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THE PARENT-CHILD PRIVILEGE: A RESPONSE TO CALLS FOR ADOPTION

DAVID A. SCHLUETER*

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I. INTRODUCTION

A popular move to recognize and codify a parent-child privilege has surfaced, despite rejection by a majority of the courts that have considered the issue.¹ Reminded of the horrors accompanying totalitarian systems that require children to testify against their parents, some commentators have asserted that adoption of such a privilege will promote the success of the family relationship in this country and avoid the trauma of family members testifying against each other at trial.² This article is a response to those assertions and, in turn, pro-

1. See, e.g., *United States v. Davies*, 768 F.2d 893, 899 (7th Cir.), cert. denied, ___ U.S. ___, 106 S. Ct. 533, 88 L. Ed. 2d 464 (1985) (noting that fourth, fifth, ninth, and eleventh circuits have rejected parent-child privilege); *Port v. Heard*, 764 F.2d 423, 430 (5th Cir. 1985) (asserting that parent-child privilege should be legislatively, not judicially, recognized); *United States v. Ismail*, 756 F.2d 1253, 1258 (6th Cir. 1985) (listing cases rejecting parent-child privilege); *In re Grand Jury Subpoena of Santarelli*, 740 F.2d 816, 817 (11th Cir. 1984) (no federal judicial support for parent-child privilege); *United States v. Jones*, 683 F.2d 817, 819 (4th Cir. 1982) (emancipated adult child may not assert parent-child privilege in grand jury proceedings); *United States v. Kinoy*, 326 F. Supp. 400, 406 (S.D.N.Y. 1980) ("no such thing" as parent-child privilege); *Three Juveniles v. Commonwealth*, 455 N.E.2d 1203, 1206 (Mass. 1983) (weight of authority is against adopting parent-child privilege); *State v. Gilroy*, 313 N.W.2d 513, 518 (Iowa 1981) (spousal testimonial privilege should not be extended to communications between parent and child); *State v. Bruce*, 655 S.W.2d 66, 68 (Mo. Ct. App. 1983) (no parent-child testimonial privilege in Missouri).

2. See, e.g., Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 632 (1970) (proposing model statute to establish parent-child privilege); Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1, 1 (1982) (parent-child communications should be beyond reach of legal system); Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 610 (1987) (protection of stable family environment strong argument for adopting parent-child privilege); Comment, *From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?*, 1978 B.Y.U. L. REV. 1002, 1003 (suggesting guidelines, defining and delimiting privilege); Comment, *The Parent-Child Privilege: A Proposal*, 47 FORDHAM L. REV. 771, 782-91 (1979) (discussing policy bases for privilege); Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910, 910 (1987) (conflict between family loyalty and need for all relevant evidence); Comment, *Parent-Child Testimonial Privilege: Preserving and Protecting the Fundamental Right to Privacy*, 52 U. CIN. L. REV. 901, 902 (1983) (failure to recognize parent-child privilege an anomaly considering Supreme Court priority on sanctity of family); cf. Note, *Questioning the Recognition of a*

poses that both judicial recognition and legislative codification are inappropriate at this time.

The article will generally address the nature and underlying rationale of privileges and will specifically address the arguments set out by proponents of the parent-child privilege. Finally, the article will critique the model parent-child privilege proposed by the American Bar Association's Criminal Justice Section.

II. PRIVILEGES: THE UNDERLYING RATIONALE

The purpose of an adversarial proceeding is to obtain the truth about a particular event.³ Specifically, in a criminal trial the goal is to determine whether the defendant committed the charged offense.⁴ The proceedings, however, are bounded by principles of due process which require, in part, that facts presented to the fact-finder be relevant and competent.⁵ Even assuming that these minimal conditions are satisfied, evidence may be inadmissible on the ground that it is privileged.⁶ The term "privilege" may be used to describe a limitation on admissibility which the courts or the legislature have deemed necessary to protect some other compelling interest.⁷

Parent-Child Testimonial Privilege, 45 ALB. L. REV. 142, 156 (1980)(noting commentators' argument that to reveal child's confidences is repugnant to social sensibilities).

3. See generally *Davis v. Alaska*, 415 U.S. 308, 315-17 (1974)(discussing cross-examination and adversarial proceedings).

4. See W. LA FAVE & J. ISRAEL, CRIMINAL PROCEDURE § 1.6, at 36-37 (1984).

5. See, e.g., FED. R. EVID. art. IV (Relevancy); FED. R. CRIM. EVID. art. VI (Witnesses); TEX. R. EVID. art. IV (Relevancy); TEX. R. CRIM. EVID. art. IV (Relevancy); TEX. R. EVID. art. VI (Witnesses); TEX. R. CRIM. EVID. art. VI (Witnesses). These two requirements of relevancy and competency lie at the heart of the law of evidence. Other rules requiring authentication and rejection of hearsay depend heavily, if not exclusively, on these two foundations. Some privileges are founded on competency considerations. For example, the historical basis of the rule barring testimony of the wife against her husband rested on the proposition that the wife was not competent to testify against her master. See *Trammel v. United States*, 445 U.S. 40, 53 (1980); see also C. MCCORMICK, EVIDENCE § 66, at 161-63 (3d ed. 1984); 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 603, at 862-63 (Chadbourn rev. 1979).

6. See generally C. MCCORMICK, EVIDENCE § 72, at 170-72 (3d ed. 1984)(listing purposes of privilege rules); *id.* § 74, at 175-76 (pointing out limitations on effectiveness of privilege); 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2175, at 3-4 (McNaughten rev. 1961)(extrinsic policy of exclusion); *id.* § 2197, at 113-14 (summary of privileges); *id.* § 2285, at 527-28 (listing principles of privileged communications).

7. The term "privilege" often includes references to a constitutional or statutory right not to give incriminating evidence—a personal right which, like other rights, may be waived. See generally H. WENDORF & D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL 62-63 (1983).

Privileges are generally disfavored because they often suppress otherwise reliable evidence and thus impede the discovery of truth. In *Trammel v. United States*,⁸ the United States Supreme Court reiterated:

Testimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man's evidence. As such they must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principles or utilizing all rational means for ascertaining truth.⁹

Thus, any proposed new privilege—a rule of exclusion—must be scrutinized carefully as to its purposes and probable effects.

A key element of virtually every privilege is confidentiality.¹⁰ If the holder of the privilege destroys the element of confidentiality, the privilege is generally considered waived.¹¹ Therefore, it is not surprising that in setting out a four-part template for recognizing any new common law privilege, Professor Wigmore made confidentiality the keystone:

1. Did the communication originate in a confidence that it would not be disclosed?
2. Is the element of confidentiality essential to a full and satisfactory maintenance of the parties' relationship?
3. Is the relationship one which in the opinion of the community should be fostered?
4. Will the injury that would inure to the relationship, because of disclosure, be greater than the benefit thereby gained for correct disposal of the litigation?¹²

8. 445 U.S. 40 (1980).

9. *Id.* at 50 (footnotes omitted).

10. The importance attached to confidentiality is especially evident where the privilege explicitly indicates that only "confidential" communications will be protected. In other privileges, the requisite confidentiality is presumed. *See, e.g.*, TEX. R. EVID. 507 (trade secrets privilege); TEX. R. CRIM. EVID. 507 (same). *See generally* J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527-28 (McNaughten rev. 1961).

11. *See, e.g.*, *United States v. Gann*, 732 F.2d 714, 723 (9th Cir.) (statements to attorney not privileged where third party present), *cert. denied*, 469 U.S. 1034 (1984); *United States v. Klaye*, 707 F.2d 892, 894 (6th Cir.) (statements to one's spouse by telephone not privileged when third party listening), *cert. denied*, 464 U.S. 858 (1983); TEX. R. EVID. 511 (waiver of privilege by voluntary disclosure); TEX. R. CRIM. EVID. 511 (same); C. MCCORMICK, EVIDENCE § 80, at 193-94 (3d ed. 1984); *id.* § 90, at 215-17.

12. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527-28 (McNaughten rev. 1961).

In other words, the test for adopting a new privilege should be whether allowing the exclusion will foster the relationship it is designed to protect.¹³ This traditional and accepted template is sometimes referred to as the "utilitarian" justification for privileges.¹⁴ More recently, however, some commentators and courts have urged an alternative "nonutilitarian" justification.¹⁵ They argue that some privacy interests are entitled to protection without regard to whether a privilege will actually promote a protected relationship. Under this theory, a privilege is justified if it protects the privacy of a human relationship.¹⁶

The language in *Trammel* and the justifications offered to support privileges indicate that traditional privileges are the results of a careful and thoughtful balancing process: weighing the need for the evidence to determine the "truth" against the need to protect some public good. That "good" may be the maintenance of confidentiality between marriage partners,¹⁷ the protection of state secrets,¹⁸ the assurance of complete and accurate medical¹⁹ or mental care,²⁰ the provision of sound legal advice,²¹ or the protection of some financial interest.²²

Each jurisdiction is generally free to strike its own balance between the need for evidence and the protection of the public good. As a general rule, no jurisdiction is required to recognize any particular

13. *See id.*

14. *See* C. MCCORMICK, EVIDENCE § 72, at 171 (3d ed. 1984)(utilitarian justification for privileges).

15. *See id.* § 72, at 172; *see also* Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 600 (1980)(advocating balance of practical and theoretical considerations); Comment, *Parent-Child Testimonial Privilege: Preserving and Protecting the Fundamental Right to Privacy*, 52 U. CIN. L. REV. 901, 916-20 (1983)(weighing policies for and against parent-child privilege).

16. *See* *Roberts v. Superior Court*, 508 P.2d 309, 316 (Cal. 1973)(constitutionally recognized right to privacy in psychotherapist-patient privilege). *See generally* Black, *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 46-52.

17. *See, e.g.*, TEX. R. EVID. 504 (husband-wife privilege); TEX. R. CRIM. EVID. 504 (same).

18. *See, e.g.*, FED. R. EVID. 509 (1972 proposed final draft)(printed in 56 F.R.D. 183, 251-54 (1973)); MIL. R. EVID. 505 (classified information).

19. *See* TEX. R. EVID. 509 (physician-patient privilege). *But see* TEX. R. CRIM. EVID. 509 (no physician-patient privilege in criminal trials).

20. *See* TEX. R. EVID. 510 (confidentiality of mental health information); *see also* TEX. R. CRIM. EVID. 510 (communications by alcohol or drug abusers privileged).

21. *See* TEX. R. EVID. 503 (attorney-client privilege); TEX. R. CRIM. EVID. 503 (same).

22. *See* TEX. R. EVID. 507 (trade secrets).

privilege.²³ An exception to this general rule lies in those privileges with constitutional underpinnings, such as the privilege against self-incrimination.²⁴ With such privileges, a minimum level of protection is required by the United States Constitution. A state would, of course, be free to establish a more protective privilege either through statute or through interpretation of its own constitution.²⁵

The disparity among privileges recognized by courts is exemplified by the fact that not all jurisdictions have adopted the physician-patient privilege.²⁶ Additionally, many states do not recognize an accused's privilege to suppress the testimony of his or her spouse.²⁷ Even where a state has adopted a particular privilege, the specific boundaries of that privilege may vary greatly from other jurisdictions. For example, in some states which recognize the spousal privilege, the ability to suppress confidential communications made between spouses is absent where they have engaged in joint criminal activity.²⁸

Most of the commonly recognized privileges depend, to some extent, on professional relationships in which a certain degree of

23. See C. MCCORMICK, EVIDENCE § 73.2, at 174-75 (3d ed. 1984). Occasionally, conflict of law questions arise where litigation in a forum state involves communications made outside the forum state which may or may not be recognized as privileged under the laws of the forum state. See *id.*

24. See U.S. CONST. amend. V (privilege against self-incrimination).

25. See FED. R. EVID. 501 (deferring to state privilege law in civil diversity proceedings in federal court); see also S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 331 (4th ed. 1986). Federal decisions concerning testimonial privileges are not binding on the states. See *Loesch v. State*, 620 P.2d 646, 649 n.4 (Alaska 1980).

26. See Goldberg, *The Physician-Patient Privilege—An Impediment to Public Health*, 16 PAC. L.J. 787, 792 (1985)(fifteen states do not recognize physician-patient privilege). But see FED. R. EVID. 501 (granting trial court discretion to recognize privileges in accordance with common law).

27. Compare TEX. R. EVID. 504 (recognizing *confidential communications* privilege between husband and wife) with TEX. R. CRIM. EVID. 504(1) (recognizing *testimonial* privilege between husband and wife). For a listing of how various states have treated the two possible husband-wife privileges see *Trammel v. United States*, 445 U.S. 40, 48 n.9 (1980)(jurisdictional survey).

28. See TEX. R. EVID. 504(d)(1); TEX. R. CRIM. EVID. 504(1)(d)(1). The federal courts are split on the issue of whether to recognize a spousal confidential communication privilege when both husband and wife have engaged in joint criminal activity. See, e.g., *In re Grand Jury Subpoena of Koecher*, 755 F.2d 1022, 1026-27 (2d Cir. 1985), *vacated as moot per curiam sub nom.* *United States v. Koecher*, ___ U.S. ___, 106 S. Ct. 1253, 88 L. Ed. 2d 46 (1986)(discussing split among circuits on whether to apply the privilege). The Supreme Court agreed to consider this particular case in the 1985 term. However, after hearing oral arguments, the Court learned that the case was moot and remanded the case to the lower court without deciding the issue. See *United States v. Koecher*, ___ U.S. ___, 106 S. Ct. 1253, 88 L. Ed. 2d 46 (1986).

confidentiality is assumed.²⁹ For example, in the attorney client relationship, most clients believe that what they tell their lawyer will remain confidential. If the client is not already aware of the privilege, his attorney will inform him of its existence during their consultations.³⁰ Because the assistance of counsel is considered an essential element of the American legal system, the law generally permits the client to prevent disclosure of any confidential communications made to his counsel.³¹ In theory, the assurance of confidentiality fosters not only the immediate attorney-client relationship, but also educates others who observe the privilege in operation and depend on confidentiality in their own future conversations.³²

Few privileges are absolute, and the public's overriding interest in disclosure may tip the balance away from confidentiality. In regard to the attorney-client privilege, some jurisdictions permit disclosure over objection where the communication reveals ongoing criminal activity.³³ Likewise, in regard to the spousal privilege, otherwise protected communications may be compelled where spousal abuse or other similar crimes are in issue.³⁴ A defendant's constitutional rights to confrontation and compulsory process may also require disclosure of privileged information.³⁵

29. With professional privileges, it can reasonably be expected that the professional will inform the individual of the existence of the privilege. See FED. R. EVID. 504 advisory committee's note (1972 proposed final draft)(printed in 56 F.R.D. 183, 242 (1973)).

30. See *id.*

31. See, e.g., TEX. R. CRIM. EVID. 503(b) (general rule of lawyer-client privilege).

32. See *State v. 62.96247 Acres of Land in New Castle County*, 193 A.2d 799, 807 (Del. Super. Ct. 1963). The Delaware Superior Court asserted:

[T]he duty of the confidant of nondisclosure of confidential communications is imposed to protect the reliance interest of the communicant, with an assent of the community. This reliance interest is protected because such protection will encourage certain communications. Encouraging these communications is desirable because the communications are necessary for the maintenance of certain relationships. It is socially desirable to foster the protected relationships because other beneficial results are achieved, such as the promotion of justice, public health and social stability. These goals are promoted in furtherance of a well-organized, peaceful society, which in turn is considered necessary for human survival.

Id.

33. See TEX. R. CRIM. EVID. 503(d)(1) (exempts attorney-client privilege where allowing it would further crime or fraud).

34. See TEX. R. CRIM. EVID. 504(d)(1), (2) (no marital privilege allowed where communication made in furtherance of crime or testimony relates to family violence).

35. See *Nixon v. United States*, 418 U.S. 683, 711-12 (1974)(due process requires disclosure); *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974)(confrontation clause may require disclosure); *Washington v. Texas*, 388 U.S. 14, 23 (1967)(compulsory process required invalidation

The delicate process of drafting and adopting any particular privilege is, of course, a controversial task. One need only look so far as the process of adopting the Federal Rules of Evidence³⁶ to see that the debate concerning adoption of privileges for federal cases finally resulted in the rejection of separate codifications for each privilege. Instead, Congress agreed to a simple, flexible rule which states that privileges will be determined by the federal courts.³⁷

In forging their own versions of codified rules of evidence, state courts and legislatures have, in most cases, modeled their efforts after the federal version.³⁸ However, some jurisdictions have codified their own specific rules of privilege,³⁹ and some of these rules have been patterned after the federal privilege rules rejected by Congress.⁴⁰ In other instances, drafters have adopted privileges which were not only rejected at common law, but which also reflect the parochial interests of some narrow segment of state practice.⁴¹ In each case, however, the drafters were explicitly or implicitly striking the balance between disclosure for the purposes of determining the truth and the need to nurture or protect some public good.

of Texas statute treating co-accused as incompetent witness). *See generally* Hill, *Testimonial Privilege and Fair Trial*, 80 COLUM. L. REV. 1173 (1980).

36. *See* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 1-6 (4th ed. 1986)(discussing process of adopting federal rules of evidence).

37. *See* FED. R. EVID. 501. Federal Rule of Evidence 501 states:

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

Id.

38. Within several years of the effective date of the Federal Rules, January 1975, seven states had codified their evidence rules. *See* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 775-98 (2d ed. 1980)(master chart comparing federal and state rules for Arkansas, Florida, Maine, Nebraska, Nevada, New Mexico, and Wisconsin).

39. *See, e.g.*, S. SALTZBURG, L. SCHINASI & D. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL § V, at 413-88 (2d ed. 1986); TEX. R. EVID. 501-512.

40. *See generally* FED. R. EVID. art. V (1972 proposed final draft)(printed in 56 F.R.D. 183 (1973)).

41. *Compare* TEX. R. EVID. 510 (privilege for statements to psychiatrists) with TEX. R. CRIM. EVID. 510 (privilege for statements by persons involved in treatment of alcohol or drug abuse). The Texas Rules of Criminal Evidence specifically state that there is no physician-patient privilege in state criminal proceedings. *See* TEX. R. CRIM. EVID. 509.

It is also important to note that the generic term "privilege" may actually refer to one of two privileges: the privilege not to take the stand or the privilege not to reveal the contents of a particular communication. The first is generally referred to as the adverse testimonial privilege and the second is generally referred to as the confidential communications privilege.⁴² Of the two, the adverse testimonial privilege is obviously broader because it will exclude testimony about anything which a witness would have observed or heard. Under the confidential communications privilege, a witness may take the stand and relate what he observed⁴³ and what he heard, so long as what he heard is not confidential.⁴⁴ Thus, in examining any proposed privilege it is essential to determine the exact scope of the information which the privilege will conceal from the fact-finder.

In some applications of the parent-child privilege, neither the parent nor the child is required to take the stand and testify against the other.⁴⁵ Other proposals are more limited and would only prohibit disclosure of confidential communications between the child and the parent.⁴⁶ Most versions protect only communications made by the child to the parent.⁴⁷ The issue of the extent to which any privilege

42. See *State v. Teel*, 712 P.2d 792, 794 (N.M. Ct. App. 1985)(subject of privilege must be both confidential and a communication); *State v. Bonaparte*, 660 P.2d 334, 336 (Wash. Ct. App. 1983)(two distinct privileges included in marital privilege statute); see also *Trammel v. United States*, 445 U.S. 40, 47 (1980)(confidential communications).

43. See *State v. Teel*, 712 P.2d at 794-95; *State v. Bonaparte*, 660 P.2d at 336-37.

44. In some jurisdictions, otherwise confidential communications are not destroyed by inadvertent disclosure. See, e.g., TEX. R. EVID. 503(a)(5) (communication is confidential if not intended for disclosure to third persons); TEX. R. CRIM. EVID. 503(a)(5) (same).

45. See *In re Grand Jury Proceedings of Agosto*, 553 F. Supp. 1298, 1325 (D. Nev. 1983)(child granted testimonial privilege not to testify against parent); *In re Grand Jury Proceedings of Greenberg*, 11 Fed. R. Serv. 579, 587 (D. Conn. 1982)(mother not required to testify against daughter on religious grounds). See generally Note, *Recognition of a Parent-Child Testimonial Privilege*, 23 ST. LOUIS U.L.J. 676 (1979)(proposal to grant privilege to both parent and child).

46. See *In re A & M*, 403 N.Y.S.2d 375, 381 (App. Div. 1978)(communications by minor child may be privileged); see also IDAHO CODE § 9-203(7) (Supp. 1987)(parent not compelled to disclose). The form of the parent-child privilege which only prohibits disclosure of confidential communications between the child and the parent is the most popular with commentators. See generally Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1, 58 (1982)(proposing statute granting privilege to minor children). Cf. Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910, 925 (1987)(would extend privilege to adult children).

47. See, e.g., IDAHO CODE § 9-203(7) (Supp. 1987); MINN. STAT. ANN. § 595.02(1)(i) (West Supp. 1987). The statutory privilege in Idaho provides:

Any parent, guardian or legal custodian shall not be forced to disclose any communica-

should apply is discussed in more detail *infra*.

III. MEASURING THE JUSTIFICATIONS FOR A PARENT-CHILD PRIVILEGE

A variety of arguments have been advanced in support of a number of familial privileges,⁴⁸ the most popular being the parent-child privilege. Such a privilege was not recognized at common law⁴⁹ and was apparently not seriously considered by the drafters of the Federal Rules of Evidence.⁵⁰ The current momentum for recognition of such a privilege was triggered in 1979, when a New York court adopted a

tion 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 parents, guardian or legal custodian.

IDAHO CODE § 9-203(7) (Supp. 1987). The statutory privilege in Minnesota provides:

A parent or the parent's minor child may not be examined as to any communications made in confidence by the minor to the minor's parent. A communication is confidential if made out of the presence of persons not members of the child's immediate family living in the same household. This exception may be waived by express consent to disclosure by a parent entitled to claim the privilege or by the child who made the communication, or by failure of the child or parent to object when the contents of a communication are demanded. This exception does not apply to a civil action or proceeding by one spouse against the other or by a parent or child against the other, nor to a proceeding to commit either the child or parent to whom the communication was made or to place the person or property or either under the control of another because of an alleged mental or physical condition, nor to a criminal action or proceeding in which the parent is charged with a crime committed against the person or property of the communicating child, the parent's spouse, or a child of either the parent or the parent's spouse, or in which a child is charged with a crime or act of delinquency committed against the person or property of a parent or a child of a parent, nor to an action or proceeding for termination of parental rights, nor any other action or proceeding on a petition alleging child abuse, child neglect, abandonment or nonsupport by a parent.

MINN. STAT. ANN. § 595.02(1)(i) (West Supp. 1987). *But see* Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 599 n.105 (1987)(proposing adverse testimonial and confidential communications privileges for both parent and child).

48. *See Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1563 (1985)(general discussion of familial privileges).

49. *See* J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2227, at 211-13 (McNaughten rev. 1961)(privilege not generally recognized by common law).

50. Neither the Proposed Federal Rules, nor accompanying notes, nor legislative history proposes a parent-child privilege.

similar rule.⁵¹ Since then only Idaho,⁵² Minnesota,⁵³ and Massachusetts⁵⁴ have codified a parent-child privilege. Of those courts which have considered such a privilege, most have rejected it.⁵⁵ The majority of the cases applying the privilege were tried in New York state courts,⁵⁶ and only a few federal courts have recognized or applied the privilege.⁵⁷

Despite judicial reluctance to do so, virtually every commentator addressing the issue has urged either legislative or judicial adoption of a parent-child privilege.⁵⁸ Some common themes or arguments have

51. See *People v. Fitzgerald*, 422 N.Y.S.2d 309, 312 (Westchester County Ct. 1979)(privilege based upon right of privacy in United States and New York constitutions).

52. See IDAHO CODE § 9-203(7) (Supp. 1987).

53. See MINN. STAT. ANN. § 595.02(1)(i) (West Supp. 1987).

54. See MASS. ANN. LAWS ch. 233, § 20 (Law. Co-op. Supp. 1987). The law was amended in 1986 to make minor children incompetent to testify against their parents. That new provision states:

Fourth, An unemancipated, minor child, living with a parent, shall not testify before a grand jury, trial of an indictment, complaint or other criminal proceeding, against said parent, where the victim in such proceeding is not a member of said parent's family and who does not reside in the said parent's household. For purposes of this clause the term "parent" shall mean the natural or adoptive mother or father of said child.

Id. This amendment was made following a controversial ruling by the Massachusetts high court which refused to excuse three minor children from testifying against their father. See *Three Juveniles v. Commonwealth*, 455 N.E.2d 1203, 1207 (Mass. 1983), *cert. denied*, 465 U.S. 1068 (1984); see also Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910, 913 (1987).

55. See, e.g., *United States v. Davies*, 768 F.2d 893, 899 (7th Cir.), *cert. denied*, ___ U.S. ___, 106 S. Ct. 533, L. Ed. 2d 464 (1985); *Port v. Heard*, 764 F.2d 423, 430 (5th Cir. 1985); *United States v. Ismail*, 756 F.2d 1253, 1258 (6th Cir. 1985); *In re Grand Jury Subpoena of Santarelli*, 740 F.2d 816, 817 (11th Cir. 1984); *United States v. Jones*, 683 F.2d 817, 819 (4th Cir. 1982); *United States v. Kinoy*, 326 F. Supp. 400, 406 (S.D.N.Y. 1980); *cf.* *State v. Gilroy*, 313 N.W.2d 513, 518 (Iowa 1981); *Three Juveniles v. Commonwealth*, 455 N.E.2d 1203, 1206 (Mass. 1983); *State v. Bruce*, 655 S.W.2d 66, 68 (Mo. Ct. App. 1983).

56. See, e.g., *People v. Harrel*, 450 N.Y.S.2d 501, 504 (App. Div. 1978); *In re A & M*, 403 N.Y.S.2d 375, 377-82 (App. Div. 1978); *People v. Fitzgerald*, 422 N.Y.S.2d 309, 311-13 (Westchester County Ct. 1979).

57. See *In re Grand Jury Proceedings of Agosto*, 553 F. Supp. 1298, 1325-31 (D. Nev. 1983)(survey of cases applying parent-child privilege); *In re Grand Jury Proceedings of Greenberg*, 11 Fed. R. Serv. 579, 584 (D. Conn. 1982)(acknowledging authority to create common law testimonial privileges).

58. See, e.g., Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 632 (1970); Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1, 1 (1982); Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 600 (1987); Comment, *From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?*, 1978 B.Y.U. L. REV. 1002, 1003; Note, *The Parent-Child Privilege: A Proposal*, 47 FORDHAM L. REV. 771, 782-91 (1979); Note, *Parent-Child Loyalty*

emerged from these writings and opinions. Their primary argument is grounded on the constitutional right of privacy. Another argument rests on the freedom of religion clause of the first amendment, with the remainder being based on social or policy arguments.

A. *The Constitutional Right of Privacy*

Advocates of a parent-child privilege rely heavily upon decisions from the United States Supreme Court indicating that a right of privacy is implied in the United States Constitution.⁵⁹ There are two components to this right: the right to conduct one's affairs in private, free from government intrusion, and the right to personal autonomy. *Griswold v. Connecticut*⁶⁰ is an example of the first component, and *Roe v. Wade*⁶¹ is an example of the latter component. Proponents of the privilege also point to decisions which stress the importance of "family" privacy and autonomy. For example, the Court has indicated that important personal decisions affecting marriage,⁶² procreation,⁶³ schooling,⁶⁴ and living arrangements⁶⁵ are important rights which the government should respect.

To date, however, no United States Supreme Court decision has indicated that the right to privacy absolutely requires any privilege in

and Testimonial Privilege, 100 HARV. L. REV. 910, 910 (1987); Comment, *Parent-Child Testimonial Privilege: Preserving and Protecting the Fundamental Right to Privacy*, 52 U. CIN. L. REV. 901, 902 (1983); cf. Note, *Questioning the Recognition of a Parent-Child Testimonial Privilege*, 45 ALB. L. REV. 142, 156 (1980).

59. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965)(right of privacy includes right to use contraceptives). The Court has never pinpointed a specific provision in the Constitution as the source of this right of privacy. Rather, it is found in the penumbra of other specific provisions, such as the first, fourth, fifth, and ninth amendments. See generally Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)(advocating recognition of right of privacy).

60. 381 U.S. 479 (1965)(freedom from intrusion by the government into decisions by couples to use birth control devices).

61. 410 U.S. 113 (1973)(recognizing womens' personal right to choose abortion).

62. See *Zablocki v. Redhail*, 434 U.S. 374, 383-85 (1978)(right to marry).

63. See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973)(right to abortion).

64. Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 222-31 (1972)(state's compelling interest in compulsory education outweighed by family and religious training of Amish society); see also *Pierce v. Society of Sisters*, 268 U.S. 510, 532 (1925)(recognizing right of parents to select child's school); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923)(freedom of education essential to orderly pursuit of happiness).

65. See *Moore v. City of East Cleveland*, 431 U.S. 494, 521 (1977)(restricting household inhabitants by blood relation).

private communications among family members.⁶⁶ The issue was before the Court in the 1985 term, but was rendered moot before the Court could make its decision. The case addressed the validity of a joint-participant exception to the spousal communications privilege.⁶⁷

Consequently, proponents of the privilege are left with advancing the following syllogism: (1) there is a constitutional right to privacy; (2) the United States Supreme Court has recognized the importance of the family and has in some cases declined from interfering with child-rearing; (3) the Court has recognized the desirability of protecting certain confidential communications, therefore; (4) there is a constitutional basis for recognizing a parent-child privilege which will nurture and protect the family unit.

The foregoing conclusion does not necessarily follow from the first three generally accepted arguments. The Supreme Court has been hesitant in concluding that intimate personal decisions or actions are necessarily protected as fundamental privacy rights. Indeed, decisions such as *Bowers v. Hardwick*⁶⁸ seem to signal the Court's reluctance to further expand the concept of "privacy."⁶⁹ Proponents of the parent-child privilege often fail to recognize that the constitutional right to privacy, like so many other constitutional rights, is not absolute. Even if a particular interest is protected under the broad and nebulous umbrella of "privacy" and thus entitled to status as a "fun-

66. See *Trammel v. United States*, 445 U.S. 40, 50-53 (1980). In *Trammel*, the Court implied that, unlike spousal testimonial privileges, confidential communications privileges protect the intimacy of the marriage relationship. However, it did not say that such privileges were constitutionally required. See *id.* Instead, the federal rule governing confidential marital communications is grounded in the common law. See *Wolfe v. United States*, 291 U.S. 7, 12 (1934).

67. See *United States v. Koecher*, ___ U.S. ___, 106 S. Ct. 1253, 88 L. Ed. 2d 46 (1986)(order vacating and dismissing case as moot).

68. ___ U.S. ___, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986)(Constitution does not grant fundamental right to homosexuals to engage in sodomy).

69. See *id.* at ___, 106 S. Ct. at 2846, 92 L. Ed. 2d at 148. In *Bowers v. Hardwick*, the Supreme Court asserted:

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution There should be, therefore, great resistance to expand the substantive reach of the [Due Process] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself authority to govern the country without express constitutional authority.

Id.

damental right,"⁷⁰ the government may still limit the right. However, to do so, the government must demonstrate that it has a compelling interest in limiting the right and that its means of limiting or intruding upon such right are necessary and closely tailored to furthering the compelling governmental interest.⁷¹

The Supreme Court has generally recognized that this close scrutiny is necessary only where the government has significantly limited the individual's exercise of his right to privacy.⁷² In the absence of such an intrusion the government's actions are generally subject only to a "rational basis" review. That is, the government need only show that there is some rational basis for its action.⁷³ A common example of this is the ability of states to set procedures and standards for obtaining marriage licenses. Although the right to marry is fundamental, absent a substantial interference with that right, no compelling governmental interest need be shown for marital statutes.⁷⁴

Even assuming that parent-child communications need some sort of constitutional protection, the threshold issue is whether compelled disclosure of otherwise confidential statements presents a significant barrier to the right of the parent and child to communicate in the future. Proponents argue that forcing a child or parent to testify against the other will almost always harm the relationship.⁷⁵ How-

70. The Supreme Court has struggled with defining "fundamental" rights that are entitled to heightened constitutional scrutiny. Aside from rights explicitly present in the Constitution, the Court has identified as fundamental those liberties which are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Other liberties recognized by the Court as fundamental are those "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *see also Bowers*, ___ U.S. at ___, 106 S. Ct. at 2844, 92 L. Ed. 2d at 146-47 (discussing whether homosexuals have fundamental right to engage in sodomy).

71. *See, e.g., Roe v. Wade*, 410 U.S. 113, 115 (1973); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

72. *See, e.g., Maher v. Roe*, 432 U.S. 464, 473 (1977)(undue burden on decision to obtain abortion); *Zablocki v. Redhail*, 434 U.S. 374, 388-91 (1978)(state placed significant and direct burden on person's opportunity to marry).

73. *See Harris v. McRae*, 448 U.S. 297, 324-26 (1980). In *Harris*, the Court rejected the argument that failure of the government to fund abortions placed a substantial obstacle in the path of a woman desiring an abortion and then applied the rational basis test in concluding that the legislative decision not to fund certain abortions was rationally based. *See id.*

74. *See Zablocki*, 435 U.S. at 388.

75. *See, e.g., Coburn, Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 617 (1970)(compelling parental testimony will destroy rapport crucial to sustaining parent-child relationship); *Stanton, Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1, 40-46 (1982)(unprivileged

ever, the studies are inconclusive, as one proponent of a broad family privilege points out.⁷⁶ Such a broad argument could be made in virtually any case where a family member or close friend is compelled to testify against another member or friend. A privilege or exclusionary rule should not be formulated to avoid a difficult or emotional dilemma, especially when revelation of the truth would be sacrificed.

Allowing that communications between a parent and child are entitled to some constitutional protection and that compelled testimony is a substantial intrusion, the government might still reasonably deny protection where revelation of those communications is necessary to further the compelling government interest in determining the truth in a trial. This would seem especially true where a child's actions have transgressed the criminal laws. Not only does the state have a compelling interest in protecting its citizens, but the child's actions might also be sufficiently egregious to exceed the protective bounds of autonomous discretion, which is generally free from governmental intrusion.

Furthermore, other decisions of the Court on the topic of privacy erode the proponents' constitutional argument. In a line of decisions, the Court has indicated that a child's decision to obtain an abortion may not be blocked by her parents.⁷⁷ Thus, even within the sanctity of family relations, the parents' control may be subject to limitation for the good of the child. This same reasoning should support limited governmental intrusion for the specific purpose of determining the truth in a judicial proceeding.

communications lead to breakdown of family as center of child development); Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 604 (1987)(without adoption of parent-child privilege, mutual trust between parent and child will be destroyed); Comment, *The Parent-Child Privilege: A Proposal*, 47 FORDHAM L. REV. 771, 787-88 (1979).

76. See *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1578-81 (1985).

77. See, e.g., *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 444 (1983)(government must provide alternative means of determining if minor capable of deciding whether abortion in best interest where parents refuse consent); *H.L. v. Matheson*, 450 U.S. 398, 411 (1981)(upholding statute allowing abortion despite parental objection); *Bellotti v. Baird*, 443 U.S. 622, 643 (1979)(state must provide alternative to parental consent); cf. *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976)(spouse not allowed veto power during first trimester).

B. *The Constitutional Right to Freedom of Religion*

A second possible constitutional argument is that compelling testimony from a child will violate the tenets of the family's religious beliefs and infringe upon the free exercise right provided by the first amendment.⁷⁸ The argument is that in some religions much spiritual emphasis is placed on the sanctity of the family. At least two courts have applied the privilege on religious grounds.⁷⁹ Like the privacy argument, there is some superficial appeal to this justification.

For "mainline" religions it is generally not difficult to point to religious teachings or writings and find some credible reference to family unity and respect for one's parents and elders. Indeed, for those of the Judeo-Christian faiths, the Fourth Commandment mandates that children honor their fathers and mothers. However, theologians would likely struggle with the delicate questions that might arise if, in the search for truth, reliable evidence was suppressed by reliance on similar teachings. The possible conflict of religious values poses some problem for codifying any particular parent-child privilege. While there are apparently some religious writings which point to protection of the family relationship, there are also religious writings which recognize the ability of parents to testify *against* their children. In the Old Testament book of *Deuteronomy*, the book of Mosaic law, instruction is given as to dealing with troublesome children:

If any man has a stubborn and rebellious son who will not obey his father or his mother, and when they chastise him, he will not even listen

78. See *Deuteronomy* 24:16 (New American Standard Translation). This source simply indicates that fathers shall not be put to death for their sons, nor shall sons be put to death for their fathers; everyone shall be put to death for his *own* sin. See *id.* But see *Diehl v. State*, 698 S.W.2d 712, 721 n.5 (Tex. App.—Houston [1st Dist.] 1985, no writ)(Levy, J., dissenting). Talmudic commentary interprets it as a ban on adverse testimony:

What is that implication of the text 'The fathers shall not be put to death for the sins of the children?' If it implies the fathers shall be put to death for the *iniquity* of the fathers, that has already been stated (Deut. 24, 16): "every man shall be put to death for his own sin." But the text implies that the fathers shall not be put to death *on the testimony* of the children and the children *on the testimony* of their fathers.

Id. (quoting Sanhedrin 27b)(emphasis original). However, *Deuteronomy* 21:18-21 explicitly permits parents to testify against incorrigible children and in effect provide evidence sufficient to sustain the penalty of death. See *Deuteronomy* 21:18-21 (New American Standard Translation).

79. See *In re Grand Jury Proceedings of Agosto*, 553 F. Supp. 1298, 1298 (D. Nev. 1983)(applying parent-child privilege pursuant to tenets of Catholic faith); *In re Grand Jury Proceedings of Greenberg*, 11 Fed. R. Serv. 579, 587 (D. Conn. 1982)(applying parent-child privilege pursuant to tenets of conservative Jewish teachings).

to them, then his father and mother shall seize him, and bring him out to the elders of his city at the gateway of his home town. And they shall say to the elders of the city, "This son of ours is stubborn and rebellious, he will not obey us, he is a glutton and a drunkard."

Then all the men of his city shall stone him to death; so you shall remove the evil from your midst, and all Israel shall hear of it and fear.⁸⁰

Particular religious beliefs notwithstanding, the courts have recognized time and again that the freedom to practice one's religion, although fundamental, is not absolute.⁸¹ The current standard used by the Supreme Court in determining whether the first amendment's free exercise clause has been violated bears markings of a balancing test.⁸² An individual must first show that the governmental action places a significant or substantial burden on that individual's religious beliefs or practices. Assuming such a burden is established, it must be balanced against the importance of the government's interests and the effect that allowing an exception would cause.⁸³ Whereas significant governmental burdens on an individual's religious beliefs will be subjected to strict scrutiny,⁸⁴ incidental governmental burdens may be

80. *Deuteronomy* 21:18-21 (New American Standard Translation). The passage quoted in the text is cited not to support the death penalty for recalcitrant children, but to demonstrate the well-known and oft-cited proposition that both sides of any reasonable ethical or moral issue can be supported by religious writings or teachings. In short, it is not clear that religious teachings necessarily and unalterably require a parent-child privilege.

81. *See, e.g., Bowen v. Roy*, ___ U.S. ___, 106 S. Ct. 2147, 2158, 90 L. Ed. 2d 735, 744 (1986). Chief Justice Burger asserted: "given the diversity of beliefs in our pluralistic society and the necessity of providing governments with sufficient operating latitude, some incidental neutral restraints on free exercise of religion are inescapable." *Id.*

82. *See Wisconsin v. Yoder*, 406 U.S. 205, 234-36 (1972)(Amish children not required to attend public schools after eighth grade).

83. *See, e.g., id.* at 213-15; *Goldman v. Weinberger*, ___ U.S. ___, 106 S. Ct. 1310, 1314, 89 L. Ed. 2d 478, 485 (1986)(finding military regulation preventing wearing of religious apparel with uniform not significant burden on religious freedom); *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905)(individual may be required to receive a vaccination); *Reynolds v. United States*, 98 U.S. 145, 168 (1879)(upholding federal law directed at Mormons prohibiting polygamy).

84. *See Yoder*, 406 U.S. at 221. Determining what constitutes a significant burden is a threshold issue and one not easily defined. *See Roy*, ___ U.S. at ___, 106 S. Ct. at 2158, 90 L. Ed. 2d at 744. Chief Justice Burger, in a plurality opinion, attempted to draw a distinction between those government regulations which may result in a criminal penalty being imposed against those exercising their religious freedom and those being denied government benefits. The former would be considered significant, while the latter of a less intrusive nature. The Chief Justice noted that "virtually every action that the Government takes, no matter how innocuous it might appear, is potentially susceptible to a Free Exercise objection." *Id.* at ___

sustained so long as there is some rational basis for the governmental action.⁸⁵

In the proper circumstances, the need for determining truth in a trial may outweigh religious tenets compelling silence. Assuming that the government has substantially interfered with the practice of religion by requiring disclosure of parent-child communications, it must demonstrate that its interests are compelling and that requiring the testimony is a necessary means to further those interests.⁸⁶ Obtaining reliable evidence for a trial, especially a criminal trial, should be considered a compelling interest.⁸⁷ Another inherent difficulty with relying upon the freedom of religion justification for a parent-child privilege is the general reluctance of the courts to question the legitimacy of a particular religious belief.⁸⁸ However, the courts may inquire into the centrality and sincerity of the belief.⁸⁹

C. *Social Policy Arguments*

1. Preservation of the Family

Proponents of a parent-child privilege argue that important and

n.17, 106 S. Ct. at 2156 n.17, 90 L. Ed. 2d at 749 n.17. As an example, the Chief Justice noted that someone might invoke a religious objection based on Norse mythology to filing a tax return on Woden's day (Wednesday). *See id.*

85. *See Roy*, ___ U.S. at ___, 106 S. Ct. at 2156, 90 L. Ed. 2d at 749-50 ("the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."). *But see id.* at ___, 106 S. Ct. at 2166, 90 L. Ed. 2d at 762 (O'Connor, J., concurring in part, dissenting in part)(no precedent for application of rational basis test in area of free exercise clause).

86. As with most of the free exercise clause cases, which seem to apply general rules in an ad hoc manner, *see generally Wisconsin v. Yoder*, 406 U.S. 205 (1972), whether testimony would be necessary turns on the facts and circumstances of the case and the availability of alternative, reliable evidence.

87. Whether obtaining reliable evidence for a civil trial should be considered a compelling governmental interest is debatable. In such cases, the government's interest is really that of the individual litigant seeking disclosure. *Cf. United States v. Nixon*, 418 U.S. 683, 712 & n.19 (1974). In *Nixon*, the Supreme Court stressed that its concern with the balance between the President's claim to an executive privilege and the need to produce all relevant evidence was grounded in the constitutional dimensions of criminal proceedings, which are not present in civil litigation. *See id.*

88. *See Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)(deciding what constitutes a religious belief is delicate matter).

89. *See, e.g., Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981)(courts may inquire into whether individual's assertion made in good faith); *Yoder*, 406 U.S. at 215-16 (claims must be "rooted in religious belief;" Court distinguished beliefs of Amish from philosophical and personal beliefs such as those of Thoreau).

compelling interests are at stake any time a child, or parent, is compelled to testify against the other. Proponents assert that studies indicate the nuclear family is in danger of extinction and that any privilege protecting the family will serve as an invaluable bastion against external threats.⁹⁰ The family, they argue, should be permitted to work through any problem without fear of disclosure of any private communications.⁹¹

These social policy arguments urging protection of interfamilial communications have some superficial appeal. Most parents welcome and encourage frank communications from their children. However, the credibility of these arguments is diminished when it becomes apparent that neither proponents nor opponents of the parent-child privilege can cite convincing empirical data to show whether such a privilege ever encourages frank and confidential discussions.⁹² It is much easier, and more convincing, to consider the more tangible and immediate effects of using the privilege to suppress the introduction of probative evidence. Furthermore, the difficulty in relying upon a particular social theory or philosophy for a privilege is that other equally credible movements or theories may be ignored. For example, advocates of the popular "tough-love" movement might conceivably welcome "tough" testimony from parents concerning disposition of a child accused of criminal conduct. A child's, or some other third person's, ability to obstruct that testimony would interfere with the parents' autonomous right to rear their children the way they deem necessary and proper.

2. Repugnancy of Family Members Testifying Against Each Other

Another argument raised in support of the privilege is grounded on the natural repugnancy of requiring family members to testify against each other.⁹³ It seems apparent that to rely upon such testimony can, in some instances, be problematic and a tactic to be avoided in all but

90. See Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 610-11 (1987).

91. See *id.* at 608.

92. See *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1578-81 (1985)(noting empirical stand-off as to whether parent-child privilege encourages frank discussion between parents and children).

93. See Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. at 611-13.

the rarest of circumstances. However, should the fact that, in some situations, there may be difficulty in admitting the testimony support a privilege which would apply even where it would not be repugnant and would not create a dilemma for the testifying member? Examples sometimes cited to advance this argument are the reminders that totalitarian governments do not recognize a parent-child privilege.⁹⁴ Such reminders do little more than stir the emotions, and ignore the fact that until recently, little, if any, serious attention was paid to such a privilege by either the courts or commentators in this country.

Our system of government, past or present, in no way resembles Nazi Germany or Soviet Russia. As with any aspect of the judicial process which is subject to abuse, the courts' and the public's response to "repugnant" use of familial testimony provides an adequate remedy. Few prosecutors are willing to incur public wrath and criticism for needless use of testimony of either a child or a parent against the other. In short, the fear of abuse is simply not sufficiently well-founded to justify the codification of a parent-child privilege and is certainly not grounds for blanket exclusion of otherwise reliable evidence.

3. The Cruel Trilemma

A related social policy argument sometimes raised is that calling a family member to the stand creates a cruel trilemma for the witness.⁹⁵ The witness must either (1) testify truthfully and condemn the accused-relative, (2) testify falsely and commit perjury, or (3) refuse to testify and risk contempt. A similar trilemma, however, faces every witness in such a situation.⁹⁶ Is the trilemma for the witness any less compelling when the accused is a lifelong friend or associate? Some

94. See *Diehl v. State*, 698 S.W.2d 712, 720 (Tex. App.—Houston [1st Dist.] 1985, no writ)(Levy, J., dissenting). Justice Levy asserted:

[Requiring parents and children to testify against each other] is inconsistent with the way of life we cherish, and raises the spectre of a totalitarian regime, as created by Adolph Hitler and imagined by George Orwell, where systematic government programs attempt to 'persuade' young children to inform against their parents. We want no 'Hitler Jugend' in the United States, nor do we want the police to behave in a manner which brings the law into disrepute.

Id.

95. See *id.* (risking perjury or contempt "could seriously undermine public respect and confidence in our system of justice"); see also Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1, 46 (1982).

96. The witness' trilemma is often associated with the right against self-incrimination.

would answer that when blood ties are at stake, the burden on the witness is especially difficult. That response seems to place a higher premium on mere blood ties, while ignoring the actual relationships involved. In some cases the blood ties are all that exist where the child or parent has shown little familial intimacy, love or respect—until judicial proceedings are commenced.

The problem with this particular social policy argument is that it assumes that whatever familial tie exists will necessarily vanish once the witness is compelled to take the stand. If the family relationship is indeed based on trust and respect, which is the proponents' basis for the privilege, then that relationship should withstand the compulsion to testify. Even assuming that the relationship would suffer, such is not enough reason to codify a privilege and suppress otherwise reliable evidence.⁹⁷

D. *Other Legal Arguments*

Federal Rule of Evidence 501⁹⁸ is sometimes cited by proponents as authority for codifying a parent-child privilege.⁹⁹ The argument generally asserts that Congress recognized the importance of developing privileges in American jurisprudence and that the flexible language of rule 501 not only permits the adoption of new privileges, but also encourages such adoption.¹⁰⁰ However, review of the history of rule 501 indicates that it was a compromise. There was such a negative response to the codification of any privilege that Congress decided to defer to the courts.¹⁰¹ Such a compromise can hardly be viewed as a mandate to codify a parent-child privilege that has been rejected by most of the courts which have considered it. Rule 501 can be relied

97. See 8 J. WIGMORE, EVIDENCE § 2228, at 213-17 (McNaughten rev. 1961 & Supp. 1986). Professor Wigmore observed that the danger of discord which might arise from spouses testifying against each other is only a "casual and minor one, not to be exaggerated into the foundation of so important a rule." *Id.* at 216. Although Professor Wigmore was addressing the adverse testimonial privilege, the same conclusion would seem apropos for any parent-child privilege.

98. FED. R. EVID. 501 (allowing federal courts to formulate specific privileges).

99. See *In re Grand Jury Proceedings of Agosto*, 553 F. Supp. 1298, 1322 (D. Nev. 1983).

100. Proponents assert that the underlying legislative history of Congress' rejection of the more restrictive proposed privileges supports a liberal attitude toward recognizing privileges. See Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L.J. 613, 616 (1976).

101. See S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 333-35 (4th ed. 1986).

upon just as strongly by opponents of the privilege; the better course is to test the viability of the privilege in the courts instead of codifying the privilege.

Another legal argument for adopting a parent-child privilege compares other contemporary privileges which have commonly protected a wide range of interests, including financial interests. The argument is that if our judicial system is willing to protect marriage, attorney-client, and physician-patient relationships through use of privileges, then the system should protect the parent-child relationship.¹⁰² The fact that less altruistic relationships are protected does not justify codification of an additional privilege. This rationale is based upon the arguable contention that existing privileges are necessary and that adopting additional privileges is desirable. Yet, if a parent-child privilege is widely adopted, then similar privileges may be extended to other types of relationships.¹⁰³ At least one commentator has called for adoption of a privilege for "shared intimate relationships"¹⁰⁴ which would include protection of confidential communications between, *inter alia*, "intimate friends."¹⁰⁵

A significant factor in rejecting a confidential communications privilege for the parent-child relationship is there is little reason to believe that the parent and child would ever depend on such a privilege in making statements to one another.¹⁰⁶ In many of the other recognized privileges, one of the parties, usually a professional, can be trusted to expressly or impliedly inform the other that their communi-

102. See Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 604-14 (1970)(discussing other evidentiary privileges as support for child-parent privilege).

103. See *People v. Sanders*, 457 N.E.2d 1241, 1245 (Ill. 1983)(spread of privilege would be difficult to maintain). Fear that privileges similar to a parent-child privilege would be extended to other relationships is not unfounded. The difficulty with codifying or otherwise adopting a parent-child privilege is to fairly include all of those who would deserve the privilege. Once a utilitarian privilege is adopted, it must be broad enough to include the non-traditional families which may well be more loving and trusting than those of the traditional composition: father, mother, and child. If one accepts the argument that it is the unique trust and relationship of the "family" which gives rise to the privilege, then other so-called family and intimate relationship privileges would be more easily accepted.

104. *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1588 (1985).

105. See *id.* at 1590. The author notes that such a privilege would cover "unmarried cohabitants, homosexual lovers, and 'intimate' friends." *Id.*

106. See *id.* at 1578-81.

cations will remain confidential.¹⁰⁷ Indeed, the drafters of the proposed federal rule governing a marital privilege did not include a confidential communications provision for this very reason.¹⁰⁸ Similar analysis would support rejecting any protection of family communications.

E. *Summary*

In reviewing the various justifications for adoption of a parent-child privilege, it is apparent that none is compelling. The constitutional arguments are grounded primarily on dicta or analogy. Although some courts have relied upon the right of privacy and the free exercise clause, there are no United States Supreme Court opinions holding that confidential communications are constitutionally protected. The remaining arguments are founded primarily on sociological and psychological viewpoints which are superficially attractive but insufficient to obstruct otherwise reliable information from the fact-finders. In the balance, the need for such information outweighs any constitutional or social interest which the parent and child might otherwise possess.

IV. A CRITIQUE OF THE PROPOSED ABA MODEL

A. *Introduction*

In the past several years, considerable effort has been expended drafting various proposals for a workable parent-child privilege. As noted in the preceding discussion, the justifications for the privilege do not support codifying legislation, nor do they support a wholesale adoption by courts of the privilege. On the other hand, the arguments against any parent-child privilege become clearer when one examines the specifics of the proposed models.

Although proponents do not agree on the most appropriate model,

107. See *State v. Gordon*, 655 F.2d 478, 486 (2d Cir. 1981)(statements to priest concerning business transaction not protected). With privileges involving a professional, it is usually not required that the professional actually advise the client that their communications will remain confidential. For example, if the priest-penitent privilege is to apply it is necessary that the penitent have made his statements to the priest pursuant to obtaining spiritual counseling or advice. Statements made to a clergyman on matters of business would generally not be protected. See *id.*

108. See FED. R. EVID. 505 advisory committee's note (1972 proposed final draft) (printed in 56 F.R.D. 183, 246 (1973)).

there are some common themes or issues in the various proposals. Generally, the models follow a standard format for codification of privileges. The proposed models typically cover: (1) definitions of key terms; (2) the general rule of privilege; (3) identification of who may claim the privilege; (4) waiver of the privilege; and (5) exceptions to the rule of privilege. There is, of course, a variance in the coverage of the models and in the quality and clarity of the draftsmanship.

For purposes of critique and analysis, this article focuses on a model statute proposed by the American Bar Association's Criminal Justice Section.¹⁰⁹ The model represents considerable debate and compromise and serves as a potential template for legislatures and courts considering the adoption of a parent-child privilege.¹¹⁰

The proposed model offers two different privileges. The first is an adverse testimonial privilege which allows either the parent or the child to prevent the other from testifying.¹¹¹ The second privilege is a confidential communications privilege which allows either the parent or the child to prevent the other from disclosing information which was communicated with the intent that it remain confidential.¹¹² The following sections briefly address the proposed model in the key areas outlined above. Despite careful and narrow tailoring, the model itself demonstrates inherent problems of interpretation and application which are not found in some of the other more commonly accepted privileges.

B. *Definitions*

As with most codified privileges, the proposed model contains definitions of key terms such as "parent," "child" and "confidential communication." Although the topic of definitions may seem mundane, it

109. The ABA proposed model for codification of a parent-child privilege had its genesis in the Criminal Justice Section and was presented to the Section at its meeting in August, 1986 in New York. After lengthy debate, the Section voted to seek the approval of the ABA House of Delegates. In San Francisco in August 1987, at the annual meeting of the ABA, the proposal was withdrawn with a view toward presenting it at the February, 1988 mid-year meeting. See *A Model Parent-Child Privilege* (editor's note), 2 CRIM. JUST., No. 2, Summer 1987, at 34.

110. The current ABA proposed model for codification of a parent-child privilege, completed in April, 1987, is the result of several years of drafting and redrafting, compromise and debate. A copy of the most recently available draft of that model and the drafters' comment are included as appendices to this article.

111. See ABA MODEL PARENT-CHILD PRIVILEGES STATUTE § 102 (Current Proposed).

112. See *id.* § 103.

is in the definitional section that the real breadth of a privilege is often buried. A parent-child privilege intended to have the broadest application could define "child" to include any person having a "parent," which in turn could be defined to include not only a natural parent, but also any person having control or responsibility for the child.¹¹³ The application of this potentially broad definition could block communications by an emancipated adult to a grandparent, uncle, guardian, or older sibling. Even assuming that a parent-child privilege is appropriate, this broad approach is unnecessary and resembles more of a "family" privilege than a parent-child privilege.¹¹⁴

The definitions in the ABA proposed model statute are narrower, but still capable of overbreadth. The definitions of "adverse,"¹¹⁵ "party to a confidential communication,"¹¹⁶ and "proceeding"¹¹⁷ are unremarkable. However, the following terms are troublesome: (1) "confidential communication";¹¹⁸ (2) "family member";¹¹⁹ (3) "child";¹²⁰ and (4) "parent."¹²¹

The first key term, "confidential communications" covers private "messages" between a parent and the parent's child.¹²² However, according to the model definition, the messages need not be made in absolute privacy because the presence of other family members does not destroy the communication's confidentiality.¹²³ Nor would subsequent revelation of the messages to other family members defeat con-

113. See Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1, 58 (1982). For example, the Stanton model defines "parent" as "the natural or adoptive parent, the stepparent or foster parent, guardian or other adult having legal or practical responsibility for the unemancipated child." *Id.*

114. See notes 105-107 *supra* and accompanying text for discussion on the concerns for adopting an unmanageable privilege.

115. ABA MODEL PARENT-CHILD PRIVILEGES STATUTE § 101(a) (Current Proposed).

116. *Id.* § 101(f).

117. *Id.* § 101(g).

118. *Id.* § 101(c).

119. *Id.* § 101(d).

120. *Id.* § 101(b).

121. *Id.* § 101(e).

122. See *id.* § 101(c). This section provides:

Confidential Communication means a message intended to convey a meaning, made between a parent and the parent's child with the reasonable expectation its content not be known by anyone except family members. The message may be made by any means including oral, written or sign language or assertive conduct.

Id.

123. See *id.* ("with the reasonable expectation its contents not be known by anyone except family members.").

fidentiality.¹²⁴ According to the model, the term "family member," discussed *infra*, includes a parent or the parent's child.¹²⁵ It is not clear whether "parent's child"¹²⁶ refers to only the child in question or to another child of the parent, i.e., a sibling or another child of a second parent. If the drafters intended this latter interpretation,¹²⁷ then the rule is broader than many privileges which may be nullified by the presence of a third person.¹²⁸ Such an interpretation incorrectly assumes that other family members such as rival siblings have a need to hear the confidential communication or to assist in solving whatever problem may be revealed. Again, this extension creates the possibility of a much broader, and wholly unjustifiable, "family" privilege.¹²⁹

The second key term, "family member,"¹³⁰ is an apparent attempt to control the runaway breadth of the parent-child privilege. Yet, this definition is also problematic. In addition to the difficulty of defining "parent's child," there is apparently no requirement that the family members actually reside together.¹³¹ Superficially, the definition covers not only a "model" family relationship, but also seems to cover, for example, confidential communications made by a desperate prodigal child returning after an extended absence to obtain financial assistance from otherwise uncaring parents. The proposed model apparently makes no attempt to distinguish the two situations. This lack of distinction marks another broad approach and demonstrates the difficulty of adopting an appropriate privilege. Few legislators are

124. *See id.*

125. *See id.* § 101(d).

126. *Id.*

127. The language of section 101(c) implies that a family member other than either the parent or the parent's child may be present. If the drafters intended to limit confidential communications to a parent and a child, then the language referring to family members is unnecessary. Even more curious is the lack of clear guidance in the model definition itself as to whether the presence of a second parent would defeat the privilege. In their comment at section 101(c) (Appendix B to this article), the drafters indicate that the presence of a family member will not void the privilege and that the definition is intentionally "broad."

128. *See* TEX. R. CRIM. EVID. 504(1) (covers only marital communications not intended for disclosure to another).

129. *See generally* *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450 (1985) (extensive discussion of privileged communications including history, theory, and recent developments).

130. *See* ABA MODEL PARENT-CHILD PRIVILEGES STATUTE § 101(d) (Current Proposed).

131. *See id.* The section provides that "[f]amily member" means a parent or the parent's child." *Id.*

willing to define the concept of a worthy family relationship, even though compelled revelation of confidential communications in a trusting, loving relationship is arguably more repugnant to society than a scenario involving a runaway returning only to obtain money.¹³²

The third and fourth key terms define "child" and "parent." The term "child" is defined as "a person who has not attained the age of majority."¹³³ The definition of "parent" is broad—it includes a natural or adoptive parent, a step-parent, or a legal guardian.¹³⁴ More remarkable is the fact that the definition includes "any living person the court recognizes to have acquired a right to act as a parent . . ."¹³⁵ The model lists as examples a foster parent or relative having long-term custody of a child.¹³⁶ This last category is particularly troublesome. The examples cited by the drafters are not exclusive and therefore a supervisor of a home for runaway children might qualify as a person who has acquired a right to act as a parent. Even assuming that the definition implies that a child is living in some sort of "home" environment, it would still encompass statements made to an adult sibling acting as a *de facto* surrogate parent.¹³⁷

Under the terms of the model privilege, the parent-child relationship could be easily stretched to cover relationships which are not familial. Although the Supreme Court has historically been generous

132. Similar line drawing is required in other privileges, where, for example, there must be a marriage or some sort of professional relationship. See TEX. R. EVID. 503(b) (attorney-client privilege limited to relationship between "client" and "lawyer" providing legal services); TEX. R. CRIM. EVID. 503(b) (same); TEX. R. EVID. 504(a) (confidential communications privilege limited to communications made between spouses while married); TEX. R. CRIM. EVID. 504(1)(b) (same). This sort of definition requires much closer scrutiny of the motives for the relationship.

133. ABA MODEL PARENT-CHILD PRIVILEGES STATUTE § 101(b) (Current Proposed). The drafters' comment indicates that state law would control the issue of who is considered a "minor." *Id.* § 101(b) (comment attending).

134. See *id.* § 101(e).

135. *Id.*

136. See *id.* The drafters note in their comment that the definition "could also include situations where a parent/child relationship exists but there is *no biological or legal relationship* between the two parties." *Id.* (comment attending)(emphasis added).

137. Some proponents argue that even if a parent-child privilege cannot encourage confidential communication within the family, the absence of one would certainly discourage such communication. This sort of utilitarian argument would seem to support the extended reasoning that, even though the communications were not made in a trusting or intimate family context, future communications and reliance should not be jeopardized. See *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1579 (1985).

in defining "family,"¹³⁸ it has not been faced with an argument that someone responsible for a child might invoke a constitutional right not to testify against the child.

The point here is that any attempt to draw workable definitions entails the delicate and possibly offensive process of defining what constitutes a "family." In an attempt to be fair to all possible family arrangements, any model covering this point potentially stretches the privilege beyond whatever tenuous rationale may have originally supported it.

C. *The Adverse Testimonial Privilege*

1. In General

In proposing models for a parent-child privilege, drafters have two options. The privilege may be drafted to cover either or both: (1) an adverse testimonial privilege; (2) a confidential communications privilege. The first type of privilege prevents either the child or the parent from taking the witness stand to testify against the other.¹³⁹ Such a privilege could be drafted to follow a similar privilege applicable in some jurisdictions to adverse spousal testimony. This privilege is difficult to justify in light of the Supreme Court's opinion in *Trammel v. United States*,¹⁴⁰ which rejected the argument that a defendant should be able to suppress the testimony of his or her spouse.¹⁴¹ This particular privilege is vested in the witness spouse alone. The rationale for a husband-wife privilege, marital harmony, is usually already absent if one of the spouses is willing to testify against the other.¹⁴² The same

138. See *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977)(members of extended family included within definition of "family"). The Court in *Moore* applied strict scrutiny to invalidate a city's attempt to control the living arrangements of "related" members of a family. See *id.* But see *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8-9 (1974)(applying rational basis test in sustaining ordinance affecting unrelated individuals). There is an analogous distinction between attempts to control living arrangements and attempts to obtain information necessary for either a criminal or civil proceeding.

139. See *In re Grand Jury Proceedings of Agosto*, 553 F. Supp. 1298, 1325 (D. Nev. 1983)(applying adverse testimonial privilege). See generally Kandoian, *The Parent-Child Privilege and the Parent-Child Crime: Observations on State v. De Long and In re Agosto*, 36 ME. L. REV. 59 (1984).

140. 445 U.S. 40 (1980).

141. See *id.* at 52-53.

142. See *id.* at 52. Note, however, that according to one commentator fourteen states still permit the accused spouse to prevent his or her spouse from testifying. See *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1467 n.30 (1985).

argument could be made with regard to any similar coverage of parent-child testimony. That is, the existence of family harmony is questionable if either the child or the parent is willing to testify. The adverse testimonial privilege is also potentially much broader than a confidential communications privilege because it would exclude testimony about what the witness observed without regard to whether he had ever discussed it with another family member.

2. Scope and Waiver

The proposed model statute provides that the testifying parent or child may decline to testify adversely against the other in any criminal proceeding.¹⁴³ The proposed model statute indicates that the adverse testimonial privilege is held by the parent or the child who is the witness.¹⁴⁴ However, the privilege will not exist with regard to a matter which occurred before there was a parent-child relationship.¹⁴⁵ This appears to mirror what some jurisdictions treat as a marriage entered into solely for the purpose of suppressing testimony. The marriage usually remains valid, but neither spouse may prevent the other from taking the stand.¹⁴⁶ In the context of the parent-child privilege, the drafters of the model statute apparently recognized that two individuals could theoretically attempt to suppress testimony through adoption or some similar action designed to make the relationship appear to be one of parent and child.

3. Exceptions

The drafters of the model statute list two exceptions to the parent-child testimonial privilege. First, the privilege is not available where the defendant is charged with a crime against the witness or another family member.¹⁴⁷ Second, the privilege is not available where the witness and the defendant have acted jointly in any criminal enterprise.¹⁴⁸ This second exception parallels the joint participant excep-

143. See ABA MODEL PARENT-CHILD PRIVILEGES STATUTE § 102(b)(1) (Current Proposed).

144. See *id.* § 102(c).

145. See *id.* § 102(b)(2)(ii).

146. See TEX. R. CRIM. EVID. 504(2).

147. See ABA MODEL PARENT-CHILD PRIVILEGES STATUTE § 102(d)(1) (Current Proposed).

148. See *id.* § 102(d)(2).

tion to the husband-wife privilege.¹⁴⁹ Here, the exception is not limited to criminal activity which is the focus of the criminal proceeding; presumably, the prosecution may defeat the parent-child privilege if it can show that the defendant and the witness acted jointly in any criminal conduct, even if it is totally unrelated to the proceeding.

D. *Confidential Communications Privilege*

1. Scope of the Privilege

The second option available to drafters is the parent-child confidential communications privilege. More easily justified, this privilege places a premium on the private nature of communications in the family context. However, as noted earlier, it can be drafted in such a way as to create a privilege as broad as the adverse testimony privilege.¹⁵⁰

The proposed ABA model extends the privilege to both civil and criminal proceedings and indicates that either the parent or the child may prevent the other from disclosing confidential communications between the parent and the child if either is a party to the proceeding¹⁵¹ or if either is called to testify before a grand jury.¹⁵² However, the privilege does not apply if the parent-child relationship did not exist at the time of the confidential communication.¹⁵³ This limitation mirrors the similar restriction placed upon the proposed adverse testimonial privilege.¹⁵⁴

2. Invoking the Privilege

The breadth of any privilege is determined to a great extent by who is permitted to invoke the privilege. As a general rule, most privileges may be invoked by the holder of the privilege or by someone on behalf

149. Compare ABA MODEL PARENT-CHILD PRIVILEGES STATUTE § 103(d)(2) (Current Proposed) with TEX. R. CRIM. EVID. 504.

150. See IDAHO CODE § 9-203(7) (Supp. 1987); MINN. STAT. ANN. § 595.02(1)(i) (West Supp. 1987). See generally Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 10 (1982).

151. See ABA MODEL PARENT-CHILD PRIVILEGES STATUTE § 103(b)(1)(i) (Current Proposed).

152. See *id.* § 103(b)(1)(ii).

153. See *id.* § 103(b)(2)(ii).

154. See ABA MODEL PARENT-CHILD PRIVILEGES STATUTE § 102(d)(1) (Current Proposed).

of the holder.¹⁵⁵ In several proposed and adopted parent-child privileges, the drafters have suggested that both the testimonial and communications privileges be invocable by either the child or the parent.¹⁵⁶ Of course, that is the broadest construction and the most protective of the parent-child relationship. By analogy to the marital testimonial privilege, the *Trammel* decision would not require a parent-child testimonial privilege for the accused parent or accused child.¹⁵⁷

The proposed ABA model suggests that the confidential communications privilege be held jointly by the parent *and* the parent's child.¹⁵⁸ However, the model also indicates that "any party to a confidential communication may raise the privilege . . ."¹⁵⁹ The model defines "party to a confidential communication" as "a parent or the parent's child . . ."¹⁶⁰ That definition, read in conjunction with the word "any," seems to imply that a sibling member, as a party to the communication, may invoke the privilege.

The proposed communications privilege is overly broad to the extent that it encompasses statements made by the parent to the child.¹⁶¹ If it is the child's confidential statements which need to be privileged, then it should be the child alone who holds the privilege, either as an accused or as a witness.¹⁶² The effect of giving the privi-

155. See, e.g., C. McCORMICK, EVIDENCE § 73.1, at 173-74 (3d ed. 1984)(who may assert privilege); *id.* § 92, at 221-23 (holder of attorney-client privilege).

156. See Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1, 59 (1982). The current Minnesota statute provides for claims and waivers by either the parent or the child. See MINN. STAT. ANN. § 595.02(1)(i) (West Supp. 1987); see also *People v. Fitzgerald*, 422 N.Y.S.2d 309, 315 (Westchester County Ct. 1979). However, in Idaho, only the parent may claim the privilege. See IDAHO CODE § 9-203(7) (Supp. 1987).

157. See *Trammel v. United States*, 445 U.S. 40, 44-46 (1980).

158. See ABA MODEL PARENT-CHILD PRIVILEGES STATUTE § 103(c) (Current Proposed). This provision is confusing. Although the drafters apparently intend to place the privilege only in the hands of the parent and the child, it could be claimed by a third party as a member of the family who heard the communication. In any event, a third person should only be able to claim the right on behalf of either the child or the parent. Furthermore, the effect of giving the privilege to both the parent and the child is that an accused parent can suppress otherwise voluntary testimony by the child concerning statements made by the child to the parent.

159. *Id.* § 103(c)(2) (emphasis added).

160. *Id.* § 101(f).

161. See *id.* § 101(c). This section indicates that a confidential communication includes messages between the parent and the parent's child. There is no requirement that only messages from the child to the parent be protected. See *id.*

162. Most of the cases which have addressed the issue of whether both the child and the

lege to both the parent and the child is that an accused parent can suppress otherwise voluntary testimony by the child concerning statements made by the child to the parent. Rather, any other person should only be able to claim the privilege on behalf of the child.

Furthermore, it is usually the holder of the privilege who may waive the privilege.¹⁶³ Most codified privileges require that any waiver, whether express or implied, be knowing and voluntary.¹⁶⁴ The proposed model includes no reference to waiver but implicitly suggests that both the child and the parent, as joint holders, must cooperate in any waiver.¹⁶⁵ Thus, a parent-defendant could suppress an incriminating statement he or she had made to the child although the child was willing to testify against the parent. Little justification exists for such a rule.

3. Exceptions

Assuming that the drafters have proposed a broad privilege, some reasonable limitations may be effected by including exceptions to the privilege. Typical exceptions include situations in which either the child or the parent is charged with criminal conduct against the other or where some sort of legal adversarial relationship is involved. These types of exceptions are essential to circumscribing otherwise broad and unmanageable privileges. In addition, such exceptions reflect policy compromises recognizing important societal interests in declining to protect certain communications or relationships.¹⁶⁶

parent's statements should be privileged have focused entirely on communications by the child to the parent. Indeed, the argument for protecting communications made by a parent to a child is much weaker. Virtually all of the justifications for the privilege center on the need to nurture trust by the child in the parent. See Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1, 59 (1982). But see Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 632 (1970)(proposing model covering communications by both the child and the parent).

163. See 8 J. WIGMORE, EVIDENCE § 2321, at 629-30 (McNaughten rev. 1961 & Supp. 1986)(only client may waive attorney-client privilege); *id.* § 2327, at 634-38 (voluntary testimony is waiver); *id.* § 2340, at 670-73 (marital privilege belongs to communicating spouse); *id.* § 2386, at 851-53 (only patient may waive physician-patient privilege).

164. See, e.g., TEX. R. CRIM. EVID. 511 (waiver of privilege by voluntary disclosure); TEX. R. CRIM. EVID. 512 (privilege not waived if erroneously compelled or without opportunity to claim).

165. See ABA MODEL PARENT-CHILD PRIVILEGES STATUTE § 103(c) (Current Proposed). The proposed model should be compared with the Idaho provision which indicates that only the parent may waive the privilege. See IDAHO CODE § 9-203(7) (Supp. 1987).

166. See *Trammel v. United States*, 445 U.S. 49, 50 (1980).

The ABA proposal contains nine fairly typical exceptions. There is no privilege, *inter alia*, where the parent and the child are adverse parties,¹⁶⁷ where the child's parents are adverse parties,¹⁶⁸ where either the parent or the child is charged with a crime against the other,¹⁶⁹ where the issue of parental misconduct or misfeasance is in issue,¹⁷⁰ where an action has been brought to establish the competence of either the parent or the child,¹⁷¹ or where the parent and child were jointly involved in activity giving rise to the proceeding.¹⁷² This last exception parallels the joint-actor exception to the husband-wife privilege which has been adopted by some jurisdictions.¹⁷³

Again, assuming that a parent-child privilege is appropriate, these exceptions address those societal interests which outweigh any possible need to protect a parent-child relationship. The list could be lengthened by recognizing that in some offenses the government justifiably intrudes into an otherwise private relationship. For example, where the communication is relevant to a case in which the defendant is charged with a felony offense, especially a capital offense, the privilege should not apply.

E. Penalties

The drafters of the proposed ABA model have attempted to put some teeth into the two privileges by setting out penalties, both for disclosing and for failing to disclose. The first provision addresses the refusal of a witness to testify as to matters which are not protected by either privilege or by any other applicable rule of law.¹⁷⁴ The model provides that refusal to testify is punishable as contempt and that in assessing an appropriate penalty the court should consider factors such as the age, mental condition, future welfare, and safety of the

167. See ABA MODEL PARENT-CHILD PRIVILEGES STATUTE § 103(d)(1) (Current Proposed).

168. See *id.* § 103(d)(2).

169. See *id.* § 103(d)(4).

170. See *id.* § 103(d)(8).

171. See *id.* § 103(d)(5).

172. See *id.* § 103(d)(3).

173. See IDAHO CODE § 9-203(7) (Supp. 1987); MINN. STAT. ANN. § 595.02(1)(i) (West Supp. 1987). See generally Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 10 (1982).

174. See ABA MODEL PARENT-CHILD PRIVILEGES STATUTE § 104(a) (Current Proposed).

witness.¹⁷⁵ Presumably this provision is included for the purpose of protecting the parent-child relationship notwithstanding the absence of a privilege. Depending upon the disposition by the court, there may be little incentive for either a parent or a child to offer unprivileged testimony about the other if they suspect that no sanctions will be imposed.

The second provision addresses the issue of sanctions for testifying about a confidential communication. It states that either a parent or child who testifies in the absence of a joint waiver shall be punished by the court for contempt.¹⁷⁶ The model fails to delineate whether this same sanction would apply to any other witness, such as a sibling, who wrongfully disclosed privileged communications. However, the model does indicate that if a witness wrongfully discloses the confidential communication, the judge should consider the same criteria in assessing a penalty.

F. *Summary*

The proposed ABA model ignores the general trend to adopt only a confidential communications privilege for statements made by a child to his or her parent. However, assuming that any privilege is justified, the proposal presents several major problems. First, its broad definition of the key term "parent" creates problems of application. It opens the door to unbridled application and expansion of a more generalized and unjustified "family" privilege. Second, by permitting persons other than a minor child to invoke the privileges, the model is unnecessarily broad in covering those interests which proponents claim to be at the heart of the privilege—encouraging disclosures by children to their parents. Third, although the listed exceptions to the privilege are acceptable, any codification of a parent-child privilege should include some provision for recognizing that in certain serious offenses, whatever justification might exist for the privilege should defer to the public good.

V. CONCLUSION

The momentum for adopting a parent-child privilege seems to have been generated by a few courts and a number of commentators who

175. *See id.* § 104(a)(3).

176. *See id.* § 104(b).

see the privilege as an important protector of the family unit. Although there may be several superficially attractive social and policy arguments, there is simply no merit to the constitutional or legal arguments offered in support of the privilege. The best constitutional argument proponents have been able to muster is the implicit right to privacy which, to date, has been granted limited application by the United States Supreme Court. The proponents' strongest support for their contention is that dicta and implications of right to privacy decisions favor establishment of a constitutional right to family privacy. What the proponents fail to address is the fact that aside from the privilege against self-incrimination, the Court has not recognized a specific constitutional right to any particular testimonial privilege. Rather, the Court has generally relied upon the common law. Nor have the proponents of a parent-child privilege satisfactorily demonstrated that there has been widespread abuse of family relationships to obtain evidence, either in civil or criminal proceedings. If there are abuses, the remedy lies not in the adoption of an exclusionary rule, but instead in taking administrative or legal steps against those causing the abuse.

Even assuming that a parent-child privilege is supported by the proponents' myriad arguments, there remains the problem of drafting a parent-child privilege that recognizes the delicate balance between the interests of the parent and child and the public's right to reliable evidence. In examining the carefully drafted and well-debated ABA model, it becomes apparent that a slippery and difficult slope awaits the drafter in defining key terms, determining the scope of the privilege, and identifying who may properly claim the privilege. Unless a parent-child privilege is narrowly-tailored, it will soon become a much broader and entirely useless "family" privilege.

VI. APPENDICES

A. *Appendix A: ABA Model Parent-Child Privileges Statute*

§ ——— (CURRENT PROPOSED)

101. DEFINITIONS.

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

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

102. ADVERSE TESTIMONIAL PRIVILEGE.

- (a)(1) *Privilege Created.* There is an adverse testimonial privilege.
- (2) The privilege is delineated by this Section.
- (b)(1) *Scope.* The adverse testimonial privilege exists when either a parent or the parent's child is:
 - (i) a defendant in a criminal proceeding or the subject of a juvenile delinquency proceeding, and the other is called to give testimony; or
 - (ii) called to give testimony concerning the other in a grand jury proceeding.
- (2)(i) Neither a parent nor the parent's child who validly asserts the adverse testimonial privilege in a proceeding may be compelled to provide an answer to a question if it would be adverse to the other.
- (ii) However, a parent or a child who is a witness may not assert the privilege in response to a question about a matter that occurred at a time when the relationship of parent and child did not exist.

(c) *Witness Held*. The adverse testimonial privilege is held by the parent or the child who is a witness.

(d) *Exceptions*. There is no adverse testimonial privilege:

(1) When the proceeding concerns an offense against the person or property of the witness or a family member that is purported to have been committed by the witness' parent or child; or

(2) When it is purported that the witness is involved with his or her parent or child in any criminal activity.

103. CONFIDENTIAL COMMUNICATIONS PRIVILEGE.

(a)(1) *Privilege Created*. There is a confidential communications privilege.

(2) It is delineated by this Section.

(b)(1) *Scope*. The confidential communications privilege may be asserted by a parent or the parent's child when either of them is:

(i) a party to any proceeding and the other is called to give testimony; or

(ii) called to give testimony concerning the other in a grand jury proceeding.

(2)(i) Neither a parent nor the parent's child may be compelled to answer a question concerning confidential communications if the confidential communications privilege is validly asserted in a proceeding.

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

(c) *Jointly Held*.

(1) The confidential communications privilege is jointly held by each party to a confidential communication.

(2) Any party to a confidential communication may raise the privilege and thereby prevent the communication from being disclosed by the other party in any proceeding.

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

(1) A parent and the parent's child are opposing parties;

(2) A child's parents are opposing parties;

(3) The parent or the parent's child is a party, if the parent and the child were jointly involved in activity giving rise to the proceeding;

(4) A parent or the parent's child is a party in any criminal or juvenile proceeding if the basis of the proceeding is alleged acts committed against the person or property of a family member;

(5) An action is brought to commit a parent or child because of alleged mental incompetence or a mental disorder or to establish a parent or child's mental competence;

(6) An action is brought to place the person or property of a parent

or the parent's child in the custody or control of another because of alleged mental or physical incompetence;

(7) The neglect, dependency, deprivation, abandonment or non-support of a child's parent or a parent's child is at issue;

(8) The mental, physical or sexual abuse of a parent or the parent's child is at issue; or

(9) Termination of parental rights is at issue.

104. PENALTIES.

(a) *Penalty for Nondisclosure of Testimony*

(1) If no adverse testimonial privilege or confidential communications privilege exists, the court shall require the person to testify provided no other rule or law prevents the compelled disclosure of that testimony.

(2) Refusal to testify is punishable by the court as contempt.

(3) If the witness refuses to disclose the compelled testimony in violation of paragraph (2), the court, in determining the appropriate penalty, shall consider among other factors:

(i) The age, and the mental and physical condition of the witness; and

(ii) The present and future welfare and protection of the witness.

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

(1) If a confidential communication is held to be privileged, the witness shall not disclose the confidential communication in a proceeding.

(2) A parent or child who discloses a privileged confidential communication in a proceeding which has been validly raised may be punished by the court for contempt.

(3) If a witness discloses the confidential communication in violation of paragraph (2), the court, in determining the appropriate penalty, shall consider among other factors:

(i) The age, and the mental and physical condition of the witness; and

(ii) The present and future welfare and protection of the witness.

B. *Appendix B: Comment Attending ABA Model Parent-Child Privileges Statute (Current Proposed)*

DEFINITIONS
(Section 101)

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

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

(b) *Child*: The age by which a person is determined to be a “child” is determined by each State’s law on the age of majority. The definition does not provide for a mentally defective person to be considered a “child” once that person has reached the age of majority. Therefore, in rare instances when a person’s chronological age has reached the age of majority but the mental age is in question, it shall be left to the court to determine if that person fall[s] within the definition of “child” as used in this statute.

(c) *Confidential Communication*: The definition of “confidential communication” is intended to be broad. It gives recognition to the fact that children often communicate with their parents by means other than the spoken word. Young children are especially prone to communicate confidentially with their parents by gestures, expressions of emotion, unique mannerisms or other behavior, the meaning of which is clearly understood by the parent and the child.

The presence of a family member when a confidential communication is made between parent and child will not void the privilege. This is a recognition of the closeness of persons living in family units. It may not be possible for a parent and a child to communicate with each other without some other family member being privy to the communication. In addition, the closeness of the family unit may negate the parents and children to perceive a need [sic] to communicate secretly among themselves. The statute does not seek to punish parents and children who have this kind of open relationship within their

family. However, the statute does not create a family or sibling privilege. Therefore, any family member who is present when the confidential communication is made cannot raise the privilege to preclude being required to testify.

(d) *Family Member*: The definition of "family member" is limited to the nuclear family (i.e. parents and their children). The term is used in the definition of "confidential communication" to restrict this term to the select communications that are made within the family unit with the expectation that it will [be] known only to parents and siblings. It is also used in Section 102(c)(1) and 103(d)(4). These subsections create exceptions to the raising [of] the adverse testimonial privilege and the confidential communications privilege when the parent and the child have competing interests.

(e) *Parent*: The definition of "parent" includes those person[s] who most commonly have a parental relationship with a child. It is possible that a child could at different times have all categories of these parents (i.e. birth parents, adoptive parents, step parents [sic] and legal guardians). However, the confidential communications privileges [sic] and the adverse testimonial privilege may only be asserted with regard to communications that occurred at the time the parent and child relationship existed. Cases in which there is a dispute as to whether the relationship existed will be resolved by the courts. This is reinforced by subsections 102(b)(2)(ii) and 103(b)(2)(ii). Even a birth parent may be found to have relinquished the parental relationship in certain circumstances, such as when there has been an adoption. Similarly, a communication made between a child and someone who has not yet become the child's step parent [sic] (or who has ceased to be a step parent [sic] due to divorce) would not be subject to either of the privileges. (See Subsections 102(b)(2)(ii) and 103(b)(2)(ii)).

Whether or not it includes foster parents (and thereby extends the privileges to foster parents and children in their care) is left to the discretion of the court. The court also would have the discretion to recognize the existence of a parent/child relationship between a child and other persons. Typical examples would be grandparents or an aunt and an uncle who are raising the child. It could also include situations where a parent/child relationship exists but there is no biological or legal relationship between the two parties.

(f) *Party to a Confidential Communication*: The definition limits this phrase to a parent and the parent's child. In addition, the parent

or the child must have been intended to be the recipient of the communication. Therefore, if a child confides something to one parent with the intent that it not be know[n] by the other parent, the privilege cannot be raised to foreclose testimony by the parent who was not the intended recipient of the communication.

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

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

ADVERSE TESTIMONIAL PRIVILEGE (Section 102)

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

Subsection (a): This subsection contains the operative language that creates the privilege. The privilege is described in subsection (b).

Subsection (b): The parent/child adverse testimonial privilege is similar to the testimonial marital privilege articulated in *Trammel v. U.S.*, 445 U.S. 40 (1980). As stated in subsection (b), the privilege may be asserted only by the parent or child who is a witness. It may only be asserted in criminal proceedings, juvenile delinquency proceedings, or grand jury proceedings.

Paragraph (2) contains the critical language that vests a parent or a child with the right to raise the privilege in order to preclude being forced to answer any question adverse to the other. This same paragraph makes it clear that the right to raise the privilege only exists if the question relates to a matter the [sic] occurred at the time when the parent/child relationship existed. (See [sic] discussion under definition of "Parent.")

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

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

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

CONFIDENTIAL COMMUNICATIONS PRIVILEGE (Section 103)

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

Subsection (a): This subsection contains the operative language that creates the privilege. The privilege is described in subsection (b).

Subsection (b): There are a number of differences between the adverse testimonial privilege outlined in Section 102 and the confidential communications privilege. These differences are created through the divergent provisions in subsection[s] 102(b) and 103(b).

Subsection 103(b) provides that the confidential communications privilege applies in "any proceeding." (See 103(b)(1)(i)). Unlike the adverse testimonial privilege, it is not limited to proceedings that are criminal in nature. This distinction between the privileges arises because the adverse testimonial privilege only seeks to protect parents and their children from being compelled to make statements that may be directly "incriminating" to each other, hence surfacing in the context of a criminal proceeding. It acts as a bar to the State from abusing its authority to force parents and children to testify against each other.

The confidential communications privilege has a broader purpose. It is not intended merely to prevent abuse by the prosecutorial authorities. It seeks to grant sanctity and protection to all communications between parents and their children that those parties intend to be confidential. For this reason, the privilege acts as a shield to preclude

these communications from being disclosed in any forum, whether it be criminal or civil.

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

Subsection (b)(2) explains the result of the confidential communication privilege being asserted. When it is validly asserted in a proceeding (and no exception in subsection (d) applies) the witness may not be compelled to disclose, nor voluntarily disclose, the confidential communication. It should be noted however, that this subsection makes it clear that the witness may be compelled to answer a question if the parent-child relationship did not exist at the time of the confidential communication. (*See* [sic] discussion under definition of "Parent.")

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

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

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

Paragraph (d)(1) applies to situation[s] in which the parent and child are opposing parties. Since this suggests that the parent and child vol-

untarily placed themselves in the adversarial position, the policies behind the statute of preserving and fostering family harmony fail. In addition, it would be unfair to permit one of the parties to use the privilege to silence the other's testimony about a confidential communication that could contain exculpatory evidence.

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

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

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

Paragraphs (d)(5) and (6) apply in situations where mental competency is at issue. In order for the court to protect the rights of the person who is the subject of the proceeding, it is necessary that full disclosure of communications between parents and their children be disclosed. The need for truth in the factfinding process is the overriding consideration in such matters.

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

PENALTIES (Section 104)

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

Subsection (a): Paragraph (a)(1) creates a penalty for failure to pro-

vide testimony when an adverse testimonial privilege or confidential communications privilege does not exist, or when "no other rule or law" would prevent compelled disclosure of the witness' testimony. Paragraph (a)(2) states that a court's inherent contempt powers should be used to punish failures to testify. Paragraph (3) sets out factors the court should consider in fashioning the appropriate penalty. Since a child could be the one charged with contempt, the court should take the factors in subparagraphs (3)(i) and (ii) into consideration when fashioning a penalty.

Subsection (b): This subsection applies only to the confidential communications privilege. It gives an incentive for these communications to be held in confidence by providing penalties when they are disclosed in testimony in a way that violates the statute. Paragraph (2) states that the court should use its inherent contempt powers to punish unauthorized disclosures. Subparagraphs (3)(i) and (ii) set out factors the court should consider when deciding the penalty for unauthorized disclosure of a privileged confidential communication.