616 (1886). *Boyd* involved a customs revenue law enabling a government attorney, on motion to a federal court, to require a merchant to produce his accounts and invoices for inspection. *Id* at 618. The Court held the law to be unconstitutional as applied, because it was an undue infringement on the right to privacy. *Id.* at 638.

112. *Id.* at 630.

113. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

114. *Id.* at 193. The authors pointed out:

> [I]n very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone . . . .

Id.

115. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("[The Framers of the Constitution] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.").

116. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262

The right to family integrity, and thus family privacy, is not explicitly mentioned in the Constitution.[117] Nevertheless, the Supreme Court recognized the importance and the autonomy of the family unit in *Meyer v. Nebraska*[118] and in *Pierce v. Society of Sisters*.[119] In *Meyer*, the Court struck down a statute prohibiting the teaching of a foreign language earlier than the eighth grade;[120] in *Pierce*, the Court invalidated an Oregon statute requiring parents to send their children to public schools.[121] In each case, the Court determined that the statute in question was arbitrary and not reasonably related to a legitimate state purpose.[122] *Meyer* and *Pierce*, both frequently cited as authority in privacy cases,[123] demonstrate that constitutional limits exist to prevent state interference with certain parental childrearing decisions. Each case protected the right of parents to rear their children with minimal state interference, and each case illustrated the need for judicial protection in the area of family relations.

The right to control one's children was also recognized in *Prince v. Massachusetts*,[124] albeit indirectly. The Court in *Prince* upheld the constitutionality of a Massachusetts statute prohibiting a child from selling articles of any kind in the street,[125] observing that the family unit was not beyond control and regulation.[126] The Court, however, emphasized that such control was the exception rather than the rule, because the state usually cannot interfere with family matters.[127] The

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U.S. 390 (1923).

117. The right to familial privacy must be gleaned from the Bill of Rights. *See* Carey v. Population Servs., Int'l, 431 U.S. 678, 684–85 (1977); Roe v. Wade, 410 U.S. 113, 152 (1973).

118. 262 U.S. 390 (1923).

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

120. *Meyer*, 262 U.S. at 390–91. The Court observed that the term liberty encompassed many rights including the right of teachers to teach and the right of students to acquire knowledge. *See id.*

121. *Pierce*, 268 U.S. at 534–35. The Court refused to recognize the right of the state to "standardize its children," *id.*, holding that the compulsory public education statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.*

122. *See Meyer*, 262 U.S. at 403; *Pierce*, 268 U.S. at 535–36.

123. *See, e.g., Carey*, 431 U.S. at 684–85; Moore v. City of E. Cleveland, 431 U.S. 494, 499–501 (1977).

124. 321 U.S. 158 (1944).

125. *Id.* at 170–71. Sarah Prince, a Jehovah's Witness, was convicted for violating a Massachusetts child labor law which made it unlawful for any parent or guardian to furnish any boy under the age of 12 or any girl under the age of 18 any articles for sale in a public street. Sarah Prince permitted her nine-year-old niece to sell religious materials in public. *Id.* at 159–62.

126. *Id.* at 166.

127. *See id.* at 166–70. The Court noted:

> [T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private

Court further noted that parents have the right to use considerable discretion in raising their children.[128] These three decisions, *Meyer*, *Pierce*, and *Prince*, leave little doubt as to the protection afforded a family under the Constitution.

While the concept of parental control has been viewed with importance under the United States Constitution, other family-oriented decisions have also been afforded constitutional protection. For example, the right to marry,[129] to procreate,[130] to use contraceptives,[131] and to rear children[132] have all been afforded constitutional protection based on the right to privacy. Although the constitutional right to privacy is not clearly defined, the Supreme Court decisions recognizing the right illustrate that there is a "zone," a "private realm of family life which the state cannot enter."[133] It cannot be seriously contended that the right to privacy evidenced in these decisions fails to encompass the privacy of the family unit as it relates to the parent-child privilege.

The United States Supreme Court has not yet determined that the parent-child privilege is protected by the United States Constitution. Nevertheless, at least one state court has addressed the issue. In 1978, a New York court recognized a parent-child privilege based on a right to family integrity in the case of *In re A & M*.[134] In this case, the New York appellate court was confronted with a privacy claim for constitutional protection of communications from a child to a parent. The parents of a sixteen-year-old youth were issued a subpoena to testify before a grand jury investigating an arson.[135] The subpoena sought any admissions the youth might have made to his parents.[136] At the trial

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realm of family life which the state cannot enter.

Id. at 166.

128. *Id.* at 165–66.

129. *See* Zablocki v. Rehail, 434 U.S. 374 (1978) (state statute requiring unmarried individuals charged with support of a child not in their custody to obtain a court order approving a marriage held an unconstitutional invasion of the fundamental right of marriage).

130. *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (upholding right of a single mother to be free to choose abortion without parental consent).

131. *See Carey*, 431 U.S. 678 (1977) (statute prohibiting distribution of contraceptives to any minor held unconstitutional under the first and fourteenth amendments); Eisenstadt v. Baird, 405 U.S. 438 (1972) (statute limiting the distribution of contraceptives was held unconstitutional because it discriminated between married and unmarried persons); Griswold v. Connecticut, 381 U.S. 479 (1965) (statute forbidding the use of contraceptives was held unconstitutional because it impinged upon the right of marital privacy).

132. *See Yoder*, 406 U.S. 205 (1972) (compulsory public education statute held unconstitutional when parental right of free exercise of religion outweighed state's educational interest).

133. *Prince*, 321 U.S. at 166.

134. 61 A.D.2d 426, 432, 403 N.Y.S.2d 375, 379–80 (1978). The initials "A" and "M" refer to the youth's parents. Anonymity is required in proceedings involving minors. *Id.* at 428, 403 N.Y.S.2d at 377.

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

level, the court granted a motion to quash the subpoena, holding that the communication between the parent and child fell within New York's marital privilege.[137] The appellate court reversed, refusing to expand the marital privilege.[138] The court, however, concluded that "the integrity of family relational interests is clearly entitled to constitutional protection."[139] Therefore, while the court held that the parents would not be excused from testifying before the grand jury, it limited the scope of inquiry to questions which would not invade the realm of family privacy.[140] The practical effect of the court's holding was to recognize a narrow parent-child privilege. Thus, the parent-child privilege has been justified in at least one case[141] on constitutional grounds. The basis of that justification is that confidential communications between parent and child are protected from compelled disclosures as these confidential communications fall within the realm of the right to privacy.

C. *Adoption of a Parent-Child Privilege as a Matter of Analogy*

The parent-child privilege should also be recognized because it parallels many of the currently recognized testimonial privileges in that it is based on similar justifications and similar purposes.[142] For instance, the parent-child privilege closely parallels the professional privileges.[143] The primary justifications for recognition of professional privileges are to encourage frank disclosure of pertinent information[144] and to foster the free flow of information,[145] without fear of public scorn and humiliation.[146] The purpose of recognizing professional privileges is to facilitate the proper and efficient resolution of a problem.[147] For ex-

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137. *Id.*

138. *Id.* at 436, 403 N.Y.S.2d at 382.

139. *Id.* at 432, 403 N.Y.S.2d at 380. The appellate court held that, while such communications were not protected by statute, intra-familial communications do fall within the constitutionally recognized right to family privacy. *Id.* at 430, 403 N.Y.S.2d at 378. This right to privacy is not absolute. The court must balance the state's interest in obtaining all relevant testimony against the family's interest in maintaining a healthy atmosphere. *See id.*

140. *Id.* at 435–36, 403 N.Y.S.2d at 382.

141. The constitutional issue was also addressed in *Fitzgerald*, 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Westchester County Co. 1979). In *Fitzgerald*, the court upheld the claim of a parent-child privilege, believing that the parent-child privilege emanates "directly from such rights as are granted by both the Federal and New York State Constitutions . . . which have fostered the recognition of what has come to be known as the 'right to privacy.'" *Id.* at 716–17, 422 N.Y.S.2d at 312.

142. *See supra* notes 18–60 and accompanying text.

143. *See* Comment, *A Parent-Child Testimonial Privilege: Its Present Existence, Whether it Should Exist, and to What Extent*, 13 CAP. U.L. REV. 555, 564 (1984) (analogizing a parent-child privilege with a professional privilege).

144. *See supra* note 31 and accompanying text.

145. *See supra* note 38 and accompanying text.

146. *See supra* note 44 and accompanying text.

147. *See supra* notes 32, 38 & 44 and accompanying text.

ample, when an adult is confronted with a difficult problem, he or she may turn to a professional for assistance and relief, whether the problem is legal, medical, or spiritual in nature.[148] This communication between the adult and the professional advisor would be privileged.[149] Similarly, when a minor child is faced with a problem, the child quite naturally turns to someone with wisdom, with medical training, or with spiritual discipline. That individual, more often than not, is the child's parent.[150] If a minor consults a professional for guidance and advice, the communication between the minor and the professional may be privileged.[151] If the professional privilege would attach, logic suggests that the parent-child privilege should also attach when a child consults his or her parent in a similar manner.[152]

The parent-child privilege also parallels the nonprofessional marital privilege.[153] The justification for recognition of the nonprofessional marital privilege is to promote and to preserve harmony and tranquility between spouses.[154] Society recognizes a need to nurture the delicate marital relationship, and society supports this need by recognizing a marital privilege which precludes forced confidential disclosures.[155] Society also views the parent-child relationship as exceptionally significant.[156] The courts and legislatures, however, have only minimally recognized a parent-child privilege. This minimal recognition is difficult to understand as the two relationships—the marital relationship and parent-child relationship—are quite similar. As noted by one commentator:

> Ideally, the child-parent relationship encompasses aspects of the marital relationship—mutual love, affection, and intimacy . . . the parent providing emotional guidance and the child relying on him for help and support. . . . As in the marital . . . relation[ship], this optimal child-parent relationship cannot exist without a great deal of communication between the two. . . . Manifestly, the parent's disclosure of such information to a third party, without the concurrence of the child, would deter continued

148. *See Agosto*, 553 F. Supp. at 1325–26.

149. *See supra* notes 24–51 and accompanying text.

150. *Harrell*, 87 A.D.2d at 24, 450 N.Y.S.2d at 503. ("As our courts have recognized, when a minor is arrested for a crime, it is only natural that, in the first instance, he should regard his parents, rather than a lawyer, as a source of assistance and advice.").

151. *See supra* notes 24–51 and accompanying text.

152. *See* Stanton, *supra* note 94, at 13 ("[I]t is illogical to require that a young person turn to outside professionals in order for his private communications to be protected.").

153. *See Agosto*, 553 F. Supp. at 1325–26 (noting the similarities between the parent-child relationship and the marital relationship).

154. *See* Federated Dep't Stores, Inc. v. Esser, 96 Misc. 2d 567, 568, 409 N.Y.S.2d 353, 354 (Sup. Ct. 1978). *See also supra* note 60 and accompanying text.

155. *See Agosto*, 553 F. Supp. at 1325.

156. *See Harrell*, 61 A.D.2d at 431, 403 N.Y.S.2d at 379.

> communication between child and parent. Thus, the promise of confidentiality is a necessary prerequisite to the satisfactory maintenance of the child-parent relationship. . . . [157]

Both relationships are based upon trust and confidence,[158] and both the parent-child and marital relationships help establish a fundamental, vital family institution. Recognition of a parent-child privilege, not unlike the marital privilege, would foster familial tranquility. The argument that compelled disclosure discourages future communications between parent and child also justifies recognition of a parent-child privilege.[159] This view is based on the assumption that open communication is essential for a successful relationship and that confidentiality is essential for communication. If disclosure is compelled, the child might feel betrayed and the parent-child relationship could be irreparably harmed.[160] Various commentators suggest that compelled disclosure promotes dissension among the entire family.[161] The United States Court of Appeals for the Sixth Circuit noted: "Analogous to the spousal privilege, the parent-child privilege purportedly would serve the public interest in preserving the harmony and confidentiality of the parent-child relationship."[162] In sum, the parent-child privilege should be recognized by analogy to the professional and nonprofessional testimonial privileges because: (1) the parent-child privilege can be based upon criteria and justifications similar to other privileged communications; (2) the parent-child relationship is not that dissimilar from the marital relationship in that both foster familial tranquility; and (3) the parent-child privilege would keep lines of communications open by preventing parents from having to betray their children through compelled disclosure.

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157. Comment, *supra* note 97, at 781 (footnotes omitted).

158. *See Agosto*, 553 F. Supp. at 1325–26. *See also* Comment, *supra* note 143, at 566 ("Like the husband-wife relationship, the parent-child relationship is based primarily upon warmth and a sense of trust.").

159. *Cf.* Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CALIF. L. REV. 1353, 1359 (1973) ("The rationale for the testimonial privilege is . . . on avoiding dissention rather than on fostering confidence."); Comment, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 NW. U.L. REV. 208, 231 (1961) ("To subject these communications to disclosure in court would restrict and inhibit freedom of communication between the spouses, thus destroying the vehicle which fosters harmonious and productive marriages.").

160. Coburn, *supra* note 75, at 616–17 ("[C]ompelling a parent to testify against his child is to destroy the desired intrafamilial rapport which is crucial to sustaining the child-parent relationship.") (footnote omitted).

161. *See, e.g.*, Comment, *supra* note 98, at 789; Comment, *Recognition of a Parent-Child Testimonial Privilege*, 23 ST. LOUIS U.L.J. 676, 687 (1979) (parent-child privilege is a natural extension to the marital privilege). *But see* 8 J. WIGMORE, *supra* note 2, § 2228, at 216 (required testimony by spouse is only minor cause of marital dissension).

162. United States v. Smith, 756 F.2d 1253, 1258 (6th Cir. 1985).

IV. SCOPE OF THE PARENT-CHILD PRIVILEGE—A SUGGESTED STANDARD

This comment has advocated the recognition of the parent-child privilege. The parent-child privilege should not, however, be an absolute privilege; rather, it should be a qualified privilege. Although many courts have been confronted with the issue of whether to recognize a parent-child privilege, few courts have been inclined to do so. This reluctance to recognize a parent-child privilege is possibly attributable to the judiciary's aversion to establishing new precedent. A more likely explanation is the relative inability of the judiciary to develop an adequate test for determining when the privilege should apply, taking into account the competing needs of both the communicating child and the civil and criminal justice systems. Although both Manley and Wigmore articulated standards for determining when a testimonial privilege should be recognized, neither focused specifically on parent-child communications.[163] Thus, this comment proposes that the following standard should be used for determining whether to recognize a parent-child privilege in a given factual situation:

(1) The communication must originate in confidence;

(2) The communication must occur outside the presence of third parties;

(3) Communications encompass both spoken words and physical acts;

(4) Communications involving plans of future crime or fraud are not privileged;

(5) The parent-child privilege exists only when mutually asserted by *both* parent and child;

(6) The parent-child privilege exists only when the child is a minor;

(7) The parent-child privilege encompasses only communications from child to parent—not from parent to child;

(8) The parent-child privilege applies to both criminal and civil proceedings; and

(9) The parent-child privilege is inapplicable when the child and the parent are opposing parties in legal proceedings.

If all elements apply to a given situation, then the parent-child privilege should be recognized.

The first element—requiring confidentiality—is deemed fundamental for a communication to be privileged.[164] A communication is

163. *See supra* notes 77–95 and accompanying text.

164. *See* IDAHO CODE § 9-203(7) (Supp. 1985); MINN. STAT. ANN. § 595.02(1)(i) (West Supp. 1986). *See also supra* notes 25–60 and accompanying text.

confidential if made when a child seeks *guidance* or *support* from either parent.[165] If the court determines that the communication lacks confidentiality, no parent-child privilege should be recognized.[166] Furthermore, the prerequisite of confidentiality alone does not give rise to a privilege.[167]

The second element—that the communication occur in private—is necessary to ensure that the communication is indeed confidential. If the communication occurs in the presence of third parties, the communication is *presumed* not to be confidential and therefore not privileged against compelled disclosure.[168] An implict requirement for invoking the attorney-client[169] or the marital privilege[170] is that the communication be made with a reasonable expectation of confidentiality. This implies that the communication be uttered outside the presence of third parties. Without such a requirement, a parent or child could claim that all overheard conversations were confidential, thereby effectively preventing all damaging communicative evidence from being used against them.

The third element—the form of communication—encompasses any physical, oral, or written act conveyed by the child to the parent.[171] Little distinction exists to favor oral acts over physical or written acts, as the parent and child live in close proximity. If the child's nonverbal act can be reasonably interpreted as conveying an idea, then the act

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165. *See In re* A & M, 61 A.D.2d 426, 434–35, 403 N.Y.S.2d 375, 381 (1978). The court noted the importance of interaction between parent and child: "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." *Id.* at 429, 403 N.Y.S.2d at 378.

166. *See* United States v. Jones, 683 F.2d 817 (4th Cir. 1982) (court noted an absence of a confidential communication and refused to uphold the claim of parent-child privilege); State v. Gilroy, 313 N.W.2d 513 (Iowa 1981) (parent-child privilege inapplicable when no confidential communication was apparent between father and daughter); Cabello v. State, 471 So. 2d 332 (Miss. 1985) (court refused to apply parent-child privilege when confidentiality was lacking); *In re* Mark G., 65 A.D.2d 917, 410 N.Y.S.2d 464 (1978) (parent-child privilege inapplicable when the son's statement to his father was not in confidence and was not for the purpose of obtaining support, advice or guidance).

167. *See* Perry v. Fiumano, 61 A.D.2d 512, 516, 403 N.Y.S.2d 382, 384 (1978) ("Communications made in confidence are not protected purely because of their confidentiality, but may be kept secret only if premised upon a public policy expressed by statute or in furtherance of an overriding public concern of constitutional dimension . . . .").

168. *See* State v. Bruce, 655 S.W.2d 66 (Mo. Ct. App. 1983) (court determined that no parent-child privilege existed when son's statement to mother was overheard by a third party). *See also* MINN. STAT. ANN. § 595.02(1)(i) (West Supp. 1986) (one requirement for statutory privilege is that the communication not be made in the presence of non-family members).

169. *See supra* note 28 and accompanying text.

170. *See supra* notes 54–55 and accompanying text.

171. *See* 8 J. WIGMORE, *supra* note 2, § 2337.

constitutes a communication.[172] Furthermore, currently recognized testimonial privileges readily acknowledge that communications encompass oral, written, and physical acts or any means of conveying an idea.[173]

Under the fourth element, no parent-child privilege should exist if the communication consists in whole or in part of plans to commit future illegal acts,[174] because no apparent public policy is furthered by recognizing a privilege under such conditions. Presumably, because the creation of new testimonial privileges involves a balancing process, society's interest in fact-finding would outweigh the individual's interest in promoting illegal activities.[175]

Under the fifth element, although the child or parent may claim the privilege on behalf of the child, the privilege should exist only when it is mutually asserted by both parties.[176] Specifically, this more stringent requirement is not an element of the widely-recognized privileges.[177] Typically, in an attorney-client or physician-patient relationship, only the client or patient need invoke the privilege; mutual assertion of the privilege by both the professional and the nonprofessional is not required.[178] The absence of mutual affirmation of the privilege indicates a lack of the confidentiality element, as it is probable that neither party intended that the communication be privileged.

The sixth element—requiring that the child be a minor—sensibly limits the application of this standard. Because the goal of the parent-child privilege is to foster the parent-child relationship through love, guidance, and support, once the child reaches majority, this goal is no

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172. *Cf.* State v. Smith, 384 A.2d 687, 689–90 (Me. 1978) ("[N]onverbal actions can constitute a 'communication' for the purposes of our marital privilege law.").

173. *See* 3 S. GARD, *supra* note 3, § 21:4; 3 C. TORCIA, *supra* note 18, § 568.

174. *Cf.* United States v. Penn, 647 F.2d 876 (9th Cir.), *cert. denied*, 449 U.S. 903 (1980). In *Penn*, the court refused to uphold defendant's claim of a parent-child privilege when police believed that defendant was using her children to distribute narcotics and defendant's five-year-old-child had told the police the whereabouts of her mother's cache of drugs. *Id.* at 875. Judge Kennedy, in his dissent, however, noted that "courts have protected . . . [the parent-child union] where the threat of disruption is in some respects more attenuated than in the circumstances of the case before us." *Id.* at 888 (Kennedy, J., dissenting).

175. *See* People v. Sanders, 99 Ill. 2d 262, 271, 457 N.E.2d 1241, 1245 (1983) ("The expansion of existing testimonial privileges and acceptance of new ones involves a balancing of public policies . . . .").

176. *See* Cissna v. State, 170 Ind. App. 437, 352 N.E.2d 793 (1976) (court declined to recognize a parent-child privilege when defendant's mother testified over son's objection about his involvement in a break-in); *Cabello*, 471 So. 2d 332 (Miss. 1985) (no parent-child privilege existed when privilege was not mutually asserted); People v. Gloskey, 105 A.D.2d 871, 482 N.Y.S.2d 82 (1984) (claim of a parent-child privilege denied when defendant's father did not wish to remain silent); *Mark G.*, 65 A.D.2d 917, 410 N.Y.S.2d 464 (court recognized the parent-child privilege but declined to apply it when not mutually asserted).

177. *See supra* notes 24–60 and accompanying text.

178. *See supra* notes 24–38 and accompanying text.

longer compelling.[179] This more stringent element requiring the child to be a minor will prevent parents, and children past the age of minority, from abusing the parent-child privilege needlessly.[180]

The seventh element—that the communication be from child to parent—is a fundamental element of this standard and goes to the core of promoting the familial relationship. If a child by seeking guidance reveals intimate thoughts to his or her parent, public policy dictates that these communications be privileged so as to prevent harm to the child.[181] Little public policy exists, however, to preclude such testimony when parents reveal confidential matters to their child.[182] One court noted the difference between communications originating from a child and those originating from a parent:

> Because a parent does not need the advice of a minor child in the same sense that a child may need the advice of a parent, the case for a testimonial privilege as to confidential communications from parent to child seems weaker than the case as to such communication from child to parent.[183]

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179. *See* United States v. Ismail, 756 F.2d 1253 (6th Cir. 1985) (court refused to recognize a parent-child privilege when defendant's 30-year-old son was subpoenaed to testify at trial about his father's alleged drug dealings). *Jones*, 683 F.2d 817 (4th Cir. 1982) (court refused to recognize a parent-child privilege where the child was 29 years old). *See also* IDAHO CODE § 9-203(7) (Supp. 1985); MINN. STAT. ANN. § 595.02(1)(i) (West Supp. 1986). Both the Idaho and Minnesota statutes require that the child be a minor as a condition for invocation of the parent-child privilege.

180. However, some courts disagree with this reasoning and believe that fostering mutual trust and love should exist throughout the lives of the parent and child. *See Agosto*, 553 F. Supp. at 1329 ("[T]he recognition of the reciprocity and mutuality of the parent-child relationship [exists] at *all* ages of the participants . . . ."); People v. Fitzgerald, 101 Misc. 2d 712, 718, 422 N.Y.S.2d 309, 313 (Westchester County Ct. 1979) ("[I]t does not follow that [the parent-child relationship] can arbitrarily be said by the State to cease at the stroke of midnight on the last day of the child's seventeenth year.").

181. *See Fitzgerald*, 101 Misc. 2d at 715, 422 N.Y.S.2d at 311.

182. *See Ismail*, 756 F.2d 1253 (6th Cir. 1985) (court refused to recognize a parent-child privilege when the communication was from parent to child); *In re* Santarelli, 740 F.2d 816 (11th Cir. 1984) (en banc) (court declined to recognize a parent-child privilege when appellant refused to testify before a federal grand jury upon being informed that his father was a possible target of the investigation); *In re* Starr, 647 F.2d 511 (5th Cir. 1981) (court refused to uphold a claim for a parent-child privilege when appellant refused to answer questions about her parents' involvement in a homicide investigation); Gibbs v. State, ___ Ind. App. ___, 426 N.E.2d 1150 (1981) (court determined that the lower court did not err in refusing parents' claim of a parent-child privilege when their children testified against them in a murder proceeding). *See also* IDAHO CODE § 9-203(7) (Supp. 1985) (Idaho parent-child privilege statute only protects communications made from child to parent); MINN. STAT. ANN. § 595.02(1)(i) (West Supp. 1986) (only child to parent communications are protected).

183. Three Juveniles v. Commonwealth, 390 Mass. 357, 362, 455 N.E.2d 1203, 1206 (1983). *But see Agosto*, 553 F. Supp. at 1329. In upholding a parent-child privilege when the parent confided to the child, the court observed:

> It can even be argued that there is a role reversal in the parent-child relationship, as the parent grows older and becomes more reliant on the child. In this regard, the parent be-

Under the eighth element, little distinction can be made between a civil or criminal proceeding when a child confides to his parent. When a child seeks guidance from a parent, the legal distinctions between a civil and criminal suit, to the child, blur. The child simply wants advice. Therefore, the parent-child privilege should apply in either case.[184]

Under the ninth and final element—requiring that parent and child not be opposing parties—it seems that no justification is apparent to uphold a privilege in such a circumstance.[185] Public policy simply fails to uphold a testimonial privilege when the parties are opposing one another. In this situation, the need to hear all relevant testimony outweighs the need to preserve familial integrity.

In summary, a strong case for recognition of a parent-child privilege can be made if all of the aforementioned elements are satisfied. To date, only two known cases have denied a parent-child privilege when all of the preceding elements have been satisfied.[186]

V. CONCLUSION

Holders of a testimonial privilege are entitled to refuse to testify in court about certain communications spoken in confidence. Testimonial privileges are based upon public policy. Society recognizes that, in some instances, it is more beneficial for society to support the needs of

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comes a child, once again, and the child assumes the role of a parent and protector of his aging parent.

Id.

184. *See* IDAHO CODE § 9-203(7) (Supp. 1985) (parent-child privilege recognized in both civil and criminal proceedings).

185. *See* Hunter v. State, 172 Ind. App. 397, 360 N.E.2d 588 (1977) (court refused to recognize a parent-child privilege when parents were convicted on three counts of cruelty to a child); De Leon v. State, 684 S.W.2d 778 (Tex. Ct. App. 1984) (court refused to recognize a parent-child privilege when the parents of a minor child were convicted of intentionally causing the death of one of their children by failing to provide proper medical care). *See also* IDAHO CODE § 9-203(7) (Supp. 1985) (parent-child privilege not recognized when parent and child are opposing parties); MINN. STAT. ANN. § 595.02(1)(i) (West Supp. 1986) (parent-child privilege not recognized in civil or criminal proceedings when the child is adverse to the parent).

186. In Port v. Heard, 764 F.2d 423 (5th Cir. 1985), the court refused to recognize a parent-child privilege when a 17-year-old male confided to his parents that he had murdered a female postal carrier. *Id.* at 430. The prosecutors subpoenaed the youth's parents because, although the youth confessed to the murder, his confession was inadmissible as the police officers had not followed Texas law which required a tape recording of all confessions. *See* Schulman, *Parents, Children and the Law*, NEWSWEEK, Aug. 27, 1984, at 81. In the second case, *In re* Frances J., ___ R.I. ___, 456 A.2d 1174 (1983), the Rhode Island Supreme Court declined to recognize a parent-child privilege when a minor confided to her mother of her complicity in a stabbing. *Id.* at ___, 456 A.2d at 1178. The court noted that this particular case was not "an appropriate vehicle for the adoption of a new privilege." *Id.* The court also observed that the parent-child privilege was ineligible for appellate review because the issue was not properly raised before the trial judge. *Id.*

special relationships rather than to support the needs of litigants by requiring the presentation of all relevant testimony. The parent-child relationship is a sufficiently important institution within our society, yet the parent-child privilege is only marginally recognized. It is time for the judiciary and the legislature to rectify this anomaly by recognizing the parent-child testimonial privilege.

The parent-child privilege meets all the requirements of the Manley and Wigmore standards for recognizing testimonial privileges. These standards, however, are very broad in their scope and, thus, do not consider the particular aspects of the parent-child relationship. The adoption of the standard proposed by this comment rectifies the inadequacies of the aforementioned standards by focusing solely on the parent-child relationship. By adopting this standard, and thus, the parent-child privilege, the judiciary will more adequately protect the interests of the communicating child. The creation of such a privilege is logically consistent with currently recognized testimonial privileges and is inherently beneficial to the family unit and to society. Continued denial of the privilege, however, could result in trauma to children, distrust within the family unit, and a distorted view of society.

A primary consideration for any family is the quality of life provided to each family member. A family with established personal relationships based on love, open communication, and support is more capable of meeting the needs of its members. In such a secure home, the child is better able to learn conventional values and to develop a strong self-image. If the intra-familial relationship is frought with discord and noncommunication, however, serious problems can develop. Indeed, delinquent behavior can be traced to inadequate socialization and to lack of family cohesion.[187] Psychologists have determined that "[t]roubled youngsters find it nearly impossible to communicate their feelings in a normal way to adults . . . . Many children become delinquent for the first time after a shattering crisis in the home involving the parents."[188] One such crisis could develop when parents are legally required to disclose confidential matters concerning their child. Adoption of a parent-child privilege, therefore, is essential to maintaining open lines of communication between a child and his or her parents, thus protecting family harmony.

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187. *See* H. JAMES, CHILDREN IN TROUBLE, 196 (1969) ("[A] study indicates that most of those who work with children in trouble are convinced that those youngsters . . . are products of their environment."). *See also* M. HASKELL & L. YABLONSKY, JUVENILE DELINQUENCY 115–52 (1974); P. KRATCOSKI & L. KRATCOSKI, JUVENILE DELINQUENCY 39–69 (1979).

188. H. JAMES, *supra* note 187, at 197.