To Tell or Not to Tell? An Analysis of Testimonial Privileges: The Parent-Child and Reporter's Privileges

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NOTES

TO TELL OR NOT TO TELL? AN ANALYSIS OF TESTIMONIAL PRIVILEGES: THE PARENT-CHILD AND REPORTER'S PRIVILEGES

The ultimate goal of the adversarial system is to ascertain the truth. Accordingly, the common law advocated the admittance of all relevant evidence to enable the fact-finder to make an informed decision. In certain circumstances, the common law and the Fed-

1 See Fed. R. Evid. 102. Rule 102 provides that the Federal Rules of Evidence "shall be construed . . . to the end that the truth may be ascertained and proceedings justly determined." Id.; see also Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) (noting testimony of witnesses in judicial process is crucial to further predominant principle of utilizing all rational means for ascertaining truth); Edward Cleary, McCormick on Evidence § 72, at 170 (3d ed. 1984) (asserting that "the overwhelming majority of all rules of evidence have as their ultimate justification some tendency to promote the objectives set forward in the conventional witness' oath, the presentation of 'the truth, the whole truth, and nothing but the truth'"); Black's Law Dictionary 555 (6th ed. 1990) (defining "evidence" as "all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved . . . . That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other.").

2 See 8 John H. Wigmore, Evidence in Trials at Common Law § 2192, at 70 (McNaughton rev. 1961) (1st ed. 1904). Wigmore propounded that "[f]or more than three centuries it has now been recognized as a fundamental maxim that the public has the right to every man's evidence." Id. He also determined that all have a "general duty to give what testimony one is capable of giving and any exemptions which may exist are distinctly exceptional." Id.; see also United States v. Nixon, 418 U.S. 683, 709 (1974). The Court stated:
eral Rules of Evidence provide for pertinent information to be excluded due to superior policy considerations. Privileges are one means of precluding such information from reaching the fact-finder. At common law, only the attorney-client and spousal privileges were recognized.

We have elected to employ an adversary system...in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice...be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. Id.; see also James B. Thayer, A Preliminary Treatise on Evidence of the Common Law 264 (1898) (propounding that practice of admitting all relevant evidence is "a presupposition involved in the very conception of a rational system of evidence"); Jeffrey Begens, Comment, Parent-Child Testimonial Privilege: An Absolute Right or an Absolute Privilege?, 11 U. Dayton L. Rev. 709, 717 (1986) (asserting that legal system functions most effectively when all relevant evidence is made available).

3 See Spencer A. Gard, Jones on Evidence §§ 21:1 to :43 (6th ed. 1972). There are exceptions to the policy of admitting all relevant evidence. Id. § 20:1. One such exception is governed by the evidentiary rules of incompetency. Id. §§ 20:1 to :14. The rules of incompetency reject a witness's testimony on the grounds of unreliability. Id. Such a witness may be deemed mentally incompetent, or incompetent due to past criminal behavior. Id. It has been established that:...the public interest is best served by the paramount requirement that all facts relevant to a litigated issue should be available to the court to the end that the truth may be ascertained. Thus ordinarily the sanctity of confidence must yield to the necessity of getting all the facts and it is only in a few rare relationships that the public policy of protecting the relationship overrides the public policy of unrestricted injury. Id.

Federal Rule of Evidence 403 defines another instance warranting the exclusion of relevant evidence. See Fed. R. Evid. 403. This Rule calls for the exclusion of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Id.; see also M.C. Slough, Relevancy Unraveled, 5 Kan. L. Rev. 1, 12-15 (1956) (addressing balancing of probative value and need for evidence against harm likely to result from its admission); Herman L. Trautman, Logical or Legal Relevancy—A Conflict in Theory, 5 Vand. L. Rev. 385, 392 (1952) (same).

4 See Edith L. Fisch, New York Evidence § 511, at 334 (2d ed. 1992-93). Privileges are designed to protect and strengthen certain relationships deemed socially desirable. Id. The recognition of testimonial privileges, however, often causes the exclusion of clearly relevant and nonprejudicial evidence. Id. Nevertheless, the courts and legislature deem the social benefit derived from the protected relationship to outweigh the harm that results from the exclusion of the evidence. Id.; see also 65 N.Y. Jur. Witnesses § 44 (1969). Testimonial privileges serve as an exception to the generally accepted notion that the public's interest in the disclosure of facts is paramount to "considerations of inviolability of communications made in the reliance on personal confidence, on a fiduciary or contract relations." Id.; Jack B. Weinstein et al., Evidence Cases and Materials 1348 (8th ed. 1988). The subject of privileges may be divided into three categories: (1) privileges that have a direct constitutional basis, such as the Fifth Amendment privilege against self-incrimination; (2) privileges created to insure free communication in confidential relationships, such as the attorney-client privilege; and (3) privileges connected with the effective functioning of governmental institutions, such as the state secret and official information privileges. Id.

5 Berd v. Lovelace, 21 Eng. Rep. 33, 33 (1577). The first evidentiary privilege recognized at common law was the protection of communications between attorney and client. Id.; Dennis v. Codrington, 21 Eng. Rep. 53, 53 (1580). Shortly thereafter, courts began to create a marital privilege, which was widely accepted in both criminal and civil cases by the late
Thereafter, various states enacted legislation which created privileges protecting communications between physicians and patients; psychotherapists and patients; and priests and confessors.

6 Smith, 425 F. Supp. at 1040. The physician-patient testimonial exception did not exist at common law. Id. Thus, the physician-patient privilege is purely a creature of statute. See Wigmore, supra note 2, § 2380. The privilege enables patients to prevent disclosure of confidential communications confided in their doctor. See Jones v. Superior Court, 119 Cal. App. 3d 534, 534 (Cal. Dist. Ct. App. 1981). The privilege may only be invoked, however, if the confidential information was necessary for and obtained during the course of treatment. Id. For cases outlining the exceptions to the privilege, see State v. Dyal, 478 A.2d 390, 394 (N.J. 1984) (privilege may not be invoked in criminal cases involving drinking); Prink v. Rockefeller Center, 48 N.Y.2d 309, 315, 398 N.E.2d 517, 522, 422 N.Y.S.2d 911, 1993].

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ment. Id. Eventually, the common law recognized additional privileges such as priest-penitent, doctor-patient, as well as, several governmental privileges. Id.; see also In re Navarro, 155 Cal. Rptr. 522, 523 (Cal. Ct. App. 1979). The attorney-client privilege protects against compelled disclosure of confidential communications between attorneys and clients. Id.; Geoffrey C. Hazard, Jr., An Historical Perspective on the Attorney-Client Privilege, 66 Cal. L. Rev. 1061, 1065-66 (1978). The testimonial exception is the product of judicial decisions augmented by statutes. Id. The fundamental purpose of the privilege is to encourage open communication between attorneys and clients. See People v. Meredith, 631 P.2d 46, 51 (Cal. 1981). In the absence of a such a privilege, a client will be reluctant to make full disclosure to his attorney. Id.; EDMUND M. MORGAN, FOREWORD to AMERICAN LAW INSTITUTE MODEL CODE OF EVIDENCE 24-28 (1942). The privilege is that of the client, thus the attorney is required to disclose evidence if the client does not object. Id. For a particular communication to be privileged, it is not necessary that the communication be made directly to the lawyer. See United States ex rel. Edney v. Smith, 425 F. Supp. 1038, 1048 (E.D.N.Y. 1976). The privilege may be maintained if the communication is conveyed to the lawyer's representatives, such as associates or clerks. Id. For the exceptions to the privilege, see Fed. R. Evid. 503(d)(5) (proposed) (1993) (privilege does not apply when attorney retained by two or more clients and there is resulting litigation between any clients); In re Grand Jury Subpoena Served Upon John Doe, Esq. (Slotnick) v. United States, 781 F.2d 238, 247 (2d Cir.) (en banc) (mere identity of client not protected by attorney-client privilege), cert. denied, 475 U.S. 1108 (1986); In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982) (attorney-client privilege inapplicable when client voluntarily discloses confidential communication to third party); Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975) (communication which is basis of affirmative defense not covered by attorney-client privilege); Clark v. State, 261 S.W.2d 339, 347 (Tex. Crim. App.) (privilege may not be interposed when client seeks attorney's advice in furtherance of crime or fraud), cert. denied, 346 U.S. 855 (1953).

At early common law, a spouse was incompetent to testify where the husband or wife was a party to a judicial proceeding. See Trammel v. United States, 445 U.S. 40, 44 (1980). This rule resulted from "two canons of medieval jurisprudence": defendants could not testify on their own behalf due to their interest in the proceeding, and the husband was the dominant person in the marital relationship. Id. Despite its "medieval roots," the validity of the spousal disqualification rule remained unchallenged until the mid-nineteenth century. Id. Currently, the courts recognize two types of spousal privileges. Id. at 53. The first privilege, known as the "marital privilege" permits a witness-spouse to refuse to testify against the other spouse in a criminal trial. Id. The second, the "husband-wife" privilege, is available in both civil and criminal proceedings and protects confidential communications between husband and wife during marriage. See People v. Molski, 10 N.Y.2d 78, 76, 176 N.E.2d 81, 81, 217 N.Y.S.2d 65, 65 (1961); see also N.Y. CIV. PRAC. L. & R. § 4502 (McKinney 1993) (husband-wife privilege recognized by New York); N.Y. CRIM. PROC. § 60.10 (McKinney 1993) (same). In order to claim the "marital privilege," the parties must be legally married at the time of trial. See United States v. Bolzer, 556 F.2d 948, 951 (9th Cir. 1977). In contrast, the "husband-wife" privilege merely requires the parties to be married at the time of the conversation. See In re Vanderbilt, 57 N.Y.2d 66, 66, 439 N.E.2d 378, 378, 453 N.Y.S.2d 662, 662 (1982).
sors. In the 1970s, Congress proposed to expressly enumerate such privileges as part of the Federal Rules of Evidence. After much comment and controversy, however, Congress enacted Federal Rule of Evidence 501 ("Rule 501"), which left courts to interpret and create privileges "in the light of reason and experience."

Although granted much leeway, courts have typically construed existing privileges narrowly, and have been reluctant to create new privileges. Nevertheless, the parent-child and the reporter's

916 (1979) (privilege inapplicable when patient places his physical condition in controversy).

7 See Fed. R. Evid. 504 (proposed) (1993); Subpoena Served Upon Zuniga, 714 F.2d 632, 637 (6th Cir. 1983) (Federal Rule 501 permits recognition of psychotherapist-patient privilege). The privilege is inapplicable in several situations. See id. § 1024 (West 1994) (privilege inapplicable if psychotherapist reasonably believes patients are dangerous to themselves or others and disclosure of communication is necessary to prevent threatened danger); Cal. Evid. Code § 1026 (West 1994) (psychotherapist-patient privilege inapplicable to information required to be reported to public office).

8 See Weinstein et al., supra note 4, at 1571 (noting two-thirds of states have enacted statutes covering confidential communications between priest and penitent). However, the extent of protection provided by the privilege varies by jurisdiction. See Fed. R. Evid. 506 (proposed) (1993). Some states restrict the priest-penitent privilege to communications in confessions, whereas others apply the privilege to any confidential communication to a clergyman in his professional capacity. Id. The priest-penitent privilege is unique in that both parties may claim the privilege. See Keenan v. Gigante, 47 N.Y.2d 160, 168, 390 N.E.2d 1151, 1158, 417 N.Y.S.2d 226, 230 (1979).


10 See Fed. R. Evid. 501. This rule provides in relevant part:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, state or political subdivision thereof shall be determined in accordance with state law.

Id. Federal common law generally guides the privilege inquiry, except in cases where state law is controlling as to an element of the claim or defense. Id.


12 See Wigmore, supra note 2, § 2192. Dean Wigmore has condemned evidentiary privileges since they are in derogation of the general rule that everyone is obligated to testify when properly summoned and are an obstacle to the administration of justice. Id.; accord C. McCormick, Evidence 159 (2d ed. 1972) (permitting any privilege functions to halt search for truth); Morgan, supra note 5, at 22-30 (same); 97 C.J.S. Witnesses, at 259 (1957);
privileges have been adopted by courts. The special relationship existing between parents and children, as well as reporters and their sources, have thus been accorded privileged status.

This Note focuses on the parent-child privilege, the reporter's privilege, and the controversy surrounding both. Part One analyzes the present status of the parent-child privilege under federal and state law. Part One also examines the constitutional and public policy justifications supporting the parent-child privilege. Part Two traces the historical development of the reporter's privilege and examines the Supreme Court's decision in *Branzburg v. Hayes* and its effect on the status of the reporter's privilege. Finally, Part Two examines the circumstances under which the reporter's privilege may be defeated.

I. THE PARENT-CHILD PRIVILEGE

The history of the parent-child privilege can be traced to ancient Jewish and Roman law, which barred family members from testifying against one another. These civilizations believed that the family was the foundation of society and to allow family members to testify against each other would effectively destroy society. Similarly, the parent-child privilege is based upon the spousal privilege, which was created by the English Evidence Act of 1853. Nevertheless, the parent-child privilege, as with other

see also *Branzburg v. Hayes*, 408 U.S. 665, 691 n.29 (1972) (indicating that creating new testimonial privileges has been met with disfavor since such privileges obstruct search for truth); ACLU of Mississippi v. Finch, 638 F.2d 1336, 1344 (5th Cir. 1981) (noting "[p]rivileges are strongly disfavored in federal practice").


14 See Meredith Watts, The Parent-Child Privilege: Hardly a New or Revolutionary Concept, 28 WM. & MARY L. REV. 583, 591-92 (1987). Ancient Jewish law deemed it necessary to protect society, and thus, found that fostering strong familial relationships would be the most efficient method to bring about this goal. *Id.* at 591. The Talmud, a compilation of Jewish law, specifically "forbids a parent from testifying against his or her children." *Id.* at 591-92; see also *In re Greenburg*, 11 Fed. R. Serv. 2d (Callaghan) 579, 581 n.6 (D. Conn. 1982) (Jewish scholars acknowledge parent-child privilege rule of Jewish faith).

15 See Watts, supra note 14, at 592. The Romans strongly believed that the foundation of society was the family, and thus recognized the rule of testimonium domesticum. *Id.* This rule mandated that parents and children could not be forced to testify against each other. *Id.* The rule prevented the erosion of family relations, which the Romans saw as the basis of society. *Id.* The Napoleonic Code also prohibited the compelled disclosure of confidences between family members, commanding that "[n]o one may be required to disclose confidences between himself and a family member." *Id.* at 593. The familial privilege is also recognized as part of the law in many other countries including France, West Germany, and Sweden. *Id.*

16 See supra notes 14-15.

17 See Betsy Booth, Comment, Underprivileged Communication: The Rationale for a Par-
newly emerging testimonial privileges, has faced much resistance by courts and legislators.\textsuperscript{18}

A. The Federal Law

Rule 501 does not expressly set forth a parent-child privilege.\textsuperscript{19} Rule 501 does, however, allow for federal courts to recognize new privileges on a case-by-case basis.\textsuperscript{20} Nevertheless, only the Nevada and Connecticut district courts have recognized the parent-child testimonial privilege.\textsuperscript{21} The Nevada District Court, in its seminal decision, \textit{In re Agosto},\textsuperscript{22} applied an expansive view of Rule 501.\textsuperscript{23} The court determined that the legislative history of Rule 501 was indicative of Congress's intent to leave courts free to expand the present law of privileges in order to reach situations where constitutional protection was deemed critical.\textsuperscript{24} Therefore, the court utilized the parent-child privilege to protect an individ-
ual's right to privacy.25

Although the Agosto court recognized the need for a parent-child privilege, the majority of federal courts have refused to adopt such a privilege.26 Similarly, no circuit court has adopted a parent-child privilege, although three circuit courts have implied the possible recognition of a privilege if federal, rather than state law, controlled the case,27 or if the issue simply arose under a different factual situation.28 It appears that federal courts are adopting a narrow construction of Rule 501 and are reluctant to create new testimonial privileges.

B. State Law

Although the parent-child privilege was not recognized at common law,29 Idaho,30 Minnesota31 and Massachusetts32 enacted

25 Agosto, 553 F. Supp. at 1325.
26 See, e.g., In re Grand Jury Proceedings of John Doe, 842 F.2d 244, 248 (10th Cir.) (rejecting child's attempt to assert parent-child testimonial privilege in regard to testimony against mother), cert. denied, 488 U.S. 894 (1988); United States v. Davies, 768 F.2d 893, 900 (7th Cir.) (rejecting use of parent-child privilege by defendant's daughter), cert. denied, 474 U.S. 1008 (1985); In re Santarelli, 740 F.2d 816, 817 (11th Cir. 1984) (denying appellant's motion to quash grand jury subpoena after appellant asserted parent-child privilege); In re Grand Jury Proceedings (Starr), 647 F.2d 511, 512-13 (5th Cir. 1981) (finding no federal judicial support or recognition to prevent child from testifying against mother and stepfather); United States v. Penn, 647 F.2d 876, 885 (9th Cir.) (expressing that there is no judicially or legislatively recognized general family privilege), cert. denied, 449 U.S. 903 (1980).
27 See Port v. Heard, 764 F.2d 423, 430 (5th Cir. 1985). The court indicated that defendant's father and stepmother would have been excused from testifying against him, if federal law, rather than Texas law applied. Id.
28 See United States v. Ismail, 756 F.2d 1253, 1258 (6th Cir. 1985) (declining to address whether parent-child privilege should be adopted in situations involving unemancipated minors); United States v. Jones, 683 F.2d 817, 819 (4th Cir. 1982) (implying parent-child privilege may be applicable in different factual setting).
30 See Idaho Code § 9-203(7) (Supp. 1985). The code provides:
Any parent, guardian or legal custodian shall not be forced to disclose any communication made by their minor child or ward concerning [matters] in any civil or criminal action to which such child or ward is a party . . . [except] this section does not apply to a civil action or proceeding by one against the other nor to a criminal action or proceeding for a crime committed by violence of one against the person of the other, nor does this section apply to any case of physical injury to a minor child where the injury has been caused as a result of physical abuse or neglect by one or both of the parents, guardian or legal custodian.

Id.

31 See Minn. Stat. Ann. § 595.02(1)(j) (West 1993). The statute provides:
A parent or the parent's minor child may not be examined as to any communication made in confidence by the minor to the minor's parent. A communication is confidential if made out of the presence of persons not members of the child's immediate family living in the same household . . . . This exception does not apply to a civil action or
legislation adopting such a privilege. In Idaho and Minnesota, the state cannot compel parents to reveal communications of their minor children in criminal or civil proceedings. These statutes, however, do not afford privileged status to a communication between parent and child because the states’ primary concern is to encourage children to seek support from their parents.

Unlike Idaho and Minnesota, the Massachusetts legislature enacted a limited parent-child privilege, which disqualified minor children from testifying against their parents in criminal proceedings. The enactment was in response to the Massachusetts Supreme Court’s decision in *Three Juveniles v. Commonwealth.*

In *Three Juveniles,* the court held that the defendant’s children could be compelled to testify against their father in his murder trial.

Notwithstanding the few states that recognize a parent-child privilege, most state courts have refused to adopt the privilege.
Some states reason that such a privilege would be an exception to the general rule that all evidence must be available in the search for truth and, thus, a parent-child privilege should be discouraged. 39 Other states, rejecting the privilege, have asserted that the “Wigmore test” 40 was not satisfied. 41

It is well established that testimonial privileges serve to protect certain desirable relationships. 42 Dean John Wigmore developed a test consisting of four fundamental conditions to aid in determining whether testimonial privileges, such as the parent-child privilege, should be recognized as a matter of public policy. 43 For a testimonial privilege to be recognized, the Wigmore test provides that the communication must be made in confidence; such confidence must be necessary for the relations between the parties; the community must recognize the relationship as one which should be encouraged; and finally, the disclosure of the communications must bring forth greater harm to the relationship than the benefit which emanates from the proper disposal of litigation. 44

Wigmore reasoned that privileged relationships hold certain characteristics in common which distinguish them as deserving privileged status. 45 He also asserted that denying privileged sta-

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39 See Dixon, 411 N.W.2d at 763 (all privileges are exceptional and should be discouraged); Gail D., 525 A.2d at 337 (same).

40 See Wigmore, supra note 2, § 2285.

41 See Maxon, 756 P.2d at 1301. The Maxon court claimed that the parent-child privilege failed to satisfy Wigmore’s postulate. Id. Further, the court stated that the concern of losing evidence outweighed public policy favoring a parent-child privilege. Id.

42 See supra notes 3-9 (emphasizing that special relationships exist warrant protection through testimonial privileges).


44 See Wigmore, supra note 2, § 527 (declaring that “[o]nly if these four conditions are present should a privilege be recognized”).

45 See id.; see also Covey, supra note 18 (expounding Wigmore’s rationale for developing four-prong test).
tus to certain relationships was justifiable because these relationships lack one or more of the identified conditions.\textsuperscript{46} Wigmore's test, therefore, demands that these four conditions serve as the foundation for ascertaining the existence of all privileges.\textsuperscript{47}

After examining the issue in light of Wigmore's postulate, the parent-child privilege should undoubtedly be accepted because it satisfies each condition of the Wigmore test.\textsuperscript{48} The parent-child relationship is one which by its very nature is founded and maintained upon an aura of confidence.\textsuperscript{49} Moreover, children rely on their parents for guidance throughout their lives, and if a parent were to betray this confidence, irreparable damage would result to the child's development\textsuperscript{50} and the parent-child relationship.\textsuperscript{51} Likewise, New York courts have determined that the parent-child relationship demands recognition as a testimonial privilege.

\textbf{C. Judicial Recognition of the Parent-Child Privilege in New York}

Although New York does not have a statutorily created parent-child privilege,\textsuperscript{52} such a privilege has been judicially recognized.\textsuperscript{53}

\begin{itemize}
\item \textsuperscript{46} See Wigmore, \textit{supra} note 2, \S 527.
\item \textsuperscript{47} See \textit{id.}; see also \textit{supra} note 43 (discussing support of Wigmore test to establish parent-child privilege from courts and scholars).
\item \textsuperscript{48} See \textit{id}.
\item \textsuperscript{49} See Begens, \textit{supra} note 2, at 721 (asserting that confidentiality is essential to maintenance of parent-child relationship); Daniel R. Coburn, \textit{Child-Parent Communications: Spare the Privilege and Spoil the Child}, 74 \textit{Dick. L. Rev.} 599, 623 (1970) (contending "[i]t is difficult to imagine a relationship which, by its inherent nature, spawns communications of a confidential nature with a greater degree of frequency"); Watts, \textit{supra} note 14, at 608 (averring parent-child relations "breed" confidential communications).
\item \textsuperscript{50} See \textit{Begens, supra} note 2, at 722. Research indicates that the lack of parental interaction with a child can lead to abnormal behavior. \textit{Id}.
\item \textsuperscript{51} See \textit{In re Agosto}, 553 F. Supp. 1298, 1326 (D. Nev. 1983). The Agosto court professed: To damage the parent-child relationship would result in damage to the child's relationship to society as a whole. In an age in which Americans bemoan the lack of loyalty or sense of responsibility which some family members seem to exhibit toward one another, resulting in massive government support programs, it is paradoxical that, on the other hand, the government seeks to employ information-gathering tactics which further undermine the integrity and supportive structure of the family unit. \textit{Id}.
In *In re A & M*, the Appellate Division, Fourth Department, reviewed whether the constitutionally protected right to privacy extended to parent-child communications. The court found that the "integrity of the family relational interests [was] clearly entitled to constitutional protection." Writing for the court, Justice M. Delores Denman recognized the State's goal of obtaining all relevant facts to detect and prosecute criminal behavior. Justice Denman posited, however, that a parent-child communication would be privileged because the societal benefit in fostering parent-child relations outweighed the State's interest in compelling the disclosure of facts. The privilege would be established if it

(McKinney 1993) (journalist privilege).

53 WILLIAM P. RICHARDSON, RICHARDSON ON EVIDENCE § 455-A, at 200 (10th ed. & Supp. 1973) (stating that no parent-child privilege was created by New York's legislature); FISCH, supra note 4, § 751, at 288 (same).

54 61 A.D.2d 426, 403 N.Y.S.2d 375 (4th Dep't 1978).

55 Id. at 428, 403 N.Y.S.2d at 377. The question before the court was one of first impression in New York State. Id. The District Attorney of Erie County was investigating an alleged arson which occurred at a nearby college. Id. Several witnesses identified a sixteen year old child near the scene of the arson. Id. The district attorney subsequently issued subpoenas to the child's parents. Id. The district attorney was allegedly seeking evidence, in the form of admissions, which may have been made by the child to his parents. Id. The trial court granted a motion to quash the subpoena based upon the notion that the communications between a child and parent were protected under New York's marital privilege. Id. Although the Appellate Division refused to expand the marital privilege, the court did conclude that the communications could be shielded from disclosure. Id. at 429, 403 N.Y.S.2d at 378. Addressing the need for a parent-child privilege, the court noted:

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. Shall it be said to those parents "Listen to your son at the risk of being compelled to testify about his confidences?"

Id.

56 Id. at 432, 403 N.Y.S.2d at 380. The court's decision was influenced by the United States Supreme Court decision in *Moore v. East Cleveland*, 431 U.S. 494 (1977). Id. The *Moore* Court propounded that the Constitution protects "the sanctity of the family precisely because the institution of the family is deeply rooted in the Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." See Moore, 431 U.S. at 503-04.

57 A & M, 61 A.D.2d at 433, 403 N.Y.S.2d at 380. The law of evidence is based upon the full disclosure of facts which assist in ascertaining the truth. Id.

58 Id. at 432, 403 N.Y.S.2d at 380. The court utilized a balancing test since competing interests were involved. Id. The court weighed the state's interest in full disclosure of all relevant facts, against the parent's right to privacy. Id. Although society's interest in protecting parent-child relations was considered to outweigh the state's quest for the truth, the court permitted the parent's testimony. Id. at 436, 403 N.Y.S.2d at 382. However, the court limited the scope of the interrogation to questions which did not invade the family's privacy. Id.

was found that the confidential information was revealed by the child solely for the purpose of seeking guidance or support from his parents.\textsuperscript{59}

Since \textit{In re A & M}, many New York courts have acknowledged the parent-child privilege.\textsuperscript{60} In \textit{People v. Fitzgerald},\textsuperscript{61} the Westchester County Court expanded the existing parent-child privilege to prevent the State from forcing the disclosure of confidential communications between a parent and child regardless of the child’s age.\textsuperscript{62} The court found the sanctity and privacy of the family to constitute a fundamental right which should be protected by the United States Constitution.\textsuperscript{63} The court professed that the family’s right to privacy was fundamentally ingrained in “our his-
Tory and tradition."\(^{64}\)

These cases have laid the foundation for future courts to recognize the parent-child testimonial privilege on constitutional grounds. Thus, the New York Court of Appeals should review the parent-child privilege and establish a uniform rule for the lower courts to follow. Further, the New York Legislature should enact legislation, as has been proposed in the past, to codify the parent-child privilege.\(^{65}\)

D. Arguments Supporting Establishment of the Parent-Child Privilege

1. The Constitutional Right to Privacy

The argument set forth in New York justifying the parent-child privilege is an old concept.\(^{66}\) As explained in Fitzgerald, the parent-child relationship clearly falls within the ambit of the right to privacy.\(^{67}\) The right to privacy has been expounded upon since 1886, when the United States Supreme Court construed a right of privacy in both the Fourth and Fifth Amendments.\(^{68}\) These century-old cases have, therefore, laid the groundwork for recognizing a parent-child privilege.

In 1923, the Supreme Court recognized the right to privacy within the family setting in Meyer v. Nebraska.\(^{69}\) The Meyer Court stated, that under the Constitution, the family was an autonomous unit that should be free of undue state interference.\(^{70}\) In his decision, Justice James McReynolds posited that parents have a right to direct the education of their children.\(^{71}\) Additionally, in

\(^{64}\) See Fitzgerald, 101 Misc. 2d at 716, 422 N.Y.S.2d at 312 (finding that these rights were "so rooted in the traditions and conscience of our people as to be ranked as fundamental" (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))).


\(^{66}\) See supra notes 14-15 (commenting that notions of parent-child privilege established under ancient laws).

\(^{67}\) See supra notes 62-64.

\(^{68}\) See Boyd v. United States, 116 U.S. 616, 630 (1886); cf. Andresen v. Maryland, 427 U.S. 465, 477 (1976) (limiting privacy granted by Fourth and Fifth Amendments); see also Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (claiming "[T]he Framers of the Constitution conferred, as against the Government, the right to be let alone—the most comprehensive of rights and right most valued by civilized men"); Samuel Warren & Louis Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 193 (1890) (asserting right to privacy as "the right to be left alone").

\(^{69}\) 262 U.S. 390 (1923).

\(^{70}\) Id. at 399.

\(^{71}\) Id. at 401. The Court struck down a statute prohibiting the teaching of a foreign language before the student reached the eighth grade. Id. at 402.
Pierce v. Society of Sisters,72 the Supreme Court held that parents have a constitutionally protected right to decide whether or not to send their children to public school.73 Lastly, in Wisconsin v. Yoder,74 the Supreme Court noted that history and Western civilization have75 acknowledged that the primary role of parents is to nurture and raise their children.76

Each of these cases protected the right of parents to assume the primary role in decisions concerning child-rearing. The Supreme Court has, therefore, supported the proposition that there is a "private realm of family life which the state cannot enter."77 The "private realm," includes those areas in which state intrusion would interfere with the integrity of the family.78 Case law demonstrates that a state should not force parents to testify against their children because this constitutes an invasion of the familial right to privacy. As such, it is inconceivable that the right to privacy, evidenced by these decisions, does not pertain to the privacy of the family unit with regard to the parent-child privilege.

2. Family Unity

The importance of family relations79 and the protection of peace and harmony within the family unit have been emphasized through court decisions and commentaries.80 The family is the

72 268 U.S. 510 (1925).
73 Id. at 534-35. At issue in Pierce, was an Oregon statute that required children between the ages of eight and sixteen to attend public schools. Id. at 530. The Court found that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." Id. at 535.
74 406 U.S. 205 (1972).
75 Id.
76 Id. at 232. The Court upheld the right of Amish parents to refuse to send their children to public schools after the eighth grade. Id.
79 See supra notes 68-77 and accompanying text (explaining evolution of family right to privacy through Supreme Court precedence).
80 See Smith v. Org. of Foster Families, 431 U.S. 816, 844 (1977). The Smith Court explained:
most influential factor in a child's development. Commentators have further recognized that positive family interaction is significant in preventing juvenile delinquency and promoting well-adjusted children with positive self-images. Thus, it is apparent that society has a strong interest in fostering open communications between parents and children.

The forced disclosure of confidential parent-child communications carries many negative consequences. Although the state will have access to all relevant facts, children may become suspicious of the legal system and society in general. Additionally, children may lose respect for two valuable aspects of their lives: their parents and family. When the state compels disclosure from parents regarding confidential communications, parents are faced with the strong competing demands of parental loyalty and legal authority.

Parents have two alternatives to succumbing to the state's wishes. First, a parent-witness may be subjected to contempt
proceedings for refusing to testify.\(^7\) Secondly, the parent-witness may testify, but lie in an effort to protect the child.\(^8\) Recognition of a parent-child privilege would serve to remedy the dilemma faced by parents called to testify against their children by effectively removing the burden of choosing between these competing interests.

3. Support from Two Currently Recognized Privileges

Parent-child confidential communications should be afforded privileged status because of the similarities between the parent-child relationship and those relationships currently recognized under testimonial privileges.\(^9\) In particular, the parent-child relationship encompasses aspects of the relations between psychotherapists and their patients.\(^10\) This privilege usually protects the confidentiality of highly personal and embarrassing communications made by the patient for the purpose of treatment for mental or emotional conditions.\(^11\) Because of the nature of this relationship, the need to protect the privacy and confidentiality of the communications was recognized as a prerequisite to its success.\(^12\)

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87 See, e.g., John Doe v. United States, 842 F.2d 244, 245 (10th Cir.) (affirming district court order holding fifteen year old minor in contempt for refusing to testify against mother or other family members), cert. denied, 488 U.S. 894 (1988); United States v. Jones, 683 F.2d 817, 818 (4th Cir. 1982) (holding son in contempt for refusing to answer grand jury questions about his father); State v. DeLong, 456 A.2d 877, 877 (Me. 1983) (upholding contempt conviction of seventeen year old who refused to testify against her father).

88 See United States v. Ismail, 756 F.2d 1253, 1256 (6th Cir. 1985). In Ismail, defendant's son was forced to testify against the defendant. Id. When the prosecutor learned that the son had lied, the child was forced to testify again. Id. This situation resulted in the child's contemplation of suicide. Id.

89 See In re Agosto, 553 F. Supp. 1298, 1303 (D. Nev. 1983) (analogizing parent-child privilege with psychotherapist-patient and marital privileges); Levine, supra note 81, at 780 (same); Watts, supra note 14, at 608-09 (same); see also Begens, supra note 2, at 727 (examining parent-child privilege through analogy with professional privilege); Koepp, supra note 43, at 564 (same).

90 See supra notes 7 & 88 (applying psychotherapist-patient privilege to parent-child privilege).

91 See FED. R. EVID. 504(b) (proposed) (1993). This rule would provide: A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of his family.

92 See Levine, supra note 82, at 779 (acknowledging important role confidentiality plays in maintenance of parent-child relationship); see also Robert M. Fisher, Psychotherapeutic Professions and the Law of Privileged Communications, 10 WAYNE L. REV. 609, 611 (1964) (alleging disclosure of confidences may destroy psychotherapeutic relationship with patient and circumvent sensitive relations with other patients); David W. Louiselle, The Psychologist in Today's Legal World, 41 MINN. L. REV. 731, 745-46 (1957) (successful therapy re-
Similarly, when children are faced with a serious problem and are unsure about how to handle themselves, their first reaction is usually to seek assistance and advice from their parents. Because children are inclined to confide in their parents, there exists a need for the free flow of highly personal information. It is illogical that children must seek a professional psychotherapist's assistance, rather than parental assistance, in order for such communications to remain privileged.

In addition, the marital privilege supports the adoption of the parent-child privilege because the relationships within each privilege parallel one another. The marital privilege, like the parent-child privilege, is highly dependent upon the protection of communications. The relationships are founded upon shared love, fondness, intimacy, and trust. Both relationships also aid in the promotion of the family institution. Society has recognized the need to nurture the marital bond in an effort to foster and preserve harmony and tranquility between spouses. Society, likewise, values the parent-child relationship, and the recognition of such a privilege unquestionably strengthens family harmony and

quirest utmost trust between patient and psychotherapist).

93 See In re A & M, 61 A.D.2d 426, 434, 403 N.Y.S.2d 375, 378 (4th Dep't 1978) (consistent with parental role that children seek guidance and advice from parents); see also People v. Harrell, 87 A.D.2d 21, 24, 450 N.Y.S.2d 501, 503 (2d Dep't 1982) (stating that "[w]hen a minor is arrested for a crime it is only natural, that in the first instance, he should regard his parents, rather than a lawyer, as a source of assistance and advice"), aff'd, 59 N.Y.2d 620, 449 N.E.2d 1263 (1983).

94 See Stanton, supra note 43, at 13 (asserting that "every person needs the opportunity for intimate and trusting relationships in which highly personal information can be freely communicated").

95 See Levine, supra note 82, at 781 (common elements of marital and parent-child relationships support adoption of parent-child privilege); see also Koepp, supra note 43, at 564 (analogizing marital relationship and parent-child relationship); Watts, supra note 14, at 602 (noting similarities between parent-child and marital relationships).

96 See Levine, supra note 82, at 781 (noting marital relationship warrants protection).

97 See id. (expressing that mutual love, affection, and intimacy are aspects shared by both marital and parent-child relationships).

98 See Begens, supra note 2, at 729 (marital and parent-child relationships based on "trust and confidence" and establish "vital family institution"); Watts, supra note 14, at 597 (discussing basis for marital privilege as promoting trust and reliance between spouses).

99 See Trammel v. United States, 445 U.S. 40, 44 (1980) (rationale for marital privilege "perceived role in fostering harmony and sanctity of the marriage relationship"); Federated Dep't Stores, Inc. v. Esser, 96 Misc. 2d 567, 568, 409 N.Y.S.2d 353, 354 (Sup. Ct. N.Y. County 1978) (marital privilege purports to preserve peace, confidence, and tranquility between spouses); see also Richardson, supra note 53, § 447, at 402 (justification for marital privilege avoiding "feeling of indelicacy and want of decorum" that would arise from requiring persons to condemn their spouse).

100 See supra notes 66-77 (discussing Supreme Court recognition that parent-child communications be afforded constitutional protection).
It has been established that the parent-child relationship, by its very nature, warrants privileged status. Justification for such recognition has been seen through the protection of the constitutional right to familial privacy. Public policy not only favors the recognition of a parent-child privilege, but demands such recognition. The parent-child privilege enables the family institution to grow, and in turn, strengthens the love and mutual trust between the parent and child. Another extraordinary relationship warranting recognition as a testimonial privilege is that between reporters and their sources.

II. The Reporter's Privilege

A. The Historical Development of the Newsgatherer's Privilege

At common law, courts consistently rejected the contention that the First Amendment provided protection to reporters from disclosing their confidential sources. Courts were not compelled to

101 See United States v. Ismail, 756 F.2d 1253, 1258 (6th Cir. 1985). The Sixth Circuit stated: "Analogous to the spousal privilege, the parent-child privilege purportedly would serve the public interest in preserving the harmony and confidentiality of the parent-child relationship." Id.

102 U.S. CONST. amend. I. The First Amendment provides in relevant part:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Id.

103 See Branzburg v. Hayes, 408 U.S. 665, 668 (1972) (noting reporter's privilege not accepted at common law); William v. American Broadcasting Co., 96 F.R.D. 658, 662 (W.D. Ark. 1983) ("it is now universally conceded that there was no journalistic privilege at common law."); Adams v. Associated Press, 46 F.R.D. 439, 440 (S.D. Tex. 1969) (following other jurisdictions tendency to deny reporter's privilege), cert. denied, 402 U.S. 901 (1971); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416, 416 (S.D. Mass. 1957) (noting that no American jurisdiction has recognized reporter's privilege absent statutory creation); Ex parte Lawrence, 48 P. 124, 125 (Cal. 1897) (reporters required to disclose identity of sources during investigation of state senate); Joslyn v. People, 184 P. 375, 377 (Co. 1919) (reporter may not refuse to testify regarding confidential sources); Clein v. State, 52 So. 2d 117, 120 (Fla. 1950) ("Members of the journalistic profession do not enjoy the privilege of confidential communication, as between themselves and their informants, and are under the same duty to testify, . . . as any other person."); Flunkett v. Hamilton, 70 S.E. 781, 783 (Ga. 1911) (mere fact that communication made in confidence does not give rise to testimonial privilege); In re Grunow, 85 A. 1011, 1012 (N.J. 1913) (reporter's privilege viewed as detrimental to due administration of law); People ex rel. Mooney v. Sheriff, 269 N.Y. 291, 295, 199 N.E. 415, 416 (1938) (reporters called as witnesses before grand jury may not refuse to answer pertinent questions relating to communications made to them in newsgathering capacity); Caldero v. Tribune Publishing Co., 562 P.2d 791, 799 (Idaho) ("There can be little dispute that the common law recognized no privilege which would support a newspaper or reporter in refusing, upon proper demand, to disclose information received in confidence."), cert. denied, 434 U.S. 930 (1977).
create a reporter's privilege because the judiciary believed that the public's interest in the due administration of law outweighed private considerations existing between journalists and their sources.\textsuperscript{104} Courts also believed that such a privilege encouraged journalists to "invent the news."\textsuperscript{105}

Initially, there were few instances where reporters sought First Amendment protection from disclosure.\textsuperscript{106} Prior to the 1960s, there were only seventeen cases involving a newsgatherer's privilege.\textsuperscript{107} As the number of subpoenas substantially increased during the late 1960s and early 1970s, the number of cases in which reporters claimed a testimonial privilege increased proportionately.\textsuperscript{108} In 1972, the Supreme Court, in \textit{Branzburg v. Hayes},\textsuperscript{109} addressed the issue of whether the First Amendment conferred a

\textsuperscript{104} See \textit{Branzburg}, 408 U.S. at 665 (interests served by grand jury investigations outweigh reporters' interests in maintaining confidential relationships); \textit{Adams}, 46 F.R.D. at 441 (reporters' private concerns must yield to public interest in permitting grand juries toascertain truth); \textit{Clein}, 52 So. 2d at 120 (noting that canon of journalistic ethics forbidding disclosure of newspaper's source must yield to interests of justice).

\textsuperscript{105} See William W. Van Alstyne, \textit{The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories}, 9 \textit{HOFSTRA L. REV.} 1, 16 (1980) (asserting reporter's privilege may tempt reporters to invent news due to greater immunity from having to validate articles).


\textsuperscript{109} See \textit{id}. (citing cases in which reporters claimed testimonial privilege prior to 1970).

privilege upon reporters to refuse to appear and testify before a grand jury.\textsuperscript{110}

\textbf{B. Branzburg v. Hayes}

\textit{Branzburg v. Hayes} consolidated four cases\textsuperscript{111} in which reporters witnessed criminal conduct by their confidential sources and thereafter published articles pertaining to the illicit activities.\textsuperscript{112} These reporters were later subpoenaed to appear before grand juries to disclose their sources in order to assist criminal investigations.\textsuperscript{113} The journalists, relying on the "Freedom of the Press Provision" of the Constitution, claimed a privilege from disclosing the identity of their sources, and refused to testify.\textsuperscript{114} In a narrow decision, the Supreme Court held that the First Amendment did not relieve a newspaper reporter of the duty to respond to a grand jury subpoena and answer questions relevant to a criminal investigation.\textsuperscript{115} The Court reasoned that as long as harassment was not

\textsuperscript{110} Id. at 665. "The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment." Id.


\textsuperscript{112} See Caldwell, 434 F.2d at 1082 (New York Times reporter subpoenaed due to series of articles written about Black Panthers); Pappas, 266 N.E.2d at 297-98 (television reporter subpoenaed to testify about Black Panthers' role in riots in New Bedford, Massachusetts); Meigs, 503 S.W.2d at 748-49 (Branzburg subpoenaed based on article in which he specifically described illegal use of drugs); Pound, 461 S.W.2d at 345 (reporter Paul Branzburg, of the Louisville Courier-Journal, described personal observation of production of hashish in article).

\textsuperscript{113} See Caldwell, 434 F.2d at 1082; Pappas, 266 N.E.2d at 298; Pound, 461 S.W.2d at 345; Meig, 503 S.W.2d at 749.

\textsuperscript{114} Caldwell, 434 F.2d at 1082. Mr. Caldwell refused to appear before the grand jury. Id. The Ninth Circuit accepted the reporter's assertion of privilege and held that absent a showing of a "compelling governmental interest" in the information sought, reporters were protected from disclosure based on the First Amendment. Id. Paul Branzburg also refused to appear before a grand jury. See Pound, 461 S.W.2d at 348. The Kentucky Supreme Court ordered Branzburg to disclose his sources. Id. Paul Pappas appeared before the grand jury, but refused to testify claiming a First Amendment privilege. See Pappas, 266 N.E.2d at 298. Similar to Branzburg, Pappas was required to disclose his sources. Id.

\textsuperscript{115} Branzburg, 408 U.S. at 692. The Court stated it could not entertain the notion that the First Amendment protected a newsman's agreement not to conceal the criminal activity of his source, or evidence thereof, on the theory that it was better to write about crime than do something about it. Id. In reaching this conclusion, the Court relied heavily on the role of grand juries and the vital public interests they further. Id. at 686-88, 699-702. The Court also found the reporters' claims regarding the burden that would be placed on the press if such a privilege was not recognized unpersuasive. Id. at 692.

Justice William Powell submitted a separate concurring opinion, in which he proposed a case-by-case balancing test. Id. at 708-710 (Powell, J., concurring). However, Justice Potter Stewart, along with Justices William Brennan and Thurgood Marshall, dissented, and
the state’s underlying motive for requesting the information, the grand jury had the right to request that a reporter testify.\textsuperscript{116}

The facts of \textit{Branzburg} were atypical of the ordinary situation in which a reporter would gain access to confidential information.\textsuperscript{117} Normally, journalists report stories based on indirect-acquired knowledge, unlike the \textit{Branzburg} reporters who wrote first-hand reports.\textsuperscript{118} Although the Court held that the First Amendment did not shield reporters from testifying regarding their personal observations of a crime in grand jury proceedings,\textsuperscript{119} the Court’s limited holding provided little insight into whether the Constitution provided for a privilege in other contexts.\textsuperscript{120} For example, the Court’s plurality opinion failed to address whether a First Amendment reporter’s privilege would be recognized in cases where reporters received information relating to criminal activities of their sources, but did not actually witness the events.\textsuperscript{121} Similarly, the Court did not provide guidance as to whether such a privilege would be available in defamation cases where reporters were defendants or in other civil litigation where reporters were called as nonparty witnesses.\textsuperscript{122}


\textsuperscript{116} \textit{Id.} at 681, 707-08. The \textit{Branzburg} Court recognized that reporters were entitled to some First Amendment protection. \textit{Id.} Specifically, the Court noted that “without some protection for seeking out news, freedom of the press could be eviscerated.” \textit{Id.} Thus, if it was found that a grand jury proceeding was conducted in bad faith and/or the sole impetus in requesting the disclosure of confidential sources was to harass the press, the reporter could invoke First Amendment protection. \textit{Id.}

\textsuperscript{117} See Douglas H. Frazer, Note, Criminal Law: The Newsperson’s Privilege in Grand Jury Proceedings: An Argument for Uniform Recognition and Application, 75 J. CRIM. L. \& CRIMINOLOGY 413, 426 (1984) (noting that privilege is more likely to be asserted in situation in which reporter has no first-hand knowledge of his source’s crime as opposed to relatively uncommon factual situation of \textit{Branzburg}); see also Browne, supra note 106 (asserting \textit{Branzburg} plurality did not consider typical case in which confidential source divulges his crime to reporter).

\textsuperscript{118} See Browne, supra note 106.

\textsuperscript{119} See \textit{Branzburg} v. Hayes, 408 U.S. 665, 668 (1972) (compelled disclosure not violative of First Amendment).

\textsuperscript{120} See Baker v. F \& F Investment, 470 F.2d 778, 781 (2d Cir. 1972) (federal law on question of compelled disclosure “at best ambiguous”), \textit{cert. denied}, 411 U.S. 966 (1973); State v. Kiss, 700 P.2d 40, 45 (Idaho 1985) (Donaldson, C.J., concurring) (noting that after \textit{Branzburg}, “the federal constitutional status of the newsperson’s privilege is anything but clear”).

\textsuperscript{121} See Browne, supra note 106. “Neither the courts nor the federal or state legislators have clearly defined a journalist’s right to keep sources confidential.” \textit{Id.}

\textsuperscript{122} See Caldero v. Tribune Publishing Co., 562 P.2d 791, 795 (Idaho 1977). In determining whether to adopt a reporter’s privilege, in a civil context, the \textit{Caldero} court explained that it was without Supreme Court guidance on this subject. \textit{Id.}
C. Federal and State Support for the Reporter’s Privilege

1. Federal Law

Notwithstanding the Supreme Court’s decision, circuit courts have acknowledged a reporter’s privilege.\(^{123}\) While the circuit courts agree that the testimonial exception is not absolute, there is disagreement as to the extent of protection permitted by the privilege.\(^{124}\) For example, some circuits have held that the privilege may be invoked absent a confidentiality agreement, while others afford limited protection to confidential information.\(^{125}\)

2. State Law

A substantial number of state courts have recognized some form of constitutionally mandated reporter’s privilege.\(^{126}\) The scope of

\(^{123}\) See Browne, supra note 106. The First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and District of Columbia Circuits have all recognized a reporter’s privilege. Id.; see also LaRouche v. National Broadcasting Co., 780 F.2d 1134, 1139 (4th Cir.) (permitting reporter’s privilege with respect to confidential informants), cert. denied, 479 U.S. 818 (1986); United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983) (recognizing privilege in criminal context); Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981) (acknowledging newsgatherer’s privilege in civil cases); Bruno & Stillman, Inc. v. Globe Newspaper Inc., 633 F.2d 583, 585, 595-96 (1st Cir. 1980) (privilege recognized in libel action); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) (recognizing reporter’s privilege with respect to confidential sources and unpublished information in criminal context), cert. denied, 449 U.S. 1126 (1981); Miller v. Transamerican Press, 621 F.2d 721, 725 (5th Cir. 1980) (recognizing privilege only in cases in which information was received in confidence), cert. denied, 450 U.S. 1041 (1981); Silkwood v. Kerr-Mcgee Corp., 563 F.2d 433, 436-37 (10th Cir. 1977) (privilege permitted in civil case); Farr v. Pitchess, 522 F.2d 464, 467-68 (9th Cir. 1975) (permitting qualified reporter’s privilege not to disclose sources in criminal proceedings), cert. denied, 427 U.S. 912 (1976); Baker, 470 F.2d at 783 (recognizing privilege in civil action); Cervantes v. Time, Inc., 464 F.2d 586, 992-93 & n.9 (8th Cir. 1972) (permitting privilege in libel action).


\(^{126}\) See Loadholtz v. Fields, 389 F. Supp. 1299, 1302 (D. Fla. 1975) (qualified privilege permitted in civil case); Gadsen County Times, Inc. v. Horne, 426 So. 2d 1234, 1238 (Fla.
the privilege differs from state to state.\textsuperscript{127} For instance, Pennsylvania's journalist's privilege protects all documents that might potentially provide evidence of a reporter's news sources,\textsuperscript{128} whereas Maryland's privilege only protects the identity of the sources.\textsuperscript{129}

Where state judiciaries have failed to act, twenty-six state legislatures have enacted statutes granting newsgatherers a privilege of nondisclosure.\textsuperscript{130} These statutes are commonly known as "shield laws" because they "shield" reporters from contempt citations in the event they refuse to testify.\textsuperscript{131} The extent of protection

\begin{itemize}
  \item Dist. Ct. App. 1983) (privilege permitted in civil and criminal cases);
  \item Dallas Oil & Gas, Inc. v. Mouer, 533 S.W.2d 70, 81 (Tex. Civ. App. 1976) (privilege recognized in civil context);
  \item State v. St. Peter, 315 A.2d 254, 271 (Vt. 1974) (privilege recognized in criminal context);
  \item Brown v. Commonwealth, 204 S.E.2d 429, 430 (Va. 1974) (privilege recognized in criminal proceeding);
  \item Zelenka v. Wisconsin, 266 N.W.2d 279, 286-87 (Wis. 1978) (privilege adopted in criminal case).
\end{itemize}

\begin{itemize}
  \item Compare Knight-Ridder Broadcasting, 70 N.Y.2d at 153, 511 N.E.2d at 1117, N.Y.S.2d at 596 (holding New York privilege does not extend protection to non-confidential sources of information) and Marketos v. American Employers Ins. Co., 460 N.W.2d 272, 281 (Mich. 1990) (no protection for confidential materials) with Gulliver's Periodicals, 455 F. Supp. at 1203 (lack of confidentiality immaterial in determining whether reporter may invoke privilege) and Altemose Constr., 443 F. Supp. at 491 (privilege may be maintained when news sources not confidential).
\end{itemize}

\begin{itemize}
  \item See Steaks Unlimited, Inc. v. Deener, 623 F.2d 264 (3d Cir. 1980) (stating all non-published portions of source's statement protected even though identity of primary source of information known).
\end{itemize}

\begin{itemize}
  \item See Tofani v. State, 465 A.2d 413 (Md. 1983) (Maryland's journalist's privilege protects identity of news sources and not information obtained therefrom).
\end{itemize}

\begin{itemize}
  \item See Browne, supra note 106. Alabama, Alaska, Arizona, Arkansas, California, Delaware, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, and Texas have passed legislation to protect reporters from compelled disclosure. Id.
\end{itemize}

\begin{itemize}
  \item A few states which have been unsuccessful in codifying a reporter's privilege, have construed their state constitutions as providing protection for reporters against compelled disclosure. See State v. Siel, 444 A.2d 499, 502 (N.H. 1982) (newsreporter's privilege based on Part I, Article 22 of New Hampshire constitution); Zelenka, 266 N.W.2d at 286 (Wisconsin constitution interpreted as permitting privilege).
\end{itemize}

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The Attorney General has issued general guidelines pertaining to issuing a subpoena to a member of the news media. See 28 C.F.R. § 50.10 (1979) (codifying Attorney General guidelines). The guideline provide:

Negotiations with the media shall be pursued in all cases in which a subpoena is contemplated. These negotiations should attempt to accommodate the interests of the trial or grand jury with the interests of the media. Where the nature of the investigation permits, the government should make clear what its needs are . . . as well as its willingness to respond to the particular problems of the media.

Id.; see also 28 C.F.R. § 50.10(d) (1979) (requiring express authorization from Attorney General if negotiations fail).
provided by these statutory privileges vary from state to state.\(^{132}\) Although New Jersey’s and Maryland’s shield laws have been interpreted as providing an absolute privilege to reporters, the majority of states that have enacted shield laws have granted reporters only a qualified privilege.\(^{133}\) California’s statute is unique, since it does not directly provide reporters with a privilege, but instead, provides journalists immunity from contempt citations.\(^{134}\)

### 3. The New York Shield Law

As the largest information center in the United States, New York provides extensive protection to newsgatherers.\(^{135}\) New York’s shield law was enacted prior to the \textit{Branzburg} decision and protects newsgathering and a reporter’s right to disseminate information to the public without fear of compelled disclosure.\(^{136}\) Section (b) of New York’s shield law grants professional journalists an absolute exemption from contempt proceedings if they refuse to testify regarding their confidential sources or information obtained therefrom.\(^{137}\) This exemption applies in civil, criminal, and other proceedings.


\(^{134}\) See CAL. CONST. art. I, § 2(b); CAL. EVID. CODE § 1070 (West 1983) (original provision for reporter’s shield law); Mitchell v. Superior Court, 690 P.2d 625, 626 (Cal. 1984). Since California’s shield law provides reporters with immunity rather than a privilege, courts may use other sanctions against reporters for nondisclosure. \textit{Id.}

\(^{135}\) See N.Y. CIV. RIGHTS § 79-h (McKinney 1993).


\(^{137}\) N.Y. CIV. RIGHTS § 79(h)(b) (McKinney 1993). This section provides in pertinent part: no professional journalist or newscaster . . . shall be adjudged in contempt by any court in connection with any civil or criminal proceeding . . . for refusing or failing to disclose any news obtained or received in confidence or the identity of the source of any such
and grand jury proceedings and may be invoked if two prerequisites are satisfied. Specifically, the information or its sources must be disclosed to the reporters under a "cloak of confidentiality," and the information must come into the journalists' possession in the course of their capacity as newsgatherers. In addition, section (c) provides reporters with a qualified exemption from contempt for refusing to divulge nonconfidential, unpublished information or sources.

D. Defeating the Privilege

According to the United States Court of Appeals for the Second Circuit, the reporter's privilege may only be overcome upon a showing of a "compelling interest" in the information requested. In determining whether a "compelling interest" exists, the Second Circuit utilizes a stringent tripartite test. The litigant seeking

news coming into such person's possession in the course of gathering or obtaining news for publication.


See von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987). In order to successfully invoke protection of New York shield law, journalist must show information was received in the course of newsgathering. Id.

N.Y. Civ. Rights § 79-h(c) (McKinney 1993). This section provides in pertinent part: no professional journalist or newscaster ... shall be adjudged in contempt by any court in connection with any civil or criminal proceeding ... for refusing or failing to disclose any unpublished news obtained or prepared by a journalist or newscaster in the course of gathering or obtaining news as provided in subdivision (b) of this section, or the source of any such news, where such news was not obtained or received in confidence, unless the party seeking such news has made a clear and specific showing that the news is (i) highly material and relevant; (ii) critical or necessary to the maintenance of the party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source.

Baker v. F & F Investment, 470 F.2d 778, 782 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973). This test was adopted to reflect a paramount interest in the maintenance of a vigorous, aggressive, and independent press capable of participating in robust, unfettered debate, over controversial matters, an interest which has been a primary concern of the First Amendment. Id.

See United States v. Cutler, No. 93-6160, 1993 U.S. App. LEXIS 24752, at *6-7 (2d Cir. Sept. 23, 1993) (reaffirming that three-prong test articulated in Burke is proper standard in cases where litigant seeks to defeat reporter's privilege); United States v. Aponte-Vega, 20 Media L. Rep. (BNA) 2202 (S.D.N.Y. 1992) (denying disclosure due to government's failure to satisfy three-prong test); United States v. Sanusi, 813 F. Supp. 149, 154 (E.D.N.Y. 1992) (applying three-prong standard to ensure media work product disclosed only when necessary to ensure fair judicial process); see also United States v. Burke, 700 F.2d 70, 76-77 (2d Cir.) (test may be applied in both criminal and civil proceedings), cert. denied, 464 U.S. 816 (1983); Baker, 470 F.2d at 783-85 (test applied in civil context); In re
Petroleum Products, 680 F.2d 5, 7-8 (2d Cir. 1982) (per curiam) (identity of reporter's sources may only be disclosed upon satisfying three-prong test); accord N.Y. Civ. Rights § 79-h(c) (McKinney 1993) (identical test codified with respect to nonconfidential information); O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 527, 523 N.E.2d 277, 283, 528 N.Y.S. 2d 1, 7 (1988) (same test applies under New York constitution).

Garland v. Torre, 259 F.2d 545, 550-51 (2d Cir. 1958). This test was first articulated in a suit brought by Judy Garland. Id. The case arose when Marie Torre, a reporter for the Herald Tribune, wrote an article describing the actress as overweight. Id. Torre attributed the statement to an unidentified CBS official. Id. Garland sued CBS and sought to depose Torre to determine the identity of the official who made the comment. Id. Torre refused to testify, claiming a First Amendment privilege. Id. In an effort to ensure that the reporter's First Amendment rights were not infringed, the United States Court of Appeals for the Second Circuit applied a three-prong test to determine if the plaintiff had a compelling and overriding interest in the information sought. Id. In short, the Garland test demanded relevancy; necessity; and exhaustion of alternative sources. Id. Ultimately, the Second Circuit compelled disclosure after concluding that Garland satisfied all three requirements. Id.


United States v. Cutler, 815 F. Supp. 599, 601-05 (E.D.N.Y. 1993). Judge I. Leo Glasser warned counsel on three occasions to comply with Rule 7 of the Criminal Rules of the District Court, which prohibits attorneys from making certain extrajudicial statements during a pending case. Id.

See Edward Frost, Hearing on Cutler's Contempt Charge, N.Y.L.J., Jan. 31, 1992, at 1, col. 1 (Cutler accused federal prosecutors of having a "personal vendetta" against Gotti and called case against Gotti "an example of McCarthyism"); see also Andrew Blum, Just What Did Attorney Say that Was Such a Problem?, NAT'L L.J., Jan. 18, 1993, at 26 (Cutler stated that government witnesses were "bums" and "Gotti is loved more than anyone else in the city").

ration for his defense, Cutler subpoenaed numerous reporters in order to obtain their unpublished notes and related testimony regarding interviews he gave during the Gotti trial. The reporters claimed a privilege and moved to quash the subpoenas. The District Court for the Eastern District of New York denied the motions and ordered the reporters to comply. The journalists refused and were found in contempt of court. The district court stayed the imposition of punishment pending an expedited appeal.

On appeal, the Second Circuit applied the three-prong test articulated in United States v. Burke. Cutler alleged that the Second Circuit test should no longer be utilized in view of the dicta in Branzburg v. Hayes, which suggested that such a stringent test was not required. Cutler also relied upon the recent Supreme Court decision in University of Pennsylvania v. EEOC. In this decision, the Supreme Court interpreted Branzburg as rejecting the notion that the First Amendment required a special showing of necessity before a reporter could be compelled to disclose confidential information.

willfully violating the court order and Rule 7. Id.

See United States v. Cutler, NO. 93-6160, 1993 U.S. App. LEXIS 24752, at *5 (2d Cir. Sept. 23, 1993); Daniel Wise, Arguments Set on Legality of Subpoenas; Gotti Lawyer Demanding Notes from 13 Reporters, N.Y.L.J., July 16, 1993, at 1, col. 1 ("Mr. Cutler claims to need both the reporters and their notebooks to demonstrate the context in which his remarks were made.").

Cutler, 1993 U.S. App. LEXIS 24752, at *8 (reporters moved to quash on ground that the subpoenas "contravened the reporter's qualified privilege").

Id.

Id. The reporters were willing to testify as to "the substance" of the articles, but refused to disclose confidential sources, or to produce notes or other unpublished materials unless directed to do so by the Second Circuit. Id. The district court rejected the reporters offer and were fined. Id.; see Andrew Blum, Free Speech Brawl, NAT'L L.J., July 12, 1993, at 6. "Held in contempt were Daily News Reporters Jerry Capeci and Tom Robbins; New York Post reporters Karen Philips, James Nolan and Kevin McLaughlin; New York Times reporter Selwyn Raab and Arnold Lubash; Newsday reporters Peter Bowles, Kevin McCoy and Anthony DeStefano; as well as CBS Inc. and Fox Television's station WNYW." Id.


Branzburg v. Hayes, 408 U.S. 665, 679 (1972) (rejecting reporters' contention that three-part test must be satisfied before disclosure compelled).


Id. at 201. In Univ. of Pennsylvania, a Wharton School of Business professor was denied tenure. Id. She sought disclosure of peer review materials in order to show that she was denied tenure due to racial and sexual discrimination. Id. The university claimed an "academic freedom" privilege of non-disclosure. Id. The Court refused to recognize defendant's asserted privilege. Id. at 182. The Court noted that the plaintiff was not required to make a "specific reason for disclosure," beyond a showing of relevance to compel disclosure. Id. at 193.
The Second Circuit rejected Cutler's arguments and applied the three-prong test. The Second Circuit found that the information Cutler sought pertaining to the interviews he gave as highly material and relevant, as well as critical to Cutler's claim since the reporters' notes and testimony were "probably the only significant proof regarding his asserted criminal behavior." Because Cutler satisfied the three-prong test, the Court permitted disclosure.

The Second Circuit was correct in reaffirming the three-prong test as the proper standard in reporter privilege cases, since each aspect of the test serves to protect the confidentiality of journalists' sources. In particular, the materiality requirement protects the news media, by requiring that the litigant seeking disclosure have a strong interest in the information sought, and is not merely trying to obtain information which may or may not be relevant to the investigation. Moreover, because the litigant seeking disclosure will, in the majority of the cases, have a rational basis for requesting information from reporters, the "necessary and critical" requirement is a demanding burden on the plaintiff, and thereby safeguards against unnecessary infringement of reporters' constitutional rights. Finally, the third aspect of the test provides additional protection to the news media by requiring the plaintiff to make a special showing that the sources or information sought are unidentifiable or unaccessible by other means.


The law in this Circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.

Id. at *10.
161 Id.
162 Id. at *20. Moreover, the Court found that such evidence was "available only from the reporters and [television] stations." Id. The Second Circuit did not, however, find that Cutler was entitled to the production of reporters' testimony and notes regarding comments by government officials regarding John Gotti and his trial. Id.
164 See id. (government must prove information sought from reporters is clearly relevant to the grand jury investigation in order to avoid "needless injury to First Amendment values").
165 See Riley v. Chester, 612 F.2d 708, 716 (3d Cir. 1979) (reporter's privilege may not be defeated without "strong showing by those seeking to elicit the information that there is no other source for the information requested"); Dangerfield v. Star Editorial, Inc., 817 F. Supp. 833, 838 (C.D. Cal. 1993) ("a showing that a plaintiff has exhausted all other possible sources is more protective of journalists' First Amendment rights"); see also Frazer, supra note 117, at 431 (asserting exhaustion requirement attempts to avoid First Amendment confrontation).
E. The Effect of Compelled Disclosure on the Press

Because journalists rely predominantly on confidential sources for their news stories, the importance of a reporter's privilege is obvious.\(^\text{166}\) Without a reporter's privilege, a journalist will be faced with a troublesome dilemma.\(^\text{167}\) In the event of a subpoena, reporters will encounter the prospect of being charged with contempt or divulging their sources at the expense of their professional ethics\(^\text{168}\) and reputations.\(^\text{169}\)

Furthermore, the absence of a reporter's privilege will have a chilling effect on newsgathering\(^\text{170}\) and undermine the press's role as a public "watchdog."\(^\text{171}\) Without assurances that their identities will be kept confidential, potential informants will be deterred from coming forward.\(^\text{172}\) As sources "dry up," the effectiveness of

\(^{166}\) See Osborn, supra note 108, at 75. As many as 72% of journalists believe their effectiveness as newsgatherers would be impaired without confidential sources Id. Numerous affidavits submitted by journalists convinced the district court that the absence of a reporter's privilege would seriously hamper newsreporter's ability to gather, analyze and publish news. Id. For example, Walter Cronkite stated in his affidavit: "In doing my work, I (and those who assist me) depend constantly on information, ideas, leads and opinions received in confidence." Id.

\(^{167}\) See Branzburg, 408 U.S. at 731 (Stewart, J., dissenting) (without constitutional protection, reporters placed in troublesome position of "telling all" or going to jail).

\(^{168}\) See G. Bird & F. Merwin, THE PRESS AND SOCIETY 592 (1971). The American Newspaper Guild's code of ethics provides: "newspaperman shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies." Id.

\(^{169}\) See Branzburg v. Hayes, 408 U.S 665, 731 (1972) (asserting compelled disclosure would adversely affect journalists' credibility).

\(^{170}\) See Frazer, supra note 117, at 414. Mr. Frazer comments: The news media experiences a chilling effect when a reporter testifies about confidential sources. Not only does such testimony inhibit confidential sources from talking to the media, but because reporters also fear revealing their confidential contacts, such testimony diminishes the zeal with which newspersons investigate matters of acute public interest. Id.; see also Branzburg, 408 U. S at 693. The plurality conceded that compelling reporters to disclose their sources would have a chilling effect on newsgathering. Id. However, the Court did not believe this "chilling effect" would be substantial. Id.

\(^{171}\) See Rosen, supra note 136, at 295 (asserting long-term repercussion of protecting only mechanical processes of newsgathering and not news itself undermines press role as watchdog of government behavior); see also David J. Onorato, Note, A Press Privilege for the Worst of Times, 75 GEO. L. REV. 361, 361 (1986) (compelled disclosure threatens press's ability to perform its watchdog role).

\(^{172}\) See Branzburg, 408 U.S. at 728 (Stewart, J., dissenting) (absence of constitutional reporter's privilege will deter sources from revealing information); James A. Guest & Alan L. Stanzler, The Constitutional Argument for Newsmen Concealing their Sources, 64 NW. U. L. REV. 18, 44-46 (1969) (absence of reporter's privilege inhibits free flow of information by deterring informants from communicating with press and press from seeking out information for dissemination); Note, Developments in the Law—Privileged Communications, 98 HARV. L. REV. 1450, 1601 (1985) (compulsory disclosure restricts confidential communications between reporters and sources).
reporters will undoubtedly be impaired.\textsuperscript{173} The looming threat of compelled disclosure will also force the media to temper its reports and shy away from investigative reporting.\textsuperscript{174} Without the protection of confidentiality, the news media will inevitably become self-censoring.\textsuperscript{175} In the final analysis, this ruinous effect on the dissemination of news will not only infringe upon the freedom of the press,\textsuperscript{176} but also adversely affect the freedom of the United States public\textsuperscript{177} because the general public relies upon the news to make value judgments and informed decisions.\textsuperscript{178}

\textbf{F. Recommendations}

The Supreme Court’s position in \textit{Branzburg} failed to take the above ramifications into account. Although judicial decisions and shield laws provide some protection to reporters,\textsuperscript{179} no uniform privilege exists.\textsuperscript{180} Moreover, the existing privileges created by ju-

\textsuperscript{173} Baker v. F & F Investment, 470 F.2d 778, 782 (2d Cir. 1972) (“the threat to a newsman of being charged with contempt and of being imprisoned for failing to disclose his information or its sources can significantly reduce his ability to gather vital information”); see also Rosen, \textit{supra} note 136, at 295 (asserting compelled disclosure will undermine newsmen reporters ability to disseminate news to public).

\textsuperscript{174} See Caldwell v. United States, 434 F.2d 1081, 1086 (9th Cir. 1970). “[I]t is not unreasonable to expect journalists everywhere to temper their reporting so as to reduce the probability that they will be required to submit to interrogation.” \textit{Id}.

\textsuperscript{175} See \textit{Branzburg v. Hayes}, 408 U.S 665, 731 (1972) (“when governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, . . . uncertainty about exercise of the power will lead to ‘self-censorship’”); see also Zurcher v. Stanford Daily, 436 U.S. 547, 573 (1978) (noting prospect of losing access to confidential sources may cause reporters to engage in self-censorship).

\textsuperscript{176} See U.S. CONST. amend. I; see also Caldwell, 434 F.2d at 1085 (“the very concept of free press requires that the news media be accorded a measure of autonomy; that they should be free to be pursue their own investigations to their own ends without fear of governmental interference . . .”); Rosen, \textit{supra} note 136, at 286 (asserting that press independent public informant entitled to be unburdened by government).

\textsuperscript{177} Baker, 470 F.2d at 785 (“It is axiomatic, and a principle fundamental to our constitutional way of life, that where the press remains free so to will a people remain free.”); see also \textit{Branzburg}, 408 U.S. at 726 (Stewart, J., dissenting) (denial of newsmen’s privilege deprives public from obtaining information needed to “run the affairs of the Nation in an intelligent way.”); Frazer, \textit{supra} note 117, at 441 (denial of constitutional reporter’s privilege frustrates journalists’ ability to gather news and jeopardizes “the public’s right to know”).

\textsuperscript{178} See Browne, \textit{supra} note 106, at 739-40 (“If fewer sources reveal information to the press, a less informed public will result. A less informed public lowers society’s ability to make responsible choices about issues concerning the public’s welfare.”); see also Zerilli v. Smith, 665 F.2d 705, 711 (D.C. Cir. 1981) (without unrestricted press, society is less able to make informed decisions).

\textsuperscript{179} See \textit{supra} notes 123-30 and accompanying text (discussing cases and statutes adopting reporter’s privilege).

\textsuperscript{180} See \textit{id}. (comparing extent of protection offered in various jurisdictions); see also Frazer, \textit{supra} note 117, at 441 (arguing in support of adoption of constitutional qualified privilege).
dicial decisions and statutes fail to rise to the level of protection available under the United States Constitution. Therefore, the Supreme Court should expressly adopt a reporter's privilege in order to ensure the free flow of information and the constitutional rights of the news media. In so doing, the Court should utilize the three-prong test adopted by the Second Circuit.

The Supreme Court should employ the Second Circuit's approach for several reasons. First, the employment of an identical standard of review in civil, criminal, and grand jury proceedings at the federal and state levels, would ensure all parties consistent and predictable results. Second, courts have traditionally been reluctant to permit First Amendment rights to be infringed upon without a strong showing of a "compelling interest." Therefore, the three-prong test is entirely consistent with the standard of review utilized in other First Amendment cases. Third, the Second Circuit standard properly balances the interests at stake. Specifically, the test fully considers the constitutional interests of the news media, while at the same time taking into account litigants' interests in gathering evidence pertinent to the defense or prosecution of their cases. Finally, the Second Circuit approach promotes fairness and justice by permitting the litigant seeking disclosure to defeat the reporter's privilege, provided all three re-

181 See Browne, supra note 106 (asserting courts' strict construction of shield laws provide "little in the way of protection for reporters"); Frazer, supra note 117, at 434 (noting that shield laws "insufficient substitute" for recognition of constitutional privilege).

182 See Browne, supra note 106, at 739 (asserting Supreme Court should establish journalistic privilege); Frazer, supra note 117, at 442 ("The reporter's first amendment privilege is a constitutionally derived right, . . . that deserves judicial acceptance.").

183 See supra note 143 (citing Second Circuit cases utilizing three-prong approach); see also Frazer, supra note 117, at 415-16 (application of three-prong test not necessary in states where shield laws confer greater protection to reporters).

184 See supra notes 180-82.


186 See id.

187 See Frazer, supra note 117, at 430-31 (three-prong test equitably balances rights of both parties); see also Riley v. Chester, 612 F.2d 708, 716 (3d Cir. 1979) (three-part test strikes "delicate balance" between assertion of privilege and interests of litigants seeking information); Pankratz v. Dist. Court of Denver, 600 P.2d 1101, 1103 (Colo. 1980) (Rovira, J., concurring) (three-prong test properly considers "the needs of a free press to investigate and the needs of the state to have the testimony of every person available in judicial proceedings").
quirements are satisfied.  

CONCLUSION

While it has been accepted as a general proposition that the public is entitled to every person's evidence, there are particular relationships which, by their very nature, demand special treatment. After careful examination of two such relationships, it is evident that the need for both a parent-child and reporter's privilege is paramount. Without protection from the courts, the confidential communications between parents and children, as well as reporters and informants, will be destroyed.

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188 Baker v. F & F Invest., 470 F.2d 778, 782 (2d Cir. 1972). The Baker court noted there would be rare instances where the First Amendment interests of reporters would be required to yield to the interests of the public. Id. In such cases, the reporter's privilege would be defeated in the interests of justice. Id.