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The Child-Parent Privilege: A Proposal

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COMMENTS

THE CHILD-PARENT PRIVILEGE: A PROPOSAL

INTRODUCTION

The rule that all relevant evidence is admissible in judicial proceedings serves a strong public policy in favor of full development of the facts in litigation. As such, the rule facilitates the search for truth that lies at the heart of the adversary system in this country. Therefore, states have broad powers to compel their citizens to testify as to matters that may bear upon the outcome of a particular case.

The evidentiary privileges protecting communications between two or more persons are exceptions to the general rule, because they exclude other


5. In general, the confidential communications privileges are designed to protect private communications between two people, e.g., husband and wife, priest and penitent. Thus, communication through or in the presence of a third person will ordinarily negative any presumption of confidentiality. See, e.g., Wolle v. United States, 291 U.S. 7 (1934) (statements in letter dictated by defendant to his wife and transcribed by stenographer held not to fall within the husband-wife confidential communications privilege); People v. Castiel, 153 Cal. App. 2d 653, 315 P.2d 79 (1957) (the attorney-client privilege does not prevent a third person who was openly present and overheard a conversation between attorney and client from testifying as to the contents of the conversation). There are several qualifications to this rule. For example, the presence of a representative or employee of an attorney during a professional consultation will normally not destroy the confidentiality of the communication. See, e.g., Cal. Evid. Code § 952 (West 1966 & Supp. 1978); N.Y. Civ. Prac. Law § 4503(a) (McKinney Supp. 1978). Similarly, a psychologist- or psychotherapist-patient privilege may attach even though there were third persons present during
erwise relevant evidence.6 Their creation represents a judicial7 or legislative
determination that preserving and fostering certain relationships outweighs
the potential benefit to the judicial system of compelled disclosure.8 Typically,
the privileged relationship is a socially desirable one9 which requires confi-
dentiality to function optimally.10 By protecting communications made in
confidence, a privilege both preserves the privacy of the instant relationship11
and encourages open communication between others involved in the same
type of beneficial association.12

Because privileges protect confidentiality at the possible expense of accurate
adjudication,13 they have never received universal acceptance from courts or
court commentators.14 Indeed, some commentators advocate the abolition of formal

the communication if the claimant can show that the third person was in some way necessary to
effectuate the purpose of the consultation. See, e.g., Yaron v. Yaron, 83 Misc. 2d 276, 372
N.Y.S.2d 518 (Sup. Ct. 1975) (New York's statutory privilege for communications between
psychologist and client interpreted to encompass consultations and interviews between family
counseling agency and spouses who were attempting to preserve their marriage); Cal. Evid. Code
§ 1012 (West Supp. 1978).

6. C. McCormick, Handbook of the Law of Evidence § 72, at 151-52 (2d ed. 1972); 8 J.
Wigmore, supra note 3, § 2192(3), at 73.

7. Although a privilege may be created through judicial action, it is far more common for it to
arise out of legislative enactment. C. McCormick, supra note 6, § 77, at 156; Slovenko, Psychiatry
and a Second Look at the Medical Privilege, 6 Wayne L. Rev. 175, 181 (1960).

8. C. McCormick, supra note 6, § 72, at 152; Louisell, Confidentiality, Conformity and
Privileges Today]; Reutlinger, Policy, Privacy, and Prerogatives: A Critical Examination of the
Proposed Federal Rules of Evidence as They Affect Marital Privilege, 61 Cal. L. Rev. 1353, 1360
(1973).

9. 8 J. Wigmore, supra note 3, § 2285, at 527.

10. Id. Dean Wigmore lists "four fundamental conditions" which must be satisfied before a
privilege should be recognized: "(1) The communications must originate in a confidence that they
will not be disclosed. [See note 341 infra and accompanying text.] (2) This element of confidentiality
must be essential to the full and satisfactory maintenance of the relation between the parties. [See
notes 90-91, 126-30 infra and accompanying text.] (3) The relation must be one which in the
opinion of the community ought to be sedulously fostered. [See notes 89, 112-14 infra and
accompanying text.] (4) The injury that would inure to the relation by the disclosure of the
communications must be greater than the benefit thereby gained for the correct disposal of
litigation." [See notes 161-74 infra and accompanying text.] Id.

11. Mullen v. United States, 263 F.2d 275, 280 (D.C Cir. 1958) (Fahy, J., concurring) ("The
benefit of preserving [the husband-wife, attorney-client, and priest-penitent] confidences involute
overbalances the possible benefit of permitting litigation to prosper at the expense of the tranquility
of the home, the integrity of the professional relationship, and the spiritual rehabilitation of a
penitent."); Privileges Today, supra note 8, at 110-11.

12. People v. Shapiro, 308 N.Y. 453, 458-59, 126 N.E.2d 559, 561-62 (1955); 8 J. Wigmore,
supra note 3, § 2291, at 545 (attorney-client privilege); Note, The Marital Testimony And
Communications Privileges: Improvements And Uncertainties in California and Federal Courts, 9 U.
communications privilege). See generally Reutlinger, supra note 8, at 1358.

13. See note 6 supra and accompanying text.

(criticizing privileges in general); Morgan, Some Observations Concerning a Model Code of
Evidence, 89 U. Pa. L. Rev. 145, 152-53 (1940) (criticizing the attorney-client and husband-wife
privileges); Comment, Questioning the Marital Privilege: A Medieval Philosophy in a Modern
privileges altogether, suggesting instead that the exclusion of testimony be a matter of judicial discretion.\textsuperscript{15} Nevertheless, not only have the traditional privileges—attorney-client, husband-wife, priest-penitent, physician-patient—largely endured,\textsuperscript{16} but the last twenty years have witnessed an influx of new privileges protecting communications between laypersons and professionals in a wide variety of fields.\textsuperscript{17}

Unlike the expansion of professional privileges,\textsuperscript{18} there has been no similar legislative movement in the area of nonprofessional relationships. In fact, the only communications privilege that does not have a professional as one of its beneficiaries is the privilege protecting marital communications.\textsuperscript{19} Private communications between other family members, for example, have never been privileged.\textsuperscript{20}

Particularly striking is the absence of a privilege for confidential communications between child and parent. From a historical perspective, the lack of a

\textit{World, 7 Cum. L. Rev. 307, 318-22 (1976)} [hereinafter cited as \textit{Marital Privilege}] (criticizing marital confidential communications privilege). Probably the most widely criticized privilege is that protecting communications between physician and patient. \textit{E.g.,} 8 J. Wigmore, \textit{ supra} note 3, § 2380a; \textit{Curd, Privileged Communications Between the Doctor and his Patient—An Anomaly of the Law,} 44 W. Va. L.Q. 165 (1938). Even the most accepted of all privileges, the attorney-client privilege, has its detractors. \textit{E.g.,} Morgan, \textit{ supra}, at 152-53.

15. C. McCormick, \textit{ supra} note 6, § 77 at 159; \textit{Note, Privileged Communications: A Case by Case Approach,} 23 Me. L. Rev. 443, 445 (1971) (suggesting such an approach for professional privileges).


17. \textit{See notes 67-73 infra} and accompanying text.

18. This trend has been viewed with alarm by some commentators who suggest that the creation of some of the newer privileges has arisen not out of any proven need for secrecy within a given relationship, but rather “to serve the purposes of politically powerful groups seeking the convenience and prestige of a professionally-based privilege.” C. McCormick, \textit{ supra} note 6, § 77, at 159 (footnote omitted); \textit{accord,} 8 J. Wigmore, \textit{ supra} note 3, § 2286, at 532; \textit{cf.} Rosenheim, \textit{Privilege, Confidentiality, and Juvenile Offenders,} 11 Wayne L. Rev. 660, 664-65 (1965) (noting the relative absence of such “campaigns” on the part of social workers).


20. C. McCormick, \textit{ supra} note 6, § 79, at 165. \textit{But see Coburn, Child-Parent Communications: Spare the Privilege and Spoil the Child,} 74 Dick. L. Rev. 599, 600 n.5 (1970) (in some parts of Europe, relatives by blood or marriage are incompetent to testify as witnesses and can claim a privilege against self-incrimination if asked to testify against members of their families). Marital communications made in the presence of other family members old enough to comprehend the communications are usually not privileged. \textit{E.g.,} \textit{In re A & M,} 61 A.D.2d 426, 428-29, 403 N.Y.S.2d 375, 377 (1978); \textit{In re Bourne's Estate,} 206 Misc. 378, 133 N.Y.S.2d 192 (Surr. Ct. 1954); Fuller v. Fuller, 100 W. Va. 309, 130 S.E. 270 (1925); Chamberlain v. State, 348 P.2d 280 (Wyo. 1960). \textit{But see Hicks v. Hicks,} 271 N.C. 204, 155 S.E.2d 799 (1967) (presence of eight year old daughter did not destroy confidentiality).
privilege seems odd in light of the consistent recognition of the family as an autonomous social unit and the emphasis placed on preserving its sanctity and harmony. Today, although the concept of the nuclear family as a haven of peace and harmony has been seriously questioned, there is a continued recognition of the importance of familial openness and interaction to the child's psychological and social development. Nevertheless, no state has enacted a statutory privilege for communications between child and parent. Moreover, attempts in recent years by litigants to persuade courts to recognize a child-parent privilege have been largely unsuccessful. Typically, these decisions cite the lack of a statute protecting such communications, rather than any strong aversion to the concept of such a privilege.

In light of this legislative inaction and judicial reluctance, the opinion last year by the New York Appellate Division in In re A & M is something of an anomaly. In that case, the court stated that if all members of the family seek to prevent disclosure, communications made by a child to his parents regarding his participation in a crime may be constitutionally protected by "a right of family privacy." The court did not hold any specific communication to be privileged; indeed, it avoided placing the label "privilege" on the testimonial exemption it had created. Nevertheless, the case has far-reaching implications both for the law of evidence and for constitutional law. As to the former, the court constructed the outlines of a confidential communications privilege previously unrecognized by any American court or

21. "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (footnote omitted).


23. See notes 112-16 infra and accompanying text.


A possible precursor to these relatively recent cases is Lindsey v. People, 66 Colo. 343, 181 P. 531 (1919), appeal dismissed, 255 U.S. 560 (1921), in which a juvenile court judge sought to invoke a privilege for private, informal conversations he had had with a minor who was suspected of murdering his father. The judge argued that he had assumed a position in loco parentis to the boy immediately after the crime was committed. In rejecting his claim, the court noted that the privilege "is one which is denied a natural parent." Id. at 355, 181 P. at 536.


28. Id. at 435 n.9, 403 N.Y.S.2d at 381 n.9. The requirement that all family members must desire to preserve confidentiality eliminates many situations from the parameters of the "privilege." For example, the cases cited in note 25 supra involved claims of privilege asserted by only one family member. See notes 275-77 infra and accompanying text.

29. 61 A.D.2d at 429, 403 N.Y.S.2d at 378.

30. Id. at 435, 403 N.Y.S.2d at 381.

31. Id. at 434-35, 403 N.Y.S.2d at 381.
CHILD-PARENT PRIVILEGE

legislature. As to the latter, the court expanded the amorphous constitutional right of privacy to include the right to preserve the confidentiality of certain family conversations even against the strong state interest in facilitating the factfinding process.

As a result of the decision in In re A & M, it is likely that claims of privilege among family members will be asserted with increasing frequency. This Comment will analyze the arguments for and against creating a privilege for communications made in confidence by a child to his parent. Because the rationale for the proposed privilege derives in part from the rationales for several of the more familiar privileges, Part I will present a brief examination of the marital privileges and the various privileges protecting communications between patients and psychotherapists. Part II will contend that, as a matter of policy, a child-parent privilege should be recognized. Part III will examine the possibility of constitutional protection for child-parent communications notwithstanding the absence of a statute. Finally, a proposed statute for a joint privilege will be set out in the Appendix.

I. THE MARITAL AND PSYCHOTHERAPEUTIC PRIVILEGES

A. The Marital Privileges

Two privileges are generally recognized between husband and wife in the United States today: the privilege to exclude adverse testimony or "anti-marital fact" privilege and the privilege for confidential communications. At common law there was a third rule, incompetency, which did not operate as a privilege, but rather was a total disqualification of a party's spouse from testifying for or against the other. See notes 24-25 supra and accompanying text. For discussions of the open-ended nature of the right of privacy, see Henkin, Privacy and Autonomy, 74 Colum. L. Rev. 1410 (1974); McKay, The Right of Privacy: Emanations and Intimations, 64 Mich. L. Rev. 259 (1965).

Indeed, this trend may have already begun. Eight months after the decision in In re A & M, the Appellate Division was presented with another claim of child-parent privilege in In re Mark G., 61 A.D.2d at 433, 403 N.Y.S.2d at 380-81. In that case, however, the child alone asserted the privilege. The claim was denied because the court found no evidence "that respondent made the statement to his father in confidence and for the purpose of obtaining support, advice or guidance, nor that the father wished to remain silent and keep respondent's answer confidential." Id. at 465.

At common law there was a third rule, incompetency, which did not operate as a privilege, but rather was a total disqualification of a party's spouse from testifying for or against the other. 2 J. Wigmore, supra note 3, at §§ 600-620. Today, marital incompetency has generally been abolished or severely restricted in most states. Id. § 602, at 737. Spousal incompetency has also been abolished in federal courts. Funk v. United States, 290 U.S. 371 (1933).

Wigmore coined the phrase "anti-marital fact" which emphasizes that the privilege excludes only testimony by one spouse which would be adverse to the other. Id. § 2234, at 231. Some commentators distinguish between the classic formulation of the privilege which permits one spouse to prevent the other from testifying against him and the less common "privilege of one spouse to refrain from testifying against the other. Note, The Husband-Wife Evidentiary Privileges: Is Marriage Really Necessary, 1977 Ariz. St. L.J. 411, 413 [hereinafter cited as Evidentiary Privileges]. Because both exclude adverse testimony and have the same underlying rationale, however, they are referred to as one general privilege. See, e.g., 8 J. Wigmore, supra note 3, §§ 2241; Note, The Husband-Wife Privileges of Testimonial Non-Disclosure, 56 Nw. U.L. Rev. 208, 209-16 (1961) [hereinafter cited as Testimonial Non-Disclosure].

8 J. Wigmore, supra note 3, §§ 2332-2341; McCormick, supra note 6, §§ 78-86.
Although the two overlap, different justifications have traditionally been advanced for each and some commentators who recognize the validity of one privilege completely reject the other.

The privilege to exclude adverse testimony prevents the spouse of a party from testifying if the testimony would be harmful to the interests of the party. Two reasons are generally given in support of the privilege against adverse testimony. One is that the privilege prevents dissension within the family which might result from compelling one spouse to testify against the other. The second is a "natural repugnance" experienced by society at the idea of condemning one spouse with the testimony of the other. Both justifications have been criticized by commentators. The repugnancy rationale has been dismissed as an outworn sentiment which is easily outweighed by the competing interests of the state and litigants. As for preventing dissension, the primary objection seems to be that there is no cause and effect relationship between the privilege and family harmony; a good relationship is not dependent upon testamentary immunity and a troubled one will not be saved by it.

39. 8 J. Wigmore, supra note 3, § 2333, at 644; Testimonial Non-Disclosure, supra note 37, at 218.

40. Compare notes 43-44 infra and accompanying text with note 51 infra and accompanying text.

41. Wigmore approves of the confidential communications privilege, 8 J. Wigmore, supra note 3, § 2332, at 643, but believes the privilege against adverse testimony to be "illogical and unfounded." Id. § 2228, at 218. Conversely, the drafters of the proposed Federal Rules of Evidence omitted a privilege for confidential communications, but included a privilege for an accused to exclude adverse spousal testimony, Proposed Fed. R. Evid. 505, 56 F.R.D. 244 (1972), stating that it "represent[s] the one aspect of marital privilege the continuation of which is warranted." Proposed Fed. R. Evid. 505, Advisory Comm. Note, 56 F.R.D. 245, 245 (1972). McCormick is critical of both privileges. C. McCormick, supra note 6, § 66, at 145 (adverse testimony privilege); id. § 86, at 173 (confidential communications privilege).


Regardless of who the holder is, numerous exceptions to the privilege have been articulated. For example, there is no privilege under most statutes where a crime has been committed by one spouse against the other, against the children of either or in actions brought by one spouse against the other, such as divorce, commitment, abandonment or support proceedings. See, e.g., Ariz. Rev. Stat. Ann. § 13-4062(1) (West 1978); Cal. Evid. Code § 972 (West Supp. 1978); 8 J. Wigmore, supra note 3, §§ 2239-2240.

43. Hawkins v. United States, 358 U.S. 74, 77 (1958); 8 J. Wigmore, supra note 3, § 2228, at 216.

44. 8 J. Wigmore, supra note 3, § 2228, at 217-18 (emphasis omitted).

45. Id. at 218; Evidentiary Privileges, supra note 37, at 427.

46. C. McCormick, supra note 6, § 66, at 145-46; 8 J. Wigmore, supra note 3, § 2228, at 216; Evidentiary Privileges, supra note 37, at 427.
The privilege for confidential communications prohibits testimony by a spouse concerning communications made in confidence by one spouse to the other during the marriage. The major distinction between it and the privilege to exclude adverse testimony is that the latter excludes adverse testimony by a spouse whether or not that testimony relates to confidential communications between the spouses. The privilege for confidential communications, however, prevents disclosure of spousal conversations or, in some states, "communicative acts," whether or not the subject matter of the communication is actually adverse to the interests of the spouse claiming the privilege.

The justification usually advanced for the confidential communications privilege is that it encourages open communication between spouses, thereby fostering a socially beneficial relationship. Although the rationales for the privilege against adverse testimony focus upon a preservation of the presumed happiness and harmony already existing within the marital relationship, the

47. C. McCormick, supra note 6, § 78. Unlike the privilege against adverse testimony, the confidential communications privilege can be claimed whether or not a spouse is a party to the proceeding. E.g., Cal. Evid. Code § 980 (West 1966 & Supp. 1979); N.Y. Civ. Prac. Law § 4502(b) (McKinney 1963); Reutlinger, supra note 8, at 1364. For a compilation of statutes, see 2 J. Wigmore, supra note 3, § 488.

48. 8 J. Wigmore, supra note 3, § 2333, at 644.


50. 8 J. Wigmore, supra note 3, § 2333, at 644. In practice, however, the types of communications that will be sought to be withheld are those that tend to incriminate one of the spouses. Id. In order to be privileged, the communication must have been "confidential," i.e., it must have arisen out of and in reliance upon the marital relationship. Id. § 2336, at 648. If a statute does not expressly require confidentiality, most courts will imply it. Id. Compare Ariz. Rev. Stat. Ann. § 12-2232 (1956) (no requirements of confidentiality); Tex. Code Crim. Proc. Ann. art. 38.11 (Vernon 1966 & Supp. 1966-1978) (same) with Cal. Evid. Code § 980 (West 1966 & Supp. 1979) (express requirements of confidentiality); N.Y. Civ. Prac. Law § 4502(b) (McKinney 1963) (same).

In the absence of facts to the contrary, confidentiality is often presumed. Blau v. United States, 340 U.S. 332, 334 (1951); Wolffe v. United States, 291 U.S. 7, 14 (1934). See also Cal. Evid. Code § 917 (West 1966 & Supp. 1978). This presumption disappears, however, if the communication related to everyday business matters, e.g., Parkhurst v. Berdell, 110 N.Y. 386, 393-94, 18 N.E. 123, 127 (1888), or was made in the presence of third persons, e.g., Pereira v. United States, 347 U.S. 1, 6 (1954); Wolffe v. United States, 291 U.S. 7, 14 (1934); People v. Melski, 10 N.Y.2d 78, 81-82, 176 N.E.2d 81, 84, 217 N.Y.S.2d 65, 68 (1961), even if those persons are the couple's children. See note 20 supra.

Although some statutes afford the privilege to both spouses, e.g., Cal. Evid. Code § 980 (West 1966 & Supp. 1978), and a few to the spouse to whom the communication is made, e.g., N.M. Stat. Ann. § 20-1-12(a) (1953 & Supp. 1975), the better rule seems to be to make the communicating spouse the holder. C. McCormick, supra note 6, § 83, at 169; 8 J. Wigmore, supra note 3, § 2340, at 670; see, e.g., N.Y. Civ. Prac. Law § 4502(b) (McKinney 1963). Making the communicating party the holder seems best designed to further the underlying policy of the privilege, which is to foster open communication between the spouses. See note 51 infra and accompanying text.

51. 8 J. Wigmore, supra note 3, § 2332; Reutlinger, supra note 8, at 1358-59.
confidential communications privilege is more future-oriented. In the immediate case it protects the expectations of privacy of the communicating spouse, but its larger goal is to foster communication generally within the institution of marriage.

Although the privilege for confidential communications is probably more favorably regarded than the privilege against adverse testimony, it too has its critics. The main argument against the privilege is that it does not serve its intended purpose, primarily because free communication occurs as a result of pre-existing trust in the marital partner and not because of the existence of a privilege. Furthermore, assuming that the existence of the privilege might encourage spouses to confide in each other, very few couples are aware of its existence and its salutary effects are therefore negligible. A third criticism of the privilege is that the marital relationship, unlike the professional relationships, is not exclusively based upon verbal communication; therefore, the need for a privilege between married couples is not as great as the need for the professional privileges.

The principal effect of these derogations of the privilege has been legislative and judicial restriction, rather than complete abrogation. Similarly, exceptions to the privilege against adverse testimony are being carved out with increasing frequency, particularly at the federal level. Nevertheless, the marital privileges, in one form or another, remain an integral part of most state evidentiary codes. Their continued vitality indicates a legislative and

52. See Privileges Today, supra note 8, at 113.
53. See note 51 supra and accompanying text.
54. Rettinger, supra note 8, at 1381-82; Testimonial Non-Disclosure, supra note 37, at 216.
55. C. McCormick, supra note 6, § 86, at 172-73; Marital Privilege, supra note 14, at 320.
56. "[V]ery few people ever get into court, and practically no one outside the legal profession knows anything about the rules regarding privileged communications between spouses." Hutchins & Slesinger, Some Observations on the Law of Evidence: Family Relations, 13 Minn. L. Rev. 675, 682 (1929) (footnote omitted). It has been suggested that the privileges within professional relationships are more well-known than the marital privilege because they "have as one party a professional person who can be expected to inform the other of the existence of the privilege." Proposed Fed. R. Evid. 505, Advisory Comm. Note, 56 F.R.D. 245, 246 (1972).
59. See, e.g., United States v. Trammel, 558 F.2d 1166, 1169 (10th Cir. 1978) (defendant cannot invoke the privilege to prevent his spouse from testifying if she has been granted immunity in exchange for testimony relating to a crime in which both she and defendant participated), cert. granted, 99 S. Ct. 1277 (1979); United States v. Allery, 526 F.2d 1362, 1367 (8th Cir. 1975) (spousal testimony held admissible in federal child abuse prosecutions); United States v. Apodaca, 522 F.2d 568, 571 (10th Cir. 1975) (no privilege when witness had married spouse three days before trial).
60. 2 J. Wigmore, supra note 3, § 488 (citing statutes).
judicial determination that invading the privacy of the marital relationship is simply too high a price to pay for the possible benefits of compelled disclosure.61

B. The Psychotherapeutic Privileges

During the last twenty years, there has been a rapid development of various privileges protecting communications between a patient and a psychotherapist.62 In fact, next to the privilege for attorney-client communications, the psychotherapeutic privilege is probably the most widely accepted privilege today. The primary rationale for the privilege is that confidentiality is a necessary prerequisite to the maintenance of such a relationship.63 Because successful therapy requires the utmost trust between patient and psychotherapist,64 a privilege is essential to assure the patient that the intimate and embarrassing statements made in the course of treatment will not be divulged.65 Moreover, compelling a psychotherapist to disclose such communications would be likely to have an inhibiting effect upon others engaged in therapy and might deter some from seeking help altogether.66

Many states have no general psychotherapist-patient privilege, but have specific privileges solely for psychologists.67 A few states have separate privileges for psychiatrists.68 Other groups that have either been included under a general psychotherapist-patient privilege or have won privileges of their own include social workers,69 marriage and family counselors,70 school psychologists,71 teachers,72 and guidance counselors.73 The same rationale

61. Reutlinger, supra note 8, at 1360.
62. See notes 67-73 infra and accompanying text.
65. "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame." Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955) (quoting M. Guttman & H. Weihofen, Psychiatry and the Law 272 (1952)); see C. McCormick, supra note 6, § 99, at 213 n.9; Slovenko, supra note 7, at 184-85.
66. "The disclosure of confidences may not only destroy the single psychotherapeutic relationship, but the fact of disclosure may become common knowledge and thus upset the sensitive relationships which have been established with a great number of clients . . . ." Fisher, supra note 19, at 629 (discussing psychotherapy in schools and institutional settings). See also Comment, Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers, 61 U. Cal. L. Rev. 1050, 1053-54 (1973) [hereinafter cited as Underprivileged Communications].
71. E.g., id. §§ 1010(d), 1014 (included within general psychotherapist-patient privilege); Idaho Code § 9-203.6 (Supp. 1978) (separate privilege).
applies to all: a guarantee of confidentiality is necessary in order for the professional to provide satisfactory and socially beneficial care.74

C. The Marital, Psychotherapeutic, and Child-Parent Relationships: Common Elements

Traditionally, the rationales for the privileges between husband and wife have been viewed as fundamentally different from those supporting the psychotherapist-patient privilege.75 Certain similarities in their underlying bases do exist, however. First, both relationships are considered to be socially desirable.76 Second, communication about highly personal matters occurs frequently in each.77 Third, there is an expectation inherent in both relationships that whatever is revealed in confidence will remain private.78 Finally, confidentiality is essential if either beneficial relationship is to function optimally.79

Obviously, the dynamics of the two relationships are very different. The psychotherapist-patient relationship is almost exclusively verbal;80 the marital relationship is presumably held together by love, affection, and some degree of emotional commitment, as well as the exchange of verbal confidences.81 Communication between spouses ideally consists of a mutual sharing of intimacies and a mutual support,82 whereas in the psychotherapist-patient relationship

75. Compare notes 43-44, 51 supra and accompanying text with notes 63-65 supra and accompanying text.
76. In re Lifschutz, 2 Cal.3d 415, 421-22, 467 P.2d 557, 560-51, 85 Cal. Rptr. 829, 832-33 (1970) (psychotherapist-patient relation); see Privileges Today, supra note 8, at 113 (marital relation); Reutlinger, supra note 8, at 1360 (same); Testimonial Non-Disclosure, supra note 37, at 218 (same).
79. C. McCormick, supra note 6, § 99, at 213 n.9 (psychotherapist-patient relation); 8 J. Wigmore, supra note 3, § 2332, at 642 (marital relation); Privileges Today, supra note 8, at 113 (same); Psychologist, supra note 64, at 744-45 (psychotherapist-patient relation).
82. Russell, supra note 78, at 280.
relationship the patient reveals and the therapist guides and supports. Finally, although the assurance of confidentiality is a prerequisite to a satisfactory relationship in both instances, it is clear that the psychotherapist would be totally unable to function unless he could promise his patient some measure of secrecy; the marital relationship conceivably could, and undoubtedly does, exist without the expectation of complete confidentiality.

Upon examination of the relationship between child and parent, certain similarities to both of the above relationships emerge. Ideally, the child-parent relationship encompasses aspects of the marital relationship—mutual love, affection, and intimacy—as well as elements of the relationship between psychotherapist and patient—the parent providing emotional guidance and the child relying on him for help and support. Because parental influence is probably the most important factor in a child's emotional development, society has a vital interest in fostering this dual affectional and therapeutic relationship between parent and child. As in the marital and psychotherapeutic relationships, this optimal child-parent relationship cannot exist without a great deal of communication between the two. Such a relationship would be characterized by a free flow of highly personal information from the child to the parent. Manifestly, the parent's disclosure of such information to a third party, without the concurrence of the child, would deter continued communication between child and parent. Thus, the promise of confidentiality is a necessary prerequisite to the satisfactory maintenance of the child-parent relationship, just as it is to the presently privileged marital and psychotherapeutic relationships.

83. "[T]here is hardly any situation in the gamut of human relations where one human being is so much subject to the scrutiny and mercy of another human being as in the psychodiagnostic and psychotherapeutic relationships." Psychologist, supra note 64, at 745.

84. See note 79 supra and accompanying text.

85. M. Guttmacher & H. Weihofen, supra note 77, at 272 ("It would be too much to expect...[patients to confide freely] if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand.").

86. See A. Skolnick, supra note 77, at 236-70.


88. See notes 114-17 infra and accompanying text.

89. A. Coffey, The Prevention of Crime and Delinquency 56 (1975); J. Conger, Adolescence and Youth 195-97 (2d ed. 1977). The important role which the family, and particularly the parent, plays in the emotional development of the child has been recognized judicially on numerous occasions. See, e.g., Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977) ("[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children...") (citation omitted); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

90. See notes 114-15 infra and accompanying text.

91. See notes 128-29 infra and accompanying text.
II. POLICY BASIS FOR THE CHILD-PARENT PRIVILEGE

Many forces shape the personality of the child and affect his development into adulthood. Among the more obvious are biological factors, economic status, educational opportunities and intellectual capabilities, and the influence on the child of peers and other members of the community. Probably the most crucial factor, however, and the prime determinant of whether a child ultimately becomes a healthy and functioning member of society, is the type of relationship he has with the other members of his family, particularly his parents.

A. Family Interaction and Child Development

In most cases, the various members of the family, and particularly the parent or parents, are the first individuals with whom the child has social contact. Throughout his developmental years the family continues to be the primary shaper of the child's behavior patterns, values, attitudes, and goals. Whether the familial influence is positive or negative depends to a great extent upon the quality and amount of interaction and communication between parent and child.

The correlation between delinquent behavior and a lack of interaction and affection within the family has been consistently demonstrated. Studies have shown that a significant number of juvenile delinquents come from homes where there was inadequate interaction and little communication. One study of the family backgrounds of delinquent boys showed that the strongest indicator of adolescent delinquency was the juvenile's relationship with his family. In fact, although the broken home was at one time

92. See generally S. Glueck & E. Glueck, Physique and Delinquency 217-48 (1956). Other physiological theories of personality development include those which link heredity with a tendency toward criminal behavior and those which have found a relationship between behavior and levels of hormonal secretions. See A. Coffey, supra note 89, at 45-47.
93. See Rodman, Lower-Class Family Behavior, in Family in Transition 410 (A. Skolnick & J. Skolnick eds. 1971). The author states that lower class families are more "fluid" than middle-class ones, with higher rates of divorce, illegitimacy, and desertion. Id. at 413.
96. See note 89 supra and accompanying text.
98. A. Coffey, supra note 89, at 56; J. Conger, supra note 89, at 195-96.
99. See notes 112-16 infra and accompanying text.
100. In describing delinquents as a group, one research team has isolated certain distinguishable characteristics. Among them are similar sociological backgrounds "in having been reared . . . in homes of little understanding, affection, stability, or moral fibre by parents usually unfit to be effective guides and protectors." S. Glueck & E. Glueck, Toward a Typology of Juvenile Offenders 2 (1970). See generally R. Trojanowicz, supra note 97, at 76.
102. S. Glueck & E. Glueck, Delinquents and Nondelinquents in Perspective 9-10 (1968). The
believed to be a prime cause of delinquency, that theory has not been wholly substantiated and it has recently been suggested that "quarrelsome and negligent homes" are a more significant factor than the mere fact of divorce or parental desertion. Thus, the way in which the family functions is more important than its structure.

The obligation for providing discipline for the young has traditionally rested with the parent and the child's need for this has been well-documented. Discipline, however, may take many forms, and the type of discipline a parent exerts may be more significant than the amount. Studies of delinquent and nondelinquent families have concluded that the parents of delinquents are likely to resort to physical punishment; those of nondelinquents are likely to reason with the child about misconduct. It would be overly simplistic to conclude from these and similar studies that the injudicious use of physical discipline causes juvenile delinquency, while reasoning and communication prevent it. It seems clear, however, that the form of discipline utilized by a parent is an important factor in the child's emotional and moral development.

The causes of delinquency are manifold and complex and a negative family life is only one of many reasons why a child may exhibit delinquent behavior. Positive family interaction, however, plays a more significant role in the prevention of delinquency and the promotion of a well-adjusted child. It is primarily for this reason that society has such a strong interest in fostering open communication between parent and child. Studies demonstrate that children raised by parents who emphasize two-way communication and who involve the children in family decisions are well-adjusted and have a

authors also found that boys coming from homes marked by a lack of family cohesiveness and poor supervision and discipline had a nine in ten chance of becoming delinquents. S. Glueck & E. Glueck, Toward a Typology of Juvenile Offenders 55-57 (1970). See also R. Trojanowicz, supra note 97, at 68-72.

103. E.g., Wirt & Briggs, Personality and Environmental Factors in the Development of Delinquency, 73 Psychological Monographs 1 (1959); see A. Coffey, supra note 89, at 44 (1975).

104. It is clear, however, that there is a statistical relationship between broken homes and adolescent maladjustment. See, e.g., W. Ahlstrom & A. Navighurt, 400 Losers 44-45 (1971); S. Glueck & E. Glueck, Delinquents and Nondelinquents in Perspective 12-13 (1968).

105. H. Sandhu, Juvenile Delinquency, Causes, Control, and Prevention 52 (1977); see J. Conger, supra note 89, at 584.


107. See, e.g., A. Coffey, supra note 89, at 60-63.


109. See generally R. Trojanowicz, supra note 97, at 78-80 (summarizing studies showing that physical or erratic disciplinary practices contribute to delinquent behavior).

110. For discussions of the various social, psychological, physical, and cultural theories of delinquency, see A. Coffey, supra note 89, at 26-50; H. Sandhu, supra note 105, at 33-64.

111. H. Sandhu, supra note 105, at 33-64.

112. A. Coffey, supra note 89, at 56.

113. See note 116 infra and accompanying text.
positive self-image.\textsuperscript{114} In one study, it was found that democratic and permissive parents who accompany their rules of conduct with frequent explanations were most likely to have confident, independent children. Conversely, adolescents lacking in self-confidence were most likely to be raised by autocratic, noncommunicative parents.\textsuperscript{115} Similarly, other studies have concluded that adolescents raised by emotionally supportive parents possess high self-esteem and confidence.\textsuperscript{116}

It is thus clear that there is a correlation between a child's self-image and emotional health on the one hand and a close, communicative family structure on the other. Guidance and discipline in the form of reasoning and interaction seem to produce a more well-adjusted child than dictatorial parental practices. Thus, there is a therapeutic element in child-parent communications which, though perhaps not as pervasive as in the psychotherapist-patient relationship, nevertheless plays a vitally important role in the child's growth.\textsuperscript{117}

The role that a parent, or in some cases the entire family, can play in the therapeutic process, either alone\textsuperscript{118} or in conjunction with a professional, has received growing recognition in recent years.\textsuperscript{119} An increasing number of social workers and psychologists, especially when treating children, are involving the entire family in the treatment.\textsuperscript{120} This trend is reflected in a number of jurisdictions in which the psychotherapist-patient privilege encompasses not only communications between the two parties directly involved in the treatment, but also communications between the therapist and members of the patient's family.\textsuperscript{121} Moreover, a California court recently held that even in the absence of statutory inclusion, statements by parents to a psychiatrist

\textsuperscript{114} In one survey of attitudes of children toward their parents, 85\% of those raised under democratic practices considered their parents' ideas of how they should behave to be reasonable and fair. Elder, \textit{Structural Variations in the Child Learning Relationship}, 25 Sociometry 241, 258 (1962). Those parents using autocratic methods ranked lowest. \textit{Id.} In the same study, adolescents were asked whether they ever felt unwanted. Again, about 40\% of those raised by autocratic parents responded positively as compared with only 10\% of those reared under a democratic structure and 11\% of those reared under a permissive structure. \textit{Id.} at 259.


\textsuperscript{117} Coburn, \textit{supra} note 20, at 615, 618-21. The author notes that the juvenile court system in the United States has traditionally been based upon the idea that confession of wrongful conduct has great therapeutic value for the child. \textit{Id.} at 620-21. The theory is that the child can be effectively treated only after he has admitted his involvement in criminal activity. \textit{Id.} \textit{See also} Note, \textit{Rights and Rehabilitation in the Juvenile Courts}, 67 Colum. L. Rev. 281, 331 (1967). Similar benefits may accrue whether the confession is made to a juvenile court judge or to a parent.

\textsuperscript{118} "[G]reat therapeutic contributions may... be made by friends[and] relatives." Rosenhelm, \textit{supra} note 18, at 670.

\textsuperscript{119} See Haley, \textit{A Review of the Family Therapy Field}, in Intimacy, Family and Society 60 (A. Skolnick & J. Skolnick eds. 1974).

\textsuperscript{120} Eisenman, \textit{The Origins and Practice of Family Therapy}, in \textit{The Family} 135, 141-43 (P. Stein, S. Richman & N. Hannon eds. 1977).

regarding the dangerous propensities of their daughter were within the
purview of the psychotherapist-patient privilege. 122 At least one statute grants
a privilege to participants in group therapy sessions, 123 and the recognition of
a privilege for marriage and family counselors 124 obviously implies that
confidences divulged in front of family members will be privileged. Similarly,
statutes granting a privilege to a child and a school guidance counselor, which
permit waiver only with the consent of the parent, 125 necessarily contemplate
the parent's involvement in the child's discussions with the counselor. These
provisions signify the importance of involving the entire family in the thera-
peutic process.

The parental role as a provider of guidance and discipline can only be
fulfilled if the child feels that he can rely on his parents for help and advice. 126
Effective guidance, like effective therapy, cannot take place in a vacuum; the
parent must have some knowledge of his child's problems before he can
provide meaningful help. 127 This knowledge can only arise if there is open
communication within the family. The child must feel that the parent can be
trusted, 128 and the graver the problem, the more essential the element of
trust becomes. In his home, more than anywhere else, the child should be
couraged to communicate freely and should be made to feel that what he
has shared with his parent in confidence will not be disclosed to outsiders. 129
Without the promise of confidentiality, however, child-parent interaction will
necessarily be inhibited and the parent will be unable to provide salutary
guidance and support. At a time when the demise of the family is being both

125. Mich. Comp. Laws Ann. § 600.2165 (1968) ( privilege can be waived by parent without
126. See Coburn, supra note 20, at 618-19.
127. A parent should be familiar with certain aspects of his child's life, for instance, the child's
activities and associates. In addition, the parent should be aware of his location. A. Coffey, supra
note 89, at 62.
128. See J. Conger, supra note 89, at 220.
129. One writer has stated, referring to the psychotherapist-patient relationship, that "the
condition for such openness is the guarantee that whatever is presented to the other or others is
disclosed in privacy." Journard, Some Psychological Aspects of Privacy, 31 J. Law & Contemp.
Prob. 307, 311 (1966). Of course, the parent is not a substitute for, and will not always perform a
function identical to, the psychotherapist. A patient may reveal more in analysis than he would to the
closest members of his family. Slovenko, supra note 7, at 184-85. Nevertheless, communication, trust,
and parental guidance are integral parts of the process of emotional nurturing and are
extremely important for the development of a psychologically healthy adult. See notes 114-17
supra and accompanying text. In fact, there may be a danger in placing too much reliance on the
social worker or psychotherapist. A parent may substitute the judgment of the professional in
place of his own, preferring to rely upon the psychologist to solve child-parent conflicts. A.
Coffey, supra note 89, at 58. The parent may then become reluctant to assume responsibility over
his child's behavior. Id. at 58-59. One writer has stated that the primary role of the professional
"should not be to work with the children themselves but to help create the kind of conditions and
situations in which parents and others who carry the responsibility for the day-to-day care of
children can function effectively as human beings." Bronfenbrenner, Who Cares for America's
predicted and decried, it seems anamolous to deny child-parent communications the same protection as is granted to communications arising out of other socially beneficial relationships.

B. The Marital Confidential Communications and Proposed Child-Parent Privileges: Criticisms and Justifications

Because the proposed privilege is based in part upon the rationale which supports the marital confidential communications privilege—that of fostering open communication and interaction—and because the child-parent relationship, like that of husband and wife, is a nonprofessional one, many of the criticisms of the confidential communications privilege are also applicable to the child-parent privilege. Perhaps the predominant argument against the husband-wife confidential communications privilege is that it will have no effect upon the average marital relationship since "in all likelihood" the parties are unaware of its existence. On the other hand, critics argue, the professional relationships generally involve one party—the practitioner—who probably is aware of the privilege and will so inform his client or patient.

If one accepts this proposition, it is obviously applicable to all nonprofessional relationships, including that of parent and child. The presumption of ignorance on the part of married people, however, has never been substantiated. Furthermore, even if only a small segment of the married population is aware of the privilege, the state policy of fostering open communication is furthered as to them.

Even assuming that most families would be unaware of a child-parent privilege prior to a court appearance, its absence would certainly have an adverse effect upon the child who learns firsthand that his parent can be compelled to reveal any intimate conversations they may have had. Inevitably, the child will feel betrayed and this feeling may be only slightly diminished by the knowledge that his parent's act of disclosure is not voluntary.Ironically, the juvenile accused of some crime or delinquent

131. Compare note 51 supra with note 117 supra and accompanying texts.
134. The argument was originally advanced in 1929. Hutchins & Slesinger, supra note 56, at 682. The authors, however, cited no authority for their proposition. Id. Moreover, even if the statement was true in 1929, it is likely that a greater percentage of the populace in today's litigious society is aware of the existence of a privilege. See Reutlinger, supra note 8, at 1374.
135. Speaking of the marital privilege, one writer has noted that it is "the litigants of the world . . . who encounter [the existence or non-existence of a privilege] in its most stark and meaningful terms." Reutlinger, supra note 8, at 1377.
136. Compelled parental disclosure may cause more damage to the child-parent relationship than compelled spousal disclosure would cause to the marital relation. A younger child especially may not fully comprehend that his parent is being forced to testify and may feel that the parent, who, at the time the confidence was revealed by the child, explicitly or implicitly promised to maintain secrecy, has lied to him. Such a belief may have far-reaching adverse effects on the entire relationship. See R. Trojanowicz, supra note 97, at 90.
behavior who suffers the airing of his confidential statements is likely to be
the one most in need of parental guidance and family interaction.\textsuperscript{137} Yet, it is
this child who, as a result of his experience, will be unlikely to seek parental
solace again. If he had not previously considered the possibility of compelled
parental disclosure, he will most certainly be cognizant of it in the future.

Another frequent criticism of the marital confidential communications
privilege which could be asserted against the child-parent privilege is that the
existence of a statute, even if known to those protected by it, will not
appreciably increase communication in a family in which trust and openness
do not already exist.\textsuperscript{138} In other words, that which encourages spouses or
children "to fullest frankness is not the assurance of a courtroom privilege,
but the trust they place in the loyalty and discretion of each other."\textsuperscript{139}

This argument is irrefutable as far as it goes. It is highly unlikely that a
person will divulge his secrets to spouse or parent because he knows that they
will be safe from disclosure in a courtroom.\textsuperscript{140} The argument, however, fails to
take into account the vital role the privileges play in preserving an existing
relationship.\textsuperscript{141} The rationale of preserving family harmony and preventing
dissension is generally applied only to the marital privilege against adverse
testimony and not to the confidential communications privilege.\textsuperscript{142} Yet, it
would seem to be an equally valid justification for both.\textsuperscript{143} Although the
confidential communications privilege is not primarily designed to exclude
adverse testimony, from a practical standpoint such a privilege is most likely to
be invoked when the communication sought to be disclosed is in some way
incriminating to the communicating party.\textsuperscript{144} Similarly, cases in which child-
parent confidential communications privileges have been asserted have also
primarily involved communications which were adverse to the interests of the

137. As discussed earlier, studies of the families of delinquents have shown that, in many
cases, there is little interaction between child and parent. See notes 100-08 supra and accompanying
text. Generally, the delinquent child has not received proper affection, socialization, and
would seem that the juvenile offender, possibly even more than the nondelinquent, needs the
support of his parent; "(ultimately, the rehabilitation of an individual may depend more upon the
support and concern of his family than on any other one factor." A. Coffey, supra note 89, at 185.

138. C. McCormick, supra note 6, § 86, at 172; 8 J. Wigmore, supra note 3, § 2332, at 642;
Marital Privilege, supra note 14, at 318.

139. C. McCormick, supra note 6, § 86, at 173.

140. Id.

141. Id. v. United States, 263 F.2d 275, 280 (D.C. Cir. 1958) (Fahy, J., concurring). See also
Privileges Today, supra note 8, at 110; Testimonial Non-Disclosure, supra note 37, at 219.

142. See note 43 supra and accompanying text.

143. See Reutlinger, supra note 8, at 1369-71. Contra, Proposed Fed. R. Evid. R. 505, 56
F.R.D. 245, 245-46 (1972) ("The traditional justifications for privileges not to testify against a
spouse and not to be testified against by one's spouse . . . bear no relevance to marital
communications."). Critics of the adverse testimony privilege have suggested that the rationale
for preserving family harmony would be better served by encompassing all family members
within the privilege. See Hutchins & Slesinger, supra note 56, at 677; Evidentiary Privileges,
supra note 37, at 427.

144. 8 J. Wigmore, supra note 3, § 2333, at 644; Evidentiary Privileges, supra note 37, at 417.
Revelations of these intimate communications may have a very negative impact upon a pre-existing family relationship. In fact, the most salient effect of both the marital confidential communications privilege and child-parent privilege is not so much that they encourage open communication (although this may well be true in some instances), but that they protect the confidentiality of a communication once it has been made. If it is accepted that the state and society in general have a strong interest in preserving and fostering the child-parent relationship, then it must be recognized that compelling disclosure of a child's confidences runs directly counter to this interest. What the privilege protects is not only the expectation of privacy, that is, the encouragement of confidential communications, but the privacy of the family relationship itself.

Another justification generally asserted in support of the marital privilege for adverse testimony, but not usually advanced as a rationale for the confidential communications privilege, is that society experiences a "natural repugnance" at the thought of forcing one spouse to incriminate the other. Yet, since incrimination is often the end result of compelled disclosure of confidential communications, the repugnancy rationale is also applicable to those situations. Moreover, even if disclosure would not be directly harmful to a claim or defense of the communicating party, the idea of forcing one spouse to divulge confidences entrusted to him by the other is certainly as "repugnant" to public sensibilities as compelled adverse testimony.

It is obvious that compelling a parent to reveal his child's secrets is no less offensive than compelled spousal disclosure. In fact, one of the harshest...
critics of the adverse testimony privilege has suggested that the repugnancy rationale would make more sense if the privilege encompassed the testimony of parents, children, and siblings, as well as that of husband and wife. Although the repugnancy rationale has been dismissed by critics as sentimental, and not sufficiently important to overcome the needs of state and litigants for disclosure of relevant evidence, it is suggested that there is a great deal more than indecorum involved when disclosure of intimate family confidences is compelled. At stake is no less than the right of a family to maintain its inviolability and integrity. At the least, compelled parental disclosure will result in strained relations, not only between the child and the parent who revealed his secrets, but among the entire family. The extent and duration of the breakdown in intrafamilial interaction will vary from family to family depending upon such factors as its inherent stability, the age of the child, the subject matter of the communication disclosed, and the type of proceeding in which testimony is given. In almost every case, however, some compelling a parent to reveal his child’s incriminating statements indirectly violates the child’s constitutional privilege against self-incrimination, “solely because of a natural, but regrettably mistaken belief on his part that his conversations with his parents are private.” Coburn, supra note 20, at 600; cf. id. at 617 (“This method of circumventing a juvenile’s privilege against self-incrimination is repugnant to our system of justice and fair play.”).

155. 8 J. Wigmore, supra note 3, § 2228, at 217 n.2.
156. C. McCormick, supra note 6, § 86, at 173; 8 J. Wigmore, supra note 3, § 2228, at 217.
157. Evidentiary Privileges, supra note 37, at 427.
158. C. McCormick, supra note 6, § 86 at 173; 8 J. Wigmore, supra note 3, § 2228, at 217-18.
159. 8 J. Wigmore, supra note 3, § 2228, at 217.
161. See notes 128-30 supra and accompanying text.
162. For example, parents using democratic methods of childrearing where interaction between family members is consistently encouraged may be better able than authoritarian parents to regain the trust of the child whose confidences have been divulged. See notes 114-16 supra and accompanying text.
163. See note 136 supra and accompanying text.
164. The degree of family disruption resulting from compelled disclosure may depend upon how embarrassing or harmful the particular communication was to the child. When divulgence would directly implicate the child in a crime, see, e.g., In re A & M, 61 A.D. 2d 426, 403 N.Y.S. 2d 375 (1978), the effects of parental testimony on the family may be more severe than in situations when less intimate matters are disclosed. See, e.g., In re Kinoy, 326 F. Supp. 400, 406 (S.D.N.Y. 1970) (testimony was sought from a father regarding the whereabouts of his daughter when the daughter was not herself a target of the grand jury’s investigation).
degree of harm seems inevitable, and in many families future communication may be permanently deterred.

In formulating a privilege, it is not enough merely to demonstrate that compelled disclosure will lead to a deterioration of the socially desirable child-parent relation. The potential for harm must be weighed against the public need for disclosure of all relevant evidence, particularly in criminal cases. It is indisputable that the production of facts is central to the proper functioning of the adjudicatory system. Yet, in a practical sense, the benefits accruing to the adjudicatory process in the absence of a privilege may be minimal; even without a privilege the court may be denied the testimony. A parent called upon to testify has several courses of action open to him. First, he can comply with the request for disclosure. Second, he can refuse to testify, either flatly or by claiming a privilege. A flat refusal will obviously subject him to a contempt citation, and the chances for a successful assertion of a privilege seem slim in light of the historic reluctance on the part of most courts to recognize privileges in the absence of statutory authorization. Finally, the parent can lie or conveniently forget, and accept the possibility of a perjury conviction.

Although it is probably impossible to ascertain how many parents have chosen or would choose the second or third alternative, it does not seem unreasonable to assume that many would find the first choice to be a morally unacceptable one, particularly if there was a chance that by testifying the parent would become the instrument of his child's conviction. Choosing the second alternative would not aid the disposal of the litigation, for if the parent refuses to answer questions despite the threat of contempt, no evidence can be obtained from him. That the third alternative will not further adjudication is obvious; in fact, it has been suggested by some commentators that privileges

166. See notes 4-8 supra and accompanying text.

167. Although the potential for harm to a privileged relationship may be greater in criminal or grand jury proceedings, the need for disclosure of relevant evidence is also usually deemed to be more compelling. See United States v. Nixon, 418 U.S. 683, 709 (1974); Branzburg v. Hayes, 408 U.S. 665, 686-88 (1972); United States v. Bryan, 339 U.S. 323, 331 (1950); McMann v. SEC, 87 F. 2d 377, 378 (2d Cir. 1937).

168. See notes 1-3 supra and accompanying text.

169. Cf. Robinson, supra note 74, at 929 (one option open to a guidance counselor called upon to testify regarding communications made to him by a counselee, would be to agree to testify, "if he found that option to be morally and professionally acceptable"); Testimonial Non-Disclosure, supra note 37, at 210 (one option open to a wife compelled to testify against her husband would be to "testify, and possibly condemn her husband").

170. In re A & M, 61 A.D. 2d 426, 433, 403 N.Y.S. 2d 375, 380 (1978) (discussing the risk of prosecution for contempt if parents refuse to divulge their child's confidences); Coburn, supra note 20, at 629 (same); see Robinson, supra note 74, at 929 (same in context of guidance counselor-counselee relationship); Underprivileged Communications, supra note 66, at 1054 (same in context of social worker-patient relationship); Testimonial Non-Disclosure, supra note 37, at 210 (same in context of marital relationship).

171. See Robinson, supra note 74, at 929, 932 (discussing this option in the context of counselor-pupil relationship).

172. See note 26 supra and accompanying text.

actually aid the ascertainment of truth by decreasing the likelihood of perjury.\textsuperscript{174} Therefore, in the context of child-parent communications the state's interest in compelled disclosure may not outweigh the societal benefit gained by insulating the relationship.

III. THE CHILD-PARENT PRIVILEGE AND THE CONSTITUTIONAL RIGHT OF PRIVACY

A. Confidential Communications and the Right of Privacy

The concept of privacy—the individual's "right to be let alone"\textsuperscript{175}—has emerged as a viable constitutional doctrine in the past century.\textsuperscript{176} Concomitantly, there has been increasing recognition of the important role that privileges may play in safeguarding this right.\textsuperscript{177} Courts and commentators have spoken of preserving the inviolability of confidences,\textsuperscript{178} protecting the right to be let alone,\textsuperscript{179} and the importance of the privileges to "human freedom."\textsuperscript{180} Therefore, certain privileges that preserve the confidentiality of communications arising out of various relationships may be constitutionally mandated, possibly assertable even in the absence of statute.\textsuperscript{181}

The right of privacy was elevated to the level of a constitutional guarantee in Griswold v. Connecticut,\textsuperscript{182} in which the Supreme Court declared a Connecticut statute forbidding the use of contraceptives to be an unconstitutional invasion of the "zone of privacy" surrounding the marriage relationship.\textsuperscript{183} Subsequent cases have confirmed that this right of marital privacy is one aspect of a more general right of privacy.\textsuperscript{184} After Griswold, the idea that confidential com-
Communications within certain relationships might be encompassed in the amorphous right of privacy began to crystallize. In particular, some commentators have suggested that marital and physician-patient communications are constitutionally protected and that these privileges are therefore assertable even in the absence of statute.\textsuperscript{185} Such an approach, however, has been largely unexplored by the judiciary. Most courts, in analyzing whether the invocation of a privilege in a particular situation is proper, merely examine the applicable statutory privilege and its exceptions.\textsuperscript{186} The few cases that have discussed the relationship between privileges and privacy have generally involved two types of claims by litigants: that the right of privacy mandates recognition of a privilege in the absence of statute\textsuperscript{187} or that the right of privacy mandates recognition of an absolute privilege and that any statutory exceptions are therefore unconstitutional.\textsuperscript{188} Although claims of an absolute privilege have been uniformly rejected,\textsuperscript{189} some courts have indicated that certain confidential communications would be entitled to constitutional protection even in the absence of statute.\textsuperscript{190} Other courts, however, have denied that the right of privacy requires any recognition of a particular privilege.\textsuperscript{191}

The latter approach was adopted by the court in \textit{Felber v. Foote}.\textsuperscript{192} In \textit{Felber}, a physician sought an injunction against the enforcement of a Connecticut statute that required physicians to report to the state commissioner of health information about patients believed by them to be drug-dependent.\textsuperscript{193} The statute further provided that the reports would not be admissible in any criminal prosecutions.\textsuperscript{194} The plaintiff claimed that the statute was an uncon-
stitutional invasion of his own privacy rights as a physician as well as the rights of all other "practitioners of the healing arts" and their patients. At that time, Connecticut had no general physician-patient privilege, but did have a psychotherapist-patient privilege which protected confidential communications and records of mental patients.

The court held that the statute did not invade the privacy rights of either physician or patient. As to the physician's claim of privacy within the physician-patient relationship, the court stated that Griswold's recognition of a right of privacy protected only "the sanctity of the family" and did not include other relationships within its penumbra. Indeed, the court denied the existence of a broad constitutional right of privacy and rejected the idea of a constitutional foundation for the physician-patient privilege which would enable the patient to assert a privilege in the absence of statute. Consequently, whether a patient's communications to his doctor could be protected from disclosure would depend solely upon the existence or nonexistence of a statutory privilege.

The same year in which the Felber court concluded that no privacy rights were involved in the physician-patient privilege, the California Supreme Court, in In re Lifschutz, reached the opposite conclusion in the context of the psychotherapist-patient relationship. Unlike the situation in Felber, however, there was an applicable statutory privilege which, in the absence of waiver, would have been assertable by a patient or his psychotherapist on his behalf. At issue in Lifschutz was the constitutionality of the statutory patient-litigant exception which provided that a patient who places his emotional condition in issue in a civil or criminal proceeding automatically waives the privilege.

195. Id. at 87. The court did not discuss the issue of the physician's standing to raise the constitutional rights of his patients. Id.
196. Id. at 88 n.8. Connecticut presently recognizes privileges for communications between psychologists and patients, Conn. Gen. Stat. Ann. § 52-146c (West Supp. 1979) and psychiatrists and patients, id. §§ 52-146d to -146j (West Supp. 1979), but still has no general physician-patient privilege.
197. 321 F. Supp. at 88 n.8. The court stated that the statutory privilege could be asserted only by the patient for whose benefit the privilege existed. Thus, it could not be invoked by Dr. Felber. Id. In some states, the applicable statutory privilege specifically allows the psychotherapist to claim the privilege on his patient's behalf. See, e.g., Cal. Evid. Code § 1014(b) (West Supp. 1979); Ill. Stat. Ann. ch. 51, § 5.2 (Smith-Hurd Supp. 1978).
198. 321 F. Supp. at 87-89.
199. Id. at 88-89. It should be noted that Felber was decided before many of the more recent Supreme Court cases which have broadened the right of privacy beyond the parameters of marriage and family relations. See cases cited note 184 supra.
200. 321 F. Supp. at 88. The court noted that the plaintiff had not claimed that the statute constituted an unreasonable search and seizure in violation of the fourth amendment. Had he done so, however, he would not have prevailed because the statutory provision forbidding disclosure of the reports in criminal proceedings provided "built-in fourth amendment protection." Id.
201. Id. at 87.
202. Id. at 88.
204. Id. at 431, 467 P.2d at 567, 85 Cal. Rptr. at 839.
205. Id. at 421, 467 P.2d at 559-60, 85 Cal. Rptr. at 831-32.
206. Id. at 422-23, 467 P.2d at 561, 85 Cal. Rptr. at 833. The patient-litigant exception to
In Lifschutz, a psychiatrist sought to secure his release from prison where he had been confined after refusing to comply with a court order to answer questions and produce records regarding a former patient.207 The patient had instituted an action for civil assault alleging, among other things, that he had suffered emotional distress.208 His deposition revealed that ten years earlier he had received psychiatric treatment from Dr. Lifschutz.209 Defendant sought the records and testimony from Lifschutz, but the latter repeatedly refused to comply with the request, even after the trial court ordered compliance, holding that the plaintiff had automatically waived the statutory psychotherapist-patient privilege by placing his mental condition in issue. Lifschutz was held in contempt and was incarcerated.210

Dr. Lifschutz contended that the court order was an unconstitutional infringement of his personal rights of privacy, his right to practice his profession effectively, and his patients' privacy rights.211 He claimed that Griswold mandated recognition of an absolute constitutional right for psychotherapists to refuse to disclose statements made in the context of the psychotherapist-patient relationship and that the legislative exceptions to the privilege were therefore unconstitutional.212 The court held that the statutory patient-litigant exception did not infringe upon the privacy rights of either psychotherapists213 or their patients.214 Nevertheless, the court went on to state in dictum that, although not absolute, a patient does have an assertable right of privacy which protects confidences revealed in psychotherapy.215 In fact, if he had not placed his


207. 2 Cal. 3d at 420-21, 467 P.2d at 559-60, 85 Cal. Rptr. at 831-32.
208. Id. at 420, 467 P.2d at 559, 85 Cal. Rptr. at 831.
209. Id. at 420-21, 467 P.2d at 559-60, 85 Cal. Rptr. at 831-32.
210. Id. at 421, 467 P.2d at 560, 85 Cal. Rptr. at 832.
211. Id. at 420, 467 P.2d at 559, 85 Cal. Rptr. at 831. Lifschutz based his standing to assert the constitutional rights of his patients on the decision in Griswold, in which the Court allowed a physician to assert the rights of his patients. 381 U.S. at 481. The Lifschutz court distinguished Griswold, however, on two grounds, and stated that it would be "inappropriate" to allow Lifschutz to assert his patients' rights. 2 Cal. 3d at 423 n.4, 467 P.2d at 561 n.4, 85 Cal. Rptr. at 833 n.4. First, the psychiatrist's and patient's wishes might not always coincide on the issue of whether to disclose communications. Id. Second, whereas in Griswold the married couples were not in a position to assert their own rights, here the patient himself had had "full opportunity" to do so, because he was a party in the original action. Id.
212. 2 Cal. 3d at 423-24, 467 P.2d at 561-62, 85 Cal. Rptr. at 833-34.
213. Id. at 423-24, 467 P.2d at 561-62, 85 Cal. Rptr. at 833-34. Disclosure would not violate any privacy rights of the psychotherapist because "[i]t is the depth and intimacy of the patients' revelations that give rise to the concern over compelled disclosure: the psychotherapist . . . does not exert a significant privacy interest separate from his patient." Id. at 424, 467 P.2d at 562, 85 Cal. Rptr. at 834 (emphasis and footnote omitted).
214. Id. at 433, 467 P.2d at 568, 85 Cal. Rptr. at 840-41. Although the court had denied Lifschutz standing to raise the rights of his patients, see note 211 supra, it embarked on an extensive discussion of the privacy rights of the patient. See notes 215-17 infra and accompanying text.
215. 2 Cal. 3d at 431-33, 467 P.2d at 567-69, 85 Cal. Rptr. at 839-41. Because the court found the
emotionally significant in issue and thus triggered the statutory exception, the
patient's communications could have had constitutional protection in addition to
or in spite of any statutory rules of evidence. Although the Griswold decision
was not deemed to be controlling, the court noted its open-ended quality and
extended the zone of marital privacy recognized there to the psychotherapeutic
session.

Lifschutz was followed by the Ninth Circuit's decision in Caesar v. Montana, in which the California statutory patient-litigant exception was again challenged by a psychiatrist on constitutional grounds. The court agreed that a right of privacy encompasses the psychotherapist-patient relationship but stated, as in Lifschutz, that this did not provide the psychiatrist with an absolute right of nondisclosure. Basing its analysis upon Roe v. Wade and Doe v. Bolton, the court stated that the right of privacy inherent in the psychotherapist-patient relationship, although fundamental, is not absolute but rather conditional, and can be regulated by the state upon a showing of a compelling state interest. Holding the state's interest in insuring the ascertainment of truth in the instant legal proceedings to be compelling, the court concluded that the patient-litigant exception did not violate the constitutional rights of either patient or psychotherapist.

The Caesar court thus further defined the exact limitations of the right of privacy inherent in the psychotherapist-patient relationship. The court accepted without discussion the constitutional protection afforded the relationship but stated that a state may nevertheless intrude into the
psychotherapist-patient privilege when such intrusion is "properly justified."\textsuperscript{228}

Creating an exception to the privilege when the patient has made his emotional condition an element of his claim or defense was deemed to be a justifiable intrusion in light of the state's "compelling" interest in the ascertainment of truth.\textsuperscript{229}

The major issue unresolved by \textit{Lifschutz} and \textit{Caesar} is whether, in the absence of waiver, the patient's right of privacy would outweigh the state's interest in facilitating the ascertainment of truth. That this state interest is a significant one is well established.\textsuperscript{230} The \textit{Lifschutz} and \textit{Caesar} cases suggest, however, that a patient who had not placed his emotional condition in issue would be able to claim a right of privacy to prevent disclosure of confidential communications even in the absence of statute.\textsuperscript{231} Thus, his right of privacy in this situation would prevail over the competing state interest. Whether confidential communications are entitled to constitutional protection is a question which arises not only in the context of the psychotherapist-patient relationship, but in other relationships which are arguably entitled to constitutional protection, such as that between parent and child.\textsuperscript{232}

\textbf{B. Family Privacy and the Child-Parent Privilege}

\begin{enumerate}
\item The Judicial Response

Since 1923, the Supreme Court has recognized the family as an autonomous unit entitled to constitutional protection from undue state regulation.\textsuperscript{233} Cases involving family life can be grouped into two broad categories: those involving state interference with the physical structure or definition of the family\textsuperscript{234} and

\begin{itemize}
\item \textsuperscript{228} \textit{Id.} at 1067.
\item \textsuperscript{229} \textit{Id.} at 1069. The court agreed with Lifschutz that by placing his emotional condition in issue, the patient waived the privilege only insofar as the condition he had disclosed. \textit{Id.} at 1069-70.
\item \textsuperscript{230} United States v. Nixon, 418 U.S. 683, 709 (1974); Branzburg v. Hayes, 408 U.S. 665, 700 (1972); Blair v. United States, 250 U.S. 273, 281 (1919). Furthermore, Supreme Court cases that have held the right of privacy to be fundamental have also stated that it is not absolute, but can be restricted upon a showing of a compelling state interest. \textit{See, e.g.,} Roe v. Wade, 410 U.S. 113, 155 (1973); Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969).
\item \textsuperscript{231} \textit{See} notes 215-17, 220 \textit{supra} and accompanying text.
\item \textsuperscript{232} \textit{See} notes 27-34 \textit{supra} and accompanying text.
\item \textsuperscript{233} \textit{Meyer} v. Nebraska, 262 U.S. 390 (1923). In \textit{Meyer}, the Court overturned a state statute prohibiting foreign language instruction in elementary schools. The Court upheld both the instructor's right to teach German and the parents' right to engage him to instruct their children. \textit{Id.} at 400. The parents' right "to marry, establish a home and bring up children" was held to arise out of the liberty guaranteed by the fourteenth amendment. \textit{Id.} at 399.
\item \textsuperscript{234} \textit{See} Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977) (pre-removal hearings are not constitutionally mandated when children living in foster homes for less than 18 months are returned to their natural parents as opposed to another foster home); Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (city housing ordinance requiring single family dwellings and limiting definition of family to a few related individuals held unconstitutional); Stanley v. Illinois, 405 U.S. 645 (1972) (a state has no authority to interfere with the custody rights of an unwed father absent a finding of neglect on his part); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (state's definition of family in wrongful death statute which barred a mother from recovering for the death of her illegitimate son held unconstitutional); Levy v. Louisiana, 391 U.S. 68 (1968) (same wrongful death statute held unconstitutional as applied to prohibit illegitimate child from maintaining an action for the death of his mother).
\end{itemize}
those involving the right to make certain decisions relating to various aspects of family life such as marriage, procreation, contraception, and the upbringing of children. These cases provide support, either implicitly or explicitly, for what has now become a well-known maxim—that there is a "private realm of family life which the state cannot enter."

The zone of privacy surrounding family life, however, can be encroached upon if the state can demonstrate that its regulation serves a compelling state interest. The greater the intrusion upon freedom of choice in matters of marriage and family life, the stronger the state interest must be. Whether the private interests involved in a particular situation outweigh the public ones necessitates an analysis of the competing interests.

Very few cases have dealt with the question of constitutional protection for intrafamilial communications, either between husband and wife or parent and child. Although the California courts have been in the forefront in recognizing constitutional protections for patients' communications, a claim by a juvenile that intrafamilial conversations fell within "a penumbral right of privacy" was denied by a California court in In re Terry W. The juvenile had

235. See Zablocki v. Redhail, 434 U.S. 374 (1978) (statute which provided that unmarried residents with obligation to support minor children not in their custody had to obtain a court order before they could marry held to impinge unconstitutionally upon the fundamental right to marry); Loving v. Virginia, 388 U.S. 1 (1967) (miscegenation statute invalidated on the ground that it deprived a couple of the fundamental freedom to marry).

236. See Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (a state cannot impose blanket provisions requiring parental or spousal consent as a condition for an unmarried minor or woman to obtain an abortion in the first 12 weeks of pregnancy); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (mandatory leave provisions for pregnant school teachers invalidated on the ground that they unnecessarily interfered with the decision to raise a family); Roe v. Wade, 410 U.S. 113 (1973) (statute forbidding an abortion except to save the life of the mother violated the mother's fundamental right of privacy).


238. See Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory education statute as applied to Amish parents invalidated because parents' right to free exercise of religion and to rear their children outweighed state's asserted interests in educating its children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (statute which barred children from attending private school invalidated because it denied parents the liberty to direct the upbringing of their children); Meyer v. Nebraska, 262 U.S. 390 (1923) (statute barring foreign language instruction to school children invalided).


242. Id.

243. See notes 203-29 supra and accompanying text.

244. 59 Cal. App. 3d 745, 748, 130 Cal. Rptr. 913, 914 (1976).
made a confession to his mother regarding his involvement in a burglary; her testimony to that effect was introduced at the boy's trial over the objection of counsel. 245 On appeal, he argued, inter alia, that such compelled disclosure was unconstitutional. 246 Although it conceded that the arguments for a child-parent statutory privilege were "persuasive", the court held that the right of privacy does not protect child-parent communications. 247

In its statement that "the 'penumbra' is limited to the relationship between husband and wife," 248 the Terry court seemingly ignored the conclusion of In re Lifschutz 249 that the right of privacy recognized in Griswold clearly encompassed patient-psychotherapist communications. 250 The court also failed to consider all of the post-Griswold decisions which explicitly included within their definitions of privacy matters relating to family life. 251 Instead, it cited several cases, none of which involved relationships within the traditional family structure, in which privacy claims have been rejected by the Supreme Court. 252 Moreover, the court noted that it would be "unwise" for "a court of our level" to expand the right of privacy into the uncharted area of intrafamilial communications. 253 As to the creation of an evidentiary privilege, the court stated that such action should be left to the legislature. 254

In direct contrast to Terry, the New York Appellate Division, in In re A & M, 255 expanded the constitutional right of family privacy to embrace communications made by a child to his parent. In that case, a subpoena was issued to the parents of John Doe, a sixteen year old boy, requiring them to appear before a grand jury which was conducting an investigation into an alleged arson. 256 Other witnesses had reported seeing the boy at the scene of the fire and testimony was sought from his parents regarding admissions he may have made to them. 257 The trial court granted the motion to quash the subpoena on the ground that these child-parent conversations fell within the scope of the New York statutory privilege for confidential marital communications. 258

On appeal, the Appellate Division reversed, refusing to enlarge any of the existing statutory privileges. 259 The court, however, then undertook a detailed
analysis of the parents' claim that compelled testimony would violate their right of privacy. Citing a long line of authority, the court concluded that "the integrity of the family relational interests is clearly entitled to constitutional protection." It then embarked upon the more difficult task of balancing the competing private and state interests. The necessity for openness and trust between child and parent was acknowledged, as was the beneficial effect upon society which would result from the fostering of a confidential child-parent relationship. The court further stated that the idea of compelling a parent to disclose his child's potentially incriminating statements revealed to the parent in confidence "is shocking to our sense of decency, fairness and propriety."

In assessing the competing interests, the court recognized the "legitimate" state objective of facilitating the adjudicatory process, but concluded that if the information sought was divulged to the parents "for the purpose of obtaining support, advice or guidance," the societal interest in preserving and fostering the child-parent relationship would outweigh the state's interest in factfinding. The court, however, held that this right of nondisclosure did not excuse the parents from appearing and testifying before the grand jury. Nevertheless, the parents could not be compelled to answer questions which would intrude upon the family's privacy.

The court emphasized that its recognition of a right of family privacy surrounding certain communications between child and parent did not create a privilege. Notwithstanding this disclaimer, however, the effect of the decision does indeed suggest a narrow privilege for child-parent communications. As formulated by the court, the "privilege" seems to encompass only communications made by a child to his parent and not vice versa. In this respect, it is similar to the psychotherapeutic and other professional privileges which have as their purpose the protection of patients' or clients' confidential statements, unlike the marital confidential communications privilege which protects the confidences of either partner. Certainly the rationale for the privilege—that the fostering of a confidential parent-child relationship is necessary to the child's development of a positive system of values, and results in an ultimate good to society as a whole—is primarily concerned with encouraging the child to confide and preserving those confidences once they are made.

The most unusual aspect of the court's discussion is its statement, made in a

the boy's mother. Id. at 429, 403 N.Y.S.2d at 377-78; accord, In re Kinoy, 326 F. Supp. 400, 405-06 (S.D.N.Y. 1970).

260. 61 A.D.2d at 432, 403 N.Y.S.2d at 380.

261. Id. at 432, 403 N.Y.S.2d at 380.

262. Id. at 433, 403 N.Y.S.2d at 380.

263. Id. at 433-34, 403 N.Y.S.2d at 380.

264. Id. at 435, 403 N.Y.S.2d at 381.

265. Id.

266. Id. at 436, 403 N.Y.S.2d at 382. A question regarding the boy's presence or absence from home would not necessitate the divulgence of any intrafamily communications. Even under a statutory confidential communications privilege, therefore, that type of inquiry could properly be made. See notes 49-50 supra and accompanying text.

267. 61 A.D.2d at 434-35, 403 N.Y.S.2d at 381.

268. Id. at 435, 403 N.Y.S.2d at 381.

269. See note 65 supra.

270. See note 50 supra and accompanying text.

footnote, that nondisclosure would be permissible only if all family members wish to avoid disclosure. The child, therefore, could not prevent his parents from testifying, as is the case with most evidentiary privileges. The court was concerned that if the child was the sole holder, he could invoke the privilege in proceedings instituted by parents who were unable to control his behavior.

Recognizing a privilege only where it is the unanimous desire of the family to maintain confidentiality severely restricts its scope. In In re Terry W., for example, it was the juvenile defendant alone who attempted to assert the privilege; apparently the mother had not objected to testifying. In Hunter v. State, an appeal from a conviction of cruelty to a child, the defendants unsuccessfully sought to invoke a privilege to exclude the testimony of their son. In both of these cases, the parties were claiming a right to prevent other family members from testifying and thus the privilege in In re A & M would have been unavailable. In fact, the New York Appellate Division, in a recent decision, reaffirmed this crucial aspect of the case by holding that a father's testimony regarding his son's admission to him of criminal mischief was properly admissible when there was no evidence that the father had wished to remain silent.

2. Analysis

Although the decision in In re A & M possibly raises more questions than it answers, there are two issues in particular that merit more detailed

272. Id. at 435 n.9, 403 N.Y.S.2d at 381 n.9.
273. Privileges are generally claimable by the communicating party who can then prevent the other from divulging his confidences. See note 50 supra.
274. 61 A.D.2d at 435 n.9, 403 N.Y.S.2d at 381 n.9.
277. Id. at —, 360 N.E.2d at 598.
278. In re Mark G., — A.D.2d —, 410 N. Y.S.2d at 464 (1978). The court further stated that, unlike A & M, "[i]t does not appear that respondent made the statement to his father in confidence and for the purpose of obtaining support, advice or guidance, nor that the father wished to remain silent and keep respondent's answer confidential." Id. at —, 410 N. Y.S.2d at 465.
279. For example, although the court stated that a question regarding the boy's whereabouts on the night of the fire would not invade the privacy of the family, it did not discuss whether the parents could refuse to divulge any private communications made to them by their son or only those made "for the purpose of obtaining support, advice or guidance." 61 A.D.2d at 433, 403 N.Y.S.2d at 380. The court's subsequent decision in In re Mark G., — A.D.2d —, 410 N. Y.S.2d 464 (1978), suggests that the latter may be the case. See note 278 supra. Narrowing the ambit of the "privilege" in this way, however, seems to introduce an overly subjective element into a court's determination of whether disclosure can be compelled. Not only would the court have to decide whether the communication was confidential, see note 50 supra and accompanying text, it would have to make the additional finding as to the purpose of the child's statement. In order to make such a finding, it would probably be necessary to reveal the subject matter of the communication, which would substantially negate the salutary effects of permitting nondisclosure in the first place. Moreover, it would seem to be difficult to determine exactly what type of communication would in fact be "for the purpose of obtaining support, advice or guidance." If the court in In re A & M meant that in all cases an additional determination as to the subject matter of the communication would have to be made, it is
discussion. The first is whether the court properly analyzed the competing interests involved when it determined that certain confidential child-parent communications are entitled to constitutional protection. If so, it must be determined whether it is correct, from the standpoints of both constitutional law and the policies the privilege is designed to promote, to permit its invocation only when all members of the child's family wish to preserve secrecy.

a. The Competing Interests

As to the first issue, the court weighed the privacy interests of the parties involved and the societal interest in protecting and fostering the parent-child relationship against the state's "legitimate interest" in the factfinding process and concluded that the interests in preserving confidentiality outweighed those favoring disclosure. Although its ultimate decision may be correct, the court's analysis of the various competing interests was somewhat cursory. It is clear that the state's interest in assuring that the truth is ascertained in judicial and administrative proceedings may be more than merely "legitimate"—some courts have held it to be compelling. The broad powers of a state to compel testimony from its citizens and the general obligation of those citizens to testify promote purposes which ultimately benefit society. Of course, the state and public need for relevant testimony may be more pressing in some situations than in others. For example, in criminal cases or grand jury proceedings such as In re A & M, the duty of a subpoenaed witness to appear and testify is subject to few exceptions. In comparison, the needs of the state may not be as exigent in civil actions and the citizen's corresponding testimonial duty not as strong.

The most obvious competing interest is, of course, the private right asserted by the parties involved. The Supreme Court has never declared confidential intrafamilial communications to be encompassed within the "private realm of family life." Yet, aside from the intimacies of the marital relationship, it would be difficult to imagine an aspect of family life which is more inherently private than confidential communications between child and parent. Those suggested that this is too fine a line to draw. The better approach would be to fashion the scope of protection along the lines of the marital confidential communications privilege; a presumption of confidentiality would attach to all communications made between parent and child unless circumstances indicate otherwise. See note 50 supra and accompanying text.

Another issue not fully resolved by the court was whether the entire family, even those not a party to the child's communication, must desire nondisclosure before a court should permit it. Giving a family member who was not directly involved in the discussion the power to veto a decision by parent and child not to disclose a particular communication seems not only unfair, but contrary to many of the policies underlying the court's decision. The relationship most deserving of protection here is the one which fostered the child's communication in the first place—the one between the child and parent or parents in whom he has confided.

280. 61 A.D.2d at 433-34, 403 N.Y.S.2d at 380.
281. See note 225 supra and accompanying text.
282. See notes 1-3 supra and accompanying text.
283. See notes 166-67 supra and accompanying text.
284. See note 167 supra and accompanying text.
286. "Our decisions establish that the Constitution protects the sanctity of the family precisely because the family is deeply rooted in this Nation's history and tradition. It is through the family that
matters which a child chooses to share with his parent and which both choose
to withhold from others would seem encased in the very core of the zone of
family privacy. 287

Moreover, there is more at stake in the context of child-parent communications
than merely a "balance of private right and public good." 288 As the court
in In re A & M stated, society also has an interest in fostering a confidential
relationship between parent and child. 289 Although judicial recognition of
enclaves of privacy in the immediate sense benefits only those individuals
directly involved in the litigation, in a larger sense it benefits all of society. 290
Those private rights that are deemed to be of constitutional dimension attain
that status because of a judicial determination that they are consistent with
values articulated in the constitutional text and thus essential to the liberty of
all citizens. 291

Balancing the several interests favoring nondisclosure against the public
interest in the admission of relevant evidence, it seems that in certain circum-
stances the possible exclusion of probative evidence may be outweighed by the
benefits of preserving confidentiality. 292 Factors to be considered include
whether the action is civil or criminal, whether the information sought is
essential to a claim or defense of one of the parties to the proceeding, and
whether the same information can be obtained through other means. 293 In
addition, it should be remembered that the privilege created in In re A & M
is substantially more restrictive than other confidential communications privi-
leges because it can be invoked only if both the communicating child and the
parent or parents to whom the communication is made agree on nondisclo-
sure. 294 Consequently, the instances in which its assertion may hinder litigation
are greatly reduced.

b. Who Should Hold the Privilege?

The question remains as to whether a joint privilege will adequately further
the underlying societal interests involved and protect the privacy interests of
we inculcate and pass down many of our most cherished values, moral and cultural." Moore v. City

287. "The essence of privacy is no more, and certainly no less, than the freedom of the individual
to pick and choose for himself the time and circumstances under which, and most importantly, the
to which, his attitudes, beliefs, behavior and opinions are to be shared with or withheld from
others." Ruebhausen & Brim, Privacy and Behavioral Research, 65 Colum. L. Rev. 1184, 1188-89
(1965).


289. 61 A.D.2d at 433, 403 N.Y.S.2d at 380.

290. See Caesar v. Mountanos, 542 F.2d 1064, 1073 (9th Cir. 1976) (Hufstedler, J., dissenting),
(1976).

process and liberty not limited to the terms of specific constitutional guarantees); Olmstead v. United
States, 277 U.S. 438, 478 (1927) (Brandeis, J., dissenting) (privacy one aspect of the broad scopes of
constitutionally protected rights).

292. "[T]here are things even more important to human liberty than accurate adjudication. One
of them is the right to be left by the state unmolested in certain human relations. . . . [W]hatever
handicapping of the adjudicatory process is caused by recognition of the privileges, it is not too great a
price to pay for secrecy in certain communicative relations." Privileges Today, supra note 8, at 110.

293. See C. McCormick, supra note 6, § 77, at 159-60.

294. 61 A.D.2d at 435 n.9, 403 N.Y.S.2d at 381 n.9.
both the minor and his parents, if indeed the latter have any assertable rights at all. If secrecy is sought by both the child and his parents, as in In re A & M,296 the conflict is merely one between the state and the autonomous family unit. When there is a clash between the wishes of child and parent, however, the issues become more complex, raising problems of the individual child's assertable right of privacy as against both the interests of the state and the wishes of his parent.297

The right of privacy extends to minors as well as adults and the minor's right to make certain fundamental decisions affecting his life may in some situations be paramount to any competing interests of both his parents and the state. For example, in Planned Parenthood v. Danforth,298 the Supreme Court held that a state may not impose a blanket provision requiring the consent of a parent before an unmarried minor can obtain an abortion.299 One of the rationales asserted by the state in support of the consent requirement was its interest in preserving family autonomy and parental control.300 The Court rejected the idea that giving a parent veto power would in any way strengthen the family unit or augment parental authority when there is such fundamental dissension between the nonconsenting parent and the minor.301 Thus, although the state does have a significant interest in preserving the family, the statutory provisions did not further that interest. Similarly, in Carey v. Population Services,302 a plurality of the Court held unconstitutional a New York statute prohibiting any sale or distribution of contraceptives to minors under the age of sixteen, stating that minors have a right to privacy in connection with decisions affecting procreation.303 The Court expressed doubt as to the validity of the state's contention that limiting access to contraceptives would in any way promote its interest in discouraging sexual activity among the young.304

Although Carey and Danforth stand for the proposition that, in the absence of substantial justification, the state cannot infringe upon a child's right to

295. The cases that have discussed a constitutional foundation for the psychotherapist-patient privilege have uniformly held that whatever privacy rights are involved belong to the communicating patient, rather than the doctor. Caesar v. Mountanos, 542 F.2d 1064, 1070 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977); United States ex rel. Edney v. Smith, 425 F. Supp. 1038, 1044 (E.D.N.Y. 1976), aff'd, 536 F.2d 556 (2d Cir. 1977); In re Lifschutz, 2 Cal.3d 415, 423-24, 467 P.2d 557, 561-63, 85 Cal. Rptr. 829, 833-35 (1970). Analogizing the child-parent relationship to that of patient and psychotherapist, see notes 63-66 supra and accompanying text, it might initially seem as though the privacy rights are those of the child solely.

296. 61 A.D.2d at 428, 403 N.Y.S.2d at 377.
299. Id. at 74.
300. Id. at 75.
301. Id. But see Bellotti v. Baird, 428 U.S. 132, 147 (1976) (state may require some type of parental consent for the performance of an abortion on a minor, so long as the minor's best interests are protected).
303. Id. at 693.
304. Id. at 697-99.
make certain decisions, it is unlikely that his independent right to privacy in the area of confidential intrafamily communications would outweigh the competing state and parental interests. State restrictions on the privacy rights of minors are subject to a less stringent test than that used for adults.305 Moreover, unlike Carey and Danforth, where the respective restrictions did not significantly promote the asserted state interests, it is obvious that compelling citizens to testify directly furthers the strong state interest in accurate adjudication. It seems improbable, therefore, that in the absence of a statutory privilege, the child could assert a sufficiently strong privacy interest to prevent disclosure by his parents.

From a policy viewpoint the case for making the child the sole holder becomes stronger. Certainly if the only purpose of the privilege was to encourage the child to communicate to his parents, giving the child the power to determine whether such confidences are revealed in the courtroom would most further that goal. The child would then be absolutely assured that whatever is revealed to his parents in confidence will remain private unless he chooses to divulge it, or permits his parents to do so. For this reason, the overwhelming number of statutory privileges for confidential communications between husband and wife grant the privilege to the communicating spouse.306 Similarly, most psychotherapist-patient privileges belong to the patient,307 or, if claimable by the psychotherapist, can be waived only with the consent of the patient.308

Fostering open communication, however, is not the only objective of the privilege. An equally important goal is that of promoting a therapeutic relationship between parent and child in which the parent can provide the guidance, discipline, and direction which are so essential to the child's emotional growth.309 Constructing a privilege which allows the child to prevent his parent from testifying would not further this purpose, but rather would frustrate it.310

A child-parent privilege establishing the child as the sole holder in effect usurps the parental role at a time when it is most urgently needed. Compelled disclosure of a child's confidences is most likely to be sought when the child is suspected of involvement in some delinquent activity. This is often a period of crisis for the entire family, a period when the child is greatly in need of advice and guidance. In light of the policies the privilege is designed to promote, it would seem that the parent should have some input into the decision as to whether the child's confidences should be disclosed.

In addition to counteracting many of the underlying policy rationales, a privilege recognizing the child as sole holder might seriously infringe upon the

306. See note 50 supra and accompanying text.
307. See notes 63-65 supra and accompanying text.
308. See notes 63-65 supra and accompanying text.
309. See notes 114-29 supra and accompanying text.
310. The Supreme Court's reasoning in Danforth that family harmony would not be preserved by giving a parent the power to veto his child's decision to obtain an abortion, 428 U.S. at 75, seems equally applicable in the context of child-parent communications; the integrity of the family unit will not be substantially preserved by giving either the child or the parent the power to prevent the other from testifying.
parents' right to direct the upbringing of their child. In fact, the historical and constitutional protection accorded to the family unit, is primarily a recognition of the parental right to care for and nurture their offspring. This right, however, carries with it attendant responsibilities and correlative rights in the child. The child has the right to receive parental guidance and physical and emotional nurture. Although the child's right to be directed until maturity has not explicitly been held to be of constitutional dimension, it is a natural outgrowth of parental rights and responsibilities.

On occasion the child's independent right of decisionmaking may conflict with his right to emotional nurture and guidance. One writer has characterized these as "rights of choice" and "rights of protection." When a parent feels that disclosure of his child's misdeeds is in the child's best interests, but the child himself wants to maintain secrecy there is a conflict between these respective rights. The preservation and fostering of family autonomy necessitates that a minor's rights of choice be subordinated in many instances to his rights of protection. The decision as to whether communications divulged in confidence by a child to his parents is one which should not be left solely to the choice of the child.

311. At common law, the autonomous family unit traditionally received broad protection from courts. Thus, parents have always been presumptively entitled to the custody of their children. See Foster & Freed, Child Custody (pt. 1), 39 N.Y.U. L. Rev. 423, 424-27 (1964); Sayre, Awarding Custody of Children, 9 U. Chi. L. Rev. 672, 673-76 (1942). Additionally, parents have the right to their child's companionship. See W. Prosser, The Law of Torts § 124 (4th ed. 1971) (discussing the right of parents to recover for injuries or wrongful death of their children as based on both economic and associational interests of the parents). Parents also have the right to utilize the services of their children. See W. Tiffany, Persons and Domestic Relations 340-43 (3d ed. 1921). Moreover, parents and children have certain reciprocal rights and duties vis-a-vis each other, such as the child's right to receive and the parent's duty to provide support. See Roe v. Doe, 29 N.Y.2d 188, 193-94, 272 N.E.2d 567, 569-70, 324 N.Y.S.2d 71, 74-75 (1971). Finally, the child has historically had a right to state protection from parental abuse. See Hafen, Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights", 1976 B.Y.U. L. Rev. 605, 614 (1976).

312. See notes 233-39 supra and accompanying text.

313. Most cases dealing directly with the concept of family integrity have involved claims of state interference with this right. See notes 238-39 supra and accompanying text. It should be noted that in several of the Supreme Court cases recognizing a right of family privacy, claims of free exercise of religion as well as parental authority were asserted. Wisconsin v. Yoder, 406 U.S. 205, 208-09 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 532 (1925). These first amendment claims strengthened the parental interests involved. Wisconsin v. Yoder, 406 U.S. at 233, Pierce v. Society of Sisters, 268 U.S. at 534-35. Furthermore, Pierce and Yoder involved disputes between parents and state over the minor's best interests; the child played a passive role in the conflict. Accord, Meyer v. Nebraska, 262 U.S. 390 (1923). Thus, these decisions are not dispositive of the state's duty to uphold parental authority in situations where the exercise of that authority is in direct conflict with the minor's claim to a right of privacy. See Wisconsin v. Yoder, 406 U.S. at 241-46 (Douglas, J., dissenting in part). They do establish, however, that parents have a constitutionally protected right to the physical and emotional care of their children.


316. Id. at 1387-88.

317. See note 313 supra and accompanying text.
The enactment of a child-parent privilege which gives the child the right to prevent his parents from testifying would clearly be an intrusion upon the parental role at a critical period of the juvenile’s life.\textsuperscript{318} The interest which the state has in preserving the autonomy of the family is not furthered by giving one family member the absolute power to prevent the others from testifying.\textsuperscript{319} On the contrary, such a statute might well have the effect of eroding whatever harmony exists between parent and child. Furthermore, the societal interest in the healthy emotional development of the child is best served not by giving the child the right to veto parental decisions, but rather by allowing those decisions to be made within the confines of the family.\textsuperscript{320} Even the objective of encouraging the child to confide in his parents\textsuperscript{321} may be better attained by a joint, rather than a unilateral, privilege. Establishing a joint privilege will inevitably increase child-parent interaction, since the decision regarding disclosure will then be a communal one.

There are other reasons as well for denying a privilege when parent and child cannot agree. When one wants to disclose and the other does not, whether it be parent or child who desires secrecy, the rationale of preserving family harmony greatly diminishes. At such a juncture, family harmony, at least on this issue, has in all probability disappeared. The morally repugnant aspect of compelling disclosure of child-parent communications\textsuperscript{322} is also substantially removed when either the parent or child seeks to admit the testimony. What is "shocking to our sense of decency"\textsuperscript{323} is the coercive nature of such testimony—that the parent can be forced to reveal intimate and potentially incriminating matters about his child. If the parent in fact wishes to testify, that coercive element disappears. If it is the child himself who desires disclosure, the repugnancy justification also largely disappears. At that point, it does not seem offensive or unfair to require the parent to testify.

CONCLUSION

Perhaps more than any other socially beneficial association, the relationship between child and parent is one which should be sedulously fostered and protected. Admittedly, the family is no longer the exalted institution it once was.\textsuperscript{324} Divorce rates are increasing\textsuperscript{325} and divorce itself is no longer a stigmatizing event.\textsuperscript{326} Children are more likely today to be raised in single parent homes.\textsuperscript{327} Moreover, increasing numbers of individuals are rejecting the idea

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\item \textsuperscript{318} See notes 135-37 supra and accompanying text.
\item \textsuperscript{319} See note 301 supra and accompanying text.
\item \textsuperscript{320} See notes 112-17 supra and accompanying text.
\item \textsuperscript{321} See notes 127-30 supra and accompanying text.
\item \textsuperscript{322} See notes 150-60 supra and accompanying text.
\item \textsuperscript{323} In re A & M, 61 A.D.2d 426, 433, 403 N.Y.S.2d 375, 380 (1978).
\item \textsuperscript{324} See Birdwhistell, \textit{The Idealized Model of the American Family}, in \textit{The Family} 310 (P. Stein, J. Richman & N. Hannon eds. 1977).
\item \textsuperscript{325} H. Bass & M. Rein, \textit{Divorce or Marriage} 3 (1976).
\item \textsuperscript{326} Weitzman, \textit{Legal Regulation of Marriage: Tradition and Change}, 62 Calif. L. Rev. 1169, 1203 (1974).
\item \textsuperscript{327} See LeMasters, \textit{Parents Without Partners}, in \textit{Intimacy, Family and Society} 522-23 (A. Skolnick & J. Skolnick eds. 1974).
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that the nuclear family is the only or best way in which to raise children. For those who do choose a more traditional lifestyle, expanding urbanization and geographic mobility have physically and psychologically isolated many families and diminished the social support which was formerly provided by the surrounding community.

Rather than being arguments against the establishment of a privilege, however, these trends suggest that there may be more of a need for a privilege today than ever before. It has been suggested, for example, that higher incidences of divorce may mean that those families which do remain intact are held together not so much out of duty and tradition, but out of affection. Additionally, the insularity of the American family increases the importance of positive relationships within that unit. Rapid social change makes it more necessary than ever for a child to have an adult figure he can turn to for guidance and advice; the parent is best prepared to fulfill this role. The creation of a child-parent privilege would ensure that this relationship, once established, was not damaged by compelling the parent to divulge his child's intimate disclosures.

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APPENDIX

Privilege for Confidential Communications Between Child and Parent

(a) Statement of Privilege

In all civil and criminal actions and proceedings where testimony under oath is required, a parent or parents and his/her legal minor child, whether or not any or all are parties, have a joint privilege to refuse to disclose any

328. See, e.g., A. Skolnick, supra note 77, at 140-49.
332. The parent will not be immune from service of process. See In re A & M, 261 A.D.2d 426, 435, 403 N.Y.S.2d 375, 381 (1978). As with other confidential communications privileges, the parent will not be able to raise the issue of privilege until he has actually appeared and been questioned. See 8 J. Wigmore, supra note 3, § 2197, at 113-14.
333. If the communication is made to one parent, the child and that parent are the holders of the privilege. If the communication is made to both parents, all three are holders. A family member who was not a participant in the conversation, however, is not a holder. Therefore, unlike in In re A & M, it is not necessary that all family members seek to preserve confidentiality before a privilege will attach. See notes 272-73 supra and accompanying text.
334. The privilege will only attach to communications made by a minor child. Accord, Coburn, supra note 20, at 632. As the child approaches emancipation, the underlying rationale for the privilege, i.e., to preserve the therapeutic relationship, gradually diminishes in importance. Of course, equally intimate statements may be made by an adult to his parent. As far as the interests of the state and society are concerned, however, the need for a privilege is far stronger during the child's developmental years. See notes 107-17 supra and accompanying text.
335. See note 50 supra accompanying text.
communications made by the minor to his parent(s) if both the child and
parent(s) desire nondisclosure and the communication was made by the child
in confidence to him/them.

(b) Who Can Claim the Privilege

Unless there is an express waiver by one of the parties entitled to waive the
privilege, the privilege may be claimed by the child on behalf of himself and his
parent(s) or by a parent or parents to whom the communication was made on
behalf of himself/themseves and his/their child.

(c) Waiver of the Privilege

(1) Any of the following parties may waive the privilege with respect to a
communication otherwise protected by it:

(A) One or both parents to whom the communication was made and
who are entitled to claim the privilege.

(B) The child who made the communication.

(2) Waiver shall be effected either by express oral or written consent to
disclosure made without coercion or by a failure on the part of the child or
parent(s) to object when the contents of a communication are demanded.

(d) Definitions

(1) A communication includes spoken words or acts of the child intended
to convey a meaning to the parent or parents.

(2) A communication is confidential if made in reliance upon the child-
parent relation and out of the presence of third persons who are not members
of the child's immediate family.

(e) Presumption of Confidentiality

A presumption of confidentiality will attach to any communication which is
claimed by both parent(s) and child to be confidential and the opponent of the
privilege will have the burden of proof to establish that the communication was
not confidential.

(f) Exception—Crime or Fraud

There will be no privilege if the court finds that sufficient evidence, aside
from the communication, has been introduced to warrant a finding that the

336. But see Coburn, supra note 20, at 632 (child can claim privilege to prevent parent from
testifying).

337. Either the child or parent can claim the privilege on the other's behalf; there need not be an
affirmative claim of privilege by all of the holders. The purpose of this provision is to prevent the loss
of the privilege if one of the holders is not before the court. See, e.g., In re Kinoy, 326 F.Supp. 400
(1970) (father was compelled to reveal daughter's whereabouts in connection with a grand jury
investigation).

338. The effect of this waiver provision is that the privilege can be invoked only where both
parent and child seek to preserve the confidentiality of the communication.


340. See note 49 supra and accompanying text.

341. Although siblings and other family members cannot claim the privilege, their presence at
the time the confidential statement was made should not nullify it. See Coburn, supra note 20, at
632-33. This is contrary to the general rule for marital confidential communications which disallows a
privilege when the communication is made in the presence of the spouses' children. See note 20 supra.

342. See note 50 supra.
communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or fraud.  

(g) Exception—Commitment Proceeding  

There is no privilege in a proceeding to commit either the child or parent to whom the communication was made or otherwise to place him or his property under the control of another because of his alleged mental or physical condition.

(h) Exception—Proceeding Between Parent and Child or Between Spouses  

(1) There is no privilege in a civil proceeding brought by or on behalf of one spouse against the other spouse. 

(2) There is no privilege in a civil proceeding brought by or on behalf of a parent or child against the other.

(i) Exception—Criminal Proceedings  

(1) There is no privilege in a criminal proceeding in which a parent otherwise able to claim the privilege is charged with a crime committed at any time against the person or property of the communicating child, the parent's spouse, or a legal child of either the parent or the parent's spouse. 

(2) There is no privilege in a criminal proceeding in which a child otherwise able to claim the privilege is charged with a crime committed at any time against the person or property of a parent or a legal child of a parent.

(3) There will be no privilege in a criminal proceeding in which a parent is charged with:  

(A) Child abuse 

(B) Adultery 

(C) Child neglect 

(D) Abandonment or Non-support.

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343. See note 58 supra.  
344. This is a common exception to the marital confidential communications privilege. See, e.g., Cal. Evid. Code § 982 (West 1966).  
345. This exception encompasses divorce or separation proceedings and civil actions within the family. See, e.g., id. § 984.  
346. Although these provisions may appear to be unnecessary since the privilege can be waived by either parent or child, provision is made for nonrecognition of a privilege when a crime has been committed within the family to ensure that a parent will not be able to influence or coerce his child into claiming a privilege.