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The Parent-Child Privilege

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COMMENTS

The Parent-Child Privilege

I. INTRODUCTION

The concept of a parent-child testimonial privilege is of recent origin. The earliest case to consider the possibility of such a privilege is little more than a decade old,[1] and fewer than twenty courts have ruled on the problem since that case.[2] A few states have dealt with the privilege statutorily,[3] but most have let the courts decide whether a parent may refuse to testify against his child, and vice versa.[4] While most states do not recognize the

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1. *In re* Kinoy, 326 F. Supp. 400 (S.D.N.Y. 1970). The body of scholarly comment on the parent-child privilege is small. *See* Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599 (1969-1970); Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1 (1982); Note, *Questioning the Recognition of a Parent-Child Testimonial Privilege*, 45 ALB. L. REV. 142 (1980); Comment, *From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?*, 1978 B.Y.U. L. REV. 1002; Comment, *The Child-Parent Privilege: A Proposal*, 47 FORDHAM L. REV. 771 (1979); Comment, *Confidential Communication Between Parent and Child: A Constitutional Right*, 16 SAN DIEGO L. REV. 811 (1979).

2. *In re* Matthews, 714 F.2d 223 (2d Cir. 1983); United States v. Jones, 683 F.2d 817 (4th Cir. 1982); *In re* Starr, 647 F.2d 511 (5th Cir. 1981); Unitad States v. Penn, 647 F.2d 876 (9th Cir.), *cert. denied*, 449 U.S. 903 (1980); Port v. Heard, 594 F. Supp. 1212 (S.D. Tex. 1984); *In re* Agosto, 553 F. Supp. 1298 (D. Nev. 1983); *In re* Greenberg, 11 Fed. R. Evid. Serv. (Callaghan) 579 (D. Conn. 1982); *In re* Terry W., 59 Cal. App. 3d 745, 130 Cal. Rptr. 913 (1976); People v. Sanders, 99 Ill. 2d 262, 457 N.E.2d 1241 (1983); Hunter v. State, 172 Ind. App. 397, 360 N.E.2d 588, *cert. denied*, 434 U.S. 906 (1977); Cissna v. State, 170 Ind. App. 437, 352 N.E.2d 793 (1976); State v. Gilroy, 313 N.W.2d 513 (Iowa 1981); Three Juveniles v. Commonwealth, 390 Mass. 357, 455 N.E.2d 1203 (1983); People v. Harrell, 87 A.D.2d 21, 450 N.Y.S.2d 501 (1982), *aff'd*, 59 N.Y.2d 620, 463 N.Y.S.2d 185, 449 N.E.2d 1263 (1983); *In re* Mark G., 65 A.D.2d 917, 410 N.Y.S.2d 464 (1978); *In re* A & M, 61 A.D.2d 426, 403 N.Y.S.2d 375 (1978); People v. Fitzgerald, 101 Misc. 2d 712, 422 N.Y.S.2d 309 (1979); *Ex parte* Port, 674 S.W.2d 772 (TEX. Crim. App. 1984).

3. IDAHO CODE § 9-203(7) (Supp. 1984); MINN. STAT. ANN. § 595.02(9) (West Supp. 1984); *see also* A CODE OF EVIDENCE FOR THE STATE OF NEW YORK: SUBMITTED TO THE 1982 SESSION OF THE LEGISLATURE BY THE NEW YORK STATE LAW REVISION COMMISSION § 507 (1982) [hereinafter cited as PROPOSED CODE].

4. To date the privilege has always been claimed by the witness, not by a party to the proceedings. The privilege has generally been claimed in order not to divulge confi-

privilege, acceptance may be spreading, although not without a great deal of criticism. This comment will review the development of the parent-child privilege in the state and federal courts to date, analyze the rationale used to find or deny the privilege, and examine the methods used to determine recognition of the privilege, concluding that it is justified in some situations. However, because each family situation is unique, it argues that the privilege should be granted on a case-by-case basis by the courts, rather than by the legislatures.

II. The Development of the Parent-Child Privilege in the Courts

The parent-child privilege has been claimed in both state and federal courts, but in neither system has the privilege been widely recognized. Nevertheless, it has found some acceptance at both levels.

A. Development in the State Courts

New York is currently the only state to have a judicially accepted parent-child testimonial privilege. The courts of California, Illinois, Indiana, Iowa, Massachusetts, and Texas have considered and rejected the parent-child privilege,[5] although some have hinted that a privilege might be acceptable in a "confidential" situation.[6]

In a 1978 arson case, *In re A & M*,[7] sixteen-year-old John Doe was placed by witnesses near the scene of the fire. His parents were subpoenaed to testify about any admissions the boy might have made to them. The trial court quashed the subpoena and extended the marital privilege to encompass a parent-child privilege. On appeal, the New York Supreme Court, Appellate Division, held that the case did not fall under the marital privilege or any other statutory privilege[8] and that the creation of privileges in New York was exclusively a legislative concern. However, the court concluded that under some circumstances communications made by a minor child to his parents within the

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dential communications between parent and child but has occasionally been claimed as a general privilege not to testify at all against a parent or child.

5. *See* cases cited *supra* note 2.

6. *See, e.g.*, State v. Gilroy, 313 N.W.2d 513, 518 (Iowa 1981); Three Juveniles v. Commonwealth, 390 Mass. 357, ___, 455 N.E.2d 1203, 1204 (1983).

7. 61 A.D.2d 426, 428, 403 N.Y.S.2d 375, 377 (1978).

8. *Id.*

context of a confidential family relationship may be shielded from disclosure as a matter of constitutional right.[9] The court reached this conclusion by balancing the state's interest in receiving all pertinent evidence against the family's constitutional right to privacy. It held that in this instance, "the interest of society in protecting and nurturing the parent-child relationship [was] of such overwhelming significance that the State's interest in fact-finding must give way."[10]

One year later in *People v. Fitzgerald*,[11] the holding of *A & M* was enlarged. Twenty-three year old Michael Fitzgerald hit two teenage pedestrians while driving, killing one of them. Frightened, he did not stop but a few days later went to his father for guidance. Mr. Fitzgerald testified before a grand jury about his son's confidence but sought to prevent the use of that testimony at trial, claiming a parent-child privilege.[12]

The Westchester County Court went beyond the holding of *A & M* and held that despite the lack of legislative pronouncement, a parent-child privilege existed in New York, flowing directly from both the federal and state constitutions, which "have fostered the recognition of what has come to be known as the 'right to privacy.' "[13] The court not only recognized the privilege but also held that it extended beyond the child's minority. It reasoned that the parent-child relationship of mutual trust, respect, and confidence was one that should be fostered throughout the lives of the parties and one that merited protection through a testimonial privilege. Indeed, the court pointed out that no other previously recognized privilege had an age limitation: all others were governed by the nature of the relationship and the character of the communication.[14]

In an effort to prevent judicial development of new privileges, New York's proposed Code of Evidence would codify present law by limiting privileges to those specifically provided by constitution or statute (including the Code of Evidence).[15] In apparent agreement with the decisions in *A & M* and *Fitzgerald*,

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9. *Id.* at 434-35, 403 N.Y.S.2d at 381.

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

11. 101 Misc. 2d. 712, 422 N.Y.S.2d 309 (1979).

12. *Id.* at 713-14, 422 N.Y.S.2d at 310-11. The trial at which the privilege was invoked took place in January of 1976, before the decision in *A & M*.

13. *Id.* at 716-17, 422 N.Y.S.2d at 312. See discussion of the constitutional right to privacy, *infra* text accompanying notes 43-61.

14. *Fitzgerald*, 101 Misc. 2d at 718-20, 422 N.Y.S.2d at 313-14.

15. PROPOSED CODE, *supra* note 3, § 501(b).

the proposed code includes a parent-child privilege.[16] The New York State Law Revision Commission justified recognition of the privilege through two "imperative social considerations": first, the role of the parent in developing and establishing a child's emotional stability, character, and self image; and second, the "well-recognized principle that there are certain 'private realm[s] of family life which the state [should not] enter.' "[17] The proposed rule would expand the scope of the privilege beyond that recognized by the courts, allowing it to be claimed by either the parent or the child with no restriction based on age.[18]

B. Development in the Federal Courts

Federal courts have used three approaches to parent-child privilege claims. Some have summarily denied the privilege, refusing to discuss the issue; others have rejected the proposed privilege after analyzing the claim; and two have accepted the privilege to some extent.

The first federal court to consider a parent-child privilege used the first approach.[19] Arthur Kinoy, an attorney, was subpoenaed to appear before a grand jury to testify about his daughter's location. He refused to appear, claiming both an attorney-client privilege and a parent-child privilege. The district court rejected Kinoy's argument that knowledge of his daughter's whereabouts had come to him as an attorney rather than as a parent[20] and minced no words in dismissing the claimed parent-child privilege.[21]

In *United States v. Jones*,[22] the Fourth Circuit took the

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16. *Id.* § 507.

17. *Id.* at 91 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

18. The *Fitzgerald* rule is followed in the Proposed Code: the privilege is not limited to children eighteen and under. PROPOSED CODE, *supra* note 3, § 507, at 92.

19. *In re* Kinoy, 326 F. Supp. 400 (S.D.N.Y. 1970); *see also In re* Starr, 647 F.2d 511, 512-13 (5th Cir. 1981) ("We can find no federal judicial support for recognition of a 'parent-child' privilege, and decline to create one under the circumstances of the present appeal"); United States v. Penn, 647 F.2d 876, 885 (9th Cir. 1980) ("There is no judicially or legislatively recognized general 'family' privilege, . . . and we decline to create one here"). Refusal even to consider a proposed privilege would seem unwarranted at the federal level, given the broad powers available to courts under Federal Rule of Evidence 501 to develop the law of testimonial privileges using common law principles: "privilege . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

20. *Kinoy*, 326 F. Supp. at 403.

21. *Id.* at 406.

22. 683 F.2d 817 (4th Cir. 1982).

second approach, analyzing but rejecting the claimed privilege. The court relied on the United States Supreme Court's decision in *Trammel v. United States*.[23] It reasoned that because testimonial privileges contravene the fundamental principle that "the public . . . has a right to every man's evidence,"[24] such privileges should be recognized "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[25] Noting that in *Trammel* the Supreme Court had restricted the testimonial privilege between spouses, the *Jones* court declined to expand the law of privileges in the family setting by recognizing a new one.[26] The court did not, however, reject the possibility that it might acknowledge the privilege under other factual circumstances.[27]

Thus far, only two federal district court decisions have favored the parent-child privilege. The first, *In re Greenberg*,[28] recognized the privilege only under limited circumstances. In *Greenberg*, a grand jury was conducting an investigation of Susan Greenberg and others suspected of marijuana importation. Susan's mother, Helen Greenberg, was in Florida visiting her at the time of the alleged arrival of the marijuana. Mrs. Greenberg was subpoenaed to testify about that visit and generally about her relationship with her daughter. She refused to testify on the grounds that her conservative Jewish religion forbade a parent to testify against her child.[29]

The court divided Mrs. Greenberg's claim into two issues: first, whether she had a valid first amendment claim, and second, whether an all-encompassing parent-child testimonial privilege should exist in this case. The court recognized that there was a conflict between the grand jury's right to every person's evidence and an individual's freedom to exercise her religion and

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23. 445 U.S. 40, 50-51 (1980).

24. *Id.* at 50 (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).

25. *Trammel*, 445 U.S. at 50 (quoting Elkins v. United States, 364 U.S. 206, 234 (1960)).

26. *Jones*, 683 F.2d at 819.

27. *Id.* ("Whether, in changed factual circumstances, the presence of other considerations would make a difference we, of course, have no occasion to consider and do not now address.").

28. 11 Fed. R. Evid. Serv. (Callaghan) 579 (D. Conn. 1982).

29. *Id.* at 580-81.

to maintain family privacy.[30] The court noted that only state interests of the highest order could override legitimate claims of free exercise of religion. The court found that Mrs. Greenberg's religion forbade her from testifying about matters that might directly incriminate her daughter. Although her testimony might aid the investigation, other means could provide the same information; so her testimony was not essential to the grand jury investigation. The court upheld Mrs. Greenberg's free exercise challenge and did not require her to testify on these matters.[31]

The court concluded that it had the authority under Federal Rule of Evidence 501[32] to find and develop a parent-child privilege covering Mrs. Greenberg's confidential but nonincriminating communications with her daughter.[33] It used careful balancing to determine whether a privilege should be recognized in this case. The court noted that in the case of communications between a small child and his parent, confidentiality might be critical to the child's emotional development. In this case, however, the "child" was an adult who did not need parental guidance to the extent that a minor might. The court therefore concluded that the benefit to the grand jury of compelling Mrs. Greenberg's testimony outweighed possible incidental injury to the parent-child relationship.[34]

In the second and most recent federal case to consider and accept the parent-child privilege, *In re Agosto*,[35] the United States District Court for the District of Nevada came to a much broader and less well-reasoned conclusion than did the court in *Greenberg*. In an area characterized by a fine balancing of facts, the court considered surprisingly few facts in concluding that a child may not only claim the parent-child privilege to avoid testifying about confidential communications from his father, but that he may even refuse to appear as a witness in a proceeding against his father.[36] Although the opinion is lengthy and heavily

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30. *Id.* at 582.

31. *Id.* at 584.

32. *Id.*; see text of rule *supra* note 19.

33. This testimony was not proscribed by Mrs. Greenberg's religion. *Greenberg*, 11 Fed. R. Evid. Serv. at 582.

34. *Id.* at 587.

35. 553 F. Supp. 1298 (D. Nev. 1983).

36. *Id.* at 1325. Note that not even the traditional privileges grant a total immunity from appearing as a witness. The extremity of Judge Claiborne's conclusion could be related to his well-known dislike of government lawyers and methods. Claiborne, while on the bench, carried on a feud with Justice Department "Strike Force" attorneys:

documented, the meticulous factual balancing found in *Greenberg* is notably absent.[37] The court did balance the interests of the family relationship against the interests of the government at great length, but it did so abstractly. It did not apply the facts of the case before it to its generalized findings that the confidence and privacy inherent in the parent-child relationship outweigh the government's interest in collecting evidence. The court's broad holding and lack of factual analysis evince its lack of solid reasoning. For this reason its recognition of the parent-child privilege may have little precedential value.

C. Summary

Of the courts that have considered the parent-child privilege, only three, one state and two federal, have accepted it. However, several of the state courts rejecting the privilege have suggested they might accept it in other circumstances. Most of these courts have represented that they would accept the privilege if they were presented with a situation in which the communication between the parent and the child were intended to be confidential.[38] Thus, the parent-child privilege may be gaining ground in the courts.

III. METHODS OF ANALYSIS

Most evidentiary rules are justified by the courts' desire to receive evidence in its most accurate form. Hearsay evidence, for example, is generally not admitted because it does not proceed from the personal knowledge of the witness. Testimonial privileges, on the other hand, are not justified by a concern for the

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> Claiborne . . . said he made up his mind when he became a judge that he would defend the "little persons." "In following that philosophy I made a lot of enemies in the Justice Department. . . . I came down hard on them and if I had not, I would not be here today." . . . Claiborne said U.S. prosecutors pursued him because he had been an outspoken critic of the Justice Department. He had in the past characterized the Justice Department'e Organized Crime Strike Force as "crooks and liars."

Claiborne Given 2 Years in Prison: Expressing Remorse, Judge is Sentenced on Income Tax Fraud, Los Angeles Times, Oct. 4, 1984, at 3, col. 1.

37. "Because the issues presented to the Court are of such an interesting and important nature, and because the law in this area is relatively undeveloped at the present time, this Court will endeavor to examine the requested motion in depth both as to law and policy." *Agosto*, 553 F. Supp. at 1299-1300. This is an understatement, leading another court to term the thirty-page opinion "prolix." Three Juveniles v. Commonwealth, 390 Mass. 357, ___, 455 N.E.2d 1203, 1207 (1983).

38. *See supra* note 6 and accompanying text.

quality of evidence, but by a societal interest in relationships thought to be sufficiently important to justify the reduced availability of evidence.[39] The most common examples of evidentiary privileges are those between attorney and client, physician and patient, clergy and penitent, and husband and wife. The rationale behind these privileges is that these relationships cannot function properly without assured confidential communication between the parties. This rationale is most persuasive with the professional privileges: the attorney-client privilege rests on the lawyer's need to know all that relates to his client's problem; a physician must have complete access to his patient's thoughts and knowledge in order to identify and treat a condition; the clergy-penitent privilege "recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."[40]

These four relationships are by no means the only ones protected by testimonial privilege. However, the courts are generally quite reluctant to recognize new privileges because privileges exclude relevant evidence and thus contravene the fundamental principle that the public has a right to every person's evidence.[41] The disclosure of all relevant facts is an important goal in the progress of a lawsuit. Equally important in the eyes of many is the protection of the confidentiality inherent in certain properly functioning human relationships.[42] The tension between these two interests requires that they be balanced when a court contemplates recognition of a privilege in a specific situation.

In dealing with the parent-child privilege, courts have analyzed three basic issues: (1) whether the constitutional right to privacy as extended to the family justifies the privilege, (2) whether the privilege should be recognized by the courts or created legislatively, and (3) whetber in a given case the interests of society in receiving the family member's evidence is outweighed by society's interest in family solidarity.

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39. *See generally* CLEARY, MCCORMICK ON EVIDENCE § 72 (3d ed. 1984).

40. Trammel v. United Stetes, 445 U.S. 40, 51 (1980).

41. United States v. Bryan, 339 U.S. 323, 331 (1950) (quoting 8 J. WIGMORE, EVIDENCE § 2192 (3d ed. 1940)).

42. *See Agosto*, 553 F. Supp. at 1307.

A. The Constitutional Right to Privacy

The Constitution does not mention a general right to privacy. However, as early as 1885 the Supreme Court hinted that in certain situations a person had a privacy right against governmental intrusion.[43] In time the Court recognized that certain "zones of privacy" are protected by various constitutional provisions.[44]

Most of the Supreme Court decisions on the right to privacy have involved family or marital relationships. Citing *Pierce v. Society of Sisters*[45] and *Meyer v. Nebraska*,[46] the Court in *Prince v. Massachussetts*[47] noted that there is a "private realm of family life which the state cannot enter."[48] The right to privacy within the family has been extended to forbid unreasonable state intrusion on the right to live together as an extended family,[49] to marry,[50] to procreate,[51] to use contraceptives,[52] and to have an abortion.[53]

The Supreme Court has not decided whether the constitutional right to privacy encompasses a parent-child privilege, but other courts have used this right as a basis for deciding the question. In considering whether children should be compelled to testify in a grand jury murder investigation of their father, the Supreme Judicial Court of Massachussetts could see no basis for concluding that a constitutional right to privacy required that the children be given a testimonial privilege.[54] In a similar

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43. Boyd v. United States, 116 U.S. 616, 630, 633 (1886). The *Boyd* Court held that the seizure of a man's private papers was the equivalent of making him testify against himself, contrary to the fifth amendment prohibition.

44. For example, the first amendment was said to include a "penumbra" protecting the privacy of association in NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958), in which the court held that disclosure of membership lists of legal associations "entail[ed] the likelihood of a substantial restraint upon the exercise . . . of [petitioner's] right to freedom of association."

45. 268 U.S. 510 (1925) (holding that parents may choose to send their children to private religious schools rather than compulsory public schools).

46. 262 U.S. 390 (1923) (holding that parents may send their children to schools in which teaching takes place in languages other than English).

47. 321 U.S. 158 (1944).

48. *Id.* at 166.

49. Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977).

50. Loving v. Virginia, 388 U.S. 1, 12 (1967).

51. Skinner v. Oklahoma, 316 U.S. 535, 541-43 (1942).

52. Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965).

53. Roe v. Wade, 410 U.S. 113, 153 (1973).

54. Three Juveniles v. Commonwealth, 390 Mass. 357, ___, 455 N.E.2d 1203, 1207 (1983).

decision, a California appeals court held that admission of the confession of a boy to his mother, the only evidence linking him to a burglary, neither impinged on the privilege against self-incrimination nor invaded the penumbra of the right to privacy.[55]

On the other hand, most of the courts that have upheld the parent-child privilege have based their decisions to some extent on the familial right to privacy. The court in *In re A & M*[56] analyzed the role of the family in establishing a child's emotional stability, character, and self-image and held that the state should not compel parents to disclose information given to them in a confidential setting.[57] *In re Agosto*[58] cited *Roe v. Wade*[59] for the proposition that when a state intrudes into the realm of family privacy it must show that the regulation facilitates a compelling state interest. The court then held that the family interest in privacy outweighed the state interest in hearing evidence.[60] However, courts that have recognized the privilege have been reluctant to use the constitutional right to privacy as the sole justification for it. They have typically used this right only as a basis for further analysis of the problem.[61]

B. The Statutory Creation of Privileges

A number of state courts are reluctant to recognize new privileges in the absence of legislative pronouncement.[62] Professor Cleary points out that this reluctance began during the nineteenth century, before which time the few privileges recognized had been found through common law processes. Since the early

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55. *In re* Terry W., 59 Cal. App. 3d 745, 748, 130 Cal. Rptr. 913, 914 (1976).

56. 61 A.D.2d 426, 403 N.Y.S.2d 375 (1978).

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

58. 553 F. Supp. 1298 (1983).

59. 410 U.S. 113, 153-55 (1973).

60. 553 F. Supp. at 1326.

61. *But see* People v. Fitzgerald, 101 Misc. 2d 712, 716-17, 422 N.Y.S.2d 309, 312 (1979) (parent-child privilege flows directly from right of privacy).

62. *In re* Terry W., 59 Cal. App. 3d 745, 749, 130 Cal. Rptr. 913, 915 (1976); People v. Sanders, 99 Ill. 2d 262, ___, 457 N.E.2d 1241, 1245 (1983); Cissna v. State, 170 Ind. App. 437, 439-40, 352 N.E.2d 793, 795 (1976); State v. Gilroy, 313 N.W.2d 513, 518 (Iowa 1981); Three Juveniles v. Commonwealth, 390 Mass. 357, ___, 455 N.E.2d 1203, 1206 (1983); People v. Harrell, 87 A.D.2d 21, 25, 450 N.Y.S.2d 501, 504 (1983); *In re* A & M, 61 A.D.2d 426, 429, 434-35, 403 N.Y.S.2d 375, 378, 381 (1978). Federal courts, on the other hand, may develop privileges according to "the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience." FED. R. EVID. 501. However, federal courts run into the same problem as state courts when state law supplies the rules of decision: then "the privilege of a witness . . . shall be determined in accordance with State law." *Id.*

1800's the vast majority of new privileges created have been of legislative origin.[63] This is clearly borne out by the prolific legislation on privileges in most states today. Nearly all jurisdictions have codified the attorney-client, clergy-penitent, physician-patient, and husband-wife privileges.[64] In addition, forty-six have a

63. E. CLEARY, MCCORMICK ON EVIDENCE § 75, at 180 (3d ed. 1984).

64. Thirty-nine states and Puerto Rico have codified the attorney-client privilege: ALA. CODE § 12-21-161 (1975); ARIZ. REV. STAT. ANN. § 12-2234 (1982); ARK. STAT. ANN. § 28-1001 (Rule 502) (1979); CAL. EVID. CODE §§ 950-962 (West 1984); COLO. REV. STAT. § 13-90-107(1)(b) (Supp. 1984); DEL. UNIF. R. EVID. 502; FLA. STAT. ANN. § 90.502 (West 1979); GA. CODE ANN. §§ 24-9-24 to -25 (Code of 1981); HAWAII R. EVID. 503; IDAHO CODE § 9-203(2) (Supp. 1984); IND. CODE ANN. § 34-1-14-5(3) (Burns Supp. 1984); IOWA CODE ANN. § 622.10 (West Supp. 1984-1985); KAN. STAT. ANN. § 60-426 (1983); KY. REV. STAT. § 421.210(4) (Supp. 1984); LA. REV. STAT. ANN. § 15:475 (West 1981); ME. R. EVID. 502; MD. CTS. & JUD. PROC. CODE ANN. § 9-108 (1984); MICH. COMP. LAWS ANN. § 767.5a (West 1982); MINN. STAT. ANN. § 595.02(2) (West Supp. 1984); MISS. CODE ANN. § 73-3-37(4) (1972); MO. ANN. STAT. § 491.060(3) (Vernon Supp. 1984); MONT. CODE ANN. § 26-1-803 (1983); NEB. REV. STAT. § 27-503 (1979); NEV. REV. STAT. §§ 49.035-49.115 (1979); N.J. STAT. ANN. § 2A:84A-20 (West 1976); N.M. R. EVID. 503; N.Y. CIVIL PRAC. LAW § 4503(a) (McKinney Supp. 1984-1985); N.D. R. EVID. 502; OHIO REV. CODE ANN. § 2317.02(A) (Page 1981); OKLA. STAT. ANN. tit. 12, § 2502 (West 1980); OR. REV. STAT. § 40.225 (1984); 42 PA. CONS. STAT. ANN. §§ 5916, 5928 (Purdon 1982); P.R. R. EVID. 25; S.D. CODIFIED LAWS ANN. § 19-13-2 to -5 (1979); TENN. CODE ANN. § 23-3-105 (1980); TEX. R. EVID. 503; UTAH CODE ANN. § 78-24-8(2) (Supp. 1983); WASH. REV. CODE ANN. § 5.60.060(2) (Supp. 1985); WIS. STAT. ANN. § 905.03 (West 1975); WYO. STAT. § 1-12-101(a)(i) (1977).

Forty-nine states, the District of Columbia, and Puerto Rico have codified the clergy-penitent privilege: ALA. CODE § 12-21-166 (Supp. 1984); ARIZ. REV. STAT. ANN. § 12-2233 (1982); ARK. STAT. ANN. § 28-1001 (Rule 505) (1983); CAL. EVID. CODE §§ 1030-1034 (West 1984); COLO. REV. STAT. § 13-90-107(1)(c) (1984); CONN. GEN. STAT. ANN. § 52-146b (West Supp. 1984); DEL. UNIF. R. EVID. 505; D.C. CODE ANN. § 14-309 (1981); FLA. STAT. ANN. § 90.505 (West 1979); GA. CODE ANN. § 24-9-22 (Code of 1981); HAWAII R. EVID. 506; IDAHO CODE § 9-203(3) (Supp. 1984); ILL. ANN. STAT. ch. 110, ¶ 8-803 (Smith-Hurd 1984); IND. CODE ANN. § 34-1-14-5(5) (Burns Supp. 1984); IOWA CODE ANN. § 622.10 (West Supp. 1984-1985); KAN. STAT. ANN. § 60-429 (1983); KY. REV. STAT. § 421.210(4) (Supp. 1984); LA. REV. STAT. ANN. § 15:477 (West 1981); ME. R. EVID. 505; MD. CTS. & JUD. PROC. CODE ANN. § 9-111 (1984); MASS. GEN. LAWS ANN. ch. 233, § 20A (West Supp. 1984-1985); MICH. COMP. LAWS ANN. § 600.2156 (West 1968); MINN. STAT. ANN. § 595.02(3) (West Supp. 1984); MISS. CODE ANN. § 13-1-22 (Supp. 1984); MO. ANN. STAT. § 491.060(4) (Vernon Supp. 1985); MONT. CODE ANN. § 26-1-804 (1983); NEB. REV. STAT. § 27-506 (1979); NEV. REV. STAT. § 49.255 (1981); N.J. STAT. ANN. § 2A:84A-23 (West Supp. 1984-1985); N.M. R. EVID. 506; N.Y. CIVIL PRAC. LAW § 4505 (McKinney Supp. 1984-1985); N.C. GEN. STAT. § 8-53.2 (1981); N.D. R. EVID. 505; OHIO REV. CODE ANN. § 2317.02(C) (Page 1981); OKLA. STAT. ANN. tit. 12, § 2505 (West 1980); OR. REV. STAT. § 40.260 (1984); 42 PA. CONS. STAT. ANN. § 5943 (Purdon 1982); P.R. R. EVID. 28; R.I. GEN. LAWS § 9-17-23 (1969); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 19-13-16 to -18 (1979); TENN. CODE ANN. § 24-1-206 (1980); TEX. R. EVID. 505; UTAH CODE ANN. § 78-24-8(3) (Supp. 1983); VT. STAT. ANN. tit. 12, § 1607 (1973); VA. CODE § 8.01-400 (1984); WASH. REV. CODE ANN. § 5.60.060(3) (Supp. 1985); W. VA. CODE §§ 57-3-2 to -4 (1966); WIS. STAT. ANN. § 905.06 (West 1975); WYO. STAT. § 1-12-101(a)(ii) (1977).

Thirty-nine states, the District of Columbia, and Puerto Rico have codified the physician-patient privilege: ARIZ. REV. STAT. ANN. § 12-2235 (1982); ARK. STAT. ANN. § 28-

psychiatrist, psychologist, or psychotherapist-patient privilege,[65]

1001 (Rule 503) (1979); CAL. EVID. CODE §§ 990-1007 (West 1984); COLO. REV. STAT. § 13-90-107(1)(d) (Supp. 1984); DEL. UNIF. R. EVID. 503; D.C. CODE ANN. § 14-307 (1981); GA. CODE ANN. § 24-9-40 to -45 (Supp. 1984); HAWAII R. EVID. 504; IDAHO CODE § 9-203(4) (Supp. 1984); ILL. ANN. STAT. ch. 110, ¶ 8-802 (Smith-Hurd 1984); IND. CODE ANN. § 34-1-14-5(4) (Burns Supp. 1984); IOWA CODE ANN. § 622.10 (West Supp. 1984-1985); KAN. STAT. ANN. § 60-427 (1983); LA. REV. STAT. ANN. § 15:476 (West 1981); ME. R. EVID. 503; MICH. COMP. LAWS ANN. § 600.2157 (West 1968); MINN. STAT. ANN. § 595.02(4) (West 1947 & Supp. 1984); MISS. CODE ANN. § 13-1-21 (Supp. 1984); MO. ANN. STAT. § 491.060(5) (Vernon Supp. 1985); MONT. CODE ANN. § 26-1-805 (1983); NEB. REV. STAT. § 27-504 (1979); NEV. REV. STAT. §§ 49.215-49.245 (1981); N.H. REV. STAT. ANN. § 329:26 (1984); N.J. STAT. ANN. § 2A:84A-22.2 (West 1974); N.Y. CIV. PRAC. LAW § 4504 (McKinney Supp. 1984-1985); N.C. GEN. STAT. § 8-53 (Supp. 1983); N.D. R. EVID. 503; OHIO REV. CODE ANN. § 2317.02(B) (Page 1981); OKLA. STAT. ANN. tit. 12, § 2503 (West Supp. 1984-1985); OR. REV. STAT. § 40.235 (1984); 42 PA. CONS. STAT. ANN. § 5929 (Purdon 1982); P.R. R. EVID. 26; S.D. CODIFIED LAWS ANN. §§ 19-13-6 to -11 (1979); TEX. R. EVID. 509; UTAH CODE ANN. § 78-24-8(4) (Supp. 1983); VT. STAT. ANN. tit. 12, § 1612 (Supp. 1984); VA. CODE § 8.01-399 (1984); WASH. REV. CODE ANN. § 5.60.060(4) (Supp. 1985); WIS. STAT. ANN. § 905.04 (West Supp. 1984); WYO. STAT. § 1-12-101(a)(i) (1977).

Forty-eight states, the District of Columbia, and Puerto Rico have codified the husband-wife privilege: ARIZ. REV. STAT. ANN. §§ 12-2231 to -2232 (1982); ARK. STAT. ANN. § 28-1001 (Rule 504) (1979); CAL. EVID. CODE §§ 970-973, 980-987 (West 1984); COLO. REV. STAT. § 13-90-107(1)(a) (Supp. 1984); CONN. GEN. STAT. § 52-146 (West 1960); DEL. UNIF. R. EVID. 504; D.C. CODE ANN. § 14-306 (1981); FLA. STAT. ANN. § 90.504 (West 1979); GA. CODE ANN. §§ 24-9-21(1), 24-9-23 (Code of 1981); HAWAII R. EVID. 505; IDAHO CODE § 9-203(1) (Supp. 1984); ILL. ANN. STAT. ch. 110, ¶ 8-801 (Smith-Hurd 1984); IND. CODE ANN. 34-1-14-5(6) (Burns Supp. 1984); IOWA CODE ANN. §§ 622.8-622.9 (West 1950); KAN. STAT. ANN. § 60-428 (1983); LA. REV. STAT. ANN. §§ 15:461-462 (West 1981); ME. R. EVID. 504; MD. CTS. & JUD. PROC. §§ 9-105 to -106 (1984); MASS. GEN. LAWS ANN. ch. 233, § 20 (West Supp. 1984-1985); MICH. COMP. LAWS ANN. § 600.2162 (West 1968); MINN. STAT. ANN. § 595.02(1) (West Supp. 1984); MISS. CODE ANN. § 13-1-5 (Supp. 1984); MO. ANN. STAT. § 491.020 (Vernon 1952); MONT. CODE ANN. § 26-1-802 (1983); NEB. REV. STAT. § 27-505 (1979); NEV. REV. STAT. §§ 49.295 (1981)-49.305 (1979); N.H. REV. STAT. ANN. § 516:27 (1974); N.J. STAT. ANN. § 2A:84A-22 (West 1976); N.M. R. EVID. 505; N.Y. CIV. PRAC. LAW § 4502 (McKinney 1963); N.C. GEN. STAT. §§ 8-56 to -57.2 (1981 & Supp. 1983); N.D. R. EVID. 504; OHIO REV. CODE ANN. § 2317.02(D) (Page 1981); OKLA. STAT. ANN. tit. 12, § 2504 (West 1980); OR. REV. STAT. § 40.255 (1984); 42 PA. CONS. STAT. ANN. §§ 5913-5915, 5923-5927 (Purdon 1982); P.R. R. EVID. 27; R.I. GEN. LAWS § 9-17-13 (1969); S.C. CODE ANN. § 19-11-30 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. §§ 19-13-12 to -15 (1979); TENN. CODE ANN. § 24-1-201 (1980); TEX. R. EVID. 504; UTAH CONST. art. I, § 12, UTAH CODE ANN. §§ 77-1-6(2)(d) (1953), 78-24-8(1) (Supp. 1983); VT. STAT. ANN. tit. 12, § 1605 (1973); VA. CODE § 8.01-398 (1984); WASH. REV. CODE ANN. § 5.60.060(1) (Supp. 1985); W. VA. CODE § 57-3-4 (1966); WIS. STAT. ANN. § 905.05 (West 1975); WYO. STAT. §§ 1-12-101(a)(iii), 1-12-104 (1977).

65. ALA. CODE § 34-26-2 (Supp. 1984); ALASKA STAT. § 08.86.200 (1982), ALASKA R. EVID. 504; ARIZ. REV. STAT. ANN. § 32-2085 (Supp. 1977-1984); ARK. STAT. ANN. § 28-1001 (Rule 503) (1979); CAL. EVID. CODE §§ 1010-1028 (West 1984); COLO. REV. STAT. §§ 13-90-107(1)(g) (1973), 12-43-120 (Supp. 1984); CONN. GEN. STAT. ANN. §§ 52-146c to -146d (West Supp. 1984); DEL. UNIF. R. EVID. 503; D.C. CODE ANN. § 14-307 (1981); FLA. STAT. ANN. § 90.503 (West 1979); GA. CODE ANN. §§ 24-9-21(5), 43-39-16 (Code of 1981); HAWAII R. EVID. 504.1; IDAHO CODE § 9-203(6) (Supp. 1984); ILL. ANN. STAT. ch. 111, ¶ 5306 (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. § 25-33-1-17 (Burns Supp. 1984); IOWA CODE ANN. § 622.10 (West Supp. 1984-1985); KAN. STAT. ANN. § 74-5323 (1980); KY. REV.

and twenty-one allow the same for a social worker;[66] nineteen allow a testimonial privilege to accountants;[67] sixteen recognize a deaf-mute interpreter privilege;[68] and twenty-five provide that a reporter has a privilege not to divulge his source.[69]

STAT. §§ 319.111 (1983), 421.215 (1972); LA. REV. STAT. ANN. § 37:2366 (West 1974); ME. R. EVID. 503; MD. CTS. & JUD. PROC. CODE ANN. § 9-109 (1984); MASS. GEN. LAWS ANN. ch. 233, § 20B (West Supp. 1984-1985); MICH. COMP. LAWS ANN. § 333.18237 (West 1980); MINN. STAT. ANN. § 595.02(7) (West Supp. 1984); MISS. CODE ANN. § 73-31-29 (1972); MONT. CODE ANN. §§ 26-1-807, 26-1-809 (1983); NEV. REV. STAT. §§ 49.215-49.245 (1981); N.H. REV. STAT. ANN. § 330-A:19 (1984); N.J. STAT. ANN. § 45:14B-28 (West Supp. 1984-1985); N.M. R. EVID. 504; N.Y. CIV. PRAC. LAW § 4507 (McKinney Supp. 1984-1985); N.C. GEN. STAT. § 8-53.3 (Supp. 1983); N.D. R. EVID. 503; OHIO REV. CODE ANN. § 4732.19 (Page Supp. 1983); OKLA. STAT. ANN. tit. 12, § 2503 (West Supp. 1983); OR. REV. STAT. § 40.230 (1984); 42 PA. CONS. STAT. ANN. § 5944 (Purdon 1982); S.D. CODIFIED LAWS ANN. §§ 19-13-6 to -11 (1979); TENN. CODE ANN. §§ 24-1-207 (1980), 63-11-213 (1982); TEX. R. EVID. 510; UTAH CODE ANN. § 58-25-8 (Supp. 1983); VT. STAT. ANN. tit. 12, § 1612 (Supp. 1984); VA. CODE § 8.01-400.2 (1984); WASH. REV. CODE ANN. § 18.83.110 (1978); WIS. STAT. ANN. § 905.04 (West Supp. 1984-1985); WYO. STAT. § 33-27-103 (1977).

66. ARK. STAT. ANN. § 71-2815 (Supp. 1983); CAL. EVID. CODE §§ 1010(c), 1014 (West 1984); COLO. REV. STAT. § 12-63.5-115 (1978); IDAHO CODE § 54-3213 (1979); ILL. ANN. STAT. ch. 111, ¶ 6324 (Smith-Hurd Supp. 1984-1985); KY. REV. STAT. § 335.170 (1983); LA. REV. STAT. ANN. § 37:2714 (West 1974); ME. REV. STAT. ANN. tit. 32, § 7005 (Supp. 1978-1984); MD. CTS. & JUD. PROC. CODE ANN. § 9-121 (1984); MICH. COMP. LAWS ANN. § 339.1610 (West Supp. 1984-1985); MONT. CODE ANN. § 37-22-401 (1983); N.M. R. EVID. 509; N.Y. CIV. PRAC. LAW § 4508 (McKinney Supp. 1984-1985); N.C. GEN. STAT. § 8-53.7 (Supp. 1983); OKLA. STAT. ANN. tit. 59, § 1272.1 (West Supp. 1984); OR. REV. STAT. § 40.250 (1984); S.D. CODIFIED LAWS ANN. § 36-26-30 (1977); TENN. CODE ANN. § 63-23-107 (Supp. 1984); UTAH CODE ANN. § 58-35-10 (1974); VA. CODE § 8.01-400.2 (1984); W. VA. CODE § 30-30-12 (Supp. 1984).

67. ARIZ. REV. STAT. ANN. § 32-749 (Supp. 1984-1985); COLO. REV. STAT. § 13-90-107(1)(f) (1984); FLA. STAT. ANN. § 90.5055 (West 1979); GA. CODE ANN. § 43-3-32(b) (Code of 1981); IDAHO CODE § 9-203A (1979); ILL. ANN. STAT. ch. 111, ¶ 5533 (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. § 25-2-1-23 (Burns 1982); KAN. STAT. ANN. § 1-401 (1982); KY. REV. STAT. § 325.440 (Supp. 1984); LA. REV. STAT. ANN. § 37:87 (West Supp. 1985); MD. CTS. & JUD. PROC. CODE ANN. § 9-110 (1984); MICH. COMP. LAWS ANN. § 339.713 (West Supp. 1984-1985); MISS. CODE ANN. § 73-33-16(2) (Supp. 1984); MONT. CODE ANN. § 37-50-402 (1983); NEV. REV. STAT. §§ 49.125-49.205 (1979); N.M. STAT. ANN. § 38-6-6(c) (1978); PA. STAT. ANN. tit. 63, § 9.11a (Purdon Supp. 1984-1985); P.R. LAWS ANN. tit. 20, § 790 (1974); TENN. CODE ANN. § 62-1-116 (1982).

68. ARIZ. REV. STAT. ANN. § 12-242(E) (Supp. 1984); Act of June 29, 1983, Pub. Act No. 83-395, 1984 Conn. Legis. Serv. 89 (West); FLA. STAT. ANN. § 90.6063(7) (West Supp. 1984); GA. CODE ANN. § 24-9-107(b) (Supp. 1984); LA. REV. STAT. ANN. § 46:2371 (West 1982); ME. REV. STAT. ANN. tit. 5, § 48(4) (Supp. 1984-1985); MICH. COMP. LAWS ANN. § 393.506(2) (West Supp. 1984-1985); MINN. STAT. ANN. § 595.02(8) (West Supp. 1984); MONT. CODE ANN. § 49-4-511 (1983); N.H. REV. STAT. ANN. § 521-A:11 (Supp. 1983); N.M. STAT. ANN. § 38-9-10 (Supp. 1984); N.C. GEN. STAT. § 813-5 (1981); N.D. CENT. CODE § 28-33-06 (Supp. 1983); UTAH CODE ANN. § 78-24a-10 (Supp. 1983); VA. CODE § 8.01-400.1 (1984); WIS. STAT. ANN. § 905.015 (West Supp. 1983).

69. ALA. CODE § 12-21-142 (1975); ALASKA STAT. § 09.25.150 (1983); ARIZ. REV. STAT. ANN. § 12-2237 (1982); ARK. STAT. ANN. § 43-917 (1977); CAL. EVID. CODE § 1070 (West 1984); DEL. CODE ANN. tit. 10, §§ 4320-4326 (1975); ILL. ANN. STAT. ch. 110, ¶ 8-901 (Smith-Hurd 1984-1985); IND. CODE ANN. § 34-3-5-1 (Burns 1973 & Supp. 1984); KY. REV.

In addition there are numerous other privileges, covering such diverse relationships as school personnel and students;[70] sexual assault victims and counselors;[71] state ombudsmen and clients;[72] pharmacists and clients;[73] nurses and patients;[74] audiologists or speech-pathologists and patients;[75] addiction counselors and clients;[76] marriage or family counselors and clients;[77] optometrists and patients,[78] dentists and patients,[79] and chiropractors and clients.[80] Two states, Idaho and Minnesota, have enacted legislation codifying the parent-child privilege,[81] and a number have evidentiary rules forbidding children under a

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STAT. § 421.100 (1972); LA. REV. STAT. ANN. § 45:1452 (West 1982); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1984); MICH. COMP. LAWS ANN. § 767.5a (West 1982); MINN. STAT. ANN. § 595.022 (West Supp. 1984); MONT. CODE ANN. §§ 26-1-901 to -902 (1983); NEV. REV. STAT. § 49.275 (1981); N.J. STAT. ANN. § 2A:84A-21 (West Supp. 1984-1985); N.M. R. EVID. 514; N.Y. CIV. RIGHTS LAW § 79-h(b) (McKinney Supp. 1984-1985); N.D. CENT. CODE § 31-01-06.2 (1976); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (Page 1981); OKLA. STAT. ANN. tit. 12, § 2506 (West 1980); OR. REV. STAT. § 44.520 (1984); 42 PA. CONS. STAT. ANN. § 5942 (Purdon 1982); R.I. GEN. LAWS § 9-19.1-2 (Supp. 1984); TENN. CODE ANN. § 24-1-208 (1980).

70. CONN. GEN. STAT. ANN. § 10-154a (West Supp. 1978-1983); IDAHO CODE § 9-203(6) (Supp. 1984); IND. CODE ANN. § 20-6.1-6-15 (Burns Supp. 1984); IOWA CODE ANN. § 622.10 (West Supp. 1984-1985); KY. REV. STAT. § 421.216 (Supp. 1984); MICH. COMP. LAWS ANN. § 600.2165 (West Supp. 1984); MONT. CODE ANN. §§ 26-1-808 to -809 (1983); NEV. REV. STAT. §§ 49.290, 49.291 (1981); N.C. GEN. STAT. § 8-53.4 (Supp. 1983); N.D. CENT. CODE § 31-01-06.1 (1976); OR. REV. STAT. § 40.245 (1984); 42 PA. CONS. STAT. ANN. § 5945 (Purdon 1982); S.D. CODIFIED LAWS ANN. §§ 19-13-21.1 to -21.2 (1979); VA. CODE § 8.01-400.2 (1984).

71. CAL. EVID. CODE §§ 1035-1036.2 (West 1984); Act of July 8, 1983, Pub. Act No. 83-429, 1984 Conn. Legis. Serv. 123 (West); FLA. STAT. ANN. § 90.5035 (West Supp. 1984); ILL. ANN. STAT. ch. 110, ¶ 8-802.1 (Smith-Hurd 1984); ME. REV. STAT. ANN. tit. 16, § 53-A (Supp. 1984-1985); MINN. STAT. ANN. § 595.02(10) (West Supp. 1984); N.J. STAT. ANN. § 2A:84A-22.12 (West Supp. 1984-1985); OHIO REV. CODE ANN. § 2921.22(E)(6) (Page 1982); 42 PA. CONS. STAT. ANN. § 5945.1 (Purdon 1982).

72. ALASKA STAT. § 24.55.260 (1978).

73. IND. CODE ANN. § 25-26-13-15 (Burns 1982).

74. COLO. REV. STAT. § 13-90-107(1)(d) (Supp. 1983); MINN. STAT. ANN. § 595.02(7) (West Supp. 1984); MONT. CODE ANN. § 26-1-809 (1983); N.Y. CIV. PRAC. LAW § 4504(9) (McKinney Supp. 1984-1985); OR. REV. STAT. § 40.240 (1984); VT. STAT. ANN. tit. 12, § 1612 (Supp. 1984).

75. MONT. CODE ANN. § 26-1-806 (1983); UTAH CODE ANN. § 58-41-16 (Supp. 1983).

76. N.D. CENT. CODE §§ 31-01-06.3 to -06.6 (Supp. 1983).

77. N.J. STAT. ANN. § 45:8B-29 (West 1978); N.C. GEN. STAT. § 8-53.5 (Supp. 1983); UTAH CODE ANN. § 58-39-10 (Supp. 1983).

78. WASH. REV. CODE § 18.53.200 (1978).

79. N.Y. CIV. PRAC. LAW § 4504(a) (McKinney Supp. 1984-1985); VT. STAT. ANN. tit. 12, § 1612 (Supp. 1984).

80. WIS. STAT. ANN. § 905.04 (West Supp. 1984-1985).

81. IDAHO CODE § 9-203(7) (Supp. 1984); MINN. STAT. ANN. § 595.02(9) (West Supp. 1984); *see also* PROPOSED CODE, *supra* note 3, § 501(h) (1982).

certain age to testify, except in child abuse cases, or unless the child is affirmatively found capable of testifying.[82]

There is little agreement among the states on the subject of which governmental branch should be allowed to develop new privileges. Fifteen state legislatures have expressly ruled out the possibility of judicial innovation in this area.[83] Almost as many, twelve, have explicitly sanctioned common law jurisdiction.[84] This leaves nearly half of the state legislatures silent on the subject.

There are good reasons for not allowing the courts to develop new *professional* privileges. The relationships that give rise to these privileges do not vary greatly within each category. For example, most lawyer-client communications are of the same basic type—an adult client communicating with his attorney. Therefore, when a new professional privilege is proposed, the only question is whether society's interest in encouraging that type of communication outweighs the state's interest in gathering evidence. The courts simply are not equipped to make these broad policy judgments. Our system of government vests in legislatures the duty to research facts and compile statistics on broad social matters, and thus legislatures should make these policy determinations.

However, the relationships the parent-child privilege seeks to protect differ significantly from case to case because of the individuality of each family situation. While a client probably expects confidence when conferring with his attorney, the same might not be true with every intrafamilial communication. Furthermore, a breach of confidence by a testifying family member

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82. COLO. REV. STAT. § 13-90-106(1)(b)(I) (Supp. 1984) (age 10); IND. CODE ANN. § 34-1-14-5(2) (Burns Supp. 1984) (age 10); KY. REV. STAT. § 421.210(2) (Supp. 1984) (age 14); LA. REV. STAT. ANN. § 15:469 (West 1981) (age 12); MICH. COMP. LAWS ANN. § 600.2163 (West 1968) (age 10); MINN. STAT. ANN. § 595.02(6) (West Supp. 1984) (age 10); MO. ANN. CODE § 491.060(2) (Vernon Supp. 1985) (age 10).

83. ARK. STAT. ANN. § 28-1001 (Rule 501) (1979); CAL. EVID. CODE § 911 (West 1984); FLA. STAT. ANN. § 90.501 (West 1979); HAWAII R. EVID. 501; ME. R. EVID. 501; MD. CTS. & JUD. PROC. § 9-101 (1984); MONT. R. EVID. 501; NEB. REV. STAT. § 27-501 (1979); NEV. REV. STAT. § 49.015 (1979); N.J. REV. STAT. § 2A:81-1 (1976); N.M. R. EVID. 501; N.D. R. EVID. 501; OKLA. STAT. ANN. tit. 12, § 2501 (West 1980); TEX. R. EVID. 501; WIS. STAT. ANN. § 905.01 (West 1975); *see also* PROPOSED CODE, *supra* note 3, § 501(b) (1982).

84. ALA. CODE § 10-4-391 (Supp. 1984); ALASKA STAT. § 09.25.210 (1983); ARIZ. R. EVID. 501; IOWA R. EVID. 501; MICH. R. EVID. 501; MINN. R. EVID. 501; N.C. R. EVID. 501; OHIO R. EVID. 501; OR. REV. STAT. § 40.295 (1984); UTAH R. EVID. 501; WASH. R. EVID. 501; WYO. R. EVID. 501; *see also* DEL. CODE ANN. tit. 16, § 908 (1983); N.H. REV. STAT. ANN. § 169.43 (1977) (common law privileges mentioned but not codified).

might have differing effects on the family relationship, depending on the individual situation. Some family relationships are so strong that required testimony would not weaken them. At the opposite extreme, some are so weak that a forced disclosure of confidences could hardly weaken them further.

Another important factor that differs greatly from one family situation to another is the age of those involved. An extremely important factor in a minor child's maturation may be a trusting relationship with his parents acquired through his knowledge that they would not reveal his confidence. This may be far less important to an adult child's emotional stability. It may also be less important when the situation is reversed and the child is asked to testify against a parent.

It is likely that legislative pronouncements on the parent-child privilege would not be flexible enough to cover the needs of individual family relationships and yet still fulfill the very important need of the court to gather all available evidence when a privilege is not required. Courts, on the other hand, are well equipped to handle individual situations and are able to judge when a privilege is necessary by balancing the various interests against each other. Broad legislation on the parent-child privilege would therefore be inappropriate. The decision on whether a particular parent-child communication merits protection by a privilege should be left to the individual courts to determine based on the facts of the specific case before them.

C. The Balancing Test

Most courts, whether they favor the parent-child privilege or not, recognize the need to balance the interests of the family against those of the state in coming to a conclusion. Many use Wigmore's approach to analyzing new privileges.[85] This test requires a court to find four fundamental conditions before it establishes any privilege against the disclosure of communications:

> (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.

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85. *See, e.g., In re* Greenberg, 11 Fed. Rules Evid. Serv. 579, 585 (Callaghan) (D. Conn. 1982); *see also* Three Juveniles v. Commonwealth, 390 Mass. 357, ___, 455 N.E.2d 1203, 1207 (1983) (uses a balancing process similar to Wigmore's without citing him).

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Only if these four conditions are present should a privilege be recognized.[86]

Wigmore's first three elements seem readily applicable to the parent-child situation. First, when confidentiality is not expected, a privilege seems unnecessary: the question generally arises only when a witness desires not to divulge a confidence made to him, or a party desires that a witness not divulge it.[87] Second, in order for an effective parent-child relationship to exist in most families, confidentiality is essential if it is expected by the parties. Third, the community without doubt believes that the parent-child relationship should be sedulously fostered.[88] Indeed, the Supreme Court has said 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. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[89]

The fourth requirement elicits the most controversy: the injury to the relationship by disclosure of the confidential communication must be greater than the benefit derived. Because the nature of the parent-child relationship varies from family to family, this is an extremely fact-oriented inquiry and must be decided on a case-by-case basis.

Few would deny that the family in present-day society needs bolstering. Confidence between parents and their children enhances preservation of the family unit, and the law should not make parents and children apprehensive about exchanging in-

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86. 8 WIGMORE, EVIDENCE § 2285, at 527 (McNaughton rev. 1961), *cited with approval in* Doe v. United States, 711 F.2d 1187, 1193 (2d Cir. 1983); ACLU v. Finch, 638 F.2d 1336, 1344 (5th Cir. 1981); Caesar v. Moutanos, 542 F.2d 1064, 1068 n.13 (9th Cir. 1976); United States v. Steelhammer, 539 F.2d 373, 377 n.* (4th Cir. 1976); Radiant Burner, Inc. v. American Gas Ass'n, 320 F.2d 314, 318-19 (7th Cir. 1963).

87. *But see In re* Agosto, 553 F. Supp. 1298, 1325 (D. Nev. 1983) (son may refuse even to appear as a witness in a proceeding against his father).

88. This is certainly so where the child is a minor. This relationship might not be considered as important to the social structure when it involves adult children and their parents.

89. Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977). For a good application of this test, see *In re* Greenberg, 11 Fed. R. Evid. Serv. (Callaghan) 579, 585-86 (D. Conn. 1982).

formation.[90] Confidence, however, enhances the preservation of many socially useful "units," such as friendships and business associations, most of which by no means fall under a testimonial privilege.

The parent-child privilege is frequently compared to the husband-wife privilege, since both occur within the family context.[91] The traditional rationales for the husband-wife privilege are that it is necessary to preserve family harmony and prevent dissension, and that the state, as an unseen third party to the marriage covenant, has an interest in strengthening that bond. No doubt a parent-child privilege would "preserve family harmony and prevent dissension," but the state may not have the same interest in strengthening intrafamilial bonds that it does in strengthening interspousal bonds. Furthermore, in many situations, intrafamilial bonds may not need strengthening as much as interspousal ones.

Another argument sometimes made in favor of the parent-child interest, as opposed to the state's fact-finding interest, is that if forced to testify, the parent or child might perjure himself rather than betray a confidence.[92] The state, it is said, is here put in the position of punishing selflessness and loyalty inculcated in the family member by the state itself. "A [family member] is delivered into a psychological double-bind in which he is scorned and branded as disloyal if he does testify and jailed if he does not."[93] Such an argument could, however, be made in relation to testimony by a person against a friend or business associate as well, yet there is no likelihood that such confidences will be privileged. Moreover, there is always a danger that a witness might perjure himself when called to testify against his wishes, but this has never been thought to warrant a privilege.

Still, the "violence done to the child, the damage to family unity, and the consequent injury to society that may result from the State's coercing an unemancipated minor to testify against a parent,"[94] or a parent to testify against a child, may be too high

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90. United States v. Penn, 647 F.2d 876, 887 (9th Cir. 1980) (Goodwin, J., dissenting).

91. *See, e.g., In re* Agosto, 553 F. Supp. 1298, 1304 (D. Nev. 1983).

92. *E.g., id.* at 1310; *In re* A & M, 61 A.D.2d 426, 433, 403 N.Y.S.2d 375, 380 (1978).

93. *In re* Agosto, 553 F. Supp. 1298, 1326 (D. Nev. 1983).

94. Three Juveniles v. Commonwealth, 390 Mass. 357, ___, 455 N.E.2d 1203, 1208 (1983) (O'Connor, J., dissenting).

a price to pay for the enforcement of our criminal laws. It is probably true, as pointed out in *In re A & M*,[95] that young people must perceive in their parents a sense of fairness and decency in order to develop into responsible, mature adults. Yet to some, divulgence of a confidence at trial would have no harmful psychological effect at all. Indeed, the opposite might be true: it is fair and decent to report the truth in a judicial, setting and frequently no coercion would be involved at all in requesting a willing family member to testify.

When viewed in the abstract, then, the family member's interest in not divulging a confidence and the state's interest in receiving evidence seem equally balanced. For this reason no general decision can be made about the appropriateness of a parent-child privilege applicable in all cases. Rather, the courts should be permitted to decide in each instance whether a parent-child privilege is necessary based on the facts of the case before it.

IV. Conclusion

The movement for recognition of a parent-child privilege has come mainly in the courts, not in legislative bodies. There is good reason for this. The legislature is a deliberative body empowered to conduct hearings, examine evidence, and debate propositions and is probably the best forum for creating new privileges affecting professional relationships when a privilege is necessary in nearly all situations to assure full communication. However, because of the nature of the parent-child relationship, an all-encompassing parent-child privilege is not called for. Indeed, the majority of courts that have considered recognition of the privilege have held it unnecessary given the facts before them. A privilege may nevertheless be necessary in some situations, particularly when the familial right to privacy requires one, or the need to preserve the family relationship in a given case outweighs the need to receive evidence in that case. The courts themselves are best able to judge the merits of each situation and are in a hetter position than the legislature to grant a privilege when necessary.

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95. 61 A.D.2d at 432-33, 403 N.Y.S.2d at 380.