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## The Parent-Child Testimonial Privilege - Has the Time for It Finally Arrived

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# THE PARENT-CHILD TESTIMONIAL PRIVILEGE-HAS THE TIME FOR IT FINALLY ARRIVED?

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## I. INTRODUCTION

In late January 1998, Independent Counsel Kenneth Starr subpoenaed Marcia Lewis to reveal to a grand jury communications she had with her daughter, Monica Lewinsky, regarding Monica's relations with President Bill Clinton.<sup>2</sup> While most Americans were appalled by such behavior,<sup>3</sup> these tactics are not new nor are they uncontroversial. Academics and courts in the United States have been grappling with the issue of compelled parent or child testimony for more than twenty-five

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<sup>2</sup>See Peter Baker, *Lewinsky Met Privately with Clinton After Subpoena*, WASH. POST, January 29, 1998, at A1. President Clinton was alleged to have met privately with Monica Lewinsky urging her to lie under oath about their relationship during a deposition for Paula Jones' case of sexual harassment against the President.

<sup>3</sup>Letter from Alex Abrams, Lawyer, to Editor, N.Y. TIMES, March 30, 1998, at A16; David J. Wolfsohn & John S. Summers, *Needed In Law and Society: Parent-Child Privilege*, PHILA. INQUIRER, February 26, 1998, at A15; Robert Peterson & Gerald Uelmen, *Commentary: Starr's Legacy May Include a New Privilege; Law: Compelling Monica Lewinsky's Mother to Testify Has Spawned Calls for Protecting Parent-Child Communications*, L.A. TIMES, April 23, 1998, at B9.

years.<sup>4</sup> In March 1998, Congress introduced two bills concerning parent-child compelled testimony.<sup>5</sup> The House of Representatives proposed substantive changes to the Federal Rules of Evidence to recognize a parent-child privilege in all cases.<sup>6</sup> The Senate proposed a study evaluating the necessity of a parent-child privilege, and, if found to be necessary, an evaluation of the type of privilege to institute.<sup>7</sup> Under the Senate bill, a parent-child privilege would not extend to cases involving violence or drugs.<sup>8</sup>

This article uses the recent bills in the House and Senate to analyze the parent-child privilege debate. First, this article will discuss the history of the parent-child privilege. Next, the proposed bills will be evaluated to determine their effectiveness in achieving their goals and in resolving the debate. This article will then discuss the effects that the passage or nonpassage of these bills (particularly the House bill) would have. Finally, this article proposes a broad parent-child privilege.

## II. BRIEF HISTORY OF THE PARENT-CHILD PRIVILEGE

Although controversial, the idea of a parent-child privilege is not new. In fact, the parent-child testimonial privilege has existed since ancient times.<sup>9</sup> Ancient Jewish law specifically forbade a parent from testifying against his or her children, and the Romans mandated that parents, children, patrons, freemen and slaves could not testify against each other.<sup>10</sup> Currently, the laws of France, Germany and Sweden embody a parent-child privilege whereby no relative by blood or marriage may be forced to testify against each other.<sup>11</sup> The United States does not, for the most part, recognize such a privilege.

The United States does recognize several privileges, including the attorney-client privilege, physician-patient privilege, priest-penitent privilege, psychotherapist-patient privilege, and spousal privilege.<sup>12</sup> However, only two federal district courts<sup>13</sup>

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<sup>4</sup>Gregory W. Franklin, Note, *The Judicial Development of the Parent-Child Testimonial Privilege: Too Big for Its Britches?* 26 WM. AND MARY L. REV. 145, n.1 (1984), citing Daniel R. Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599 (1970).

<sup>5</sup>See H.R. 3577, 105th Cong., 2d Sess. (1998); and S. 1721, 105th Cong., 2d Sess. (1998).

<sup>6</sup>See H.R. 3577.

<sup>7</sup>See S. 1721.

<sup>8</sup>*Id.*

<sup>9</sup>Wendy M. Watts, *The Parent-Child Privilege: Hardly a New or Revolutionary Concept*, 28 WM. AND MARY L. REV. 583, 587 (1987).

<sup>10</sup>*Id.* at 592

<sup>11</sup>*Id.* at 593 (the prevailing view in the civil countries of Western Europe is that no person will be forced to divulge confidences between himself and another family member).

<sup>12</sup>*Id.* at 594.

<sup>13</sup>See *In re Grand Jury Proceedings* (Agosto), 553 F. Supp. 1298 (D. Nev. 1983); *In re Grand Jury Proceedings* (Greenburg), 11 Fed. R. Serv. (Callaghan) 579 (D. Conn. 1982).

(located in Nevada and Connecticut) and four states<sup>14</sup> (Idaho, Minnesota, Massachusetts, and New York) recognize a parent-child privilege. Nine federal circuits have explicitly rejected a parent-child privilege.<sup>15</sup>

Federal Rule of Evidence Rule 501 enables courts to interpret and create privileges governed by common law and in light of reason and experience.<sup>16</sup> Commentators have formulated various tests to recognize a testimonial privilege.<sup>17</sup>

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<sup>14</sup>See IDAHO CODE § 9-203(7) (1997); MINN. STAT. § 595.02(1)(j) (1997). New York has a judicially-recognized privilege. See also *People v. Fitzgerald*, 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979). Massachusetts law, while not recognizing a parent-child privilege, prevents a minor child from testifying against a parent in a criminal proceeding. See MASS. GEN. LAWS ch. 233, § 20 (1998).

<sup>15</sup>See *In re Erato*, 2 F.3d 11 (2d Cir. 1993); *In re Grand Jury Proceedings (John Doe)*, 103 F.3d 1140 (3d Cir. 1997); *United States v. Jones*, 683 F.2d 817 (4th Cir. 1982); *In re Grand Jury Proceedings (Starr)*, 647 F.2d 511 (5th Cir. 1981); *Port v. Heard*, 764 F.2d 423 (5th Cir. 1985); *United States v. Ismail*, 756 F.2d 1253 (6th Cir. 1985); *United States v. Davies*, 768 F.2d 893 (7th Cir.), *cert. denied*, 474 U.S. 1008 (1985); *United States v. Penn*, 647 F.2d 876 (9th Cir.) (en banc), *cert. denied*, 449 U.S. 903 (1980); *In re Grand Jury Proceedings (John Doe)*, 842 F.2d 244 (10th Cir.), *cert. denied*, 488 U.S. 894 (1988); *In re Grand Jury Subpoena (Santarelli)*, 740 F.2d 816 (11th Cir.) (per curiam), *reh'g denied*, 749 F.2d 733 (11th Cir. 1984).

<sup>16</sup>FED. R. EVID. 501.

<sup>17</sup>Dean Wigmore's four factor formula to establish a new privilege is the most respected:

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

8 JOHN H. WIGMORE, EVIDENCE § 2285 (J. McNaughton rev. ed. 1961).

Manley has formulated a different test that focuses on whether the privilege satisfies the following emotions and desires:

- 1) Instinctive revulsion against the betrayal of confidence.
- 2) A sense of compassion even for a transgressor, i.e. a feeling that there should be for every man some sanctuary beyond the reach of society's law where he may safely confide his guilty secrets in an attempt to ease his troubled spirit.
- 3) A sense of fair play related to the Norman view of a lawsuit as a species of contest or sporting event wherein it would be too easy, and hence unfair and against 'the rules of the game,' to hound a man to his doom by convicting him through the lips of his own intimate friends, family, or medical, legal, or spiritual advisors.
- 4) A desire to preserve the function of certain socially valuable relationships even at the cost of occasional suppression of the truth and injustice in such, presumably few, particular cases.
- 5) A feeling of individual and professional pride and self-importance in being the inviolable repository of others' secrets.

Manley, *Patient, Penitent, Client and Spouse in New York*, 21 N.Y. ST. B.A. BULL. 288, 290 (1949).

While the parent-child privilege arguably passes these tests, no circuit court has been willing to recognize the privilege.<sup>18</sup> Courts have been overwhelmingly opposed to recognizing a parent-child privilege, broad or narrow, without legislative action.<sup>19</sup> Although no circuit court has adopted the parent-child privilege, some have implied possible recognition if federal law, rather than state law, controlled the case or if the issue arose under different circumstances.<sup>20</sup>

In *Jaffee v. Redmond*,<sup>21</sup> the Supreme Court for the first time recognized a privilege that was not in existence at common law when the Federal Rules of Evidence were enacted in 1975: the psychotherapist-patient privilege.<sup>22</sup> The Court in *Jaffee* declared that Rule 501 did not “freeze the law,” and that whenever the public and private interests furthered by the privilege outweigh the cost to the search for the truth, a new privilege should be recognized.<sup>23</sup> The Third Circuit, the first to consider the parent-child privilege after *Jaffee*, declined to do so based on four basic reasons:

- (1) The overwhelming majority of all courts - federal or state - have rejected such a privilege . . .
- (2) No reasoned analysis of Federal Rules of Evidence 501 or of the standards established by the Supreme Court or by [the Third Circuit] supports the creation of such a privilege.
- (3) Creation of such a privilege would have no impact on the parental relationship and hence would neither benefit that relationship nor serve any social policy.
- (4) Although [courts] have the authority to recognize a new privilege, the recognition of such a privilege, if one is to be recognized, should be left to Congress.<sup>24</sup>

The Third Circuit also stated that the privilege should not be created because it does not pass the second and fourth factors of the Wigmore test:<sup>25</sup> confidentiality in the form of testimonial privilege is not indispensable for a successful parent-child relationship, and the truth-seeking function of the judicial system outweighs the relatively insignificant injury to the relationship resulting from non-recognition of

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<sup>18</sup>See cases cited *supra* note 15.

<sup>19</sup>See *id.*

<sup>20</sup>Yolanda L. Ayala & Thomas C. Martyn, Note, *To Tell or Not to Tell? An Analysis of Testimonial Privileges: The Parent-Child and Reporter's Privileges*, 9 ST. JOHN'S J. LEGAL COMMENT. 163, n.27, n.28 (1993), [hereinafter Note, *To Tell or Not to Tell?*] citing *Port v. Heard*, 764 F.2d 423, 430 (5th Cir. 1985) (indicating defendant's father and stepfather would have been excused if federal rather than Texas, law applied); *United States v. Ismail*, 756 F.2d 1253 (6th Cir. 1985) (declining to address whether parent-child privilege should be adopted in situations involving minors); and *United States v. Jones*, 683 F.2d 817 (4th Cir. 1982) (implying parent-child privileges may be applicable otherwise).

<sup>21</sup>518 U.S. 1 (1996).

<sup>22</sup>See *id.* See also Daniel Capra, A “New” Privilege: Parent-Child, N.Y. L. J., May 9, 1997, at 3.

<sup>23</sup>518 U.S. 1 (1996).

<sup>24</sup>*In re grand Jury Proceedings (John Doe)*, 103 F.3d 1140, 1146-7 (3d Cir. 1997).

<sup>25</sup>See *supra* note 17.

the privilege.<sup>26</sup> The dissent disagreed with these two points, finding that the privilege is essential for parent-child relationships and that the injury is not outweighed by the states' interests.<sup>27</sup>

The Third Circuit stated that the legislature is best equipped to deal with such issues as whether the privilege should apply to adult children, adopted children or unemancipated minors, whether parents include stepparents or grandparents, whether the privilege should extend to siblings, and whether the presence of another family member automatically destroys the privilege.<sup>28</sup> Generally, courts believe that a matter with this kind of uncertainty is better left to the legislature.<sup>29</sup>

### III. THE CONTROVERSY

There is great disagreement between courts and the majority of legal commentators and academics over whether to recognize a parent-child testimonial privilege.<sup>30</sup> Because privileges obstruct the search for truth and because the administration of justice relies on the court's ability to hear all relevant evidence, courts have been reluctant to expand existing privileges and create new ones.<sup>31</sup> The courts, reluctant to place any obstacles in the path of the judicial system's truth-seeking function, are not willing to incorporate a new privilege where the injury to individual society members is arguably not outweighed by the state's interest in seeking the truth.<sup>32</sup>

The majority of legal commentators and academics on this subject, however, are in favor of a parent-child privilege.<sup>33</sup> Legal commentators and academics have espoused the parent-child privilege based on a number of reasons. First, some legal commentators and academics predicate the necessity of a parent-child privilege on the Supreme Court's recognition of the fundamental right to privacy and of familial autonomy.<sup>34</sup> Second, academics and commentators base the need for a privilege on social reasons including the "violence done to the child, the damage to family unity,

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<sup>26</sup>See *In re Grand Jury (John Doe)*, 103 F.3d 1140, 1152 (3d Cir. 1997).

<sup>27</sup>*Id.* at 1160 ("confidentiality underlies the parent-child relationship... the damage resulting from compelling a parent against his child, in most if not all cases, outweighs the benefit associated with correct disposal of the litigation").

<sup>28</sup>*Id.* at 1155.

<sup>29</sup>See cases cited *supra* note 15.

<sup>30</sup>Compare cases cited *supra* note 15 with Marianne Scott, Comment, *Parent-Child Testimonial Privilege: Preserving and Protecting the Fundamental Right to Family Privacy*, 52 U. CIN. L. REV. 901 (1983); Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910 (1987).

<sup>31</sup>See Franklin, *supra* note 4, at 146.

<sup>32</sup>See, e.g., *In re Grand Jury Proceedings (John Doe)*, 103 F.3d 1140 (3d Cir. 1997).

<sup>33</sup>See *id.* at 1146, n.12 (citing numerous law review articles in favor of a parent-child privilege).

<sup>34</sup>Marianne Scott, Comment, *Parent-Child Testimonial Privilege: Preserving and Protecting the Fundamental Right to Family Privacy*, 52 U. CIN. L. REV. 901 (1983); see also *supra* note 9.

and the consequent injury to society<sup>35</sup> that may result from compelled testimony of a child against a parent.<sup>36</sup> Third, academics and commentators believe that a parent-child privilege should exist for reasons similar to those reasons for the existence of currently recognized privileges: to protect potentially embarrassing communications which were engaged in for the purpose of guidance.<sup>37</sup>

Among commentators in favor of the parent-child privilege, there exists controversy over how broadly to construe the privilege. The debate is over several issues including whether adult children or only unemancipated children are covered, whether the privilege is reciprocal in that parents may not testify against children and children may not testify against parents, and whether only confidential communications are covered or all adverse testimony is protected.<sup>38</sup> Although legal commentators and courts generally disagree on whether or not to have a parent-child privilege, many legal commentators also advocate for a legislative resolution, rather than the courts "creating" law.<sup>39</sup>

#### IV. RECENT DEVELOPMENTS

Recently, Congress rose to the courts' and commentators' challenge to legislate regarding the parent-child privilege. Congress, spurred by Independent Counsel Kenneth Starr's investigation of Monica Lewinsky,<sup>40</sup> finally responded in March of 1998 and introduced two separate bills dealing with the issue of parent-child compelled testimony.<sup>41</sup> The House bill proposed substantive changes to the Federal Rules of Evidence to explicitly recognize a parent-child testimonial privilege.<sup>42</sup> The

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<sup>35</sup>J. Tyson Covey, Note, *Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege*, 1990 U. ILL. L. REV. 879, 879 (1990); see also Scott, *supra* note 34.

<sup>36</sup>Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910 (1987) (arguing that strong and supportive parent-child bonds are so important to society that they should be protected by a testimonial privilege); see also Covey, *supra* note 35.

<sup>37</sup>See Ayala & Martyn, *supra* note 20.

<sup>38</sup>Compare Franklin, *supra* note 4 (arguing for a privilege limited to minor children, non-reciprocal with only communication from the child to the parent protected, and protecting only confidential communications, not all adverse testimony) with Scott, *supra* note 34 (arguing for a privilege including adult children, reciprocal in nature, held by both parties, and protecting adverse testimony as well as confidential communications).

<sup>39</sup>See, e.g., Covey, *supra* note 35; and Capra, *supra* note 22.

<sup>40</sup>See 144 CONG. REC. E504-01 (daily ed. March 27, 1998) (statement of Rep. Lofgren) ("there now exists a serious defect in our Federal criminal and civil law and procedures that has unfortunately been brought into focus by Independent Counsel Kenneth Starr's investigation of the President. Under Federal law and the law of most States, children can be compelled to testify against their parents, and parents against their children"). See also 144 CONG. REC. S1508-02 (daily ed. March 6, 1998) (statement of Sen. Leahy) ("I recently spoke . . . about the disgust that I share with most Americans about the tactics of Special Prosecutor Kenneth Starr and the disturbing spectacle of hauling a mother before a grand jury to reveal her intimate conversations with her daughter in a matter . . . which do[es] not pose [a] grave threat to the public safety").

<sup>41</sup>See H.R. 3577, 105th Cong., 2d Sess. (1998); S. 1721, 105th Cong., 2d Sess. (1998).

<sup>42</sup>See H.R. 3577.

Senate proposed the Attorney General investigate to determine whether the Federal Rules of Evidence should be amended to explicitly recognize a parent-child privilege.<sup>43</sup> The following section will individually examine both bills in light of prior judicial decisions and writings of legal commentators regarding what each believes to be the proper analysis of the parent-child privilege.

#### V. ANALYSIS OF THE HOUSE BILL

The House bill, named the Confidence in the Family Act, proposed a substantive amendment to Federal Rules of Evidence 501 specifically allowing for a parent-child privilege.<sup>44</sup> The House proposed in relevant part that Rule 501 of Federal Rules of Evidence be amended to include the following:

(b)(1) A witness may not be compelled to testify against a *child or parent* of the witness.

(2) A witness may not be compelled to disclose the content of a *confidential communication* with a child or parent of the witness.

(3) For purposes of this subdivision, 'child' means, with respect to an individual, a birth, adoptive, or step-child of the individual, and any person (such as a foster child or a relative of whom the individual has long-term custody) with respect to whom the court recognizes the individual as having a right to act as a parent.

(4) The privileges provided in this subdivision shall be governed by principles of the common law, as they may be interpreted by the courts of the United States in the light of reason and experience, that are similar to the principles that apply to the *similar privileges of a witness with respect to a spouse of a witness*.<sup>45</sup>

The issue is whether this bill is well drafted in that it achieves the primary goals of a parent-child privilege with minimal intrusion on the truth-seeking function of the law.<sup>46</sup>

#### A. Goals of the Confidence in the Family Act

The House bill would ensure that parents and children would not be compelled to testify against one another.<sup>47</sup> This shields witnesses from the trauma associated with testifying against a child or parent and creates recognition and respect for the special nature of parent-child relationships.<sup>48</sup> Two goals can be ascertained. One goal is to protect parent-child witnesses from the "cruel trilemma" whereby the witness is

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<sup>43</sup>See S. 1721.

<sup>44</sup>See H.R. 3577.

<sup>45</sup>*Id.* (emphasis added).

<sup>46</sup>See Covey, *supra* note 35, at 887.

<sup>47</sup>See H.R. 3577.

<sup>48</sup>See 144 CONG. REC. E504 (daily ed. March 27, 1998) (statement of Rep. Lofgren).



faced with three disagreeable options: (1) testify truthfully and betray their family; (2) refuse to testify and risk contempt charges; or (3) testify falsely and hinder the truth-seeking function of the judicial system even more.<sup>49</sup> The second goal is to protect children's and parents' reasonable expectations of privacy when seeking guidance, comfort or support.<sup>50</sup> This bill would acknowledge respect for the familial sphere and allow and foster open communication between parents and children, thus protecting the parent-child relationship, like the spousal relationship, from undue governmental intrusions.<sup>51</sup> These goals would lend support to the Constitution's insistence that law enforcement officials respect the privacy of the individual and the home<sup>52</sup> as well as protect children.

The purposes of the spousal privilege are similar. The adverse testimony privilege serves to protect the marriage from disharmony, while the confidential communications privilege serves to encourage open communication within a marriage.<sup>53</sup> Both relationships, spousal and parent-child, are clearly regarded as valuable to society.<sup>54</sup> Similar to the spousal privilege, the parent-child privilege would continue to protect the familial sphere and demonstrate the government's respect for confidentiality within the family.<sup>55</sup>

### B. Reciprocity

The House bill takes a clear position on the controversy surrounding the parent-child privilege.<sup>56</sup> The Confidence in the Family Act provides for a reciprocal privilege.<sup>57</sup> The bill provides that a child may not be compelled to testify against a parent *and* a parent may not be compelled to testify against a child.<sup>58</sup> Almost all existing or proposed parent-child privilege statutes restrict coverage to

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<sup>49</sup>*See id.*; *see also* Watts, *supra* note 9.

<sup>50</sup>*See* 144 CONG. REC. E504 (daily ed. March 27, 1998) (statement of Rep. Lofgren).

<sup>51</sup>Covey, *supra* note 35, at 888 (legislators should keep in mind two primary goals when drafting a statute recognizing the parent-child privilege: (1) protect children's reasonable expectations of privacy; and (2) protect minor children from the traumatic and potentially destructive experience of testifying against their parents or having their parents testify against them).

<sup>52</sup>Sandra Guerra, *Family Values? The Family as an Innocent Victim of Civil Drug Asset Forfeiture*, 81 CORNELL L. REV. 343 (1996).

<sup>53</sup>*See* Franklin *supra* note 4; *see also* Watts, *supra* note 9, at 598 ("the Court [in *Trammel v. United States*, 445, U.S. 40 (1980)] reasoned that the justification for the privilege against adverse spousal testimony lies in the privilege's perceived role in fostering harmony and sanctity of the marriage relationship").

<sup>54</sup>*See id.*

<sup>55</sup>*See* Covey, *supra* note 35.

<sup>56</sup>*See* H.R. 3577, 105th Cong., 2d Sess. (1998).

<sup>57</sup>*See id.*

<sup>58</sup>*See id.* (emphasis added).

communications from child to parent.<sup>59</sup> Justifications for this restriction are based on the reasoning that the parent-child privilege should resemble a professional privilege.<sup>60</sup> Advocates of a non-reciprocal parent-child privilege believe that the main goal for a parent-child privilege is to allow children to seek guidance and help, and that this goal outweighs the impediment on the government's truth-seeking function.<sup>61</sup> Proponents of this belief insist that children require parental advice and guidance more than parents require advice from children.<sup>62</sup> Furthermore, these advocates argue that children expect communications with their parents to remain confidential, more so than parents expect of their conversations with their children.<sup>63</sup> The need to protect parents from children's divulgence, it is believed, is not as great as the need to protect children from parents' disclosures.<sup>64</sup> Parents' communications with the child not concerned with guidance for the child, therefore, should remain unprotected according to advocates of this belief.<sup>65</sup>

Reciprocity, however, better realizes the goal of protecting parents and children from the cruel trilemma - to spare the children from the traumatic experience of having to betray their parents or of having their parents betray them.<sup>66</sup> Furthermore, the professional-relationship goal of seeking guidance is well served by reciprocity. As parents and children grow older, the roles often reverse - parents may look to children for guidance.<sup>67</sup> This is more apparent with immigrant parents whose children may be more assimilated into the American culture. The parents look to their children for guidance about the different social, legal, and cultural ways of the United States. Additionally, in today's era of high divorce rates, parents and children typically look to each other for guidance when spouses separate.<sup>68</sup> The spousal privilege allows for reciprocity because communication between both spouses is essential; an ideal parent-child relationship should encompass the mutual love, intimacy and trust associated with the marital relationship.<sup>69</sup> The House bill's reciprocity protects a family's expectations of privacy and allows for children and parents to look to each other for guidance.

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<sup>59</sup>See Note, Covey, *supra* note 35, at 903. See also IDAHO CODE § 9-203(7) (1997); MINN. STAT. § 595.02(1)(j) (1997).

<sup>60</sup>See Franklin, *supra* note 4, at 172.

<sup>61</sup>*Id.*

<sup>62</sup>*Id.*

<sup>63</sup>*Id.*

<sup>64</sup>*Id.*

<sup>65</sup>See Franklin, *supra* note 4, at 172.

<sup>66</sup>See Covey, *supra* note 35, at 904.

<sup>67</sup>See Scott, *supra* note 34, at 919.

<sup>68</sup>*Id.* at 919. It is estimated that approximately one-half of marriages end in divorce. It is much more difficult to terminate a parent-child relationship than a marriage.

<sup>69</sup>See Scott, *supra* note 34; *but see* Franklin, *supra* note 4, at 171 (arguing that relationships of parent-child and spouses are fundamentally different; spouses look to each other for guidance - two-way - whereas children look to parent for guidance - one-way).

*C. Confidential Communications vs. Adverse Testimony*

The Confidence in the Family Act protects only confidential communications;<sup>70</sup> adverse testimony is not protected. The House believes this would be the best compromise between allowing prosecutors to search for the truth and respecting familial privacy.<sup>71</sup> By limiting the privilege to cover only those confidential communications, the House limits the breadth of protection to only those communications necessary for the guidance and emotional health of the child.<sup>72</sup> The House bill does allow for parents to offer needed guidance to their children without fear of incriminating them while still allowing for the courts to search for the truth. Proponents of this limitation on the privilege argue that a broader privilege extending to adverse testimony would lead to abuse and is too intrusive on the state's need to gather evidence.<sup>73</sup> Professional privileges also only cover confidential communications; adverse testimony is not protected.<sup>74</sup> The limitation to confidential communications serves the purpose of allowing for openness when seeking guidance, but does not relieve the witness of his or her dilemma.

The Supreme Court recognized an adverse testimony privilege in spousal relations.<sup>75</sup> In many states, the spousal privilege protects adverse testimony, although some states do protect only confidential communications between spouses.<sup>76</sup> The adverse testimony privilege in the marital privilege serves mainly to prevent marital disharmony.<sup>77</sup> The House bill states the parent-child privilege should be developed similar to the spousal privilege;<sup>78</sup> however the bill already differs from the spousal privilege in those states where an adverse testimony spousal privilege is recognized. In view of the spousal privilege's limitation in many states, a broader parent-child privilege may seem overbroad.<sup>79</sup> In these states, the confidential communications limitation is appropriate. However, in parent-child communications, confidential communications may be difficult to distinguish from other information

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<sup>70</sup>See H.R. 3577, 105th Cong., 2d Sess. (1998).

<sup>71</sup>See 144 CONG. REC. 2504 (daily ed. March 27, 1998) (statement of Rep. Lofgren).

<sup>72</sup>See Franklin, *supra* note 4, at 172.

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

<sup>74</sup>See, e.g., Proposed Federal Rule of Evidence 503 (Attorney-Client Privilege), Rule 504(b) (Psychotherapist-Patient) and Rule 506 (Clergymen). FED. R. EVID. DELETED AND SUPERSEDED MATERIALS.

<sup>75</sup>See *Trammel v. United States*, 445 U.S. 40 (1980).

<sup>76</sup>See *Developments in the Law - Privileged Communication v. Familial Privilege*, 98 HARV. L. REV. 1563, 1567 n.29-30 (1985). Fourteen states statutorily empower a party to prevent a spouse from giving adverse testimony - Arizona, Colorado, Idaho, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, Virginia, Washington, West Virginia, and Alaska. Four states' statutes render a spouse incompetent to testify against his or her spouse - Ohio, Pennsylvania, Texas, and Wyoming. California, Florida, and Wisconsin by statute recognize a confidential communications privilege.

<sup>77</sup>See Franklin, *supra* note 4, at 153.

<sup>78</sup>See H.R. 3577, 105th Cong., 2d Sess. (1998).

<sup>79</sup>See Franklin, *supra* note 4, at 173.

available to family members; another family member may learn of communications as a result of the family's familiarity with each other's activities.<sup>80</sup> In states where only confidential communications are protected, both written and oral expressions are protected.<sup>81</sup> An expression is confidential if the communicator subjectively intended the communication not be disclosed.<sup>82</sup> There is a presumption that communications between spouses are confidential, but this can be rebutted in two ways: (1) if the spouse knew a third party was present; and (2) even if communications were in private, a showing that the communicant intended statements to be disclosed to specific third parties.<sup>83</sup> Because determining whether a communication is confidential may be extremely difficult in parent-child situations, an adverse testimony privilege is more appropriate. An adverse testimony privilege would be preferable to dissolve the dilemma of family betrayal and would likely be more practical in view of the difficulties associated with a privilege limited to confidential communications.

Limiting the privileged testimony to only those confidential communications instead of the broader, adverse testimony approach does not serve the purposes of protecting children from the trauma associated with testifying against their parents or vice versa, of alleviating the witness' trilemma, or of protecting the familial privacy. Compelled parent-child testimony that leads to incriminating evidence would still sever family ties, invite perjury, and cause trauma.<sup>84</sup> Limiting the parent-child privilege to only confidential communications does not achieve the goal of preventing the trauma associated with the betrayal of a family member; parents and children may still feel like they are betraying their family by giving testimony that is adverse, for instance, negating alibis. The ABA Proposed Parent-Child Privilege Statute<sup>85</sup> recommended an adverse testimonial privilege for criminal trials and confidential communications for civil trials. The sense of betrayal in criminal trials would be greater when loss of liberty is at stake. In civil trials, the concern is not whether betrayal leads to confinement but whether the expectations of confidentiality were honored.<sup>86</sup> A privilege protecting only confidential communications does not completely eliminate the sense of betrayal that would accompany testifying adversely when it would lead to loss of liberty, as it would in federal criminal trials.

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<sup>80</sup>See Scott, *supra* note 34, at 926.

<sup>81</sup>See *Developments in the Law - Privilege Communication v. Familial Privilege*, *supra* note 76, at 1572.

<sup>82</sup>*Id.* at 1573.

<sup>83</sup>*Id.*

<sup>84</sup>See Scott, *supra* note 34, at 926.

<sup>85</sup>See Watts, *supra* note 9, at 618-23. The ABA proposed a parent-child privilege which provided for an adverse parent-child testimonial privilege held by the witness in criminal trials, except when the defendant is charged with a crime against a family member and when the witness is involved in any criminal activity. §102. The ABA proposal provided for a confidential communications privilege jointly held by both parties in civil trials; exceptions to the confidential communications privilege include when the parents and children are opposing parties, when crimes are committed against a family member, and when mental competence is at issue. § 103.

<sup>86</sup>See Covey, *supra* note 35, at 905.

The confidential communications privilege also raises a number of unanswered questions such as how the law would be enforced. Does the parent or child specifically have to say this conversation is confidential? Would that be realistic? Additionally, it may be difficult to distinguish confidential communications from all other communication.<sup>87</sup> The goals of the privilege are not limited to allowing children seeking guidance but include protecting the family from government intrusion and decreasing the trauma to children. A broader privilege protecting adverse testimony as well should be adopted in lieu of a narrower privilege protecting only confidential communications. This would foster open communications as well as relieve the witness of the sense of betrayal.

#### *D. Definition of Child*

The Confidence in the Family Act defines child broadly, leaving much discretion to the courts. The definition of child includes a birth child, adoptive child, step-child and anyone else the court recognizes as a ward of a person (including long-term foster children).<sup>88</sup> This leaves some discretion within the court to include primary caretakers. This definition is broad, but accurately reflects today's rapidly changing family situations. The catchall provision protects those persons who are effectively rather than just legally responsible for the children.<sup>89</sup> This expansive definition is preferable because it furthers the goal of protecting the child's expectations of confidentiality when requesting guidance from parents or parental figures. For critics that argue such a broadness will lead to abuse and over-extension, the general antipathy of courts in recognizing privileges should keep potential abuses in check and will limit the use of this provision to those parent-child relationships that are genuine.<sup>90</sup>

The House bill makes no mention of an age limitation to only apply the privilege to minor children, which many statutes and courts advocate.<sup>91</sup> By not limiting the privilege to minors, Congress respects families in the broader sense. Just because children grow older, they may not necessarily grow apart from their families.<sup>92</sup> The extension of the privilege beyond the child's minority recognizes that many parent-child relationships continue after emancipation of the child, frequently leading to a role reversal type situation as the parent grows older and becomes increasingly dependent on the child.<sup>93</sup> Furthermore, the bill acknowledges that children reside with their parents until well after emancipation, and is consistent with the requirement many states have that children support their parents as the states require

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

<sup>88</sup>*See* H.R. 3577, 105th Cong, 2d Sess. (1998).

<sup>89</sup>*See* Covey, *supra* note 35, at 901.

<sup>90</sup>*Id.* at 902.

<sup>91</sup>*Id.* Practically all existing and proposed parent-child privileges apply only during a child's minority, including Idaho and Minnesota codes and the ABA Proposed Parent-Child Privilege Statute, as discussed in Watts, *supra* note 9.

<sup>92</sup>*See* Scott, *supra* note 34, at 918.

<sup>93</sup>*Id.*

parents to support their children.<sup>94</sup> With the state requiring families to continue support after emancipation of the children, it is only appropriate that the privilege continues beyond that as well. Many commentators argue that the privilege is not necessary once the child is grown as the child does not depend on the parent for guidance.<sup>95</sup> If protecting the child's expectations of confidentiality and allowing him or her to go to the parents for guidance were the only goals of the statute, this may seem reasonable. However, an important goal of the statute is to protect families, like the spousal privilege protects marriages.<sup>96</sup> The family does not dissolve when a member becomes older.<sup>97</sup> Parent-child relationships continue through adulthood and contribute to the well-being of individuals and society.<sup>98</sup> Parent-child loyalty existing beyond the child's minority should be fostered for the benefit of society. The inclusion of adult children in the parent-child privilege protects family loyalty and better serves society.

#### *E. Exceptions*

The House bill makes no explicit exceptions to the parent-child privilege. Advocates of the privilege acknowledge exceptions would be appropriate in certain situations.<sup>99</sup> Examples of these exceptions include crimes committed by a parent against the child himself or other family members, and situations in which an adult child is suspected of abusing an elderly parent.<sup>100</sup> Each of the three existing state statutes provides for an exception when a crime was committed against a family member.<sup>101</sup> In spousal privileges, which the bill states should guide in the development of the parent-child privilege,<sup>102</sup> the privilege does not apply if one spouse committed a crime against another,<sup>103</sup> and most states do not allow the spousal

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<sup>94</sup>*Id.* at 924. Parents are often obligated to continue support for physically or mentally handicapped children past the age of majority. *Id.*, n. 77. Additionally, after a divorce, the noncustodial parent may be required to contribute to college expenses. *Id.* As of 1984, 27 states had filial support statutes. *Id.* n. 78.

<sup>95</sup>*See* Franklin, *supra* note 4, at 170.

<sup>96</sup>*See* 144 CONG. REC. E504-01 (daily ed. March 27, 1998) (statement of Rep. Lofgren) ("the damage that such an experience [providing testimony against children] can cause parents, children, and familial relationships is readily apparent and worthy of our concern").

<sup>97</sup>*See, e.g.*, Letter from Alex Abrams, lawyer, to Editor, N.Y. TIMES, March 30, 1998, at A16. ("Among young unmarried men and women, like Ms. Lewinsky, a bond with one or both parents may often be the most intimate of all.")

<sup>98</sup>*See* Scott, *supra* note 34, at 919-20. "By serving as a reference point for people's beliefs, values, and choices of action, intergenerational ties help prevent such a fraying of the fabric of society." *Id.*

<sup>99</sup>*Id.* at 927.

<sup>100</sup>*Id.*

<sup>101</sup>*Id.* at 927, n.90; *see also* IDAHO CODE § 9-203(7) (1997); MINN. STAT. § 595.02(1)(j) (1997); MASS. GEN. LAWS ch. 233, § 20 (1998).

<sup>102</sup>*See* H.R. 3577, 105th Cong., 2d Sess. (1998).

<sup>103</sup>*See Developments in the Law - Privileged Communications v. Familial Privileges, supra* note 76, at 1570.

privilege when one spouse is accused of abusing a child or another family member.<sup>104</sup> It can be reasonably inferred, therefore, that these exceptions are implied in the bill through developed spousal privilege law and “in light of reason and experience.”<sup>105</sup>

The statute does not specifically state who may waive the privilege, but in spousal privileges, as modified by the Court in *Trammel*,<sup>106</sup> an adverse testimony privilege rests with the testifying spouse, and only that spouse may waive the privilege.<sup>107</sup> In federal criminal cases, a confidential communications privilege can either be waived by the spouse who made the communication or by the defendant, regardless of whether the defendant was the communicant.<sup>108</sup> The bill does state the privilege should be adopted similar to the spousal privilege. It would appear, therefore, that the parent-child privilege would work in a similar fashion.

What would be protected under the statute? Monica Lewinsky’s mother in Kenneth Starr’s investigation of President Clinton would not have had to testify in front of a grand jury as to what her daughter told her about her relations.<sup>109</sup> Alan and Sonye Grossberg of New Jersey would not have been subpoenaed to reveal what their daughter told them about the death of her newborn son of whom their daughter was accused of leaving in a motel dumpster.<sup>110</sup> Mrs. Pisani, the mother of the Massachusetts patrolman being investigated for cheating on his exams, would not have been forced to refuse to testify.<sup>111</sup> The ten-year-old child in South Dakota would not have had to testify against his father in the murder trial of another child.<sup>112</sup>

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<sup>104</sup>*Id.* at 1570-71.

<sup>105</sup>H.R. 3577.

<sup>106</sup>445 U.S. 40 (1980).

<sup>107</sup>See Franklin, *supra* note 4, at 153.

<sup>108</sup>See *Development in the Law - Privileged Communication v. Familial Privileges*, *supra* note 76, at 1571-72.

<sup>109</sup>See Editorial, *Mother and Witness; Painful or Not, Marcia Lewis’ Testimony is Important*, PITTSBURGH POST-GAZETTE, February 18, 1998, at A14. See also Baker, *supra* note 2.

<sup>110</sup>See Doug Most, *A Court Has Ears Inside the Home; Parent-Child Secrets Not Safe*, THE RECORD (Bergen County, NJ), December 7, 1997, at A1. Amy Grossberg, 18, and her high school boyfriend were charged with murdering their baby and leaving the body in a dumpster. The Grossbergs have resisted the subpoena. See also Editorials, *Subpoenaed Parents*, 151 N.J.L.J. 926 (1998).

<sup>111</sup>See Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910 (February 1987); Harvey Silvergate, *American Family Values*, NAT’L L.J., November 13, 1995, at A23. Mrs. Pisani, an elderly Italian mother, was subpoenaed to testify against her son, a patrolman, being investigated in a police-exam cheating scandal. The court refused to quash the subpoena. Mrs. Pisani refused to testify, and the government did not seek to go further.

<sup>112</sup>See *United States v. Elk*, 955 F. Supp. 1170 (D. S.D. 1997). Mr. Elk was charged with the murder of a twenty-month old male child. Prosecutors called his ten-year-old son as a witness before the grand jury, which the defendant claimed caused the child psychological trauma.

All of these people would have had the right to remain loyal to their families and continue to communicate with them.

#### VI. SENATE BILL

The Senate takes an entirely different approach.<sup>113</sup> Rather than giving outright support for a parent-child privilege, the Senate attempts a balancing approach. The Senate proposed that the Attorney General study the development of a parent-child privilege and the measurements that should be taken to ensure confidentiality of communications between parents and children.<sup>114</sup> The Senate specifically tries to balance the truth-seeking function of the courts against family confidentiality; where crimes of violence or drugs are at stake, the family's privacy rights are secondary.<sup>115</sup> The Senate wants to weigh the "danger that free communication between a child and his or her parent will be inhibited and familial privacy and relationships will be damaged" against public safety and integrity of the judicial system.<sup>116</sup>

The bill proposed that the Attorney General, within one year, evaluate the need for a parent-child privilege. Based on prosecutors' reluctance to use parents and children as witnesses against each other because of its dangers,<sup>117</sup> it is unlikely that the Attorney General will find that a parent-child privilege would change the current state of criminal prosecution. Even if the Attorney General does find a need for a parent-child privilege, in its attempt to balance the law enforcement needs of society against the family, the Senate has decided that familial relationships outweigh the need for truth in all situations except those involving violence or drugs.<sup>118</sup> Therefore, Monica Lewinsky's mother would be spared, but the Grossberg parents would not. Mrs. Pisani would be spared, but the ten-year-old child would not.

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<sup>113</sup>See S. 1721, 105th Cong., 2d Sess. (1998).

<sup>114</sup>S. 1721 provides in relevant part:

(a) The Attorney General of the United States shall

(1) study and evaluate the manner in which the states have taken measures to protect the confidentiality of communications between children and parents and, in particular, whether such measures have been taken in matters that do not involve allegations of violent or drug trafficking conduct. ...[and submit to Congress]

(b) (2) recommendations based on the findings on the need for and appropriateness of further action by the Federal Government . . .

(c) the Judicial Conference of the United States shall complete a review and submit a report to Congress on

(1) whether the Federal Rules of Evidence should be amended to guarantee that the confidentiality of communications by a child to his or her parent in matters that do not involve allegations of violent or drug trafficking conduct will be adequately protected in federal court proceedings; and

(2) if the rules should be so amended, a proposal for amendments to the rules that provides the maximum protection possible for the confidentiality of such communications.

<sup>115</sup>See S. 1721.

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

<sup>117</sup>*Discussed infra* (p. 16-17).

<sup>118</sup>See S. 1721, 105th Cong., 2d Sess. (1998).



The differentiation between crimes of violence or drugs and other crimes does not serve the purposes of a privilege. Witnesses would still undergo the cruel trilemma in cases where liberty is severely at stake. In criminal trials of higher magnitude, society's need for truth is arguably greater. The Senate's position states that society's benefit in many situations outweighs society's benefits from strong family ties. However, in criminal trials where the penalty is more severe, parents and children are more susceptible to the trilemma; there is also a greater chance of perjury and frustration of the process. Excluding crimes of violence or drugs from the protection of the privilege does not alleviate the witness' trilemma problem as the loss of liberty is still so significant that the sense of betrayal would still be present and significant damage to the relationship would occur. The balance that the Senate attempts to achieve would accomplish the goals of the parent-child privilege in a distinct minority of cases. The House bill takes a more definitive stance.

## VII. EFFECTS

If the House bill passes as introduced, a new parent-child privilege would exist in federal courts similar to the spousal privilege. This, in reality, would have very little effect on prosecutors. The Department of Justice realizes special consideration is warranted when the witness is a close family member and typically tries to avoid compelling a witness to testify against a family member.<sup>119</sup> In practice, Assistant United States Attorneys are reluctant to use family members.<sup>120</sup> Rarely would it be necessary to use a parent's testimony; prosecutors attempt to obtain evidence in other ways so the parental testimony is not necessary.<sup>121</sup> According to one experienced Assistant United States Attorney, in more than ten years of prosecuting experience, not once has it been an issue where a parent must testify against his or her child.<sup>122</sup> Many practitioners are convinced that if a case is so thin that it depends on a parent's or child's testimony, it should not be brought.<sup>123</sup> Parents forced to testify against their child may commit perjury or be willing to be held in contempt in order not to incriminate their children.<sup>124</sup> The parents' willingness to risk contempt frustrates any attempt to gather information.<sup>125</sup> This does not help achieve the prosecutorial goal of seeking the truth. Because of this bind, prosecutors rarely seek to pit parents and

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<sup>119</sup>DEPT. OF JUSTICE MANUAL, §9-23.211 (1997) ("consideration should be given to whether the witness is a close family relative of the person against whom testimony is sought. A close family relative is a spouse, parent, child, grandparent, grandchild or sibling of the witness. Absent specific justification, *we will ordinarily avoid compelling the testimony of a witness who is a close family relative* of the defendant on trial or of the person upon whose conduct grand jury scrutiny is focusing") (emphasis added).

<sup>120</sup>Based on conversations with an Assistant United States Attorney who requested his name be withheld.

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

<sup>122</sup>*Id.*

<sup>123</sup>See Harvey Silvergate, *American Family Values*, NAT'L L.J., November 13, 1995, at A23.

<sup>124</sup>See Watts, *supra* note 9.

<sup>125</sup>Based on conversations with an Assistant United States Attorney who requested his name be withheld. See also Mrs. Pisani's case, *supra* note 111.

children against each other.<sup>126</sup> Prosecutors recognize the strong emotional ties between parents and children.<sup>127</sup> There is a greater risk of perjury with witnesses who are family relatives of the defendant, and it is more likely to alienate a jury.<sup>128</sup> The chance of perjury would effectively render the testimony useless, and the confrontation between a parent and child may antagonize a jury.<sup>129</sup> In Idaho, where a parent-child testimonial privilege prohibits compelling parents from disclosing confidential communications from their minor children, cases involving minors have not been made more difficult since enactment of the statute eight years ago.<sup>130</sup>

If the House bill does pass, it will send a clear message that privacy in the home outweighs the impediments on the truth-seeking function of the courts. It would say that family values are worth fostering seriously. If the Senate approach is taken, this message would be tempered. The message would then be that the war on drugs and violence is more important than familial autonomy and privacy, but other, less “wrong” crimes are not.

If the House bill does not pass, the message is more uncertain. On the one hand, it gives courts more reason not to create a privilege; after all, Congress did not see it worth legislating so the courts will likely be even more hesitant to create such a new privilege. However, in creating the Federal Rules of Evidence, Congress decided not to adopt the nine specified privileges, but instead decided to enact Rule 501 which gave courts power to expand privileges on a case-by-case basis.<sup>131</sup> In doing so, Congress was not “freezing the law.”<sup>132</sup> The physician-patient privilege was not included in the proposed rules and has since gained wide recognition.<sup>133</sup> By merely acknowledging the need for a parent-child privilege, Congress is opening the door for courts to consider creating one. However, courts have been extremely reluctant to create such a privilege and have consistently held if one were to be created, it

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<sup>126</sup>See Doug Most, *A Court Has Ears Inside the Home; Parent-Child Secrets Not Safe*, THE RECORD (Bergen County, NJ), December 7, 1997, at A1.

<sup>127</sup>See Naftali Bendavid, *Lewinsky's Mother Testifies: Starr's Subpoena Stirs Up Ethical and Legal Debates*, CHI. TRIB., February 11, 1998, at N1, quoting Bruce Yannett, New York attorney, “Prosecutors recognize there is a vital and important and special relationship between family members, and that before you intrude on that relationship you’d better have a compelling reason. . . . John Gotti’s parents weren’t subpoenaed.”

<sup>128</sup>Based on conversations with an Assistant United States Attorney who requested his name be withheld.

<sup>129</sup>*Id.*

<sup>130</sup>Doug Most, *A Court Has Ears Inside the Home; Parent-Child Secrets Not Safe*, THE RECORD (Bergen County, NJ), December 7, 1997, at A1 citing Ken Jorgenson, a deputy attorney general in Boise, Idaho.

<sup>131</sup>See FED. R. EVID. 501; and FED. R. EVID. DELETED AND SUPERSEDED RULES 502-513. See also Watts, *supra* note 9, at 589.

<sup>132</sup>*Jaffee v. Redmond*, 518 U.S. 1 (1996).

<sup>133</sup>See FED. R. EVID. DELETED AND SUPERSEDED RULES 502-513; Franklin, *supra* note 4, at 149 (more than two-thirds of states statutorily recognize a physician-patient privilege).

should be left to the legislature.<sup>134</sup> It is likely, then, that failure of the House bill would settle the controversy against a parent-child testimonial privilege.

#### VIII. PROPOSAL

The purpose of the parent-child privilege should be a combination of the purposes behind the professional privileges and the spousal privilege. Parent-child relationships are necessary for the nurturing, growth and survival of both parents and children.<sup>135</sup> Guidance from the parent is vital to the task of parenting just as guidance from an attorney or physician is vital to his or her tasks. Communication between parties in these cases should remain confidential to foster an open forum. However, the parent-child relationship is different from that of a doctor-patient or attorney-client. Those professional relationships are affirmatively sought out for a specific reason and limited duration. Parent-child relationships are not affirmatively sought out by the specific parties involved. The relationship's goal is to benefit society by fostering healthy, happy individuals. Betrayal by a parent or child would likely sever the relationship or create a great deal of harm to this beneficial relationship.<sup>136</sup> The goals of the parent-child privilege should be to allow open communication for guidance and to foster family relationships which are beneficial to society.

The House bill accomplishes these goals relatively well. By allowing for a reciprocal privilege, it alleviates the trauma associated with both a child testifying against his/her parents and the parent testifying against the child. Protecting communication between parents and adult children as well as minors considers the continual need for guidance and fosters intergenerational relationships. Creating a parent-child privilege, which is in general similar to a spousal privilege, shows that Congress values parent-child relationships as much as spousal relationships. This message is consistent with the government's emphasis on "family values."<sup>137</sup> Structuring the parent-child privilege after the spousal privilege also decreases the novelty of the privilege; because existing law explains the spousal privilege, the parent-child privilege law will already be developed.

The House bill fails in its goals, however, by limiting the privilege to confidential communications only. While this would have protected Marcia Lewis from revealing Monica Lewinsky's confidences, it will not alleviate the trauma associated with testifying against one's parent or child. Parents or children, if they know certain testimony will be adverse, are still likely to perjure themselves or refuse to make a statement to protect their loved ones. Adverse testimony, as well as communications, should be protected to eliminate these concerns, and neither parent nor child should be forced to betray the other.

The Senate bill does not achieve the goals of the parent-child privilege. By limiting the privilege to only those cases not involving violence or drugs, the Senate still subjects witnesses to the cruel trilemma. The Senate's statement is that the parent-child relationship is not valued as much as a spousal relationship since no

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<sup>134</sup>See cases cited *supra* note 15.

<sup>135</sup>See Scott, *supra* note 34.

<sup>136</sup>*Id.*

<sup>137</sup>See Silvergate, *supra* note 123.

such limitation is placed on the spousal privilege. In the Senate's balance of family versus crime, society's interest in punishing drug crimes is more valuable than the societal interest in fostering and maintaining good parent-child relations. Though the Senate is attempting to open the debate forum on the issue of parent-child privilege, its statement is too diluted to be taken seriously. Proposing a study to evaluate if a parent-child privilege should exist is not taking the concerns of the public seriously, especially in the aftermath of Marcia Lewis' compelled testimony.

The ideal parent-child privilege would be created by statute with leeway given to the courts to develop the privilege in a fashion similar to the spousal privilege. Since the relationship is not entered into for a specific task, it should not end at a statute-specified age. The privilege would apply to children of all ages, minors and adults. The privilege would be reciprocal to alleviate the trauma and foster open communication. If the witness wishes to voluntarily testify against a family member, he or she should be allowed to do so as there would be no trauma and the relationship is likely not worth fostering.<sup>138</sup> The privilege should be a broad adverse testimony privilege to diminish the harm associated with betraying a loved one. Exceptions should be made when a crime is committed by one family member against another, similar to the spousal privilege exceptions. The House bill is almost the ideal privilege statute. By including adverse testimony under the protection of the privilege, the bill would be a model statute.

#### IX. CONCLUSION

The need for a parent-child privilege can be justified in terms of the constitutional right to privacy, the societal need to foster parent-child relationships and the need for individuals to develop their emotional and physical health. The House's Confidence in the Family Act<sup>139</sup> correctly recognizes the importance of keeping the family sphere private and loyal. By aiming the statute to protect the family and alleviate the cruel trilemma that parents and children face when compelled to testify against each other, the House bill acknowledges the need for a parent-child privilege by statute. The House bill encourages guidance and communication by providing for a reciprocal privilege. Including adult children under the protection of the privilege recognizes the importance of transgenerational relationships to society. The broad definition of children embodied in the bill acknowledges the varying and dynamic families of today's era. The House fails in its effectiveness in achieving its goals by not providing for an adverse testimony privilege and instead providing for a limited confidential communications privilege. An adverse testimony privilege would better serve both goals of fostering communication and alleviating trauma. The Senate bill,<sup>140</sup> with its proposal of a study, does not effectively recognize the importance of a parent-child privilege. By not allowing for a parent-child privilege in cases where drugs or violence are involved, the Senate shows its unwillingness to place much importance on familial loyalty.

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<sup>138</sup>See Scott, *supra* note 34, at 926; *but see* Scott, *supra* note 34, at 929, n.89 (defendants should be able to prevent voluntary testimony in order to prevent prosecutors from improperly inducing parents or children testify).

<sup>139</sup>H.R. 3577, 105th Cong., 2d Sess. (1998).

<sup>140</sup>S. 1721, 105th Cong., 2d Sess. (1998).

The ideal parent-child privilege would be reciprocal, would protect adverse testimony, and would define children broadly. It would be developed in a fashion similar to that of the spousal privilege. Creation of a broad parent-child privilege would be consistent with the fundamental right to family privacy. Creation of such a privilege would also recognize and allow for loyalty between parents and children. Finally, creation of a parent-child privilege would foster open, nurturing, and beneficial relationships between parents and children. The law should recognize a parent-child privilege to protect the constitutional right to family relationships and to foster parent-child relationships which are beneficial to society.