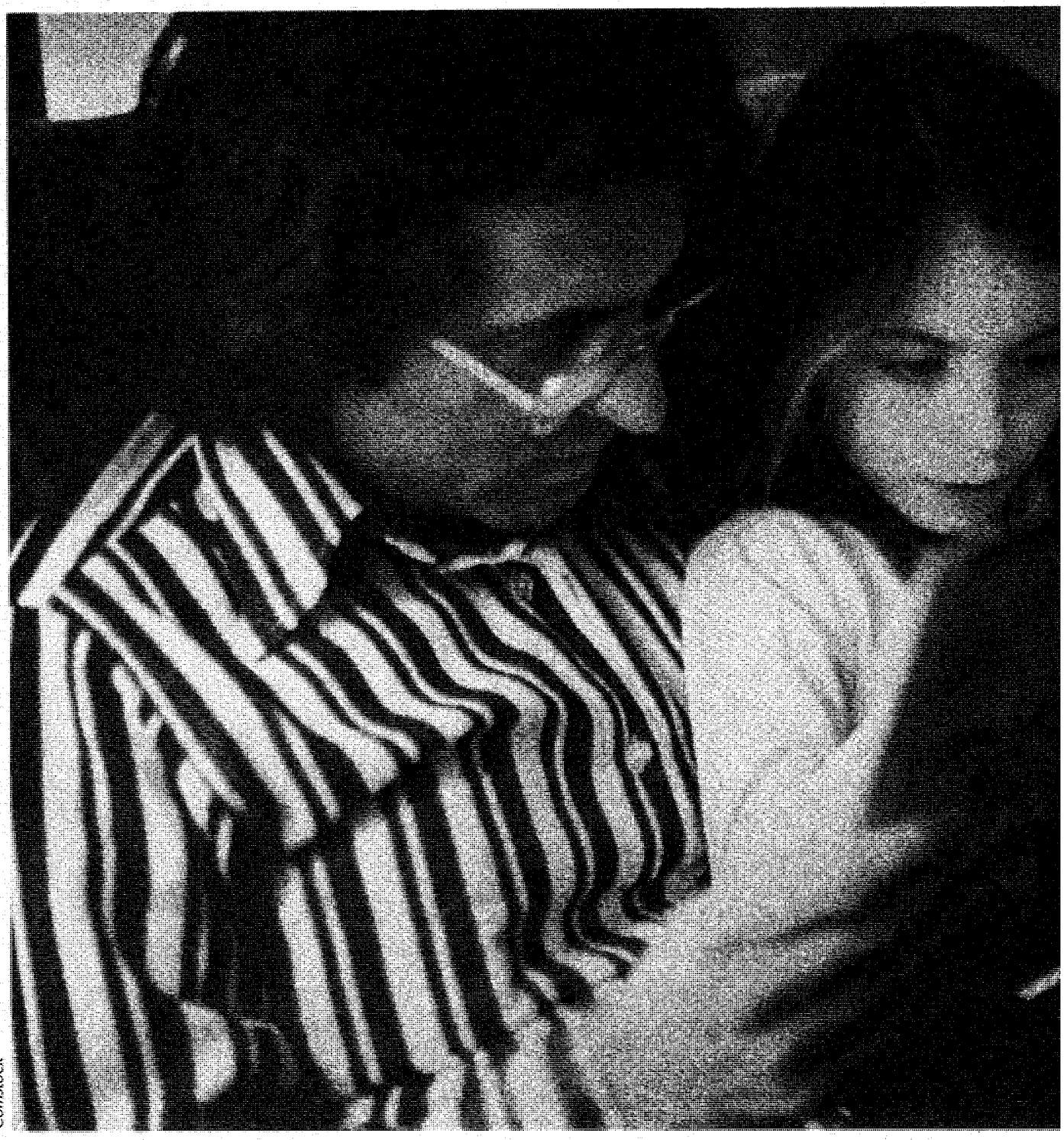
1987

Do We Need a Parent-Child Privilege

David A. Schlueter

Do We Need a Parent



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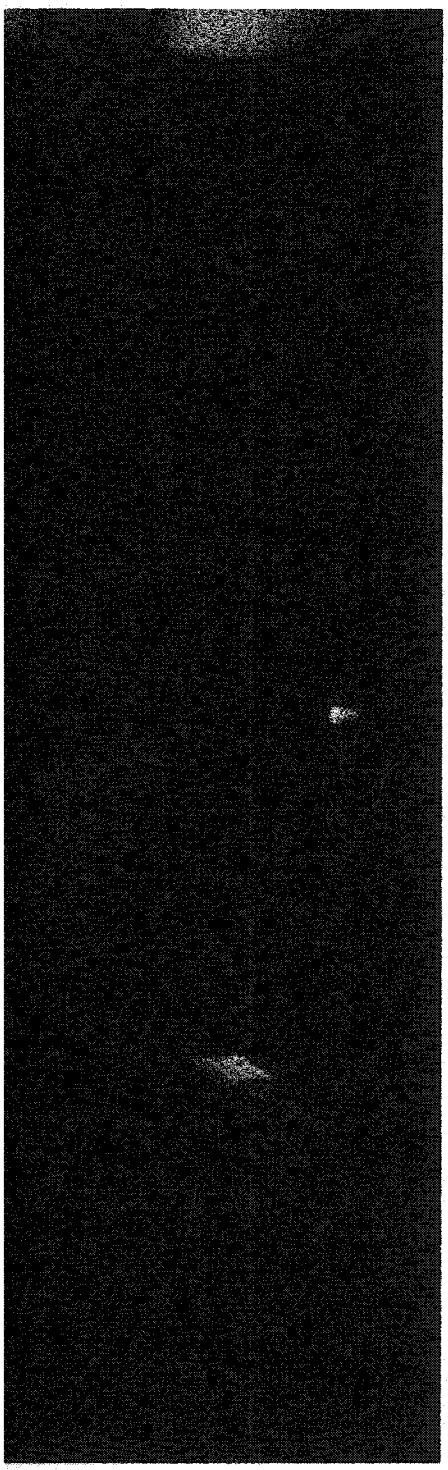
Child Privilege?



Yes

BY WENDY M. WATTS

We all would agree that certain relationships are vital to society and that these relationships cannot exist without confidentiality. These relationships are protected by five privileges. Firmly established in American law, they are: the attorney-client privilege, the physician-patient privilege, the psychotherapist-patient privilege, the priest-penitent privilege, and the husband-wife privilege.

The word privilege is derived from the Latin phrase "privata lex." It is defined as a particular and peculiar benefit or advantage enjoyed by a person, company, or class beyond the common advantages of others. *Black's Law Dictionary* 1077 rev. 5th ed(1979). In American law, there are three categories into which rules of privilege fall. Coburn, "Child-Parent Communications: Spare the Privilege and Spoil the Child," 74 *Dick. L. Rev.* 599, 602-603 (1970). First, there are privileges designed to protect the rights of the individual, such as the exclusionary rule or the privilege against self-incrimination. Second, there are privileges designed to maintain the "integrity of the system of government," such as the privilege that accompanies government secrets. Fisher, "The Psychotherapeutic Professions and the Law of Privileged Communications," 10 *Wayne L. Rev.* 609, 609-610 (1964). Finally, there are privileges designed to protect individuals who are participants in certain relationships which the state deems

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No

BY DAVID A. SCHLUETER

Frustrated with her parent's illegal and undetected conduct, a teenager gathered the contraband in a garbage bag and presented it at the police station. In the past year, public attention has focused on similar incidents where children have reported their parents to the police. Is evidence "gathered" in this way admissible? Are incriminating statements by the parents to the child admissible against them? In most jurisdictions the answer is "yes" on both counts.

The reactions to these "child-snitching" cases are mixed, and often accompanied by calls for protection for any statements made or actions observed within the parent-child relationship. Similar calls are heard when the focus is on a parent who possesses incriminating information about a child's criminal activity. *See, e.g., Port v. Heard,* 764 F.2d 423 (5th Cir. 1985). Although a majority of courts considering the issue have rejected a parent-child privilege, there is a popular move to urge codification of the privilege, which would block testimony by one against the other.

Balanced against the general principle that evidentiary privileges are generally disfavored because they potentially block otherwise relevant evidence, *Trammel v. United States,* 445 U.S. 40, 50 (1980), is the argument that some relationships deserve assurance that shared confidences will be protected. Intense debate almost always sur-

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No

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rounds the question of whether we should expect that a member of a particular relationship will not be required to testify against another member of that relationship. The intensity of the debate is evidenced in part by the fact that in approving the Federal Rules of Evidence, Congress could not agree on codification of privileges and left that issue to the federal courts.

A parent-child privilege was not recognized at common law and was apparently not seriously considered by the drafters of the Federal Rules of Evidence. The current momentum for recognition of such a privilege was apparently triggered when a New York court concluded that a parent-child privilege could be based upon both the United States and New York constitutions. *People v. Fitzgerald,* 422 N.Y.2d 309 (Westchester County Ct. 1979). Since then, only a few states have codified a parent-child privilege: Idaho, Minnesota, and Massachusetts. Of those courts which have considered the availability of such a privilege, a great majority of them have rejected it. And of those cases applying the privilege, most were tried in New York state courts. Only a few federal courts have recognized the privilege. *See, e.g., In re Grand Jury Proceedings (Agosto),* 553 F. Supp. 1298 (D. Nev. 1983); *In re Grand Jury Proceeding* (Greenberg), 11 Fed. R. Evid. Serv. 579 (1982).

To overcome the reluctance to adopt yet another privilege, proponents of the parent-child privilege typically offer a number of justifications. The chief argument is one grounded on the Constitution—the right of privacy. Still another argument rests on the freedom of religion clause of the First Amendment. The remainder take on the form of social or policy arguments.

David A. Schlueter *is Associate Dean and Professor of Law at St. Mary's University, San Antonio, Texas.*

The constitutional right of privacy

Proponents of the parent-child privilege lean heavily upon decisions from the Supreme Court which indicate that a right of privacy is implied in the Constitution. This right has two aspects: the right to conduct one's affairs in private free from government intrusions and the right to personal autonomy. *Griswold v. Connecticut,* 381 U.S. 479 (1965), is an example of the former aspect. *Roe v. Wade,* 410 U.S. 113 (1973), is an example of the latter. Proponents also point to those decisions which spell out the importance of "family" privacy and autonomy. For example, the Court has indicated that important personal decisions affecting marriage, procreation, schooling, and living arrangements are important rights which may not be lightly treated by the government. To date, however, no Supreme Court decision has indicated that the right to privacy absolutely requires any privilege in private communications between family members.

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

Few would quarrel with the first three arguments. But the fourth proposition does not necessarily follow from the first three. What most proponents of the parent-child privilege fail to recognize is that any constitutional right to privacy, like so many other constitutional rights, is not absolute. Assuming that a particular interest is protected under the broad and nebulous umbrella of "privacy," the government is permitted to limit that interest if it can demonstrate a compelling government interest and that its means of limitation or intrusion are necessary and closely tailored to meeting that interest.

The Court has generally recognized that this close scrutiny is not necessary unless the government has placed some substantial or significant hurdle in the way of the individual's exercise of the right to privacy. In the absence of a hurdle, the government's actions are generally only subject to a "rational basis" review. That is, is there some rational basis for the government's limitation or action? A common example of this is the ability of states to set procedures and standards for obtaining a marriage license. The right to marry is fundamental, but absent substantial interference with that right, no compelling government interest need be shown.

Thus, in a discussion of a parent-child privilege, the threshold issue is whether compelled disclosure of otherwise confidential statements presents a substantial hurdle or 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. But studies in this area are apparently inconclusive, as one proponent of a broad family privilege points out. "Developments—Privileged Communications," 98 *Harv. L. Rev.* 1450, 1578-81 (1985). And that argument could be made in virtually any case where any family member or close friend is compelled to testify against another member or friend. A difficult and emotion-racked dilemma does not necessarily a privilege or exclusionary rule make, especially when rev-

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To Our Readers

Part II of "Making Sense of the Bail Reform Act" will appear in the next issue. It will examine the impact of the *Salerno* decision.

han) 579,582-84 (D. Conn. 1982) acknowledges a parent-child privilege based upon the free exercise clause of the First Amendment.

Although a number of federal courts have not recognized the parent-child privileges, none have entirely abandoned the concepts. Some courts have given the green light to the privileges if the appropriate fact situation arises. *See United States v. Jones,* 683 F.2d.817 (4th Cir. 19820 and United States v. Ismail, 756 F.2d 1253 (6th Cir. 1985). Many who argue against the adoption of a privilege state that the following cases are parent-child privilege cases that the courts have rejected. When read closely one will see this is not so. *See In re Grand Jury Proceedings Matthews,* 714 F.2d 223 (2d Cir. 1983) (court rejected a broad in-law privilege not parent-child); *United States v. Davies,* 768 F.2d 893 (7th Cir. 1985) (court rejected idea of parent-child privilege within context of police investigation only); *United States v. Penn,* 647 F.2d 876 (9th Cir. 1980) (court rejected a very broad *family,* not parent-child, privilege).

Answering the critics

Some argue there isn't a need for the parent-child privileges. One argument advanced for this proposition is that there aren't "enough" cases. Is this to suggest that the parent-child relationship will only rise to the level of deserving protection when such cases reach epidemic proportions? Another criticism that has been advanced is that these privileges would be shields for intra-family crime and/or physical, sexual or mental abuse. This is not true. No privilege exists in those and other harmful situations. Critics also contend that the parent or child who is the party to the proceeding may always block the introduction of testimony by the parent or child witness. This is not the case. The adverse-testimonial privilege, which applies in criminal cases only, is a witness-held privilege, the witness having the right to testify or not. The confidential communications privilege operates differently as it is a jointly held privilege. Both privileges have a number of exceptions which prevent misuse and abuse of the privilege concept.

On August 9, 1986, the Criminal Justice Section of the American Bar Association adopted a model parent-child privilege. (See "A Model Parent-Child Privilege," on page 34) It is similar to the two part spousal privilege, encompassing both an adverse-testimonial and a confidential-communications privilege. The statute is narrowly drafted and covers a parent and his or her child only. It is not a broad family privilege.

There are a number of reasons for such a statute to be adopted by state legislatures or used as a guideline by the federal courts. There is a need for continuity and predictability in law. As far as this issue is concerned, there is neither. The second and most important reason is to protect the family from unnecessary intrusion by the government or overzealous prosecutors. As Professor Irving Younger has stated, "We know that one of the horrors of Nazi Germany was children snitching on their parents. It seems to me common decency that you don't put a child before a grand jury on her mother's conduct." Burke, "Nevada Girl 16, Ordered to Testify Against Mother," *Nat'l L.J.,* Mar. 9, 1981, at 3, col. 2.

Adoption of the parent-child privileges is the logical extension of the spousal privileges. Most courts accept, and society sanctions, the need for the spousal privilege. It is hard to believe that state legislatures and Congress in adopting the marital privileges intended to suggest the parent-child relationship was less deserving of attention and protection by the law. The parent-child relationship is life-long. Unlike the other relationships now protected by privileges, the parent-child relationship is terminated only by death of the parent, and not merely by payment of a fee or by a judicial decree. **CJ**

A complete discussion of the legal and social arguments supporting a parent-child privilege, and a description of a model privileges statute developed by the American Bar Association Criminal Justice Section, can be found in Volume 28 of the *William and Mary Law Review.*

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elation of the truth is in issue.

Assuming communications between a parent and child are entitled to some constitutional protection, and compelled testimony is considered a substantial intrusion, the government might still reasonably deny reliance upon that protection where revelation of those communications is necessary to determine the truth in a trial—a compelling government interest. This would seem especially true in a criminal case. Not only is there a compelling state interest in protecting its citizens, but the child's actions might be construed as sufficiently egregious to exceed the protective bounds of autonomous discretion, which is generally free from governmental intrusion.

It might also reasonably be argued that 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. *See, e.g., Akron Center for Reproductive Health, Inc.,* 462 U.S. 416 (1983). Thus, even within the sanctity of the family parents' control is not unlimited, and may be curtailed for the good of the child. It would seem that the same argument would support limited governmental intrusion for

the specific purpose of determining the truth in a judicial proceeding.

The constitutional right to freedom of religion

Proponents sometimes advance the constitutional argument that compelling testimony from a child will violate the family's religious beliefs and constitute unconstitutional infringement of the free exercise clause of the First Amendment. The argument runs 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. *See, e.g., In re Grand Jury Proceedings (Agosto),* 553 F. Supp. 1298 (D. Nev. 1983). Again, like the privacy argument, there is some superficial appeal to this justification. For mainline religions it is generally not difficult to find in religious teachings or writings credible references 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 are to honor their fathers and mothers. Most theologians would nonetheless struggle with the delicate questions that might arise if, in the search for truth, reliable evidence was stifled by reliance on similar teachings.

The possible conflict of religious values, however, poses a problem for codifying any particular parent-child privilege. While there are apparently some religious writings that urge protection of the family relationship there are also some that recognize the ability of parents to testify *against* their children. In the Old Testament book of Deuteronomy, Chapter 21, verses 18-21, the book of Mosaic law, instruction is given for dealing with troublesome children: Parents of a rebellious and stubborn son, who will not listen to them, is to be taken to the city elders at the city gate where they are to testify against him. The penalty is death.

Particular religious beliefs notwithstanding, the courts have recognized time and again that the freedom to practice one's religion, although fundamental, is not absolute. *See, e.g., Bowen v. Roy,* 106 S. Ct. 2417 (1986); *United States v. Lee,* 455 U.S. 252 (1982). In the proper circumstances the need for determining truth in a trial may outweigh religious tenets compelling silence. Like the tests for measuring the constitutionality of government intrusion into certain privacy interests, the inquiry would be: Assuming that the government has substantially interfered with the practice of religion, it must demonstrate a compelling government interest and use of necessary means to further that interest. Obtaining reliable evidence for a trial, especially a criminal trial, should be considered a compelling interest.

The difficulty with relying upon this constitutional justification for a parent-child privilege is the reluctance of the courts to intrude into the legitimacy of a particular religious belief. However, they may inquire into the centrality and sincerity of the belief. *Thomas v. Review Bd.,* 450 U.S. 707 (1981).

Social policy arguments

Proponents of a parent-child privilege argue that important and compelling interests are at stake whenever a child or parent is compelled to testify against the other. They argue that studies indicate that the nuclear family is in danger of extinction and that any privilege protecting the family will serve as an invaluable bastion against external threats. The family, they continue, should be permitted to work through any problems that might be presented by the private communications between family members.

These arguments have some surface appeal. Most parents welcome and encourage frank communications with their children. But the credibility of these arguments suffers somewhat 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. It is much easier, and more convincing, to consider the tangible and immediate effects of using the privilege to block the introduction of probative evidence. Second, the difficulty in relying upon a particular social theory or philosophy for a privilege is that other equally credible social movements or theories may be ignored. For example, advocates of the popular "tough love" movement might conceivably welcome the ability of parents to offer incriminating testimony concerning disposition of a child accused of criminal conduct. A child's or some other third person's ability to block that testimony would then interfere with the parents' autonomous rights to rear their children as they deem necessary.

Another argument raised in support of the privilege is grounded on the natural repugnancy of requiring family members to testify against each other. Again, most would agree that to rely upon such testimony is troubling and should be avoided. But should that fact 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 used to advance this argument are the reminders that totalitarian governments do not recognize a parent-child privilege. Such reminders do little more than stir the emotions and ignore the fact that, until recently, the courts and commentators paid little if any serious attention to such a privilege. And most citizens of this country do not view our system of government, past or present, as approaching anything like Nazi Germany or Soviet Russia. As with any aspect of the judicial process which is subject to abuse, the courts and the public response to "repugnant" use of familial testimony provides a 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 enough cause to codify a parent-child privilege. Fear of abuse is not grounds for blanket exclusion of otherwise reliable evidence.

A related social policy argument sometimes raised is the assertion that calling a family member to the stand creates a cruel trilemma for that witness. 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. That same trilemma, however, faces every witness. Is the trilemma for the witness any less compelling when the accused is a lifelong friend or associate? Some 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. In some cases that is all that exists where the child or parent has shown little or no love or respect—until criminal proceedings are commenced. The problem with this particular social argument is that it assumes that whatever familial tie existed will necessarily vanish once the witness is compelled to take the stand. If the family relationship is indeed based on trust and respect—the proponents' basis for the privilege—then that relationship should withstand government compulsion to testify. Even assuming that the relationship would suffer, it is not enough reason to codify a privilege and block otherwise reliable evidence.

Other legal arguments

Federal Rule of Evidence 501 is sometimes cited as authority for codifying a parent-child privilege. The argument generally is 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. A review of the history of Rule 501 indicates that it was a compromise. There was such a negative response to the adoption of any privileges that Congress decided to defer to the courts. For a discussion of the legislative history see S. Saltzburg and K. Redden, *Federal Rules of Evidence Manual*, 331 (4th ed. 1986). But that compromise can hardly be viewed as a mandate to codify a parent-child privilege which to this point has been rejected by most of the courts which have considered it. Rule 501 can be relied upon just as strongly by opponents of the privilege. The better course is to test the viability of the privilege in the courts and not rush to codification.

A second legal argument for adopting a parent-child privilege rests in comparing other contemporary privileges which have commonly protected a wide range of interests, including financial interests. If our judicial system is willing to protect relationships such as marriage, an attorney-client or doctor-patient relationship through use of privileges, then surely, the argument continues, the system should protect the parent-child relationship. In some jurisdictions that argument might well, in itself, carry the day. The fact that other less altruistic relationships are protected is an attractive justification. But it is simply not attractive enough to warrant codification of an additional privilege. The argument assumes, perhaps incorrectly, that all existing privileges are necessary and that the slippery slope of adopting additional privileges is a desirable one. If a parent-child privilege is widely adopted, it is not difficult to imagine calls for extension of similar privileges to any relationship. At least one commentator has called for adoption of a privilege for "shared intimate relationships" which would include protection of confidential communications between "intimate friends." *Developments—Privileged Communications, supra,* at 1590.

A significant factor in rejecting a confidential communications privilege for the parent-child relationship is that there is little, if any, reason to believe that the parent and child would ever count on such a privilege in making statements to one another. In many of the other privileges, either one of the parties, usually a professional, can be counted on to inform the other that what is said will remain confidential. Indeed, the drafters of the proposed federal rule governing a marital privilege did not include a confidential communications provision for this very reason. Similar analysis would support rejection of protection for any family communications.

Summary

None of the various justifications for adoption of a parent-child privilege is compelling. The constitutional arguments are grounded primarily on dicta or analogy. Although some courts have relied upon the right of privacy and free exercise clause, there is no Supreme Court opinion 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 block 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.

This does not mean that prosecutors or police should necessarily encourage children or parents to "snitch" on the other. What it means is that when one of them voluntarily walks into the police station with a garbage bag of drugs or an earful of incriminating statements, the prosecutor should be able to use that evidence. **CJ**

In The Next
Criminal Justice

Jury Selection
After *Batson*