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Do you swear to tell the truth, the whole truth, and nothing but the truth against your child?

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DO YOU SWEAR TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH *AGAINST* YOUR CHILD?

*Hillary B. Farber**

Currently in the United States there is no federally recognized parent-child privilege. The U.S. Supreme Court has never granted certiorari in a case involving the recognition of a parent-child privilege. For many, it is a revelation to learn that the government can compel testimony about communications and observations between parents and their children. Scholars have written about the social policy implications caused by the lack of a parent-child privilege. In spite of these thoughtful policy-based arguments, neither Congress nor forty-six state legislatures have responded by recognizing even a limited form of a parent-child privilege. This Article singles out one specific context—the prosecution of juveniles—and argues that such a privilege is essential in order to ensure children the due process protections guaranteed to them under law. In an effort to contextualize the socio-legal problem and the solution, this Article provides a historical overview of privilege law in the United States and compares the parent-child relationship to relationships that are protected by an evidentiary privilege. It singles out the importance of parent-child communications in light of the biological and psycho-social differences between adolescents and adults and links these findings to the argument that a juvenile's right against self-incrimination requires the recognition of a parent-child privilege. An exploration of antecedents in comparative law traditions reveals that the United States lags behind other developed nations when it comes to rules that shield family members from acting as witnesses against one another.

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INTRODUCTION

On June 8, 1984, the body of a female letter carrier was found in the woods in the northwest section of Houston.[1] Bloodhounds traced the woman's scent to the home of Bernard and Odette Port, the parents of seventeen-year-old David Port. David was missing, his parents were concerned, and so they allowed the police to search their home for clues. When the police informed the Ports that their son was a murder suspect, they refused to allow the police to search further.[2] When David returned home, he was arrested, but not before speaking to his parents. Three days later, Bernard and Odette Port were subpoenaed to testify before the grand jury investigating their son for murder. Prosecutors wanted the parents to testify about their conversations with and observations of David just before David was arrested.[3] The Ports refused to testify. "I've worked so hard to be a father . . . I just couldn't [testify]," said Bernard Port.[4] "A mother's instinct is to protect. I would feel unnatural doing the opposite,"[5] Odette Port added. The Ports were ultimately jailed for contempt of court. Bernard Port spent approximately two months in jail. Odette Port spent four.[6]

It may be startling to learn that the government can compel testimony about communications and observations between parents and their children. No intra-familial privilege shields parents or children from prosecutorial reach. The absence of a parent-child evidentiary privilege can lead to the kind of dilemma faced by David Port's parents.[7] Forty-five states and the federal system do not

1. Aric Press & Roger Schulman, *Parents, Children, and the Law*, NEWSWEEK, Aug. 27, 1984, at 81.

2. Peter Carlson, *A Texas Murder Case Raises an Exquisite Question: Must Parents Testify Against Their Child?*, PEOPLE, Oct. 15, 1984, at 146.

3. Port v. Heard, 764 F.2d 423, 425 (5th Cir. 1985).

4. Press & Schulman, *supra* note 1, at 81 (internal quotation marks omitted).

5. *Id.* (internal quotation marks omitted).

6. *See Sonia Live: Sins of the Children* (CNN television broadcast Dec. 9, 1992) (discussing David Port's case with guests, including the Ports' attorney, Randy Schaffer).

7. The Port case is not an aberration. *See, e.g.*, *In re* Grand Jury, 103 F.3d 1140 (3d Cir. 1997) (involving a 1995 subpoena of a former FBI agent to testify about a conversation he had with his eighteen-year-old son, who was the target of a grand jury investigation); Doug Most, *A Court Has Ears Inside The Home; Parent-Child Secrets Not Safe*, RECORD, Dec. 7, 1997, at A01 (describing the subpoena of the parents of eighteen-year-old Amy Grossberg, charged with the murder of her newborn baby, to testify about what their daughter had told them about the death of her son); *Police Talk to Dartmouth Suspects' Parents*, N.Y. TIMES, Mar. 18, 2001, at A-28 (describing the parents of two teenagers charged with killing two Dartmouth college professors

recognize an evidentiary parent-child privilege.[8] Some parents respond as the Ports did—willing to sacrifice their liberty for the sake of their family. Others may choose a different path—to comply with the law as currently written.[9]

Compelling parents to testify against their minor children unleashes a host of deeply rooted societal values. On the one hand, there is the need to shield parent-child communications from government compulsion in order to preserve familial integrity. On the other hand, there is the need to ascertain all relevant evidence in a criminal matter. The conflict is intensified in a political climate that elevates family values while simultaneously prosecuting more children as adults at ages younger than ever before.[10] Congress has never considered a parent-child privilege aimed exclusively at shielding parents from testifying against their minor children and

agreeing to cooperate with investigators in turn for not having to testify before a grand jury); Barry Siegel, *Choosing Between Their Son and the Law*, L.A. TIMES, June 13, 1996, at 1 (describing Arthur and Geneva Yandow's experience in jail after refusing to cooperate with a subpoena to appear before a Vermont grand jury to testify against their twenty-five-year-old son).

8. The following states have some form of a parent-child privilege: CONN. GEN. STAT. § 46b-138a (2007) (providing that a parent of a minor who is accused in a juvenile court matter "may elect or refuse to testify for or against the accused child," except that the parent must testify if he or she is the victim of violence allegedly inflicted by the child); IDAHO CODE ANN. § 9-203(7) (2004) (providing that parents or guardians "shall not be forced to disclose any communication made by their minor child or ward to them concerning matters in any civil or criminal action to which such child or ward is a party" unless the case involves violence by one party against the other); MASS. GEN. LAWS ANN. ch. 233 § 20 (2000) (providing that a minor child may not be forced to testify against natural or adoptive parents in a grand-jury inquiry or criminal proceeding, unless the victim is a member of the parent's family living in that parent's house); MINN. STAT. § 595.02(j) (2008) (providing that a parent may not be compelled to testify "as to any communication made in confidence by the minor to the minor's parent," except in certain enumerated situations); People v. Fitzgerald, 422 N.Y.S.2d 309, 314 (N.Y. County Ct. 1979) (holding that parent-child privilege is applicable to any parent-child communication, despite age of child, as long as the communication is made for the purpose of obtaining support, guidance, or advice); *In re* A&M, 403 N.Y.S.2d 375, 381 (N.Y. App. Div. 1978) (finding that New York has the only judicially recognized parent-child privilege, based upon the right to privacy found in the State Constitution).

9. Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910, 921 (1987) (citing *In re* Agosto, 553 F. Supp. 1298, 1326 (D. Nev. 1983) ("A society that values parent-child relationships should not place parents and children in a 'psychological double-bind in which [the witness] is scorned and branded as disloyal if he does testify and jailed if he does not.'")). This scenario has been referred to by some lawmakers as a cruel "trilemma" because a third course of action contemplated by a parent who does not want to testify is to testify falsely. *See infra* text accompanying note 228.

10. In 2004, 9,400 delinquency cases were waived to adult court, reflecting a 21 percent increase from 2000 because of changes in states laws made during the 1990s. ANNE L. STAHL, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, FACT SHEET: DELINQUENCY CASES IN JUVENILE COURT, 2004, at 2 (2008), http://www.ncjrs.gov/pdffiles1/ojjdp/fs200801.pdf.

disclosing communications and observations between the two.[11] Lawmakers' failure to narrow the proposed parent-child privilege to minor children is the primary reason a parent-child privilege is recognized in only five states.[12]

This Article proposes a parent-child privilege limited to communications between parents and their minor children, and parents' observations of their minor children. In an effort to refine the debate over the recognition of a parent-child privilege, this Article further limits its application to a single context: the prosecution of a minor.[13] The juvenile justice context best illustrates the dichotomy in the handling of parent-child communications. Our society encourages, in some instances even mandates, children to communicate openly with their parents; at the same time, absent is any legal protection of the information that is shared between parent and child that would shield it from government compulsion. Arguably, compelling the disclosure of parent-child communications reveals the tension between the government's need for probative evidence of a crime and respect for the unique role parents undertake in the criminal cases against their children.

We do not know how often parents are compelled to testify against their minor children. There are few reported cases on this subject, and even fewer that specifically deal with parents who testify against their *minor* children. One factor that contributes to the paucity of reported decisions is that juvenile delinquency cases go to trial and receive appellate review even less frequently than adult prosecutions.[14] Second, juvenile proceedings are closed to the public,

11. The Parent-Child Privilege Act was introduced in the U.S. House of Representatives in 1998, 1999, 2001, 2003, and 2005. *See* H.R. 3433, 109th Cong. (2005) (proposing a parent-child privilege which would apply in civil and criminal proceedings and would not distinguish between minor children and adult children); H.R. 538, 108th Cong. (2003); H.R. 733, 107th Cong. (2001); H.R. 522, 106th Cong. (1999); H.R. 3577, 105th Cong. (1998). So to all intents and purposes, the proposed parent-child privilege would protect any communications made between parents and their children, regardless of the age of the child. The criticism by members of Congress was that it was overbroad. *See infra* Part VI.

12. *See infra* Part IV. A majority of lawmakers sympathetic to the concerns attached to compelling parents to testify against their children agreed that the scope needed to be further limited. Nevertheless, the legislative history reveals no meaningful attempt to draft legislation to bring about large-scale support for a parent-child privilege.

13. The privilege would apply equally to a juvenile delinquency proceeding or a criminal proceeding, as long as the defendant has not reached the age of majority.

14. *See* N. Lee Cooper, Patricia Puritz & Wendy Shang, *Fulfilling the Promise of* In re Gault*: Advancing the Role of Lawyers for Children*, 33 WAKE FOREST L. REV. 651, 674–75 (1998) (stating that relatively few juvenile delinquency cases are appealed in most jurisdictions);

so information about the proceedings is more difficult to obtain. No study has examined the frequency with which prosecutors compel parents to testify against their children. Media accounts[15] can only begin to reveal the circumstances under which this legal phenomenon occurs. To gain a meaningful understanding of the legal and social impact of the lack of a parent-child testimonial privilege, it is important to identify the circumstances that would incline a prosecutor to seek incriminating information from the parents of the accused[16] Despite the lack of empirical data, courts and legislators seem to believe that compelling parents to testify against their minor children is so rare an event that, in essence, there is a de facto privilege that protects the communications between parents and their children.[17] In fact, if the occurrence of this legal phenomenon is indeed rare,[18] it suggests the presence of a social norm that lays bare a deep-seated belief that parent-child confidentiality deserves protection. A richer understanding of how this legal phenomenon is viewed by prosecutors will add immeasurably to whether that protection should be formalized by the adoption of an evidentiary privilege.

This Article was inspired in part by Professor Catherine Ross's invitation to scholars and practitioners to place the need for a parent-child evidentiary privilege within the context of the due process rights of minors.[19] Professor Ross argues that the strongest case for a testimonial privilege is when parents are subpoenaed to testify against their minor child with whom they are living.[20] Professor Ross

Steven A. Drizin & Greg Luloff, *Are Juveniles Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 294–99 (2007) (critiquing the lack of an appellate or post-conviction practice in juvenile court).

15. *E.g.*, Carlson, *supra* note 2.

16. The author has undertaken a research study that which examines prosecutorial attitudes toward the use of state-compelled parental testimony in juvenile prosecutions.

17. *In re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. 1487, 1491 (E.D. Wash. 1996) ("The court believes the paucity of authority on this topic may reflect a deep-seated sense of respect for the family on the part of state and federal prosecutors.").

18. Consideration of this legal phenomenon should not be limited to instances where parents have actually been subpoenaed by the prosecution. Simply knowing that a prosecutor can issue such a subpoena can alter the way the accused minors, their parents, and their counsel make decisions concerning the litigation.

19. Catherine Ross, *Implementing Constitutional Rights for Juveniles: The Parent-Child Privilege in Context*, 14 STAN. L. & POL'Y REV. 85 (2003).

20. *Id.* at 85–86 ("The case for a testimonial privilege is strongest in the case of a minor child living with the parent who is the subject of a *subpoena ad testificandum* through which the

terms this paradigm the "essential parent-child privilege."[21] This Article strives to meet Professor Ross's challenge and to go beyond it by incorporating recent legal developments and scientific studies that strengthen the case for an evidentiary privilege for parents and their minor children. While some may argue that the proposed privilege set forth in this Article does not extend far enough, it is the opinion of this author that the first step toward the recognition of a parent-child privilege is to craft a narrow privilege that responds to legislative and judicial concerns that have caused prior proposals to fail at both the national level and the state level.[22] Courts and lawmakers in some of the states that have rejected a parent-child privilege on the grounds that the proposed privilege was too broad have shown receptivity to an evidentiary privilege for minor children and their parents.[23] The scenario that underlies the "essential parent-child privilege" is the strongest case for a parent-child privilege because it implicates both the due process rights of minors and the most compelling of the social policy interests at stake.

Part I provides a historical overview of privilege law in the United States and compares the parent-child relationship to relationships that are entirely protected by an evidentiary privilege. Part II sets forth two constitutional arguments in favor of a parent-child privilege: the juveniles' right against self-incrimination and the parents' right to maintain the care, custody, and control of their children. Part III illustrates the importance of parent-child communications in light of the legally recognized biological and psycho-social differences between adolescents and adults. Part IV explores prior efforts to codify a parent-child privilege at both the state level and the federal level. Part V critiques the legal and normative rationales that have been used to reject a parent-child privilege. Finally, Part VI explores the antecedents in comparative law traditions that specifically shield family members from acting as witnesses against one another. Throughout this Article, the author will offer her own insights and explanations as to why a parent-child

state seeks to compel the parent's testimony against the child. And yet most jurisdictions in the United States do not recognize even a privilege that covers confidential communications from minors to their parents.").

21. *Id.* at 95.

22. *E.g.*, H.R. 3577, 105th Cong. (1998).

23. *See infra* Part IV.

privilege has not gained traction in the United States despite earnest attempts by academicians, legislators, judges, and advocacy groups to have such a privilege adopted.

I. PRIVILEGE LAW: A HISTORICAL PRELUDE

Privileges are evidentiary rules that constrict the flow of information to the trier of fact in order to advance substantive social policies.[24] Two distinct rationales for privileges have been advanced since their inception. The most common rationale is the protection of interests and relationships of such social worth that they justify the sacrifice of available evidence relevant to the administration of justice.[25] The relationships which fall under the rubric of the evidentiary rules discussed in this Article are between attorney and client, psychotherapist and patient, clergy and communicant, and husband and wife. A second rationale for privileges advances a theory that certain human relationships are so fundamentally private that they warrant protection from interference regardless of whether the privilege substantially affects conduct between the parties.[26] For instance, communication between a husband and a wife may not be induced by the existence of an evidentiary privilege. Nonetheless, unflagging support for the privilege exists on the basis that it serves to protect the essential privacy in the marital relationship.[27]

Notwithstanding the rationales described above, evidentiary privileges clash with the belief that the public has the right to "every man's evidence."[28] Not surprisingly, the evidentiary privileges section of the Federal Rules of Evidence was among the most controversial.[29] Rather than approving some or all of the proposed privileges, Congress passed one rule, Federal Rule of Evidence

24. *See* BLACK'S LAW DICTIONARY 1197 (6th ed. 1990).

25. JOHN W. STRONG, MCCORMICK ON EVIDENCE § 86 (5th ed. 2006).

26. *Id*.

27. *Id.*

28. Wendy Meredith Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 586–87 (1987); *see also* Branzburg v. Hayes, 408 U.S. 665, 674 (1972) (quoting *In re* Pappas, 266 N.E.2d 297, 299 (Mass. 1971)).

29. Some members of the Advisory Committee to the Proposed Rules of Evidence disapproved of broad evidentiary privileges such as husband-wife and doctor-patient privileges. Judge Jack Weinstein, a committee member, referred to evidentiary privileges as "hindrances which should be curtailed." EDWARD J. IMWINKELRIED, THE NEW WIGMORE 153 (2002) (quoting Judge Weinstein).

501,[30] which abdicates the recognition of evidentiary privileges to the courts. Federal Rule of Evidence (FRE) 501 states that courts should recognize privileges under the common law "as they may be interpreted . . . in the light of reason and experience."[31] Today, most of those proposed privileges are recognized by federal common law and state statutes.[32] Privileges can act as disqualifications, which exempt the witness from testifying altogether.[33] The majority of evidentiary privileges do not completely bar the witness from testifying; instead, they act to exclude certain types of evidence, such as communications.[34] A privilege protecting a communication between persons simply means that a witness cannot be compelled to testify about the content of the communications but may be required to testify about other relevant evidence.[35] Evidentiary privileges in American law can be divided into two categories: professional and personal. Regardless of classification, every privilege applies to relationships characterized by trust and confidentiality.[36] The privileges recognized by the federal courts are the attorney-client privilege, the psychotherapist-patient privilege, the clergy-communicant privilege, and the spousal privileges.[37] This section begins with a discussion of the professional privileges in an effort to focus the reader on the multifaceted role of parents in the prosecution of their children. The premise of this Article is that because the prosecution of children requires parents to act in ways that are associated with legal and mental health professionals, the law should extend to parents the same privilege it provides to lawyers,

30. FED. R. EVID. 501.

31. *Id.*

32. *E.g.*, CAL. EVID. CODE § 970 (West 2009). Other privileges, such as the constitutional privilege against self-incrimination and the privilege for governmental information will not be discussed with the same detail because they are beyond the scope of this Article.

33. *See, e.g.*, STRONG, *supra* note 25, § 78. When first established, the adverse spousal testimonial privilege disqualified and prevented one spouse from testifying either *for or against* the other spouse in a criminal or civil matter. *Id.* Over time, the common law rule has been modified such that both spouses are fully competent to testify, but in a criminal proceeding the prosecution may not call one spouse without the accused spouse's consent. *E.g.*, CAL. EVID. CODE § 970.

34. *See, e.g.*, United States v. Robinson, 763 F.2d 778, 783 (6th Cir. 1985) (stating that the federal common law marital communications privilege applies only to communications).

35. *Id.*

36. STRONG, *supra* note 25, § 86.

37. *See generally* Jaffee v. Redmond, 518 U.S. 1 (1996) (describing the different types of privileges recognized by federal courts).

psychotherapists, and other professionals covered by an evidentiary privilege. The spousal privilege can be characterized as a personal privilege, which exists to preserve the sanctity of the marital relationship,[38] as well as the social norm against convicting defendants based upon the testimony of their life partners.[39] Obvious comparisons exist between the marital privilege and a parent-child privilege and are fully explored following the discussion of the existing professional privileges.

A. Attorney-Client Privilege

The attorney-client privilege is one of the most sanctified professional privileges recognized by law. The societal interest at the core of the attorney-client privilege is to provide clients with a trusting and confidential relationship when they seek legal assistance.[40] The purpose of the privilege is even broader than concerns over self-incrimination; it exists so that no barriers can get in the way of clients' full and frank disclosure of *any* type of information to their lawyers that is relevant to the attorney-client relationship, even information containing no wrongdoing whatsoever.[41]

> Clients consult attorneys for a wide variety of reasons, only one of which involves possible criminal liability. Many attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice.[42]

The absence of an attorney-client privilege would erode the integrity of the legal profession and undermine the premise that candor is essential to acquire the best legal advice. By the nature of the profession, there will be instances where lawyers are in possession of valuable information pertaining to an investigation or a

38. STRONG, *supra* note 25, § 86.

39. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 216–17 (McNaughton rev. 1981) (1961).

40. The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

41. Swidler & Berlin v. United States, 524 U.S. 399, 407–08 (1998).

42. *Id.*

lawsuit.[43] The privilege may be invoked despite the type of proceeding, criminal or civil,[44] because in either forum, the social cost incurred by the disclosure is greater than the benefit gained by its revelation.

The U.S. Supreme Court's decision in *Swidler & Berlin v. United States*[45] reveals the judiciary's respect for the attorney-client privilege. The *Swidler* Court held that the attorney-client privilege survives the death of the client.[46] Underlying the Court's decision was the recognition that the concerns clients may have about information being disclosed during their lifetimes exist posthumously.[47] The demise of one's reputation, potential civil liability, and possible harm to friends and relatives do not cease upon death.[48] The Court observed that if confidentiality was not assured posthumously, the client in *Swidler* may well not have made disclosures to his attorney.[49] *Swidler* demonstrates an extraordinary commitment to ensuring that lawyers do not incriminate their clients, both during their clients' lifetimes and afterwards. Except for certain circumstances, the client is the only person who can waive the attorney-client privilege.

B. Psychotherapist-Patient Privilege

The last time the U.S. Supreme Court recognized a new privilege was in 1996 when it determined that confidential communications between patients and their psychotherapists, including social workers, were to be protected from involuntary disclosure.[50] *Jaffee v. Redmond* concerned the disclosure of statements that a police officer made to her licensed social worker

43. *See, e.g.*, *id.* (denying government lawyers' request for a criminal case exception to posthumous application of attorney-client privilege).

44. *E.g.*, CAL. EVID. CODE § 910 (West 2009) ("[T]he provisions of this division apply to all proceedings.").

45. 524 U.S. 399.

46. *Id.* at 407.

47. *Id.*

48. *Id.*

49. *Id.* at 408. When the U.S. Supreme Court was considering whether to limit the posthumous privilege between attorneys and clients, it sought empirical evidence to gauge whether limiting the privilege to the client's lifetime would reduce candor between lawyer and client. The empirical data was scarce and inconclusive. Nevertheless, the Court declined to limit the privilege. *Id.* at 409.

50. Jaffee v. Redmond, 518 U.S. 1, 18 (1996).

during psychotherapy sessions following an incident where the officer shot and killed a man while on duty.[51] Police officer Mary Lu Redmond, and the department she worked for at the time, were sued under the federal civil rights statute after Redmond killed the plaintiff.[52] In the course of the litigation, the plaintiff sought the notes of a clinical social worker which were taken during her counseling sessions with Redmond.[53] The defendant urged the Court to continue the evolutionary development of evidentiary privileges according to Federal Rule of Evidence 501 and recognize a privilege for communications between psychotherapists and their patients.[54]

Resting on the belief that protecting the communications between psychotherapists and their patients promotes sufficiently important social interests, the Court continued the expansion of common law privileges under FRE 501. The professional ethics of psychotherapists require confidentiality, yielding only to the law.[55] At the heart of the psychotherapist-patient relationship is a commitment to trust and privacy that if eroded, harms the patient and threatens the integrity of the profession. Many patients divulge intimate details of their personal relationships, habits, and professional conduct to their therapists that patients would never reveal without an assurance of confidentiality.[56] From a professional standpoint, without a guarantee to patients that their communication will be confidential, the therapists' role is compromised. Were there no privilege, patients, for fear of disclosure, might not be completely honest with their therapists, undermining the therapists' ability to treat their patients.[57] Moreover, patients might opt out of therapy

51. *Id.* at 4.

52. *Id.*

53. *Id.* at 5.

54. *Id.*

55. AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT 4.01 (2002), *available at* http://www.apa.org/ethics/code2002.pdf.

56. *Jaffee*, 518 U.S. at 12.

57. *Id.* at 10–11.

> [T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rules of Evidence, a psychiatrist's ability to help her patients 'is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general

altogether because they are concerned that their confidences may be revealed.

As with any privilege recognized under law, the value of the psychotherapist-patient privilege has been determined to outweigh the costs incurred by its existence. Predictably, the social worth of dispensing mental health counseling to those who seek it is determined to be greater than a third party's interest in seeking psychotherapist-patient communications and patient records.[58] *Jaffee* is the most recent proclamation by the Court that the evolutionary development of privileges is guided by reason and experience.

C. Clergy-Communicant Privilege

The clergy-communicant privilege, sometimes termed the priest-penitent privilege, was unknown in common law but is now recognized in all fifty states and the District of Columbia.[59] The privilege excuses clergymen from testifying in judicial proceedings regarding communications shared with them by penitents seeking spiritual advice or the chance to confess.[60] The qualification to be considered in the class of "clergy" according to the statutes depends on one's role and purpose within the denomination.[61] The traditional

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> rule . . . , there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment.'

Id. at 10–11 (internal citation omitted) (quoting Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972)).

58. *Id.* at 11.

> This case amply demonstrates the importance of allowing individuals to receive confidential counseling. Police officers engaged in the dangerous and difficult tasks associated with protecting the safety of our communities not only confront the risk of physical harm but also face stressful circumstances that may give rise to anxiety, depression, fear, or anger. The entire community may suffer if police officers are not able to receive effective counseling and treatment after traumatic incidents, either because trained officers leave the profession prematurely or because those in need of treatment remain on the job.

Id. at 11 n.10.

59. 2 SCOTT N. STONE & ROBERT K. TAYLOR, TESTIMONIAL PRIVILEGES § 6.04 (2d ed. 1995) ("[A] person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual advisor.") (quoting Proposed FED. R. EVID. 506(b)); *see also, e.g.*, CAL. EVID. CODE. § 1033 (West 2009); COLO. REV. STAT. § 13-90-107(c) (2008); FLA. STAT. § 90.505 (2009); 735 ILL. COMP. STAT. § 5/8-803 (2009); MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (West 2002).

60. Claudia G. Catalano, Annotation, *Subject Matter and Waiver of Privilege Covering Communications to Clergy Member or Spiritual Advisor*, 93 A.L.R. 5th 327, 358–53 (2001).

61. While the proposed federal rule defined a clergyman as "a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by

view has been that only priests and ministers of conventional churches may be protected by this testimonial privilege.[62] The modern trend is to recognize anyone who serves as a "spiritual representative" for a denomination as a member of the "clergy."[63] As a result, some courts have held that the clergy-communicant privilege applies to elders,[64] nuns,[65] and part-time preachers.[66]

Legal recognition of a clergy-communicant testimonial privilege is an endorsement of the need to protect the privacy of spiritual counseling. There is a natural repugnance toward compelling a member of the cloth to divulge communications made by persons seeking spiritual guidance.[67] Every state legislature and Congress have reached the same conclusion: the public interest in preserving the privacy of the clergy-communicant relationship outweighs the need to elicit evidence important to the judicial process. The inviolability of priest-penitent communications is an acknowledgment of the importance of the religious community's role in the well-being of its members. Justice Warren E. Burger offered his view on the spiritual counseling privilege when he wrote, "The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."[68]

the person consulting him," *id*. (quoting Proposed FED. R. EVID. 506(a)(1)), states vary as to what they consider to be a "clergyman." *See infra* Part I.C.

62. *In re* Swenson, 237 N.W. 589, 590 (Minn. 1931) (refuting the idea that only priests are protected by the privilege).

63. *Id*.

64. Reutkemeier v. Nolte, 161 N.W. 290, 293 (Iowa 1917).

65. Eckmann v. Bd. of Educ. of Hawthorne Sch. Dist., 106 F.R.D. 70, 72–73 (E.D. Mo. 1985) (holding that a nun's performance of priestly functions recognized by the Catholic Church and her position as spiritual advisor were sufficient to invoke the privilege).

66. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE OF THE UNITED STATES DISTRICT COURTS AND MAGISTRATES 4-06(a)(1), at 95 (1969) ("However, [the privilege] is not so broad as to include all self-denominated 'ministers.' A fair construction of the language requires that the person to whom the status is sought to be attached be regularly engaged in activities conforming at least in a general way with those of a Catholic priest, Jewish rabbi, or minister of an established Protestant denomination, though not necessarily on a full-time basis.").

67. *See* Watts, *supra* note 28, at 596.

68. Trammel v. United States, 445 U.S. 40, 51 (1980).

D. Spousal Privileges

The law recognizes the personal privilege for spouses to preserve the marital harmony that would be threatened by compelling an unwilling spouse to testify against the other.[69] Marital privileges have a long tradition that favors their recognition. Jewish law and Roman law expressly prohibit a family member from testifying against another family member.[70] At common law, the marital privilege originated with the view that a husband and a wife were recognized as one legal person.[71] Today, common law and state statutes create two distinct marital privileges: the adverse spousal testimonial privilege and the marital confidential communications privilege. The adverse spousal testimonial privilege is recognized by federal law, thirty states, and the District of Columbia.[72] This privilege is applicable when one spouse is the defendant and the testimony sought from the other spouse is adverse to the defendant.[73] The adverse spousal testimonial privilege can only be asserted during the marriage, and may relate to events that took place before the marriage.[74] Different jurisdictions apply the spousal immunity in various ways. A majority of jurisdictions apply the adverse spousal

69. *See id.* at 52.

70. W.A. HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW 1056 (Wm. W. Gaunt & Sons, Inc. 4th ed. 1992) (1876); Erica Smith-Klocek, *A Halachic Perspective on the Parent-Child Privilege*, 39 CATH. LAW. 105, 109 (1999).

71. In the seventeenth century, Lord Coke wrote that a wife could not testify either for or against her husband because they are two souls in one body. SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON § 6b (1628). The English Act of 1853 abolished the disqualification of husband and wife as witnesses and replaced it with a privilege protecting communications made between husband and wife during marriage. STRONG, *supra* note 25, at 126–27.

72. *See e.g.*, ARIZ. REV. STAT. ANN. § 12-2231 (2003) (civil); ARIZ. REV. STAT. ANN. § 13-4062 (2003) (criminal); COLO. REV. STAT. § 13-90-107 (2008); D.C. CODE ANN. § 14-306(a) (2001); KY. R. EVID. 504(a); MD. CODE ANN., CTS. & JUD. PROC. § 9-106 (West 2002); MASS. GEN. LAWS ANN. ch. 233, § 20 (2004); MICH. COMP. LAWS § 600.2162 (2008) (civil); MINN. STAT. § 595.02(1)(a) (2008); MISS. R. EVID. 601; NEB. REV. STAT. § 27-505(2) (2009); 42 PA. CONS. STAT. ANN. § 5923 (West 2000) (civil); WASH. REV. CODE § 5.60.060(1) (2009); WYO. STAT. ANN. §§ 1-12-101,-04 (2009).

73. When a criminal defendant seeks favorable testimony from a spouse and the spouse is unwilling to testify, a contest ensues between an evidentiary privilege and the Sixth Amendment right of the accused under the Compulsory Process Clause. *See* Washington v. Texas, 388 U.S. 14, 23 (1967).

74. An adverse spousal testimonial privilege prohibits a spouse from testifying before a tribunal or a grand jury, but it does not prevent the government from enlisting a spouse to provide information informally to the government in mounting evidence against the defendant spouse.

testimonial privilege only in criminal proceedings.[75] Ten of the states with the adverse spousal testimonial privilege allow either the witness spouse or the defendant spouse to assert the privilege.[76]

At early common law, the adverse spousal testimonial privilege vested with the defendant spouse, allowing the defendant to preempt the testimony of the witness spouse.[77] In *Trammel v. United States*,[78] the willingness of the wife to testify against her husband prompted the U.S. Supreme Court to reconsider whether the privilege should be vested solely with the defendant spouse; the Court reasoned that if the witness spouse *wanted* to testify, there was no spousal harmony left to protect.[79] Elizabeth and Edwin Trammel, husband and wife, conspired to import heroin into the United States.[80] When Elizabeth Trammel was arrested during an airport customs search, she immediately agreed to cooperate with the government in exchange for a grant of immunity.[81] By the time of the trial, the dissolution of the Trammel marriage was well underway. At trial, Edwin Trammel objected to his wife's testimony against him on the grounds that the adverse spousal testimonial privilege barred her from doing so.[82] The lower court affirmed the existing rule and precluded Elizabeth Trammel from testifying.[83] Breaking with precedent, the Supreme Court unanimously held that the existing rule, which permitted someone other than the witness spouse to assert the privilege, contravened public policy.[84] As Chief Justice Burger explained,

75. Thirteen states and the District of Columbia recognize an adverse spousal testimonial privilege in both criminal and civil cases. *See, e.g.*, ALASKA R. EVID. 505(a); ARIZ. REV. STAT. ANN. § 12-2231 (2003) (civil); ARIZ. REV. STAT. ANN. S 13-4062 (2003) (criminal); CAL. EVID. CODE §§ 970-973 (West 2009); COLO. REV. STAT. § 13-90-107 (2008); D.C. CODE ANN. § 14-306(a) (2001); KY. R. EVID. 504(a); MINN. STAT. § 595.02 (1)(a) (2008).

76. *See* ARIZ. REV. STAT. ANN. § 12-2231 (2003) (civil); ARIZ. REV. STAT. § 13-4062 (2003) (criminal); COLO. REV. STAT. § 13-90-107 (2008); KY. R. EVID. 504(a); MICH. COMP. LAWS § 600.2162 (2008) (civil); MINN. STAT. § 595.02(1)(a) (2008); MISS. R. EVID. 601; NEB. REV. STAT. § 27-505(2) (2009); 42 PA. CONS. STAT. ANN. § 5924 (West 2000) (civil); WASH. REV. CODE § 5.60.060(1) (2009); WYO. STAT. ANN. §§ 1-12-101,-04 (2009).

77. *See* Hawkins v. United States, 358 U.S. 74, 76 (1958).

78. Trammel v. United States, 445 U.S. 40 (1980).

79. *Id.* at 52.

80. *Id.* at 42.

81. *Id.*

82. *Id.*

83. *Id.* at 43.

84. *Id.* at 52–53.

> When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse testimony seems far more likely to frustrate justice than to foster family peace.[85]

The second type of spousal privilege is the marital confidential communications privilege. The marital confidential communications privilege permits either spouse to refuse to reveal, and prevents the other spouse from revealing, the substance of communications made between spouses *during* their marriage.[86] The privilege can be asserted by either spouse in a civil or criminal proceeding, without regard to whether the spouse asserting the privilege is a party to the proceeding.[87] The widely accepted rationale for this privilege is to promote free and open communication between spouses. In the mid-nineteenth century, legal experts opined that human happiness depended largely on the inviolability of domestic confidence. Experts felt that

> the alarm and unhappiness occasioned to society by invading its sanctity and compelling the public disclosures of confidential communications between husband and wife would be a far greater evil than the disadvantages which may occasionally arise from the loss of light which such revelations might throw on questions in dispute.[88]

85. *Id.* at 52.

86. *See* Blau v. United States 340, U.S. 332, 333–34 (1951). All fifty states and the District of Columbia recognize a marital confidential communications privilege. GEORGE FISHER, EVIDENCE 839 (2002). Eight states treat marital confidential communications testimony as a disqualification rather than a privilege. A disqualifying privilege exempts the witness from testifying altogether. Five states grant the witness spouse the ability to assert the privilege. *See* IND. CODE § 34-46-3-1 (West 2009); MICH. COMP. LAWS § 600.2162 (2008); N.C. GEN. STAT. §§ 8-56, 8-57 (2009); 42 PA. CONS. STAT. ANN. § 5914 (West 2000) (criminal); 42 PA. CONS. STAT. ANN. § 5923 (West 2000) (civil); S.C. CODE ANN. § 19-11-30 (2008).

87. The marital confidential communications privilege does not authorize either spouse to refuse to testify against the other; it simply protects confidential communications between spouses.

88. FISHER, *supra* note 85, at 840 (quoting COMMISSIONERS ON COMMON LAW PROCEDURE, SECOND REPORT 13 (1853)); *see* 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2332, at 636 (4th ed. 1961).

E. The Parent-Child Privilege and Existing Privileges: A Comparison

Federal Rule of Evidence 501 acknowledges the authority of federal courts to continue to develop evidentiary privileges in federal criminal trials is "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience."[89] The last common law privilege to be recognized under FRE 501 protects communications between patients and their psychotherapists from involuntary disclosure.[90] The U.S. Supreme Court has denied certiorari in four cases that could have sanctioned a parent-child privilege under FRE 501.[91]

Lawmakers and judges argue that the relationships deserving an evidentiary privilege are integral to our society, and the law must protect them by ensuring confidentiality. In light of society's expectations of parents and the nature of delinquency proceedings, parents are uniquely positioned to act in both a professional and a personal capacity when a child discloses incriminating information to them. Parents provide guidance and advice that closely parallels, but in importance often surpasses, the role of an attorney, psychotherapist, or spiritual counselor. Parents typically are the first responders to their child's dilemma. Even before an attorney intervenes on the child's behalf, parents are often the first to assess the need for counsel (or other professional services) based on the information provided by the child. Parents typically have substantial access to their child, gather the most information from their child, and are able to provide the most financial, emotional, and intellectual support to their child. Open and confidential communication is essential if parents are to meaningfully assess their child's dilemma and make informed decisions about appropriate actions to take.

89. FED. R. EVID. 501; *see also Trammel*, 445 U.S. at 47.

90. Jaffee v. Redmond, 518 U.S. 1, 9 (1996).

91. *See In re* Grand Jury, 103 F.3d 1140 (3d Cir.), *cert. denied*, 520 U.S. 1253 (1997); Grand Jury Proceedings of John Doe v. United States, 842 F.2d 244 (10th Cir.), *cert. denied*, 488 U.S. 894 (1988); United States v. Davies, 768 F.2d 893 (7th Cir.), *cert. denied*, 474 U.S. 1008 (1985); Three Juveniles v. Commonwealth, 455 N.E.2d 1203 (Mass. 1983), *cert. denied*, 465 U.S. 1068 (1984). *But see In re* A Grand Jury Subpoena, 722 N.E.2d 450, 457 n.15 (Mass. 2000) (noting that the privilege against self-incrimination or the right to counsel may be implicated if a parent advising a juvenile about the exercise or waiver of rights is compelled to answer questions about the content of those conversations).

Distinct from the adult criminal justice system, the juvenile justice system depends on the engagement of parents to assist their children as they navigate through a complicated and potentially punitive system. Parents are the conduits through which professionals will be retained to assist their child. Accurate and truthful information from the child better equips the parents to seek the appropriate services. Children do not assume this role for themselves, nor should they be expected to do so. Children may be targets of criminal investigations, but rarely will they have the foresight, knowledge, and resources to seek assistance, legal or otherwise, without assistance from their parents or guardian. In conferring with professionals such as lawyers, doctors, and therapists, children are not particularly good self-reporters—they tend to omit details and their descriptions lack detail (particularly legally relevant information).[92] Parents are often the ones who provide the details and fill in the gaps necessary for the professional to gain a full understanding of the child. Parents assume the financial responsibility for the professional services rendered on behalf of their child.[93] It is not uncommon for parents to consult directly with the professional, such as the lawyer, they are contemplating hiring. In light of the absence of a parent-child privilege, professionals may not be able to share as much information with parents as they would like (and children may want them to).[94] This is an unnecessary dilemma if all parties involved want full disclosure so that parents can provide the utmost emotional, intellectual, and financial support to their child.

In the juvenile justice system, the functions performed by parents overlap in many respects with those performed by an attorney. Parents routinely function as counselors to their children, helping them to navigate the legal terrain and assisting in the legal

92. *See* Barry Feld, *Juveniles' Waiver of Legal Rights: Confessions,* Miranda, *and Right to Counsel*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 105 (Thomas Grisso & Robert G. Schwartz eds., 2000); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 160–64 (1997).

93. The parents' responsibility differs from that of adult clients, who may seek guidance from any number of sources and are solely responsible for the costs they incur.

94. A parent should not obtain access to information pertaining to the representation of the parent's minor child unless the child consents to such access and the child's attorney determines that it is in the best legal interest of the child to disclose the information to the child's parent.

decision making. In many instances, children waive their right to counsel. Moreover, parents, satisfactorily or unsatisfactorily, perform many of the functions that would otherwise be fulfilled by a lawyer.[95] Empirical research indicates that when parents do not feel that the circumstances warrant retaining a lawyer for their children, children overwhelmingly waive counsel.[96] The need for a parent-child privilege is evidenced in the large number of parents serving as de facto lawyers to their children.

With or without a lawyer, the parents' role in legal decision making cannot be overstated. The onerous task of weighing options and considering the long-term consequences of one's decisions is beyond the capacity of most adolescents.[97] Lawyers advise their clients of the law and the legal consequences of their decisions, but the clients ultimately make the decisions.[98] Some lawyers tell their clients which choice they think is best, but critical decisions, such as whether to accept a plea offer and whether to testify at trial reside solely with the clients.[99] Besides the child, the persons who wield the most influence in the decision-making process are, most often, the parents. Unlike the lawyer, parents are not bound by ethical constraints that may limit the degree to which parents may influence their child's decisions. Rightly or wrongly, many parents have been telling their children what to do for most of their lives. To suddenly stop when their child faces a possible loss of liberty seems ill-

95. Waiver of counsel among juveniles is significantly higher than among their adult counterparts. One third of public defender offices surveyed in a 1993 national study on the issues pertaining to juvenile representation reported that some percentage of youth waive their right to counsel at the detention hearing. Twenty-one percent say it happens 1 to 10 percent of the time, whereas 4 percent of respondents said it happens 51 to 80 percent of the time. *See* ABA JUVENILE JUSTICE CTR. ET AL., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 44 (2002), *available at* http://www.njdc.info/pdf/cfjfull.pdf [hereinafter ABA JUVENILE JUSTICE CTR. ET AL., A CALL FOR JUSTICE]. In a 2002 indigent juvenile defense assessment, experts estimated that in one county in Virginia, 50 percent of youth waived counsel regardless of the seriousness of the offense. *See* ABA JUVENILE JUSTICE CTR. ET AL., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 23–24 (2002).

96. Donna Bishop & Hillary Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by* In re Gault, 60 RUTGERS L. REV. 125, 146–47 (2007) (discussing parental influence on child's decision to waive *Miranda* rights); *see also* ABA JUVENILE JUSTICE CTR. ET AL., A CALL FOR JUSTICE, *supra* note 95, at 45.

97. Adolescents tend to focus on the immediate, short-term consequences, not the long-term ramifications, of their decisions. *See infra* Part III.

98. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2007).

99. *See id.*

advised and unlikely. Naturally, if parents are not informed of all the relevant information, the efficacy of the parents' intervention is threatened. Indeed, uninformed parents may give poor advice based on a lack of information and a misunderstanding about the culpability of their child.

There are two ways for parents to obtain the information they need to advise and support their child in the legal case against the child. One way is for the child to tell the parents what occurred and hope that the government will never seek to access the content of their communication. The other means is for the child to consent to the lawyer's disclosure to the parents. The child's consent is also a waiver of the attorney-client privilege with respect to the information provided by the attorney to the parents because the information has been disclosed to third parties who are not covered by any existing privilege. At present, there are no means to prevent the government from compelling parents to disclose statements of their child in either scenario. In light of the similarities and shared responsibilities between the child's lawyer and the parents, the denial of a parent-child privilege is akin to effacing a child's right against self-incrimination.

The virtue of a psychotherapist-patient testimonial privilege is that patients will reveal honest and accurate information to their therapists without fear of incrimination. Children share some of the most personal information with their parents in order to receive the benefit of their parents' counsel. The most reliable advice and guidance are imparted by parents to their children based on truthful and accurate information.[100] There is a subjective expectation of privacy that information shared solely between parents and their children will be kept confidential. For many, the fact that the information shared between parents and their children is not protected from government compulsion would be a revelation. Therapists do not have to be concerned with the dilemma of choosing between loyalty to their patients and an obligation to assist law enforcement. A duty of loyalty to their child can cause a serious dilemma for parents in response to any legal requirement that parents divulge information harmful to their child.[101] In *Jaffee*, Justice

100. Due to the personal nature of their relationship, parents commonly offer unsolicited advice to their children out of a sense of moral and social responsibility.

101. *See, e.g.*, sources cited *supra* note 7.

Antonin Scalia asked an empirical question (and answered it unempirically) concerning the benefits of seeking advice from one's mother: "Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be."[102] Justice Scalia's remark underscores the necessity of parent-child communication, particularly as it applies to minors. One way to undermine the trust and confidence essential to the parent-child relationship is to force parents to testify against their children. Society places a premium on parental communication, awareness, and time spent with children. The absence of legal protection for parent-child communications and observations is inconsistent with society's expectations of parents.[103]

Personal privileges exist to respect and preserve the relationships they embody.[104] Such is the rationale underlying the spousal privilege, adopted in all fifty states and the federal common law. The parent-child relationship is an intimate, personal relationship. In most instances, the parent-child relationship is interminable. Short of rare instances of emancipation, there is no formal dissolution of a parent-child relationship comparable to the dissolution of marital unions.[105] The most compelling scenario supporting a parent-child privilege is one in which the parent-child relationship is intact both at the time the communication is made, and when the parent is compelled to adversely testify against the child. This is referred to as the "essential parent-child privilege."[106] A strong, resilient parent-child relationship stands in stark contrast to a

102. Jaffee v. Redmond, 518 U.S. 1, 22 (1996) (Scalia, J., dissenting).

103. Parents' rights may be invoked in such instances because the absence of a legal privilege has the potential to interfere with the parents' right to raise their children as they see fit.

104. *See, e.g.*, STRONG, *supra* note 25, § 72.

105. According to the 2000 census, 41.5 percent of first marriages in the United States end in divorce. *See* CENTER FOR MARRIAGE AND FAMILIES AT THE INSTITUTE FOR AMERICAN VALUES, U.S. MARRIAGE INDEX 1970–2000, http://www.americanvalues.org/center/wp-content/themes/center1/images/marriage_index_large.jpg (last visited Feb. 27, 2010). Of those first marriages ending in divorce, the median duration of a marriage was less than nine years. Studies indicate that the median duration of second marriages is less than eight years. *See* U.S. CENSUS BUREAU, TABLE 6. MEDIAN DURATION OF MARRIAGES FOR PEOPLE 15 YEARS AND OVER BY SEX, RACE, AND HISPANIC ORIGIN: 2004 (2007), *available at* http://www.census.gov/population/socdemo/marital-hist/2004/Table6.2004.xls.

106. *See* Ross, *supra* note 19.

dissolving marriage. Logically, there is no fair and just rationale for extending a testimonial privilege to spouses, while denying parents the right to claim a privilege to protect their children.[107] One commentator explained the similarity between the marital and parent-child privileges as follows:

> The child-parent relationship resembles the husband-wife relationship in that both involve a fundamental and private family bond. The child-parent relationship ideally encompasses aspects found in the marital relationship—mutual love, intimacy and trust. . . . The fact that the child-parent relationship is part of the institution of the family that it is hoped is promoted by a marital privilege makes the protection of children's private conversations with parents even more appealing.[108]

Implicitly, societal values are reflected in how the law regards particular relationships. Legal protections such as evidentiary privileges are an expression of the societal worth of the relationships they protect. Over the past decade, the social and political agenda revitalized family values. Nothing could be more antithetical to preserving the family unit than compelling unwilling parents to testify against their minor children. Also potentially damaging to familial relations are police initiatives that seek the cooperation of parents to root out information and gather incriminating evidence about their children. Initiatives conceived by the Boston and Washington, D.C., police departments that enlist parents to search their children's bedrooms, looking for firearms and evidence of other illegal activity have the deleterious effect of splintering families.[109]

107. *In re* Agosto, 553 F. Supp. 1298, 1325 (D. Nev. 1983) ("There is no reasonable basis for extending a testimonial privilege for confidential communications to spouses, who enjoy a dissoluble legal contract, while yet denying a parent or child the right to claim such a privilege to protect communications made within an indissoluble family unit, bonded by blood, affection, loyalty and tradition. . . . [I]f the rationale behind the privilege of a witness-spouse to refuse to testify adversely against his or her spouse in a criminal proceeding serves to prevent the invasion of the harmony and privacy of the marriage relationship itself, then affording the same protection to the parent-child relationship is even more compelling.").

108. Nissa M. Ricafort, Jaffee v. Redmond*: The Supreme Court's Dramatic Shift Supports the Recognition of a Federal Parent-Child Privilege*, 32 IND. L. REV. 259, 289 (1998) (quoting Ann M. Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM L.Q. 1, 6–7 (1982)).

109. Hillary B. Farber, Editorial, *Safe Homes' Inherent Perils*, BOSTON HERALD, Feb. 23, 2008, at 16. The Safe Homes Program is an initiative of the Boston Police Department to remove guns from homes where juveniles may be concealing them. The design is for police to make

Parents could quite easily misunderstand that the promise of immunity as it relates to the recovery of a firearm, includes an implied promise of confidentiality for all the information the parents shares with the police in the privacy of their own home. But in fact, information the police obtain from parents and other household members during a Safe Homes visit unrelated to the concealed firearm is compellable, including the communications between parents and their children and parents' observations of their minor children.[110]

Legislators, prosecutors, defense lawyers, parents, and children have commented on the family dilemma that will be precipitated by forcing parents to incriminate their children.[111] When all of this is balanced against law enforcement's need for evidence, the argument favoring a parent-child privilege is as strong, if not more compelling, than the privileges already recognized by law.

F. The Wigmore Factors

Dean Wigmore devised a test for determining whether communications within a particular relationship are worthy of an evidentiary privilege.[112] The Wigmore test has four fundamental conditions, all of which must be met to establish a privilege.[113]

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

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

unannounced visits to homes they believe have guns and request permission from parents to search the juveniles' bedroom. Allison Klein, *D.C. Seeks Consent to Search for Guns; Amnesty Offered for Access to Homes*, WASH. POST, Mar. 13, 2008, at B1.

110. Klein, *supra* note 109.

111. Massachusetts State Senator Cynthia Creem told the *Christian Science Monitor*, "We would hope that if children came to their parents, they would be able to share their problems. . . . [But currently], if my children come to me, I have to say, 'Go talk to your priest, go talk to your doctor, because I can't hear it.'" Kris Axtman, *Do Parents Belong on the Witness Stand?*, CHRISTIAN SCI. MONITOR, Feb. 17, 2000, at 1. A Boston family lawyer said, "Your heart really goes out to a parent whose child went to them in confidence to bear [sic] their soul. The last thing on a parent's mind is, 'Jeez, I may be subpoenaed.' Your first reaction is, 'How can I help this child that I love?'" Sacha Pfeiffer, *Case Sparks Bill on Parent-Child Confidentiality Measure*, BOSTON GLOBE, Feb. 6, 2000, at B1.

112. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (John T. McNaughton rev., Little Brown and Co. 1904).

113. *Id.*

(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 litigation.[114]

When considering any of these prongs in the context of the juvenile justice system, government maneuvers that cause fragmentation to the family unit are antithetical to the mission of the juvenile court. The juvenile court places the utmost importance on the family to provide the structure, guidance and support needed for juveniles to emerge from the delinquency experience with vastly more potential to become productive members of society.[115] In a juvenile delinquency prosecution, normative arguments supplanting the importance of the family unit—specifically the relationship between parents and children—in favor of law enforcement pursuits contravene the purpose and design of the juvenile court. A legal scheme that allows prosecutors to exercise discretion that is not subject to review on matters as monumental as compelling parents to testify against their children fails to attribute the proper weight to familial relations and the well-being of children, the core principles of the juvenile justice system.[116]

The adult criminal justice system has a different philosophy than does the juvenile justice system. The mission of the criminal justice system is to prosecute alleged violations of the law and mete out appropriate punishment.[117] The criminal justice system's broader aim is to prevent injury and harm to the general public. This it accomplishes by punishing those who violate the penal laws and by deterring those who would otherwise do harm. Retributive theories

114. *Id.*

115. JOHN WATKINS, JR., THE JUVENILE JUSTICE CENTURY 49–50 (1998).

116. *See In re* Agosto, 533 F. Supp. 1298, 1326 (D. Nev. 1983) ("The family, as the basic unit of American society, is the milieu in which such values are inculcated into individuals, and thus into society as a whole. Consequently, the child learns to relate to society and have respect for society within the initial framework of his own relationship to his parents and other family members. To damage the parent-child relationship would result in damage to the child's relationship to society as a whole.").

117. 47 AM. JUR. 2D *Juvenile Courts* § 4 (2009) ("As juvenile court proceedings are designed for the rehabilitation of minors, while the purpose of imprisonment pursuant to the criminal law is punishment, the differing needs and characteristics of adult offenders and juveniles justify the maintenance of a separate and distinct system of justice for each of the two classes.").

that favor bringing an accused to justice, even if it may have a deleterious effect on the family of the accused, are acceptable means of fulfilling the purpose of criminal prosecution.[118] Adhering to the core philosophy of the juvenile court, parents should be empowered to assist their children in positive ways, and forcing parents to provide the government with inculpatory evidence against their children contravenes this philosophy.

II. THE JUVENILE JUSTICE SYSTEM'S DESIGN AND PHILOSOPHY NECESSITATES RECOGNITION OF A PARENT-CHILD PRIVILEGE

The progressive juvenile reformers of the late nineteenth century brought wholesale change to the way the legal system had previously dealt with children accused of breaking the law. Established in 1899, the first juvenile court was founded in Chicago, Illinois, with the purpose of providing treatment and rehabilitation to wayward youth through a judicial system separate from its adult counterparts. The court assumed a parental role and was designed specifically to act in the best interest of the children who appeared before the court. This was known as the doctrine of *parens patriae*.[119] Judges treated juveniles who came before them as sons and daughters in need of guidance.[120] Juvenile court judges rarely appointed lawyers for youth and discouraged parents from retaining counsel.[121] There was little concern about protecting children from erroneous adjudications of delinquency because the upshot of such an error would presumably be the delivery of much needed services to these children. The proceedings were considered civil rather than criminal, so due process protections did not apply to the proceedings. Terminology associated with the criminal justice system, such as prosecution, jail,

118. Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS, NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179–82 (Ferdinand Schoeman ed., 1987). ("Retributivism is a very straightforward theory of punishment. We are justified in punishing because and only because offenders deserve it.").

119. *Parens patriae* literally means "parent of his or her country." BLACK'S LAW DICTIONARY 511 (2d pocket ed. 2001). Under the doctrine of *parens patriae*, the state had broad authority to act on behalf of minors, on the presumption that it acted in the best interests of those on whose behalf it intervened.

120. *In re* Gault, 387 U.S. 1, 15 (1967).

121. *See generally* Feld, *supra* note 92 (Thomas Grisso & Robert G. Schwartz eds., 2000) (discussing that in reality, juveniles receive a very different version of procedural justice than adults).

and indictment, was replaced by less penal vernacular such as adjudication, detention facility, and petition.[122] Commenting on the ethos/nature of the juvenile court, Justice Abe Fortas wrote:

> The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.[123]

The "Child Savers," as the juvenile court judges came to be known, were successful in fulfilling their mission of ideological and physical transformation of the way the justice system treated youth. By 1932, there were over six hundred independent juvenile courts operating throughout the United States.[124] For close to seventy years, the juvenile court operated as a system devoid of due process and legal rights on behalf of children. Over time, the idealism of benevolent judges and proper treatment fell short of being realized. Probation and institutional treatment facilities were understaffed, and their personnel—those responsible for clinical assessments and delivery of services—were poorly paid and poorly trained.[125] Juvenile correctional facilities transformed themselves into more punitive and institutional environments.[126] The informality of the juvenile system, its lack of procedural safeguards, and the broad scope of its authority over delinquent and pre-delinquent youth gave way to arbitrariness and abuses of power.[127] Instances of committed children being denied due process of law was all too common.

122. *See* WATKINS, JR., *supra* note 115, at 49.

123. *In re* Gault, 387 U.S. at 15–16.

124. WATKINS, JR., *supra* note 115, at 52.

125. *See, e.g.*, PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, TASK FORCE REPORT ON JUVENILE DELINQUENCY AND YOUTH CRIME (1967); Bishop & Farber, *supra* note 96, at 132.

126. *See, e.g.*, JEROME G. MILLER, LAST ONE OVER THE WALL: THE MASSACHUSETTS EXPERIMENT IN CLOSING REFORM SCHOOLS 4 (1991); DAVID STREET, ROBERT D. VINTER & CHARLES PERROW, ORGANIZATION FOR TREATMENT: A COMPARATIVE STUDY OF INSTITUTIONS FOR DELINQUENTS (1966).

127. *In re* Gault, 387 U.S. at 26.

In 1966, the Supreme Court decided its first case involving the juvenile court process.[128] In *Kent v. United States*, the Court ruled that a decision to transfer a boy from juvenile court to criminal court for prosecution and punishment as an adult could not—in light of the consequences at stake—be made without a hearing.[129] *Kent* signaled the beginning of the end of an era of unbridled discretion. In 1967, the Supreme Court decided the landmark case *In re Gault*.[130] *In re Gault* rejected the continuation of the doctrine of *parens patriae*, finding its applicability no longer appropriate in light of the contemporary treatment of juveniles by judges and by the police.[131] Writing for the majority, Justice Abe Fortas noted that the contemporary juvenile justice system had evolved significantly from the early 1900s.[132] His opinion described the doctrine of *parens patriae* as "murky and its historic credentials of dubious relevance."[133] The Court opined that "the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned."[134] *In re Gault* is one of the most significant cases in juvenile justice jurisprudence because it extended many of the same procedural protections to juveniles that apply to adults in criminal proceedings.[135] The Court imported into juvenile adjudicatory proceedings (1) the right to notice of the charges;[136] (2) the right to

128. Kent v. United States, 383 U.S. 541 (1966).

129. *Id.* at 554.

130. 387 U.S. 1 (1967). Gerald Gault, a fifteen-year-old boy originally taken into custody for making obscene phone calls while on probation for petty theft, had been committed to a state institution until his twenty-first birthday. *Id.* at 7–8. He argued that the Arizona juvenile code was facially invalid because it denied defendants the right to notice of charges, the right to counsel, the right to confrontation and cross-examination, the privilege against self-incrimination, and the right to full appellate review. As such, the Supreme Court was called upon to determine the impact of the Due Process Clause on juvenile delinquency proceedings and it determined that due process protection shall apply in juvenile adjudicatory proceedings. *Id.* at 9–10.

131. *Id.* at 18–19.

132. *Id.*

133. *Id.* at 16.

134. *Id.* at 26.

135. *Id.* at 55.

136. *Id.* at 33–34.

counsel;[137] (3) the right to confrontation and cross-examination of witness;[138] and (4) the privilege against self-incrimination.[139] The Court affirmed that "[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."[140]

Three years later, the Supreme Court held that the "beyond a reasonable doubt" standard of proof applicable in adult criminal proceedings should be the standard of proof in juvenile delinquency proceedings as well.[141] By 1971, the Court had conferred to juveniles nearly all of the due process guarantees that apply in adult criminal proceedings.[142] As expected, the 1970s marked a sea of change in the way juvenile delinquency proceedings were conducted.

As juvenile justice jurisprudence evolved, courts were reminded that although juveniles now shared many of the same due process rights as adults, they were still minors. Minors' exercise of a legal right is more often than not inextricably intertwined with their parents' participation, if not consent. As judges relinquished their surrogate parenthood and lawyers were a right rather than an aberration, the role parents assumed in juvenile proceedings became more significant. Formally and informally, parents were designated roles that required their knowledge and participation in the legal proceedings.[143] For example, the police are required in many

137. *Id.* at 36–37. *See generally id.* at 34–42 (discussing the historical development, scholarly commentary, and reasoning behind the Supreme Court's determination that the Constitution requires the right to counsel in juvenile proceedings).

138. *Id.* at 57.

139. *Id.* at 55. *In re Gault* made the Fifth Amendment right against self-incrimination applicable to juveniles, and as a result made the *Miranda* protections applicable to juveniles. Accordingly, any waiver of *Miranda* rights by juveniles must be made knowingly, voluntarily, and intelligently. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

140. *In re* Gault, 387 U.S. at 20.

141. *In re* Winship, 397 U.S. 358 (1970).

142. *See id.* at 369. A few states allow jury trials in delinquency matters, but the vast majority of them provide for bench trials. *See* H. Eugene Breitenbach, *Juvenile Court Proceedings*, 14 AM. JUR. TRIALS 619, 653 (1968). The right to be free from unreasonable searches and seizures was not squarely declared to apply to juveniles by the fact that these situations involved pre-adjudicatory issues, and even today the Fourth Amendment applies to various degrees to juveniles. *See* WATKINS, JR., *supra* note 115, at 108. Questions as to the applicability of the Exclusionary Rule to juveniles have been resolved in favor of juveniles. *Id.* Every court that has specifically addressed the issue has ruled in favor of its applicability. *Id.*

143. A majority of jurisdictions require the presence of a parent or guardian during all stages of juvenile proceedings. *See, e.g.*, IND. CODE § 31-37-12-2 (1998); N.H. REV. STAT. ANN. § 169-

jurisdictions to notify parents when their child is in police custody.[144] Some jurisdictions prohibit the police from interrogating children under the age of fourteen without a parent present.[145] Some states require children to consult with their parents prior to executing a *Miranda* waiver.[146] Many jurisdictions require a parent's presence at all delinquency proceedings.[147] Informally, judges routinely make it their practice to ask parents for their cooperation in ensuring that conditions imposed on their child are followed.

Not surprisingly, the juvenile justice system, with many trappings of the adult criminal justice system, experienced an increase in the number of children being adjudicated despite periods

B:7 (2008); TEX. FAMILY CODE ANN. § 53.06 (Vernon 2009). When a parent cannot or will not meet the level of engagement necessary, the court will appoint a guardian to stand in place of the parent to assist the child in the decision making and to be present with the child throughout the proceedings. *Id.*

144. *See, e.g.*, FLA. STAT. § 985.101 (2008); GA. CODE ANN. § 15-11-47 (2008); HAW. REV. STAT. § 571-31(b) (2006) ("When an officer or other person takes a child into custody the parents, guardian, or legal custodian shall be notified immediately."); ME. REV. STAT. ANN. tit. 15, §3203-A(2)(A) (2003) ("When a juvenile is arrested, the law enforcement officer or the juvenile community corrections officer shall notify the legal custodian of the juvenile without unnecessary delay and inform the legal custodian of the juvenile's whereabouts . . . .").

145. Massachusetts law requires that a juvenile under fourteen years of age must be allowed to confer with a parent or guardian before making a *Miranda* waiver. *See, e.g.*, Commonwealth v. A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983). There is a presumption that a juvenile over the age of fourteen needs to consult with a parent or guardian unless the child is found to be highly intelligent. *See id.* In Kansas, a juvenile under fourteen years of age must consult with a parent, guardian, or counsel during custodial interrogation in order for subsequent statements made by the juvenile to be admissible. *In re* B.M.B., 955 P.2d 1302, 1312–13 (Kan. 1998); *see also* 705 ILL. COMP. STAT. 405/5-405 (2009) (applying the same rule to Illinois).

146. *See, e.g.*, COLO. REV. STAT. § 19-2-511 (2008) (limiting the admissibility of statements made by a juvenile suspect to those made in the presence of a parent or guardian after both juvenile and adult have been apprised of the juvenile's *Miranda* rights); CONN. GEN. STAT. § 46b-137 (2007) (limiting the admissibility of statements or a confession by a juvenile to those made in the presence of a parent or guardian after both juvenile and adult have been apprised of the juvenile's *Miranda* rights); N.D. CENT. CODE § 27-20-26 (2008) (requiring that a juvenile be represented by a parent, guardian, or counsel during custodial interrogation). The Vermont Supreme Court has indicated that a juvenile must consult with an interested adult who is not a member of law enforcement before making a waiver, and the adult must be apprised of the juvenile's *Miranda* rights. *In re* E.T.C., 449 A.2d 937, 940 (Vt. 1982). In Indiana, a juvenile's *Miranda* rights may only be waived (1) by counsel if the juvenile knowingly and voluntarily joins in the waiver; (2) by a parent or guardian if that person knowingly and voluntarily makes the waiver, if that person has no "adverse interest" and the juvenile knowingly and voluntarily joins the waiver; or (3) by the juvenile if the juvenile knowingly and voluntarily makes the waiver and has been legally emancipated. IND. CODE § 31-32-5-1 (1998).

147. *See, e.g.*, IND. CODE § 31-37-12-2 (1998); N.H. REV. STAT. ANN. § 169-B:2-a (2008) (stating that a parent's failure to appear may result in the appointment of a guardian ad litem to serve the child's best interest); TEX. FAMILY CODE ANN. § 53.06 (Vernon 2009).

of overall decline in serious violent crime.[148] The number of delinquency cases involving pretrial detention increased 38 percent between 1991 and 2003.[149] The number of cases that were adjudicated and resulted in out-of-home placement increased by 30 percent between 1985 and 2005.[150] In the past decade, there has been a significant increase in the number of juveniles being prosecuted in the adult criminal justice system despite periods of decreased serious crime among the juvenile population.[151] The increase is largely due

148. "Delinquency case rates rose from 44.2 to 63.4 per 1,000 juveniles between 1985 and 1997, declined through 2003, and then remained stable through 2005." CHARLES PUZZANCHERA & MELISSA SICKMUND, NATIONAL CENTER FOR JUVENILE JUSTICE: JUVENILE COURT STATISTICS 2005 REPORT 8 (2008), *available at* http://ojjdp.ncjrs.org/ojstatbb/njcda/pdf/jcs2005.pdf. In 2005, over 31 million youth were under juvenile court jurisdiction. Eighty percent were between the ages of ten and fifteen, 12 percent were sixteen years old, and 8 percent were seventeen years old. These smaller numbers of older juveniles reflect the increased number of juveniles being transferred to adult court. *Id.*

149. The national detention rate for juvenile offenders in 2003 was 83 per 100,000 juveniles in the population. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 201 (2006), *available at* http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf.

> The number of delinquency cases involving detention increased 48% between 1985 and 2005, from 239,900 to 354,100. The largest relative increase was for person offense cases (144%), followed by drug offense cases (110%) and public order cases (108%). In contrast, the number of detained property offense cases declined 22% during this period.

PUZZANCHERA & SICKMUND, *supra* note 148, at 32 (noting that this Report includes only those detention actions that resulted in juveniles being placed in a restrictive facility under court authority while awaiting the outcome of the court process and does not include detention decisions made by law enforcement officials prior to court intake or those occurring after the disposition of a case).

150. PUZZANCHERA & SICKMUND, *supra* note 148, at 50. Between 1985 and 2005, "the number of cases involving the use of out-of-home placement increased 139% for drug offense cases, 94% for public order offense cases, and 89% for person offense cases but decreased 25% for property offense cases." *Id.* Between 1996 and 2005, it was more likely for delinquency cases involving juveniles ages sixteen and up to result in out-of-home placement than for juveniles ages fifteen and below, regardless of their offense. *Id.* at 52.

151. The number of juvenile court cases transferred to criminal court increased 71 percent between 1985 and 1994 and 42 percent from 1990 to 1994. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 1988–1997, at 2–4 (2000), *available at* http://www.ncjrs.gov/txtfiles1/ojjdp/fs200002.txt. Between 1988 and 1997, "for every 1,000 formally handled delinquency cases, [eight] were waived to criminal court." *Id.* In 1994, 11,700 delinquency cases were waived to adult court, reflecting a 73 percent increase from 1988. *Id.* In 2002, 7,100 delinquency cases were waived to adult court, reflecting a 13 percent increase from 2001. ANNE L. STAHL, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DELINQUENCY CASES IN JUVENILE COURT, 2002 FACT SHEET 2 (2006), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/fs200602.pdf. In 2004, 9,400 delinquency cases were waived to adult court, reflecting a 21 percent increase from 2000 because of changes in state laws made during the 1990s. ANNE L. STAHL, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DELINQUENCY CASES IN JUVENILE COURT, 2004 FACT SHEET 2 (2008), a*vailable at* http://www.ncjrs.gov/pdffiles1/ojjdp/fs200801.pdf. In 1998, approximately

to the number of states that have passed laws lowering the age at which a minor can be charged in the adult criminal justice system and excluding certain offenses from juvenile court jurisdiction.[152] In response to legislation, prosecutors in a number of states can file certain cases directly in criminal court, without receiving a judicial determination or "waiver" from a juvenile court judge.[153] The combination of "direct file" legislation and the lowered age at which a juvenile can be tried in adult court has effectively exposed juveniles to harsher penalties while reducing the number of cases that receive a judicial determination prior to being handled outside the

107,000 youth were incarcerated on any given day. Of these, approximately 14,500 were housed in adult facilities. The largest proportion—approximately 9,100 youth—were housed in local jails, and some 5,400 youth were housed in adult prisons. In terms of their legal status while incarcerated, 21 percent were held as adjudicated juvenile offenders or pretrial detainees, and 75 percent were sentenced as adults. JAMES AUSTIN, KELLY DEDEL JOHNSON & MARIA GREGORIOU, BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 4 (2000), *available at* http://www.ncjrs.gov/pdffiles1/bja/182503.pdf.

152. *See* PBS Frontline: Juvenile Justice Facts & Stats, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/basic.html (last visited Feb. 19, 2010). In 1995, seventeen states further expanded or amended their waiver statutes to allow juveniles to be transferred to adult court at younger ages and for an increased number of offenses. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES 1994–1996, http://ojjdp.ncjrs.org/PUBS/reform/ch2_j.html#transfer (last visited Nov. 8, 2009). In 2006, twenty-three states had no minimum age specified in at least one judicial waiver, concurrent jurisdiction, or statutory exclusion provision for transferring juveniles to criminal court. *E.g.*, CONN. GEN. STAT. § 46b-127 (2007) ("The court shall automatically transfer from the docket for juvenile matters to the regular criminal docket of the Superior Court the case of any child charged with the commission of a capital felony . . . ."); DEL. CODE ANN. tit. 10, § 1010 (2008) ("A child shall be proceeded against as an adult where: The acts alleged to have been committed constitute first or second degree murder . . . ."). In 2004, Kansas and Vermont statutes provided conditions under which minors as young as ten years old may be transferred to adult criminal court. KAN. STAT. ANN. § 38-2347(a)(2)(B) (2008); VT. STAT. ANN. tit. 33, § 5102(2)(C)(i) (2008). Since 1992, all states with the exception of Nebraska have altered their transfer statutes to make it easier for juveniles to be waived into adult court. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *supra* note 149, at 113–14. Between 1992 and 1995, forty states and the District of Columbia enacted or expanded transfer provisions. *Id.* Between 1998 and 2002, legislatures in eighteen states enacted or expanded their transfer provisions. *Id.* Between 2003 and 2004, only four states made substantive changes in transfer provisions, and only two of those states expanded them. *Id.*

153. *See* AUSTIN, JOHNSON & GREGORIOU, *supra* note 151, at 2–3 ("[T]he trend across the country is to expand the use of waivers."); U.S. DEP'T OF JUSTICE OFFICE OF JUSTICE PROGRAMS, NATIONAL SURVEY OF PROSECUTORS: PROSECUTORS IN STATE COURTS, 2005, at 7 (2006), *available at* http://ojp.usdoj.gov/bjs/pub/pdf/psc05.pdf ("In 2005, 65% of prosecutors' offices indicated they had proceeded against juvenile cases in criminal court. During the prior year prosecutors' offices reported proceeding against over 23,000 juvenile cases in criminal court. The median number of juvenile cases proceeded against in criminal court per office was four. . . . About 3% of the offices reported a specialized unit that prosecuted juvenile cases in criminal court." (citation omitted)).

jurisdiction of the juvenile court.[154] As of 2005, "there are approximately 10,000 juveniles waived to the adult court each year."[155] To paraphrase the Supreme Court in *Gault*, the closer we get to a retributive system, the greater the need for the panoply of due process rights.[156] It follows that a parent-child testimonial privilege is more appropriate now then ever.

A. A Juvenile's Right Against Self-Incrimination Requires Recognition of a Parent-Child Privilege

Courts that have considered the admissibility of confessions by juveniles have remarked on how police isolation and the immaturity and vulnerability of young people create an unparalleled atmosphere of intimidation and confusion, which can compromise the child's decision-making capabilities.[157] In the wake of *Gault*, courts employ one of two tests to determine the validity of a juvenile's waiver of his *Miranda* rights: the totality of the circumstances test[158] or the per se approach.[159] Both of these tests place importance on the presence of a parent, or other interested adult, to confer with the juvenile suspect prior to the execution of a *Miranda* waiver.[160] Under the per se

154. PUZZANCHERA & SICKMUND, *supra* note 148, at 40. As reported by national news media, the number of juveniles who were tried as adults was on the rise during the 1990s. *E.g.*, *Number of Juveniles Sent to Adult Prisons Skyrocketing, Study Shows*, CNN.COM, Feb. 28, 2000, http://www.cnn.com/2000/US/02/27/juveniles.in.jail/#2 (stating more than twice the number of youths under eighteen years of age were committed to adult prisons in 1997 than in 1985).

155. DONALD J. SHOEMAKER & TIMOTHY W. WOLFE, JUVENILE JUSTICE: A REFERENCE HANDBOOK 50 (2005).

156. *In re* Gault, 387 U.S. 1, 28–31 (1967).

157. *See id.* at 51–52; Gallegos v. Colorado, 370 U.S. 49, 54 (1962); Haley v. Ohio, 332 U.S. 596, 599–600 (1948); Commonwealth v. A Juvenile, 449 N.E.2d 654, 656 (Mass. 1983); Hillary Farber, *The Role of the Parent/Guardian in a Juvenile Custodial Interrogation: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1282–85 (2004).

158. Fare v. Michael C., 442 U.S. 707, 725 (1979).

159. IOWA CODE ANN § 232.11(2) (2000); MONT. CODE ANN. § 41-5-331(2) (2009); N.M. STAT. § 32A-2-14 (2006); WASH. REV. CODE § 13.40.140(10) (2004); State v. Presha, 748 A.2d 1108, 1114 (N.J. 2000); *In re* B.M.B., 955 P.2d 1302, 1312–13 (Kan. 1998); *A Juvenile*, 449 N.E.2d at 657.

160. A small minority of states employ what has been termed a "two-tier" model. Under this model, the age of the juvenile determines whether a court evaluates the waiver's validity according to the totality of the circumstances test or the per se test. *E.g.*, MONT. CODE ANN. § 41-5-331 (2009) (requiring an effective waiver by a youth under sixteen years of age be made with the agreement of the youth and youth's parent or guardian, or with advice of counsel). *See generally* Kimberly Larson, *Improving the "Kangaroo Courts": A Proposal for Reform in Evaluating Juveniles' Waiver of* Miranda, 48 VILL. L. REV. 629, 648 (2003) (explaining the two-tier approach).

approach, there are specific procedural safeguards which must be adhered to in order for statements that are made by a juvenile during interrogation to be admissible.[161] The safeguards range from mandating the presence of counsel during the interrogation of a juvenile younger than fourteen years of age, to mandating the presence of "an interested adult," such as a parent or guardian, to advise the juvenile on whether to waive Fifth Amendment protection.[162] The "interested adult rule," as it is often called,

161. Seven states have created a presumption that a juvenile under a certain age cannot waive *Miranda* rights or that a waiver is impermissible without an opportunity to consult with a parent. *E.g.*, IOWA CODE § 232.11(2) (2000) (declaring that a child under sixteen years of age cannot waive the right to counsel without the written consent of the child's parent, guardian, or custodian and that a waiver from a child who is at least sixteen years old is valid "only if a good faith effort has been made to notify the child's parent"); MONT. CODE ANN. § 41-5-331(2) (2009) (stating that a child under sixteen years of age can waive rights only with a parent's agreement; in instances when a parent does not agree, the child can waive after consulting with counsel, and a child who is at least sixteen years old can make an effective waiver without a parent present); N.M. STAT. § 32A-2-14 (2006) (providing a statutory prohibition on the admission of a statement by a child under thirteen years of age in the adjudicatory phase of a delinquency proceeding and a presumption that a child between thirteen and fourteen is incapable of making a valid waiver of *Miranda* rights; and establishing totality factors for assessing waivers of children over fourteen years of age); WASH. REV. CODE § 13.40.140(10) (2004) (stating that a parent must waive rights when a child is under twelve years of age); State v. Means, 547 N.W.2d 615, 620 (Iowa Ct. App. 1996); *In re* B.M.B., 955 P.2d 1302, 1312–13 (Kan. 1998) (holding that children under fourteen years of age cannot waive the right to remain silent or the right to an attorney without first having an opportunity to consult with a parent who is informed of the child's rights); *A Juvenile*, 449 N.E.2d at 657 (stating that a child under the age of fourteen cannot waive *Miranda* rights without consulting with an "interested adult"; a child who is fourteen years or older should ordinarily be given an opportunity to consult with an interested adult, and in the absence of such an opportunity, the waiver will be upheld only if the evidence shows that the child has a "high degree of intelligence, experience, knowledge, or sophistication"); *Presha*, 748 A.2d 1108, 1114 (N.J. 2000) (stating that a juvenile under the age of fourteen cannot waive *Miranda* rights in the absence of a parent unless the parent is actually unavailable or unwilling to be present for questioning); *see also* Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 451 (2006).

162. *E.g.*, COLO. REV. STAT. § 19-2-511 (2008) (limiting the admissibility of statements made by a juvenile suspect to those made in the presence of a parent or guardian after both juvenile and adult have been apprised of the juvenile's *Miranda* rights); CONN. GEN. STAT. § 46b-137 (2007) (limiting the admissibility of statements or a confession made by a juvenile suspect to those made in the presence of a parent or guardian after both juvenile and adult have been apprised of the juvenile's *Miranda* rights); 705 ILL. COMP. STAT. 405/5-170 (2009) (requiring that a juvenile under thirteen years of age suspected of murder or sexual assault be represented by counsel during custodial interrogation); N.D. CENT. CODE § 27-20-26 (2008) (requiring that a juvenile be represented by a parent, guardian, or counsel during custodial interrogation). The Vermont Supreme Court has indicated that a juvenile must consult with an interested adult who is not a member of law enforcement before making a waiver, and the adult must be apprised of the juvenile's *Miranda* rights. *In re* E.T.C., 449 A.2d 937, 940 (Vt. 1982). In Indiana, a juvenile's *Miranda* rights may only be waived (1) by counsel if the juvenile knowingly and voluntarily joins in the waiver; (2) by a parent or guardian if that person knowingly and voluntarily makes the waiver, that person has no "adverse interest," and the juvenile knowingly and voluntarily joins the

provides an opportunity for a private conversation between the child and an adult with whom the child has a caring relationship prior to making an important legal decision.[163] The interested adult is most often the child's parent.[164]

Practically, when parents arrive at the police station in response to being informed that their child is in police custody, the police will explain to the parents that they want to speak to the child about an alleged crime. The police will then read the parents and the child the *Miranda* rights. Before the child decides whether to waive his *Miranda* rights, the police will offer the parents and child the opportunity to confer about whether to submit to police questioning. Some jurisdictions explicitly state that the pre-interrogation conversation between parent and child be "meaningful."[165] Since the purpose of the rule is to allow parents to assist their child in deciding

waiver; or (3) by the juvenile if the juvenile knowingly and voluntarily makes the waiver and has been legally emancipated. IND. CODE § 31-32-5-1 (1998). In Massachusetts, a juvenile under fourteen years of age must be afforded the opportunity to confer with a parent or guardian before making the waiver. *A Juvenile*, 449 N.E.2d at 657. A juvenile over fourteen years of age must consult with a parent or guardian unless he is found to be highly intelligent. *Id.* In Kansas, a juvenile under fourteen years of age must consult with a parent, guardian, or counsel during custodial interrogation in order for subsequent statements made by the juvenile to be admissible. *In re* B.M.B., 955 P.2d at 1312–13.

163. *A Juvenile*, 449 N.E.2d at 657 ("We conclude that, for the Commonwealth successfully to demonstrate a knowing and intelligent waiver by a juvenile, in most cases it should show that a parent or an interested adult was present, understood the warnings, and *had the opportunity* to explain his rights to the juvenile . . . ." (emphasis added)); *see also* Commonwealth v. Alfonso A., 780 N.E.2d 1244, 1252–53 (Mass. 2003) ("The very purpose of our rules pertaining to the opportunity for consultation with an adult is because 'most juveniles do not understand the significance and protective function of these rights even when they are read the standard *Miranda* warnings,' they 'frequently lack the capacity to appreciate the consequences of their actions,' and the opportunity for consultation with an adult 'prevent[s] the warnings from becoming merely a ritualistic recitation wherein the effect of actual comprehension by the juvenile is ignored.'" (quoting *A Juvenile*, 449 N.E.2d at 656)).

164. Most often parents are deemed to be "interested adults" so long as there is no overt antagonism between the child and the parent. *See* Commonwealth v. Berry, 570 N.E.2d 1004, 1007–08 (Mass. 1991). Courts have routinely upheld the *Miranda* waiver when a parent was present with the minor prior to the interrogation, despite revealing a number of conflicts of interest present before and during the interrogation. *E.g.*, Commonwealth v. McCra, 694 N.E.2d 849, 852–53 (Mass. 1998). Whether parents can provide informed and disinterested advice to the child in light of conflicting personal or financial interests (of which the parents and the police may be unaware) and inadequate understanding of the *Miranda* rights are questions beyond the scope of this Article. For a complete discussion of this issue, see Farber, *supra* note 157.

165. *E.g.*, *Alfonso A.*, 780 N.E.2d at 1251. However, pre-interrogation conversations between parent and child are not meant to replicate the objective, legal-minded discussion a lawyer would have with a child concerning the merits of waiving one's *Miranda* rights. *Id.* at 1253 n.8. Anger and embarrassment are normal responses parents may have to their child's arrest. Farber, *supra* note 157, at 1296. It is reasonable, even likely, that the parent-child conversation will be emotionally charged and will consist of incriminating information.

whether to speak to the police, it is difficult to imagine how a parent could adequately provide meaningful advice without first discussing the facts and circumstances that led to the child's arrest. If the conversation fulfills its purpose, the child will tell the parents what he or she knows about the alleged criminal activity, and the parents will be able to better advise their child.[166] Courts would not require the presence of an interested adult if the only purpose was to recite the *Miranda* warnings. A police officer would surely suffice. The "interested adult rule" exists to provide an opportunity for a full and frank discussion between the child and an adult relative, which is why these communications should be protected by a legal privilege.

Jurisdictions that do not adopt the per se approach use the totality of the circumstances test to assess the validity of a juvenile *Miranda* waiver.[167] Under this test, the court reviews all the facts and circumstances surrounding the waiver. Notably, the presence of parents or guardians is a key factor in assessing whether juveniles gave knowing, voluntary, and intelligent waivers of their rights prior to police questioning.[168] The consensus among judges is that the presence of parents (or guardians) prior to and during interrogations is an added protection for juveniles.[169]

166. We do not have a lot of information about the content of these pre-interrogation conversations but one can assume they vary in each instance. The variance depends on many factors, such as the degree to which parents comprehend the significance of *Miranda* rights, the emotional response to their child's arrest, and any conflicting interests the parents may have. *See* Farber, *supra* note 157, at 1288–98 (discussing the many issues pertaining to the limitations of parental advisors in the interrogation setting).

167. The federal courts and the majority of state courts employ the totality of the circumstances test. *E.g.*, Flowers v. State, 586 So. 2d 978 (Ala. Crim. App. 1991); Quick v. State, 599 P.2d 712, 718–20 (Alaska 1979); People v. Lara, 432 P.2d 202, 215 (Cal. 1967); State v. Doe, 963 P.2d 392, 395 (Idaho Ct. App. 1998).

168. Significant weight is given to whether an adult was present during the interrogation and conferred with the juvenile prior to the waiver being executed. State v. Presha, 748 A.2d 1108, 1110 (N.J. 2000) ("[C]ourts should consider the absence of a parent or legal guardian from the interrogation area as a *highly significant fact* when determining whether the state has demonstrated that a juvenile's waiver of rights was knowing, intelligent, and voluntary." (emphasis added)); State v. Barnaby, 950 S.W.2d 1, 3 (Mo. Ct. App. 1997) ("While parental protection is of *great importance* in affecting the totality of the circumstances involved, our courts have not held that a parent's absence makes a resulting statement illegal per se." (citations omitted) (emphasis added)); Commonwealth v. Jones, 328 A.2d 828, 831 (Pa. 1974) ("*An important factor*, therefore, is whether the juvenile had access to the advice of a parent, attorney, or other adult who was primarily interested in his welfare, before making a decision to waive constitutional rights." (emphasis added)).

169. *See* sources cited *supra* note 168.

In light of the parents' role when their child is taken into custody by the police, the absence of legal protection for parent-child communications is akin to self-incrimination. Whether a jurisdiction applies the totality of the circumstances test or the per se approach to *Miranda* waivers, it is clear that both tests value (even mandate) consultation with parents or guardians in advance of the waiver.[170] In light of the absence of a testimonial parent-child privilege in all but five states, the conversations between parents and children in the police-dominated pre-interrogation atmosphere are not protected. This means that the prosecution may subpoena parents to a grand jury or other proceeding and require them to divulge the statements their child made to them during the pre-interrogation conversation.

In all likelihood, since the prosecution seeks to admit statements made by children to their parents, the parents' testimony will be used in an attempt to convict their own children. If parentd refuse to testify, they can be held in contempt of court.[171] The anomaly here is blatant, as the law in several states encourages—and at times requires—that parents and their children discuss the situation that caused the children to be taken into custody.[172] At the same time, the law denies any legal protection of their communications. If the children had consulted with attorneys instead of their parents, the attorney-client privilege would preclude the lawyers from being compelled to reveal any communication with the children.[173] Due process protections impose a significant conflict between the paradigm constructed to evaluate *Miranda* waivers and the absence of a testimonial privilege between parents and their children.[174]

B. Parents' Rights

An equally persuasive argument in support of a parent-child privilege is lodged in the doctrine of parental rights. Parents' rights

170. *E.g.*, Commonwealth v. A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983) ("For the purpose of obtaining [a] waiver, in the case of juveniles who are under the age of fourteen, we conclude that no waiver can be effective without this added protection.").

171. *See, e.g.*, Port v. Heard, 764 F.2d 423 (5th Cir. 1985). Another possibility is that a parent will testify falsely, thereby contravening the prosecution's underlying purpose.

172. *See* King, *supra* note 161, at 451–52 (listing states that require the opportunity for parental consultation before children can waive their *Miranda* rights).

173. Except in a few instances, juveniles are not mandated to consult with attorneys before they waive their *Miranda* rights. *See, e.g.*, *id.*

174. *See, e.g.*, *id.* at 461.

and responsibilities are well established in American culture. Entitlement to familial autonomy and freedom from government interference are principles that are firmly rooted in our constitutional jurisprudence.[175] Parents enjoy substantial autonomy in deciding how to raise their children, often making daily decisions that are left to their unfettered discretion.[176] The Supreme Court has long resisted encroaching on the liberty interest of fit parents to maintain the care, custody, and control of their children.[177] Two of the earliest Supreme Court cases concerning parental rights involved the parents' prerogative to choose the dimension of their children's education.[178] In *Meyer v. Nebraska*, the Court invalidated a state statute prohibiting foreign language instruction in public schools.[179] The Nebraska statute required all children be taught exclusively in English until they reached a level of proficiency—presumably in the eighth grade—to ensure that they were inculcated in the English language and in American ideals.[180] The statute was challenged on the grounds that it interfered with the liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment.[181] The Supreme Court struck down the statute and found that it impermissibly infringed on rights long and freely enjoyed, such as

175. Parham v. J. R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child are constitutionally protected.").

176. It is presumed that parents act in their children's best interests. *Parham*, 442 U.S. at 602–03. Therefore, there is generally no reason for the state to question the parents' ability to make decisions regarding their children. Troxel v. Granville, 530 U.S. 57, 68–69 (2000).

177. The Due Process Clause of the Fourteenth Amendment provides "heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel*, 530 U.S. at 65 (contemplating that the liberty interest of parents in the upbringing of their child is the oldest fundamental liberty recognized by the Supreme Court); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citing cases that recognize that the Due Process Clause protects parents' rights to direct the education and upbringing of their children).

178. Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925) ("[T]hose who nurture [a child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); Meyer v. Nebraska, 262 U.S. 390, 400–03 (1923) (holding that parents had the right to direct the subjects taught to their children); *see also* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (citing *Pierce*, 268 U.S. 510)).

179. *Meyer*, 262 U.S. at 403.

180. *Id.* at 396, 401.

181. *Id.* at 399.

the right to marry, the right to establish a home, and the right to raise children.[182]

Similarly, in *Pierce v. Society of Sisters of the Holy Names of Jesus & Mary*, the Court invalidated a state statute limiting parents' right to control the type of school their children could attend.[183] The Society of Sisters of the Holy Names of Jesus & Mary, a corporation whose mission was to care for and educate orphans according to the tenets of the Roman Catholic Church, challenged a statute mandating that all children between the ages of eight and sixteen attend public school.[184] With *Meyer* as precedent, the Supreme Court found that the Oregon statute unreasonably interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control."[185] The Court recognized the importance of parental autonomy and stated that "those who nurture [a child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[186] Subsequent cases have followed the analytical framework set forth in these early cases and have solidified a firm recognition of the fundamental right of parents to make decisions concerning the care, custody, and control of their children.[187]

More recent cases have stressed the parents' presumptive right of custody of their children and the ancillary rights derived as a result of that custody.[188] In *Troxel*, the Court made paramount the prerogative of the parent to make decisions concerning the care,

182. *Id.* at 403. "Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own." *Id.* at 401.

183. *Pierce*, 268 U.S. at 534–36.

184. *Id.* at 530–32. A violation of the statute was a misdemeanor. *Id.* at 530.

185. *Id.* at 534–35.

186. *Id.* at 535.

187. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 753 (1982) (discussing the fundamental liberty interest of parents in the "care, custody, and management" of their child's life); Parham v. J. R., 442 U.S. 584, 602 (1979); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

188. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65–67 (2000); Stanley v. Illinois, 405 U.S. 645, 657–58 (1972) (nullifying a state statute that presumes a biological father is unfit to care for and maintain custody of his children).

custody, and control of one's child.[189] The Court struck down a Washington statute that permitted courts to grant visitation rights to anyone seeking them, if so doing would serve the best interests of the child, even when the natural or adoptive parent objected.[190] The Court found that the statute, which placed the best interests of the child before the preference of the parent, impermissibly infringed on parents' fundamental liberty interest in making decisions concerning the care, custody and control of their children.[191] More broadly, the Court noted that, according to this statute, a court could overturn *any* decision by a fit parent based solely on the judge's determination of what is in the child's best interests.[192]

The parental rights doctrine emerged out of these cases with strength and vigor and is now part of the fabric of our American culture. The due process protections that exist to protect the intimacies of familial relationships should extend to parents who refuse to testify against their minor children. Government compulsion of parental testimony against minor children unconstitutionally interferes with parents' right of care, custody, and control of their own children. As Justice David Souter stated in *Troxel*, "[P]arental choice . . . is not merely a default rule in the absence of either governmental choice or the government's designation of an official with the power to choose for whatever reason and in whatever circumstances."[193] It follows that the government should be precluded from forcing unwilling parents to testify on the grounds that such testimony violates the Due Process Clause of the Fourteenth Amendment.

189. *Troxel*, 530 U.S. at 75.

190. The Revised Code of Washington permits "[a]ny person" to petition a superior court for visitation rights "at any time," and authorizes the court to grant such visitation rights whenever "visitation may serve the best interest of the child." WASH. REV. CODE ANN. § 26.10.160(3) (West 2009). Petitioners Jenifer and Gary Troxel asked a Washington superior court for the right to visit their grandchildren. Respondent, who was the children's mother, opposed the petition. *Troxel*, 530 U.S. at 60.

191. *Troxel*, 530 U.S. at 72. "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65.

192. *Id.* at 67.

193. *Id.* at 79.

III. ADOLESCENT DECISION MAKING CAN BE ENHANCED BY PARENTAL ASSISTANCE: EVIDENCE FROM PSYCHOLOGY AND NEUROSCIENCE

Neuroscience and behavioral science suggest that children are not capable of *meaningfully* assessing and appreciating the consequences of their decisions. An adolescent's ability to process and comprehend information is not solely attributable to intellectual capacity; the physical growth of the brain is also a highly important factor.[194] There is important legal precedent for the proposition that children's cognitive and psychosocial maturity mitigate their criminal culpability.[195] The confluence of neuroscience, social science, and law supports the popular belief that adult supervision and guidance enhance the quality of children's decisions. This research is valuable in supporting the argument for a parent-child evidentiary privilege.

In the past twenty years, adolescent development, decision making, and judgment have been studied extensively.[196] Much of this research focuses on the cognitive differences between adults and adolescents. Research shows a strong correlation between the psychosocial characteristics of adolescence and its effect on the process of making judgments.[197] Social scientists explain that the rapid and pervasive changes in cognitive, emotional, and social capacities that characterize adolescence correlate with certain characteristics of adolescent decisions. For example, mid-to-late teens have a relative lack of life experience and sophistication. As a result, they are less likely to be cognizant of the range of their options, less able to identify and weigh alternatives, and less able to appreciate the long-term consequences of their decisions.[198]

194. *See* Abigail A. Baird & Jonathan A. Fugelsang, *The Emergence of Consequential Thought: Evidence from Neuroscience*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y B: BIOLOGICAL SCI. 1797, 1800 (2004).

195. *See* Roper v. Simmons, 543 U.S. 551, 561–88 (2005).

196. Psychosocial factors are often referred to as "judgment" factors, because they refer to things like risk perception, self-perception, emotions, motivations, time perspective, and responsiveness to others that influence our preferences and ultimately, the judgments that we make. *See* Elizabeth S. Scott, N. Dickon Reppucci & Jennifer L. Woolard, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. & HUM. BEHAV. 221, 222–23 (1995).

197. *See* Elizabeth Cauffman & Laurence Steinberg, *Researching Adolescents' Judgment and Culpability*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, *supra* note 92, at 325, 326–27.

198. *See, e.g.*, Baird & Fugelsand, *supra* note 194, at 1801–02.

Although there are wide variations among individuals, adolescents as a group tend to process information differently than do adults, and their judgments reflect preferences and orientations that tend to be characteristic of this unique developmental period.[199] Overall, social science researchers agree that adolescents are less capable than adults of making positive decisions autonomously.

Some of the characteristics of adolescent psychosocial development that are most relevant to the discussion of why adult assistance can assist a child in making well-reasoned decisions are as follows:

- Adolescents have a different sense of time—they tend to pay more attention to short-term consequences and discount whatever long-term consequences they do see.[200]
- Compared to adults, adolescents are more impetuous; when emotions are running high, adolescent judgment is impaired.[201]
- Adolescent emotions are subject to rapid and dramatic change.[202]
- Adolescents are more likely to engage in risky behavior than are adults.[203]
- Adolescents are more susceptible to peer pressure than are adults.[204]

199. *See* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 160–64 (1997).

200. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003). Age plays an important role in the gaining of life experience. Since adolescents have not lived as long as their adult counterparts, they are less aware of their options, less able to identify and weigh alternatives, and less able to appreciate the long-term consequences of decision. *See, e.g.*, Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 552–54 (2000). Poor urban youth tend to be more "present focused" than their middle-class counterparts; *see* Carolyn M. Brown & Richard Segal, *Ethnic Differences in Temporal Orientation and Its Implications for Hypertension Management*, 37 J. HEALTH SOC. BEHAV. 350 (1996); *see also* Bishop & Farber, *supra* note 96; King, *supra* note 161.

201. *See* ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 211 (1999); Bishop & Farber, *supra* note 96, at 159 (citing Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives From Brain and Behavioral Science*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 56 (2007)).

202. *See* Steinberg & Scott, *supra* note 200, at 1012–13.

203. *See id.*

Even adolescents with an adult-like capacity to make decisions, will not make the same decisions as their adult counterpart because of the biological and psychosocial differences between the two.[205] Add to the existing divide the fact that children involved in the juvenile justice system have less capacity to reason than many of their non-delinquent counterparts. Statistics reveal that an extraordinarily high percentage of children in the juvenile justice system have mental disorders compared to children outside the juvenile justice system.[206] A 2002 study by the MacArthur Research Network on adolescent development and juvenile justice reported that the mean intelligence quotient (IQ) of detained youth was approximately 11.88 points lower than children in the community at large.[207]

Biological science research asserts that children are incapable of assessing and appreciating the consequences of their decisions because of the physiology of the adolescent brain.[208] This is because the executive center of the brain—the part responsible for foresight, planning, self-regulation, and strategic thinking—develops gradually over time.[209] Its development is generally not complete until the early

204. *See id.* at 1012; *see also* DEVIANT PEER INFLUENCES IN PROGRAMS FOR YOUTH: PROBLEMS & SOLUTIONS 118–19 (Kenneth A. Dodge, Thomas J. Dishion & Jennifer E. Lansford, eds., 2006).

205. *See* King, *supra* note 161, at 436 (citing Steinberg & Scott, *supra* note 200, at 1012).

206. *See* King, *supra* note 161, at 443. For example, "[a] 1994 study based on site visits to ninety-five public and private juvenile facilities found that 73 percent of the children reported mental health problems." Mental Health America, Fact Sheet: Children's Mental Health Statistics, Juvenile Justice, http://www.mentalhealthamerica.net/go/information/get-info/children-s-mental-health/children-s-mental-health-statistics (last visited Feb. 27, 2010). A study of Maryland juvenile facilities revealed that 57 percent of the children had a history of mental illness and 53 percent had at least one diagnosed mental disorder. Henry R. Cellini, *Mental Health Concerns of Adjudicated Adolescents*, 4 OFFENDER PROGRAMS REP. 17, 16–26 (2000), *available at* http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=184634. Approximately 77 percent of the children in Virginia's secure detention facilities met diagnostic criteria for at least one mental health disorder, while research on children in Georgia's juvenile detention facilities indicates that 61 percent of the youth had a mental disorder, including substance-abuse disorders. *Id.* In South Carolina, a random sample of youth in state-run juvenile justice facilities found that 72 percent met all criteria for at least one mental health disorder. *Id.*; *see also* Thomas Grisso, *Adolescent Offenders with Mental Disorders*, 18 THE FUTURE OF CHILDREN: JUVENILE JUSTICE 143, 148 (2008), *available at* http://futureofchildren.org/futureofchildren/publications/docs/18_02_07.pdf.

207. Janet I. Warren et al., *Correlates of Adjudicative Competence Among Psychiatrically Impaired Juveniles*, 31 J. AM. ACAD. PSYCHIATRY & L. 299, 302–05 (1999).

208. Baird & Fugelsang, *supra* note 194, at 1801–02.

209. Bishop & Farber, *supra* note 96, at 153.

twenties.[210] Thus, adolescents' capacity to make decisions based on logical reasoning, such as envisioning alternative choices, identifying likely consequences of particular choices, and weighing alternatives according to societal norms and expectations, is compromised until adulthood.

In *Roper v. Simmons*, the Supreme Court abolished the death penalty for crimes committed by juveniles.[211] Justice Anthony Kennedy, writing for the majority, underscored three characteristics about juveniles that supported the Court's decision. First, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."[212] Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure . . . . This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment."[213] Third, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[214] The Court reasoned that because of these characteristics, juvenile offenders—even those who commit heinous acts—are significantly

210. Longitudinal research using magnetic resonance imaging (MRI) and other sophisticated scanning techniques, such as magnetic resonance spectroscopy (MRS) or positron emission tomography (PET) scans, have provided images of brain function at rest and during various tasks through adolescence and into adulthood. These technologies illustrate that the prefrontal cortex undergoes dramatic changes during adolescence, and is one of the last areas of the brain to reach maturity. *Id.* at 153 n.164 (citing Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Post-Adolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819, 8826–29 (2001)); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (1999)). *See generally* King, *supra* note 161, at 434–44.

211. Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that imposing the death penalty for crimes committed by a minor under the age of eighteen violates the Eighth Amendment's prohibition against cruel and unusual punishment). Christopher Simmons was seventeen years old when he and his two friends, ages fifteen and sixteen, respectively, broke into the home of an elderly woman to commit burglary and murder. *Id.* at 556–57. They tied her up with duct tape and electrical wire, and drove her to a state park, where they threw her from a bridge into a river below. *Id.*

212. *Id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

213. *Id*. (citation omitted); *see also* Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence . . . .").

214. *Roper*, 543 U.S. at 570 (citation omitted).

less culpable than adults.[215] The Court concurred with the biological and social science research which supports that, cognitively and developmentally speaking, most juveniles are incapable of thoughtful and well-reasoned decisions, specifically, decisions unlikely to produce injurious outcomes.

Until *Roper*, the Court did not explicitly rely on social science and neuroscience to support the significant cognitive differences between children and adults. However, earlier cases recognized the vulnerability and immaturity of juveniles as well as the need for parental assistance to help relieve the pressures associated with police interrogations.[216]

The court's ruling logically extends the idea that children will typically benefit from adult knowledge and advice when making important decisions.[217] This is evidenced by the numerous state and federal laws that require parental consent prior to allowing early adolescents to engage in particular acts. These laws are premised on the understanding that young teens are not mature enough to engage in a range of activities and therefore must be afforded certain privileges.[218] For example, most states do not allow persons under eighteen to marry without parental consent.[219] However, most states *do* allow sixteen- and seventeen-year-old individuals (but not

215. *Id.* at 571–73.

216. *See* Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (reaffirming that without adult protection, a juvenile may be unable to "protect his own interests or . . . get the benefits of his constitutional rights"); Haley v. Ohio, 332 U.S. 596, 600–01 (1948) (stopping short of announcing guidelines for police questioning of juveniles, but suggesting that without "someone on whom to lean," a juvenile will be "crush[ed]" by "the overpowering presence of the law," and our established understandings of fairness and due process will be violated). In *Gallegos*, following an arrest for robbery, the juvenile was held in police custody for five days without any contact with either a relative or a lawyer. 370 U.S. at 54. When invalidating the admissibility of the confession, the Court noted the petitioner's youth and immaturity: "[W]e deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded . . . ." *Id.* In order to reduce the "unequal footing" between the juvenile and police, a lawyer, relative, or adult friend should have been made available to the juvenile, because these individuals "could have given the petitioner the protection which his own immaturity could not." *Id.*

217. Researchers have identified a number of psychosocial factors that are especially salient during the teen years, and which contribute to the adolescent characteristics of immaturity, impetuosity, and vulnerability noted by the Court in *Roper*. *See* Scott et al., *supra* note 196, at 229–32.

218. *See* Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.").

219. *See Roper*, 543 U.S. at 569.

younger teens) to marry *with* parental consent.[220] Most states also require parental consent for medical procedures for minor children prior to more critical procedures such as organ donations,[221] blood donation,[222] body piercing, and tattooing.[223] In addition, most state insurance laws prohibit minor children from contracting for insurance without parental consent.[224]

Logic suggests that requiring parental oversight and approval adds an important level of assurance that the decision to engage in the activity is well considered and a product of mature judgment. Legal schemes universally require parental approval before minors of a certain age can engage in certain activities. It follows that the law should incentivize children to communicate as openly and honestly as possible with their parents in an effort to maximize the assistance parents can render. As the law is currently written, in all but five states parents could be compelled to reveal the content of their communication against their child's interest.

220. *See, e.g.*, COLO. REV. STAT. §§ 14-2-106, -108 (2009), *amended by* Act of May 15, 2009, ch. 264, § 5, 2009 Colo. Sess. Laws 264 (allowing a sixteen- or seventeen-year-old child to marry with parental or judicial consent, but both parental and judicial consent for a child under the age of sixteen); D.C. CODE §§ 46-403, -411 (2005) (requiring both parties to be at least sixteen years old and requiring parental consent for any party under eighteen years old); HAW. REV. STAT. §§ 572-1, -2 (2006) (allowing fifteen-year-old children to marry with parental and judicial consent and requiring parental consent for children under the age of eighteen); MASS. GEN. LAWS ch. 207, §§ 7, 24, 25 (2007) (allowing a court to issue an order allowing the marriage of a minor under the age of eighteen only if there is parental consent).

221. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7150.15 (West 2009) (prohibiting anatomical gifts from children under the age of fifteen, unless emancipated, and requiring parental consent for minors between the ages of fifteen and eighteen).

222. CAL. HEALTH & SAFETY CODE §1607.5 (West 2009) (requiring parental consent and authorization from a physician before a child between the ages of fifteen and seventeen may give blood); COLO. REV. STAT. § 13-22-104(4) (2009), *amended by* Act of Mar. 19, 2009, ch. 27, § 1, 2009 Colo. Sess. Laws 27 (allowing a minor between sixteen and eighteen years of age to consent to donating blood as long as parent also consents).

223. *See, e.g.*, FLA. STAT. § 381.0075 (2009) (prohibiting a child under the age of sixteen from undergoing body piercing unless accompanied by parent or guardian and requiring written notarized parental consent for children under the age of eighteen); FLA. STAT. § 877.04 (2009) (prohibiting a child under the age of eighteen from being tattooed without written notarized consent by a parent or legal guardian); IDAHO CODE ANN. § 18-1523 (2004) (prohibiting tattooing of a minor under the age of fourteen and requiring parental consent to tattoo a child between fourteen and eighteen years of age).

224. CAL. INS. CODE § 10112 (West 2009) (requiring a minor under the age of sixteen to have written parental consent before entering into a contract for insurance).

IV. FEDERAL EFFORTS TO CODIFY A PARENT-CHILD PRIVILEGE

Since 1996, Congress has considered a parent-child privilege in four separate legislative sessions, all of which were unsuccessful.[225] The common law has not been much kinder. No federal circuit has recognized a parent-child privilege, though four circuits have said, in dicta, that if unemancipated minors confided in their parents, the court would be more receptive to finding a parent-child privilege.[226] Only one federal district court has recognized a parent-child privilege where the communication was between minors and their parent.[227]

On February 23, 1998, Senator Patrick Leahy of Vermont introduced legislation (Senate Bill 1721) instructing the Attorney General and the Judicial Conference of the United States to study important questions concerning the establishment of a privilege to protect parent-child communications in civil *and* criminal cases.[228] Leahy's legislation was prompted by the treatment of Monica Lewinsky's mother, Marcia Lewis, by Independent Counsel Kenneth Starr.[229] Starr subpoenaed Marcia Lewis to testify before the grand jury investigating President Bill Clinton as to statements Monica Lewinsky was believed to have made to her mother concerning her relationship with Clinton.[230] Despite her lawyers' best efforts, and public sentiment opposed to intruding into the private conversations between mother and daughter, no privilege barred Starr from compelling the disclosure of this information.[231] Leahy explained:

> This is the United States of America. This is not the Star Chamber of hundreds of years ago. This is not the Spanish Inquisition. No child, no matter what their age, expects his or her conversations with a parent to be disclosed to prosecuting attorneys, [sic] compelling a parent to betray his or her child's confidence is repugnant to fundamental

225. The unsuccessful legislative sessions were held in 1998, 1999, 2001, and 2003. *See supra* note 11.

226. *See* Note, *Parent-Child Loyalty and Testimonial Privilege*, *supra* note 9, at 910.

227. *In re* Agosto, 553 F. Supp. 1298, 1302–07 (D. Nev. 1983).

228. 144 CONG. REC. S803-01, at S803–S804 (1998).

229. *Id.*

230. *Id.*

231. *Id.*

> notions of family, fidelity, and privacy. Indeed, I can think of nothing more destructive of the family and family values, nor more undermining of frank communications between parent and child, than the example of a zealous prosecutor who decides to take advantage of close-knit ties between mother and daughter, of a prosecutor who said, if a mother loves a daughter and a daughter will go to a mother to talk to that mother, then we are going to grab the mother. Great family values, Mr. President. Great family values, Mr. Starr.[232]

Simultaneously in the House of Representatives, U.S. Representative Zoe Lofgren introduced House of Representatives Bill (H.R.) 3577, known as "The Confidence in Family Act."[233] This bill proposed to create a parent-child privilege in federal criminal and civil proceedings, and to amend the Federal Rules of Evidence to codify this privilege. One of Representative Lofgren's principal justifications for the proposed legislation was her belief that the parent-child relationship merits the protection of a testimonial privilege for the same reasons that the spousal relationship does.[234] According to Lofgren, "the relationship between mother and daughter, between father and daughter, between father and son is as valuable, as precious as that between husband and wife."[235] Representative Lofgren called the absence of such a privilege a "trilemma" of cruel choices for parents compelled to testify against their children: perjury, betrayal of the child's confidence, or potential jail time for contempt of court.[236]

232. *Id.* at S804. Although the bill was read twice and referred to the Senate Committee on the Judiciary, it never made it out of the committee's hands. *See* Jefferson, *infra* note 237, at 458.

233. H.R. 3577, 105th Cong. (1998).

234. This amendment would ensure that parents and children could not be compelled to testify against one another, and that confidential communications between parents and children would be protected. *Id*. These privileges would be similar to the privileges currently provided under federal law to spouses and would be developed by the courts in light of the common law, reason, and experience. Modeled after the marital privilege announced in *Trammel v. United States*, the legislation contained both an adverse testimonial privilege and a confidential communication privilege. 144 CONG. REC. H2269 (1998).

235. *See* 144 CONG. REC. H2269 (1998) (statement of Rep. Lofgren, April 23, 1998).

236. *See* 144 CONG. REC. H2272 (1998).

The House bill failed largely because it was too broad.[237] The proposed privilege made no distinction between adult children and minor children.[238] The privilege was designed to pertain to any relationship where an individual had a legal right to act as a parent.[239] This definition included foster children and long-term custody relationships.[240] Some lawmakers suggested that they would support a parent-child privilege limited to minor children in civil cases only. The implication was that shielding inculpatory communications between children and parents from a criminal investigative arm of the government was contrary to public policy.[241] The legislation was fashioned in accordance with the spousal privilege, but left to the courts to determine its applicability to specific situations.[242] "The Confidence in Family Act" was rejected by a vote of 162 to 256 on April 23, 1998.[243]

A separate bill, H.R. 4286, known as "The Parent-Child Privilege Act," was introduced by Representative Robert Andrews of New Jersey.[244] This bill also sought to amend the Federal Rules of Evidence to establish a parent-child privilege.[245] The proposed legislation would create an adverse testimonial privilege and a confidential communications privilege similar to the spousal privileges.[246] Under the proposed bill, the privilege would survive the death of parents or their children and would apply even if the parent-child relationship has been terminated.[247] Andrews first

237. *See generally* Shonah P. Jefferson, *The Statutory Development of the Parent-Child Privilege: Congress Responds to Kenneth Starr's Tactics*, 16 GA. ST. U.L. REV. 429, 457 (1999) (discussing the failure of legislation via House Judiciary deliberations on H.R. 3577).

238. *See id.*

239. 144 CONG. REC. H2268 (1998).

240. *Id.*

241. *Id.* at H2270.

242. *See* H.R. 3577, 105th Cong. (1998).

243. Jefferson, *supra* note 237, at 456.

244. H.R. 4286, 105th Cong. (1998).

245. *Id.*

246. *See* Jefferson, *supra* note 237, at 456.

247. The bill included the standard exceptions for testimonial privileges: (1) in any civil action or proceeding by the parent against the child or the child against the parent; (2) in any civil action in which the child's parents are opposing parties; (3) in any civil action contesting the estate of the child or child's parent; (4) any proceeding concerning custody, dependency, deprivation, abandonment, support, abuse or neglect of child, termination of parental rights; (5) in any criminal or juvenile proceeding in which the parent or child is charged with an offense against the person or property of the child, parent, or any member of the household or family.

introduced this bill in 1998, then again in 1999, 2001, 2003, and 2005.[248] The legislation failed to clear the House Judiciary Committee each time.

State Level Efforts to Create a Statutory or Common Law Parent-Child Privilege

State legislatures have been debating recognition of a parent-child privilege and most have rejected even a limited privilege.[249] Only five states currently provide any type of protection for parent-child communications.[250] New York has the only judicially recognized privilege, applying to confidential communications between minors and their guardians.[251] New York expressed its commitment to protecting the integrity of the family unit by recognizing that "communications . . . within the context of the family relationship" may be protected according to the constitutional right of privacy.[252]

In *In re A&M*, a sixteen-year-old boy became the target of an arson investigation after witnesses claimed he was near the scene of the fire.[253] Prosecutors subpoenaed the boy's parents to testify before the grand jury about what their son had told them in relation to the suspicious fire.[254] The parents moved to quash the subpoena on the grounds that in the privacy of their home, their son had confided in them with the expectation that such information would be kept confidential.[255] Relying upon a wealth of precedents establishing that the integrity of family interests is entitled to constitutional protection, the New York court found that the conversation between the child and his parents in this situation was the embodiment of the intimate and confidential relationship among family members.[256]

CONG. REC. H. R. 3433 (July 26, 2005). The bill also assigns a guardian ad litem or attorney for a minor child to represent the child's interests with respect to the privilege. *Id.*

248. *See supra* note 11.

249. *See infra* Part V.

250. *See supra* note 8.

251. *See In re* A&M, 403 N.Y.S.2d 375 (App. Div. 1978).

252. *Id.* at 381.

253. *See id.* at 377.

254. *See id.*

255. *See id.*

256. *Id.* at 378 ("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

In re A&M is particularly informative because it implicates the "essential parent-child privilege." One year later, a New York trial court expanded the parameters of the newly recognized parent-child privilege.[257] The court in *People v. Fitzgerald* held that the privilege applied despite the age of the child because the communication between father and son in this case was confidential and for the purpose of obtaining support, guidance, or advice.[258] In *In re Ryan*, the trial court extended the privilege to communications between the minor and his grandmother, who had raised him for most of his life as his parent.[259]

Connecticut, Idaho, Massachusetts, and Minnesota have statutory parent-child privileges that apply to children under eighteen years old, although these privileges are not equal in scope.[260] The Massachusetts law prevents minor children from being compelled to testify against their natural or adoptive parents in an *adult* prosecution, unless the inquiry involves domestic violence or child abuse.[261] Conversely, Massachusetts has deferred to the legislature for consideration of a privilege protecting parents from testifying against their children.[262] Connecticut and Idaho have the most

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?'").

257. *See* People v. Fitzgerald, 422 N.Y.S.2d 309 (Westchester County Ct. 1979).

258. *Id.* at 314, 317.

259. *In re* Ryan, 474 N.Y.S.2d 931, 932 (Fam. Ct. 1984).

260. CONN. GEN. STAT. § 46b-138a (2008) (allowing the parent of a minor accused in a juvenile proceeding to "elect or refuse to testify for or against the accused child," with the exception that the parent may be compelled to testify if he or she is the victim of violence allegedly inflicted by the child); IDAHO CODE ANN. § 9-203(7) (2009) (ensuring a parent or guardian "shall not be forced to disclose any communication made by their minor child or ward to them concerning matters in any civil or criminal action to which such child or ward is a party," unless the case is a civil action by one against the other, a criminal action for violence of one against the other, or in any case of physical injury to the minor caused by physical abuse or neglect by the parent or guardian); MASS. GEN. LAWS ANN. ch. 233, § 20 (West 2004) (preventing a minor child from testifying against his or her parent); MINN. STAT. § 595.02(j) (2008) (disallowing a parent's examination "as to any communication made in confidence by the minor to the minor's parent," except in certain enumerated situations).

261. *See* MASS. GEN. LAWS ANN. ch. 233, § 20 (West 2004). The law operates as a disqualification. *See id.*

262. *In re* Grand Jury Subpoena, 722 N.E.2d 450, 451–52 (Mass. 2000). In 2000, two Massachusetts teenagers were arrested for rape and their parents were subpoenaed to testify before the grand jury regarding communications they had with their sons pertaining to the rape accusation. *Id.* The Supreme Judicial Court stayed the enforcement of the subpoenas in order to allow the legislature the opportunity to consider the important social policy issue inherent in the establishment of a parent-child privilege and its effect on children and families. *Id.* at 456. In

protective legislation among the states that have a parent-child privilege. Under Connecticut law, parents can refuse to testify in delinquency proceedings against their minor children; but parents who are victims of a violent act by the child may testify.[263] The privilege extends to communications and observations made by the parent.[264] In Idaho, parents are not forced to disclose any communications made by their minor children in any civil or criminal action to which the child is a party, unless the case is a civil action by one against the other or involves violence by one against the other.[265]

In other states that have contemplated a parent-child privilege, advocates have been unsuccessful in garnering support for similar legislation, either because the legislation was not limited to minor children or because it applied equally to civil and criminal cases.[266]

1. Oregon

One such example is Senate Bill 313, which was introduced in the Oregon legislature in early 2009.[267] The bill proposed creating an evidentiary privilege for confidential communications made between parents and their children under the age of eighteen.[268] Either the child or the parent/guardian to whom the communication was made could claim the privilege. The proposed bill contained specific exemptions, such as when a child is charged with committing a delinquent criminal act against the parent to whom the

1983, the court had declined to create a disqualification for minor children subpoenaed to testify against their parents. *See* Three Juveniles v. Commonwealth, 455 N.E.2d 1203, 1208 (Mass. 1983). Subsequent to this ruling, the legislature enacted a testimonial privilege for minor children. *See* MASS. GEN. LAWS ANN. ch. 233, § 20 (West 2004). Consequently, Massachusetts State Senator Cynthia Creem introduced legislation in support of a parent-child privilege that would protect parents from being forced to reveal communications between themselves and their minor children. *See supra* Axtman, note 111, at 1. The 2000 legislation was stalled in a committee and was never voted on by the state legislature. Senator Creem reintroduced the bill several times subsequent to 2000. A current version of Senator's Creem's legislation, Senate Bill 1670, "An Act relative to testimony in criminal proceedings," is presently before the Massachusetts Joint Committee on the Judiciary. *See* S.B. 1670, 186th Gen. Court, Reg. Sess. (Mass. 2009).

263. CONN. GEN. STAT. § 46b-138a (2008).

264. *Id.*

265. IDAHO CODE ANN. § 9-203(7) (2009).

266. *See, e.g.*, S.B. 313, 75th Leg. Assem., Reg. Sess. (Or. 2009); S.B. 90, 35th Sess., 2003 Reg. Sess. (Fla. 2003).

267. *See* S.B. 313, 75th Leg. Assem., Reg. Sess. (Or. 2009).

268. *Id.*

communication was made, the parent's property, or against another child of the parent.[269] The bill passed the Oregon Senate in March 2009 and was referred to the Oregon House of Representatives for consideration.[270] In June 2009, however, the proposed legislation was defeated in a House vote.

2. Illinois

In 1998, Illinois State Representative Daniel J. Burke introduced House Bill 2167, which would have amended the Illinois Code to create a parent-child privilege.[271] The bill covered written and oral communications between adult or minor children and their parents,[272] and it allowed both parents and children to assert the privilege.[273] The Illinois State Bar Association supported the proposed privilege.[274] The majority of the opposition to the legislation focused on the breadth of the bill.[275] State representative Rosemary Mulligan voiced concern that the bill would have a "chilling affect [sic] on any child abuse cases," presumably because it might prevent courts from forcing children to testify regarding abuse.[276] Representative Cross voiced concern that the privilege would impede proper determinations in custody disputes.[277] Other legislators objected to

269. *Id.*

270. *See* Salem-News.com, *Two Bills Supporting Oregon Parents Pass the Senate*, SALEM-NEWS, Mar. 20, 2009, http://www.salem-news.com/articles/march202009/senate_bills_3-20-09.php.

271. TRANSCRIPTION DEBATE, H.R. 90, 90th Gen. Ass., 108th Legis. Day, at 11–12 (Ill. 1998), *available at* http://www.ilga.gov/house/transcripts/htrans90/t040298.pdf ("Many of you here are quite familiar with the attorney client privilege. There exists in law, the untouchable secrecy of the confessional and the privileged communication between a doctor and patient. In some cases even the media has attempted to claim this exemption. Are these relationships any more important than that of a parent to child? And what might the affect [sic] be if these secret entitled communications were corrupted and society would lose confidence in the confidentially of communication with these parties? I submit to this Body, that certain relationships must remain sacred, incorruptible, inviolate and secure.").

272. *See id.* at 20.

273. *See id.* at 19.

274. *See id.*

275. The legislation proposed in the House was devoid of certain exceptions that are commonly included with such privileges, such as in cases alleging physical abuse. *See id.* at 30–31.

276. *Id.* at 26.

277. *Id.* at 14.

the privilege applying equally for both adult and minor children.[278] Ultimately, a vote on the bill was postponed indefinitely.

3. Florida

In 2003, the Florida legislature proposed a bill that would have allowed "a parent and a child to refuse to disclose certain communications between them that were intended to be confidential."[279] Governor Jeb Bush vetoed this legislation on the ground that it was overly broad.[280] The governor wrote:

> I understand that the relationship between a parent and a child is unique and that free and open communication between a parent and child should be encouraged. However, I have concerns that the privilege created by this bill is overly broad. While a privilege limited to communications between a parent and a minor child may be entirely appropriate, this legislation does not limit the privilege to communications between parents and minor children. Instead, the privilege would apply to communications between a parent and a child of any age, including an adult child. I agree with the view of the state prosecutors that this broad language would adversely affect criminal investigations and would ultimately result in the delay of prosecutions in legal proceedings.[281]

4. New Jersey

The New Jersey legislature also considered a parent-child privilege in the wake of the Monica Lewinsky-President Clinton scandal. In 2000, the General Assembly and the Senate proposed a joint resolution in support of the creation of a new rule of evidence that prohibited disclosure of confidential communications between parents and their children.[282] The proposed rule was intended to

278. *See, e.g.*, *id.* at 20–21.

279. Florida Governor's Message, S.B. 90, 35th Sess., 2003 Reg. Sess. (June 26, 2003).

280. *Id.*

281. *Id.*

282. Assem. J. Res. 31, 209th Leg., 2000–01 Reg. Sess. (N.J. 2000), *available at* http://www.njleg.state.nj.us/2000/Bills/ajr/31_i1.htm.

apply to both criminal and civil proceedings and contained the standard exceptions that exist with most privileges. [283]

V. FEDERAL COMMON LAW AND THE RESPONSE TO THE PROPOSAL FOR A PARENT-CHILD PRIVILEGE

One might think that the longevity and intimacy of the parent-child relationship would be a persuasive rationale for judges to protect parent-child communications, but that has not been the case. Only one federal court has recognized an evidentiary privilege for

283. *Id.* A new rule designated as Rule 518 is adopted to read as follows:

> Rule 518. Parent-child privilege. a. A child and his or her parent, guardian or legal custodian shall not be required to disclose a confidential communication made by one to the other unless either the parent or the child consent.
>
> b. A communication between a child and his or her parent, guardian or legal custodian shall be deemed confidential despite being made before the child's sibling or other parent.
>
> c. This privilege shall not apply to:
>
> (1) a civil action or proceeding commenced by the child's parent, guardian or legal custodian against the child or by the child against the child's parent, guardian or legal custodian; or commenced by the child's parent, guardian or legal custodian against the child's other parent, guardian or legal custodian; or
>
> (2) a civil action or proceeding contesting the estate of the child or the child's parent, guardian, legal custodian; or
>
> (3) a criminal action or proceeding for a crime committed against the person or property of the child, the child's parent, guardian or legal custodian; or
>
> (4) a matrimonial action; or
>
> (5) a civil commitment proceeding against the child or the child's parent, guardian or legal custodian; or
>
> (6) any action or proceeding concerning child abuse, parental abuse, child neglect, abandonment, nonsupport, child custody or parenting time; or
>
> (7) any action or proceeding where the communication is relevant to an issue between the parent and the child; or
>
> (8) any action alleging domestic violence in violation of the "Prevention of Domestic Violence Act of 1991," P.L.1991, c.261 (C.2C:25-17 et.seq.).
>
> d. When the child is a minor, under the age of 18, the court may appoint a guardian ad litem or an attorney or both to represent the minor's interest. When the parent or child is incompetent or deceased, consent to the disclosure may be given for such parent or child by the guardian, executor or administrator.
>
> e. The requirement for consent shall not terminate with the emancipation of the child.
>
> 2. The rule set forth in section 1 of this Joint Resolution, if ordered adopted by the Supreme Court, shall take effect on the date set forth in the court order of adoption.
>
> 3. This joint resolution shall take effect immediately upon signature thereof by the Governor; and the Secretary of State is directed to transmit an authenticated copy forthwith to the Chief Justice of the Supreme Court of New Jersey.

Id.

parent-child communications.[284] Most courts that have refused to recognize a parent-child privilege have done so in cases involving adult children compelled to testify against their parents or vice versa.[285] Despite the outcomes in these cases, many courts have expressed a willingness to find a privilege either for an unemancipated minor or when an "essential parent-child privilege" existed.[286] Catherine Ross calls the "essential parent-child privilege" a narrower version of the parent-child privilege. The "essential parent-child privilege" prevents the "disclosure of confidential communications from children to their parents in order to foster meaningful communications in a relationship that is seen as essential to numerous public policy goals."[287] The paucity of reported cases implicating the "essential parent-child privilege" may create the illusion that compelling parental testimony is an extraordinary occurrence.[288] However, we know from media accounts and the few reported cases, that prosecutors can and do compel parents to testify against their minor children.[289]

As important, and perhaps more common, are explicit or implicit threats of compulsion that may influence parents' and children's decisions on how to proceed with a case. Tactically, prosecutors benefit from the option of compelling parents to testify. For example, in a juvenile prosecution in which the government subpoenas an unwilling parent, the juvenile may choose to resolve the case on terms favorable to the prosecution in lieu of forcing the parent to choose to testify or to be found in contempt of court.

284. Note, *Parent-Child Loyalty and Testimonial Privilege*, *supra* note 9, at 915.

285. *Id.*

286. *See, e.g.*, *In re* Erato, 2 F.3d 11, 16 (2d Cir. 1993) (determining that a more compelling case for the parent-child privilege would involve a parent being compelled to inculpate a minor child because that type of "strain on the family relationship that might impair the mother's ability to provide parental guidance during the child's formative years"); United States v. Ismail, 756 F.2d 1253, 1258 (6th Cir. 1985) (holding that courts may compel adults to testify against their parents in a criminal trial, but declining to address situations involving "unemancipated minors who generally require much greater parental guidance and support than do emancipated adults"); *In re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. 1487, 1497 (E.D. Wash., 1996) (recognizing that there should be some form of a parent-child privilege); *see, e.g.*, *In re* Inquest Proceedings, 676 A.2d 790, 794 (Vt. 1996) (declining to decide "whether a parent's interest in protecting a minor or incompetent child's confidential communications or conduct could ever outweigh the public interest in the criminal fact-finding process").

287. Ross, *supra* note 19, at 90.

288. *Id.* at 99–100.

289. *See supra* note 7.

For most prosecutors, there is no official protocol regarding parental compulsion, suggesting that prosecutors have considerable discretion in such circumstances. The U.S. Attorneys' Manual (the "Manual"), which sets forth Department of Justice policies and guidelines, takes the position against compelling the testimony of family members in a grand jury investigation absent "specific justification."[290] However, once a charge has been filed, there is no applicable policy. The only relevant "specific justification" mentioned in the Manual is when the "testimony to be elicited relates to a crime involving overriding prosecutorial concerns."[291] Any number of situations can substantiate "overriding prosecutorial concerns." For example, parental testimony may be compelled if (1) there is no other available source for the testimony; (2) the testimony sought is a confession by the accused; or (3) the alleged crime is serious and warrants pursuing all available evidence. Without clear guidelines, these standards delegate too much authority to individual prosecutors without providing any legal recourse for the witness. At the state level, no empirical research exists that reveals if district attorneys have guidelines for compelling parental testimony in juvenile or criminal proceedings.

The U.S. Supreme Court has never decided a case involving judicial recognition of a parent-child privilege. In 1984, the Court declined certiorari in a case involving three adolescent children compelled to testify before a grand jury investigating their father for murder.[292] *Three Juveniles v. Commonwealth of Massachusetts* was the first and last time the parent-child privilege was presented to the Supreme Court for review. Moreover, no case involving the

290. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-23.211 (1997) ("Absent specific justification, the Department will ordinarily avoid seeking to compel the testimony of a witness who is a close family relative . . . of the person upon whose conduct grand jury scrutiny is focusing.").

291. *Id*. The full list of "specific justifications" cited in the U.S. Attorneys'Manual include the following situations:

> (i) the witness and the relative participated in a common business enterprise and the testimony to be elicited relates to that enterprise or its activities; (ii) the testimony to be elicited relates to illegal conduct in which there is reason to believe that both the witness and the relative were active participants; or (iii) testimony to be elicited relates to a crime involving overriding prosecutorial concerns.

Id.

292. *See* Three Juveniles v. Commonwealth, 455 N.E.2d 1203 (Mass. 1983), *cert. denied*, 465 U.S. 1068 (1984).

"essential parent-child privilege" has ever been considered by the Court.

The first reported case to raise the issue of a parent-child privilege involved the notable lawyer Arthur Kinoy.[293] Kinoy's daughter was believed to have been involved in a radical underground group under investigation by the government in the late 1960s.[294] The government served Kinoy with a subpoena requiring that he testify before a grand jury regarding his daughter's whereabouts.[295] Although Kinoy's adult daughter was not a target of the government's investigation, the government believed that she may have had information useful to its investigation.[296] Kinoy's attempt to quash the subpoena, in the absence of a judicially recognized parent-child privilege, was unsuccessful.[297]

Both critics and supporters of a parent-child privilege widely cite *In re Agosto*.[298] This is partly because the Nevada district court approved a parent-child privilege with no distinction between adult and minor children and between the child as a witness and the parent as a witness.[299] Charles Agosto was thirty-two years old when he was subpoenaed to testify before a grand jury investigating his father for organized crime activities.[300] Agosto made three separate arguments with respect to the harm that would be caused by compelling him to testify against his father.[301]

First, he argued that the law should protect him from disavowing his loyalty to his father, which would occur if he were forced to testify, and this would cause untold suffering to him as well as his family.[302] Second, Agosto argued that compelled disclosure runs counter to a vital component of the family unit: the encouragement and fostering of reciprocal communication.[303] If the government is

293. *In re* Kinoy, 326 F. Supp. 400 (S.D.N.Y. 1970).

294. *Id.* at 401.

295. *Id.*

296. *See id.* at 406.

297. *See id.* at 406–07.

298. 553 F. Supp. 1298 (D. Nev. 1983).

299. *See In re* Agosto, 553 F. Supp. 1298, 1328 (D. Nev. 1983).

300. *See id.* at 1299; *see also* Note, *Parent-Child Loyalty and Testimonial Privilege*, *supra* note 9, at 914.

301. *In re Agosto*, 553 F. Supp. at 1300.

302. *Id.* at 1300.

303. *Id.* at 1301–02.

not estopped from such a practice, then not only would the singular family unit suffer, but society would also suffer as mutual trust and confidence in an essential relationship would erode.[304] Third, Agosto argued that inter-generational loyalty is a social goal that is as important as confidentiality within the marital relationship.[305] Therefore, the parent-child relationship should be given the same legal protections currently afforded to spousal relationships.[306]

The *In re Agosto* court criticized what it perceived was becoming a common practice. Prosecutors and grand juries in the District of Nevada subpoenaed children to testify against their parents on three separate occasions within eighteen months of the decision.[307] In a strong endorsement of the parent-child privilege, the court held that a parent-child privilege is fundamental to the protection of the privacy of familial relationships and the inviolability and integrity of the family.[308] It reiterated its conviction to intervene in matters that place individuals in a position of choosing between loyalty to their family and loyalty to the state.[309]

> The family has been traditionally recognized by society as the most basic human and psychological unit, and when the state intrudes with its vast resources in an attempt to disassemble that unit, then every safeguard under the law must be abundantly exercised by the Court to guarantee that the inherent imbalance of experience and expertise between

304. *Id.*

305. *Id.* at 1302.

306. *See id.* at 1301.

307. *Id.* at 1330. The court's mention is noteworthy because it may provide background and an explanation for the court's determination that the government's practice of this tactic is preempted.

308. *See id.* at 1328 ("It would be unjust for society to teach that while a child should listen to his parents, he does so at the risk of being required to testify against them.").

309. *See id.* at 1331.

> If the government in its zeal to pursue law enforcement goals steps into the realm of constitutionally privileged relationships, the courts must intervene. In our democratic system of justice which is based in part on respect for the law, if the law places family members in a position of choosing between loyalty to a special, life-long bond as opposed to involuntarily testifying to confidential and private matters, then the law would not merely be inviting perjury, but perhaps even forcing it. The reticence to testify or the fabrications which family members would invent to protect one another would bring the government no closer to the truth it so zealously seeks.

Id. at 1326.

> parent and state is minimized to the greatest extent humanly possible.[310]

All but two of the cases that reject a common law parent-child privilege involve the compulsion of testimony from adult children against their parents.[311] Another category of cases involves parents compelled to testify against their adult children. The only published decision involving parents compelled to testify about communications made to them by their *minor* children is the case that began this Article, *Port v. Heard*.[312] Because state law did not recognize a parent-child privilege, the Ports' framed all their arguments under the federal constitution.[313] In dicta, the court noted that had the case implicated FRE 501, the outcome may have been different in light of the interests at stake. Only three federal courts have considered recognition of a parent-child privilege since the U.S. Supreme Court signaled receptivity toward creating new privileges in *Jaffee v. Redmond*.[314] Two of those cases involved children compelled to testify against their parents.[315]

One of these cases, *In re Grand Jury*,[316] involved a criminal investigation of an eighteen-year-old whose father was subpoenaed to testify before a grand jury concerning conversations with his son.[317] The father said that if he were forced to testify, it would

310. *Id.* at 1330 (quoting Brown v. Guy, 476 F. Supp. 771, 773 (D. Nev. 1979)).

311. *See* Port v. Heard, 764 F.2d 423 (5th Cir. 1985); Ubben v. O.F. (*In re* O.F.), 2009 ND 177, 773 N.W.2d 206 (refusing to recognize a common law parent-child privilege under the privacy and liberty rights contained in the state constitution).

312. *See id.*

313. *See id.* at 428. The Ports did not make the argument that FRE 501 provides for a parent-child privilege because they were appealing a decision by a state trial court where state law controlled. *Id.* Instead, the Ports confined their habeas petition to federal constitutional claims. *See id.*

314. *See* Ricafort, supra note 108, at 283–88.

315. *See id.*

316. 103 F.3d 1140 (3d Cir. 1997).

317. *Id.* at 1142–43. The appeal presented two separate matters, both involving the same legal question: whether the court should recognize a parent-child privilege. *Id.* at 1142. One case involved a parent witness, while the other involved an adult child witness. *Id.* at 1142–43. The Delaware case involved a motion to quash a subpoena issued to a sixteen-year-old daughter as to her knowledge of the crime her father was being investigated for, but not specifically statements the father made to her. *Id.* at 1143. The second appeal stemmed from a Virgin Islands case involving a father who was subpoenaed to testify against his eighteen-year-old son regarding communications he had with his son. *Id.* at 1142–43. The witnesses in both cases sought to quash the grand jury subpoenas and asserted a parent-child privilege as grounds for their appeals. *See id.*

irreparably harm his close and loving relationship with his son.[318] Efforts to quash the subpoena were rejected.[319] Relying on the Wigmore formula, the Third Circuit found that two of the Wigmore prerequisites necessary to create a privilege were not met.[320]

First, the court explained that the privilege is not indispensable to the survival of the parent-child relationship because the privilege will have no bearing on the communication between parents and children.[321] The court reasoned that parents and children are typically not aware that there is no testimonial privilege covering communications between them.[322] Because of this lack of knowledge, the existence or non-existence of a privilege is irrelevant to their decision to discuss private matters.[323] This logic is a lot like the tail wagging the dog. It would take only a well-publicized case involving the forced betrayal of a child's confidences to his or her parents, instigated by an eager prosecutor, to alert parents and children to the fact that what they see and what they say within the family can be used against them. The public was dismayed when Ken Starr subpoenaed Monica Lewinsky's mother and forced her to reveal the substance of her conversations with her daughter concerning President Clinton.[324] Public condemnation of the

318. "I will be living under a cloud in which if my son comes to me or talks to me, I've got to be very careful what he says, what I allow him to say. I would have to stop him and say, 'you can't talk to me about that. You've got to talk to your attorney.' It's no way for anybody to live in this country." *Id.* at 1143.

319. *See id.* at 1140–57.

320. *See id.* at 1152.

321. *See id.*

322. *Id.*

323. *See id.* The Court cited to the Advisory Committee on the Federal Rules of Evidence comments that reached the same conclusion regarding the marital communications privilege. *Id.* at 1152 n.21. Interestingly, nearly every state has diverged from federal law and has adopted a marital communications privilege. Mikah K. Story, *Twenty-First Century Pillow Talk: Applicability of the Marital Communications Privilege to Electronic Mail*, 58 S.C.L. REV. 275, 281–82 (2006) (discussing the prevalence of the marital communications privilege in both state statutes and common law).

324. Although special prosecutor Ken Starr's subpoena of Monica Lewinsky's mother, Marcia Lewis, to the grand jury investigating President Clinton involved an adult child and parent relationship as well as an adult criminal investigation, it is a recent example of the public's astonishment over the lack of a parent-child privilege and its disdain for the government's interference in the parent-child relationship. *See e.g.*, Richard T. Cooper et al., *Lewinsky's Mother Leaves Distraught After Testimony; Probe: Marcia Lewis Ends Second Day Before Federal Grand Jury Investigating Alleged Affair Involving Clinton*, L.A. TIMES, Feb. 12, 1998, at A16; Richard T. Cooper et al., *Monica's Mom, the Reluctant Starr Witness Controversy*, L.A. TIMES, Apr. 2, 1998, at E1; Ruth Marcus, *Starr Pushing Envelope, Former Prosecutors Say Grilling Lewinsky's Mom Is Perfectly Legal and a Tactic Justice Officials Often Use*, MILWAUKEE J.

prosecutor's tactics encouraged federal and state legislators to consider adopting a parent-child privilege.[325] Any rationale that draws its strength from a general lack of knowledge is destined to fail, and perhaps more importantly, does nothing to address the concerns of those afflicted by government compulsion.

Legally savvy parents may very well be deterred from communicating with their children by the lack of a privilege.[326] Social science research confirms that the lack of parent-child communication has a negative psychological and social effect on children's development.[327] Parents are the most important contributors to the socialization of their children.[328] From birth, they teach their children to act in socially appropriate ways and to become productive members of society.[329] The family plays an extremely important role in determining the child's initial trajectories in life.

SENTINEL, Feb. 15, 1998, at 1; Anna Quindlen, *No Privilege for Parents*, NEWSWEEK, Jan. 17, 2000, at 74 (discussing parental outrage at the subpoena issued to Monica Lewinsky's mother); Jerry Seper, *Lewinky's Mom Cites "Hell" of Testimony, Requests Delay*, WASH. TIMES, Feb. 24, 1998, at A6; Smith-Klocek, *supra* note 70, at 105 (quoting Ruth Ann Leach, *Why Doesn't Monica's Mom Refuse to Testify?*, NASHVILLE BANNER, Feb. 17, 1998, at A11 (suggesting that Marcia Lewis should have refused to testify and should have faced imprisonment rather than violate "the precious bonds of trust she enjoys with her child")); Eric Zorn, *With Ma on Stand, Lawyers Can Mine the Mother Lode*, CHI. TRIB., Feb. 12, 1998, at 1 (commenting on the legal inconsistency which protects spousal communications but not confidential communications to parents).

325. On February 23, 1998, Senator Patrick Leahy of Vermont pledged to introduce a bill to allow Congress to consider the issue of creating a parent-child privilege in order to prevent prosecutorial abuses. In his comments, Leahy waxed at length regarding his distaste for Independent Counsel Kenneth Starr's treatment of Monica Lewinsky's mother, Marcia Lewis. *See supra* note 200. It is worth noting that the congressman's disdain may have been due in part to the subject matter that Starr was forcing Lewis to talk about.

326. *See* Press & Schulman, *supra* note 1, at 81 (describing the experience of the Ports, a married couple threatened with contempt charges for refusing to testify about physical evidence found in their home in a murder case against their seventeen-year-old son). Experiences like that of the Ports will deter parents who are aware of the case.

327. *See* SHELDON & ELEANOR GLUECK, DELINQUENTS IN THE MAKING: PATHS TO PREVENTION 50–55 (1952) (showing that the families of "non-delinquents" provided more emotional support to one another and more frequently engaged in activities with one another).

328. *In re* A&M, 403 N.Y.S.2d 375, 380 (App. Div. 1978) ("The role of the family, particularly that of the mother and father, in establishing a child's emotional stability, character and self-image is universally recognized. The erosion of this influence would have a profound effect on the individual child and on society as a whole.").

329. *See* Moore v. City of E. Cleveland 431 U.S. 494, 503–04 (1977) (plurality opinion) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this 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.").

"Trajectories in crime and deviance are no exception."[330] Social scientists who studied patterns in parental attachment and delinquent behavior found that when parents devote time to their children, communicate about their children's feelings and frustrations, and provide guidance and advice, they prevent their children's involvement in crime and delinquency.[331] Dr. Travis Hirschi, a renowned expert in social control theory, believed that children who lack a strong attachment to their parents have no way of learning moral rules and are incapable of developing a conscience.[332] He found that an increased and intimate level of communication between parents and their children decreased the likelihood that these children would commit delinquent acts.[333]

Two more leading researchers in social control theory, Rolf Loeber and Magda Stouthamer-Loeber, concurred with Hirschi. According to Loeber and Stouthamer-Loeber, if parents are generally unaware of their children's activities, social relationships, and whereabouts, then children have more opportunities to become alienated from their parents and act without adult guidance and supervision, thereby increasing the likelihood that they will commit delinquent acts.[334] A later study examined the relationship between parental efficacy and emotional support.[335] John P. Wright and Francis T. Cullen found that parents who give their children emotional support are more likely to exercise greater supervision over them and form greater attachments to them.[336] Sociologists

330. MICHAEL BENSON, CRIME AND THE LIFE COURSE 49 (2002).

331. Rolf Loeber & Magda Stouthamer-Loeber, *Family Factors as Correlates and Predictors of Juvenile Conduct Problems and Delinquency*, *in* 7 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 29, 42 (Michael Tonry & Norval Morris eds., 1986); Francis T. Cullen, *Social Support as an Organizing Concept for Criminology: Presidential Address to the Academy of Criminal Justice Sciences*, 11 JUST. Q. 527, 528–40 (1994); Robert Sampson & John Laub, *Crime and Deviance over the Life Course*, 55 AM. SOC. REV. 609, 609–27 (1990).

332. TRAVIS HIRSCHI, CAUSES OF DELINQUENCY 85–86 (2007). Children's attachment to their parents decreases association with delinquent peers and involvement in delinquent behavior. *See* Terence P. Thornberry, *Toward an Interactional Theory of Delinquency*, 25 CRIMINOLOGY 863, 873–74 (1987).

333. *See* HIRSCHI, *supra* note 332, at 93.

334. *See* Loeber & Stouthamer-Loeber, *supra* note 331, at 38. The natural sciences confirm this theory with research explaining that adolescents (and younger children) are not physically capable of well-reasoned and rational decision making. *See supra* Part III.

335. John P. Wright & Francis T. Cullen, *Parental Efficacy and Delinquent Behavior: Do Control and Support Matter?*, 39 CRIMINOLOGY 677, 682 (2001) (defining "parental efficacy" to refer to the ability of parents to control and support their children).

336. *Id.* at 691–93.

widely confirm that the parent-child relationship is crucial in creating attachment and possible desistence from crime.

The court's second rationale for rejecting a parent-child privilege is that children are not likely to think about the danger of incriminating themselves before talking to their parents.[337] The majority hypothesized that the "parent-child privilege is probably one of the least important considerations in any child's decision as to whether to reveal some indiscretion, legal or illegal, to a parent."[338] A priori, parents would not deter their children from confiding in them solely because no privilege protects their communication.[339] In other words, who else would children talk to, and what sensible parents would not encourage honest disclosure in a time of trouble? Seemingly, this argument could defeat the spousal privilege as well. After all, people in intimate relationships share personal information, usually without considering that the government may later seek to compel their conversations. Most parents instinctively assume the role of counselor, advisor, and nurturer, without considering the possibility that the government might later force them to testify against their children. The remote possibility of such a circumstance hardly seems worth silencing their children's plea for help. Leveling such a criticism against the parent-child privilege does not minimize the importance of cloaking the parent-child relationship in the same legal dressing conferred to the spousal relationship.

The court may be correct that the absence of a parent-child privilege will have no bearing on most communications between children and their parents. However, when criminal culpability is or becomes a concern, then legal recognition of the privilege is necessary. Unfortunately, a parent's knowledge of criminal culpability may often be gained only after the communication has occurred. Children may disclose incriminating information to their parents for the purpose of seeking guidance, counsel, and support. A parent-child privilege would allow parents to prospectively rely on

337. *See In re* Grand Jury, 103 F.3d 1140, 1153 (3d Cir. 1997). The court does not offer an explanation for why the same considerations do not nullify the spousal privilege. In her dissent, Judge Mansmann finds support for a narrowly tailored parent-child privilege derived from the same rationale that supports the spousal privilege. *Id.* at 1161–64 (Mansmann, J., dissenting).

338. *Id.* at 1153. *But see supra* Part III.

339. *See In re Grand Jury*, 103 F.3d at 1153.

the guarantee that their communications with their children will remain confidential.[340]

The fourth criterion of the Wigmore test has been the focal point of most of the debates regarding the proposed privilege.[341] The fourth criterion requires that the benefit derived from the acquisition of the testimony must be greater than the harm caused by obtaining such testimony.[342] The Third Circuit found that any injury to the parent-child relationship resulting from the absence of a parent-child privilege would be relatively insignificant compared to the benefit of obtaining all relevant evidence.[343]

In *In re A&M*, the court came to the opposite conclusion for three reasons: (1) the well-being of the child's development; (2) the ultimate good for society; and (3) the preservation of public confidence in the legal system.[344] The probability of fracturing the family unit is greatly increased when the government forces parents to divulge their children's personal information in order to assist the government in securing a conviction against the children.[345] Moreover, the psychological harm caused by even the threat of forcing parents to incriminate their children is inestimable. Parents' natural instinct is to protect their children from the threat of harm. Some parents would no sooner go to jail than divulge incriminating information about their children.[346] In the event that parents

340. *See* Susan Levine, Comment, *The Child-Parent Privilege: A Proposal*, 47 FORDHAM L. REV. 771, 787–88 (1979) ("[T]he most salient effect of both the marital confidential communications privilege and child-parent privilege is not so much that they encourage open communication (although this may well be true in some instances), but that they protect the confidentiality of a communication once it has been made.").

341. *See, e.g.*, *In re Grand Jury*, 103 F.3d at 1152–53.

342. *Id.* at 1152.

343. *See id.* at 1153. *But see id.* at 1160 n.5 (Mansmann, J., dissenting) ("I am convinced that the damage resulting from compelling a parent to testify against his child, in most if not all cases, outweighs the benefit associated with correct disposal of the litigation."). This fourth part of the Wigmore test requires balancing the importance of the truth-seeking function of the judicial system against the harm to the familial relationship.

344. *See In re* A&M, 403 N.Y.S.2d 375, 380 (App. Div. 1978).

345. *In re Grand Jury*, 103 F.3d at 1160 (Mansmann, J., concurring and dissenting) ("If the state is permitted to interfere in that relationship by compelling parents to divulge information conveyed to them in confidence by their children, mutual trust, and ultimately the family, are threatened."); *see also* Three Juveniles v. Commonwealth, 455 N.E.2d 1203, 1207–08 (Mass. 1983) (holding that different policy considerations are relevant when a child is called to testify *against* a parent because a parent does not need the advice of a minor child in the same way a child may need the advice of a parent).

346. *See* Press & Schulman, *supra* note 1. Gary Walker, a prosecuting attorney in Marquette, Michigan and former co-chairman of the Juvenile-Justice Advisory Committee for the National

acquiesce and testify, they may nevertheless testify falsely.[347] Neither scenario fulfills the government's purpose for compelling the testimony, nor does either scenario enhance the truth-seeking function of the justice system.[348]

Finally, a third scenario involves parents testifying truthfully against their children, which may cause the children to feel betrayed and cause irreparable harm to the parent-child relationship.[349] In *In re Agosto*, the court commented on the repercussions of compelling parental testimony:

> With the mutuality of the relationship in mind, the absurd result of requiring parent and child to testify against one another would be that children would be afraid to listen to their parents, and vice versa, for any communications would be subject to government inquiry, and could subject the child or parent to either perjury, contempt, or familial scorn. It would be hard to imagine anything which could more effectively destroy confidence and communication within the family unit. Free interchange of ideas is how the parent-child relationship develops, and if this is cut off, the family unit completely dissolves and is replaced with a disjointed group of individuals, who while sharing the same household, remain subject to the controls of an omnipresent state, capable of intrusion into the minutest details of human relationships.[350]

The quintessential showdown between parents' unwillingness to testify against their minor children and the government's purported need for the parental testimony is best illustrated in the case that introduced this Article—*Port v. Heard*.[351] David Port's parents both went to jail to maintain their loyalty to their son because they were so adamant that testifying against him would be the ultimate act of betrayal. The Ports raised the question of whether there is a

District Attorneys Association, commented that for a parent to be forced to testify against his or her child "must be the seventh ring of hell." Axtman, *supra* note 111, at 1.

347. *In re* Agosto, 553 F. Supp. 1298, 1309 (D. Nev. 1983).

348. *See id.*

349. *See id.* at 1329.

350. *Id.*

351. Port v. Heard, 764 F.2d 423 (5th Cir. 1985); *see also In re* Inquest Proceedings, 676 A.2d 790 (Vt. 1996) (holding parents in civil contempt for refusing to testify against their adult children).

constitutionally based privilege that allows parents to refrain from testifying against their children.[352] The court considered and rejected arguments that such a privilege derives from the right to privacy, from the First Amendment right to exercise one's religion, or from the Fourteenth Amendment right to equal protection under the laws.[353] In dicta, the court added that it may have decided differently if the issue of whether it would recognize a common law privilege under Rule 501 of the Federal Rules of Evidence had been raised.[354] The court recognized that the forced disclosure of parents' confidential communications with their children impedes the parents' ability to foster trust, and potentially threatens the "sanctity and integrity of the family unit."[355] In fact, the court noted that appellants could have made an argument as to the psychological and social strain that testifying against their own flesh and blood would have had on them and on other similarly situated persons.[356]

Intergenerational loyalty is a key ingredient to a well-functioning family and therefore a social value worthy of preservation. A parent-child privilege serves to protect the expectation of privacy concerning communications between parents and their children, and more widely, the privacy of the family relationship itself.[357] One commentator's assessment of a policy that permits access to evidence at the expense of the parent-child relationship is to "win the battle and lose the war."[358] The cruelty of the dilemma that parents face when forced to decide between jail and testimony against their children is a compelling reason to adopt a legal doctrine that would assure that no parent would face this decision.

The Third Circuit posited that parents' duty to "nurture and guide" their children may require parents to disclose their children's confidences to authorities when such disclosure is in their children's

352. *See Port*, 764 F.2d at 428.

353. *See id.* at 430–32.

354. *See id.* at 428, 430 (noting that the issue had not been raised because state law and state rules of evidence controlled the case).

355. *Id.* at 429.

356. *See id.* at 430.

357. *See* Levine, *supra* note 340, at 788.

358. Daniel R. Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK L. REV. 599, 632 (1970).

best interests, even though the children might not consent.[359] It is certainly debatable whether a rule preventing parents from *testifying* against their children impedes the parents' responsibility to foster the well-being of their children. One could imagine how parents could transform a negative set of circumstances into a valuable life lesson for their children without disclosing parent-child confidences in a judicial proceeding. Moreover, parents' discretion to informally disclose information to third parties would not be affected by a parent-child testimonial privilege.[360] Nonetheless, jurisdictions that are concerned with stifling parents' willingness to testify against their children can place the prerogative to assert the privilege with the parent.[361] Barring any extreme situations that expose children to physical danger or other harm, the law would not interfere with parents' rights and obligations to do what they think is in the best interest of their children.

In our society, minority status is inextricably intertwined with parental oversight and authority.[362] Extending assertion of the privilege to the parent-witness is consistent with parents' right to make decisions on behalf of their unemancipated minor children. Many of the laws affecting children are inseparable from laws pertaining to parental authority and parental rights.[363] Unemancipated minors' prerogative to act autonomously is significantly curtailed in our society. Minors who wish to enlist in the military, marry, or seek medical procedures require parental consent. A precursor to obtaining parental consent is communication with parents, which in some circumstances, may include to the disclosure of confidential information to parents—information that if disclosed to a doctor, therapist, lawyer, or clergy member would be

359. *See In re* Grand Jury, 103 F.3d 1140, 1153 (3d Cir. 1997).

360. Evidentiary privileges and disqualifications prohibit the compellability of a witness in an adjudicatory proceeding such as a grand jury, evidentiary pretrial hearing, trial, or other proceeding, but do not apply in non-testimonial situations.

361. *Cf.* Trammel v. United States, 445 U.S. 40, 53 (1980) (holding that under federal common law, the adverse spousal testimonial privilege empowers the witness spouse with the authority to assert the privilege).

362. For example, courts almost always recognize that parents have the right to surreptitiously monitor or record their children's phone conversations if the motive for doing so is to further the best interests of the children. Parents have the ability to vicariously consent on their children's behalf. *See* CLIFFORD S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING AND EAVESDROPPING: SURVEILLANCE IN THE INTERNET AGE §§ 6:23–:25 (3d ed. West 2008).

363. *See* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS? 17–18 (2005).

protected by a legal privilege. Legal schemes that assign parents the authority to either make decisions on behalf of their children or require parental consent for certain conduct desired by their children enhance the need for a parent-child privilege.

VI. ANTECEDENTS IN OTHER LEGAL SYSTEMS

The influence of international laws and customs on U.S. courts has become more prevalent in the twenty-first century. Within the juvenile justice sphere, the U.S. Supreme Court acknowledged the unpopularity of the juvenile death penalty within the international community.[364] The Court cited international practices and covenants, treaties, and the United Nations Convention on the Rights of the Child,[365] all of which have denounced the death penalty for crimes committed by juveniles under the age of eighteen.[366] Pointedly, the Court noted that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China.[367] The Court's discussion in *Roper v. Simmons* is but one example of how globalization is beginning to profoundly influence our domestic laws and policies. Further, *Roper* demonstrates that the recognition of a parent-child privilege in ancient law and among our international counterparts should prove to be an influential endorsement of a common law or statutory parent-child privilege in the U.S. legal system.

A. Jewish Law

Traditional Jewish law forbids family members from testifying against one another.[368] The Torah states, "The fathers shall not be put

364. "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." Roper v. Simmons, 543 U.S. 551, 578 (2005).

365. United Nations Convention on the Rights of the Child, art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). The United Nations Convention has been ratified by every country except the United States and Somalia. *Id.* at 576.

366. *See id.* at 575–76.

367. *Roper*, 543 U.S. at 577. Since then, each of these countries except for the United States "has either abolished capital punishment for juveniles or made public disavowal of the practice." *Id*. The Court also emphasized the United Kingdom's abolishment of the juvenile death penalty since 1948. *Id.* at 577–78.

368. *In re* Grand Jury Proceedings (Greenberg), 11 Fed. R. Evid. Serv. (Callaghan) 579, 581 (D. Conn. 1982).

to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death for his own sin."[369] The list of family members initially covered by the prohibition included spouses, parents, and children.[370] In modern times, the list of relationships covered has broadened and now includes fathers, mothers, brothers, sisters, uncles, aunts, brothers-in-law, sisters-in-law, stepfathers, stepmothers, fathers-in-law, mothers-in-law, their sons, daughters, sons-in-law, daughters-in-law, nephews, nieces, and first cousins.[371] Because protecting the sanctity of family is a core value of the Jewish tradition, Jewish law holds that the importance of the familial relationship outweighs the government's fact-finding responsibility.[372]

A few American courts have considered whether the Jewish prohibition barring testimony against family members can be applied on First Amendment grounds.[373] *In re Greenberg* recognized a limited privilege when a parent claims that testifying would violate her religious beliefs.[374] In this case, a mother was subpoenaed to testify before the grand jury regarding her daughter's actions. She claimed that as an observant Jew, her religion prohibited her from testifying against her daughter.[375] The federal district court acknowledged a conflict between the mother's ability to freely exercise her religion and the government's ability to compel her to testify against her daughter. Ultimately the court allowed her to refuse to answer questions that would incriminate her daughter.[376]

Under the Religious Freedom Restoration Act (RFRA), the Third Circuit found the Jewish prohibition on parent-child testimony

369. Smith-Klocek, *supra* note 70 (citing *Deuteronomy* 24:16). This biblical passage is also cited as the basis for the proscription against self-incrimination, since "a man is related to himself." *See* AARON KIRSCHENBAUM, SELF-INCRIMINATION IN JEWISH LAW 40–41 (1970). *See generally* Irene M. Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955 (1988).

370. *See* Smith-Klocek, *supra* note 70.

371. *See id.* at n.25 (citing 16 ENCYCLOPEDIA JUDAICA 587 (1996)).

372. *Id.* at 110.

373. *In re* Grand Jury Proceedings of John Doe, 842 F.2d 244, 245–48 (10th Cir. 1988); *Greenberg*, 11 Fed. R. Evid. Serv. (Callaghan) at 580–82.

374. *Greenberg*, 11 Fed. R. Evid. Serv. (Callaghan) at 585–87. It did not, however, recognize a parent-child privilege. *Id.*

375. *Id.* at 581.

376. *Id.* at 585–87.

to be outweighed by a compelling governmental interest.[377] The court did not state that a grand jury investigation would always outweigh the right to invoke the parent-child privilege on religious grounds; however, in this case, the court held that the government's interest outweighed important religious beliefs.[378] Because the court declined to state a bright-line rule that the governmental interest would always outweigh religious beliefs, the court did not set criteria to determine when the balance would favor religious prohibition.

B. Roman Law

The Romans believed that society's foundation depended on a cohesive family unit.[379] Like the Jewish prohibition barring family members from testifying against one another, the Romans similarly barred certain persons from testifying.[380] Early Roman law prohibited persons closely related to the plaintiff or to the defendant from testifying.[381] The Romans believed that the testimony of family members was of little or no value since they would have strong urges to misrepresent the truth in order to protect the family.[382] Rather than weigh the credibility of the testimony on a case-by-case basis, the government adopted a law simply disqualifying any witness who fell within this category of persons. Roman law is the embodiment of the view that the preservation of familial relations supersedes law enforcement's need for evidence. Any person who violated this legal and social code was considered disloyal and unworthy of being believed.[383] Cicero's prosecution of the governor of Sicily, Caius Verres, in 70 B.C.E. for extortion against the citizens of Sicily, demonstrates that the parent-child privilege was well-

377. *In re* The Grand Jury Empaneling of the Special Grand Jury, 171 F.3d 826, 830–32 (3d Cir. 1999).

378. *Id.* at 832–37.

379. *See* Watts, *supra* note 28, at 592.

380. *See id.*; HUNTER, *supra* note 70, at 1056.

381. Referred to as "testimonium domesticum," early Roman law mandated that patrons, freedmen, and slaves could not be compelled to testify against each other. Watts, *supra* note 28, at 592. Other restrictions placed on witness eligibility was the requirement that in civil cases, witnesses must be over the age of puberty, and the requirement that in criminal cases, witnesses must be at least twenty years of age. HUNTER, *supra* note 70, at 1056.

382. Watts, *supra* note 28, at 592.

383. *Id.*

established in ancient Rome and used even in notorious cases.[384] One of Cicero's claims was that Verres acquired artwork as governor without proof that he had purchased them.[385] Further, Cicero alleged that Verres had divided the extorted money into parts for himself and his future defense teams, and to bribe the eventual jurors, which suggested that he knew he would be caught eventually.[386] To bolster Verres' prosecution, Cicero attempted to summon the *patronus*[387] of the governor of Sicily, Hortensius.[388] Nevertheless, under Roman law, Hortensius was not eligible as a witness because of his close familial relationship with Verres.[389] Despite the preclusion of a key prosecution witness, Cicero supported the testimonial privilege as a means toward maintaining social order through stable families.[390]

C. Contemporary International Law

Roman law was eventually codified as *Corpus Juris Civilis* during the reign of Justinian the Great, who ruled from 527 to 565 A.D.[391] Many European countries initially modeled their laws after this code.[392] Napoleon Bonaparte, the Emperor of France from 1804 to 1815, embraced the *testimonium domesticum* and included it in his Napoleonic Code.[393] Today, the French Civil Code prohibits parents and children from testifying against one another in a dispute.[394]

384. *Id.* at 592–93; ANDREW M. RIGGSBY, CRIME AND COMMUNITY IN CICERONIAN ROME 176 (1st ed. 1999).

385. A. H. J. GREENIDGE, THE LEGAL PROCEDURE OF CICERO'S TIME 493–94 (Augustus M. Kelley ed., Rothman Reprints 1971) (1901).

386. *See* HUNTER, *supra* note 70, at 147.

387. *Patronus* refers to an ancient Roman social relationship in which the senior party served a father-like role. *See* Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487, 488 (1928).

388. *See id.* at 488.

389. *Id.*

390. *See* Watts, *supra* note 28, at 593. In Ancient Greece, women had such a subordinate role that their participation in the legal system as witness or litigant was virtually non-existent, making the need for a parent-child privilege obscure. S. C. TODD, THE SHAPE OF ATHENIAN LAW 201 (1995).

391. Watts, *supra* note 28, at 593.

392. *Id.*

393. *See id.* at 592–93.

394. *See id.* at 593. The French Civil Code previously stated, "[n]o one can be summoned as a witness if he is a blood relation, or a relative by marriage in direct line, or husband and wife of one of the parties, even although divorced." *Id.* (quoting CODE CIVIL art. 248, § 336 (G. Koch trans. 1963) (Fr.)). The Code included the following relations: father, mother, grandfather,

The prevailing view in Western European civil law countries disfavors forcing family members to divulge confidences between one another. Italian law has recognized a testimonial privilege for the "lineal relatives" of parties in civil and criminal cases, unless the cause of action concerns one's familial status, family relations, or certain other family-related matters.[395] The German Code of Criminal Procedure allows persons who are or were directly related by blood, marriage, or adoption to the accused to refuse to testify.[396] Sweden also protects communications between family members.[397]

Russia expressly prohibits close relatives—including spouses, siblings, parents, and children—from being forced to testify for or against one another.[398] Article 51 of the Russian Constitution proclaims that "[n]o one shall be obliged to testify against himself or herself, or against his or her spouse and close relatives as specified by law."[399] Under Japanese law,

> [a]ny person may refuse to give testimony when there is the fear that such testimony may result in criminal prosecution or conviction against . . . [h]is/her spouse, blood relatives within the third degree of kinship or relatives by affinity within the second degree of kinship or a person who formerly had such relative relationships with him/her . . . [or] his/her guardian.[400]

Both the Taiwanese Code of Criminal Procedure and the Austrian Code of Civil Procedure follow the Japanese Code

grandmother, son, daughter, grandson, granddaughter, brother, sister, brother- and sister-in-law, and the husband or wife of the accused, even if the spouses are divorced. *Id.*

395. CODICE DI PROCEDURA CIVILE art. 247 (Italy); CODICE DI PROCEDURA PENALE art. 199, (Italy); *see also* G.L. CERTOMA, THE ITALIAN LEGAL SYSTEM 205 (1985).

396. Strafprozeßordnung [StPO] [Code of Criminal Procedure] tit. VI, § 52, *translated in* THE GERMAN CODE OF CRIMINAL PROCEDURE 42 (Horst Niebler trans., 1965).

397. Rättegångsbalken [RB] [Code of Civil Procedure] 36:3 (Swed.), *translated in* THE SWEDISH CODE OF JUDICIAL PROCEDURE 197 (James Hurst trans., 1999) ("A spouse, former spouse, relative by blood or by marriage in direct lineal ascent or descent, or sibling of a party, or a person so related by marriage to a party that one of them is, or has been, married to a sibling of the other, or a person correspondingly related to a party, is not obliged to testify.").

398. GENNADY M. DANILENKO & WILLIAM BURNHAM, LAW AND THE LEGAL SYSTEM OF THE RUSSIAN FEDERATION 368 (1999).

399. *Id.* at 368–69.

400. KEISOHŌ [Code of Criminal Procedure], act no. 131, art. 147 (Japan). "A person who has the relationship prescribed in the preceding Article with one or more of the accomplices or co-defendants may not refuse to give testimony on matters relating only to the other accomplices or co-defendants." *Id.* at art. 148.

closely.[401] The Philippines recognizes a filial privilege that shields persons from being compelled to testify against their parents, children, or other direct ascendants or descendants.[402]

Common law countries have not followed their civil law counterparts' acceptance of a parent-child privilege. Australia is currently one of the few common law countries that recognizes a parent-child testimonial privilege.[403] South Africa entitles persons under the age of eighteen who are charged with an offense to be assisted by their parents or guardians during criminal proceedings.[404] South African courts have interpreted this provision to be used only for the child's benefit, not to the detriment of the accused.[405] Some argue that South Africa's Criminal Procedure Act, along with its Children's Act,[406] place South Africa in a strong position to recognize a parent-child testimonial privilege.[407] The United Nations Convention on the Rights of the Child sets forth many principles consistent with the adoption of a parent-child privilege.[408] Canada and Great Britain are both parties to the Convention, which was ratified in 1989.[409]

CONCLUSION

The juvenile justice system's irreversible shift from rehabilitation to a characteristically more punitive system makes meaningful access to due process rights even more vital. Tougher juvenile sentencing schemes and the rising rate of juvenile

401. *See* Zivilprozessordnung [ZPO] [Civil Procedure Statute], Stand Gazette No. 7/2006, §§ 321, 380 (Austria); TAIWAN CODE OF CRIMINAL PROCEDURE, art. 180 ("A witness may refuse to testify . . . [if] [t]he witness is or was the spouse, lineal blood relative, blood relative within the third degree of kinship, relative by marriage within the second degree of relationship, family head, or family member of the accused or private prosecutor.").

402. Rules of Court, rule 130, § 25 (Phil.).

403. Evidence Act, 1995, § 18 (Austl.) (applying to criminal proceedings in all federal courts and the courts of the Australian Capitol Territory).

404. Criminal Procedure Act 51 of 1977 s. 73(3) (S. Afr.).

405. Melanie Fourie, *Recognition of a Parent-Child Testimonial Privilege in South African Criminal Procedure: Lessons from the United States of America*, 21 S. AFR. J. CRIM. JUST. 259, 273 (2008).

406. Children's Act 38 of 2005 (S. Afr.).

407. *See* Fourie, *supra* note 405, at 259.

408. Convention on the Rights of the Child, G.A. Res. 44/25, art. 16 (Nov. 20, 1989) ("No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.").

409. *Id.*

prosecution in adult courts have increased children's exposure to adult-like punishments. The fact that the government *can*, at its discretion, compel parents to testify against their children quickly erodes the role of parents as advisors and counselors to their children. In essence, who else are children going to talk to? Society stresses the important role that parents plays in their children's development, including both positive and negative events during childhood. At this moment in time, our societal expectations of the parents' role are in conflict with the lack of legal protection afforded to parent-child communications. Such a conflict has the potential to undermine parents' ability to live up to the expectations society places on them.

The legal system is designed to prevent miscarriages of justice, and this result can be accomplished by adopting a parent-child privilege. Prosecutors, in addition to seeking justice, have an obligation to society, and society—through its courts, agencies, and citizenry—has an interest in promoting and fostering family unity.[410] The means of assessing the need for a parent-child privilege is to identify all of the ways in which the lack of the privilege impacts children, families, and society, and to weigh that impact against the truth-seeking function of the judicial system.

410. *In re* Agosto, 553 F. Supp. 1298, 1325 (D. Nev. 1983) ("There can be little doubt that the confidence and privacy inherent in the parent-child relationship must be protected and sedulously fostered by the courts. While the government has an important goal in presenting all relevant evidence before the court in each proceeding, this goal does not outweigh an individual's right of privacy in his communications within the family unit, nor does it outweigh the family's interests in its integrity and inviolability, which spring from the rights of privacy inherent in the family relationship itself.").