The Child-Parent Testimonial Privilege, the Courts and a Statutory Alternative

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1. INTRODUCTION

The Appellate Division of the New York Supreme Court has held that the right to privacy protects "confidential communications" from a child to his parents. In so holding, the court expressed concern over the policy implications of allowing the state to "compel parents to disclose information given to them in context of a familial confidential setting." Although the court based its holding on constitutional grounds, it effectively adopted a testimonial privilege unique in this country's jurisprudence. Whether this so-called "parent-child privilege" will gain general acceptance in other jurisdictions or is merely an aberration found primarily in the New York courts is not yet clear.

This article examines the historical bases and the relevant policy arguments which underlie testimonial privileges in general, and those which relate to the parent-child privilege in particular. Special attention is devoted to recent case law on the subject. Lastly, the author proposes a model statute which would extend a limited child-parent testimonial privilege to a narrowly defined class of claimants.

II. TESTIMONIAL PRIVILEGES IN GENERAL

One commentator has recently classified privileges into "three distinct types," including those designed to protect individuals against unlawful government intrusions (as in the case of compelled self-incrimination) and those which "protect the maintenance of our Government" (as provided by the protection from unlawful disclosure which is afforded government secrets). This article, however, is concerned with the third "type" of privilege; that is, 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 ... for the security and sanctity of the relationship itself.'"

In recent decades, testimonial privileges of this latter type have proliferated in number far beyond those found at common law. The earliest common law privileges addressed the values and concerns of society and law makers in a somewhat imprecise manner. Dean Wigmore observed, for example, that a "gentlemen's honor" and "one's pledge of privacy" were reason enough at one time to claim privilege from giving testimony. Thus, while the goal of these privileges may have focused on the interest of the communicating parties in maintaining the integrity of the communication to the extent that it was private, the privilege was so ill-defined as to be unworkable.

The English courts soon came to recognize that privileges against compelled testimony presented obstacles to the essential truth gathering function of the court. As a result, the firm rule was established that "[N]o pledge of privacy nor oath of secrecy can avail against a demand for the truth in a court of justice." It was reasoned that society has a "right" to evidence which enhances the quest for truth, and that the right to that truth is vindicated by the imposition of a "duty" upon each member of society to tell what he knows. Consequently, the maxim that "[T]he public ... has a right to every man's evidence" prevailed.

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law, modern testimonial privileges have devolved more from societal concerns than from any strictly legal theory. In contrast to the common law, however, it is no longer axiomatic that "[w]hen the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private." 16

Modern society requires effective interaction among its members if it is to function successfully. If one accepts that effective interaction between communicants is enhanced by openness and the absence of fear of unwanted disclosure, 11 certain relationships are indeed "rightly private." Because society benefits from certain confidential (and "rightly private") interaction, testimonial privileges are employed to foster particular relationships on the theory that the benefits to society outweigh the cost exacted by their operation.

Current testimonial privileges act to prevent disclosure of confidential communications between individuals within the context of the protected relationship. Where a valid basis for a privilege is presented, it falls to the opponent of the privilege to demonstrate that the privilege does not apply. 18 But, because they hamper the "truth-seeking function of legal proceedings," 19 testimonial privileges are construed strictly by the courts when their operation is asserted. 20

It is clearly established that only "the person vested with the outside interest or relationship fostered by the particular privilege" may claim its benefits to the extent that the privilege acts to preserve confidences. 21 In the case of "professional privileges" (i.e., those privileges other than the husband-wife privilege) 22, the privilege may be asserted only by its "owner." 23 Circumstances which tend to indicate that a legitimate expectation of confidentiality is held by a communicant otherwise entitled to claim a privilege, thus entitles him to assert the claim. 24

With the exceptions of the husband-wife 25 and the attorney-client 26 privileges which appeared at common law, 27 present testimonial privileges generally are statutory in origin; and, excepting the husband-wife privilege, all are designed to encompass the personal associations entered into by professionals in the conduct of an avocation. Although some states recognize privileges not recognized by others, many states have extended recognition to the physician-patient, 28 cleric-penitent, 19 psychotherapist-patient, 30 accountant-client, 31 social worker-client, 32 and newsperson 33 privileges.

The generally acknowledged test for validation of testimonial privileges consists of four criteria proposed by Dean Wigmore. 34 He argued that a communication is entitled to recognition and affirmative sanction only when the following are evident:

1) The communications must originate in a confidence that they will not be disclosed.

2) The 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 communications must be greater than the benefit thereby gained for the correct disposal litigation. 35

Wigmore himself pointed out that two of the generally recognized privileges did not meet all four criteria. He asserted that recognition of the doctor-patient privilege, in particular, rests on the fallacious assumption that the second and fourth conditions are "generally present." 36

Of greater difficulty to Wigmore was the husband-wife privilege. The principal argument against that privilege is that the fourth condition is not met insofar as "the occasional compulsory disclosure in court of even the most intimate marital communications [will] not in fact affect to any perceptible degree the extent to which spouses share confidences." 37 Nevertheless, Wigmore asserted that "since the other three conditions are so fully satisfied and since the compulsory disclosure of marital secrets at least might cast a cloud upon an essential aspect of the institution of marriage. the present privilege should be recognized." 38

If shared confidences are indeed among the "essential aspect[s]" of the marital relationship, and if the relationship between parents and their children flows directly from and adheres to the marital relationship, it is proper to inquire whether the same "aspects" appear in the parent-child relationship itself. If it is determined that they do appear, there can be little doubt that the underlying rationale for a testimonial privilege involving confidential communications between children and their parents is established, at least to the extent that such rationale is in conformity with Wigmore's "essential aspect" rationale supra. 39

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III. THE "PARENT-CHILD PRIVILEGE" AND THE COURTS
A. The New York Cases
As indicated at the beginning of this article, the Appellate Division of the Supreme Court of New York has had occasion to consider the question of the so-called "parent-child privilege." In Application of A & M the court reached its landmark decision on the basis of the constitutional right to privacy and on public policy considerations involving the desirability of curtailing the intrusive power of the state. In a stirring colloquy the court declared: If we accept the proposition that the fostering of a confidential parent-child relationship is necessary to the child's development of a positive system of values, and results in an ultimate good to society as a whole, there can be no doubt what the effect on that relationship would be if the State could compel parents to disclose information given to them in the context of that confidential setting. Surely the thought of the State forcing a mother and father to reveal their child's alleged misdeeds is shocking to our sense of decency, fairness and propriety.

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In A & M a sixteen-year-old youth was believed by prosecutors to have made voluntary admissions to his parents within the privacy of their home regarding an arson fire at a nearby college campus. Acting on reports by witnesses that the boy was seen in the area of the fire, a local district attorney sought to subpoena the boy's parents to compel their testimony before a grand jury regarding the alleged admissions. The subpoena was quashed on motion by the parents, apparently on two grounds: (1) that the marital privilege encompassed a parent-child privilege; and, (2) that a constitutional right of privacy extended to confidential intrafamily communications. On appeal from the order to quash the subpoena, the New York Appellate Division, Fourth Department, reversed the Trial Term on other grounds but held, inter alia, that the rights of privacy protected the confidential communications made by a minor child to his parents "under some circumstance."

In A & M the court was not confronted with the issue of "ownership" of the privilege asserted. In remanding the case the court confined its directions to the factual context involved, applying a balancing test between the legitimate [state] interest in the process of fact-finding necessary to discover, try and punish criminal behavior" and the legitimate expectation of privacy vested in the relationship is necessary to the child's development of a positive system of values, and results in an ultimate good to society as a whole, there can be no doubt what the effect on that relationship would be if the State could compel parents to disclose information given to them in the context of that confidential setting. Surely the thought of the State forcing a mother and father to reveal their child's alleged misdeeds 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 the specter of a regime which encourages betrayal of one's offspring. In A & M a sixteen-year-old youth was believed by prosecutors to have made voluntary admissions to his parents within the privacy of their home regarding an arson fire at a nearby college campus. Acting on reports by witnesses that the boy was seen in the area of the fire, a local district attorney sought to subpoena the boy's parents to compel their testimony before a grand jury regarding the alleged admissions. The subpoena was quashed on motion by the parents, apparently on two grounds: (1) that the marital privilege encompassed a parent-child privilege; and, (2) that a constitutional right of privacy extended to confidential intrafamily communications. On appeal from the order to quash the subpoena, the New York Appellate Division, Fourth Department, reversed the Trial Term on other grounds but held, inter alia, that the rights of privacy protected the confidential communications made by a minor child to his parents "under some circumstance."

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found that "[a 'parent-child' privilege] can and does exist, grounded in law, logic, morality and ethics," and that the conversation involved a "confidential communication" between the defendant and his father. The court then ruled that the State was precluded "from compelling disclosure from the father on such matters." The Fitzgerald court believed it was confronted with "a classic example for the application of a parent-child privilege" and held that the privilege applied regardless of the age of the child. The court noted the three criteria set forth by the A & M court, but rejected the limitations sought by the State as to age, declaring "[t]he mutual trust and understanding ... between the parent and the child cannot be made subject to the intrusion of the State merely because of a proposed artificial barrier of age."

In rejecting age as a factor for application of a parent-child privilege, the Fitzgerald court analogized the privilege to the husband-wife privilege. The court noted that the husband-wife privilege is mutual in that "[b]oth parties ... must consent to divulgence of confidential communications between them." The court reasoned that the interests which underlie the marital privilege also adhere to the entire familial setting insofar as "the family relationship forms a common bond wherein the interests of the parties are similar ... ." Thus, the court held, inter alia, where the confidential communications occur between a parent and a child within the context of the familial setting, and are "intended by both parties for the purpose of obtaining support, advice and guidance," the communications themselves are privileged and their disclosure may not be compelled when either party asserts the privilege.

The holdings of the A & M and Fitzgerald courts are similar as they relate to the viability of a parent-child testimonial privilege; however, as applied, the factual context of the two cases and the manner in which the courts resolved the issues before them renders the decisions wholly incompatible. A & M involved an unemancipated minor child who apparently was not under indictment, but was merely a possible target of a grand jury investigation into a crime. In Fitzgerald, the communicant was an adult, and was a defendant in a criminal action. Further, in A & M the parents of the child sought to invoke the privilege for the purpose of avoiding altogether a subpoena to appear before a grand jury. Fitzgerald involved a motion to suppress testimony voluntarily given before a grand jury by the parent of an adult defendant. Although it was not a significant issue in either of the two cases, the communicant in Fitzgerald was a co-petitioner with his father in asserting the privilege.

Finally, the divergence of the opinions in these two cases illustrates a principal rationale for the rejection by the courts of invitations to create new testimonial privileges. Arguably, the decision in Fitzgerald resulted from a combination of inadequate analysis on the part of the A & M court and erroneous reliance on the arguments of trial counsel. In light of the foregoing, it is clear that the "state of the law" in New York is at best uncertain regarding the question of whether a de facto parent-child privilege exists in that State, and under what circumstances it applies. It is also arguable that Fitzgerald is, at best, dubious authority, particularly when considered in isolation. Thus, it appears that A & M must necessarily be confined to its factual setting while the question awaits further clarification by the New York courts.

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against the Government, the right to be let alone — [is] the most comprehensive of rights and the most valued by civilized men."117 The court thus concluded that recent Supreme Court treatment of privacy issues associated with the family setting "demonstrate[s] that the Supreme Court has determined that there is a 'private realm of family life which the State cannot enter.'"118

The court concluded that the parent-child testimonial privilege satisfied the first three of Wigmore's conditions109 supra for recognition of a privilege, but that resolution of the fourth condition, "[whether] [t]he injury that would inure to the relation by the disclosure of the communication [would] be greater than the benefit thereby gained for the correct disposal of litigation,"119 presented a more difficult problem. In the opinion of the court the difficulty arose 'because this component requires a balancing between the benefit to justice... as opposed to the injury to the parent-child relationship.'111

The court expressed the view that the forced disclosure of confidential communications between a parent and a child would lead to a "breakdown of the trust" between them.112 The court believed this "breakdown" would cause "the child [to] view the entire legal system [with suspicion] ... and that [t]he parents themselves might lose respect for the legal system, if forced to testify against the child."113

According to the court, the legal system itself would suffer a detrimental effect if parents were compelled to testify against their children. Specifically, the court expressed the view that such compulsion would lead to perjured testimony by witnesses who would attempt to protect one another.114 While the court acknowledged that the witness may, of course, elect to tell the truth, it opined that it was highly likely that circumstances would effectively leave witnesses only the choice between committing perjury or subjecting themselves to possible contempt proceedings for refusing to testify at all.115 The court concluded that the expected benefit to society brought about by the recognition of the parent-child testimonial privilege outweighed the benefit to justice because, inter alia, "the expected benefit to justice ... is perhaps illusory."116

Finally, the court noted that it was "free to extend the present law of privileges to deal with those situations encountered in which constitutional protection is deemed essential."117 The court premised the foregoing view not on the Constitution per se, but on "[t]he expansive posture taken by Congress"118 in drafting Federal Rule of Evidence 501.119 The court observed that the history of Rule 501 clearly indicated that Congress intended for the courts to remain free to recognize new testimonial privileges. Because Congress had rejected an Advisory Committee proposal which narrowed some existing privileges while completely abrogating others, the court concluded that "Rule 501 recognized and arguably even advocated the evolution of new testimonial privileges as they were deemed necessary by courts in the future."120

The Agosto court displayed a courageous attitude in its treatment of the issues with which it was confronted. In acknowledging the reluctance of other federal courts to adopt the privilege and the refusal of those courts to follow the lead of the New York courts, the Agosto court declared: "[t]his court will assume no such timid posture ... [n]or will [it] ignore well-reasoned legal arguments simply because they occurred within the framework of state court opinions."121 Thus, the court followed the reasoning of the New York cases in general, and of the Fitzgerald court in particular, concluding that the confidential communications between parents and their children are entitled to privilege without restrictions as to the age122 of the communicant or distinctions based on the source of the communication.123

While its enthusiasm for addressing the question of the parent-child privilege may be commendable, the Agosto court exceeded the bounds of proper judicial review by deciding questions not in issue. It is a fundamental principle of judicial review that courts shall not reach constitutional questions unless presented squarely with justiciable issues.124 Assuming as correct the court's observation that it was "free to extend the present law of privileges"125 pursuant to Federal Rule of Evidence 501, the court could have resolved the issue of privilege on the basis of non-constitutional authorities.126 Nor need it have reached beyond the facts of the case to decide that age could not be a factor in defining the privilege.

The court's analysis of the viability of the parent-child privilege when it is tested against the Wigmore conditions is generally sound. In that portion of its opinion dealing with the Wigmore analysis, the court relied almost exclusively on a law review article...
written by Charles Coburn on the subject of the parent-child testimonial privilege. However, no where in his article did Coburn suggest the desirability of extending the privilege to include the "right" of parents to use their children as a shield against the rule of law.

In traversing well beyond the bounds of proper review, the Agosto court inadvertently undermined the strength of its own authority. In its well-intentioned desire to be at the vanguard of "a new frontier in the area of testimonial privileges," the court discarded the basic tenets of judicial restraint, and thereby sacrificed at least a degree of its power to persuade.

C. Other Courts

If any of the foregoing court decisions are to gain support it will most likely be the A & M decision because of its relative restraint. In this regard, the comment of the Supreme Judicial Court of Massachusetts is telling. In declining to adopt the parent-child testimonial privilege, the court rejected Agosto but declared that it was the court's "extreme position — an absolute privilege not to testify at all — that [it] reject[ed]."

Other state and federal courts have declined to follow the lead urged by the A & M, Fitzgerald and Agosto courts. While several have implied a degree of sympathy regarding the concept of a parent-child privilege, most have appeared to be either neutral or, in the case of the Indiana Court of Appeals, completely hostile to the proposal.

In United States v. Jones, The United States Court of Appeals for the Fourth Circuit rejected the privilege when it was claimed by the twenty-nine-year-old emancipated son of a grand jury "target." The court distinguished A & M on the grounds that Jones involved an adult child who was emancipated, and that the information sought related to business activities, not intra-familial communications. However, the court indicated that changed factual circumstances might yield a different result in the future. The court concluded with the reservation that "in particular, we do not endeavor to decide to what extent the age of the child and whether or not emancipation has occurred may or may not affect the decision as to whether any familial privilege exists."

In In re Grand Jury Proceedings, the Fifth Circuit Court of Appeals declined to adopt the privilege. There, a grand jury subpoena had been issued to the child of adults under investigation in connection with a homicide. The court distinguished the New York cases, noting that those involved confidential communications from the child to the parent and that they "were founded for the most part on the desire to avoid discouraging a child from confiding in his parents." Finally, the court implied that even had the factual settings been analogous, the "persuasiveness" of the New York cases was questionable.

The Ninth Circuit of Appeals, the Illinois Supreme Court and the California Court of Appeals have declined to recognize the parent-child testimonial privilege, at least in part on the ground that the appropriate vehicle for extending recognition to new privileges devolves to the legislatures.

Finally, in Hunter v. State the Indiana Court of Appeals flatly rejected the claim of two adults convicted of child abuse of their five-year-old adopted child. Citing Cissna v. State, decided by the same court the previous year, the court declared: "[In Cissna] [t]his court soundly denounced the theory of a 'parent-child' privilege... and we feel correctly so."

Although it is arguable that the court's strong language was precipitated by the outrageous nature of the case before it, stronger language in rejecting the claim of a parent-child privilege will not be found.

D. Summary

Despite the results which obtained in A & M, Fitzgerald and Agosto, general acceptance by the courts of a parent-child testimonial privilege seems unlikely. The reluctance of the courts to create new testimonial privileges is based on sound policy rationale including a longstanding policy of deferring to the legislative process. The diverse results of the three principal cases clearly illustrate the hazards inherent in judicial law-making of this type. Yet, despite the policy of restraint, the opinions cited in Section C supra indicate that a majority of the courts which have considered the question are generally sympathetic to the proposition of a limited privilege.

IV. THE LIMITED CHILD-PARENT TESTIMONIAL PRIVILEGE

The decisions cited supra which have recognized a parent-child privilege in some form are clearly the exception and not the rule on the question of whether confidential communications between children and their parents may be withheld from the fact finding process at either the trial, grand jury, or the discovery levels of the judicial process. It is also clear that, among the courts extending the "privilege," there has been an absence of a consensus as to whether it applies as a familial privilege generally, or whether its application should be limited to those communications from a child to his or her parents. Finally, there is an absence of agreement on the question of whether the issues presented involve a privilege per se, or whether they rise to the level of a constitutional right of privacy.

Despite these apparent inconsistencies, a limited child-parent testimonial privilege is highly desirable and is legally and morally supportable. Because of the inconsistencies, a statutorily mandated privilege is necessary for the protection of society's most precious resource: its children. The model statute proposed infra would create a limited child-parent privilege which would resolve the concerns of both the courts and commentators.

A testimonial privilege vesting in the child as to confidential communications made by the child to his or her parents in the reasonable belief that those communications will be confidential is an appropriate object of legislative attention. In establishing the privilege, it must be recognized that it derives from a recognition of a child's need to feel free to seek guidance, support and counsel from his or her parents without state-imposed restraint. It may be assumed that those times when such a need is felt most acutely by the child are precisely the times when children must feel unrestrained to follow their inclination to confide in those persons who generally are the most likely objects of their trust and affection.

Conversely, while a parent may feel a similar desire to confide in his or her child, the very fact of adulthood must be presumed to impress conscious restraint and discriminating judgment upon the parent. An adult, by virtue of age and more complete knowledge and experience, is presumed to have the ability to more completely assess the consequences of disclosing confidential information to a child. No such presumption may fairly be imposed on a child. It is not the function or the duty of society in general, nor of the judicial system in particular, to shield adults from their own indiscretions. While it is proper to question whether a child has knowingly and intelligently waived a claim to confidentiality by disclosing...
potentially incriminating facts to his or her parent(s), the same inquiry is inappropriate when a competent adult discloses similar information to his or her child. Put simply: the parent knows or ought to know better. The critical inquiry is not whether to create a privilege which encourages parents to confide in their children; it is whether to encourage, unfettered, the natural and desirable inclination of children to confide in their parents. In this regard, it is a proper function of society in general, and of the judicial system in particular, to refrain from interference with and the exploitation of the most basic and natural impulses of those in our society who are most vulnerable. Accordingly, the model statute proposed infra expressly rejects the broad bilateral privilege extended in both Father and Agosto.

One commentator has opined that "the existence of a parent-child privilege would have no significant impact on the desirable elements of the relationship."158 Such a bald assertion cannot reasonably stand on its own bottom; however, in light of the foregoing discussion, and despite the objections of the Fitzgerald court, age "barriers"159 are appropriate to the application of a child-parent testimonial privilege. A father need not be his adult, emancipated child's "confessor" in order to "fulfill[] and satisfacto[rily]"160 maintain the parent-child bond. Numerous confidential relationships are available161 to the competent, adult and emancipated child.162 The availability of these relationships provides the would-be confidential communicant with a myriad of alternatives to disclosure of potentially incriminating evidence to a parent.

Because other alternatives are available to a competent, emancipated, adult child, confidentiality is not "essential" to the "maintenance of the relation[ship]"163 between a parent and such a child. Accordingly, the statute proposed infra limits the application of the privilege to children who are not yet emancipated and who are under the age of twenty-two.164 The sole exception to the proposed limitation would permit the privilege to extend to an adult child who is found by a court to be mentally retarded such that the mental and emotional age of the child would otherwise qualify the child to claim the privilege.165

Under the statute the applicability of the privilege is presumed,166 except in circumstances where the child communicates167 with his parents in the presence of third parties who are not also family members.168 Although the presumption arises that the communication was not intended to be confidential in the later case,169 both presumptions are rebuttable by the party against whom the presumption arises. The latter presumption is rebuttable by a preponderance of the evidence tending to prove that (1) the child intended the communication to be confidential (as in the case of a conversation overheard by the third party),170 or (2) under the circumstances, the child had a reasonable expectation that the communication was confidential notwithstanding the presence of the third party (as might occur if a child disclosed confidential information to a parent in the presence of a third party who is so familiar or well known to the child that the child would have no apprehension as to the extent of the third party's loyalty).171

The statute expressly forecloses its application in certain circumstances, including cases of child abuse, incest and abandonment.172 Since it is intended to be applied for the exclusive protection and benefit of children, the shield they are necessarily provided under the statute must be stripped away in those circumstances where the privilege would otherwise stand as a shield for the benefit of an offending parent. In these circumstances, the courts are well equipped to apply every available resource for the benefit of a child who is compelled to give testimony under these exceptions to the privilege.

Provisions are also included which will prevent the child from asserting the privilege in those circumstances where a parent may seek the court's help in controlling the child's behavior.173 Such eventualities were foreseen by the A & M court174 which recognized that a privilege which purports to be for the benefit of children would fail in its essential purpose were it to do otherwise.

Finally, the privilege would be unavailable to a child who seeks to invoke its operation (1) in proceeding "to establish the mental competency of [the] proceeding "in which the child and his parent are opposing parties;"176 (3) where parent are opposing parties;176 (3) where the child is "charged with a crime against his parent or other legal child of the parent;"177 or, (4) when it is found that the otherwise confidential communication was made in "furtherance of a crime or fraud."178

The model statute proposed infra is designed to anticipate those circumstances in which the privilege is likely to arise. The principal consideration in the operation of the privilege is the reasonable subjective perceptions of the child. Accordingly, those perceptions should be judged according to the perceptions which are reasonable for a child of the same age, intelligence and experience acting under similar circumstances.

V. CONCLUSION

The enactment of a statutory child-parent testimonial privilege would eliminate the confusion evident in present case law. Most importantly, a limited child-parent testimonial privilege would vigorously promote "[a] relation ... which in the opinion of the community ought to be sedulously fostered."180

In view of the increased attention attracted by the issue of the child-parent privilege, particularly as demonstrated by recent case law, and considering the inadequate response of the courts to the questions presented, the author urges legislative enactment of a statute extending a limited child-parent testimonial privilege. The model statute proposed infra provides the framework for such legislation. 

Notes

2 Id., 405 N.Y.S.2d at 380.
3 The court stated that "[a]lthough there are persuasive arguments to apply a privilege in these circumstances, we believe that the creation of a privilege devolves exclusively on the legislature." Id. at 381 (footnotes omitted). Despite this statement, however, it is clear that the court created a privilege based ostensibly on constitutional considerations. See id. at 378 (affirming the trial court finding that "the Constitution confers a right of family privacy.")
4 See, e.g., infra notes 130-146 and accompanying text for a partial survey of cases which have considered the privilege.
5 Less than two years later, another New York court substantially expanded the privilege to include not only communications made by a minor child, but also those made by children of any age. See People v. Fitzgerald, 101 Misc.2d 712, 322 N.Y.S.2d 309 (Westchester County Ct. 1979) discussed infra at notes 67-91 and accompanying text.
6 See infra notes 130-146 and accompanying text.
Because the privilege advanced infra would limit its application to confidential disclosures of a child to his or her parent(s), the order in which the parties to the proposed privilege appear is intentionally reversed.

8 Coburn, Child-Parent Communications: Spare the Privilege and Spoil the Child, 74 Dick. L. Rev. 599 (1969) [hereinafter cited as Coburn].

9 Id. at 601 (quoting Smith, Reintegrating Our Concepts of Privileged Communicants, 16 Soc. Serv. Rev. 191, 193 (1942)) (emphasis original).

10 See infra notes 25-33 and accompanying text.

11 § 76.2 at 185 (n.e.s.person's source). C/. Wigmore supra note 21, § 727 at 171.

12 Id. at 2192 at 70.

13 Id. § 2340 at 670 (relative to waiver of the marital privilege the author declared that "[t]he privilege is intended to secure freedom from apprehension in the mind of the one desiring to communicate...."

14 Id. § 2336 at 651-52 (again discussing the marital privilege, the author stated: "[i]t is proper enough to maintain... that all marital communications should be presumed confidential until the contrary appears; but if the contrary appears, there is no reason for recognizing the privilege.


16 See In re Special Investigation No. 202 supra note 20, 53 Md. App. 96, 452 A.2d 458 (1982) (declaring that "[i]t is an elementary rule... that statutes in derogation of the common law are to be strictly construed.") at 103, 452 A.2d at 462. See also United States v. Jones, 685 F.2d 817 (4th Cir. 1982) (quoting Trammel v. United States, 445 U.S. 50, 57 (1980): "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that "the public has a right to every man's evidence").

17 See C. McCormack, Evidence § 73.1 at 173 (Cleary ed. 1984) [hereinafter cited as McCormack].

18 See infra note 25.

19 See, e.g., McCormack note 21 § 73.1.n. at 175. Cf. infra note 35 (newsperson privilege is confidential only by noncommunicating newsperson and not the newsperson's "confidential" source).


22 E.g., id. § 9-108 ("[a] person may not be compelled to disclose any confidential communication of the attorney-client privilege"). See State v. Pratt, 284 Md. 516, 520, 398 A.2d 421, 423-44 (1979) (noting that the privilege extends beyond the attorney to include agents employed by the attorney in furtherance of the confidenital relationship, such as secretaries and stenographers, and may include experts with whom the client speaks in furtherance of the relationship.

23 Wigmore supra note 11 § 2286 at 528.

24 E.g., N.Y. Civ. Prac. Law § 4504(a) (McKinney Supp. 1979) (extending the privilege to "person[s] authorized to practice... registered professional nursing, licensed practical nursing or dentistry..."). Contra Maryland (which has no statute and is thus in accord with the common law which did not recognize the privilege); for a discussion of the common law, see Franklin v. State, 8 Md. App. 134, 258 A.2d 767 (1970), cert. denied, 257 Md. 733 (1970).


26 E.g., id. § 9-109 (1974) (preventing the psychologist or psychiatrist from disclosing communications made by the patient for the purpose of diagnosis or treatment of the patient's mental or emotional disorder). No privilege applies where, e.g., the patient is the respondent in a commitment proceeding. Id. Compare N.Y. Civ. Prac. Law § 4057 (McKinney Supp. 1979) (extending the privilege to psychoologists only).

27 E.g., Md. Cs. & Jud. Proc. Code Ann. § 9-110 (1984) (providing in part: [A] certified public accountant, public accountant, or any person employed by him may not disclose the contents of any communications made by or person employing him... nor may he disclose any information derived from the person or material in rendering professional service unless the person employing him or his personal representative is the successor in interest permits it expressly.) Id. § 9-110(a). See In re Special Investigation No. 202 supra note 20 at 103-04, 452 A.2d at 462 (holding that the accountant-client privilege is not abrogated when, compared to other privileges, "it is obvious that the [others are absolute privileges while the accountant/client privilege is made subject to... the exceptions stated [in the code]} (emphasis added). The exception noted by the court provides that [the privilege does not affect the criminal laws of the State or the bankruptcy laws]." Md. Cs. & Jud. Proc. Code Ann. § 9-110(b).

28 The privilege protects ["the expectation of privacy of the client in matters involving contracts, domestic disputes, and other civil and equity controversies, but [does not create an expectation of privacy involving possible violations of the criminal or bankruptcy laws of the State."] In re Special Investigation No. 202 at 103, 452 A.2d at 462.

29 E.g., Md. Cs. & Jud. Proc. Code Ann. § 9-124 (1984) (extending the privilege to "licensed, certified social worker[s]"). The privilege applies to ["communications made while the client was receiving counseling;" Id. § 9-121(b). Compare id. §§ 121(d) and 120(4) (psychotherapist-patient privilege) (proscribing the operation of the privilege in similar circumstances).

30 E.g., id. § 9-112 (1984) (creating a privilege which applies to the newsperson and not to the innermost, and which protects only the identity of the confidential source but not the information derived from the source). Cf. Wigmore supra note 11, § 2286 at 529 (citing Garland v. Torre, 292 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958)): "[c]ompulsory disclosure may entail an abridgment of press freedom by imposing some limitation upon the availability of potentially embarrassing or incriminating press... is not absolute... [i]t must give place under the Constitution to a paramount public interest in the fair administration of justice") (emphasis added).

31 See McCormick supra note 21, § 727 at 171.

32 Wigmore supra note 11, § 2285 at 527 (emphasis original).

33 Id. at 528. The court further maintained that "the mere fact that a communication was made in express confidence of a confidential relationship, or in the implied confidence of a confidential relation, does not create a privilege."

34 Id. § 2352 at 612-43. Cf. Note, Questioning the Recognition of a Parent-Child Testimonial Privilege, 45 Alb. L. Rev. 142 (1980) (asserting that the existence of a parent-child testimonial privilege would have no significant "impact" on the "desirable" elements of the parent-child relationship.) Id. at 153.

35 Wigmore supra note 11, § 2332 at 642-43.

36 E.g., in the conclusion of the author that confidentiality of communications is indeed an essential aspect of the child-parent relationship. See discussion infra at notes 153-155 and accompanying text. Cf. infra notes 156-157 and accompanying text (distinguishing privileges which protect communications from a parent to a child.

37 See text accompanying notes 1-4.


39 403 N.Y.S.2d at 378-79 (declaring that the case before it was analogous to those cases "which acknowledge the [child]s right to control [of family life which the state cannot enter]") (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

40 Id. at 380.

41 Id. at 377.

42 Id.

43 Id. The court rejected the claim of extension to the marital privilege on the grounds that (1) the privilege is "carefully restricted and [is] subjected to close scrutiny," (2) "no privilege attaches [absent] confidentiality at the time of disclosure," (3) "the presence of the minor child destroys any aura of confidentiality.

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The court indicated strongly that a child's father to an attorney-client privilege. As to the latter claim the court found that the fact that the boy's father was an attorney was "coincident under the circumstances" and was therefore not a proper basis upon which a claim of confidentiality could arise. See infra note 3 and accompanying text.

In a footnote the court stated: "Our discussion encompasses cases only in which all family members seek to preserve the confidentiality of the communications." See supra note 3 and accompanying text.

In enumerating its criteria, the court did not include "minor" or, however, the latter referred expressly to "minor child" in its holding. See, e.g., supra note 3 and accompanying text.

Application of A & M, 403 N.Y.S.2d at 380 n. 9. While it is unclear that the court intended such a result, at least one commentator has suggested that the court intended that the privilege apply only "where the parent and child [are] in agreement that a conversation should remain secret." The commentator has correctly pointed out that, if such was the intent of the court, it is not included in the list of "minor" communications that the court intended to refrain from expressing an opinion on whether the privilege would apply in the case of an adult child. See supra notes 53 and accompanying text.

Application of A & M, 403 N.Y.S.2d at 380 n. 9.

It is urged that the parties to the privilege may not and should not be limited by the age of either party." See supra notes 53 and accompanying text.

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The court indicated strongly that a child could not assert the privilege "to prevent his parents from testifying about matters in which they were seeking the intervention and assistance of the court in controlling the child's behavior." Application of A & M, 403 N.Y.S.2d at 381 n. 9. See also infra notes 173-74 and accompanying text.

The court strongly indicated that a child could not assert the privilege "to prevent his parents from testifying about matters in which they were seeking the intervention and assistance of the court in controlling the child's behavior." Application of A & M, 403 N.Y.S.2d at 381 n. 9. See also infra notes 173-74 and accompanying text.

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Id.; 2d Ind. App. at 1720. 360 N.E.2d at 599.


Hunter v. State, 172 Ind. App. at 360 N.E.2d at 598.


Compare, e.g., supra notes 40-129 with notes 130-146 and accompanying text. See also In re Kinnon, 326 F.Supp. 400 (S.D.N.Y. 1970) rejecting the privilege on the ground that even if such a privilege existed, the case was not appropriate for application because the petitioner's daughter, who was sought by the grand jury only for information related to a third party, was not herself a "target" of the grand jury investigation. For a summary of the cases considering the privilege, see In re Agosto, 553 F.Supp. at 1512-21.


See, e.g., In re Agosto, 553 F.Supp. 1298 (D. Nev. 1983). Despite the various bases claimed by the court in support of its holding, the dictum contained in the opinion clearly indicates the intention to adopt a new privilege.


See infra Appendix.

See infra Model Statute § 1001 (a) at Appendix (definition "child").

See id. § 1001(d) (defining "parent").

"Desire" as used here is to be distinguished from what is to be presumed to be a "need" of a child.

See generally McCormick supra note 21 § 93 at 223 n.3 (waiver) [traditionally ... described as an intentional relinquishment of a known right] (citations omitted).

Note. Questioning the recognition of a Parent-Child Testimonial Privilege supra note 37.

See supra text accompanying note 75.

See supra text accompanying note 35 (second of four conditions enumerated by Wigmore for the recognition of testimonial privileges).

See, e.g., infra notes 25-33 and accompanying text.

As used in this article, "adult" means a person over the age of twenty one. Cf. infra Model Statute § 1001(a) at Appendix (defining "child").

See supra text accompanying note 35.

See infra Model Statute § 1001(a) at Appendix.

Id.; § 1006 at Appendix.

Id. § 1001(b) at Appendix (defining "communication").

Id. § 1005(a). Compare id. §§ 1005(b) with 1006 (distinguishing presumptions against confidentiality which arise when a child discloses in the presence or hearing of third party non-family members with those presumptions which arise in favor of confidentiality when disclosure is made in the presence of family members only).

Id.

Id. § 1005(b).

Id.

Id. § 1007(d).

Id. § 1007(f).

See supra note 65 and accompanying text.

See infra Model Statute § 1007(b) at Appendix.

Id. §§ 1007(c) & (d).

Id. § 1007(e).

Id. § 1007(a).


See supra note 35 and accompanying text (fourth of Wigmore's four conditions for recognition of a testimonial privilege).

Appendix

Child-Parent Testimonial Privilege

Model Statute

§1001 Definitions.

As used in this statute, the following words and phrases have the meanings ascribed.

(a) 'Child': a person who is under the age of twenty-two (22) years and who is unemancipated. A person who is found by the court to be mentally retarded to the extent that the mental age of the person is that of a person under the age of twenty-two years shall be considered a "child" for the purposes of this statute whether or not emancipated and regardless of actual age.

(b) 'Communication': any expression, interchange or transmission of ideas, expression of thoughts or messages between two or more persons which is intended for the purpose of making known from one to the other the content of such ideas, expression of thoughts or messages. The medium by which communications are imparted shall not be restricted.

(c) 'Confidential Communications': any communication made by a child to his parent and to which a presumption of confidentiality attaches. Except as otherwise provided in this statute the presence of third persons shall not alter the confidential nature of the communication.

(d) 'Parent': includes the natural or adoptive parent(s), step-parent(s), foster parent(s) or guardian(s) of the child.

(e) "Propered": any juvenile delinquency hearing or proceeding, adult civil or criminal proceeding, or grand jury proceeding.

(f) "Waiver": the intentional and voluntary relinquishment of a known right by the child or his guardian.

(g) Where the masculine gender is used in this Statute, it shall be taken to include the feminine gender as appropriate.

§1002 Child-Parent Testimonial Privilege.

Any confidential communication shall be outside the scope of discovery in any judicial proceeding when the communication is made:

(a) by a child to his parent, or by the parent to the child in response to or in communication with confidential communications;

(b) within the context of the family relationship and

(c) for the purpose of obtaining the support, advice or guidance of the parent.

§1003 Person Who May Claim the Privilege.

The child-parent privilege may be claimed —

(a) by a child on behalf of himself and his parent and as to confidential communications between the child and his parent;

(b) by a guardian appointed by the court on behalf of any child as defined in this Statute; or

(c) by an attorney on behalf of the child.

§1004 Waiver of the Privilege.

(a) A child may waive the privilege only when acting through the effective assistance of legal counsel.

(b) Exception: A person upon whom this Statute confers a privilege against disclosure waives the privilege if he discloses any significant part of the privileged matter following his retaining competent legal counsel or consents to disclosure by his attorney of any significant part of the privileged matter.


(a) The presence of third persons at the time of the confidential communication and who are not members of the child's immediate family raises a rebuttable presumption that the communication of the child was not intended to be confidential.

(b) The presumption raised under § 1005 (a) may be rebutted by a preponderance of the evidence that, under the circumstances in which the communication occurred, the child had a reasonable expectation that the communication was or would remain confidential, notwithstanding the presence of or inadvertent divulgence to the non-family third persons.

§1006 Presumption of Confidentiality.

Except as provided in § 1005, a presumption of confidentiality shall attach to any communication claimed by the child to be confidential. The opponent of the privilege shall have the burden of establishing that the communication was not confidential by clear and convincing evidence. §1007 Exceptions. There shall be no privilege under this statute under the following circumstances —

(a) When invoked in furtherance of a crime or fraud: when sufficient evidence has been introduced in any proceeding which warrants a finding that the communication was made, in whole or in part, to further or facilitate the active involvement of any person in a crime or fraud; or

(b) Proceeding to establish competency: in any proceeding brought by or on behalf of a party to establish the mental competency of a child or his parent;

(c) Proceeding in which the child and his parent are opposing parties: no privilege shall be recognized in any civil or criminal proceeding in which the child and his parent are opposing parties.

(d) The child and his parent shall be deemed to be opposing parties in any proceeding in which the parties are opposing parties or in which the party is charged with:

i. Child abuse;

ii. Incest;

iii. Adultery;

iv. Child neglect; or

v. Abandonment or non-support.

(e) Charge of crime against the parent or legal child of the parent: any child charged with a crime against his parent or other legal child of the parent shall not be entitled to claim this privilege.

(f) Parent Seeking Assistance of Court: no child may claim this privilege for the purpose of preventing his parent from testifying about matters in which the parent is seeking the assistance of the court in controlling the child's behavior.

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