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CONFIDENTIAL COMMUNICATION BETWEEN PARENT AND CHILD: A CONSTITUTIONAL RIGHT

Prior to 1978 no jurisdiction, either by statute or common law decision, protected by a testimonial privilege the confidential communications shared between parents and their children. People v. Doe is the seminal case which recognized a constitutionally based privilege arising out of the developing federal right to privacy. This Comment explores the political theory, the psychological data, and the case law which mandates the protection of confidences born of this most intimate relationship.

Shall it be said . . . , "[l]isten to your son at the risk of being compelled to testify about his confidences?"¹

Parents and children probably never stop to consider whether statements made between them in private are subject to a legally sanctioned testimonial privilege. In fact, no state currently protects such confidential communications between parent and child either by statute or by common law. Yet many parents, even if pressed, would refuse to testify as to what their child confided to them. There may be circumstances when an individual must answer to a personal sense of morality even in the face of the law's mandate to testify.²

Recently, an intermediate New York appellate court observed that even absent legislative or common law protection a parent might refuse to testify as to a child's confidences.³ The court based this conclusion upon a federal constitutional right to privacy.⁴ This Comment will briefly discuss the New York court's

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4. Id. at 430-33, 403 N.Y.S.2d at 378-80. The Doe court's finding that a federal right to privacy protects the child's confidential communications is consistent with the broader developments in the law which recognize the constitutional rights of children. The Supreme Court has emphasized that the safeguards of the Bill of Rights and the fourteenth amendment are not "for adults alone." In re Gault, 387 U.S. 1, 13 (1967). See Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976); L.
opinion, then systematically evolve a constitutionally based parent-child testimonial privilege. The discussion will initially set forth an evidentiary approach to privileges and will then explore the political tradition of privacy and the family from a constitutional perspective. Additionally, the Comment discusses the psychological importance of confidentiality within the family context to emphasize that this privilege is of constitutional magnitude. Finally, a few of the limitations of a constitutionally protected confidential parent-child privilege will be suggested.

BACKGROUND: PEOPLE V. DOE

In 1978, the Appellate Division of the New York Supreme Court, in People v. Doe, concluded that parents cannot be compelled to testify before a grand jury as to the confidential statements that their child previously made to them. Mr. Justice Denman, speaking for the court, found that the confidential communications were not protected by statute or by the common-law evidentiary privileges. Notwithstanding this lack of protection, the court held that the communications were within the protected zone of privacy created by the Federal Bill of Rights and made applicable to the states through the fourteenth amendment. In reaching this determination, the Doe court considered the United States Supreme Court cases that recognize the critical role that the family plays within the constitutional scheme. The court coupled with this the Supreme Court's acknowledgment that the family requires a favorable setting of privacy and autonomy. Once the constitutional value of family privacy was implicated, the Doe


6. Id. at 435 n.9, 403 N.Y.S.2d at 381 n.9. The court indicated in this note that it was not addressing a situation in which parents wished to testify and their child asserted a privilege. That situation would raise the broader question of who the holder of the privilege should be. Certainly, if the underlying premise of the privilege focuses on the vulnerability of the child, then the child must hold the privilege. Parents can assert the privilege on the child's behalf unless he knowingly and voluntarily waives the privilege. Whether the parents hold the parent-child privilege in their own right is beyond the scope of this Comment. If they do, the justification must be some theory other than the critical role that confidentiality plays in the child's development.

7. Id. at 428-29, 403 N.Y.S.2d at 377-78.

8. Id. at 430-33, 403 N.Y.S.2d at 378-79.

9. Id. at 428-33, 403 N.Y.S.2d at 378-80.
court balanced the state's interest in fact-finding against both the state's interest and the individual's interest in securing the family as a viable institution.\(^\text{10}\)

The court's consideration of the intrusion into parent-child communications as contrary to social utility weighed heavily in its unanimous holding. This decision was premised on psychological evidence that indicated that the child's "emotional stability, character and self-image" find their origin in the family\(^\text{11}\) and that the "atmosphere of trust and understanding without fear that his confidences" will be broken are essential to the development of stability in the child's personality.\(^\text{12}\) In conclusion, the Doe court reasoned that the price of obtaining the testimony was too great.\(^\text{13}\)

In addition to the social disutility considerations, the justices experienced an "instinctive revulsion" to requiring parental disclosure of their child's confidences.\(^\text{14}\) This feeling seemed to be a substantial factor in the constitutional balance. The "instinctive revulsion" and the perceived threat to the family as an institution within the constitutional framework convinced the court that the "right to privacy" barred disclosure. The Doe court concluded that the United States Constitution protects this critical confidential relationship\(^\text{15}\) despite the fact that no previously established evidentiary privilege applied.

**THE BACKDROP OF EVIDENTIARY PRIVILEGES**

A well-established proposition of the law of evidence entitles a court of justice to "every man's evidence."\(^\text{16}\) Thus, the law places an affirmative duty on every citizen to give testimony when required. As Professor Wigmore pointed out, "the demand comes, not from any person or set of persons, but from the community as

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10. Id. at 432-33, 403 N.Y.S.2d at 380.
12. See authorities cited note 11 supra. See also authorities cited notes 14-16 infra.
15. 61 App. Div. 2d at 434, 403 N.Y.S.2d at 380.
a whole—from justice as an institution and from law and order as indispensable elements of civilized life.” Because the demand to testify is for the good of the entire society, no man can refuse the societal mandate in order to protect his own interest unless a recognized privilege not to testify applies. Privileges are sparingly created and narrowly construed. The belief is that without full investigation and disclosure of all potential evidence, truth cannot be ascertained and justice served.

The creation of any privilege should not be an arbitrary and irrational obstacle to the search for truth. Rather, a privilege should arise only when society makes the reasoned determination that the protection of some individual interest is of transcendent importance. Only then can the interest in fact-finding be superseded. Certainly, the expedient elicitation of testimony is only one of the paramount values in a civilized society. Society, by permitting certain testimonial privileges, admittedly hampers the quest for truth in particular instances, thus acknowledging that there are other values which must be placed in the balance. “Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much.”

17. Id. at 72-73.
18. Bentham, one of the leading opponents of testimonial privileges, illustrated this proposition by stating:

[Everybody is obliged to attend, and nobody complains of it. Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.]


Most jurisdictions, by statute or common law decision, sanction limited testimonial privileges protecting certain relationships considered to be critical. Recognition of the desirability of protecting these special relationships has been traced, in part, to Roman law. The Romans felt that it was naturally repugnant to disrupt the fidelity inherent in intimate relationships. The creation of a testimonial privilege may also arise because of the disutility of compelling testimony. No doubt one of the strongest and yet most difficult rationales to substantiate is based upon the belief that the parties might be deterred from engaging in an interaction which society wants to foster. In most instances, some combination of both theories interplays to justify a common law or a statutory privilege.

The common law right to privacy encompasses these preceding justifications while affording broader protection. Jeremy Bentham acknowledged the existence of a right to privacy that protects the individual from unnecessary intrusions by the


26. According to one commentator:

At present, there is one, and only one, justification—that the relationship is rendered ineffective either because a person is deterred from entering into it or because the person is frightened into non-disclosure during its course, and, that the effect of such an absence of the privilege is undesirable in light of the relationship to society.

Fisher, supra note 24, at 611.

27. Id. at 624. However, some theorists reject the utilitarian approach entirely. They prefer to adopt a “theory of rights” approach to privileged communications. “These non-utilitarians argue . . . that persons have moral rights by virtue of their humanity, and that these rights cannot be over-ridden simply to satisfy a general utilitarian calculus.” Note, The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 HARV. L. REV. 464, 480 n.66 (1977). See also note 125 infra.

state. A similar recognition of this right may have led the United States Congress, in January 1975, to adopt broad common-law confidential privileges. Congress enacted these privileges in place of proposed court rules that would have greatly reduced the existing testimonial privileges. Congress, by creating broad testimonial privileges protecting confidential communications, was deferring to the societal mandate that a zone of privacy be maintained.

Confidential communications between husband and wife fall within a protected zone sanctioned in most jurisdictions by a statutory privilege. Various other relationships giving rise to confidential privileges include attorney-client, priest-penitent,

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physician-patient,\textsuperscript{36} and psychotherapist-patient.\textsuperscript{37} Considering the intimate relationships that are protected by a confidential communication privilege, it is striking that no jurisdictions have protected the private conversations of parent and child.\textsuperscript{38} Surely, the legislatures and courts could not have concluded that the only confidences within the family worthy of protection are those between spouses. Are a child's confidences less worthy of protection?

There is hardly a more fitting situation to apply Federal Circuit Judge Edgerton's formula\textsuperscript{39} than the child-parent interaction. A "communication made in reasonable confidence" must be protected by a privilege because failure to do so is "shocking to the moral sense of the community."\textsuperscript{40} The law can-


\textsuperscript{38.} \textit{See generally} Ames v. Ames, 231 Mich. 347, 204 N.W. 117 (1925) (lower court's refusal to permit son to testify in divorce proceeding held to be reversible error); \textit{see also} \textit{In re} Terry W., 59 Cal. App. 3d 745, 130 Cal. Rptr. 913 (1976), in which the court was confronted with the question of whether the Constitution establishes a child-parent confidential privilege. The \textit{Terry} court denied the privilege absent more persuasive authority from the United States Supreme Court. \textit{Id} at 749, 130 Cal. Rptr. at 915.

\textsuperscript{39.} Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958).

\textsuperscript{40.} \textit{Id.} at 281. \textit{Accord}, 8 J. WIGMORE, \textit{Evidence} § 2285 (McNaughton rev. ed. 1961). Wigmore's four criteria for the creation of a confidential privilege seem to be satisfied by the child-parent relationship:

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

not conclude that the absence of confidentiality will have no effect on the growth of the child and his development into a functioning individual within the social processes of a democracy.

**Privacy and Democracy**

Underlying the rationale for the creation of confidential testimonial privileges is a fundamental understanding of the respective positions of the individual and the state. The concept of privacy arises out of this balance. Privacy is considered the sine qua non to development of human dignity. Without governmental respect for individual privacy, relationships based on love and friendship cannot flourish.

The right to withhold information is an important component of individual privacy. Privacy also entails the need to communicate as an essential aspect of the individual's nourishment and growth. A society that does not afford this protected zone to the individual does not foster his growth. This lack of growth, in turn, hinders the development of the family into a strong, independent institution within the societal structure. Thus, the political system and its values will determine the degree to which the individual's privacy interest is respected by government. Confidential relationships will not inspire the protection of testimonial privileges when the political scheme does not place strong emphasis on privacy and resulting individual autonomy.

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46. The autonomy that privacy protects is also vital to the development of individuality and consciousness of individual choice in life. Leonine Young has noted that "without privacy there is no individuality. There are only types. Who can know what he thinks and feels if he never has the opportunity to be alone with his thoughts and feelings?"


A totalitarian state is characterized by a high level of surveillance and disclosure.49 Neither the individual nor his associations are free from the state's intense scrutiny. By contrast, the modern constitutional democracy draws its lifeblood from the independent and self-reliant individuals which it nurtures.50 This is achieved through the media of privacy and the family.

Liberal democratic theory assumes that a good life for the individual must have substantial areas of interest apart from political participation—time devoted to sports, arts, literature, and similar non-political pursuits. . . . It maintains a strong commitment to the family as a basic and autonomous unit responsible for important educational, religious, and moral roles, and therefore the family is allowed to assert claims to physical and legal privacy against both society and the state.51

This theoretical underpinning of the right to privacy is indicative of the values at stake when the government arguably encroaches upon the individual's confidential relationships. The search for a confidential child-parent privilege amidst the constitutionally protected right to privacy must always touch upon the nature of the democratic process. Whether this particular relationship warrants constitutional safeguards depends on both the significance of the child-parent relationship within the political structure and the burden placed upon that relationship by the failure to sanction a zone of privacy.

The Constitutionally Protected Zone of Privacy

At the outset it must be stressed that neither the United States Constitution nor the Bill of Rights makes explicit mention of a right to privacy. Yet the United States Supreme Court recognized long ago that the absence of an enumerated right is not necessarily a bar to constitutional protection.52 A constitutional right may

49. Id. at 23. Accord, H. ARENDT, ORIGINS OF TOTALITARIANISM 389-419 (1959); R. LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM (1963). The totalitarian regime demands total loyalty and the breakdown of all confidences. Id. at 426; B. MUSSOLINI, FASCISM, DOCTRINE, AND INSTITUTIONS (1935); Hollander, Privacy: A Bastion Stormed, in 12 PROBLEMS OF COMMUNISM 1 (1965); Mead & Calas, Child Training Ideas in a Post Revolutionary Context: Soviet Russia, in CHILDHOOD IN CONTEMPORARY CULTURES 173, 190-91 (1955).


52. Boyd v. United States, 116 U.S. 616, 635 (1886); See also Kauper, Penum-
be present by implication. In *Boyd v. United States*, the Court asserted that a constitutional provision protecting individual rights must be liberally construed.54

One such liberal articulation of a general right to individual privacy can be found in Mr. Justice Brandeis' dissenting opinion in *Olmstead v. United States*.55 Mr. Justice Brandeis posited that the framers of the constitution “sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the *right to be let alone...*”56 Appreciation of this value of privacy, as a component of civilized life, led the Supreme Court to shield the *family* and its autonomy.

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54. Id. at 635. *See also In re Pacific Ry. Comm'n*, 32 F. 241, 250 (1887).
55. 277 U.S. 438, 471 (1928).
56. Id. at 478 (Brandeis, J., dissenting) (emphasis added).
57. The issue of what constitutes the "family" is not altogether clear in the Supreme Court decisions. *See the Court's recent discussion in Smith v. Organization of Foster Families*, 431 U.S. 816 (1977). The Court held that, within the New York program of foster care, a foster parent did not have the same claim to constitutional safeguards as the natural parents. However, the majority acknowledged that the importance of the familial relationship, to the individuals involved and to the society, stems from the *emotional attachments* that derive from the *intimacy of daily association*, and from the role it plays in "promoting a way of life" through the instruction of children, *Wisconsin v. Yoder*, 405 U.S. 205, 231-233 (1972), as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.


Additionally, in *Smith v. Organization of Foster Families*, 431 U.S. at 845, Mr. Justice Brennan suggested that were he required to choose between protecting the child's natural parents or the foster parent, he would shield the former because the ties are "intrinsic human rights." Id. *See Note, The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudication*, 44 BROOKLYN L. REV. 63 (1977). The question then arises if a foster family would be entitled to the same substantive rights as the natural parents. The majority indicates that this does not necessarily follow. Smith v. *Organization of Foster Families*, 431 U.S. at 843 n.48. Yet the "parent" in *Prince v. Massachusetts*, 321 U.S. 158 (1944), was an aunt and not a natural parent. *See Smith v. Organization of Foster Families,
As early as 1923, the Court, in *Meyer v. Nebraska*, held unconstitutional a statute that prohibited families from formally educating their children in modern foreign languages.\(^5\) This statute was to apply until the student reached the ninth grade. Construing the language of the fourteenth amendment,\(^6\) the Court concluded that its safeguard extends not only to bodily restraint but also ensures the right "to acquire useful knowledge, to marry, establish a home and bring up children."\(^7\) This expansive interpretation of the fourteenth amendment was derived from the Court's understanding that the family unit is functionally at the heart of democracy.\(^6\) Further, the decision is premised on the belief that the family must be permitted autonomy.\(^6\) Absent this autonomy, the family cannot foster the child's development adequately to achieve the traditional goals of our highly individualized democratic society.

A subsequent articulation of this doctrine of family educational...
autonomy serves to illuminate further the spectrum of this zone of privacy. The Court, in *Pierce v. Society of Sisters*, concluded that a state cannot compel children between the ages of eight and sixteen to attend public school. Parents have a constitutional right to send their children to parochial school. The *Pierce* Court reasoned that

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64. *Id.* at 534-35.
65. *Id.* at 535 (emphasis added).
67. The requirement of a compelling state interest is one component of the strict scrutiny model of equal protection. “[T]he idea of strict scrutiny acknowledges that other political choices—those burdening fundamental rights . . . must be subjected to close analysis in order to preserve substantive values . . . [and] liberty.” *See L. Tribe, AMERICAN CONSTITUTIONAL LAW* § 16-6, at 1000 (1978). The Supreme Court has applied similar language in numerous cases. *See*, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972), where the court expressed this underlying rationale:

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68. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The *Yoder* Court held that the state did not show an interest in compulsory high school education of “sufficient magnitude” to overshadow the Amish family’s interest under the “free exercise” clause of the first amendment. *Id.* at 214. The majority closely scrutinized the compulsory education scheme and found it unconstitutional in its application to the peculiarities of the Amish child’s education. *Id.* at 221-29. *But cf. Zablocki v. Redhail*, 434 U.S. 374, 407 (1978) (Mr. Justice Rehnquist indicated in his dissent that burdening of the family need not always activate the most demanding scrutiny).

Assuming that a fundamental family interest is recognized, the government must then establish a compelling interest to warrant intrusion on the asserted right. Thus, if a child-parent confidential communication is acknowledged as a “fundamental right,” then it follows that a substantial government interest must be shown in order to intrude upon it. Surely, speed and efficiency in the ascertain-
zone of family rights stop with the parents' freedom to make educational decisions. Mr. Justice Harlan, dissenting in Poe v. Ullman,69 submitted that the intimate relations of the marital bedroom are shielded from all substantial and arbitrary intrusions or restraints by government.70 The majority in Griswold v. Connecticut later adopted similar reasoning.71 The Griswold Court's opinion, written by Mr. Justice Douglas, concluded that the Connecticut statutory scheme which prohibited contraceptives was unconstitutional because of the substantial burden it placed upon a protected zone of privacy.72 Summing up, Justice Douglas stressed:

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. . . . Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.73

More recent cases74 have extended the holding of Griswold beyond the marital community decisions regarding birth control to other aspects of intimate family relations. State statutes regulating

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69. 367 U.S. 497 (1961). The majority never reached the merits in Poe. Id. at 497.
70. Id. at 553-54 (Harlan, J., dissenting).
72. Griswold v. Connecticut, 381 U.S. at 485. The state failed to demonstrate a “subordinating interest which is compelling.” Id. at 497 (Goldberg, J., concurring) (quoting Bates v. Little Rock, 361 U.S. 516, 524 (1960)).
ing or prohibiting abortion and regulating family living arrangements have confronted the Court. These cases have necessitated the Supreme Court’s further examination of the doctrines surrounding family privacy and autonomy.

In Moore v. City of East Cleveland, the City sought to regulate the type of family members permitted to occupy a “single family dwelling.” Writing for the majority, Mr. Justice Powell remarked: “[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”

Earlier decisions of the Court acknowledging the sanctity of the family unit as the bulwark of democracy comprised the foundation of Justice Powell’s reasoning.

The language of Moore, when considered in conjunction with the discussion of privacy found in Whalen v. Roe, goes far to elucidate the Court’s present view of familial privacy. Professor Tribe, in his treatise American Constitutional Law, summed up the significance of the Whalen decision: The rights described in Whalen comprise more than the “least common denominator” of the Supreme Court’s prior holdings with “respect to marital

75. See Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (state must demonstrate compelling interest and necessity to burden a woman’s “fundamental right” to an abortion). See note 68 supra.


77. Id. at 494-97. The state’s statute recognized few categories of related individuals as “family” for the purpose of living together. See also note 51 supra (discussion of the family).


79. The “Constitution protects the sanctity of the family precisely because the institution . . . is deeply rooted in this Nation’s history and tradition. It is through the family that we inculcate . . . many of our most cherished values . . .” Id. at 503-04 (emphasis added). See also Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 305 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

Compare Griswold v. Connecticut, 381 U.S. at 495-96 (Goldberg, J., concurring), and id. at 502-03 (White, J., concurring), with Moore v. City of E. Cleveland, 431 U.S. at 549 (White, J., dissenting). Mr. Justice White believes that the due process clause extends “substantial protection to various phases of family life.” Moore v. City of E. Cleveland, 431 U.S. at 549. The right to live in a home with more than one grandchild is not within the scope of this protection. See Zablocki v. Redhail, 434 U.S. 374, 407 (1978) (Rehnquist, J., dissenting). See note 60 supra.

Further, confidentiality is more fundamental to the family relationship than is the choice of which members of the extended family with whom to live. Family confidentiality is bound up in the maintenance of various aspects of the family itself. Griswold v. Connecticut, 381 U.S. 479 (1965) (recognition of spousal confidentiality). See also Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977); In re Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970) (recognition of psychotherapist-patient confidentiality).

choice, procreation, contraception, and child rearing.”

In Whalen, Mr. Justice Stevens, writing for a unanimous Court, indicated that the Supreme Court’s doctrine of the right to privacy encompasses two distinct rights. The first right secures the somewhat general “individual interest in avoiding disclosure of personal matters.” The second right protects the interest of the individual or of the family “in independence in making certain kinds of important decisions.”

Whalen is critical to a discussion of confidential privileges. The issue addressed by the Court in Whalen focused on the extent to which a patient has a right to withhold information that he does not wish to share with others. The Court upheld the New York drug control scheme requiring limited disclosure of specified regulated drugs. In so holding, the Court closely examined the asserted legislative purpose and the elaborate safeguards to the individual’s privacy which were built into the statute. Given the circumscribed disclosure and the numerous safeguards, the Court did not require the state to prove that patient information is absolutely necessary. Normally, when a fundamental interest is at stake the state must make a greater showing of necessity.

The scope of disclosure required in Whalen should be contrasted with the ubiquitous disclosure of a public trial proceeding. The threat to privacy is greatly magnified when the facts are

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83. Whalen v. Roe, 429 U.S. at 599. See id. n.25.
84. Id. at 600. However, Mr. Justice Stewart does not recognize a “general” right to privacy. Id. at 607-09 (concurring opinion).
85. In comparison, the issue addressed in this Comment concerns the parents’ or child’s right to withhold information from the general public.
88. Id. at 592-93.
89. The information was to be kept in a secured data bank. Seventeen Department of Health employees and 24 investigators had access to the information. Additionally, the statute provided for a fine of up to $2,000 and one year’s imprisonment. Id. at 593-95.
90. Id. at 598. Mr. Justice Brennan, concurring, indicated that had the statute permitted broad dissemination of the information, only a compelling interest could overcome the patient’s right to privacy. Id. at 606. But see id. at 607-09 (Stewart, J., concurring).
91. See notes 67-68 and accompanying text supra.
bared to the entire world. Additionally, if the person disclosing the information is a member of the parent-child community, the constitutionally protected realm of family life is also involved. This added factor would weigh heavily in the balance against the state interest.\(^9\)

When government attempts to compel disclosure of confidential information in open court in a manner threatening\(^9\) to the psychological effectiveness of the child-parent relationship, the strictest judicial scrutiny should apply. The state must sustain a much greater showing of necessity than the *Whalen* Court required.

Until the New York court's decision in *People v. Doe*,\(^9\) the notion of a constitutionally sanctioned familial zone of privacy had not been extended to the situation of parent-child confidential communications.\(^9\) The creation of such a privilege would follow from an acknowledgment by the United States Supreme Court that confidential communications play a critical role in the family. The already recognized and secured values of family privacy and autonomy demand such a privilege. An examination of social-psychological theory\(^9\) will reveal that confidentiality is essential

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\(^9\) Consider Mr. Chief Justice Burger's statement:
The Court's refusal to afford constitutional protection to such commercial matters as bank records, *California Bankers Assn. v. Shultz*, 416 U.S. 21 (1974), or drug prescription records, *Whalen v. Roe*, 429 U.S. 589 (1977), only serves to emphasize the importance of truly private papers or communications, such as a personal diary or family correspondence. These private papers lie at the core of First and Fourth Amendment interests.


\(^9\) See notes 106-16 and accompanying text infra.

\(^9\) See text accompanying notes 8-10 supra.

\(^9\) The influence of scientific and social science literature in the legal decisionmaking process is now widely appreciated. Justice Brandeis held the firm conviction that courts must rely on facts and data. "Knowledge is essential to understanding; and understanding should precede judging. Sometimes, if we would guide by the light of reason, we must let our minds be bold." *Burns Baking Co. v. Bryan*, 264 U.S. 504, 520 (1924) (Brandeis & Holmes, JJ., dissenting). See *Adams v. Tanner*, 244 U.S. 590, 600 (1917) (Brandeis, J., dissenting); *A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS* 21 (1970).

In recent years the majority of the Court has looked to other scholarly professions for guidance before making major policy decisions. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972) (Court examined educational and social data in assessing the consequence to the Amish child of compulsory high school education); *Williams v. Florida*, 399 U.S. 78 (1970) (Court used social scientist's findings in considering choice between six and 12-member juries); *Powell v. Texas*, 392 U.S. 514 (1968); *Robinson v. California*, 370 U.S. 660 (1962) (studies indicated that certain types of drug abuse should be considered a disease); *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954) (Chief Justice Warren indicated that the Court's decision was supported by substantial psychological data). *Contra*, Doyle, *Can Social Science Data Be Used in Judicial Decision Making?*, 6 J.L. & Educ. 13 (1977). The author expressed doubts as to the real significance of social science in constitutional adjudication. "The decisive factor is the constitution, . . . the wording of the con-

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to the family relationship.

CONFIDENTIALITY AND INTERPERSONAL RELATIONS

Confidentiality is an essential aspect of certain socially beneficial relationships. In the absence of confidentiality, interaction might be avoided, but even if parties interact, the fear of disclosure might render the relationship ineffective to achieve its intended purposes. For example, in the psychotherapist-patient relationship the goal is the psychological adjustment of the patient. Therapy is brought about, not solely by any specific treatment, but principally by the quality of the patient-therapist interchange itself. When participating in this exchange, the patient reveals the most intimate aspects of his experiences to the psychotherapist "so that they can explore the meaning and experiential realities of his life." Privacy is imperative here.

97. For a discussion of the role of deterrence as an impetus to the creation of evidentiary privileges, see notes 26-27 and accompanying text supra.

98. Psychotherapy has been characterized as the "alteration of human behavior through interpersonal relationships." Comment, The Interest in the Practice of Psychotherapy, 8 Am. Psych. 48, 49 (1953), quoted with approval in Fisher, supra note 24, at 618. Accord, Note, The Psychotherapists' Privilege, 12 Washburn L.J. 297, 301 (1973).


But consider one commentator's observation that "[t]rust—not absolute confidentiality—is the cornerstone of psychotherapy. Talking about a patient . . . without his knowledge or consent would be a breach of trust." Slovenko, Psychotherapy and Confidentiality, 24 Clev. St. L. Rev. 375, 395 (1975).

Courts as well have acknowledged the therapist's need for confidentiality by recognizing a qualified constitutional right. This right arises out of the right of the patient to privacy. See Caesar v. Moundanos, 542 F.2d 1064 (9th Cir. 1976), cert. de-
Without privacy, there is a risk that the patient will be inhibited in his revelations and thus not gain the benefits of the relationship. 103

Similarly, the effectiveness of at least one aspect of the parent-child relationship is coextensive with the degree to which communication is fostered by confidentiality. The parent-child relationship is not a professional, therapeutic relationship. Nor does the promise of confidentiality act as an impetus to the creation of the relationship. 104 However, the fact that the relationship does not arise in anticipation of confidentiality does not in itself preclude the importance of confidentiality. Once the family comes into being, confidentiality becomes crucial.

The growth and effectiveness of any human being is dependent on the quality of his interpersonal relationships. 105 Interpersonal communications constitute a fundamental aspect of most human interaction. 106 According to one eminent family therapist, “communication is to relationships what breathing is to maintaining life.”107

Some communication, and its concomitant interpersonal relationship, will flourish only within the medium of privacy. 108 This is true even though the overall relationship between the parties may be sustained because of other needs. The parent-child relationship itself exists at least in part because of the child’s dependency. 109 Yet, the additional factors that come into play to make

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103. Fisher, supra note 24, at 618.
104. Compare the parent-child situation to the marital situation, in which confidentiality is not really an inducement. See Fawal, Questioning the Marital Privilege: A Medieval Philosophy in a Modern World, 7 Cum. L. Rev. 307 (1976), in which the author argues that the confidential communications of the marital relationship should be protected only if disclosure would result in damage to that relationship.
108. See notes 33-37 & 102 supra.
109. Dependency has been defined as the extent to which an individual relies on another or others for social reality. Schachter, Deviation, Rejection and Communication, in Approaches, Contexts, and Problems of Social Psychology 311, 322 (E. Sampson ed. 1964). See generally G. Clore, K. Renner, R. Rose, & J.
up the total parent-child interaction must not be taken to detract from the functional aspect of the interpersonal relationship dependent on communication. Just as in similar relationships rooted in communication, the guidance-oriented dimension of the parental role demands the backdrop of confidentiality. The Doe court, reaching a similar conclusion, stated:

It would be difficult to think of a situation which more strikingly embodies the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to his mother and father. There is nothing more natural, more consistent with our concept of the parental role, than that a child may rely on his parents for help and advice.

Absent confidentiality, the familial setting is not ripe for parents to act as their children's confessors and guides. Some findings have suggested that children who are free to confide in their parents show a greater social adjustment, exemplified by better social compliance, greater conformity with social norms, and emotional stability.

The functional effect of the parent-child interaction is consonant with the United States Supreme Court's recognition of the


See note 102 supra. See also Robinson, Testimonial Privilege and the School Guidance Counselor, 25 SYRACUSE L. REV. 911 (1974) (discussion of the analogous need to protect the confidentiality of the school guidance counselor).


“Free to confide” refers not only to an environment conducive to confidence but also to an inclination on the part of the child to confide. It is assumed that if an atmosphere is hostile to confidentiality the child will never develop the disposition to confide. Knowledge of the absence of confidentiality would surely stifle confession. See C. ROGERS, CLIENT-CENTERED THERAPY 343-45 (1951). See generally authorities cited note 102 supra. But the child need not be aware, at the time the statements are made, that the law does not protect his confidentiality. The spectacle of attempting to force disclosure is destructive in its own right. People v. Doe, 61 App. Div. at 433, 403 N.Y.S.2d at 380; Coburn, Child-Parent Communications: Spare the Privilege and Spoil the Child, 74 DICK. L. REV. 599, 628-29 (1970).


role of the family in American life.\textsuperscript{117} Thus,

[j]f 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.\textsuperscript{118}

If the family is to succeed in its constitutionally acknowledged posture, its right to privacy must be respected. The Doe court appropriately extended constitutional protection to the confidential dimension of family life. Preservation of the family necessitates this sanction of confidentiality.

**PARAMETERS OF THE CHILD-PARENT ZONE OF PRIVACY**

An attempt to posit the entire scope of the proposed child-parent confidential privilege would be futile. However, there are some general principles that a court should consider. "Due process" itself cannot be reduced to a formula.\textsuperscript{119} It reflects the balance that "our nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."\textsuperscript{120} When a "fundamental" interest is implicated, a court should carefully scrutinize the asserted state interest.\textsuperscript{121} This process operates within the context of each set of facts. The dimensions of the individual's zone of privacy evolve with the case law. This case-by-case adjudication "accords with the tried and traditional" approach to defining the scope of a constitutional right.\textsuperscript{122}

In the instance of the child-parent communication, the state's interest in obtaining testimony cannot be doubted.\textsuperscript{123} Usually, however, the interest of the individual and of society in protecting "the parent-child relationship is of such overwhelming significance that the state's interest in fact-finding must give way."\textsuperscript{124} The destructiveness of requiring disclosures overshadows the loss of potential evidence in most instances. Yet the privilege is not

\textsuperscript{117.} See notes 58-78 and accompanying text supra.

\textsuperscript{118.} People v. Doe, 61 App. Div. 2d at 433, 403 N.Y.S.2d at 380.


\textsuperscript{120.} Id.

\textsuperscript{121.} See notes 67-68 and accompanying text supra.

\textsuperscript{122.} Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Powell, J., concurring).

\textsuperscript{123.} People v. Doe, 61 App. Div. 2d at 433-34, 403 N.Y.S.2d at 380.

\textsuperscript{124.} Compare id., with Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977), and In re Lifschutz, 2 Cal. 3d 413, 467 P.2d 557, 85 Cal. Rptr. 829 (1970). These latter cases involved a psychotherapist asserting his patient's rights when the patient had tendered the issues into evidence. These courts' results might have been otherwise had the case involved a patient defendant asserting the confidential privilege.
The child-parent privilege might be restricted in the following situations: When the child is the chief prosecution witness, the defendant's sixth amendment right to confrontation might preclude the application of the privilege. The accused must be permitted to impeach a confronting witness by the introduction of prior inconsistent statement to call into question the credibility of the witness' testimony. Similarly, to permit the assertion of a confidential privilege relevant to an issue which the child himself tendered into evidence would be manifestly unfair. Nor should the privilege apply to protect communications made to enable the child to commit a future crime or fraud. This exception would not remove the privilege as to the confession of previous

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Consider Branzburg v. Hayes, 408 U.S. 665 (1972), in which the majority, according to Justice Stewart, adopted a "crabbed view" of the first amendment: The majority refused to adopt even a qualified newsmen's privilege based on the first amendment. Id. at 725 (Stewart, J., dissenting). For a more moderate approach to the majority's holding, see id. at 709 (Powell, J., concurring) (Powell adopts a case-by-case approach and would limit the decision to its facts). See also Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (Powell, Brennan, & Marshall, JJ., dissenting); Goodale, Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen, 26 Hastings L.J. 709 (1975).

126. See Davis v. Alaska, 415 U.S. 308 (1974), in which the chief prosecution witness in a larceny case asserted a juvenile privilege of anonymity. The Court held that the defendant's sixth amendment right to confront the witnesses against him overshadowed the local privilege. State v. Hembd, 305 Minn. 120, 232 N.W.2d 872 (1975) (the medical privilege must yield to right to confrontation).

However, the right to confront and to cross-examine a witness is not absolute and must sometimes "bow to accommodate other legitimate interests." Chambers v. Mississippi, 410 U.S. 284, 285 (1973). See generally 60 Minn. L. Rev. 1086 (1976).

127. See note 126 supra.


The parent-child privilege will find its widest application in proceedings when the child is the defendant or the accused. When the child is on the defensive, it is consistent with the underlying premises of sanctioning the privilege to permit its assertion. The child's parents should stand by his side and should not be forced to betray him in court.

CONCLUSION

Ample evidence supports the premise that confidentiality between parent and child is an essential component of their relationship. The child's healthy development stands in the balance. Seizing upon this, the *Doe* court unanimously prescribed a constitutional right to protect confidential parent-child communications. This constitutional right both arises out of and buttresses the firmly established rights to family privacy and autonomy already enumerated by the United States Supreme Court. The logical consequences of the Court's prior holdings would erect a sanctuary to the private communications of this intimate relationship. Only after these natural ties of fidelity are respected will the directive of the Bill of Rights be discharged.

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