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## PEOPLE v. DOE: ALTERNATIVE MEANS OF PROTECTING THE CHILD-PARENT RELATIONSHIP

Since 1776, a general rule of evidence has been that the state is entitled to every man's testimony.<sup>1</sup> Occasionally, exceptions to that general rule have been created. For example, testimonial privileges were created to protect certain relationships.<sup>2</sup> Also, constitutional protections render the rule inapplicable in certain situations, for example, where application of the rule would force a criminal defendant to be his own accuser.<sup>3</sup> No such exception has been available with respect to the relationship between child and parent.<sup>4</sup> No testimonial privilege protects confidential communications between a child and his parent, and no constitutional right has been extended to protect the relationship from the application of the general rule.<sup>5</sup> Recently, however, a New York court ruled in *People v. Doe*<sup>6</sup> that parents subpoenaed by a grand jury do not have to disclose confidential admissions made to them by their son.<sup>7</sup> The court based its holding on a constitutional right to familial privacy.<sup>8</sup>

In *Doe*, the parents of a sixteen-year-old boy had been subpoenaed by a grand jury investigating an arson. The grand jury suspected the boy of involvement in the arson and sought to elicit any admissions or inculpatory statements made to the parents by their son.<sup>9</sup> The parents moved to quash the subpoena. The trial court granted the motion on the basis of two considerations.<sup>10</sup> First, the trial court held that confidential communications between parent and child are protected by the marital privilege.<sup>11</sup>

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<sup>1</sup> *United States v. Bryan*, 339 U.S. 323, 331 (1950); *Blackmer v. United States*, 284 U.S. 421, 438 (1932); *Hill's Trial*, 20 How. St. Tr. 1362 (1777); *Duchess of Kingston's Case*, 20 How. St. Tr. 586 (1776). See also 8 J. WIGMORE, EVIDENCE, § 2286 n.16 (McNaughton rev. 1961) [hereinafter cited as WIGMORE]; Hutchins & Slesinger, *Some Observations on the Law Evidence: Family Relations*, 13 MINN. L. REV. 675 (1929).

<sup>2</sup> WIGMORE, *supra* note 1, at § 2285. The relationships protected were attorney-client, priest-penitent, doctor-patient and husband-wife. *Id.*; see note 113 *infra*.

<sup>3</sup> U.S. CONST. amend. v.

<sup>4</sup> Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 615-20 (1970) [hereinafter cited as Coburn].

<sup>5</sup> Note, *The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudications*, 44 BROOKLYN L. REV. 63 (1977) [hereinafter cited as *Family Integrity*].

<sup>6</sup> 61 App. Div.2d 426, 403 N.Y.S.2d 375 (1978). The name of the case includes the pseudonym, "Doe," to protect the privacy of the respondent.

<sup>7</sup> *Id.* at 435-36, 403 N.Y.S.2d at 382.

<sup>8</sup> *Id.* at 433-34, 403 N.Y.S.2d at 381.

<sup>9</sup> *Id.* at 428, 403 N.Y.S.2d at 377. The court noted in the opinion that the parents were not at the scene of the fire and that they had no personal knowledge of the arson.

<sup>10</sup> *Id.* 403 N.Y.S.2d at 377.

<sup>11</sup> *Id.* 403 N.Y.S.2d at 377. The marital privilege protects only confidential communications between partners to a valid marriage from forced disclosure, WIGMORE, *supra* note 1, at § 2335; Note, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 NW. U. L. REV. 208, 218-20 (1961) [hereinafter cited as *Husband-Wife Privileges*], and is recognized in all American jurisdictions. Note, *Spousal Testimony*, 28 BROOKLYN L. REV. 259, 293-96 (1962) [hereinafter cited as *Spousal Testimony*]. Moreover, if the communications are made within the presence of a third party, including the married couple's minor child capable of under-

Second, the trial court held that parent-child communications are protected by a constitutional right to familial privacy.<sup>12</sup> On appeal to the New York Supreme Court,<sup>13</sup> the decision of the trial court to quash the subpoena was reversed.<sup>14</sup> The court first rejected the conclusion of the trial court that the marital privilege protected child-parent communications,<sup>15</sup> reasoning that New York's statutory marital privilege protects only confidential communications between parties to a valid marriage. Since the child's statements were not communications between marital partners, they were not within the scope of the marital privilege.<sup>16</sup> The State Supreme Court agreed, however, with the trial court's reasoning that the boy's admissions were constitutionally protected.<sup>17</sup> The court relied upon a line of cases in which the United States Supreme Court recognized a realm of private family life which the state cannot enter.<sup>18</sup> This right to familial integrity stems from two separate considerations:<sup>19</sup> protection of the family as a valuable institution in society<sup>20</sup> and protection of the right of privacy in

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standing the communications, then the communications are not confidential and are unprotected. *Id.*; see Moser, *Compellability of One Spouse to Testify Against the Other in Criminal Cases*, 15 MD. L. REV. 16, 17-18 (1955) [hereinafter cited as Moser].

<sup>12</sup> *People v. Doe*, 61 App. Div.2d 426, 428, 403 N.Y.S.2d 375, 377 (1978).

<sup>13</sup> The New York Supreme Court, Appellate Division, Fourth Department is an intermediate appellate court, not the highest court in the state.

<sup>14</sup> *People v. Doe*, 61 App.Div.2d 426, 436, 403 N.Y.S.2d 375, 381 (1978).

<sup>15</sup> *Id.* at 428-29, 403 N.Y.S.2d at 377.

<sup>16</sup> *Id.* In addition to the fact that the child obviously is not a partner to the marriage, his presence during the communication also denies confidentiality. See note 11 *supra*. The court noted that there were, thus, two grounds for finding that the boy's statements were not protected by the marital privilege. The court also dealt with the respondent's claim that the attorney-client privilege applied to the boy's statements. 61 App.Div.2d at 429, 403 N.Y.S.2d at 377-78. That privilege applies only when someone seeks legal advice from a lawyer and, in doing so, confidentially reveals to the lawyer information related to the problem involved. WIGMORE, *supra* note 1, at § 2290-2292; Note, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 56 NW. U. L. REV. 235, 236 (1961); see note 113 *infra*. In *Doe*, although the boy's father was an attorney, the communications were addressed to his father in his capacity as parent rather than as attorney. 61 App.Div.2d at 429, 403 N.Y.S.2d at 377-78.

<sup>17</sup> *Id.* at 433-34, 403 N.Y.S.2d at 378.

<sup>18</sup> See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (the due process clause of the fourteenth amendment protects the decision to work while pregnant); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (the concept of ordered liberty protected by the fourteenth amendment includes the decision whether to have an abortion); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (the penumbra of the Bills of Rights creates zones of privacy protecting the decision to use contraceptives); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (the due process clause protects the parents' right to raise their children as they choose); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (the right of parents to raise their children is within the concept of ordered liberty); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the liberty which includes the right to control the education of one's children is protected by the due process clause). See also Nelson, *Domestic Tranquility and the Right to Privacy: Is There a Right to Privacy Within the Family?*, 18 S. TEX. L. J. 121 (1977); *Family Integrity*, *supra* note 5.

<sup>19</sup> *Family Integrity*, *supra* note 5, at 64-65.

<sup>20</sup> See *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (the Constitution protects family relationships); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (the traditional interest of the

one's associations.<sup>21</sup>

The court, after establishing the existence of constitutional protection of family relationships, admitted that the state may impose regulations upon such relationships, but only when the state has a legitimate interest which justifies abridging the integrity of the family.<sup>22</sup> In deciding whether the state in this particular case could require the parents to testify, the court compared the interest of society in protecting the parent-child relationship to the state's interest in the process of fact-finding necessary to the detection and punishment of criminal behavior.<sup>23</sup> On the one hand, the court reasoned, it is critical that the child have the sort of relationship with his parents that encourages him to seek their help and guidance. The court further believed that such a relationship would be impossible if the parents could be compelled to testify against the child.<sup>24</sup>

On the other hand, the court recognized the great importance of the fact-finding process.<sup>25</sup> Nevertheless, on balance, the court decided that the state's interest in fact-finding, though a legitimate interest, was insufficiently compelling to justify a burden upon society's interest in protecting the parent-child relationship.<sup>26</sup> Thus, the constitutional right to family integrity permitted the parents to refuse to testify concerning their son's admissions.

The court reasoned that the protection of the constitutional right to

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parents in controlling the rearing of their children is constitutionally protected); *Stanley v. Illinois*, 405 U.S. 645 (1972) (familial integrity is protected by the due process clause of the fourteenth amendment and by the ninth amendment); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>21</sup> See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>22</sup> *People v. Doe*, 61 App.Div.2d 426, 433, 403 N.Y.S.2d 375, 380 (1978); cf. *United States v. Nixon*, 418 U.S. 683, 710 (1974) (state's interest in fact-finding process justifies imposition upon presidential confidentiality); *Roe v. Wade*, 410 U.S. 113 (1973) (state can protect right to life even though it invades privacy of a woman in deciding whether to have abortion); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (state's interest in fact-finding process justifies imposition of a burden upon the freedom of the press); *Prince v. Massachusetts*, 321 U.S. 158, 165-67 (1944) (state may protect children even if protection involves infringement of parents' right to control their children).

<sup>23</sup> 61 App.Div.2d at 432-34, 403 N.Y.S.2d at 380.

<sup>24</sup> *Id.* The erosion of the family would lead to maladjusted, irresponsible young adults with little sense of self-esteem or self-worth. *Id.* The family is largely responsible for the socialization of the child, for his adaptation and development as a member of society. T. GORDON, PARENT EFFECTIVENESS TRAINING, *passim* (1975); Joselyn, *Adolescence, & Lidy, The Family: The Developmental Setting*, in AMERICAN HANDBOOK OF PSYCHIATRY (Arieti ed. 1974). Statistical studies have related such social problems as delinquency, crime, suicide, mental illness and unwed mothers to failing families. Furlong, *Youthful Marriage and Parenthood: A Threat to Family Stability*, 19 HAST. L. J. 105, 115 (1967); see Bridgmen, *The Lawyer and the Marriage Counselor Pari Passu — Partners in More Effective Service to Ailing Marriages*, 4 KAN. L. REV. 546, 548 (1956). The failure of families with all the related problems would be caused by forcing parents to disclose the child's confidential communications. 61 App.Div.2d at 433, 403 N.Y.S.2d at 380; accord, *Coburn*, *supra* note 4, at 615-20.

<sup>25</sup> 61 App.Div.2d at 435, 403 N.Y.S.2d at 380.

<sup>26</sup> *Id.*

familial integrity, however, did not justify quashing the subpoena.<sup>27</sup> The court held that the parents were not allowed to claim the privilege of refusing to testify to certain matters until they appeared before the grand jury.<sup>28</sup> The subpoena could not be quashed but the parents could refuse to disclose their son's statements when the grand jury asked about them.<sup>29</sup> The court reasoned that there is no invasion of privacy in simply requiring the parents to appear and that the grand jury's necessarily broad powers would be unjustifiably compromised if subpoenas could be quashed without appearing.<sup>30</sup> Therefore, the court reversed the trial court's decision and remanded the case. It directed the trial court to deny the parents' motion to quash the subpoena.<sup>31</sup>

The right to family integrity, or to privacy within the family, is not explicitly mentioned in the Constitution.<sup>32</sup> The right of familial privacy results from the protection of family relationships and the protection of personal privacy in one's associations.<sup>33</sup> Judicial determinations of the existence of the right of privacy within the family have been based on the fourth,<sup>34</sup> fifth,<sup>35</sup> ninth<sup>36</sup> and fourteenth amendments,<sup>37</sup> and on a

<sup>27</sup> *Id.* at 435-36, 403 N.Y.S.2d at 381-82.

<sup>28</sup> *Id.* "A testimonial privilege . . . does not embrace a privilege against being required to claim the privilege." *Id.* at 435, 403 N.Y.S.2d at 382, *citing* *Matter of Cunningham v. Nadjari*, 39 N.Y.2d 314, 318, 383 N.Y.S.2d 590, 591 (1976).

<sup>29</sup> 61 App.Div.2d at 436, 403 N.Y.S.2d at 381-82.

<sup>30</sup> *Id.* Generally witnesses must appear in court to claim a privilege. When a party seeks to apply the marital privilege, *see* note 11 *supra*, he must claim the privilege in court and opposing counsel may call the witness to force the claim of privilege in court. *Husband-Wife Privileges, supra* note 11, at 228. Once the privilege has been claimed and granted, however, opposing counsel is generally denied the benefit of any further comment; he cannot suggest any inferences from the claim of privilege to the jury. *Id.*; *see* *People v. Wilkes*, 44 Cal.2d 679, 284 P.2d 481 (1955). *Contra*, *Hampton v. State*, 7 Okla. Crim. 291, 123 P. 571 (1912).

<sup>31</sup> 61 App. Div. 2d at 436, 403 N.Y.S.2d at 381.

<sup>32</sup> *Carey v. Population Serv., Int'l*, 431 U.S. 678, 684-85 (1977); *Roe v. Wade*, 410 U.S. 113, 152 (1973).

<sup>33</sup> *See* text accompanying notes 18-21 *supra*. *See also* *Family Integrity, supra* note 5.

<sup>34</sup> *United States v. United States District Court*, 407 U.S. 297, 315-318 (1972) (domestic security cannot be used to justify wiretapping without a warrant); *Katz v. United States*, 389 U.S. 347, 356 (1967) (the right of privacy exists where there is a reasonable expectation of privacy); *Johnson v. United States*, 333 U.S. 10, 13 (1948) (the right of privacy in the home can be violated only on the strength of a warrant issued by a judicial officer); *Weeks v. United States*, 232 U.S. 383, 391-92 (1914) (evidence obtained in an unreasonable search and seizure is inadmissible at trial).

<sup>35</sup> *See, e.g.,* *Lefkowitz v. Turley*, 414 U.S. 70, 77-79 (1973) (one cannot be penalized for claiming his fifth amendment rights); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (an accused cannot be compelled to produce his private papers if they are incriminatory); *Miranda v. Arizona*, 384 U.S. 436, 458-60 (1966) (a suspect must be informed of his Constitutional rights and must voluntarily waive those rights in order to be questioned).

<sup>36</sup> *See, e.g.,* *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (a woman's right to privacy extends to the decision whether to have an abortion); *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring) (the right to privacy implicit in the ninth amendment protects the decision to use contraceptives).

<sup>37</sup> *See, e.g.,* *Carey v. Population Serv., Int'l*, 431 U.S. 678, 684 (1977) (a woman's right to privacy extends to the decision whether to have an abortion); *Moore v. City of E. Cleveland*, 431 U.S. 494, 500-04 (1977) (protecting the freedom of family association).

"penumbra" of the Bill of Rights.<sup>38</sup> Judicial protection of the integrity of the family began with *Meyer v. Nebraska*<sup>39</sup> and *Pierce v. Society of Sisters*.<sup>40</sup> In *Meyer*, the United States Supreme Court held that a state may not restrict the spectrum of available knowledge by prohibiting the teaching of certain academic subjects.<sup>41</sup> In *Pierce*, the Court held that the State may not require parents to send their children to public rather than parochial schools.<sup>42</sup> Each case protects the right of parents to control their children.<sup>43</sup>

The *Meyer* and *Pierce* cases are illustrative of judicial protection of the family attributable to the positive influence of the family in society. The holdings in those cases were based on the concept of ordered liberty as protected by the due process clause of the fourteenth amendment.<sup>44</sup> Parents are accorded both the right and the duty to direct the upbringing and education of their children.<sup>45</sup> This right was also recognized in *Prince v. Massachusetts*.<sup>46</sup> In *Prince*, a state statute prohibiting children from selling or distributing literature on public streets was challenged by a guardian who accompanied her child while the two sold religious pamphlets on city streets.<sup>47</sup> The Supreme Court noted that parents have the right to use considerable discretion in raising their children,<sup>48</sup> but held that the state's interest in protecting children from the evil effects of child employment on public streets was sufficient to uphold the statute.<sup>49</sup>

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<sup>38</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (the Bill of Rights as a whole creates zones of privacy, one of which protects the decision to use contraceptives).

<sup>39</sup> 262 U.S. 390 (1923).

<sup>40</sup> 268 U.S. 510 (1925).

<sup>41</sup> 262 U.S. 390, 393-94 (1923). An Oklahoma statute prohibited the teaching of the German language prior to the eighth grade. *Id.* at 397. The purpose of the state law was to assure that the children of German immigrants in the state would regard English as their native tongue. *Id.* at 398. It was asserted by the state that this would assure that they developed the traditional Anglo-American values. *Id.*

<sup>42</sup> 268 U.S. 510, 534-35 (1925). An Oregon statute required parents to send their children to public schools. *Id.* at 530-31. The Court stated that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

<sup>43</sup> *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

<sup>44</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Liberty, as protected by the due process clause of the fourteenth amendment, "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children." *Id.*

<sup>45</sup> 262 U.S. at 400; *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

<sup>46</sup> 321 U.S. 158 (1944).

<sup>47</sup> *Id.* at 159-60. The Massachusetts statutes challenged in *Prince* also made it a misdemeanor to furnish a child with any literature to be sold or distributed in any street or public place. *Id.* at 160-61. *Prince* also involved a claim based on the freedom of religion. The claim arose when a parent and child, who were Jehovah's Witnesses, claimed that it was their moral duty to spread the faith of Jehovah's Witnesses by distributing pamphlets. *Id.* at 164.

<sup>48</sup> *Id.* at 166.

<sup>49</sup> *Id.* at 170. "[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare. . . ." *Id.* at 167.

The other source of constitutional protection of family integrity is the right of personal privacy enunciated in *Griswold v. Connecticut*.<sup>50</sup> In *Griswold*, the Supreme Court held that the guarantees of the Bill of Rights have penumbras which create certain zones of privacy.<sup>51</sup> Thus, a state statute prohibiting use of contraceptives was held invalid as an impermissible imposition upon the right of privacy.<sup>52</sup> Since *Griswold*, the Court has held that personal decisions relating to marriage,<sup>53</sup> procreation,<sup>54</sup> contraception,<sup>55</sup> and abortion<sup>56</sup> are constitutionally protected.

The parental right to freedom in rearing a child, recognized by *Meyer* and *Pierce*, together with the right of privacy established by *Griswold*, have created a fairly broad right to familial autonomy.<sup>57</sup> The scope of the right is uncertain, but the *Doe* court's extension of it to protect confidential parent-child communications was not unwarranted.<sup>58</sup> The Supreme Court held in *Moore v. City of East Cleveland*<sup>59</sup> that a municipality could not regulate family associations.<sup>60</sup> A municipal ordinance only permitted fami-

<sup>50</sup> 381 U.S. 479 (1965).

<sup>51</sup> *Id.* at 484.

<sup>52</sup> *Id.* at 485-86. The concurring opinion of Mr. Justice Goldberg bases the right of privacy on the ninth amendment. *Id.* at 492-93. He noted that the history of the ninth amendment indicates that the "liberty" protected by the fifth and fourteenth amendments is not limited in scope to those specific guarantees in the first eight amendments. *Id.* He wrote that the Court must look to the traditions and the collective conscience of the country to determine what rights are so fundamental as to be included in the concept of ordered liberty. "The inquiry is whether a right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Id.* at 493.

<sup>53</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 112 (1967) (state cannot prohibit miscegenation).

<sup>54</sup> See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (state cannot require sterilization of habitual criminals).

<sup>55</sup> See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (individual has right to decide whether to use contraceptives); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

<sup>56</sup> See, e.g., *Carey v. Population Serv., Int'l*, 431 U.S. 678, 684-85 (1977) (there are certain zones of privacy, including decision whether to have an abortion, which state cannot enter); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (state can only limit woman's decision to have abortion during her third trimester).

<sup>57</sup> See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 500-04 (1977) (invalidating municipal ordinance which disallowed certain forms of family associations within single household); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (invalidating state statute which declared children of unwed fathers to be wards of court automatically upon death of their mother).

<sup>58</sup> One indication of the uncertainty and breadth of the scope of the right to family integrity is the Supreme Court's language in *Roe v. Wade*, 410 U.S. 113 (1973): "[O]nly personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy. [It is also] clear that the right has some extension to activities relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child-rearing and education." *Id.* at 152-55. See *Family Integrity*, *supra* note 5.

<sup>59</sup> 431 U.S. 494 (1977).

<sup>60</sup> *Id.* at 505-06. The Court reached a 4-1-4 plurality decision. The disagreement, however, was on the issue of whether the ordinance unreasonably interfered with the right of familial privacy, whether it was rationally related to its avowed purpose, rather than on the issue of whether the right to familial privacy exists. *Id.*

lies to live together in single unit dwellings, and defined "family" as only the nuclear family.<sup>61</sup> A grandmother was prosecuted and fined because she had two of her grandchildren, each from different parents, living with her.<sup>62</sup> The municipal ordinance, the Court reasoned, denied the right of familial autonomy in directing the rearing of the child and abridged the freedom of personal choice in matters of family life.<sup>63</sup> The freedoms protected in *East Cleveland* are consistent with the *Doe* court's holding that the right of familial privacy protected confidential communications between parent and child.<sup>64</sup> The *Doe* court's reasoning in finding a constitutional protection of the family was sound.

The *Doe* court recognized that it is also necessary to examine the interest of the state in abridging that constitutional right.<sup>65</sup> The Supreme Court has repeatedly observed that constitutional rights may be infringed if the state interest is compelling and if the law that infringes upon the right bears a rational relationship to the interest without being so broad as to unnecessarily infringe the right involved.<sup>66</sup> The Supreme Court has specifically acknowledged that such a state interest may allow an imposition upon the right to familial integrity.<sup>67</sup> In *Prince v. Massachusetts*,<sup>68</sup> the Court held that the state's interest in protecting children is sufficiently compelling.<sup>69</sup> In *Roe v. Wade*,<sup>70</sup> the Court held that a state had a sufficiently compelling interest in protecting the life of a viable fetus to prohibit abortions during the third trimester.<sup>71</sup> Both of these statutes involved significant intrusions into the recognized domain of the family, and both were upheld.

Intrusions into the constitutionally recognized domain of the family may be justified by state laws which serve compelling state interests. The *Doe* case presents the issue of whether the state's interest in fact-finding is sufficiently compelling to justify abridging the privacy of parent-child communications.<sup>72</sup> The *Doe* court conceded that the state has a legitimate interest in the fact-finding process which allows for the detection and punishment of criminal behavior.<sup>73</sup> Nevertheless, the court reasoned that the parent-child relationship is of such value to society that the state's interest in fact-finding was subordinate to protection of the family.<sup>74</sup>

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<sup>61</sup> *Id.* at 495-96.

<sup>62</sup> *Id.* at 496-98.

<sup>63</sup> *Id.* at 499-503.

<sup>64</sup> *People v. Doe*, 61 App. Div. 2d 426, 433-34, 403 N.Y.S.2d 375, 379 (1978).

<sup>65</sup> *Id.* at 433, 403 N.Y.S.2d at 380.

<sup>66</sup> *See, e.g., Roe v. Wade*, 410 U.S. 113, 152-54 (1973); *Branzburg v. Hayes*, 408 U.S. 665, 680-81 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

<sup>67</sup> *See, e.g., Roe v. Wade*, 410 U.S. 113, 152-54 (1973); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

<sup>68</sup> 321 U.S. 158, 166 (1944).

<sup>69</sup> *Id.* at 167.

<sup>70</sup> 410 U.S. 113 (1973).

<sup>71</sup> *Id.* at 152-54.

<sup>72</sup> *People v. Doe*, 61 App.Div.2d 426, 433-34, 403 N.Y.S.2d 375, 380 (1978).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*



In *Branzburg v. Hayes*,<sup>75</sup> the United States Supreme Court has considered the state's interest in the fact-finding process and has balanced that interest against constitutional rights. In *Branzburg*, the issue presented was whether the first amendment's protection of freedom of the press gave newsmen the right to refuse to disclose the identity of their news sources to a grand jury.<sup>76</sup> The Court recognized that the failure to protect newsmen's sources would burden the collection of news and, thereby, the freedom of the press.<sup>77</sup> The Court nevertheless held that the state's interest in finding facts to promote fair and effective law enforcement, particularly the importance of the grand jury, is sufficiently compelling to justify the burden on the press.<sup>78</sup> The prevailing view, according to the *Branzburg* Court, is that the first amendment interest asserted by the newsmen is outweighed by the general obligations of a citizen to appear before the grand jury and to give his testimony.<sup>79</sup> The Court held that such a view is consistent with Constitutional law.

In discussing the importance of the fact-finding process, the *Branzburg* Court emphasized the historical importance of the grand jury and the fact that grand jury proceedings are constitutionally mandated.<sup>80</sup> The Court dismissed the newsmen's claim that the infringement of their first amendment right was broader than necessary to achieve the state's purpose, and therefore invalid, by noting that the investigatory powers of the grand jury must be broad in order for it to perform its proper function in society.<sup>81</sup>

In *United States v. Nixon*,<sup>82</sup> the Supreme Court again considered the importance of the fact-finding process *vis-a-vis* a constitutional right. In that case, the President asserted a privilege for all confidential presidential communications.<sup>83</sup> The Court held that the President's confidential com-

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<sup>75</sup> 408 U.S. 665 (1972).

<sup>76</sup> *Id.* at 679-80. The Supreme Court consolidated three cases that presented that issue: *Branzburg v. Pount*, 461 S.W.2d 345 (Ky. 1971) (unreported judgment of the Kentucky Court of Appeals); *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971); and *United States v. Caldwell*, 434 F.2d 1081 (9th Cir. 1970).

<sup>77</sup> 408 U.S. at 690-91 (1972).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 687, citing *Hannah v. Larche*, 363 U.S. 420, 489-90 (1960) (Frankfurter, J., concurring); see *United States v. Bryan*, 339 U.S. 323 (1950); *Blackmer v. United States*, 284 U.S. 421 (1932).

<sup>80</sup> 408 U.S. at 687. The fifth amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST., amend. V. The Court has said of the grand jury that "its constitutional prerogatives are rooted in long centuries of Anglo-American history." *Hannah v. Larche*, 363 U.S. 420, 489-90 (1960) (Frankfurter, J., concurring). It has also been said that the inclusion of the grand jury "in our Constitution as the sole method of preferring charges in serious criminal cases shows the high place that it holds as an instrument of justice." *Costello v. United States*, 350 U.S. 359, 362 (1956).

<sup>81</sup> 408 U.S. at 688. "Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad." *Id.*

<sup>82</sup> 418 U.S. 683 (1974).

<sup>83</sup> *Id.* at 703. President Nixon made two substantive claims in addition to raising some procedural objections to a third-party subpoena duces tecum issued by the United States

munications are constitutionally protected only insofar as they relate to the effective discharge of his duties.<sup>84</sup> The result of the Court's holding is that if a president claims a privilege for confidential communications in response to a subpoena, the court must treat the subpoenaed material as presumptively privileged.<sup>85</sup> However, if the prosecutor in a criminal case can show that the material is essential to the prosecution, then the importance of the fact-finding process, together with considerations of due process, require the president to submit the materials for an in camera examination by the judge.<sup>86</sup>

In discussing the importance of the state's interest in the fact-finding process, the *Nixon* Court emphasized the need for all relevant facts in an adversary system of justice. The Court cited the maxim that the public has a right to every man's evidence<sup>87</sup> and suggested that exceptions to that maxim should be narrowly drawn.<sup>88</sup> The judicial system is designed to assure that the guilty are punished and that the innocent do not suffer. To that end, the Court said, full disclosure of all relevant facts is essential.<sup>89</sup>

The importance attributed to the fact-finding process by the Supreme Court casts doubt upon the propriety of the *Doe* court's decision. In *Branzburg*, the Supreme Court held that the state's interest in the fact-finding process of the grand jury is sufficiently compelling to justify an abridgment of the fundamental right of freedom of the press, explicitly

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District Court for the District of Columbia. *Id.* at 686. His first claim was that the courts were precluded from reviewing his claim of privilege by the doctrine of the separation of powers. Had this claim prevailed, the President would have been granted an absolute privilege of confidentiality for all presidential communications. *Id.* at 703. The President asserted that there is a valid need for confidentiality of communications between high government officials and that the independence of the executive branch protects the president, and therefore his confidential communications, from a subpoena in an ongoing prosecution. *Id.* at 705-06. The Court conceded the need for confidentiality but said, "The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III." *Id.* at 707.

The second claim of the President was that, in the absence of an absolute privilege for confidential presidential communications, Article II of the Constitution should require that his claim of privilege should prevail over the subpoena duces tecum. *Id.* at 703. In considering this second claim the Court balanced the importance of the fact-finding process against a Constitutional provision. The President asserted that without a privilege for confidential presidential communications, he could not fully and effectively perform the duties required of him by Article II of the Constitution. *Id.* at 708.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* The notion that presidential communications which the president claims are privileged are to be regarded as "presumptively privileged," stems from the language of the opinion in *Nixon v. Sirica*, 487 F.2d 700, 713 (D.C. Cir. 1973). On appeal, both parties accepted the notion as controlling.

<sup>86</sup> *Id.* at 713-14.

<sup>87</sup> *Id.* at 709.

<sup>88</sup> *Id.* at 710: "Whatever their origins, . . . exceptions to the demand for every man's evidence are not lightly created not expansively construed, for they are in derogation of the search for truth."

<sup>89</sup> *Id.* at 710.

protected by the first amendment.<sup>90</sup> Yet the *Doe* court held that the same interest is insufficiently compelling to warrant an abridgment of the right to family integrity,<sup>91</sup> a right not specifically mentioned in the Constitution.<sup>92</sup> In *Nixon*, the Supreme Court held that the need for all the relevant facts in a criminal prosecution overcomes the Constitutional protection of the confidentiality of presidential communications implicit in article II.<sup>93</sup> But the *Doe* court held that the same need in a grand jury's investigation of criminal behavior cannot overcome constitutional protection of the family.<sup>94</sup> The *Doe* court's evaluation of the importance of the fact-finding process, as compared to the importance of constitutional rights, is inconsistent with the Supreme Court's judgments on that issue.

Whether or not the *Doe* court's view of the importance of the fact-finding process is consistent with the United States Supreme Court's view, it is undeniable that family integrity and the parent-child relationship are valuable to society and worthy of protection.<sup>95</sup> The alternative to protecting a relationship by way of constitutional right is to enact a statute creating a testimonial privilege protecting the confidential communications within that relationship.<sup>96</sup> The Supreme Court recognized this possibility in *Branzburg* and suggested that the ability to legislate as broadly or as narrowly as desired, and, if necessary, to revise the statute periodically, made this alternative preferable to the extension of constitutional protection which compromises the fact-finding process.<sup>97</sup> The *Doe* court also recognized the possibility of a statutory privilege but noted that the creation of such a privilege was strictly within the province of the state legislature.<sup>98</sup>

A testimonial privilege protects confidential communications from compelled disclosure.<sup>99</sup> The purpose of a privilege is to insure the satisfactory maintenance of relationships in which confidentiality is essential.<sup>100</sup> Implicit in the recognition of a privilege is a societal preference valuing the protected relationship more highly than the state's interest in the fact-

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<sup>90</sup> *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972); see text accompanying notes 76-82 *supra*.

<sup>91</sup> *People v. Doe*, 61 App.Div.2d 426, 433-34, 403 N.Y.S.2d 375, 380 (1978); see text accompanying notes 25-26 & 73-75 *supra*.

<sup>92</sup> See note 32 *supra*.

<sup>93</sup> *United States v. Nixon*, 418 U.S. 683, 713-14 (1974); see text accompanying notes 83-90 *supra*.

<sup>94</sup> 61 App.Div.2d at 433-34, 403 N.Y.S.2d at 380.

<sup>95</sup> See text accompanying note 24 *supra*.

<sup>96</sup> See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972).

<sup>97</sup> *Id.*

<sup>98</sup> "[W]e believe that the creation of privilege devolves exclusively on the Legislature." App.Div.2d at 434, 403 N.Y.S.2d at 381 The *Doe* court's belief is supported by the fact that nearly all testimonial privileges are statutorily created. See note 103 *infra*.

<sup>99</sup> WIGMORE, *supra* note 1, at § 2285; *Husband-Wife Privileges*, *supra* note 11, at 211-14.

<sup>100</sup> WIGMORE, *supra* note 1, at § 2285; Moser, *supra* note 11, at 17-18; Sterk, *Testimonial Privileges: An Analysis of Horizontal Choice of Law Problems*, 61 MINN. L. REV. 461, 467 (1977) [hereinafter cited as Sterk]; *Husband-Wife Privileges*, *supra* note 11, at 218-19.

finding process.<sup>101</sup> Privileges are generally created by statute.<sup>102</sup> Recently, new privileges have been suggested and adopted in some states,<sup>103</sup> although

<sup>101</sup> WIGMORE, *supra* note 1, at § 2285. Most rules of evidence exclude evidence on the basis of its lack of reliability. Privileges, however, deliberately exclude evidence which is considered to be highly reliable in order to protect a given relationship. Thus, to protect the relationship, the fact-finding process is compromised. In *United States v. Nixon*, 418 U.S. 683 (1974), the Court said any exceptions to the rule requiring all citizens to give their evidence should not be lightly created or broadly construed, "for they are in derogation of the search for truth." *Id.* at 711; see Manley, *Patient, Penitent, Client and Spouse in New York*, 21 N.Y.S.B.A. BULL. 288 (1940); *Spousal Testimony, supra* note 11, at 260 n.2.

<sup>102</sup> Fifty-four American jurisdictions (including the District of Columbia, Puerto Rico, the Virgin Islands, the fifty states and the federal system) recognize the marital confidentiality privilege. Only six states (Alabama, Connecticut, Delaware, Florida, Maine and Mississippi) have no statutory basis for the privilege. *Spousal Testimony, supra*, note 11, at 293-96. At early common law, the courts would periodically allow a "gentleman" to refuse to testify when his honor would be compromised by revealing a confidence. *Layer's Trial*, 16 How. St. Tr. 93 (1772); *Lord Grey's Trial*, 9 How. St. Tr. 127 (1682); *Bulstrode v. Letchmere*, Freem. Ch. 5 (1676). Since 1776, however, a primary rule of evidence has been that the state is entitled to every man's evidence, unless some exception allows him to refuse to testify. *United States v. Nixon*, 418 U.S. 683, 710 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *United States v. Bryan*, 339 U.S. 323, (1950); *Blackmer v. United States*, 284 U.S. 421, 438 (1932); *The Dutchess of Kingston's Case*, 20 How. St. Tr. 586 (1776). See also WIGMORE, *supra* note 1, at § 2286 n.16, § 2192; text accompanying notes 1-3 *supra*. The general rule is that there is not privilege in the absence of a statute. *Stiles v. Clifton Springs Sanitarium Co.*, 74 F. Supp. 907, 908 (W.D.N.Y. 1947); *Thomas v. Morris*, 286 N.Y. 266, 36 N.E.2d 141 (1941); *Application of Heller*, 184 Misc. 75, 53 N.Y.S.2d 86 (1945).

<sup>103</sup> Eighteen states now have privileges which allow an investigative reporter to refuse to reveal the source of his information. See, e.g., ALA. CODE § 12-21-142 (1975); CAL. EVID. CODE § 1070 (West Supp., 1974); N. M. STAT. ANN. § 20-1-12.1 (Supp. 1975); N.Y. CIV. RIGHTS LAW § 79h(b) (McKinney Supp. 1970). Only Michigan, New Mexico, and New York protect the substance as well as the source of the journalist's information. Note, *Newsman-Source Privilege: A Foundation in Policy for Recognition at Common Law*, 26 U. FLA. L. REV. 453, 463 (1974) [hereinafter cited as *Newsman-Source*]. In *Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972), the Supreme Court held that the first amendment does not protect journalists from disclosing information as to sources or substance to grand juries. Eight state legislatures have considered privilege statutes since the *Branzburg* decision. See Fla. H. R. 3794 (2d Reg. Sess. 1972); Mass. S. 114 (Reg. Sess. 1972); Minn. S. 945 (Reg. Sess. 1971); Mo. H.R. 18 (Reg. Sess. 1971); Neb. Leg. 1179, 1371 (Reg. Sess. 1972); Tex. H.R. 205 (Reg. Sess. 1972); Tex. S. 558 (1972); Wis. S. 585 (Reg. Sess. 1971). Many commentators have supported the creation of journalist-source privilege. See, e.g., Note, *Constitutional Protection for the Newsman's Work Product*, 6 HARV. C.R.-C.L. L. REV. 617 (1971); Note, *Judicial Relief for the Newsman's Plight: A Time for Secrecy*, 45 ST. JOHN'S L. REV. 484 (1971); *Newsman-Source supra*, at 473. *Contra, Carter, The Journalist, His Informant and Testimonial Privilege*, 35 N.Y.U. L. REV. 1111 (1960).

Sixteen states have statutes creating an accountant-client privilege. See, e.g., ARIZ. REV. STAT. § 32-749 (West 1976); MICH. COMP. LAWS § 338.3120 (Supp. 1978); TENN. CODE ANN. § 62-143 (1976). While there is no constitutional basis for an accountant-client privilege, Couch v. *United States*, 409 U.S. 322, 335 (1973), many commentators urge the statutory creation of such a privilege. See, e.g., Jentz, *Accountant Privileged Communications: Is it a Dying Concept under the New Federal Rules of Evidence?*, 11 AM. BUS. L. J. 149 (1973); Saltzman, *Accountants and the IRS Summons: Recent Developments*, 7 TAX ADVISOR 516 (1976).

At least thirteen states recognize a privilege for confidential communications between school guidance counselors and their counselees. See, e.g., CONN. GEN. STAT. § 10-154a (West 1977); IND. CODE § 20-6.1-6-15 (1976); MICH. COMP. LAWS § 600.2165 (West 1978). This privi-

the general trend is away from the creation of new privileges<sup>104</sup> because privileges deliberately exclude reliable evidence in order to protect the relationship involved.<sup>105</sup>

There are three primary justifications for the creation of a testimonial privilege.<sup>106</sup> First, a privilege may be justified as a safeguard against invasion of personal privacy.<sup>107</sup> The need for privacy is widely recognized and may warrant the suppression of certain evidence.<sup>108</sup> Second, a testimonial

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lege also receives support from commentators. See e.g., Robinson, *Testimonial Privilege and the School Guidance Counselor*, 25 SYRACUSE L. REV. 911 (1974); Comment, *An Analysis of the 1972 South Dakota Counselor-Student Privilege Statute*, 19 S. DAKOTA L. REV. 378 (1974).

Other privileges created by statute are those for communications between psychotherapists and patients, see, e.g., CAL. EVID. CODE, §§ 1010-1028 (West Supp. 1977); COL. REV. STAT. § 13-90-107(g)(1976); IND. CODE § 25-38-1-17 (1971); N.C. GEN. STAT. § 8-53.3 (1969), and between social workers and client. See, e.g., N.Y. CIV. PRAC. LAW. § 4508 (McKinney Supp. 1978).

<sup>104</sup> The new privileges have been criticized for a number of years. In 1937-38, the American Bar Association sponsored a Committee on the Improvement of the Law of Evidence. The report of that committee criticized the creation of new privileges, suggesting that the demand for these privileges stemmed from organizational self-interest. 63 A.B.A. REPORTS 595 (1938). Certain professional organizations were said to be seeking privileges in order to augment their pride in the organization and to give its members another indication of their status as professionals. The report recommended that no legislature create any new privileges, particularly for accountants, social workers and journalists. *Id.*

Both the American Law Institute's Model Code of Evidence and the Uniform Rules of Evidence approved in 1953 by the National Conference on Uniform State Laws and the American Bar Association exclude all of the so-called novel, or new, privileges. See MODEL CODE OF EVIDENCE rules 209-24 (1942); UNIFORM RULES OF EVIDENCE 500-505. The new Uniform Rules of Evidence, approved by the National Conference of Commissioners on Uniform State Laws in August, 1974, also exclude all novel privileges. See UNIFORM RULES OF EVIDENCE 501-05 (1974).

The Supreme Court has also indicated that new privileges should not be lightly created. *United States v. Nixon*, 418 U.S. 683, 711 (1974). The Court has noted that "[t]he creation of new testimonial privileges has been met with disfavor by commentators since such privileges obstruct the search for truth." *Branzburg v. Hayes*, 408 U.S. 665, 690 n.29 (1972); see *McMann v. SEC*, 87 F.2d 377, 378 (2d Cir. 1937). See also Z. CHAFEE, *GOVERNMENT AND MASS COMMUNICATIONS* 496-97 (1947); C. McCORMICK, *EVIDENCE* 159 (2d ed. 1972); WIGMORE, *supra* note 1, at § 2192, Morgan, *Foreward to MODEL CODE OF EVIDENCE* at 22-30 (1942); Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L. J. 607 (1943).

<sup>105</sup> See note 101 *supra*.

<sup>106</sup> Sterk, *supra* note 100, at 466-69.

<sup>107</sup> *Id.* at 467; see Coburn, *supra* 4, at 602-03; Nelson, *Domestic Tranquility and the Right to Privacy: Is There a Right to Privacy within the Family?*, 18 S. TEX. L. J. 121 (1976).

<sup>108</sup> See text accompanying notes 34-38 *supra*. See also *United States v. United States District Court*, 407 U.S. 297, 314-15 (1972) (excluding evidence obtained through a warrantless wiretap); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending the exclusionary rule to improper state conduct); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (evidence obtained in an unreasonable intrusion upon one's privacy is inadmissible). The fact that a testimonial privilege might protect personal privacy does not give it Constitutional overtones, even though the same purpose may be served by the Constitutional right to privacy. *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972). See generally Note, *The Privilege Argument — How It Has Fared in Constitutional Law*, 40 MINN. L. REV. 486, 495 (1956); see also *Horn Silver Mining Co. v. New York*, 143 U.S. 305, 315 (1892).

privilege may be justified as a promotion of free communication within a relationship.<sup>109</sup> While this rationale may overlap with protecting personal privacy, it can be distinguished from the latter in that it protects and encourages relationships rather than individual interests. Thus, where free communication is essential to the satisfactory maintenance of a socially desirable relationship, a privilege from forced disclosure promotes the sort of communication that is necessary.<sup>110</sup> Finally, a privilege may be justified when forcing the witness to testify is naturally repugnant to society's sensibilities.<sup>111</sup>

Based on the policies underlying the existing testimonial privileges,<sup>112</sup>

<sup>109</sup> WIGMORE, *supra* note 1, at § 2285; Moser, *supra* note 11, at 17-18; *Husband-Wife Privileges*, *supra* note 11, at 218-19.

<sup>110</sup> WIGMORE, *supra* note 1, at § 2285; Sterk, *supra* note 100, at 469. A striking example of the need for a privilege to promote free communication is the privilege for psychotherapist-patient communications. Coburn, *supra* note 4, at 618-21; Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 184 (1960). A psychotherapeutic relationship is one in which a party feels free to discuss his problems openly without fear that his confidence will be betrayed. Coburn, *supra* note 4, at 618. Such a relationship is generally considered to be impossible where there is a constraint on free communication, such as the possibility that disclosure will be compelled in court. *Id.* at 618-21; *accord*, Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 616-20 (1964) [hereinafter cited as Fisher]; Ketcham, *Legal Renaissance in the Juvenile Court*, 60 NW. U. L. REV. 585, 593-95 (1965); Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731, 750 (1957); Rosenheim, *Privilege, Confidentiality, and Juvenile Offenders*, 11 WAYNE L. REV. 660, 663 (1965); Slovenko, *Psychotherapy and Confidentiality*, 24 CLEVE. ST. L. REV. 375, 376 (1975).

<sup>111</sup> Sterk, *supra* note 100, at 469; Fisher, *supra* note 110, at 623-25; *see* Mullen v. United States, 263 F.2d 275, 281 (D.C. Cir. 1958) (confidential communications from a penitent to priest should be privileged because forced disclosure would be "shocking to the moral sense of the community").

<sup>112</sup> There are four testimonial privileges which have been widely recognized. The first is the attorney-client privilege. WIGMORE, *supra* note 1, at §§ 2290-2329. For many years it has been recognized that effective counsel is essential to fair litigation and that such counsel is impossible absent complete confidentiality within the attorney-client relationship. *Id.* at §§ 2285, 2291; Sterk, *supra* note 101, at 467-69. *See also* Colton v. United States, 306 F.2d 633 (2d Cir. 1962); Wade v. Ridley, 87 Me. 368, 373, 32 A. 975, 976 (1895); Greenough v. Gaskell, 1 Myl. & K. 98, 103, 39 Eng. Rep. 618, 620 (Ch. 1833). The attorney-client privilege may be justified, therefore, as a protection of free communication where such communication is essential to a socially desirable relationship. *See* MODEL CODE OF EVIDENCE, rule 210, Comment (1942). *See generally* Note, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 56 NW. U. L. REV. 235, 236 (1961).

The second of the existing privileges is the doctor-patient privilege. There was no privilege at common law for surgeons or doctors, WIGMORE, *supra* note 1, at § 2380, however, the privilege is a creature of statute in most states. *See, e.g.*, MICH. COMP. LAWS § 600.2157 (1968); OR. REV. STAT. § 44.040(1)(d) (1953). Though Wigmore criticizes the privilege, *see* WIGMORE, *supra* note 1, at 2380a, many commentators support its continued observance and its extension to psychotherapists. *E.g.*, Coburn, *supra* note 4, at 618-21; Fisher, *supra* note 110, at 620-37. *See also* note 111 *supra*.

The third of the major privileges is the priest-penitent privilege. Wigmore, *supra* note 1, at § 2394. This privilege protects confidential communications from a penitent to his priest provided the priest is acting in his official capacity. *Id.* There is little justification for this privilege other than the natural repugnance of forcing a priest to disclose the confidences of his penitent. It is generally agreed, however, that removal of the privilege would be of little

Wigmore formulated a test for the creation of a privilege<sup>113</sup> which has been widely accepted.<sup>114</sup> The test, cited by the *Doe* court, sets forth four conditions which suggest when application of, or creation of, a testimonial privilege is appropriate.<sup>115</sup> First, the communications which are sought to be characterized as privileged must have originated in confidence that they would not be disclosed.<sup>116</sup> Clearly there are communications from child to parent which are intended to be confidential.<sup>117</sup> Where the facts of the case indicate that the communication in question was not intended to be confidential, they should not be privileged.<sup>118</sup>

Second, Wigmore's test requires that confidentiality be essential to the full and satisfactory maintenance of the relationship.<sup>119</sup> There seems to be a consensus that confidentiality is absolutely essential to the parent-child relationship.<sup>120</sup> The basis for the consensus on this point is the belief that communication is essential to the relationship and that such communication is stifled by a lack of confidentiality.<sup>121</sup> When a child's confidences are revealed, further communication between the parent and child is stifled and the family is unable to perform the function which society expects of it.

Third, Wigmore's test requires that the relationship be one which society feels is worthy of protection.<sup>122</sup> Society seeks to protect the parent-child relationship in order to minimize such social problems as delin-

help to the fact-finding process. Coburn, *supra* note 4, at 609.

The fourth of the major privileges is the privilege for marital communications. See note 11 *supra*. The marital privilege must be distinguished from common law incompetency and from the anti-marital fact privilege. At common law, one spouse was incompetent to testify for or against the other spouse. This rule was based on the belief that a party is not a reliable witness in his own case and on the general acceptance of the notion that a man and his wife were one. *Husband-Wife Privileges*, *supra* note 11, 208-09. Only Pennsylvania retains the incompetency doctrine entirely though traces of it remain in other states as well. *Spousal Testimony*, *supra* note 11, at 293-96.

The anti-marital fact doctrine began to develop as the incompetency doctrine gradually disappeared. *Husband-Wife Privileges*, *supra* note 11, at 209-10. This doctrine gave a party-spouse the right to prevent testimony against him by the witness-spouse in order to protect the marital relationship and to prevent perjury. *Id.*; see WIGMORE, *supra* note 1, at § 2228. Some states retain the privilege for anti-marital facts, though it is distinct from the privilege for confidential communications. See, e.g., CAL. EVID. CODE § 970 (West Supp. 1966).

The privilege for confidential marital communications protects the marital relationship, *Hawkins v. United States*, 358 U.S. 74, 77 (1958); Moser, *supra* note 11, and applies in all American jurisdictions. *Spousal Testimony*, *supra* note 11, at 293-96.

<sup>113</sup> WIGMORE, *supra* note 1, at § 2285.

<sup>114</sup> See, e.g., *Falsone v. United States*, 205 F.2d 734, 740 (5th Cir. 1953); *United States v. Funk*, 84 F. Supp. 967, 969 (E.D. Ky. 1949); *Morris v. Avallone*, 272 A.2d 344, 347 (Del. Super. 1970).

<sup>115</sup> WIGMORE, *supra* note 1, at § 2285.

<sup>116</sup> *Id.*

<sup>117</sup> Coburn, *supra* note 4, at 623.

<sup>118</sup> See note 11 *supra*.

<sup>119</sup> WIGMORE, *supra* note 1, at § 2285.

<sup>120</sup> See note 24 *supra*.

<sup>121</sup> *Id.*

<sup>122</sup> WIGMORE, *supra* note 1, at § 2285.

quency, crime, suicide and mental illness, all of which have been related to failing families.<sup>123</sup> To decrease the incidence of these problems, society feels the family should be fostered and protected. This is revealed by the fact that the family is afforded some constitutional protection.<sup>124</sup>

Finally, the Wigmore test requires that forced disclosure must be more destructive than constructive; it must hurt the relationship more than it helps further society's interest in criminal justice.<sup>125</sup> The *Doe* court pointed out the harm that would inure to the family by compelling parents to disclose their child's admissions.<sup>126</sup> Though the Supreme Court likely would deny that a parent-child privilege meets this requirement,<sup>127</sup> the Court has specifically left open the possibility of a statutory privilege created either by federal or by a state legislature.<sup>128</sup> It seems clear that whether the privilege meets this final requirement is a question best resolved by legislative bodies.

A comparison of the parent-child privilege under consideration to the existing marital privilege supports the conclusion that the creation of the new privilege would be justified.<sup>129</sup> The marital privilege is the result of an effort to protect the marital relationship, a relationship which society feels ought to be fostered.<sup>130</sup> The privilege is based on the belief that without free communication and confidentiality, a marriage cannot perform its social functions.<sup>131</sup> Thus, the marital privilege protects all confidential communications made during the marriage, even after divorce or death of one of the spouses.<sup>132</sup>

There are some exceptions to the marital privilege derived from the common law "necessity exception."<sup>133</sup> The exceptions vary from state to state but all involve situations where the marital relationship has deteriorated to a point at which it is no longer worthy of protection.<sup>134</sup> Many states have preserved the common law exception that the marital privilege does not apply where one spouse is tried for an assault upon the other.<sup>135</sup> In such

<sup>123</sup> See note 24 *supra*.

<sup>124</sup> See text accompanying notes 32-38 *supra*.

<sup>125</sup> WIGMORE, *supra* note 1, at § 2285.

<sup>126</sup> *People v. Doe*, 61 App.Div.2d 426, 432-33, 403 N.Y.S.2d 375, 380 (1978).

<sup>127</sup> See text accompanying notes 90-94 *supra*.

<sup>128</sup> *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972).

<sup>129</sup> The marital privilege is the most closely related to the proposed parent-child privilege. The other existing privileges involve communications made to one in his professional capacity. WIGMORE, *supra* note 1, at §§ 2300-04, 2382-83, 2394-96; see note 112 *supra*.

<sup>130</sup> See notes 11 & 112 *supra*.

<sup>131</sup> *Id.*; see *Hawkins v. United States*, 358 U.S. 74, 77 (1958); Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 *TUL. L. REV.* 101, 113 (1956).

<sup>132</sup> See notes 11 & 112 *supra*.

<sup>133</sup> WIGMORE, *supra* note 1, at § 2239; Hutchins & Slesinger, *supra* note 1, at 676-77.

<sup>134</sup> Twenty-seven states deny the application of the marital privilege in cases involving non-support or desertion. *Spousal Testimony*, *supra* note 11, at 293-96. Seventeen disallow the privilege in cases involving abandonment. *Id.* Sixteen states deny it in cases involving crimes against the other spouse or their children. *Id.* Thirteen states refuse the privilege in cases involving a civil action by one spouse against the other. *Id.*

<sup>135</sup> *Id.*



a trial, civil or criminal, the value of the familial relationship to society has decreased to the point that it is subordinate to society's interest in finding the facts and in protecting past and potential victims.

Confidentiality would seem to be as essential to the parent-child relationship as it is to the husband-wife relationship.<sup>136</sup> Moreover, both relationships are ones which society feels ought to be sedulously fostered.<sup>137</sup> It is clear that a communication between a parent and child is as likely to be confidential as a communication between husband and wife.<sup>138</sup> Finally, every American jurisdiction and many foreign jurisdictions have decided that the harm that would be caused to the marital relationship by compelling disclosure of confidential communications within that relationship outweighs the benefit of disclosure to the judicial process.<sup>139</sup> It would seem reasonable to assert that this value judgment is equally true of the parent-child relationship and that the statutory creation of a privilege for confidential parent-child communications is therefore justifiable.

In analyzing the decision of the New York Supreme Court in *People v. Doe*, one must look both at the court's assertion that the parent-child relationship is constitutionally protected and at the court's finding that the state's interest in the fact-finding process is not sufficiently compelling to justify an abridgment of that constitutional protection. With respect to the constitutional protection, the court's reasoning is very sound. The United States Supreme Court has clearly established that there exists a fundamental right to familial integrity.<sup>140</sup> That right protects the parents' authority to direct the upbringing and education of their children<sup>141</sup> and the individual's right of privacy in deciding whether to raise a family<sup>142</sup> and with whom to raise a family.<sup>143</sup> A simple extension of this right of privacy justifies protecting a child-parent communication.

Some uncertainties arise, however, with respect to the *Doe* court's finding that the state's interest in the fact-finding process is not sufficiently compelling to justify an infringement of familial integrity.<sup>144</sup> The United States Supreme Court has had opportunities to evaluate the importance of the grand jury and of the fact-finding process in general, and has established that the state's interest in the search for truth is compelling.<sup>145</sup> The Court has upheld laws which furthered that interest by requiring every man to give his testimony even though such laws imposed upon constitu-

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<sup>136</sup> Coburn, *supra* note 4, at 623-25; see Committee on Psychiatry and Law, *Confidentiality and Privileged Communications in the Practice of Psychiatry*, 45 GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, 95 (1960); Goldberg, *Social Work and Law*, 7 CHILDREN 168 (1960).

<sup>137</sup> See notes 24 & 112 *supra*.

<sup>138</sup> *Id.*; see notes 11 & 108 *supra*.

<sup>139</sup> See note 112 *supra*.

<sup>140</sup> See text accompanying notes 32-64 *supra*.

<sup>141</sup> See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>142</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 152-54 (1973).

<sup>143</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>144</sup> *People v. Doe*, 61 App.Div.2d 425, 433-34, 403 N.Y.S.2d 375, 380 (1978).

<sup>145</sup> See text accompanying notes 65-89 *supra*.

tionally protected rights,<sup>146</sup> including a right specifically enumerated in the first amendment.<sup>147</sup> The *Doe* court, however, considered the state's interest in the fact-finding process insufficient to warrant an intrusion upon the right to familial integrity. The propriety of that judgment is doubtful.

The *Doe* court's impression of the importance of the parent-child relationship is one that is widely shared.<sup>148</sup> To protect that relationship and to avoid the questionable assertion that familial integrity outweighs the search for evidence, a statutory privilege could be drafted with appropriate limits and exceptions. Both the *Doe* court and the United States Supreme Court recognize this alternative, and the Supreme Court has found a statutory privilege preferable to the recognition of a new constitutional right to refuse to testify.<sup>149</sup>

A testimonial privilege for confidential communications between parent and child meets all of the requirements of the widely accepted Wigmore test.<sup>150</sup> It would protect confidential communications within a relationship to which confidentiality is essential, a relationship which society deems worthy of protection from the injury that would inure to it by compelling disclosure of the communication. The new privilege would be logically consistent with the existing privilege for confidential communications within the marital relationship.<sup>151</sup> All that is necessary is for the state legislatures to decide that protection of the parent-child relationship warrants the imposition of a burden upon the judicial system by further limiting the sources of relevant facts. Unless and until the legislature makes that decision, the *Doe* court's decision will remain open to question, and the parent-child relationship may be left unprotected.

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<sup>146</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>147</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>148</sup> See note 24 *supra*.

<sup>149</sup> 408 U.S. at 706.

<sup>150</sup> WIGMORE, *supra* note 1, at § 2285; see text accompanying notes 112-118 *supra*.

<sup>151</sup> See text accompanying notes 119-29 *supra*.

