From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?

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From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?

I. INTRODUCTION

On the evening of March 26, 1977, several hundred students were attending a dance held in the first floor cafeteria area of the Canisius College student center in Buffalo, New York. During the dance the auditorium on the second floor was somehow set ablaze. Suspecting arson, the local district attorney convened a grand jury to conduct an investigation. The testimony elicited from several witnesses conclusively placed "John Doe," a sixteen-year-old, near the auditorium at the time of the fire. Cognizant that a juvenile may not constitutionally be forced to incriminate himself,\(^1\) the district attorney devised an ingenious, if not ingen-uous, strategy to secure the juvenile's admission of the crime.\(^2\) He issued subpoenas to John's parents, seeking testimonial evidence in the form of admissions John may have made to his parents concerning the fire. Neither parent was in the vicinity of the student center at the time the alleged arson occurred and thus neither parent had personal knowledge concerning the incident. A motion brought by John's parents to quash the subpoenas was granted and the district attorney appealed. Hence, the question before the court in \textit{People v. Doe}\(^3\) was whether a parent whose minor child had come to him in the privacy of the home seeking guidance and counsel could be compelled to divulge the substance of the potentially incriminating communication.

Of all the relationships that comprise our social fabric, the most important exist within the familial context.\(^4\) Hence, it is not surprising to find that nearly every state recognizes by statute or case law an evidentiary privilege that, to one degree or another,
operates to exclude from judicial consideration confidential communications between husband and wife. What is surprising is that not a single jurisdiction recognizes an evidentiary privilege affording such deference to parent-child communications.

This Comment will consider the question of whether communications between parents and their minor children should, in whole or in part, be beyond the reach of legal process. First, it will explore in depth the nature and rationale of evidentiary privileges with respect to parent-child communications in an attempt to determine whether the protection of communications between parent and child would accord with the generally accepted rationales underpinning the presently recognized privileges. Second, the concept of family integrity and privacy will be outlined in the light of both common law and constitutional interpretation, which together have created a protective panoply surrounding many aspects of family life. Whether the protections that inhere in family privacy include a protection for parent-child communications will then be analyzed. Finally, and perhaps most importantly, this Comment will attempt to define and delimit the confines of such a privilege, suggesting guidelines courts and legislatures may consider in dealing with parent-child communications.

II. THE NATURE OF EVIDENTIARY PRIVILEGES

A. Introduction

The word "privilege" is derived from the Latin phrase "privata lex," meaning a private law applicable to a small group of persons as their special prerogative. Before a meaningful analysis of evidentiary privileges may be entertained, the law governing privileges must be extracted from the rules of evidence. Rules of evidence preventing the introduction of probative facts may generally be classed in two groups: rules of exclusion and rules of privilege. Rules of exclusion serve either of two functions. Certain rules of exclusion attempt to maintain the integrity of the factfinding process by barring the introduction of probative material that by its nature is unreliable or untrustworthy. Examples

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5. See note 43 infra.
of these rules include “the hearsay rule, the opinion rule, the rule rejecting proof of bad character as evidence of crime, and the rule excluding secondary evidence until the original document is shown to be unavailable.” Other exclusionary rules keep out “irrelevant or immaterial matter which would prove nothing, waste time, and sometimes actually harm the opponent by improperly calling attention to things about the opponent or his case which might arouse prejudice or ill will against him in the minds of the jury.”

The practical effect of the evidentiary privilege is the same as any of the exclusionary rules—it excepts certain classes of evidence from judicial consideration. However, its rationale is much different. The exclusionary rules actually facilitate the proper ascertainment of truth by excluding evidence that may be misleading, prejudicial, or untrustworthy. Privileges, on the other hand, are not an aid to the discovery of truth. They in fact impair and often completely stifle the factfinding process. “Their sole warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.”

The rules of privilege may conveniently be categorized into three groups. The first class of privileges consists of those devoted to the protection of the rights of the individual, such as the privilege against self-incrimination and the exclusionary rule which proscribes the introduction of illegally obtained evidence.

9. McCormick, supra note 8, § 72, at 151.
11. See McCormick, supra note 8, § 72, at 152; Barnhart, supra note 8, at 377; McCormick, supra note 8, at 447.
14. Coburn, supra note 2, at 602; Fisher, supra note 13, at 610.
15. The exclusionary rule, at first blush, is seemingly what its name implies: a rule of exclusion. On closer analysis, however, it is clear that the exclusionary rule is in fact a privilege. Professor McCormick made the following observation:

Manifestly, however, the rule allowing the objection is not designed to protect the parties against unreliable evidence. Quite the contrary. The constitution-makers looked back to the protection of the person, the home, and the owner’s effects, against unreasonable official interference. If the court rejects the evidence, it is not because it would shed false light on the issues, but only because its exclusion may serve to discourage future unlawful seizures and raids. The objection, then, seems properly classed as a claim of privilege.

McCormick, supra note 8, at 450-51 (footnote omitted).
The second group of privileges is designed to maintain the "integrity of the system of government," and includes the privilege accorded the government against the disclosure of informants, the privilege afforded judges and jurors, and the privilege that accompanies government secrets. The third class is composed of "privileges designed to be 'a significant expression of the law's concern or regard for the security of the individual as a participant in relationships which the state considers it important to foster and protect and, it should be added, for the security and sanctity of the relationship itself.'" The ambit of this class of privileges circumscribes those privileges protecting the confidential communications of parties to certain relationships.

Since parent-child communications approximate many already privileged communications, a comparison of the nature and context of the parent-child relationship with the nature and context of other privileged relationships will afford an opportunity to determine whether a parent-child privilege should be recognized. In addition, it will also provide a framework within which the scope of the privilege may be ascertained if it is ultimately determined to merit recognition.

B. The History and Rationale of the Major Relational Privileges

1. Lawyer-client relations

At Roman law there was a form of the attorney-client privilege. Whether the Roman tradition influenced the development of the privilege at common law is unknown, but by the reign of Elizabeth I the privilege was firmly entrenched. At common law the attorney-client privilege was recognized because of the lawyer's status as a gentleman. The courts in that day recognized the prerogative of a gentleman not to violate a pledge of secrecy.

17. See generally McCormick, supra note 8, § 111; Wigmore, supra note 12, § 2374; 71 Dick. L. Rev. 366 (1967).
19. Coburn, supra note 2, at 602-03 (quoting Smith, Reintegrating Our Concepts of Privileged Communicants, 16 Soc. Serv. Rev. 191, 193 (1942)).
20. See generally McCormick, supra note 8, § 87; Wigmore, supra note 12, §§ 2290-2291; Sedler & Simeone, The Realities of Attorney-Client Confidences, 24 Ohio St. L.J. 1 (1963); Comment, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 Yale L.J. 1226 (1962).
22. Id. at 489.
23. Wigmore, supra note 12, § 2290, at 543.
24. Id.; Radin, supra note 21, at 487.
The privilege accorded gentlemen gradually eroded due to judicial views that the need for truth overshadowed the importance of a gentleman's honor. The lawyer, however, was able to retain the exemption as the rationale supporting the privilege underwent a significant change. Rather than being a consideration for the oath and honor of the attorney, the new rationale became "the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal adviser." Today, the privilege is recognized in every state.

2. Husband-wife communications

Early common law prevented interested parties from testifying in their own causes. It was also believed that the husband and wife were a single entity before the law. The logical consequence of these two propositions was that a person became wholly incompetent to testify in any action either for or against his spouse. "Contemporaneous with, and perhaps pre-existing the incompetency" rule, some courts held that a witness could testify in his spouse's behalf, but the party-spouse could prevent the other from testifying against him. This has been called the "privilege for anti-marital facts." The disqualification of husbands and wives was abolished by statute in England in 1853 and was replaced by a rule that sought to prevent disclosure of communications between husband and wife. The general disposition of the legislatures and courts in the United States has been

25. McCormick, supra note 8, § 87, at 175.
26. 8 Wigmore, supra note 12, § 2290, at 543.
27. Id. at 543 (emphasis in original).
28. Comment, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 Yale L.J. 1226, 1227 & n.7 (1962).
30. Husband-Wife Privileges, supra note 29, at 208; Note, Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend, 38 Va. L. Rev. 359, 359 (1952) [hereinafter cited as Confidential Communications].
34. 8 Wigmore, supra note 12, § 2227, at 211 & n.1.
35. Id.
36. McCormick, supra note 8, § 78, at 161.
37. Id.
to follow the privileged communications rule, although some jurisdictions adhere to both the antimarital facts rule and the privileged communications rule. 38

The marital communications privilege is the natural consequence of a belief that marital communications must be protected to maintain the harmony, confidentiality, and freedom of communication necessary to the proper functioning of the relation. 39 This rationale for the privilege is not universally accepted, however. 40 The other rationale generally advanced in support of the privilege is that forcing one spouse to disclose the contents of confidential communications is so repugnant that it is judicially nonpalatable. 41 This putative justification for the existence of the privilege also has its detractors. 42 Whether these suggested rationales truly justify the existence of the privilege is largely a matter of academic debate in view of the fact that adherence to the privilege is nearly universal. 43

3. Physician-patient relations 44

Once the pledge of secrecy afforded gentlemen was no longer recognized in the English courts, any deference that may have been accorded the physician-patient relationship by the common

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38. See Husband-Wife Privileges, supra note 29, at 218 & n.50.
39. See Husband-Wife Privileges, supra note 29, at 218; Confidential Communications, supra note 30, at 359. See also Model Code of Evidence rule 215, Comment a (1942).
40. E.g., 8 Wigmore, supra note 12, § 2228, at 216:

[T]he peace of families does not essentially depend on this immunity from compulsory testimony, and . . . so far as it might be affected, that result is not to be allowed to stand in the way of doing justice to others. When one thinks of the multifold circumstances of life that contribute to cause marital dissenion, the liability to give unfavorable testimony appears as only a casual and minor one, not to be exaggerated into a foundation for so important a rule. It is incorrect to assume that there exists in the normal domestic union an imminent danger of shattering an ideal state of harmony solely by the liability to testify unfavorably.

Despite this criticism of the antimarital facts privilege and its disqualification aspect, Wigmore would allow the privileged communications rule. Id. § 2332, at 643.
41. 8 Wigmore, supra note 12, § 2228, at 217; Coburn, supra note 2, at 610 (footnote omitted); Husband-Wife Privileges, supra note 29, at 218-19.
42. See 8 Wigmore, supra note 12, § 2228, at 217-18. Even though Wigmore criticizes the "repugnancy rationale" in the context of the privilege for antimarital facts, he does accept the existence of a privilege for marital communications. Id. § 2332, at 643.
43. "Every state has adopted some form of legislation on the subject . . . ." Confidential Communications, supra note 30, at 360. For a selection of statutes that deal with this topic, see 2 Wigmore, supra note 12, § 488, at 525 n.2.
44. See generally McCormick, supra note 8, §§ 98-105; 8 Wigmore, supra note 12, §§ 2380-2391.
law was at an end. In this country statutory grants of the privilege were made as early as 1828, and at the present time over two-thirds of the states have statutes recognizing this privilege. The major policy rationale supporting the privilege is the belief that if patients know confidential communications with their physicians might later be revealed, they will never disclose all of the facts necessary to the effective treatment of their illnesses or afflictions. The immediate effect of the privilege—shielding the patient from embarrassment and invasion of his privacy—may be a second reason for maintaining the privilege.

4. Priest-penitent relations

Though there is some dispute whether the priest-penitent privilege existed at common law, it has now been adopted in all but four of the fifty states. The major policy rationale supporting this privilege is a “fear that the relationships would not be ‘wholesome’ or effective if there were any fear of disclosure of confidences.” A more reasonable justification for the privilege is that compelling priests to divulge the substance of communications is simply so repugnant that it has been proscribed.

C. Limitations on the Scope of the Relational Privileges

Since privileges obstruct the search for truth, the creation of

45. 8 WIGMORE, supra note 12, § 2380.
46. MCCORMICK, supra note 8, § 98, at 212.
47. MCCORMICK, supra note 8, § 98, at 212. These statutes are compiled and recited in 8 WIGMORE, supra note 12, § 2380, at 819 n.5.
49. See, e.g., Falkenburg v. Prudential Ins. Co., 132 Neb. 831, 273 N.W. 478 (1937) (the privilege enables the patient to secure medical treatment without fear of betrayal); Woernley v. Electromatic Typewriters, Inc., 271 N.Y. 228, 2 N.E.2d 638 (1936) (the privilege prevents the physician from disclosing matters that might humiliate the patient).
51. The “consensus of the authorities” is that the priest-penitent privilege did not exist at common law. Stoyles, supra note 50, at 32 & n.24. See 8 WIGMORE, supra note 12, § 2394. Contra, Hogan, supra note 50, at 7-14.
52. MCCORMICK, supra note 8, § 77, at 158. The statutes are collected in 8 WIGMORE, supra note 12, § 2395, at 873 n.1.
54. Coburn, supra note 2, at 609-10.
new privileges and the maintenance of a broad scope for existing ones has generally been met with disfavor by both courts and commentators. This judicial and commentatorial "war" on the privileged communications doctrine, with advocates calling for either a complete abolition of certain privileges or their limitation, has exerted a substantial influence tending to restrict the scope of all relational privileges. Even the most ardent supporters of an expansive role for privileged communications have agreed the scope of such communications must be reasonably limited. The result of the antipathy toward privileges in general has been a significant factor in the creation of numerous exceptions to all relational privileges. A brief summary of those exceptions will be discussed in Section V.

III. RECOGNITION OF THE PARENT-CHILD PRIVILEGE AS A MATTER OF SOCIAL POLICY

A parent-child privilege would comport very well with the basic notions behind the relational privileges. It would be hard to imagine a situation that more strikingly reflects an intimate and confidential relation than that which exists between parent and child when a distressed young person, perhaps filled with remorse and fear, turns to his parents for counsel and guidance. Indeed, this was a portion of the rationale behind the court's decision in People v. Doe.

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

57. Wigmore argued for the abolition of the physician-patient privilege. 8 WIGMORE, supra note 12, § 2380a.
58. See, e.g., Slovenko, supra note 7, at 179-81.
59. 61 A.D.2d at 433, 403 N.Y.S.2d at 380.
Hence, compelled disclosure of such confidences may be so repugnant that it should be proscribed on this basis alone. The repugnance argument has as much force in this context as in the context of any of the relational privileges.

An adolescent's knowledge that his parents may be compelled to reveal confidential communications may seriously impair the adolescent's willingness to confide in his parents. Just as a privilege in other contexts ostensibly has the purpose of promoting relations by guarding against apprehension of disclosure, a privilege in the parent-child context arguably would maintain the freedom of communication necessary to the healthy existence of the parent-child relationship. This is not the only manner by which a rationale supporting recognition of a parent-child privilege can be developed, however. The traditional method of analyzing "new" privileges is attributed to Dean Wigmore.

The "Wigmore test" has been applied both by scholars in attempts to determine whether a privilege should be recognized by statute, and by courts in determining whether a privilege should be recognized in a particular fact situation. The test consists of four parts.

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation.

Whether the parent-child privilege meets the requirements of the Wigmore test has been discussed fully elsewhere and the question has been answered affirmatively.

There is an additional advantage to be gained by recognition of the parent-child privilege. If, as likely, the parent refuses to...
testify, he has but two alternatives. He may refuse to testify and subject himself to contempt proceedings, or he may deliberately commit perjury and assume the risk of criminal prosecution. The latter course of conduct can only serve to convince the child, who may be guilty of antisocial conduct, that "two wrongs do make a right" and that "crime does pay," while the former course of conduct would tend to lead the child to question the fairness of the legal system.  

The fact the parent-child relationship fully accords with the basic rationale of privileges and likely meets the requirements of the Wigmore test may be of some import when and if a legislature considers adopting a statute creating such a privilege. It is unlikely, however, that these arguments would persuade a court to recognize such a privilege; judicial privilegemaking came to a virtual halt a century ago. The state interest in providing judicial proceedings with all relevant facts is considered so important, especially to judges, that it may simply overwhelm the arguments favoring the recognition of the privilege. As the Supreme Court noted in United States v. Nixon:

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all of the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Mere policy arguments, irrespective of their cogency, cannot be expected to persuade a court to create a privilege covering parent-child communications. It is clear that privilegemaking is now viewed as a function devolving exclusively on the legislature. There are, however, constitutional dimensions to the ques-

65. Id. at 629.
66. Id. at 628-29.
69. Id. at 709.
70. Even the Doe court felt disposed to leave the privilegemaking function to the legislature. 61 A.D.2d at 434-35, 403 N.Y.S.2d at 381.
tion of parent-child communicative privacy which may compel courts to recognize such a privilege.

IV. RECOGNITION OF THE PARENT-CHILD PRIVILEGE AS A CONSTITUTIONAL MATTER

A. Early Protections of Familial Rights

The common law of both England and the United States took cognizance of the family as the primordial social, political, and economic unit, affording it such deference that the family became a legally autonomous unit. Familial autonomy was characterized as an "inherent, natural right, for the protection of which, just as much for the protection of the rights of the individual to life, liberty and pursuit of happiness, our government is formed." This legal panoply constructed around the family was later incorporated with even greater force into the constitutional law of the United States.

The constitutional protection of familial autonomy has its


At common law, parents have been presumptively entitled to the custody of their children, thereby enabling the family to perform its historic functions. Parental custody, perhaps the most basic component of the right to family integrity, involves more than mere physical control of children. It includes other duties: the support and care of one's children and the control over their conduct by instruction and discipline. And it includes other rights: the right to utilize the services of one's children, to share their companionship, and to supervise their moral, religious, and intellectual education. Although these additional rights and duties flow from the parents' physical custody of their children, they do not depend on immediate physical control. For example, parents whose children are in school have in effect delegated part of their right to educate their children, but they may still legally supervise the children's course of study and veto particular aspects of it. And if parents separate, the duty to support may remain in the father even though the mother has physical custody.

At common law, children, too, can claim rights to family integrity. Their rights and duties are often reciprocal to those of their parents—for example, the child's right to receive and the parent's duty to provide support and the child's duty to perform and parental right to the benefit of the child's services. Children may also claim under a mutual right of parent and child to a continuing heritage—the parent has a right to rear and teach his child, and the child has a right to be brought up by, and learn from, his own parent. That children have an assertable interest in parental custody belies the much-disputed but still fashionable theory that, at common law, children were treated as the chattel of their parents.

73. Lacher v. Venus, 177 Wis. 558, 569-70, 188 N.W. 613, 617 (1922).
roots in substantive due process.\textsuperscript{74} Although substantive due process had its heyday in the economic and social sphere, the doctrine was also applied in areas involving familial rights.\textsuperscript{73} The economic utilization of substantive due process was repudiated in the 1930's\textsuperscript{76} in favor of a "minimum rationality" test\textsuperscript{77} and was, in the words of Justice Black, "laid . . . to rest once and for all."\textsuperscript{78} That portion of substantive due process that called into play a heightened judicial scrutiny in the areas of familial or personal rights, however, was never explicitly overturned. In fact its continued existence was noted by Justice Stone in his famous foot-

\footnotesize{\textsuperscript{74} Substantive due process "refers to the principle that a law adversely affecting an individual's life, liberty, or property is invalid, even though offending no specific constitutional prohibition, unless the law serves a legitimate governmental objective." Perry, Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases, 71 NW. U.L. REV. 417, 419 (1976). It has also been characterized as "the judicial practice of constitutionalizing values that cannot fairly be inferred from the constitutional text, the structure of governmental ordained by the Constitution, or historical materials clarifying otherwise vague constitutional provisions." Id. (footnote omitted).

The doctrine of substantive due process first emerged in the dissenting opinions of the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 83-130 (1873), wherein the view was expressed that the fourteenth amendment imposed a substantive restraint on state legislation. Id. at 111-24 (Bradley, J., dissenting). Justice Bradley's seemingly bold assertion was simply the exposition of the older theme of "natural law" which others at an earlier date had attempted to import into the Constitution. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J., separate opinion). The doctrine of substantive due process first persuaded a majority of the Court in Allgeyer v. Louisiana, 165 U.S. 578 (1897).

\textsuperscript{75} See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). In Meyer, the Court reversed the conviction of a teacher who had taught German in a public school in violation of a state statute prohibiting the teaching of foreign languages to young children. Justice McReynolds thought that the "liberty" of the due process clause encompassed personal as well as economic rights.

Without doubt, it [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

262 U.S. at 399. Justice McReynolds found that the Nebraska law interfered with the calling of modern language teachers, with the opportunities of children to acquire knowledge, and with the power of parents to control their child's education. Id. at 401.

In Pierce the Court sustained a challenge to a statute requiring children to attend only public schools because the law interfered "with the liberty of parents and guardians to direct the upbringing of children under their control." 268 U.S. at 534-35.

\textsuperscript{76} See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934).

\textsuperscript{77} The minimum rationality test meant the Court would no longer make a meaningful scrutiny of economic regulations beyond that envisioned in the rational basis test. See Williamson v. Lee Optical Co., 348 U.S. 483 (1955); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

\textsuperscript{78} Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting).}
note to United States v. Carolene Products Co.\textsuperscript{79} precisely at a
time when the economic and social utilization of substantive due
process was clearly in disrepute.\textsuperscript{80} The distinction drawn between
economic and personal rights was implicitly given life by subse-
quent cases that, although not explicitly relying on the due pro-
cess clause, seemingly utilized the principle to protect personal
rights not specifically mentioned in the Bill of Rights.\textsuperscript{81} Personal
(as well as familial) rights were viewed as coming to the Court
"with a momentum for respect lacking when an appeal is made
to liberties which derive merely from shifting economic arrange-
ments."\textsuperscript{82}

\section*{B. Familial Autonomy and the Right of Privacy}

\subsection*{1. General contours of the right of privacy}

The newest phase of constitutional protection for familial
rights had its genesis in 1965 in Griswold v. Connecticut.\textsuperscript{83} In that
case the Court struck down a Connecticut law which forbade the
use of contraceptives even by married couples. After rejecting an
invitation to utilize \textit{Lochner} in the resolution of the controversy,\textsuperscript{84}
the majority reasoned that certain provisions of the Bill of Rights
created penumbras of constitutional protection that, although
not specifically enumerated in the Bill of Rights, must be recog-
nized since "[w]ithout those peripheral rights the specific rights
would be less secure."\textsuperscript{85} The penumbral rights of the first, third,
fourth, and fifth amendments, taken together, created a "zone of
privacy" which, absent certain circumstances, the state could not
enter.\textsuperscript{86} The right of privacy guarantee has been called the "new
due process"\textsuperscript{87} and rightly so, for the Court has explicitly recog-
nized that the privacy cases actually rest on the "liberty" interest
protected by the due process clause.\textsuperscript{88} Even when \textit{Griswold} was

\begin{footnotesize}
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\item \textsuperscript{79} 304 U.S. 144, 152 n.4 (1938).
\item \textsuperscript{80} See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York,
\phantom{999} 291 U.S. 502 (1934).
\item \textsuperscript{81} See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381
\phantom{999} U.S. 479 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Skinner v. Oklahoma,
\phantom{999} 316 U.S. 535 (1942).
\item \textsuperscript{82} Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).
\item \textsuperscript{83} 381 U.S. 479 (1965).
\item \textsuperscript{84} \textit{Id.} at 482.
\item \textsuperscript{85} \textit{Id.} at 482-83.
\item \textsuperscript{86} \textit{Id.} at 484-86.
\item \textsuperscript{87} Dixon, The "New" Substantive Due Process and the Democratic Ethic: A
\item \textsuperscript{88} Whalen v. Roe, 429 U.S. 589, 599 & n.23 (1977); Roe v. Wade, 410 U.S. 113, 153
\phantom{999} (1973).
\end{itemize}
\end{footnotesize}
handed down, many recognized that it was simply substantive due process under another name.  

"The concept of a constitutional right to privacy still remains largely undefined." In Whalen v. Roe the Court attempted to bring some order to the area by recognizing that "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." These divergent "strands" of privacy have elicited two separate responses from the Supreme Court. The protection accorded the interest in confidentiality is arguably not as great as the protection afforded the decisionmaking autonomy interest. In the autonomy area, if the governmental intrusion invades a "fundamental" personal right, the intrusion will be allowed only if there is a "sufficiently compelling state interest." Even with the presence of a compelling state interest, however, the state's intrusion upon the right must be no broader than is necessary. That is, the "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."  

2. Parent-child communicative privacy as a fundamental right  

Before a particular autonomy interest may legitimately fall under the protective umbrella of the right of privacy, it must be...
determined that the interest is fundamental.97 The initial focus of judicial scrutiny is thus shifted away from the alleged constitutional infringement to the nature of the right itself. The Supreme Court has characterized the fundamental rights protected by the autonomy strand of the right of privacy as including "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education."98 Also regarded as fundamental are activities related to the right of families to live together;99 the right of parents to the care, custody, and control of their children;100 and the right to associate with family members.101

Taken collectively, these decisions comprise a right of familial autonomy; i.e., the right of the family as a unit to be free from undue governmental influence in making certain decisions and in engaging in certain activities. The question here is whether the interest of parent and child in communicative privacy is fundamental and thus incidental to the right of familial autonomy. Since parent-child communications are at the very heart of family life and relationships, they can properly be classed as fundamental along with those familial rights that the autonomy strand of the right of privacy is designed to protect. Consonant with this analysis, the court in People v. Doe refused to disturb the lower court's ruling that Doe's parents need not testify concerning the substance of any confidential communications they may have had with their son.102 The court thus followed such venerable familial autonomy precedents as Meyer v. Nebraska,103 Pierce v. Society of Sisters,104 and Stanley v. Illinois,105 which all afforded the parent-child relationship some measure of constitutional protection.106

The view of the court in Doe that parent-child communicative privacy is a fundamental right was not, of course, the only view the court could have taken. In re Terry W.107 involved essen-

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101. Drollinger v. Milligan, 552 F.2d 1220 (7th Cir. 1977).
102. 61 A.D.2d at 434-35, 403 N.Y.S.2d at 381.
103. 262 U.S. 390 (1923).
104. 268 U.S. 510 (1925).
105. 405 U.S. 645 (1972).
106. Stanley dealt with the right of a father to the custody and companionship of his children. The rights of parent and child protected by Meyer and Pierce are discussed in note 75 supra.
tially the same question presented in *Doe.* In that case the only
evidence linking Terry W. with a burglary was an alleged confes-
sion to his mother, who desired to testify as to the substance of
the confession in a juvenile delinquency proceeding. Terry
claimed the communication was constitutionally protected by his
right of privacy and should therefore be excluded from the pro-
ceeding. In ruling to allow the testimony, the court refused to
extend the right of privacy to protect such communications, rea-
soning that the right was limited to husband and wife.\(^{108}\) While
the court may have had justifiable reasons for not basing a
parent-child privilege on the right of privacy in the circumstances
before it,\(^{109}\) the court’s apparent rationale—that the right of pri-
vacy does not include the parent-child relationship—was without
merit.

3. **Compulsory disclosure as a violation of the right of privacy**

Another issue involved in right of privacy analysis is whether
the inhibiting effect of compulsory disclosure constitutes a direct
or incidental burden on parent-child communications. This
direct-incidental burden dichotomy was an important factor in
Justice White’s majority opinion in *Branzburg v. Hayes,*\(^{110}\) a case
with a setting similar to the situation in *Doe,* but involving an
explicit constitutional right—freedom of the press. In that case,
the district attorney was attempting to force a reporter to reveal
the sources of information he had utilized in writing a story relat-
ing to criminal activities. Just as *Doe* argued that disclosure or
the prospect of disclosure would create an atmosphere in which
parent-child communications would be impaired,\(^{111}\) the reporter
argued that disclosure would destroy relationships and potential
relationships between a reporter and his sources. Both cases argu-
ably involved the infringement of a fundamental right—*Doe*’s
right to privacy and *Branzburg*’s right to freedom of the press.

In response to the claim that compelled disclosure violated
the reporter’s fundamental interest in freedom of the press, the
*Branzburg* majority noted that the “First Amendment does not
invalidate every *incidental* burdening of the press that may result
from the enforcement of civil or criminal statutes of general appl-

\(^{108}\) *Id.* at 749, 130 Cal. Rptr. at 914-15.
\(^{109}\) See notes 156-63 and accompanying text infra.
\(^{110}\) 408 U.S. 665 (1972).
icability." In cases raising the claim of governmental intrusion upon fundamental interests, there must be more than an "indirect" effect produced by the governmental activity on the interest, or, stated differently, the threat of interference with the fundamental right posed by the governmental activity must be "sufficiently grievous" to "establish a constitutional violation." The Branzburg Court reasoned that since the "inhibiting effect of such subpoenas on the willingness of informants to make disclosures" to newsmen was speculative, the burden on free press could only be incidental and no violation of a fundamental interest had occurred.

Arguably, forcing disclosure of parent-child communications would only indirectly or incidentally burden that fundamental interest. The state does not directly place a restraint on what the communicants may or may not say, nor does it threaten the vast bulk of confidential communications between parent and child. It could be argued that the truly important communications between parent and child have little to do with crimes the child may have committed: of the thousands of communications between parent and child, those involving discussion of the child's legal misdeeds would be minuscule. In any event, it may be expecting too much of the adolescent mind to believe that a child who would otherwise admit legal wrongdoing to parents would, knowing that a parent could later be compelled to testify concerning his confession, be deterred in making such communications. Any "chilling effect" on the child, or the parent for that matter, is just as incidental a burden in this case as in the case of the reporter and his source.

It can persuasively be maintained, however, that the burden on the fundamental interest of parents and children in communicative privacy rises to the violation of a constitutional right. Irrespective of whether a burden on a constitutional right is consid-

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112. 408 U.S. at 682 (emphasis added).
113. See, e.g., Zablocki v. Redhail, 434 U.S. 374 (1978), in its equal protection analysis the Court differentiated the burden there on the right to marry and the burden on the same right in another case, Califano v. Jobst, 434 U.S. 47 (1977). For the Court, the difference in the outcome of the two cases was explained by the fact that the governmental intrusion in Jobst was only indirect, while the interference in Redhail was direct. See also Whalen v. Roe, 429 U.S. 589 (1977) (confidentiality interest of the right of privacy not burdened because the supposed governmental interference was not "sufficiently grievous"); Branzburg v. Hayes, 408 U.S. 665 (1972) (freedom of press only incidentally burdened); Plante v. Gonzalez, 575 F.2d 1119, 1131-32 & n.19 (5th Cir. 1978) ("secondary effects" on familial privacy are not enough to establish a violation of the right).
115. 408 U.S. at 693-94.
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117. See notes 27, 39, 48, 53 and accompanying text supra.

118. There are now privileges covering journalists, accountants, psychologists, confidential clerks or stenographers, public school teachers, psychiatrists, and social workers. See 8 Wigmore, supra note 12, § 2286.

119. 61 A.D.2d at 432, 403 N.Y.S.2d at 380 (footnote omitted).

120. If parents have the constitutional right to guide and counsel their children, see Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925);
reveal his confidences and the child, rightly or wrongly, now refuses to confide in them, to whom will the child turn when he needs counsel and guidance the most? There is a great difference between requiring a newsman to dig deeper and harder for news and requiring a parent to breach a trust affecting the quality of a relationship having the single greatest influence on his child’s entire future life.

4. Compelling state interest test

The mere fact that an aspect of the fundamental right of familial autonomy may be burdened does not of itself compel the recognition of a parent-child privilege. The particular autonomy interest may nevertheless be regulated if there is a “sufficiently compelling state interest.” In Branzburg the Court pointed out that the state interest in factfinding was at least impelling: “Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government.” There can be little doubt the state interest in the investigation of crime is an important one, and thus it may be argued that despite any constitutional infringement the state should prevail. However, when governmental activity encroaches on a bona fide fundamental interest, recognition that the state interest is vital is not dispositive. For example, in Wisconsin v. Yoder, after recognizing that the state interest in education “ranks at the very apex of the function of a state,” the Court refused to accept the state’s claim that its interest was free from a balancing process. The Court noted that “a State’s interest . . ., however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and in-

Meyer v. Nebraska, 262 U.S. 390 (1923), surely children have the right to receive that counsel and guidance.

121. Doe’s counsel persuasively argued:

How can a parent be expected to effectively exercise his right and discharge his duty to appropriately guide the child in accordance with a perception of his best interests? Will parent and child ever be at peace to again live within the tranquil and free atmosphere of their home after a parent has been compelled to testify concerning communications conveyed to him in confidence by his minor child and perhaps disclose facts which may incriminate him? Will the child ever feel free to speak confidentially to his parent again?


123. 408 U.S. at 690 (emphasis added).


125. Id. at 213.
The state interest in investigation of crime and the accumulation of all facts relevant to a judicial proceeding is unquestionably one of its most important interests. Neither can it be denied that a privilege in many cases interferes with that interest or may even stifle it completely. Compelling a parent to testify "may be not only a highly convenient aid to accurate fact finding, but in some instances [it may be] the sine qua non of discovery of the full truth." Additionally, "[e]xemptions lessen the fairness of a trial, inasmuch as a trial is only as good as the evidence considered by the court." Recognition of the parent-child privilege will not find favor with evidence scholars whose antipathy toward all privileges arises from the belief that the preeminent position of the state interest in factfinding requires a subordination of the values of confidentiality in nearly all relational contexts.

Yet this state interest should not and can not be exalted to the status of an absolute. If this interest were absolute, there would be no requirement of probable cause, no prohibition of unreasonable searches and seizures, and certainly no privilege against self-incrimination. The contemporaneous existence of these rights and the state interest in accumulation of facts demonstrates that "there are things even more important to human liberty than accurate adjudication." Professor Louisell has noted that:

It is the historic judgment of the common law, as it apparently is of European law and is generally in western society, that whatever 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 . . . .

There is a cluster of familial rights which antedates both the state and its interests. These rights have enjoyed a position of judicial preference since the early days of common law and that preference was incorporated into the constitutional law of this

126. Id. at 214 (emphasis added).
129. Slovenko, supra note 7, at 177.
130. See, e.g., McCormick, supra note 8, § 79, at 165; 8 Wigmore, supra note 12, § 2192.
131. Louisell, supra note 61, at 110.
132. Id.
country more than fifty years ago. It should be clear that the family unit does not simply co-exist with our constitutional system; it is an integral part of it. In democratic theory as well as in practice, it is in the family that children are expected to learn the values and beliefs that democratic institutions later draw on to determine group directions. The immensely important power of deciding about matters of early socialization has been allocated to the family, not to the government.

Not only has the state been hesitant to intervene in family affairs, it is in fact inadequate to perform essential family functions—such as the guidance and counseling of children in trouble.

A careful consideration of the importance of the right of familial autonomy in general and of the parent-child relationship in particular clearly demonstrates that parent-child communications constitute a portion of the “private realm of family life which the state cannot enter.” The state interest in making available all relevant facts in a judicial proceeding must give way to this fundamental constitutional right. Generally the state has at its command all of the resources necessary for effective fact investigation without the need to intrude on the communications of parent and child. The idea that familial communications must be reached by the state to ensure effective law enforcement was never accepted at Roman law, and the prevailing view in the civil law countries of Western Europe for many years has been that no one may be forced to divulge confidences between himself and another family member. The idea that such communications merit some sort of legal protection is certainly not novel.


The law, as far as specific individual relationships are concerned, is a relatively crude instrument. It neither has the sensitivity nor the resources to maintain or supervise the ongoing day-to-day happenings between parent and child—and these are essential to meeting ever-changing demands and needs. Nor does it have the capacity to predict future events and needs, which would justify or make workable over the long run any specific conditions it might impose concerning, for example, education, visitation, health care, or religious upbringing.

137. See Radin, supra note 21, at 488.
138. See, e.g., 7 AMERICAN SERIES OF FOREIGN PENAL CODES, French Code of Civil Procedure § 335 (G. Koch trans. 1963); 9 id., German Code of Criminal Procedure § 52(3) (H. Niebler trans. 1965); 15 id., Swedish Code of Judicial Procedure, ch. 36, § 3 (A.
5. Striking the balance

The balance struck in cases involving fundamental autonomy interests and important state interests does not have to be an all-or-nothing proposition: the question need not be one of total immunity or total disclosure. In Roe v. Wade\textsuperscript{139} those asserting the autonomy strand of privacy in the abortion context argued a woman should have complete independence in making the decision of whether to abort the fetus,\textsuperscript{140} while the state insisted it had a compelling interest in the life of the unborn child which made any decision to abort subject to regulation.\textsuperscript{141} The Court agreed the autonomy interest in making the abortion decision was constitutionally protected, yet did not go so far as to entirely subordinate the state interest to the autonomy interest. The Court held the state interest was not sufficient to overcome the woman’s privacy interest during the first trimester of pregnancy,\textsuperscript{142} but after that point the state interest became compelling enough to subordinate the privacy interest.\textsuperscript{143}

The conclusion that parent-child communications should be included in the right of familial autonomy does not mean that all such communications require constitutional protection, just as the view that a woman’s decision to have an abortion was constitutionally protected did not mean that under no circumstances could the state regulate her decision. It simply means “communications made by a minor child to his parents within the context of the family relationship may, under some circumstances, lie within the ‘private realm of family life which the state cannot enter.’”\textsuperscript{144} Even though such a right may justify the refusal of Doe’s parents to testify concerning confidential communications, it does not necessarily require that Terry’s mother remain silent at a juvenile delinquency hearing when she believes her son’s best interests would be served by disclosure.

V. Limitations on the Parent-Child Privilege

The creation and delimitation of privileges is a matter that

\textsuperscript{139} 410 U.S. 113 (1973).
\textsuperscript{140} Id. at 156.
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 163.
\textsuperscript{143} Id.
\textsuperscript{144} 61 A.D.2d at 435, 403 N.Y.S.2d at 381 (emphasis added) (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
in modern experience has almost exclusively been left to legislative judgment.\textsuperscript{145} Even though the court in \textit{Doe} sanctioned the prerogative of the parents not to testify and in so doing implicitly recognized a parent-child privilege, it explicitly refused the invitation to create a full “privilege” despite its belief parent-child communications met the requirements of Wigmore’s test.\textsuperscript{146} Although the court held that under some circumstances communications made by a minor to his parents in the family context were constitutionally privileged, the court expressed its belief that “the creation of a privilege devolves exclusively on the Legislature.”\textsuperscript{147} While the court cannot be faulted for refusing to create a “privilege,” such a result is unsatisfactory because it fails to establish a uniform approach to the question.

Just as the established relational privileges are not extended to situations where extension is not necessary to further the purpose of the privilege, it may reasonably be expected that a parent-child privilege would not be and should not be available in situations where it is neither logically nor constitutionally necessary. Exceptions to the privacy afforded parent-child communications, however, may be made only where there is a constitutional as opposed to a social reason for doing so. The remainder of this Section investigates possible exceptions to and limitations of the parent-child privilege.

\textbf{A. The Confidentiality Requirement}

If a communication is to be protected by the panoply of privilege, it must have been made in confidence. This general rule is applicable to all the major relational privileges\textsuperscript{148} and comports with the reasoning supporting most privileges. If the parties involved did not care to maintain the secrecy of the communication, the revelation of such conversations cannot be thought to be repugnant. Nor can it be said the need to avoid apprehension of disclosure protects communications that are nonconfidential in nature. If the parties themselves have revealed the confidence to third parties, the parties have manifested that no such apprehension exists. In privacy cases, the known presence of third parties

\textsuperscript{145} McCormick, supra note 8, § 77, at 156.
\textsuperscript{146} 61 A.D.2d at 404-405, 400 N.Y.S.2d at 381.
\textsuperscript{147} Id.
\textsuperscript{148} This is true of the husband-wife privilege, McCormick, supra note 8, § 80; the priest-penitent privilege, Stoyles, supra note 50, at 36-37; the attorney-client privilege, 8 WIGMORE, supra note 12, §§ 2311-2313; and the physician-patient privilege, McCormick, supra note 8, § 101.
to an act, that if done in private would be constitutionally protected, vitiates the constitutional protection afforded by the right of privacy. Thus, a legislature or court could constitutionally impose a confidentiality requirement on the parent-child privilege. The question is, would it be wise to do so?

Many children, due to their relative immaturity, simply cannot be expected to act like adults. They may have no conception of what it means to communicate in private. Additionally, the normal family household may well be a place wherein privacy is unattainable. The presence of other family members during such communications may not only be probable, but may in fact be impossible to avoid. It may therefore be necessary to prevent other family members from testifying to protect the intimacy of parent-child communications. However, courts and legislatures could go one step further. If in fact the familial right of privacy protects parent-child communications, that protection should attach unless the communicants knowingly admit a third party to the confidential communication. This would accord with standard constitutional doctrine—waiver of constitutional rights must be knowing and informed.

B. Setting the Bounds of Childhood

There can be little doubt the most potent influence on a child is his family. Once children leave the home and begin to lead their own lives, however, this influence and the need to maintain the privacy of child-parent communication may be expected to decrease. In other words, the potential destructiveness of forced disclosure on the future of the relationship would be greatly lessened, as would the repugnance to such a procedure. That is not to say the forced disclosure would have no impact on the relation; it could affect the parent-child relationship. But, in view of the presumptive maturity of the adult child and due to the probable decrease in the frequency and necessity for confidential communications between parent and child, the impact of forced disclosure on the relationship could be expected to significantly decrease. As an adult, no longer within the family structure on a day-to-day basis nor dependent upon it for counsel and sustenance, such a “child” would be in a different position than an unemancipated minor.

The delicate balance between the significant state interest in

149. See Lovisi v. Slayton, 539 F.2d 349 (4th Cir. 1976).
150. Even the privilege against self-incrimination is subject to waiver. See Miranda v. Arizona, 384 U.S. 436, 479 (1966).
fact accumulation and the familial interest in communicative privacy in the case of an emancipated child would be tipped in favor of the state and disclosure could be compelled. Given the importance of the state interest, the decrease in the significance of the relationship, and the declining impact of disclosure on that relationship, a contrary result in the case of emancipated children would amount to exaltation of theory over the practical realities of life.

C. Actions in Which the Parent and Child Become Adverse

Once the parties to a confidential communication become adverse parties in litigation, the rationale mandating the privacy of their communications has vanished. Thus, in a divorce action either spouse may testify concerning confidential communications,151 in an action by the client against his lawyer the attorney may reveal otherwise excludable confidences;152 and in an action for malpractice the physician may divulge confidences he generally could not reveal.153 Once the parties become adverse as to a matter that relates to the communication, there is no good reason for suppressing testimony as to the substance of the communication. The need to foster the relationship by protecting its confidences is obviated once the relationship has deteriorated to the point the communicants acquire adverse legal interests, as in the case of a wife who is beaten by her husband.

The argument against such an exception would be that since the right to communicative privacy is constitutionally based, it simply cannot be diluted. The right of privacy, however, is not absolute. When parent and child have adverse interests in a legal dispute they in truth are wearing two hats: first, they are adversaries; and second, they are members of the same family. By involving themselves in such a dispute the parent and child have removed the communication from the “private realm of family life which the state may not enter,”154 and have, by putting the particular matter in dispute, called into question the evidence necessary to resolve the dispute.155 Once the parent or child vio-

151. McCormick, supra note 8, § 84, at 171; 8 Wigmore, supra note 12, § 2338.
152. McCormick, supra note 8, § 91, at 191.
153. Id. § 104; 8 Wigmore, supra note 12, § 2385.
155. See In re Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970), wherein the court held that a litigant who puts a matter in controversy may not interpose a privilege, even though the privilege may have a constitutional basis in the right of privacy. See also Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976), noted in 10 Loy. L. Rev. 696 (1977).
lates the rights of the other communicants, by subjecting him to a beating for example, he should not be able to exclude the evidence of his misdeeds by recourse to the privilege. Thus, a court or legislature would be justified in allowing the parent to testify in cases where parent and child are adverse parties.

D. The Holder of the Privilege

Suppose A's son, C, relates in confidence to A the fact he has committed a crime. A firmly believes C should turn himself in and counsels C to do so. C fears doing so will ruin his chances for acceptance at law school and refuses. A goes to the police and is called as a witness at trial. Should C be able to claim the privilege and suppress the testimony?

In the case of the attorney-client relation, the desire of the attorney to reveal a client's confidence is of no import since the privilege belongs to the client.\textsuperscript{156} The same is generally true of the physician-patient privilege.\textsuperscript{157} In the case of the husband-wife privilege, a spouse may prevent testimony concerning a confidential communication despite the willingness of his partner to testify.\textsuperscript{158} It is reasoned that allowing the state to reach confidential communications when one of the parties is willing to divulge the substance of such communications would not prevent apprehension of full disclosure. Arguably, if a child knows a parent may later betray him even though the parent could not be forced to do so, there exists a disincentive to fully talk out all of his problems. Just as the relational privileges allow the communicant to prevent the testimony of his cocommunicant, even though the cocommunicant is willing to testify, it could be argued the child should be able to prevent testimony concerning confidential communications despite the willingness or desire of his parent to testify.

There is, however, an argument to be made in favor of the proposition that a parent should be able to reveal such confidences over the objections of his child. In most cases parents are in a better position than the child to know what would be in the child's best interest.\textsuperscript{159} Perhaps the confidence Terry's mother revealed to the court resulted in the very kind of experience required to prevent Terry from becoming a truly nefarious charac-

\textsuperscript{156} See McCormick, supra note 8, § 92, at 192.
\textsuperscript{157} Both Wigmore and McCormick state that the privilege belongs to the patient. McCormick, supra note 8, § 102, at 218; 8 Wigmore, supra note 12, § 2386, at 851.
\textsuperscript{158} See McCormick, supra note 8, § 83.
\textsuperscript{159} Hafen, supra note 71, at 651-56.
A close examination of the cases establishing a zone of familial autonomy reveals that the right consists largely of the rights of parents to the care, custody, control, and upbringing of their children. Hence, the parent-child communication privilege is arguably held only by the parent; the parent, considering the best interest of the child, decides whether to withhold information or whether to disclose such information. To prevent him from doing so may well be an invasion of his constitutionally protected right to make decisions with respect to the upbringing of his children.

Yet the constitutional rights of the parents are not the only constitutional rights that may be asserted. The child has an autonomy interest in making the decision of whether to communicate certain confidences to his parents. However, although the Supreme Court has accorded minors most of the constitutional rights enjoyed by adults, the Court, noting the special position that children occupy in the social scheme, has recognized in a number of cases that the privacy rights of minors are not coequal with those of adults. Because a parent may in fact know what course of action is in the best interests of the child and because the right of the parent to disclose is at least coequal with the right of the child to prevent disclosure, there should be a requirement that the parent participate in claiming the privilege.

These proposed exceptions to a parent-child privilege are not the only exceptions a court or legislature may wish to consider. One notable example might be the distinction between "acts and facts." Since the basic impetus of most privileges derives from the belief that persons involved in certain relationships should be free from apprehension of disclosure, the protection of the privilege in many jurisdictions extends only to communications or communicative acts but not to noncommunicative acts. If the act is not intended to communicate then the apprehension of disclosure that the privilege is designed to guard against would not be alleviated by protecting any information obtained, and disclosure may be compelled. McCORMICK, supra note 8, § 79 (husband-wife privilege); WIGMORE, supra note 12, § 2306 (attorney-client privilege). Although the majority rule is probably to the contrary, McCORMICK, supra note 8, § 79, at 164; 35 CORNELL L.Q. 187, 188-89 (1949), there is a substantial minority to the effect that the viewing of noncommunicative acts is not a privileged matter. McCORMICK, supra note 8, § 79, at 164. While protection of parent-child communications or acts intended to communicate are essential to keep the lines of communication open, the protection of viewing noncommunicative acts may not be.


162. The cases that afford minors lesser rights than adults in the privacy area are discussed in Note, The Minor's Right of Privacy: Limitations on State Action after Danforth and Carey, 77 COLUM. L. REV. 1216, 1227-33 (1977).

163. The court in People v. Doe hinted that the privilege should be allowable only if all the family members participated in claiming the privilege. 61 A.D.2d at 435 n.9, 403 N.Y.S.2d at 381 n.9.
VI. CONCLUSION

With the exception of the husband-wife relationship, it simply cannot be argued that the relationships now protected by the panoply of privilege are more important to society (and the individuals involved) than the parent-child relationship. It is an anomaly that a purely clinical relationship such as the physician-patient relationship seemingly commands more respect in the legal world than does the fundamental relationship of parent and child. There is nothing more deeply rooted in our history and tradition, and indeed in our Constitution, than the sanctity of the family. While the importance of the state interest in fact accumulation cannot be ignored, it should not be exalted to a relative importance it does not possess.

Neither of the competing state or familial interests is an absolute. Striking a balance between these two interests may be accomplished, as it has in the contexts of other relational privileges, by recognizing the privilege but allowing for exceptions in appropriate circumstances. While the list of possible exceptions catalogued here is not exhaustive, it does form a starting point for serious consideration of the conflict between parent-child communicative privacy and the demands of effective law enforcement.

Bruce Neal Lemons