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Implementing Constitutional Rights for Juveniles: The Parent-Child Privilege in Context

Catherine J. Ross
George Washington University Law School, cross@law.gwu.edu

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A renewed interest in creating a parent-child privilege has been in the air since 1996, when the U.S. Supreme Court recognized a novel privilege covering communications from a patient to a psychotherapist in *Jaffee v. Redmond*.[1] The betrayal of a confidential relationship between family members violates an even more significant cultural norm as reflected in longstanding themes of Western art and literature. Since Cain's deadly rivalry with Abel, such betrayals have crossed bright lines.[2] Jurists as diverse as Justices Thurgood Marshall and Antonin Scalia agree on at least one principle: people in trouble often like to talk to their mothers.[3] Even the television crime boss Tony Soprano evokes sympathy when his mother appears to agree to testify against him.[4]

This Article reexamines the arguments for a parent-child privilege and then proposes new ways of thinking about such a privilege grounded in the constitutional rights of children and their parents. 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 state seeks to compel the parent's testimony

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* Catherine J. Ross (B.A., Yale University, 1971; Ph.D., Yale University, 1977; J.D., Yale Law School, 1987) is Associate Professor of Law at the George Washington University Law School.

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[1] 518 U.S. 1 (1996); Nissa M. Ricafort, Note, Jaffee v. Redmond: *The Supreme Court's Dramatic Shift Supports the Recognition of a Federal Parent-Child Privilege*, 32 IND. L. REV. 259 (1998). A spate of commentary urging development of a parent-child privilege appeared during the late 1970s and early 1980s. *In re* Grand Jury (Doe), 103 F.3d 1140 (3d Cir. 1997) (collecting authorities). Social consensus about the inviolability of the parent-child relationship led to a public outcry when Monica Lewinsky's mother was subpoenaed to tell a federal grand jury about her adult daughter's confidences the year after *Jaffee* was decided. *See generally* Amee A. Shah, *The Parent-Child Testimonial Privilege—Has the Time for It Finally Arrived?*, 47 CLEV. ST. L. REV. 41 (1999) (discussing recent House and Senate bills aimed at recognizing a parent-child privilege, and advocating a broad privilege); Jessica Perry, Note, *The Parent-Child Testimonial Privilege: An Argument for Qualified Recognition*, 37 BRANDEIS L.J. 97 (1998) (proposing a limited parent-child privilege that balances societal interest in the integrity of the family with judicial concerns about truth-seeking in litigation); Catherine B. Sarson, Note, *The Child-Parent Testimonial Privilege: Attempts at Codification Have Missed Their Mark*, 12 GEO. J. LEGAL ETHICS 861 (1999) (tracing the reluctance of courts and legislatures to establish a child-parent testimonial privilege to the broad scope of the privilege as commonly proposed, and proposing a narrower privilege that may overcome that reluctance).

[2] *See* Wendy Meredith Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 612 (1987) (discussing the "horrors which thrive when certain relationships are deemed subordinate to the state," as in the case of thirteen-year-old Pavlik Morozov, who became a Soviet hero when he denounced his father as an enemy of the state during Stalin's regime).

[3] Riley v. Illinois, 435 U.S. 1000, 1000 (1978) (Marshall, J., dissenting from denial of certiorari); *Jaffee*, 518 U.S. at 22 (Scalia, J., dissenting).

[4] *The Sopranos: Proshai, Livushka* (HBO television broadcast, Mar. 4, 2001).

against the child.[5] And yet most jurisdictions in the United States do not recognize even a privilege that covers confidential communications from minors to their parents.

The forced betrayal of confidential communications from a minor child to a parent seems particularly heinous. This very prospect has led jurists and respected members of the bar to confess that they would perjure themselves rather than testify against their children. These responses reflect in part our sentimental traditions regarding the sanctity of family ties, as well as functional or social policy arguments about the unique role of families in childrearing. Imagine that your teenage child calls and asks you to pick him or her up from a corner near the party he or she was attending. When you arrive, you see your child's clothing smeared with blood. Without thinking, you ask, "What happened?" Though this instinctive human response of a parent to a child in trouble is developmentally correct, it is risky as a matter of law under the current regime, because the same knowledge that helps the parent understand how best to help the child exposes the parent to the risk of being served with a government subpoena to testify against that child.

A solicitous social and legal response to the relationship between parent and child grows in part from the recognition that children possess unique vulnerabilities.[6] The concept of children's vulnerability is commonly used to justify state paternalism rather than to promote rights for minors. But much of the growing scholarship on children and the law considers how the law can reconcile rights and vulnerabilities. Unfortunately, any discussion of a possible parent-child privilege to date has occurred in isolation from the literature of juvenile rights and juvenile justice, which has left proponents of the privilege heavily reliant on sentiment and social policy rather than arguments based on rights. In this Article, I argue that many of the constitutional rights afforded to children cannot be exercised meaningfully absent free and open communications with their parents. Parents, as the common law and the Constitution have long recognized, are by default the primary guardians of their children's rights and needs. In light of children's vulnerabilities and dependency, parents may be the intermediaries through which children can best assert their rights.[7]

Part I of this Article explores the existing law of privilege, highlighting arguments that tend to support the development of a parent-child privilege. Section I.A initially orients the reader in the law of privilege by setting out the general theories of privilege and its evolution under the common law. The Article then reinterprets the jurisprudence of parent-child privilege in two ways. First, Section I.B examines the current status of the parent-child privilege under federal and state law and argues that—contrary to widespread belief—no precedents on point interfere with the creation of a common law privilege protecting communications from a minor child to a parent. Second, Section I.C explains why so few of the reported cases that ostensibly concern parent-child privilege involve communications from a minor child to a parent and suggest that we have been operating under a de facto privilege regime in which families rely on the good faith and sensibilities of prosecutors and judges.

Part II of this Article proposes new justifications for a parent-child privilege. This Part offers three arguments that are either expressly based on or conceptually related to constitutional rights. These arguments draw upon: (1) the fundamental liberty interest of parents in a parent-child relationship free from governmental intrusion; (2) the role of parents as necessary conduits between their children and professionals, such as psychotherapists and attorneys, whose contributions to the social good are acknowledged by the existence of express testimonial privileges; and (3) constitutional rights available to

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[5] *See* Sarson, *supra* note 1, at 862-63 (arguing that any parent-child privilege created should be limited to "minor children who make confidential communications to their parents").

[6] *See* Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427 (2000) [hereinafter Ross, *Anything Goes*].

[7] Elsewhere I have argued that the interests of children and their parents are not always aligned and may even be in direct conflict. Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223 (1999) [hereinafter Ross, *An Emerging Right*]; Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1580-85 (1996) [hereinafter Ross, *From Vulnerability to Voice*].

minors in the juvenile justice system that children cannot exercise in a meaningful manner unless they are able to consult with their parents.

Part III considers some of the questions likely to arise under the common law if a parent-child privilege is created. These questions include how to define a parent-child relationship for purposes of the privilege, whether the parent or child should control assertion of the privilege, the consequence of transferring a minor to adult court, the relationship of a parent-child privilege to the operation of parental liability statutes, and possible exceptions where, for example, parent and child are alleged co-conspirators in illegal activities.

I. THE CURRENT LAW OF PRIVILEGE

A. THE COMMON LAW EVOLUTION OF THE GENERAL LAW OF PRIVILEGE

Every person has a duty to testify when called upon to aid in the search for truth.[8] Narrow exceptions to this duty, while strongly disfavored, exist in the form of testimonial privileges. The privileges fall into three categories: privileges that protect the rights of the individual,[9] privileges that protect the workings of government,[10] and privileges designed to protect relationships justified by a greater public good.[11] Any privilege designed to protect communications between parents and children would fall in the last category.

Under the Federal Rules of Evidence, courts have authority "to continue the evolutionary development of testimonial privileges."[12] Rule 501 of the Federal Rules of Evidence provides only that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[13] The adoption of Rule 501 by Congress followed its rejection of a series of rules promulgated by the Federal Advisory Committee and sent on to Congress by the Supreme Court.[14] Privilege proved to be one of the most controversial areas in the development of the Federal Rules of Evidence, and remains one of the most heavily litigated in the federal appellate courts.[15] Privilege is particularly important because it expresses

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[8] *See* United States v. Nixon, 418 U.S. 683, 709 (1974).

[9] For a discussion of the privilege against self-incrimination, or the exclusionary rule, see Watts, *supra* note 2, at 591 (citing Daniel R. Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 602-03 (1970)).

[10] *Nixon*, 418 U.S. at 683 (discussing government secrets privilege).

[11] Jaffee v. Redmond, 518 U.S. 1, 9-13 (1996) (reviewing privilege doctrine and recognizing psychotherapist-patient privilege).

[12] Trammel v. United States, 445 U.S. 40, 47 (1980). The Court elaborated:

> In rejecting the proposed Rules [codifying nine specific privileges] and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis," and to leave the door open to change.

Id. at 47 (citation omitted); *see also Jaffee*, 518 U.S. at 7 (referring to legislative history of Rule 501); WEINSTEIN'S FEDERAL EVIDENCE § 501.02(1)(a) (explaining that *Jaffee v. Redmond* makes clear that "Rule 501 also authorizes the federal courts to establish new privileges in response to changing conditions"). Despite the clear language of Rule 501 of the Federal Rules of Evidence, some commentators urge that legislatures, not courts, should create any new privileges. *See* Raymond F. Miller, Comment, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 CONN. L. REV. 771, 801 (1999). In fact, in recent years, state legislatures have taken the lead in creating privileges. *Id.* at 780-81.

[13] FED. R. EVID. 501. For a discussion of the meaning of Rule 501, see FED. R. EVID. 501 advisory committee's note; *Jaffee*, 518 U.S. at 1; *Trammel*, 445 U.S. at 40; *see also* FED. R. CRIM. P. 26 (using identical language).

[14] Congress rejected a series of thirteen proposed rules (Rules 501-513), which codified selected privileges that had been recognized under the common law and created certain new privileges but barred courts from continuing to participate in the evolution of a common law of privilege. FED. R. EVID. 501-513 deleted and superseded materials; FED. R. EVID. 501 and advisory committee's note at 68-72; *see generally* Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61 (1973) (discussing the controversy concerning the proposed rules).

[15] Note, *Making Sense of Rules of Privilege Under the Structural (Il)Logic of the Federal Rules of Evidence*, 105 HARV. L. REV. 1339, 1339 n.3 (1992) (citing six Supreme Court decisions about privilege decided between adoption of Federal Rules of Evidence and date of article's publication). Since 1992, the Supreme Court has decided two additional cases centering on privilege: *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), and *Jaffee v. Redmond*, 518 U.S. 1 (1996).

community agreement about social goals seen as more significant than a just outcome in any particular case. That is the primary reason why privilege applies at every stage of a proceeding, unlike other provisions of the code governing evidence.[16]

The use of the phrase "in the light of reason and experience" in Rule 501 has carried interpretive baggage in the context of the common law of privilege. The Supreme Court used its 1933 decision in *Funk v. United States* to discuss the nature of judicial power to make common law doctrine.[17] It is "axiomatic," the Court underscored, "that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions."[18] Quoting its earlier decision in *Hurtado v. California*, the *Funk* Court explained that the "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law . . . and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted."[19]

The Supreme Court later concluded that Congress "confirmed" the authority it had asserted in *Funk* when it authorized the judiciary to determine the admissibility of evidence under the "principles of the common law as they may be interpreted . . . in the light of reason and experience" under the Federal Rules of Criminal Procedure.[20] In *Funk*, the Court held that, contrary to the common law tradition, a wife may testify on behalf of her husband in a criminal trial. In *Hawkins v. United States*, the next case it considered that raised issues concerning the spousal privilege, the Court explained that when it considers modifications to the common law of privilege it "must look to experience and reason, not to authority."[21] Presumably, the drafters of the language used in Federal Rules of Evidence 501 were familiar with the flexibility incorporated in the phrase "in the light of reason and experience," and were aware that the application of the phrase to rules of evidence could evolve in response to changing social realities.[22]

The enumerated rules rejected by Congress would have included a spousal privilege drastically narrower than its common law predecessor,[23] as well as privileges for communications to clergy, psychotherapists (but not physicians generally), and lawyers.[24] The proposed rules restricted, rather than broadened, the scope of existing privileges that concerned interpersonal confidential communications.[25] In rejecting the proposed enumerated privileges and substituting Rule 501, Congress emphasized both the continuing evolution of the common law of privilege, and the duty of federal courts to respect the law of

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[16] FED. R. EVID. 104(a) (stating that courts deciding preliminary questions concerning the admissibility of evidence are "not bound by the rules of evidence except those with respect to privileges"); 12 FED. PROC. L. ED. § 33:256 (1988) ("[Rule] 501 covers privileges regarding testimony, discovery, or other disclosure in connection with federal judicial proceedings . . . and applies at all stages of all actions, cases, and proceedings.").

[17] 290 U.S. 371 (1933).

[18] *Id.* at 383. Later in the same term, the Court used the phrase "common law principles as interpreted and applied by the federal courts in the light of reason and experience" to sum up the position it staked out in *Funk*. Wolfle v. United States, 291 U.S. 7, 12 (1934).

[19] *Funk*, 290 U.S. at 382-83 (quoting Hurtado v. California, 110 U.S. 516, 530-31 (1884)).

[20] Hawkins v. United States, 358 U.S. 74, 76-77 (1958) (citing FED. R. CRIM. P. 26 in a case involving the spousal privilege), *rev'd on other grounds*, Trammel v. United States, 445 U.S. 40 (1980).

[21] *Hawkins*, 358 U.S. at 77.

[22] Justice Scalia correctly points out that, since the Federal Rules of Evidence were adopted, the Supreme Court has taken a dim view of creating new privileges or defining recognized privileges broadly. Jaffee v. Redmond, 518 U.S. 1, 19 (1996) (Scalia, J., dissenting) (discussing recent Supreme Court cases).

[23] Proposed Rule 505 of the Federal Rules of Evidence, titled "Husband and Wife," was limited to testimony in criminal prosecutions. FED. R. EVID. 505 (Proposed Rule 1972). It did not recognize any marital privilege in civil cases, even where state law continued to recognize the privilege and constituted the substantive law governing the controversy. One member of the Advisory Committee stated, "the husband and wife privilege has pretty generally been eliminated." David Berger, *Privileges, in* JUDICIAL CONFERENCE—SECOND CIRCUIT, A DISCUSSION OF THE PROPOSED FEDERAL RULES OF EVIDENCE, 48 F.R.D. 41, 48 (1969); *see also* Krattenmaker, *supra* note 14.

[24] FED. R. EVID. 503, 504, 506 (Proposed Rule 1972).

[25] Krattenmaker, *supra* note 14 (arguing that the Advisory Committee gave short shrift to individual privacy while elevating the confidentiality claims of corporate entities).

privilege as it evolved in the states where state law supplied the rule of decision in civil cases. Congress expressly reserved judgment on each of the proposed enumerated privileges, which, it noted, "should be determined on a case-by-case basis."[26]

The proposed enumerated rules did not address communications between parents and children. Even in the early 1970s (before Congress acted), critics of the proposed rules pointed to the omission of communications between parents and children as a sign of the inconsistency and insufficiency of the Advisory Committee's proposed rules with relation to the right of privacy.[27] More recently, feminist scholars and others have argued that privilege rules shelter only those relationships "accorded a high status by traditional, male norms," but not analogous relationships valued by women, including those among "family members, or best friends, even though women may consider these relationships as confidential and intimate as the marital relationship."[28]

The Supreme Court revisited the marital privilege under the Federal Rules of Evidence (for the first and, until now, last time) in its 1980 decision in *Trammel v. United States*.[29] In *Trammel*, the Court restricted the scope of the long-recognized common law spousal privilege by holding that a wife could voluntarily testify against her husband in a criminal trial despite his express assertion of the privilege. Chief Justice Burger, writing for the Court, acknowledged that the marital privilege had a long history dating back to at least 1628 in England, and was applied by the Supreme Court as early as 1839.[30] Elizabeth and Edwin Trammel, husband and wife, had conspired to import heroin into the United States, along with Edwin's co-defendants and others. When authorities arrested Elizabeth for transporting heroin during an airport customs search, she immediately agreed to cooperate with the government in exchange for a grant of immunity. Chief Justice Burger emphasized that the wife's testimony was voluntary[31] and that it rested entirely on knowledge, acts, and communications that had never been part of confidential marital discourse.

The Court attacked the broad contours of the common law adverse testimonial privilege, which it had recognized just twenty-two years earlier in *Hawkins*. In the intervening years, many states had introduced no-fault divorce as an option, and the divorce rate was approaching a historic peak.[32] The *Trammel* opinion explained that by the time one spouse is prepared to turn on the other in the witness box:

> 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 spousal testimony seems far more likely to frustrate justice than to foster family peace.[33]

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[26] FED. R. EVID. 501; S. REP. NO. 93-1277, at 7058-59 (1974).

[27] Krattenmaker, *supra* note 14, at 83, 94.

[28] Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 441 (1991); *see also* Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631, 647 ("[T]he positive law of testimonial privilege represents an unstable and largely unthinking attempt to reconcile values we proudly expound with others whose influence we acknowledge less readily."); *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1563, 1588-92 (1985) (proposing a privilege based on personal intimacy that would extend to unmarried cohabitants (both heterosexual and homosexual couples or close friendships)).

[29] See Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045 (1995), for an insightful discussion of the spousal privilege.

[30] Trammel v. United States, 445 U.S. 40, 44 (1996) (citing 1 EDWARD COKE, INSTITUTES *6b); *see also* Jin Fuey Moy v. United States, 254 U.S. 189, 195 (1920); Graves v. United States, 150 U.S. 118 (1893); Stein v. Bowman, 38 U.S. (13 Pet.) 209, 220-23 (1839); Bent v. Allott, 21 Eng. Rep. 50 (Ch. 1580).

[31] There is reason for skepticism about whether such a plea bargain can truly be viewed as "voluntary."

[32] D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 538 (1998).

[33] *Trammel*, 445 U.S. at 52.

The *Trammel* opinion preserved the adverse testimonial privilege to the extent that both spouses asserted it, and also left the privilege covering confidential marital communications intact.[34] According to the Court, the "spousal privilege, as modified in *Trammel*" continues to further "the important public interest in marital harmony."[35]

The marital privilege model suggests two distinct privileges that can be asserted in the context of the parent-child relationship.[36] The broader privilege would protect the parent from compulsion to give adverse testimony against a child, regardless of the source of the parent's knowledge, on the ground that such testimony would undermine (if not destroy) the relationship between parent and child. A narrower privilege—which I call the "essential" parent-child privilege—would prevent disclosure of confidential communications from the child to the parent in order to foster meaningful communications in a relationship that is seen as essential to numerous public policy goals.

Support for development of a parent-child privilege is found in the Supreme Court's 1996 decision in *Jaffee v. Redmond*.[37] In *Jaffee*, the Court, for the first time, accepted a novel privilege claim rather than using Rule 501 as an opportunity to either limit an existing privilege or refuse to adopt a new one. The Supreme Court held that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence."[38]

The Court used *Jaffee* to lay out its approach to considering whether to recognize a privilege that did not exist in common law. In order to determine whether creation of a new privilege is warranted, the Supreme Court balanced "the public and private interests supporting recognition of the privilege" against "the need for probative evidence" and the "likely evidentiary benefit that would result from the denial of the privilege."[39]

A reassessment of the weight accorded the benefits flowing from recognition of a privilege could therefore prove determinative in renewed consideration of the parent-child communication. Part II of this Article argues that a number of private and public interests, some with constitutional dimensions that have previously been overlooked or undervalued, weigh heavily in favor of finding a privilege protecting confidential communications from a minor to one or both parents. As a prefatory matter, the next portion of this Article analyzes current federal and state law regarding the parent-child privilege.

B. THE CURRENT STATUS OF THE PARENT-CHILD PRIVILEGE UNDER FEDERAL AND STATE LAW

Most courts, both federal and state, have declined to find a common law parent-child privilege. As one of the first judges to consider the question scoffed, "[t]here is no such thing."[40] Although the Supreme Court has never granted review of a case involving an asserted parent-child privilege,[41] Justice

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[34] *Id.* at 45 n.5 (expressly noting that the holding did not disturb the confidential marital communications privilege recognized in Wolfle v. United States, 291 U.S. 7 (1934) and in Blau v. United States, 340 U.S. 332 (1951)).

[35] Jaffee v. Redmond, 518 U.S. 1, 11 (1996) (quoting *Trammel*, 445 U.S. at 53).

[36] Daniel J. Capra, *A "New" Privilege: Parent-Child*, N.Y.L.J., May 9, 1997, at 3.

[37] Ricafort, *supra* note 1.

[38] *Jaffee*, 518 U.S. at 15. According to the Court, the facts amply demonstrated the importance of confidential counseling. Police officer Redmond had shot and killed Jaffee when she responded to a call about a disturbance. The Court reasoned that police officers should be encouraged to confront the stress that frequently accompanies their jobs. In addition, the Court noted that the community might suffer if police go untreated after traumatic events, whether or not they remain on the force. *Id.* at 11 n.10.

[39] *Id.* at 7, 9-11.

[40] *In re* Kinoy, 326 F. Supp. 400, 406 (S.D.N.Y. 1970) (rejecting claim of privilege by a father who also alleged he was acting as his daughter's attorney).

[41] The Supreme Court has denied certiorari in four cases that would have raised a question about parent-child privilege. *See In re* Grand Jury (Doe), 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).

Scalia has been similarly dismissive. Dissenting in *Jaffee v. Redmond*, he opposed creation of a psychotherapist-patient privilege on the ground, among others, that if you asked "the average American 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. Yet there is no mother-child privilege."[42]

Justice Scalia never asked the obvious follow-up question, "Why not?" He might well have done so, since there appears to be "no blanket prohibition" against a parent-child privilege in the common law.[43] Indeed, the notion of a privilege running from children to parents is hardly new.[44] Its roots can be traced to ancient Jewish and Roman law.[45] Civil law countries in Europe, including France, Sweden, and Germany, protect communications among a broad group of family members from compelled testimony.[46] In France, any recipient of a subpoena may refuse to testify if related "by blood or by marriage in the direct line of one of the parties or his [or her] spouse, even though divorced."[47] So too in Sweden, where:

> [a] spouse, former spouse, relative by blood or by marriage in direct lineal ascent or descent, or brother or sister of a party, or a person so related by marriage to a party that one of them is, or has been, married to a brother or sister of the other, or a person correspondingly related to a party, is not obliged to testify.[48]

In Germany, the right to refuse to testify in both civil and criminal matters begins with a couple's engagement to marry and continues after divorce, reaching relatives by blood and marriage "to the third degree."[49] Commentators on German law observe that the legislative rationale for relieving a fiancée, spouse, or close relative from the "burden of testifying" is "quite clear: In these cases there is obviously a conflict of interests, and the law should not force anyone to give evidence against relatives or persons he or she is in love with."[50] These provisions seem to focus on the sensibilities of the prospective witness (who has the discretion to testify or not) and on the risks of receiving perjured testimony from a witness presumed to have close personal ties to a party.

1. The Wigmore Factors Fit

The concerns reflected in the civil law tradition of exceptions to the duty to testify based on close personal ties are also reflected in Anglo-American legal thought, as captured in the work of our leading commentator on evidence, Dean Wigmore. Wigmore set forth four fundamental conditions that must be satisfied before courts recognize any privilege:

(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.
(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*

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[42] *Jaffee*, 518 U.S. at 22 (Scalia, J., dissenting).
[43] *In re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. 1487, 1493 (E.D. Wash. 1996).
[44] *See* Watts, *supra* note 2, at 591-93.
[45] *In re Grand Jury (Doe)*, 103 F.3d at 1162 (Mansmann, J., dissenting) (quoting J. Tyson Covey, Note, *Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege*, 1990 U. ILL. L. REV. 879, 883 (1990)).
[46] *Id.*
[47] GEORGE A. BERMANN ET AL., FRENCH LAW: CONSTITUTION AND SELECTIVE LEGISLATION, §§ 7-40 (1998).
[48] THE SWEDISH CODE OF JUDICIAL PROCEDURE 141 (Anders Bruzelius & Krister Thelin eds., rev. ed. 1979).
[49] GERMAN COMMERCIAL CODE & CODE OF CIVIL PROCEDURE IN ENGLISH 290-91 (Charles E. Stewart trans., Oceana Publications 2001); THE GERMAN CODE OF CRIMINAL PROCEDURE 42-43 (Horst Niebler trans., 1965).
[50] ANKE FRECKMANN & THOMAS WEGERICH, THE GERMAN LEGAL SYSTEM 195 (1999). In criminal prosecutions, the government must inform witnesses of their right to refuse to testify, and if the prosecutor fails to do so, any resulting testimony may be "subject to the ban on utli[z]ation." *Id.* at 195-96.

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of the litigation.[51]

The first factor seems to be uncontroversial as applied to discussions between parents and children. The nature of the communications at issue, child-to-parent confidences, suggests that they originate in the child's faith that the parent can be counted on to handle the child's trust and dependency with care. Some observers, however, question whether a child should count on preservation of confidence, since the parent might conclude that revelation would better serve the child's interests as the parent understands them.[52] It seems beyond discussion that the parent-child relationship is one which "ought to be sedulously fostered," satisfying the third factor.[53]

The second and fourth factors have received the closest scrutiny in the context of the relationship between parents and children.[54] Both factors are commonly analogized to the marital privilege.[55] Whether or not the participants are aware of the privilege, the trust inherent in the relationship prompts disclosures, and the participants rely on mutual discretion. Since the spousal privilege is maintained despite the questionable notion that a privilege is a prerequisite to confidential communication, authorities posit, a parent-child privilege should similarly preserve open exchange between children and parents.[56] "[F]ew can deny," one author concludes, "that the confidential nature of the communications between a child and a parent are essential to the 'full and satisfactory maintenance' of their relationship."[57] Further, the relationship between children and parents may have a stronger claim to protection than that between spouses. Unlike many marriages today, the parent-child relationship is generally a lifelong undertaking, which lasts from the child's arrival in the family through the joint lifespan of parent and child.

As to the fourth Wigmore factor, a balancing of injuries to the relationship against the benefits to truth-seeking, commentators generally agree that even the healthiest parent-child relationship can succumb to stress and that the risk of disclosure could undermine a relationship on which society depends heavily.[58] One father (a former FBI agent) explained that if he were forced to testify against his son, the "excellent relationship, very close, very loving relationship . . . would dramatically change and the closeness . . . would end."[59] He added:

> 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 [of] 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.[60]

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[51] 8 JOHN HENRY WIGMORE, EVIDENCE § 2285, at 527 (John T. McNaughton ed., rev. ed. 1961); *see also In re* Grand Jury (Doe), 103 F.3d 1140, 1152 (3d. Cir. 1997) (citing Wigmore factors in rejecting a parent-child privilege).

[52] For a discussion of who should control the privilege, see *infra* Section III.B.

[53] *See, e.g., In re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. 1487, 1494-95 (E.D. Wash. 1996) ("[C]hildren should not be dissuaded from seeking guidance and support from parents during difficult times . . . . Especially in light of this society's increasing concern with the weakening of the family structure, such communication and parental guidance should be encouraged, not discouraged, by the judiciary.").

[54] *See, e.g.*, State v. Maxon, 756 P.2d 1297 (Wash. 1988) (reviewing the arguments in a case involving an adult defendant). Edward J. Imwinkelried doubts that a parent-child privilege can satisfy Wigmore's "instrumental" approach, because children are unlikely to withhold confidences in the absence of a privilege they know nothing about. Instead, Imwinkelried proposes a humanistic rationale for privileges that promote individual autonomy, which he argues would support a parent-child privilege. 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES §§ 5.4.1.-5.4.3(a), 6.2.2 (2002).

[55] The analogy is not necessarily helpful since Wigmore himself was no fan of the marital privilege which he called "one of the most curious and entertaining chapters of the law of evidence." 8 WIGMORE, *supra* note 51, at §2228, at 213.

[56] Sarson, *supra* note 1, at 865-66 (citing Ann M. Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1 (1982) for the proposition that an adult, unlike the typical child, has a range of potential confidantes, some of whom are covered by the privilege).

[57] *Id.* at 865.

[58] *Id.* at 866-67.

[59] *In re* Grand Jury (Doe), 103 F.3d 1140, 1143 (3d Cir. 1997).

[60] *Id.* at 1143 (citations omitted).

Despite that father's eloquence before the trial court, when the Third Circuit considered the matter on appeal it declined to create a common law parent-child privilege. The majority in *In re Grand Jury (Doe)* [61] doubted that such a privilege would satisfy the second and fourth Wigmore factors, finding no reason to believe that confidences between parents and children would disappear in the absence of a privilege. In contrast to the attorney-client privilege, the court reasoned, a parent could not be presumed to know that a privilege did or did not exist, could not be expected to explain the law to the child, and neither party would be likely to base their decisions about the conversation on the potential testimonial consequences.[62] Therefore, the court concluded that confidentiality was not an essential element of the father-son relationship and that no great injury would inure to the relationship if confidentiality were breached under duress.

This hypothesis flies in the face of the weight of judicial reasoning in a variety of contexts. Courts presume that their opinions will have normative implications, and that regular people will make rational decisions in light of existing law in many spheres, including family life.[63] For example, courts have held that non-custodial parents, "hindered by fear that a birthday wish or weekly phone call" would subject them to long-arm jurisdiction in the child's home state, might sacrifice the quality of their relationship rather than run that risk.[64] This proposition seems more farfetched than the possibility that a parent who suspects that a child is about to confess to a serious crime might, in the light of highly publicized cases about the lack of a parent-child privilege, realistically conclude that he or she needs to talk to a lawyer before continuing the conversation. Moreover, there seems to be little basis for the presumption that an adult would worry more about whether a privilege exists in talking with a spouse (where the conversation is privileged) than with a minor child (where it generally is not).

The lack of empirical information does not undermine the arguments in favor of privilege. In 1998, the Supreme Court observed that even with respect to the attorney-client privilege, the oldest and most frequently asserted privilege, "[e]mpirical evidence . . . is limited."[65] In the face of uncertainty about how much the privilege did or did not contribute to candor, the Court declined to narrow the scope of the privilege to exempt posthumous disclosure of client confidences, since it concluded that a substantial number of clients and attorneys seemed to think that the privilege encouraged candor, even if clients were "often uninformed or mistaken about the privilege."[66]

2. *Federal Courts*

The issue of a parent-child privilege has rarely been presented to a federal court in pristine form: i.e., covering a confidential communication from a minor to his or her parent. Most courts that have considered recognition of a parent-child privilege have declined to find one, in large part because of two critical misperceptions. First, judges have failed to distinguish between a privilege covering confidences from a minor child to a parent, on the one hand, and confidences from parent to child, or from adult children to parents, or testimony not based on confidences at all, on the other. This first confusion has generated the second misperception: judges have erroneously concluded that previous courts have already rejected judicial creation of a parent-child privilege regardless of how it is defined.[67]

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61 *Id.*

62 *Id.* at 1152-53.

63 *See, e.g.*, Kulko v. Superior Court, 436 U.S. 84 (1978) (arguing that subjecting an out-of-state parent to long-arm jurisdiction merely because he allowed his child to spend time with the other parent would "impose an unreasonable burden on family relations").

64 *In re* Marriage of Crew, 549 N.W.2d 527, 529 (Iowa 1996).

65 Swidler & Berlin v. United States, 524 U.S. 399, 409 n.4 (1998) (finding that three studies "do not reach firm conclusions on whether limiting the privilege would discourage full and frank communication").

66 *Id.*

67 *See, e.g., In re* Grand Jury (Doe), 103 F.3d 1140, 1146 (3d. Cir. 1997) (noting that the overwhelming majority of courts, both federal and state, have rejected such a privilege and that no federal court of appeals has recognized such a privilege, and declining to adopt such a privilege in the instant matter). Eight federal courts of appeals have expressly rejected the asserted

Federal judicial review of the precedents on parent-child privilege has frequently lumped together cases that are analytically distinct.[68] Courts have treated as doctrinally identical cases that involve distinct claims of privilege: (1) claims of privilege where parents are asked to testify against the interests of minor children who live at home; (2) claims of privilege where minor children living at home are subpoenaed to testify against their parents; (3) claims of privilege where parents are asked to testify against the interests of offspring who are now mature adults; and (4) claims of privilege where adult offspring are subpoenaed to testify against their parents.[69] Within each of these four categories, further discriminations may be needed depending on 'whether the source of the potential witness' knowledge is a confidential communication or is based on personal observations that any person who was present at the time could have made. Properly understood, at least eight distinct fact situations might give rise to a claim of parent-child privilege.[70] Table 1 depicts these divisions.

TABLE 1: TAXONOMY OF PARENT-CHILD PRIVILEGES ASSERTED

Category	Witness	Party with interests at issue	Source of knowledge
Type I I A. The Essential Privilege I B. Parental Adverse Testimonial Privilege	Parent	Minor child	I A. Confidential communication from minor child I B. Parent's observation of minor child
Type II	Minor child	Parent	II A. Confidential communication from parent II B. Observation
Type III	Parent	Adult child	III A. Confidential communication from child III B. Observation
Type IV	Adult child	Parent	IV A. Confidential communication from parent IV B. Observation

In *In re Grand Jury (Doe)*,[71] the 1997 Third Circuit case described above, the court failed to distinguish between two consolidated cases in declining to announce a parent-child privilege. The first case involved an appeal from a Virgin Islands decision in which the court below refused to quash a grand jury subpoena to a father concerning an investigation of his eighteen-year-old (i.e., legally adult) son—which I have identified as a "Type III" case.[72] The second appeal—a "Type II" case—challenged a

privilege, and none have recognized it. *Id.* at 1147. That misapprehension is shared by most legal commentators, including those who urge adoption of a parent-child privilege. *See, e.g.*, Shah, *supra* note 1, at 43.

[68] Commentators have taken the opinions at their word and have not noted this endemic analytical lapse.

[69] Judge Mannsman, dissenting in *In re Grand Jury (Doe)*, is among the few jurists or scholars to note the error of lumping together these distinct categories of cases. *See In re Grand Jury (Doe)*, 103 F.3d at 1162-63; *see also* Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (involving a claim of testimonial privilege, holding that where a criminal defendant was charged with sexual offenses against his minor daughter, it would violate the Confrontation Clause to prevent cross-examination of the daughter); *In re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. 1487, 1491 (E.D. Wash. 1996). The issue in *Ritchie* was defense access to child welfare agency records governed by a confidentiality statute, which the Supreme Court held did not have to be produced. *Ritchie*, 480 U.S. at 39.

[70] If we also consider that some witnesses may be willing to testify over the objections of the party whose interests are at stake, while others refuse, we easily arrive at sixteen categories.

[71] 103 F.3d at 1140.

[72] The bright line separating minors from adults runs throughout the law, determining when whether teenagers will even have the opportunity to be tried in juvenile court, whether they can drink, drive, vote or marry (albeit different ages of majority may apply to each activity). The dissent in *In re Grand Jury (Doe)*, however, apparently considered eighteen a transitional age and

decision in the District of Delaware to enforce a subpoena issued to a sixteen-year-old girl to testify before a grand jury investigating her father's alleged participation in a kidnapping.[73] The Third Circuit considered these two fact patterns to be indistinguishable for analytical purposes,[74] and considered each of them to present claims of a parent-child privilege, which it rejected. Neither of the cases presented in pristine form the question of a privilege governing communications from a minor child to a parent.

The majority found it persuasive that no other federal circuit court had found a parent-child privilege and that only two federal lower courts had ruled favorably on such a privilege.[75] But this is a gross oversimplification for three reasons. First, no federal court, including the Third Circuit, has squarely considered the issue of whether a parent-child privilege should exist under federal law that would prevent a parent from being compelled to testify about confidential communications from a minor child. This is the "Type IA" privilege at the core of my argument, which I consider the "essential parent-child privilege." Second, a remarkable number of courts—both federal and state—that have declined to find a parent-child privilege on the facts before them (not involving a confidential communication from a child to a parent) expressly reserved the broader question of whether a parent-child privilege should exist under other circumstances.[76] Third, many courts, including the Third Circuit itself, have indicated that the legislature rather than the courts should take the lead if a parent-child privilege is to be recognized.[77]

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referred to the target of the Virgin Islands Grand Jury as a teenager, distinguishing the case from Delaware where the parent was the target of investigation. In the Virgin Islands case, Judge Mansmann believed that seeking paternal testimony adverse to an eighteen-year-old adequately framed:

> [A] question of first impression in the federal court . . . should we make available to a parent and a child an evidentiary privilege which could be invoked to prevent compelling that parent to testify regarding confidential communications made to the parent by his child in the course of seeking parental advice and guidance?

Id. at 1158 (Mansmann, J., dissenting).

[73] *Id.* at 1140-43.

[74] Indeed, in collecting the cases from federal and state courts to justify its conclusion that virtually no authority supported creation of a parent-child privilege, the court failed to catalogue the cases in any way—did they involve parent testifying against child or vice versa, adult or minor children, confidential communications or factual observations? *See id.* at 1146-47 (collecting cases). Even eminent commentators followed the court's lead. *See* Capra, *supra* note 38, at 3 (stating that the court "refused to recognize the . . . privilege for confidential communications between parent and child").

[75] *In re Grand Jury (Doe),* 103 F.3d at 1146-47.

[76] *In re* Erato, 2 F.3d 11, 16 (2d Cir. 1993) (declining to recognize a new privilege in a case involving a 52-year-old criminal defendant, which "presents a weaker claim for recognition of a parent-child privilege than might be presented in a case involving a minor child"); Port v. Heard, 764 F.2d 423, 430 (5th Cir. 1985) (holding that under the Texas code, parents can be required to testify against a son charged with murder in adult court where their contribution is necessary to determination of the truth, but noting that the outcome might be different under the Federal Rules of Evidence because "this case presents a compelling argument in favor of recognition"); United States v. Ismail, 756 F.2d 1253, 1258 (6th Cir. 1985) (holding that no testimonial privilege relieves an emancipated adult from testifying against a parent at a criminal trial, but expressly limiting the holding to the facts); United States v. Jones, 683 F.2d 817 (4th Cir. 1984) (reserving the question of whether a familial privilege may exist if the child is an unemancipated minor in a matter involving an adult son compelled to testify against his father); *In re* Grand Jury (Starr), 647 F.2d 511, 512 (5th Cir. 1981) (declining to create a federal parent-child privilege where an apparently adult witness refused to testify before a grand jury before which her mother and stepfather were targets in a homicide); *In re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. 1487, 1487 (E.D. Wash. 1996) (declining to apply privilege where an unemancipated seventeen-year-old moved to quash a subpoena requiring him to testify before a grand jury investigating his parents as well as himself, but "without prejudice" to subsequent assertions of the privilege after development of a fuller record); Three Juveniles v. Commonwealth, 455 N.E.2d. 1203, 1207 (Mass. 1983) (reserving expressly "the question of confidential communications between parent and child"); *In re* Frances J., 456 A.2d 1174, 1178 (R.I. 1983) (noting that a case involving "a barrage of novel and unsupported contentions" is "unequivocally" not "an appropriate vehicle for the consideration of adoption of a new privilege"); *In re* Inquest Proceedings, 676 A.2d 790, 794 (Vt. 1996) (declining to find a privilege in a matter involving a competent adult criminal defendant, but expressly reserving the question of "whether a parent's interest in protecting a minor of incompetent child's confidential communications or conduct could ever outweigh the public interest in the criminal fact-finding process").

[77] *In re Grand Jury (Doe),* 103 F.3d at 1154-56. Many other courts have recognized the persuasiveness of the arguments favoring a parent-child privilege, but have indicated that the legislature should take the lead in developing any parent-child privilege rather than the judiciary. Matter of Terry W., 130 Cal. Rptr. 913, 914 (Ct. App. 1976) (holding that although there "are undoubtedly situations where a communication from child to parent falls within the attorney-client . . . privilege" the California Evidence Code expressly reserves the power to create new privileges to the legislature, which is better suited to define its parameters); *see also* Marshall v. Anderson, 459 So. 2d 384, 386 (Fla. Dist. Ct. App. 1984) (noting that in contrast to the Federal

Only two federal courts in addition to the Third Circuit have had occasion to discuss the issue of parent-child privilege since the Supreme Court signaled its receptivity to novel privileges in *Jaffee*. In both instances, the judges indicated in obiter dicta that they found no bar to creating a parent-child privilege, but that the facts before them did not raise the question directly or appropriately.[78] Both cases involved "Type II" claims of privilege in which the government sought testimony by minors against their fathers.

In the first case, a federal court in the Eastern District of Washington considered the arguments for a privilege at length in a case where a seventeen-year-old unemancipated boy challenged a subpoena requiring him to testify against his father before a grand jury.[79] The boy and his mother were also targets of the grand jury investigation. The court rejected the boy's claim that the Constitution barred his testimony, expressly reserving, "without prejudice," the question of whether the Constitution could ever "privilege parent-child relations or actions."[80] It further found that while the common law did not provide a parent-child privilege, it also posed no bar to the judicial creation of such a privilege.[81] In light of the Supreme Court's decision in *Jaffee*, the district court concluded that "[b]oth reason and experience mandate the recognition of some form of a parent-child privilege."[82] The court declined to apply a parent-child privilege to quash the grand jury subpoena because the boy had not shown either that he would be questioned about confidential communications, or that his testimony would be adverse to his father's interests. The court reserved its ability to consider application of a parent-child privilege if the facts appeared to warrant one in subsequent proceedings.[83]

The social and psychological concerns raised by "Type II" and "Type IV" cases—in which offspring are called upon to testify against their parents—are easily distinguishable from the concerns that motivate a "Type I" privilege. We do not generally expect competent parents to rely on their children (especially their minor children) for advice and guidance. Therefore, any confidences flowing from the parent to the child are less likely to serve public goals concerning the mutual roles of the participants. The family is recognized in the law as the building block of society, but at least in theory it exists and receives social support to serve the needs of the younger generation. Despite the bright line I posit between children and adults within the family, it is a commonplace observation that in some families these lines are blurred or even reversed. Regardless of the role played by the child in any given family, a child who is forced to testify or provide evidence that leads to a parent's arrest[84] will likely be burdened by internal feelings of guilt and external reprimands from beloved authority figures.

In another case involving the testimony of minors against their parents, the Fourth Circuit relied on the framework articulated in *Jaffee* in concluding that "[t]here may be much to commend a testimonial privilege in connection with the testimony of or against a minor child to preserve the family unit which is

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Rules of Evidence, which preserves the common law role of the courts in creating new privileges, the Florida Evidence Code forbids the state's courts from developing a new "academic" privilege); State v. Gilroy, 313 N.W.2d 513, 518 (Iowa 1981) (declining to recognize a privilege "apart from statutory authority"); People v. Amos, 414 N.W.2d 147, 148 (Mich. 1987) ("[R]ecognition of a new privilege should be left up to the legislature."); Missouri v. Bruce, 655 S.W.2d 66, 68 (Mo. Ct. App. 1983) (creation of a parent-child privilege is " a matter for the legislature").

78 United States v. Dunford, 148 F.3d 385 (4th Cir. 1998); *In re Grand Jury Proceedings, Unemancipated Minor Child*, 949 F. Supp. at 1487.

79 *In re Grand Jury Proceedings, Unemancipated Minor Child*, 949 F. Supp. at 1491.

80 *Id.*

81 *Id.* at 1493.

82 *Id.* at 1494, 1496.

83 *Id.* at 1497. The court might also have taken the position that the privilege was inappropriate to the extent it could be shown that the teenager was a coconspirator and that the conversations at issue were in pursuit of the conspiracy rather than confidences exchanged between family members.

84 In *United States v. Davies*, 768 F.2d 893 (7th Cir. 1985), a teenage girl provided her father's telephone number to federal agents, who then tapped the line, leading to his arrest. In *United States v. Penn*, 647 F.2d 867 (9th Cir. 1980), the defendant's five-year-old son showed the police where his mother kept her drugs after a policeman gave him five dollars.

so much under stress in today's society."[85] The court went on, however, to explain that the case before it was an inappropriate vehicle for finding a novel privilege. Appellant Dunford, convicted in a lower court for illegally possessing guns despite his status as a convicted felon and drug user, sought to exclude the testimony of two of his minor daughters. There was evidence before the trial court that Dunford had sexually abused both girls, and had used the guns at issue to threaten them. In response to Dunford's arguments about the "integrity and inviolability of the family relationship," the Fourth Circuit panel observed with remarkable understatement: "This is not the beneficial family unit that history has celebrated, and this is not the relationship which Dunford argues in principle should remain protected."[86] The court did not examine the nature of the testimony the girls had offered at trial, which neither involved confidential communications nor could be termed adverse. (They apparently perjured themselves rather than face their father's ire.)

3. State Law

In contrast to federal common law, which merely poses no bar to development of a "Type I" privilege, several states have expressly recognized some form of "Type I" parent-child privilege. Discussion in the minority of federal courts and in the states that have provided a parent-child privilege points toward the possibility of generating an essential privilege based on rights theory.

New York is the only state whose courts have expressly recognized a parent-child privilege.[87] Lower courts in New York State have used the common-law process to recognize a qualified parent-child privilege applying to confidential communications from a minor to his or her guardians.[88] In *In re Application of A & M*, an intermediate appellate court held that the constitutional right of privacy may, under certain circumstances, apply to the communications made by a minor child to a parent "within the context of the family relationship."[89] Thus, the parents of a sixteen-year-old target of a grand-jury investigation into an arson had to appear in response to a subpoena, and could be required to answer questions based on their observation of the son's activities,[90] but could refuse to answer questions regarding their son's discussions with them about the events at issue if the lower court found that such communications were made in search of guidance under conditions suggesting confidentiality.[91] This court drew a bright line within "Type I" claims of privilege between "Type I A" claims—the essential parent-child privilege—and "Type I B" claims in which the parent's personal knowledge is based on observations that other persons, had they been present, might also have made. (Of course, a parent may well have more opportunities to observe than other random witnesses, but perhaps not more than siblings or "best friends.") Other lower courts in New York have defined "parent" broadly based on the adult's function in the party's life, granting the state's judicially recognized parent-child privilege to communications with a grandmother who stood "in the place and stead of a parent"[92] and even extending it to statements by a twenty-three-year-old man seeking parental guidance.[93]

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85 United States v. Dunford, 148 F.3d 385, 391 (4th Cir. 1998).

86 *Id.*

87 *In re Grand Jury (Doe)*, 103 F.3d at 1146 n.13.

88 *In re* Application of A & M, 61 A.D.2d 426 (N.Y. App. Div. 1978).

89 *Id.* at 435.

90 For example, the parents could be asked if the teenager was home, and, if not, what time he left the house or returned. *Id.* at 436 (citing People v. Daghita, 299 N.Y. 194 (1949)).

91 *In re Application of A & M*, 61 A.D.2d at 436. In contrast, the trial court rejected a claim of parent-child privilege by the child's appointed attorney where the father did not object to testifying and the communication seemed to be neither confidential nor in search of guidance. *In re* Mark G., 410 N.Y.S.2d 464 (App. Div. 1978).

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

93 People v. Fitzgerald,422 N.Y.S.2d 309 (Crim. Ct. 1979); *contra In re* Harrell, 450 N.Y.S.2d 501(App. Div. 1982) (noting that seventeen-year-old's statement to mother while in custody gives rise to parent-child privilege when overheard by police who did not accord them privacy, but admission of statement was not reversible error due to overwhelming evidence of guilt). Other New York courts have declined to extend the parent-child privilege where the child is an independent adult. *See, e.g.*, State v. Hilligas, 670 N.Y.S.2d 744, 746 (Super. Ct. 1998) (noting parental testimonial privilege where a grand jury investigating a murder targets a twenty-eight-year-old man who has lived independently since age twenty-one and owned a home).

Only one reported case outside of the State of New York has squarely held that the parent of a minor child living at home may be compelled to testify about the content of a child's confidential communication.[94] In that case, a California court declined to find a privilege, deferring to the state legislature because it concluded that the state's Code of Evidence expressly reserved the power to create testimonial privileges for the legislature.[95] It went on to note that the argument that "perhaps some sort of parent-child privilege should be created" was "persuasive."[96] Similarly, in Massachusetts, the state's highest court declined the opportunity to create an essential parent-child privilege, because it prudentially concluded that "the Legislature, in the first instance, is the more appropriate body to weigh relative [competing] social policies . . . which must be balanced."[97]

In other instances, parents have asserted an adverse testimonial privilege (or "Type I B" privilege) where the state demanded that they testify based on their observations or personal knowledge. For example, in *In re E.F.*,[98] the D.C. Court of Appeals declined to recognize a privilege where the mother of a delinquent had been compelled to testify about facts limited to her teenage son's age and date of birth; obviously, neither involved confidential communications from her son.[99] The testimony in this case could only be construed as adverse because it enabled the state to try the boy in adult court, not because it shed any light on his guilt or innocence. Therefore, the opinion does not directly address the issue of adverse testimony by a parent comparable to the portion of the spousal privilege discussed in *Trammel*.[100]

In *Trammel*, the Supreme Court emphasized that the district court had not permitted the defendant-appellant's wife to reveal any confidential communications.[101] Her testimony was limited to communications made in the presence of third persons and acts that she had observed. As an unindicted coconspirator with her husband and his codefendants in a heroin-smuggling enterprise, she had observed a great deal that was useful to the prosecution. The fact that no confidential communications were at issue may have been critical to the Court's decision that the defendant's rights were not violated by his wife's voluntary testimony. The *Trammel* Court did not reach the question of whether the defendant's rights would have been violated if the court had compelled the wife to testify, as parents may be compelled to do under the current law in most jurisdictions.

The few remaining reported cases in which a child and parent jointly asserted a privilege in response to a subpoena requiring the parent to testify against a child are easily distinguishable from the New York model of a privilege covering confidential communications from a minor to his or her parent or guardian.[102] The cases in which state courts have declined to find a privilege have generally involved

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[94] In *Matter of Terry W.*, 130 Cal. Rptr. 913 (Ct. App. 1976), a son's confession to his mother was the only evidence against him in a delinquency proceeding. The mother-witness in *Terry W.* did not assert the privilege; her defendant son apparently asserted the privilege in an attempt to block her testimony. *Id.* at 914 n.1.

[95] *Id.* at 914-15.

[96] *Id.* at 914; *see also* Marshall v. Anderson, 459 So. 2d 384 (Fla. Dist. Ct. App. 1984) (noting that, unlike the Federal Rules of Evidence, the Florida Evidence Code bars the courts from adopting privileges not specified by statute).

[97] *In re* Grand Jury Subpoena, 430 Mass. 590, 591 (2000).

[98] 740 A.2d 547 (D.C. 1999).

[99] *Cf.* Port v. Heard, 764 F.2d 423 (5th Cir. 1985) (holding that Texas law does not provide for a parent-child privilege in grand-jury investigation of child); *In re* Matthews, 714 F.2d 223 (2d Cir. 1983) (rejecting an asserted in-law privilege under Rule 501). Wendy Meredith Watts correctly points out that *Matthews* is "often credited mistakenly" with refusing to recognize a parent-child privilege, which was not, in fact, at issue. Watts, *supra* note 2, at 616.

[100] 445 U.S. 40 (1980).

[101] Commentators widely regard *Trammel* as narrowing an established privilege. The case held that a criminal defendant cannot block his or her spouse's voluntary testimony, but the testimony did not involve confidential communications. Rather, it limited the much broader adverse spousal testimony rule.

[102] For example, the Supreme Court of Rhode Island declined to recognize a parent-child privilege where counsel for a teenage girl charged with stabbing another girl to death filed a motion in limine to allow the mother to testify on behalf of her daughter without being subjected to cross-examination. *In re* Frances J., 456 A.2d 1174, 1177 (R.I. 1983). The court reasonably concluded that the defense posture sought not only to craft a new privilege but also to use it "as both a shield and a sword." *Id.*

what I have labeled "Type III" claims involving middle-aged "children" who were not seeking parental guidance[103] or who were alleged coconspirators in criminal activity.[104]

Four states have created a parent-child testimonial privilege by statute; in each instance the privilege is not applicable where the offense at issue was committed against the child or against another family member. Idaho and Minnesota provide an essential parent-child privilege of the sort defined by "Type I A." The Idaho statute provides that parents may not be "forced to disclose" confidential communications from a minor that relate to civil or criminal proceedings to which the minor is a party, with exceptions for proceedings involving alleged crimes committed against the child by the parent, crimes committed against the parent by the child, or civil actions in which the child and parent are adverse parties.[105] In Minnesota, neither a parent nor a parent's minor child may be forced to testify about "any communication made in confidence by the minor to the minor's parent," with exceptions for matters involving intrafamily disputes, violence, or child abuse.[106] Connecticut and Massachusetts have adopted broader statutes that recognize a less targeted privilege. In Connecticut, the parent of a minor who is an accused in a juvenile court matter "may elect or refuse to testify for or against the accused child" regardless of whether the source of the parent's knowledge is a confidential communication or personal observation, again with the exception that the parent must testify if he or she is the victim of violence allegedly inflicted by the child.[107] Massachusetts takes a completely different approach, protecting only minor children from testifying against their parents in the criminal justice system, unless the charge involves intrafamily violence.[108]

The privilege exceptions in all of these statutes build upon the common law and statutory contours of the spousal privilege.[109] The marital communications privilege has generally been held inapplicable in matters that involve crimes committed by one spouse against the other or against the child of either spouse. According to Judge Learned Hand, "a wife from the earliest times was competent to testify against her husband, when the crime was an offence against her person."[110] In cases where the victims of violence are family members, frequently the only witnesses, if any, are members of the household; in such instances, the need for evidence from family members weighs heavily, even against the established spousal privilege.[111]

C. IS THERE A DE FACTO PRIVILEGE?

As the discussion in the previous section demonstrates, almost none of the reported cases involve testimony based on a minor's confidential communications to a parent. There are a number of explanations for the lack of reported cases, ranging from the scarcity of published cases about matters

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[103] *E.g.*, *In re* Erato, 2 F.3d 11 (2d Cir. 1993) (involving fifty-two-year-old son living in foreign country whose subpoenaed mother apparently profited from his crimes); *In re* Grand Jury Proceedings (Greenberg), 11 Fed. R. Evid. Serv. West 579 (D. Conn. 1982) (finding no parent-child privilege where mother would testify in manner that would incriminate her fugitive adult daughter, the target of grand jury investigation into importation and distribution of illegal drugs).

[104] The claim of privilege may run in either direction in these cases, falling into "Type III" or "Type IV" or both.

[105] IDAHO CODE § 9-203(7) (Michie 2002).

[106] MINN. STAT. ANN. § 595.02(j) (West 2002).

[107] CONN. GEN. STAT. ANN. §§ 46b-138a (West 2002).

[108] Massachusetts law provides 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 subject of the inquiry involves domestic violence or child abuse. MASS. GEN. LAWS ANN. ch. 233, § 20 (West 2003).

[109] *See* 8 WIGMORE, *supra* note 51, § 2338 (noting that under common law, exceptions to the spousal privilege were commonly found "in cases involving the commission of an injury by one spouse upon the other").

[110] United States v. Walker, 176 F.2d 564, 568 (2d Cir. 1949).

[111] This legal posture does not necessarily overcome the reluctance of family members to testify against each other. In a Maine case, a fifteen-year-old girl refused to testify against her father (who was charged with sexually assaulting her) because she had "forgiven him," and was consequently sent to adult prison for contempt. State v. DeLong, 456 A.2d 877 (Me. 1983) (upholding conviction for contempt of court). In a New Jersey case, two minors and their grandfather unsuccessfully attempted to quash a subpoena when the minors were required to testify against their father in a grand-jury investigation into the murder of their mother. Matter of Gail B., 525 A.2d 337 (N.J. Super. Ct. App. Div. 1987).

involving minors to the apparent reluctance of prosecutors to compel unwilling parents to testify and the fear that parents will not testify truthfully in any event.

The state courts that hear most of the cases involving minors do not, as a rule, publish their opinions. The matters in which a parent is most likely to have relevant information about his or her minor child are primarily heard in juvenile or family courts, which are governed by stringent confidentiality rules that generally preclude publication of trial-court opinions.[112] Family courts adjudicate a wide range of matters affecting minors, from juvenile delinquency—where compelled testimony is most likely to be at issue—to child support and custody, where the child's confidences are less likely to be the subject matter of litigation. Therefore, as a matter of logic, reported cases involving compelled testimony by a parent are not likely to involve minors as parties.

Moreover, prosecutors appear reluctant to compel the parents of minors to testify against their children, creating a de facto privilege.[113] I write "appear" because the cases are largely silent on this issue. Lacking precise data, some observers conclude that prosecutors and judges prudentially decline to force parents to testify in the overwhelming majority of cases.[114] That is probably true. To paraphrase the Supreme Court's observation about the dearth of cases discussing compelled testimony by attorneys about clients: if parents "were required as a matter of practice to testify . . . cases discussing that practice would surely exist."[115] As one federal judge in the State of Washington observed:

> [t]he paucity of authority on this topic may reflect a deep-seated respect for the family on the part of state and federal prosecutors. It may also be . . . in reality, a reflection of the common law in action, whereby prosecutors assume that such testimony would be subject to some sort of parent-child privilege.[116]

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[112] Recently, two states—Florida and New York—have allowed the public access to family-court proceedings, subject to judicial discretion, with a presumption of openness. FLA. STAT. ANN. § 39.507(2) (West 2002); N.Y. COMP. CODES R. & REGS. tit. 22, § 205.4 (2002); *see also Symposium: Panel III: Secrecy and the Juvenile Justice System,* 9 J.L. & POL'Y 135, 135 n.4 (2000) (remarks of Nicholas Scopetta) (stating that California is considering a law that would open juvenile dependency hearings "unless the child's interest would be harmed"). However, records, including transcripts of hearings and documents introduced in evidence, remain presumptively confidential. *See Symposium: Panel III: Secrecy and the Juvenile Justice System,* 9 J.L. & POL'Y 125, 131 (2000) (remarks of Eve B. Burton) (noting that the New York rule allowing public access to family-court proceedings "is silent" regarding access to documents); *see also* Jennifer L. Rosato, *The Future of Access to the Family Court: Beyond Naming and Blaming*, 9 J.L. & POL'Y 149, 158 (2000) (noting that, in New York, the governing "patchwork of statutes and rules . . . seems to embody a presumption of confidentiality" regarding access to family-court documents). In addition, some states, such as Massachusetts, allow the press access to hearings about the involvement of minors in serious crimes. For a general discussion of the law governing press access to juvenile court, see Emily Bazelon, Note, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155 (1999).

[113] *See In re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. 1487, 1491 (E.D. Wash. 1996) (observing that "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"). In one recent case, however, parents of two teenagers charged with stabbing two college professors to death agreed to cooperate with investigators as part of a deal that enabled them to "avoid having to testify before a grand jury." *Police Talk to Dartmouth Suspects' Parents*, N.Y. TIMES, Mar. 18, 2001, at A-28. Similarly, when discussing and declining to create a special testimonial privilege for reporters, the Supreme Court observed that a "reporter may never be called and if he objects to testifying the prosecution may not insist." Branzburg v. Hayes, 408 U.S. 665, 694 (1972).

[114] *See* Kris Axtman, *Do Parents Belong on the Witness Stand?*, CHRISTIAN SCI. MONITOR, Feb. 17, 2000, at 1 (quoting Michigan prosecutor Gary Walker, cochairman of the juvenile-justice advisory committee of the National District Attorneys Association, who estimated that parents are subpoenaed in ten percent of juvenile cases); Lance Gay, *Mom's Testimony Raises Questions of Legal Ethics*, CHI. SUN-TIMES, Feb. 15, 1998, at 31 (quoting Lawrence Goldman of the National Association of Criminal Defense Lawyers, who stated that subpoenas of parents are "rare"); Sacha Pfeiffer, *Case Sparks Bill on Parent-Child Confidentiality: Measure Would Protect Families*, BOSTON GLOBE, Feb. 6, 2000, at B1 (quoting Harvard Law Professor Martha Minow's remarks that prosecutors are "reluctant" to subpoena parents for "fear of alienating" their communities and because they fear perjurious testimony).

[115] United States v. Swidler & Berlin, 524 U.S. 399, 410 n.4 (1998).

[116] *In re Grand Jury Proceedings, Unemancipated Minor Child*, 949 F. Supp. at 1491 (noting in dicta that a federal parent-child privilege is warranted, but declining to apply it where a seventeen-year-old was subpoenaed to testify against his father and where both the child and his mother were also targets of the grand-jury investigation).

Indeed, the U.S. Attorneys' Manual instructs federal prosecutors to "consider whether the witness is a close family relative of the person against whom testimony is sought," and explains that the Justice Department "will ordinarily avoid seeking to compel the testimony of a witness who is a close family relative [including a parent, child, grandparent, grandchild, or sibling] of the defendant" or who is the subject of a grand jury-proceeding.[117] Gerard Lynch, a U.S. District Court judge who was formerly a federal prosecutor, says that he never allowed any Assistant U.S. Attorney reporting to him to coerce testimony from a parent against a child, on the ground that to do so would be "disgusting."[118]

In the fraction of cases where testimony is compelled, some parents (and some children) have been jailed for contempt of court rather than testify against family members.[119] Negative reaction to the erosion of the de facto privilege as reflected in the prudential deference of prosecutors to family relationships has resulted in public outcry and demands for federal law reform.[120]

Western culture has long tolerated, and sometimes even applauded, disobedience of the law based on personal conviction even when those who disobey pay a price for such defiance. This notion has been part of Western culture at least since Sophocles depicted his complex heroine, Antigone, who buried her rebellious brother in violation of the king's edict so that her brother could enter the land of the dead, and paid for her act with her own life.[121] If modern day prosecutors in fact refrain from issuing widespread subpoenas to parents, perhaps they are tacitly acknowledging that higher values compel predictable individual defiance of the law, particularly when family relationships are involved.

More pragmatic explanations also exist for the reluctance that prosecutors and judges appear to exhibit about pressing parents to testify against their children under protest. First, the officers of the court fear that parents will offer perjured testimony.[122] For example, an attorney who chairs the Massachusetts State Senate's Criminal Justice Committee attributed her support for a parent-child privilege in part to the risk of perjury. Many parents, she explained, "would not be truthful if they had to testify against their kids . . . . I know I would never go against the confidences of my children."[123] Where society comprehends that the average citizen would likely commit perjury rather than jeopardize his or her child, that perception supports development of a privilege. As one judge put it, the "obligation to tell the truth during the course of litigation is not negotiable. The oath a witness takes . . . must have meaning."[124] The societal commitment to truth-telling helps to explain why a criminal "defendant has the right not to respond by invoking the Fifth Amendment privilege against self-incrimination, but not the right to lie."[125]

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[117] U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-23.211 (1997).

[118] Conversation with the Honorable Gerard Lynch, U.S. District Judge, Southern District of New York, at Association of American Law Schools Conference on Evidence in Alexandria, Va. (June 3, 2002). Judge Lynch was referring to the period during which he served as Chief of the Criminal Division in the Office of the U.S. Attorney for the Southern District of New York.

[119] Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910, 910 n.4 (1987) (citing Port v. Heard, 746 F.2d 423 (5th Cir. 1985), in which a father and a mother spent two and four-and-a-half months in jail, respectively, and State v. DeLong, 456 A.2d 877 (Me. 1983), in which a teenager was jailed for seven days for refusing to testify against her father). In other instances, parents may have complied with the subpoena, or decided not to appeal, in which case no record of the trial court's decision would exist.

[120] *See* Shonah P. Jefferson, Note, *The Statutory Development of the Parent-Child Privilege: Congress Responds to Kenneth Starr's Tactics*, 16 GA. ST. U. L. REV. 429 (1999); Ricafort, *supra* note 1, at 291.

[121] SOPHOCLES, ANTIGONE (Richard Emil Braun trans., Oxford Univ. Press reprint ed., 1998).

[122] *See In re* Grand Jury Subpoena, 722 N.E.2d 450 (Mass. 2000) (granting a stay regarding compelling testimony about confidential communications until the end of the legislative session). Publicity about this case led to a legislative effort to create a parent-child privilege. *See* Axtman, *supra* note 114; Margaret Graham Tebo, *Parent Privilege: Lawmakers Seek to Protect Parent-Child Conversation*, A.B.A. J., July 2000, at 18.

[123] Axtman, *supra* note 114 (quoting Massachusetts State Senator Cynthia Stone Creem). Similarly, the Illinois Supreme Court has expressed concern about the risk that, absent a privilege, a parent might perjure herself or risk a jail sentence. People v. Sanders, 457 N.E.2d 1241, 1246 (Ill. 1983).

[124] Hon. Marian Blank Horn, *Essay: A Trial Judge's Perspective—Promoting Justice and Fairness While Protecting Privilege*, 26 FORDHAM URB. L.J. 1429, 1437 (1999).

[125] *Id.* at 1437.

Some observers estimate that prosecutors attempt to force parents to provide information in about ten percent of serious juvenile cases.[126] These situations, one prosecutor speculates, become "the seventh ring of hell" for the parents.[127] To the extent that a parent currently relies purely on prosecutorial discretion to avoid being compelled to testify against a child, the fact that the issue rarely appears to come to a head in the courts is not a substitute for a sound legal doctrine.[128]

The situation periodically does come to a head. Judges may be reluctant to hold in contempt parents who will not testify against their children, but they occasionally do so, and even incarcerate them.[129] In a widely noted Massachusetts case, the parents of two minors charged with raping another minor failed in challenging a subpoena that required them to testify against their children at a grand jury proceeding.[130] The threat of a subpoena to compel testimony may be an effective stick for obtaining "voluntary" cooperation in law enforcement investigations.[131] But the subpoena and the threat of a citation for contempt are not the only means at the state's disposal. More subtle government pressures can violate expectations of privacy in communications between parents and children, just as they can interfere with protected confidences between spouses, or between attorneys and their clients.[132] Because of the risks inherent in a system that depends on prosecutorial discretion, juvenile defenders "instruct kids to refuse to talk about their cases with their mothers and fathers . . . ." Parents are also cautioned against participating "in any discussions between lawyer and child, even when decisions are made that will profoundly affect a child's future."[133]

II. CONSTITUTIONALLY GROUNDED ARGUMENTS IN SUPPORT OF A PARENT-CHILD PRIVILEGE

Open communication between children and their parents is central to our understanding of family relationships. The preceding Part, like most of the literature to date, grounded its discussion of a parent-child privilege in a combination of moral sensibility and pragmatism. This Part argues that an *essential* parent-child privilege is the key to the meaningful exercise of a minor's constitutional rights under the Fifth and Sixth Amendments. In addition to being ancillary to constitutional rights, protection of the underlying confidential communication between children in need of advice and their parents is analogous to other confidential relationships that are today the subject of recognized testimonial privileges, such as those with doctors, psychotherapists and lawyers.

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[126] Axtman, *supra* note 114.

[127] *Id.*

[128] The risk of unregulated prosecutorial discretion is becoming a major focus of scholarship on criminal law and procedure. Robert Weisberg, *Foreword: A New Agenda for Criminal Procedure*, 2 BUFF. CRIM. L. REV. 367, 368 (1999).

[129] *See In re* Grand Jury (Doe), 103 F.3d 1140, 1164 (3d Cir. 1997) (Mansmann, J., dissenting) (noting that a parent who refuses to testify risks "a citation for contempt of court"). For example, in Vermont, the parents of a twenty-five-year-old rape suspect who lived at home and worked for his father spent forty-one days in jail after refusing to testify against their son at an investigative proceeding. Barry Siegel, *Choosing Between Their Son and the Law; A Vermont Rape Suspect's Parents Went to Jail Rather Than Testify Against Him*, L.A. TIMES, June 13, 1996, at A1. In Texas, a father and a mother spent two and four-and-a-half months in jail, respectively, for refusing to testify against their son in front of a grand jury. Port v. Heard, 764 F.2d 423 (5th Cir. 1985). In Maine, a teenager was jailed for seven days for refusing to testify against her father, who was accused of sexually molesting her. Also in Maine, a fifteen-year-old victim of sexual abuse was jailed for up to six months for refusing to testify against her father. State v. DeLong, 456 A.2d 877 (Me. 1983).

[130] Three Juveniles v. Commonwealth, 455 N.E.2d 1203 (Mass. 1983).

[131] This observation is related to the observation that even though the attorney-client privilege bars the government from compelling the attorney's testimony in most instances, a number of "prosecutorial practices" potentially "interfere with the protected relationship between counsel and client" even though the practices appear to be legal, "implicat[ing] Sixth Amendment concerns." William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 831-32 (1988).

[132] *See* Hawkins v. United States, 358 U.S. 74, 83 (1958) (Stewart, J., concurring) ("[T]here [will] often be ways to compel such testimony more subtle than the simple issuance of a subpoena, but just as cogent.").

[133] EDWARD HUMES, NO MATTER HOW LOUD I SHOUT: A YEAR IN THE LIFE OF JUVENILE COURT 211 (1996).

A. THE CONSTITUTIONAL DIMENSION OF THE RELATIONSHIP BETWEEN PARENTS AND CHILDREN: A FUNDAMENTAL LIBERTY

Most people find misuse of familial confidences simply unacceptable. Commentators have described the "natural repugnancy" such behavior provokes.[134] Irving Younger compared the case of a Nevada sixteen-year-old ordered to testify against her mother to "the horrors of Nazi Germany."[135] "It seems to me," Younger continued, "common decency that you don't put a child before a grand jury on her mother's conduct."[136] This is the basis on which Professor Charles Black urged Congress to strengthen privilege stemming "from the intrinsically private nature of the relation, and the reciprocal indecency of invading the privacy."[137]

A parent's relationship with a minor child occupies a special place in our constitutional scheme.[138] In *Trammel*, the Supreme Court accorded great weight to the policies adopted by the states regarding the spousal privilege in part because "the laws of marriage and domestic relations are concerns traditionally relegated to the states."[139] While the specific laws governing the relationship between parents and children in such areas as adoption, child custody, visitation, and child abuse are relegated to the states,[140] the Supreme Court has long held that the parent-child relationship implicates a constitutionally protected substantive due process interest.[141]

In 2000, a plurality of the Supreme Court reiterated in *Troxel* v. *Granville* that the "liberty 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."[142] Justice O'Connor's plurality opinion emphasized the

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[134] Watts, *supra* note 2, at 611-13; *see also* 25 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5572 (1989) (noting that compelled testimony of family members shocks the conscience); Anna Quinlan, *No Privilege for Parents*, NEWSWEEK, Jan. 17, 2000, at 74 (discussing parental outrage at the subpoena issued to Monica Lewinsky's mother).

[135] Watts, *supra* note 2, at 583 n.1 (quoting Younger's statement in a 1981 newspaper article).

[136] *Id.*

[137] *Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Fed. Criminal Laws of the House Comm. on the Judiciary*, 93d Cong. 232 (1973) (letter of Professor Charles L. Black, Jr.).

[138] A number of commentators who support development of a parent-child privilege have noted that the general contours of the constitutional "zone of privacy" applied to marital relationships may also bar state intrusion into the family in the form of compelled testimony. *See* Bruce N. Lemons, *From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?*, 1978 BYU L. REV. 1002 (1978); Raymond F. Miller, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 CONN. L. REV. 771 (1999); Marianne E. Scott, *Parent-Child Testimonial Privilege: Preserving and Protecting the Fundamental Right to Family Privacy*, 52 U. CIN. L. REV. 901 (1983); Susan Levine, Comment, *The Parent-Child Privilege: A Proposal*, 47 FORDHAM L. REV. 771 (1979). Only a few have paid even scant attention to the more focused constitutional protections accorded to the parent's role in the care and custody of children discussed here. *See* Scott, *supra*, at 918; Levine, *supra*, at 1016.

[139] 445 U.S. 40, 50 (1980).

[140] In other contexts, the Court has recognized a constitutional dimension to the privacy interests inherent in marriage. Griswold v. Connecticut, 381 U.S. 479 (1965).

[141] *See* Troxel v. Granville, 539 U.S. 57 (2000) (visitation rights); Wisconsin v. Yoder, 406 U.S. 205 (1972) (home-schooling rights); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (educational choices); Meyer v. Nebraska, 262 U.S. 390 (1923) (same). The exact source of this liberty interest is unclear from the Supreme Court's opinions. Equally important, two Justices used *Troxel* as the occasion for questioning the underlying premises of the substantive due process line of cases as applied to the family. Justice Scalia stated outright that "the theory of unenumerated parental rights . . . has small claim to stare decisis protection." *Troxel*, 539 U.S. at 92 (Scalia, J., dissenting). Justice Thomas was only slightly more subtle, noting that neither party in *Troxel* had briefed the issue of whether the "substantive due process cases were wrongly decided," and that he understood the plurality had also reserved resolution of that question "for another day." *Id.* at 80 (Thomas, J., concurring). So too must I reserve for another time the myriad questions surrounding the constitutional bases for protecting family privacy generally and the parent-child relationship in particular.

[142] 530 U.S. 57, 65 (2000) (plurality opinion of O'Connor, J.) (holding that a "breathtakingly broad" third party visitation statute will not stand as applied to the grandparent visitation ordered by the trial court in this case). Six opinions were issued in *Troxel*, but seven Justices agreed on this point. *See id.* at 77 (Souter, J., concurring) ("We have long recognized that a parent's interest in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment."); *id.* at 80 (Thomas, J., concurring) ("[T]his Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case."); *id.* at 86-87 (Stevens, J., dissenting) ("[T]he right of a parent to

Court's repeated confirmation of the "constitutional dimension of the right of parents to direct the upbringing of their children."[143]

The Supreme Court has never "set out exact metes and bounds to the protected interest of a parent in the relationship with his [or her] child."[144] And the holdings in many of the cases relied on for the proposition that parental rights lie at the heart of fundamental liberties have, in fact, constrained parental liberty in the interest of the State's parens patriae actions.[145] As I have argued elsewhere, the "foundation cases reveal that the ideal of parental control does not erect an impermeable shield against competing claims."[146] The competing claims that have justified state intervention into the family are easily distinguishable, however, from the kind of communications at issue here.

The first group of claims upheld by courts involves state efforts to protect the health and development of the child where a parent is failing to protect the child from harm.[147] In *Troxel*, the Supreme Court neglected to answer the second of two questions on which it had expressly granted certiorari: whether "a parent's fundamental right to autonomy in child-rearing decisions is unassailable [to the extent that] the state's parens patriae power to act in a child's welfare may not be invoked absent a finding of harm to the child or parental unfitness."[148] Unless the state could succeed in arguing that a parent whose child became the subject of a judicial proceeding was prima facie unfit, this line of cases would not generate discernable limits to the parental authority under which parents might claim a testimonial privilege to protect their children's confidences.

A second group of concerns that may diminish asserted parental authority involves questions about whether the parental rights asserted by an adult properly belong to that individual, because he or she lacks either biological or relational ties to the child that embody the notion of family.[149] A court applying a parent-child privilege could certainly inquire into whether the "parent" filled the role contemplated by the privilege, but for purposes of this discussion I presume that most claimants to the privilege would meet the Court's definition.[150] Assuming that the biological or custodial tie asserted satisfied the judge presiding at the hearing, a claim of a parent-child relationship receives considerable support in this context from the fact that the child chose to confide in that particular adult.[151] For purposes of this discussion, I assume that whatever the exact parameters of parental autonomy rights, those rights apply fully where a parent-child privilege is asserted successfully.

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maintain a relationship with his or her child is among the interests included most often in the constellation of liberties protected throughout the Fourteenth Amendment.").

[143] *Id.* at 65.

[144] *Id.* at 78 (Souter, J., concurring).

[145] *See* Ross, *From Vulnerability to Voice, supra* note 7, at 1586.

[146] *Id.*

[147] The Supreme Court's jurisprudence in this area emphasizes a "traditional presumption that a fit parent will act in the best interest of his or her child." *Troxel*, 530 U.S. at 69. Justice Kennedy's dissent in *Troxel* stated that "the law's traditional presumption has been 'that natural bonds of affection lead parents to act in the best interests of their children.'" *Id.* at 97-98 (Kennedy, J., dissenting) (citations omitted).

[148] David D. Meyer, Lochner *Redeemed: Family Privacy After* Troxel *and* Carhart, 48 UCLA L. REV. 1125, 1147 n.113 (2001) (quoting petitioner's brief).

[149] *See Troxel*, 530 U.S. at 85 (Stevens, J., dissenting) (noting that, under the *Troxel* statute, "there are plainly any number of cases—indeed, one suspects, the most common to arise—in which the 'person' among 'any' seeking visitation is a once-custodial caregiver, an intimate relation, or even a genetic parent"); Michael H. v. Gerald D., 491 U.S. 110, 123 (1989) (rejecting contention that "a liberty interest is created by biological fatherhood plus an established parental relationship"); Lehr v. Robertson, 463 U.S. 248 (1983) (finding unregistered putative biological foster father is not entitled to procedural due process rights prior to adoption of the child by her stepfather); Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 842-47 (1977) (finding no substantive due process right to "familial privacy" for foster parents).

[150] See discussion *infra* Part II.A.

[151] This argument does not stretch to reach adult mentors who have no cognizable claim to be a child's functional parent such as school teachers, Scout leaders or the hypothetical accordion player who fascinated the Justices during oral arguments in *Troxel*. Troxel v. Granville, No. 99-138, 2000 U.S. TRANS LEXIS 19, at *15 (U.S. Jan. 12, 2000).

Scholars have proposed a number of models for explaining the constitutional and common law deference to parental authority,[152] ranging from the notion of children as the parents' property,[153] to the notion of parents as their children's fiduciaries,[154] to the notion that children's developmental needs require a generative response from adults.[155] Each model offers different explanations of the sources and range of parental authority over, and responsibility for, developing minors, but they are united by the view that children require nurturing, instruction, and adult guidance. Each supports the argument that parents can best fulfill their obligations to their minor children when they can receive confidences without fear of being forced to cooperate with state authorities against what the parents believe to be the best interests of their child and their family.

In *Moore v. City of East Cleveland*, the Supreme Court explained 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."[156] A handful of lower courts have found that the constitutionally protected liberty interest in the parent-child relationship bears directly on the question of privilege, and serves sound social policy.[157] One lower court that found a parent-child privilege based on constitutional arguments drew on the expert testimony before it to emphasize that

> [b]ecause parental influence is probably the most important factor in a child's development, society has a vital interest in fostering this . . . relationship . . . [an] optimal child-parent relationship cannot exist without a great deal of communications between the two. Such a relationship would be characterized by a free flow of highly personal information from child to parent . . . .[158]

Similarly, a New York court that found a parent-child privilege emphasized that 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."[159] These considerations, combined with the Supreme Court's pronouncements on the family relationship, convinced the court that "the communications made by a minor child to his parents within the context of the family relationship may, under some circumstances, lie within the 'private realm of family life which the state cannot enter.'"[160]

In contrast to the ideal image of family life that permeates some of the opinions issued by courts, many of the youths who appear in court because of allegations of delinquent or incorrigible behavior are not accompanied by any adult other than a court-appointed attorney.[161] Some opponents of developing a common law parent-child privilege might conclude that the absence of involved adults in the lives of so many young people in trouble undermines the rationale for the privilege: if the young people likely to end up in court have no parent figure who is concerned about them, they have no parent in whom to

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[152] For an analysis of the range of views, see Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683 (2001).

[153] *See* Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

[154] *See* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

[155] *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

[156] 431 U.S. 494, 503-504 (1977), *cited in In re* Grand Jury Proceedings (Agosto), 553 F. Supp. 1298, 1303 (D. Nev. 1983); *In re* A & M, 403 N.Y.S.2d 375, 379 (App. Div. 1978).

[157] *In re Grand Jury Proceedings (Agosto)*, 553 F. Supp. 1298; *In re A & M*, 403 N.Y.S.2d at 375; *see also In re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. 1487, 1489 (E.D. Wash. 1996) (finding that *Agosto* and cases from New York state "provide persuasive authority" that a constitutional basis for a parent-child privilege exists, but finding insufficient facts to support one in the case at hand).

[158] *In re Grand Jury Proceedings (Agosto)*, 553 F. Supp. at 1303. (noting the similarity between the parent-child, marital and psychotherapeutic relationships and finding the privilege covers the child's testimony against her father).

[159] *In re A & M*, 403 N.Y.S.2d at 380 (citing developmental psychologists).

[160] *Id.* at 435 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

[161] HUMES, *supra* note 133, at 112 ("I'll be representing you today . . . . You are George, aren't you?").

confide. But it seems to me that the argument running the other way is even stronger: a young person's chances of staying out of trouble appear to be highly correlated to having an adult to lean on.

B. PARENT-CHILD CONFIDENCES ARE ESSENTIAL TO THE MEANINGFUL EXERCISE OF ESTABLISHED PRIVILEGES

The law recognizes the importance of certain relationships to higher societal values by protecting the confidences integral to those relationships from compelled testimony. Some of these protections, such as the patient-psychotherapist privilege, have no constitutional dimension, but are seen as serving "the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem."[162] At least one commentator has observed that society has a significant interest in encouraging minors who suffer from emotional problems to consult their parents and others to whom they feel intimately connected.[163]

The parent's role as a conduit may be critical to the creation of relationships covered by other privileges that are related to—if not rooted in—constitutional liberties: the spousal privilege originated in the common law and predated the Constitution, but can be viewed as serving fundamental liberties in the area of marital privacy;[164] the congregant-clergy privilege (commonly known as the priest-penitent privilege)[165] arguably implicates the Free Exercise Clause;[166] and the attorney-client privilege, which also predated the Constitution, promotes the purposes of the Sixth Amendment right to counsel.[167] In many instances, parents are a necessary conduit between a minor and the advice of another adult whose role involves a recognized testimonial privilege. A minor will normally find it easier to obtain the services of a psychotherapist or doctor[168] after consultation with a parent, who can help the minor to locate a

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[162] Jaffee v. Redmond, 518 U.S. 1, 11 (1996).

[163] Quinlan, *supra* note 134.

[164] *See* IMWINKELRIED, *supra* note 54, § 6.2.1(b) (discussing the claim that the spousal privilege has a "constitutional underpinning"). Unemancipated minors by definition do not have relationships that give rise to a marital privilege. If married, they would prima facie be emancipated.

[165] By 1963, forty-four states had enacted statutes providing for what is commonly known as a priest-penitent privilege. Robert L. Stoyles, *The Priest-Penitent Privilege*, 29 U. PITT. L. REV. 27, 33 (1969). In its 1967-68 term, the Supreme Court forwarded a proposed Federal Rule of Evidence 506 creating a priest-penitent privilege to Congress, which declined to adopt specific privileges and substituted Rule 501. By 2000, all fifty states and the District of Columbia had enacted some form of congregant-clergy privilege. Lennard K. Whittaker, *The Priest-Penitent Privilege: Its Constitutionality and Doctrine*, 13 REGENT U. L. REV. 145, 149 (2000).

[166] The first published case in the United States on the issue used the New York Constitution's Free Exercise Clause to protect priest-penitent communications. People v. Phillips (N.Y. Ct. of Gen. Sess. 1813), *reprinted in Privileged Communications to Clergymen*, 1 CATH. LAW. 199 (1955); *see also* Whittaker, *supra* note 165, at 147. The Supreme Court held that the religion clauses of the First Amendment to the U.S. Constitution applied to the states by incorporation in *Engel v. Vitale*, 370 U.S. 421 (1962). The Supreme Court has never ruled on any issue related to the priest-penitent privilege, but it has noted the existence of the privilege with apparent approval. *See* United States v. Nixon, 418 U.S. 683, 709-10 (1974). Commentators have noted that the lack of a priest-penitent privilege could raise free-exercise questions regarding the religious observance of both the congregant and the clergyman, who could be subjected to severe sectarian consequences if he testified. Whittaker, *supra* note 165, at 147. They have also noted that Establishment Clause questions may arise, depending on whether the "religious individual is merely accommodated" or whether the court deems the statute to endorse the religious practice. *Id.* at 158. Stoyles, *supra* note 165, suggests that the Establishment Clause might make the privilege unconstitutional because it may be seen as serving a sectarian purpose.

[167] United States v. Melvin, 650 F.2d 641, 645 (5th Cir. 1981) (holding that a communication protected by the attorney-client privilege "is protected from government intrusion under the Sixth Amendment if it is intended to remain confidential and was made under such circumstances that it was reasonably expected and understood to be confidential"); *see also* Weatherford v. Bursey, 429 U.S. 545, 563 (1976) (Marshall, J., dissenting from denial of certiorari) ("[T]he essence of the Sixth Amendment right is . . . privacy of communication with counsel.") (quoting United States v. Rosner, 485 F. Supp. 1213, 1224 (2d Cir. 1973)).

[168] Although there is no common law doctor-patient privilege, a majority of states have created a qualified doctor-patient privilege, beginning with New York in 1828. WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 12, §§ 2380-2391. Congress declined to adopt any of the specific evidentiary privileges recommended by the Advisory Committee and the Supreme Court, including Supreme Court Standard 501, which would have created a doctor-patient privilege. The Supreme Court has continued to refer to the doctor-patient relationship as one that qualifies for a recognized testimonial privilege. *See* Jaffee v. Redmond, 518 U.S. 1, 10 (1996); Trammel v. United States, 445 U.S. 40, 45 (1980).

qualified professional and find the resources or insurance to pay for services.[169] A parent may play an influential role in convincing a troubled youngster to seek psychotherapy, or even to consult a member of the clergy,[170] although a minor can do either without parental assistance.

There is no precedent for applying even a very limited testimonial privilege to conversations with an intimate, though not legally recognized, confidante where the conversation subsequently leads one of the participants to seek the counsel of an advisor to whom a testimonial privilege applies. In light of the constitutional umbrella that hovers over the parental role in providing guidance to children, however, parental consultations that lead to creation of a privileged relationship with a psychotherapist, clergy-person, or attorney arguably occupy a preferred status that should be protected by the privilege. This notion is particularly persuasive when it comes to a minor's relationship with an attorney, as explored in the next section.

C. PARENT-CHILD CONFIDENCES ARE ESSENTIAL FOR THE MEANINGFUL EXERCISE OF A MINOR'S CONSTITUTIONAL RIGHTS

Under *In re Gault*[171] and its progeny, minors, like adults, have the right to counsel, the right not to incriminate themselves, and the right to be silent in the face of interrogation.[172] Adult advice and mediation may be the most effective means of preserving these rights or guaranteeing that any waiver of these rights is truly informed and intelligent.[173] The more fully informed a parent is about the circumstances of the child's involvement in the activities that landed his or her child in court, the more the parent of normal competence is enabled to help a child exercise constitutional rights and plan a legal strategy in a meaningful way.[174]

A number of courts have indicated that a parent is the natural conduit through which a minor can retain private counsel or ask the court to appoint an attorney.[175] The Massachusetts Supreme Judicial Court has held that a parent "practically speaking, [is] the only avenue through which [a fifteen-year-old] could effectively evaluate and, if he wished, exercise the right to counsel."[176] Courts in Alabama have also noted that "the parent or guardian may be the conduit through which the juvenile secures an attorney."[177]

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[169] I have argued elsewhere that where family communication has broken down, minors should be able to consult such professionals independently of their parents. *See* Ross, *An Emerging Right, supra* note 7, at 252, 254-57; Ross, *From Vulnerability to Voice, supra* note 7.

[170] According to some authorities, "more than forty percent of Americans who seek counseling initially consult a member of the clergy." Whittaker, *supra* note 165, at 167 (citing Lori L. Brocker, Note, *Sacred Secrets: A Call for Expansive Application and Interpretation of the Clergy-Communicant Privilege*, 36 N.Y.L. SCH. L. REV. 455, 485 (1991)). We can speculate that in at least some of those consultations, a parent or other intimate urged the troubled individual to consult a member of the clergy.

[171] 387 U.S. 1 (1967).

[172] *Id.*

[173] *See* North Carolina v. Butler, 441 U.S. 369, 373 (1979) (holding that the question of whether an accused has waived his rights "is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case").

[174] Of course, parents, and adults in the judicial system, do not all bring equal interest, energy, education, judgment, or skill to the table. The goal here is merely to level the playing field between adults and children, not among all adults, regardless of their gifts, or all children, regardless of their parents' gifts. The latter goal is not within the competence of the law.

[175] The Massachusetts Supreme Judicial Court has noted that the question of whether a parent advising a juvenile about the exercise or waiver of rights could be compelled to answer questions about the content of conversations "would raise serious issues regarding the privilege against self-incrimination or the right to counsel." *In re* A Grand Jury Subpoena, 722 N.E.2d 450, 457 n.15 (Mass. 2000) (expressly reserving the question).

[176] Commonwealth v. Cain, 279 N.E.2d 706, 709-10 n.3 (Mass. 1972) (reversing conviction where the boy's father was in the police station asking to see his son during the interrogation but was not allowed to talk to his son until after the boy made an inculpatory statement).

[177] *Ex parte* Whisenant, 466 So. 2d 1006, 1012 (Ala. 1985) (Torbert, C.J., concurring in pertinent part), *cited with approval in* L.J.V. v. State, 545 So. 2d 240, 242 (Ala. Crim. App. 1989). *See generally* SAMUEL M. DAVIS, RIGHTS OF JUVENILES § 3.13 (2d ed. 1991) (discussing state and federal case law on a minor's ability to waive his or her *Miranda* rights).

I do not claim that a juvenile's right to counsel creates a textual constitutional right for that juvenile to talk to his or her parents in confidence. Instead, my argument is best regarded as an ancillary constitutional claim rather than a squarely constitutional argument. I argue that protection for the communication between a child and his or her parents, whether achieved by means of a parent-child privilege or by some other reliable legal mechanism, is necessary to achieve the express constitutional goals contained in the right to counsel, the right not to incriminate oneself, and similar rights when applied to minors. In this sense, I am arguing that, absent another means of protecting parent-child communications, a parent-child privilege is a necessary ancillary to meaningful constitutional rights for minors.[178]

If it were possible to protect parent-child communications without creating a novel privilege or relying on an "ancillary constitutional claim," it would be unnecessary to reach the arguments that follow in this Part. But, as the following discussion shows, alternative theories premised on the joint interest of parent and child or on agency prove unsuccessful.

1. Joint Interest and Agency Theories

When two or more persons consult the same attorney on a matter of joint interest, the attorney-client privilege covers the conversation, regardless of whether both parties are or become the attorney's clients.[179] If parents were always presumed to be engaged in a matter of joint interest with their child when they consult an attorney together, at least some of the communications at issue here might fall under the umbrella of the attorney-client privilege, diminishing the need for a separate privilege covering parents and children.

At least one court has indicated that if a conversation between parent and child takes place in front of an attorney retained to represent the child, the presence of the parents will not constitute a waiver of the attorney-client privilege, and neither the attorney nor the parents can be questioned about the substance of the conversation.[180] If this view were generally accepted, the normative message might seem to be that conversations between parents and children regarding legal topics should always be conducted in connection with representation by an attorney so that no independent parent-child privilege would be needed.

Under a related but alternative theory, the parent would be a necessary agent of the child's representation by counsel such that the parent's communications with the child outside the attorney's presence take place in the service of the child's communication with his or her attorney. The parent-as-agent theory relies on the principle that when an attorney's client reveals information to a third person to whom "disclosure is 'reasonably necessary for the transmission of the information or the accomplishment

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[178] A comparable concept has been proposed in the field of criminal law. Susan R. Klein has argued that as the bright line between civil and criminal cases has blurred, and as the government pursues what she calls "hybrid actions" in which the state initiates civil proceedings that lead to the imposition of severe sanctions but do not provide the special procedural protections available to defendants in criminal proceedings, the government can effectively circumvent constitutional guarantees. Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 695-98 (1999).

[179] *See, e.g.*, *In re* Auclair, 961 F.2d 65, 70-71 (5th Cir. 1992) (finding that attorney-client privilege applied to statements made in a pre-representation meeting between the attorney, the defendant, the defendant's secretary, and her husband because of their mutual interest, though the attorney did not ultimately represent all three parties); Kroha v. Lamonica, No. X02CV980160366S, 2001 WL 58205, at *5 (Conn. Super. Ct. Jan. 3, 2001) (finding a diary of medical treatment protected by attorney-client privilege even though the plaintiff had shown the diary to her husband because of their mutual interest in pursuing a medical malpractice claim for the death of their infant daughter).

[180] State v. Grossberg, No. IN96-12-0128, 1998 Del. Super. LEXIS 54 (Del. Super. Ct. Mar. 12, 1998) (declining to recognize a parent-child privilege covering confidential communications); *see also* Grubbs v. K Mart Corp., 411 N.W.2d 477 (Mich. Ct. App. 1987) (finding that communications by the parents of a nine-year-old civil plaintiff to her attorney were protected by attorney-client privilege because the parents were the child's agents). In contrast, the presence of children of sufficient age and intelligence during a conversation between spouses may be deemed a waiver of the marital-communications privilege. People v. Sanders, 457 N.E.2d 262 (Ill. 1983) (holding that the defendant's wife could be questioned about conversations that took place in front of the couple's children aged eight, ten, and thirteen).

of the purpose for which the lawyer is consulted'" such disclosure to the third party is protected by the attorney-client privilege.[181] Agency theory in the context of the attorney-client privilege is widely understood to extend to agents of the attorney such as support staff or expert witnesses.[182] It is rarely extended to the agents of the client.

Even if the agency theory corresponded to our image of a private zone of family life or with the reality of how intimate conversations emerge unexpectedly, which it does not, the notion that a parent is the child's agent for purposes of legal representation is by no means universally accepted. The few cases on point suggest that a court may scrutinize the circumstances surrounding the communication and whether or not the parent transmitted the information to an attorney.[183] In one civil suit, the Supreme Court of California held that the minor plaintiff's communications with his mother—who also served the required role of guardian ad litem under the California Code of Civil Procedure—were necessary to the child's suit for damages after he was hit by a car.[184] The court did not reach the issue of parent-child privilege and emphasized that the plaintiff conceded "that there is no parent-child privilege in this state," but considered the claim of the mother as a guardian with "sweeping powers" in the conduct of the case.[185] "Whether the guardian obtains such knowledge by his presence at consultations between the attorney and the minor or by securing the information from the minor for transmission to the attorney is of no consequence," the court concluded.[186] This ruling appears to be unique. The role of guardian ad litem, whether performed by a parent or a stranger, does not guarantee that the attorney-client privilege will provide an umbrella for communications with the minor. According to one federal court, the few cases that address the issue reach different conclusions depending on "what role the guardian played," but in no event does the attorney-client privilege appear to attach to a guardian who is not an attorney.[187]

Since the joint-interest and agency theories appear unlikely to protect parent-child communications under existing doctrine, it is necessary to consider the constitutional implications of denying parent and child the freedom to communicate without fear in the context of the child's right to counsel. Although the right to counsel and similar protections only come into play when a minor is accused of behavior that could result in confinement, I argue that the privilege that is necessary should apply in the context of any litigation. In order for a privilege to be predictable enough for people to rely on it, it must apply in all circumstances. Indeed, if a parent could be forced to testify about a confidential communication from a child in civil litigation, that testimony would constitute a waiver if the same conversation were ever the subject of an inquiry into delinquency or criminal behavior. One additional concern may be anticipated: why should we recognize a novel privilege that may offer protection to teenage miscreants? This is a

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[181] De Los Santos v. Superior Court, 613 P.2d 233, 235 (Cal. 1980) (applying CAL. EVID. CODE § 952); *see also* Gerheiser v. Stephens, 712 So. 2d 1252, 1254 (Fla. 1998) (applying FLA. STAT. § 90.502(1) (1995) to communications transmitted by an adult criminal defendant through his mother to an attorney, but holding that an affidavit she executed after his death in support of the attorney's conflict of interest claim constituted a waiver).

[182] City of San Francisco v. Superior Court, 231 P.2d 26 (Cal. 1951) (en banc) (holding that even where there is no treatment relationship between physician and defendant, consultation may be covered by the attorney-client privilege where the examination took place to help the patient's attorneys prepare for litigation); State v. Kociolek, 129 A.2d 417 (N.J. 1957) (holding that a psychiatrist engaged by defense counsel is covered by the attorney-client privilege); *see also* Grosslight v. Superior Court, 140 Cal. Rptr. 278 (Ct. App. 1977) (holding that parents' statements to their daughter's psychotherapist were covered by the patient-therapist privilege); Naum v. State, 631 P.2d 785 (Okla. Crim. App. 1981) (rejecting the argument that a minister transmitting a message on behalf of a communicant became his representative for purposes of attorney-client communication, and finding the clergyman-communicant privilege waived).

[183] *De Los Santos*, 613 P.2d at 233.

[184] *Id.*

[185] *Id.* at 237.

[186] *Id. But see* Foldemesi v. Schepperly, No. 96-9026, 1990 WL 115607, at *1 n.1 (S.D.N.Y. Aug. 10, 1990) (Wood, J.) (failing to reach the issue of attorney-client privilege but noting that "it is most likely that no privilege attached" to the conversations between parents claiming to be "guardians in fact" and their son's attorney in the absence of their appointment as guardians ad litem by the criminal court).

[187] Sharonda B. v. Herrick, No. 97 C 1225, 1998 WL 547306, at *4, *6, *10 (N.D. Ill. Aug. 27, 1998) (citations omitted) (noting that only a guardian ad litem who functions as an attorney is covered by the attorney-client privilege).

recurring question in debates over criminal procedure, and the answer has been clearly stated.[188] Rights are not reserved for the innocent.

2. *The Ancillary Constitutional Claim Based on a Minor's Right to Counsel*

Under federal law and in a minority of states, the parent must be independently advised of the child's *Miranda* rights for any waiver by the juvenile to withstand scrutiny.[189] But even jurisdictions that impose a per se rule barring statements obtained from a minor who did not have the opportunity for meaningful communication with a parent have so far failed to elaborate all the ways in which open communication is an essential prerequisite to the parent's knowing and informed advice to a minor child and, consequently, is also an essential prerequisite to the child's exercise of constitutional rights.

The Supreme Court has underscored that the attorney-client privilege encourages "full and frank communication between attorneys and their clients" in the service of justice.[190] Justice itself is a public good, which serves public, not private, ends. Among other things, justice "depends upon the lawyer's being fully informed by the client."[191] So too, a parent who lacks information about what happened may be handicapped in his or her effort to advise a child. There seems to be a clear anomaly in honoring a sophisticated minor's request for counsel, and the confidentiality guaranteed to the resulting conferral, while denying similar protection to the less informed minor who asks for a parent. As Justice Marshall has explained, "the accused who requests his mother rather than his ever-available attorney is the less knowledgeable, more easily coerced person most in need of protection . . . . It makes no sense to protect the knowledgeable accused from stationhouse coercion while abandoning the young person who knows no more than to ask for the one person he trusts, his mother."[192]

When a parent in turn asks a blood-stained teenager, "What happened?", as in the hypothetical posed in the introduction to this Article, "What happened?" is shorthand for many things. It means, among other things: Do you need to go to a hospital? Were you in a car accident? Were you driving? Or, have you been in a fight? Have you hurt someone, broken the law? Are the police looking for you? What level of trouble are we dealing with here?

Although most conversations between children in trouble and their parents are shielded from the public record, as I argue they should be, the occasional glimpse underscores the dependency that characterizes even those young people who have committed heinous crimes. Twenty-six-year-old John Hinckley demonstrated the accuracy of Justice Scalia's observation that people in trouble seek their mother's advice. When the FBI interrogated Hinckley immediately after he attempted to assassinate President Ronald Reagan, Hinckley said that "he would 'answer questions but he would like to speak with his parents.'"[193]

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[188] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 479 (1966) ("A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege."); Weisberg, *supra* note 128, at 373 ("[I]nnocence of defendants is very poorly correlated with the availability of strong constitutional claims.").

[189] The federal Juvenile Delinquency Act requires that parents of a juvenile arrested for delinquency be notified of the minor's arrest and constitutional rights. 18 U.S.C. § 5033 (2002). For state approaches see, for example, IND. CODE ANN. §§ 31-32-5-1 to 31-32-5-7 (West 2002) (requiring court to consider, among other things, "whether there was any coercion, force or inducement" of the minor, and whether a consenting custodial parent "knowingly and voluntarily waived the right" after "meaningful consultation" with the minor) and *In re* E.T.C., 449 A.2d 937, 939-40 (Vt. 1982) (holding that juvenile defendants are entitled to state-law equivalent of *Miranda* rights). *But see* State v. Courtney R., No. JN98-3142,1999 WL 692094, at *4 (Del. Fam. Ct. May 25, 1999) (holding that state-law equivalent of *Miranda* warnings were not required to either mother or minor, where the mother voluntarily brought the minor witness in for questioning and remained outside in the police station when the minor made inculpatory statements).

[190] Upjohn v. United States, 449 U.S. 383, 389 (1981).

[191] *Id.*

[192] Riley v. Illinois, 435 U.S. 1000, 1003 (1978) (Marshall, J., dissenting from denial of certiorari) (quoting Chaney v. Wainwright, 561 F.2d 1129, 1134 (5th Cir. 1977) (Goldberg, J., dissenting)).

[193] United States v. Hinckley, 525 F. Supp. 1342, 1352 (D.D.C. 1981) (citations omitted).

Similarly, in New York, a sixteen-year-old first offender had to decide whether to accept a plea bargain or risk a life sentence for setting a homeless man on fire. Described by reporters as "[d]efiant and sad, angry and heartsick, he wanted to talk to his mother."[194] The judge, Michael Corriero, was sensitive to the admonition in *Gault* that "the greatest care must be taken to assure that [a juvenile's] admission was voluntary . . . [and] that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."[195] The judge told the boy to take his time as he conferred with his crying mother and other family members in the front of the courtroom. The mother whispered audibly, "Take the plea, take the plea. Thirteen years will go fast. We will come visit you." Only then was the teenager able to accept the plea and provide the allocution Judge Corriero required.[196]

Parents who believe that their child is above reproach may urge their child to waive the right to an attorney and tell law enforcement officers "the truth" because they are oblivious to their child's actual behavior; indeed, they often do so.[197] Open communication that reveals to the parent that the child may have been engaged in illegal behavior may help a parent to make hard choices about whether to sell the car, use the college fund, or mortgage the house in order to retain private counsel or a better-quality private counsel. Concededly, children have been known to lie to their parents, and might do so even (or especially) when the stakes are high.[198] Some courts have concluded that remorse may lead a minor to deny wrongdoing in front of his parents: "it is often easier," one Virginia court stated, "for a child to admit wrongdoing to a stranger, than to a parent, whose love, trust, and belief in the child's goodness is difficult for a child to betray and face."[199]

But the risk that a child might not discuss his or her problems truthfully with parents does not diminish the argument for a parent-child testimonial privilege. If a child's statement of innocence to a parent were to be offered in testimony, the parental testimony would be far less likely to be compelled than to be offered voluntarily and held to be inadmissible hearsay.[200] For example, the Supreme Court of North Carolina held that an adult murderer's letters to his mother demonstrating his remorse over his crime were properly excluded from his capital sentencing proceeding (in which the rules of evidence do not apply) because they were inherently unreliable.[201] In contrast, the government generally seeks to elicit parental testimony about their offspring's inculpatory statements, not repetition of the child's protestations of innocence. For example, in an Ohio case unusual only for the fact that it involved a detailed written admission, the prosecution successfully fought to admit the adult defendant's father's copy of a thirty-eight-page confession that the defendant claimed he had written for his attorney.[202]

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[194] Jane Fritsch, *Boy, 16, Admits He Set Homeless Man on Fire*, N.Y. TIMES, Oct. 11, 2001, at D2.

[195] *In re* Gault, 387 U.S.1, 55 (1967).

[196] Fritsch, *supra* note 194. In this instance, the government planned to call the defendant's cousin to testify that the boy had admitted the crime to him. *Id.*

[197] State v. R.E. (Courtney R.), No. JN98-3142, 1999 WL 692094, at *4 (Del. Fam. Ct. May 25, 1999).

[198] Children who have strived to meet parental expectations may be just as vulnerable to this kind of deceit as "troubled" teenagers. *Cf.* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 203 (1990) (writing that 17-year-old Becky "loved her parents so much," according to her best friend, that she did not want to disappoint them by telling them she was pregnant . . . [and] used "a home remedy" and died from untreated complications rather than seeking the parental consent to abortion that was required in her state).

[199] Commonwealth v. Bazemore, 46 Va. Cir. 178, 188 (Cir. Ct. 1998) (concluding that a suspect's retraction of his confession upon seeing his mother was less reliable than his initial statement to the police).

[200] Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). Hearsay is excluded from hearings because of the difficulty of testing the reliability of the statement by means such as cross-examination of the speaker.

[201] State v. Davis, 539 S.E.2d 243, 260-61 (N.C. 2000).

[202] State v. Canady, No. 60355, 1992 WL 80048, at *11-12 (Ohio Ct. App. Apr. 16, 1992). Party admissions such as the one at issue in that case may be admitted in evidence because they do not fall within the definition of hearsay. FED R. EVID. 801(d)(1). (providing that party opponent admissions are excluded from the definition of hearsay, and therefore are admissible). A variety of doctrinal explanations have been offered to justify the admissibility of party admissions. *See, e.g.*, 8 WIGMORE, *supra* note 51, § 1048 (reviewing the rationales for concluding that party admissions are reliable); Edmund M. Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355 (1921) (arguing that extra-judicial party admissions are hearsay, but are admissible under an exception to the rule excluding hearsay because the party has an opportunity for cross-examination and

Despite the risk that a child may fail to be forthcoming, or may even lie outright to his or her parents, the opportunity for meaningful communication with a parent is an integral part of the detained child's right to communicate with a parent, provided in numerous jurisdictions.[203] In Alabama, for example, an uninformed parent cannot provide "the guidance necessary in order for [a minor] to evaluate his rights."[204] In these respects, a parent is drastically distinguished from an attorney. The ethical rules governing the practice of law require that the attorney provide the most zealous representation possible to every client. In the practice of criminal law, it is often acknowledged that an attorney may be able to give more zealous representation if he or she does not hear directly from the client that the client is indeed guilty of a heinous crime.[205] Thus, many attorneys who practice criminal law refrain from asking the ultimate question, even though the attorney-client privilege shields any confession that the client may make in private. But we may assume that parents, in contrast to paid professionals, will frequently be just as zealous in guarding the rights of a child whom they know to be guilty as one whom they believe to be innocent, perhaps more so, because they will understand the depth of the child's exposure in the justice system.[206]

Most involved parents, confronted with a child in trouble, ask, "What happened?" As a matter of child-rearing, that is undoubtedly the correct thing to do. But the lack of a testimonial privilege for parents may jeopardize the parents' ability to keep the admissions they coax from a child as confidences. Parents, who may have the greatest need to know, are not assured of the right to keep their knowledge private without breaking the law and/or going to jail while the law affirmatively requires lawyers, who do not need to know and often don't want to know, to keep secrets.

The Supreme Court has observed that a request to see a parent, if ignored, might violate *Miranda v. Arizona*,[207] although it has never reached the question.[208] Psychological research provides powerful support for the notion that children's suggestibility and limited understanding of their legal rights make them especially vulnerable during interrogations.[209] Lower federal courts have held that confessions and other waivers of rights obtained during a period in which law enforcement officials prevented parents and children from consulting are void.[210]

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confrontation of the witness, as well as the opportunity to offer contradictory testimony); John S. Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 65 U. PA. L. REV. 258, 493 (1938) (supporting the dominant view that the hearsay rule is inapplicable to party admissions, which are "relevant circumstantial conduct").

[203] For example, Alabama gives juvenile defendants such rights. Anderson v. State, 729 So. 2d 900, 901 (Ala. Crim. App. 1999) (citing ALA. R. JUV. P. 11(B), which states that "if the child's counsel, parent, or guardian is not present, then the child has a right to communicate with them"). Use of any statement made by a minor who was not informed of his right to communicate with a parent is barred in Alabama. *Ex parte* Whisinant, 466 So. 2d 1006 (Ala. 1985).

[204] L.J.V. v. State, 545 So. 2d 240, 245 (Ala. Crim. App. 1989) (quoting *Ex parte* Whisanant, 466 So. 2d 1006, 1012 (Ala. 1985) (Torbert, C.J., concurring)).

[205] *See* People v. James, No. E026718, 2001 WL 1284235, at *5 (Cal. Ct. App. Oct. 23, 2001) ("[T]he client cannot reasonably expect that, after hearing [an] admission of guilt, the attorney will proceed to present testimony from the client or other witnesses at trial that the client is innocent.").

[206] Guilt and innocence may not always fall clearly on one side or the other of a bright line. Issues such as intent, motive, and going along with the crowd may all influence the assessment. Hon. Michael A. Corriero, *A Democratic Society's Response to Juvenile Crime*, 65 BROOK. L. REV. 763, 776 (1999) (reviewing FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE (1998) and noting that many serious cases involving youthful offenders are characterized by "multiple defendants, multiple levels of maturity, and multiple levels of involvement and culpability").

[207] 384 U.S. 436 (1966).

[208] Fare v. Michael C., 442 U.S. 707 (1978); *see also* Riley v. Illinois, 435 U.S. 1000 (1978) (Marshall, J., dissenting from denial of certiorari) (writing that the Court should decide the narrow question presented, on which the circuits are split, "whether an accused child's request to see a parent must be honored by the police before they continue interrogation, at least when the parent is available at the police station and interested in speaking to his child").

[209] *See, e.g.*, THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981); Barbara Kaban & Ann E. Tobey, *When Police Question Children: Are Protections Adequate?*, 1 J. CENTER CHILD. & CTS. 151 (1999).

[210] United States v. Female Juvenile (Wendy G.), 255 F.3d 761 (9th Cir. 2001).

In *Fare v. Michael C.*,[211] the Supreme Court held that a juvenile's request for his probation officer does not have the same per se effect under *Miranda* as a request to see an attorney (i.e., automatically stopping the interrogation until the attorney is present and barring the admission of any statements made after such request in proceeding against the accused). The Court distinguished a probation officer from both an attorney on one hand and a parent on the other. A probation officer is not trained in the law or knowledgeable about a suspect's rights, nor is the officer a trained advocate. Most parents share the same disabilities, which is why minors need licensed attorneys to represent them in addition to the parent who offers loving guidance.[212] But a probation officer has the further drawback as a prospective confidant in that "[his] duty to his employer in many, if not most cases . . . conflict[s] sharply with the interest of the juvenile," since he is bound to report any wrongdoing to authorities regardless of how he learned about it.[213]

Unlike probation officers, parents ordinarily have no obligation to report their child's actions to law enforcement officials, but they are free to report the child's behavior to authorities if they decide that doing so will serve the child's interests by helping the child to obtain treatment or other rehabilitative services. Like lawyers, parents, if freed from the threat of having to testify, could best protect their children's rights "by learning the extent, if any, of the [child's] involvement in the crime under investigation, and advising his [child] accordingly."[214] Unlike a probation officer, an involved parent may be presumed to place the interests of his or her child first, above society's.[215]

Courts in most jurisdictions analyze the validity of a confession made by a juvenile after authorities have denied his or her request to see parents by looking at the "totality of the circumstances."[216] As applied to a minor, the totality of the circumstances test generally includes factors such as the child's age, educational level, mental state, and prior experience with law enforcement.[217] These factors help courts to assess the minor's immaturity—the "tautological attribute" of the status of childhood.[218] Supreme Court cases reveal a view of childhood vulnerability as "a bundle of presumed, perceived, or measurable ways in which children differ from adults in dimensions such as factual understanding, inferential understanding (appreciation), reasoning (both intellectual and moral) and ability to exercise choice, including understanding the repercussions of choice."[219] All of these dimensions of childhood underscore the minor's need to consult with his or her parents before making critical decisions about whether or not to waive constitutional rights.

Courts applying the totality of the circumstances test in the context of juvenile waivers ask, among other things, whether a parent or other interested adult was present, understood the child's rights, and had the opportunity to explain those rights to the child and consult with the child.[220] If a parent has not had an

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[211] 442 U.S. 707 (1978).

[212] Ross, *From Vulnerability to Voice*, *supra* note 7, at 1585 (stating that federal courts have uniformly held that parents who are not lawyers appearing pro se in civil litigation may not represent their children in court).

[213] *Fare*, 442 U.S. at 720-21; *see also* Commonwealth v. Bazemore, 46 Va. Cir. 178, 188 (Cir. Ct. 1998) (stating that federal cases seem to indicate that "[i]f a juvenile unequivocally requests to see a parent and such request is denied, the statement is probably inadmissible").

[214] *Fare*, 442 U.S. at 721-22.

[215] Indeed, this is the very complaint that law enforcement officials level at parents who refuse to testify.

[216] *See, e.g.*, Louisiana v. Fernandez, 712 So. 2d 485, 487-88 (La. 1998) (reversing an earlier per se rule and adopting the totality of the circumstances standard for considering the admissibility of confessions by juveniles, in conformity with "the large majority of other jurisdictions"); Theriault v. State, 223 N.W.2d 850, 853 (Wis. 1974); David T. Huang, Note, *Less Unequal Footing: State Courts' Per Se Rules for Juvenile Waivers During Interrogations and the Case for their Implementation*, 86 CORNELL L. REV. 437, 449 (2001); Trey Meyer, Comment, *Testing the Validity of Confessions and Waivers of the Self-Incrimination Privilege in the Juvenile Courts*, 47 U. KAN. L. REV. 1035, 1072 n.299 (1999) (listing thirty-six states that apply the totality of the circumstances test).

[217] *In re* B.M.B., 955 P.2d 1302, 1307-08 (Kan. 1998) (citing State v. Young, 552 P.2d 905 (Kan. 1976)).

[218] Ross, *From Vulnerability to Voice*, *supra* note 7, at 1590.

[219] *Id.*

[220] *In re B.M.B.*, 955 P.2d at 1309 (reversing the trial court's application of the totality of the circumstances test that allowed introduction of a confession because it improperly ignored the very young age of the ten-year-old suspect and the detective's

opportunity for private consultation with his or her minor child before interrogation, or if that communication occurs under the shadow of a threatened subpoena to a parent, the parent may not understand the gravity of the child's exposure.[221] Parents who urge their children to "tell the truth" without knowing what happened may later be unable to suppress the resulting inculpatory statements.[222]

The advice and mediation that a parent is expected to provide may be the most effective means of preserving a minor's rights under the Fifth and Sixth Amendments, or of assuring that any waiver of those rights is truly knowing and intelligent. A parent is the natural conduit through which a child can request counsel or retain a private attorney. Parents, however, are hampered in their efforts to help a child exercise constitutional rights and plan a legal strategy if they cannot talk confidentially about "what happened." The premise that children are vulnerable, and not yet fully able to strategize or to comprehend the consequences of their actions, is the cornerstone of a minor's legal status. It is one key to the liberty interests vested in parents over the care of their children. It is perverse at best to recognize that vulnerability on the one hand, and to acknowledge that minors have constitutional rights on the other, without recognizing how vulnerabilities may diminish the exercise of rights. If a child in trouble is fortunate enough to have concerned parents, the laws of evidence should not impede the child's ability to rely on his or her parents for informed advice. Recognition of a privilege that protects a child's confidential communication with a parent is the sine qua non of a child's meaningful exercise of constitutional rights within the justice system.

III. APPLICATION OF A PARENT-CHILD PRIVILEGE

The Supreme Court tried to head off judicial timidity in the face of potential complexity when it accepted a new privilege under Rule 501 of the Federal Rules of Evidence in *Jaffee*.[223] The Justices instructed lower court judges not to be paralyzed by details: a "rule that authorizes the recognition of new privileges on a case-by-case basis makes it appropriate to define the details of new privileges in a like manner."[224] The *Jaffee* majority stated unequivocally: "it is neither necessary nor feasible to delineate its full contours in a way that would 'govern all conceivable future questions in this area.'"[225] Thus it is not incumbent upon the courts, legislators, or even commentators to answer all of the questions that might surround a new parent-child privilege.

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failure to assure the mother's presence or to await her arrival at the police station after she called him and adopting a per se rule for children under age fourteen); Commonwealth v. A Juvenile, 449 N.E.2d 654 (Mass. 1983) (stating that the state's "heavy burden" is not met without a showing that the parent who was present understood the *Miranda* warnings and explained them to his children and adopting a per se rule for minors under the age of fourteen).

[221] *See, e.g.*, KAN. STAT. ANN. § 38-1624(c)(3)(A), (B) (West 2001) (stating that no confession or admission made by a juvenile during an interrogation is admissible into evidence unless it was made "following a consultation between the juvenile and the juvenile's parents . . . as to whether the juvenile will waive such juvenile's right to an attorney and right against self-incrimination"). This statute largely codified the holding in *In re B.M.B.*, 955 P.2d at 1302, discussed in Meyer, *supra* note 216.

[222] *E.g.*, Marine v. State, 607 A.2d 1185, 1190 (Del. 1989) (mother urged teenage suspect in strangulation of neighbor "to tell the truth . . . tell the detective whatever he knew . . . . 'If you did something to the little girl and it was an accident, just say so.'"); State v. Courtney R., No. JN98-3142, 1999 WL 692094, at *2 (Del. Fam. Ct. May 25, 1999) (mother told daughter to "tell the truth").

[223] The Third Circuit deferred the question of a parent-child privilege to Congress in part because it believed that only a legislative body would be "able to consider, for example, society's moral, sociological, economic, religious and other values without being confined to the evidentiary record in any particular case." *In re* Grand Jury (Doe), 103 F.3d 1140, 1154-55 (3d Cir. 1997). Questions the majority identified for legislative resolution included: "Does 'parent' include step-parent or grandparent? Does 'child' include an adopted child, or a stepchild? Should the privilege extend to siblings? Furthermore, if another family member is present at the time of the relevant communication, is the privilege automatically barred or destroyed?" *Id.* at 1155 (citing cases including *In re* Grand Jury Subpoena (Matthews), 714 F.2d 223, 224-25 (2d Cir. 1983) (in-laws); United States v. (Under Seal), 714 F.2d 347, 349 (4th Cir. 1983) (brother and cousin)). The Third Circuit's concern about how to treat adopted children is puzzling to say the least. The legal status of adoption obliterates the legal relationship with biological parents and creates a new permanent parent-child relationship.

[224] Jaffee v. Redmond, 518 U.S. 1, 18 (1996).

[225] *Id.* (quoting *Upjohn*, 449 U.S. 383, 393 (1981)).

Nonetheless, it is possible to anticipate some of the knottier problems that would likely come up in actual cases and controversies if more jurisdictions were to entertain a privilege that covered confidential communications from children to their parents. These include, but are not limited to, the five key dilemmas discussed here: Who will the courts treat as parents and children for purposes of a privilege? To whom does the privilege belong? What relationship should exist, if any, between a jurisdiction's position on a parent-child privilege and its substantive law regarding parental liability for the actions of minor children? Would the privilege apply when minors are tried as adults? And, is there a crime-fraud or co-conspirator exception? This Section addresses each of these questions in an effort to test the coherence of the narrow privilege proposed here.

A. DEFINING THE PARENT-CHILD DYAD

Courts are called upon regularly to determine whether two individuals share a parent-child relationship imposing rights and duties. The inquiry begins with the adult. Judges regularly engage in inquiries about which adults have the rights and responsibilities of parenthood in the context of battles over custody, visitation, and child support. Establishing whether a parent-child relationship exists should not prove markedly more complex in the context of privilege claims than it does in determining child support obligations, custody, and visitation. The law in these areas should provide ample guidance to trial courts as they craft a jurisprudence of parent-child privilege, guided by state statutes and common law.

Doctrines that may prove important include "equitable parenting" in which step-parents, grandparents, aunts and uncles, and others assume legal rights and responsibilities to children based on their functional performance in the children's lives.[226] If a child is lucky enough to have more than two adults who function as parents, whether they include step-parents in a joint custody arrangement, a parent's long-term non-marital relationship with a significant other or other common arrangements, trial courts have long demonstrated their capacity to determine who is a parent.

The issue of who qualifies as a "child" may also require inquiry on a case-by-case basis. Courts could conclude that a bright line should be drawn at the age of majority, but that approach might not adequately promote the intent at the essence of a parent-child privilege: to enable young people to confide in and receive guidance from their parents. The Third Circuit used a bright line to treat the eighteen-year-old subject of the grand jury inquiry in the Virgin Islands as an adult, even though he appeared to be living at home and had turned to his father for advice.[227] Dissenting, Judge Mansmann found the majority's approach simplistic:

> I would not adopt a bright-line rule applicable only to those who have not reached legal majority. In order to advance the policy interests . . . articulated, I would prefer to leave the particular factors to be considered in determining application of the privilege to development on a case-by-case basis. I expect these factors would include such variables as age, maturity, whether or not the child resides with his parents . . . .[228]

This measured approach fits comfortably with Supreme Court jurisprudence that reflects awareness that minors come in many stripes, including "mature" and "immature."[229] Similarly, some persons over the age of eighteen may not yet have ripened into maturity.

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[226] *See, e.g.*, Soumis v. Soumis; 553 N.W.2d 619, 622 (Mich. Ct. App. 1996) (affirming an award of joint-custody to the divorcing stepfather because he was the "equitable father" regardless of whether he was the biological father); M.H.B. v. H.T.B., 498 A.2d 775 (N.J. 1985) (holding that the doctrine of equitable estoppel could be used to support a former stepfather's duty to provide child-support); UNIF. PARENTAGE ACT § 4.4 (1973) (amended 2000) (creating a presumption of paternity if a man "receives the child into his home and openly holds out the child as his natural child" even if there is no biological or marital relationship).

[227] *In re Grand Jury (Doe)*, 103 F.3d at 1142-43.

[228] *Id.* at 1160 (Mansmann, J., concurring and dissenting).

[229] Ross, *From Vulnerability to Voice*, *supra* note 7, at 1590; *see also* Thompson v. Oklahoma, 487 U.S. 815, 859 (1988) (Scalia J., dissenting) (questioning a bright line between fifteen- and sixteen-year olds for purposes of applying the death penalty).

While the notion of the "mature" minor is generally used to explain the notion of rights that attach before the age of majority,[230] in the context of an essential parent-child privilege, it may be that no bright line magically transforms a child so that he or she no longer relies upon parental guidance. One New York court recognized this in extending protection to communications from a twenty-three-year-old who sought parental guidance.[231] Courts might also assess competency and whether the respective roles played by child and parent seem consistent with the parent's function as advisor and guide in the young person's quest for autonomy.[232]

B. TO WHOM DOES THE PRIVILEGE BELONG?

Those who oppose the development of a parent-child privilege frequently voice the concern that it would impede a parent's ability to seek help from authorities when confronted with a troubled or incorrigible child.[233] For example, all three members of the Third Circuit panel that considered the parent-child privilege claims presented in *In re Grand Jury (Doe)* agreed that parents need the flexibility to repeat what a child says if the parent decides that it would be in the child's "best interests" to do so.[234] If a parent-child privilege resembled the spousal privilege before *Trammel* in the sense that it embraced both confidential communications and adverse testimony regardless of its basis, and that the privilege belonged only to the spouse against whom the testimony was offered, that might impede parental reliance on juvenile courts to help them discipline their children.[235]

But after *Trammel*, the contours of what we can view as the model family privilege look quite different: the adverse testimony privilege belongs to the spouse who volunteers to testify so that only confidential communications are subject to an absolute privilege. If we applied this model to parents and children, the "Type I A" or essential parent-child privilege would belong to the child and could not be waived by the parent, but the "Type I B" or adverse testimony privilege would belong to the parent, who could waive it over the child's objection.

Under this interpretation, parents would be able to turn to authorities for help with children who appear to be out of control based on the parents' observations: the child stays out overnight, wears gang colors, has drugs and weapons hidden in the house, and comes home visibly under the influence of illegal substances. No testimony about these sensory observations would be based on confidential communications, and therefore the parent could elect to bring the information to the attention of authorities.[236]

It seems likely that in most instances a minor whose relationship with his or her parents has deteriorated to the point where the parents would consider turning to juvenile authorities for help is

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[230] Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) ("[C]onstitutional rights do not mature and come into being magically when one attains the state-defined age of majority."); *see also* Ross, *An Emerging Right*, *supra* note 7; Ross, *From Vulnerability to Voice*, *supra* note 7, at 1588-93.

[231] People v. Fitzgerald, 422 N.Y.S.2d 309 (Crim. Ct. 1979).

[232] *See* Ross, *Anything Goes*, *supra* note 6, at 485-86 (arguing that the legal view of the maturation process is consistent with a view of parenting as fostering emerging autonomy).

[233] 144 CONG. REC. H2269 (daily ed. Apr. 23, 1998) (statement of Rep. Coble) ("[A] parent-child privilege might prevent a parent from acting in the child's best interest by notifying authorities.").

[234] *In re Grand Jury (Doe)*, 103 F.3d 1140, 1153, 1160 n.6 (3d Cir. 1997) (Mansmann, J., concurring & dissenting). The "best interests" of a child is a notoriously slippery concept.

[235] The question of whether appropriate safeguards are available to children whose parents seek to have them committed as "incorrigible" is beyond the scope of this Article, but I have commented on it elsewhere. *See* Ross, *From Vulnerability to Voice*, *supra* note 7, at 1579-82 (discussing "incorrigibility" proceedings and the inappropriate use of psychiatric hospitals by parents of difficult teenagers).

[236] The brother of the Unabomber drew from his observations, not from confidential communications, when he shared his suspicions with law enforcement agents. United States v. Kaczynski, 239 F.3d 1108, 1120 (9th Cir. 2000).

unlikely to confide in them.[237] If the minor were to defy expectations and do so, however, verbal confidences should be protected against compelled disclosure. As the Supreme Court explained in *Jaffee*:

> [m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the [speaker's] interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege . . . .[P]articipants . . . must be able to predict with some degree of certainty whether discussions will be protected . . . .[238]

One major exception to the absolute protection accorded confidential communications might be drawn from the psychotherapist analogy: if a minor presents an imminent threat to himself or others, parents, like therapists, would be released from the obligation of confidentiality in order to prevent harm.[239] Indeed, psychotherapists have an obligation to inform authorities if patients present "a clear danger" to themselves or others or have been the victim of abuse.[240] Therapists routinely inform their patients of the limits on the confidentiality surrounding their conversations. For all of the reasons distinguishing parents from professionals discussed above, it would be unrealistic to expect parents to make similar disclosures to their children. Yet many children presumably understand that the parental role may require the adult to take action if risks seem significant.

A recent trend toward holding parents legally accountable for their children's illegal acts reveals another dimension of the significance of confidences.[241] Since 1988, states have enacted statutes holding parents increasingly liable for "omitting the performance of . . . reasonable care, supervision, protection and control over their minor child."[242] This formulation turns on its head the constitutional liberty first enunciated in *Meyer v. Nebraska*[243] and clarified in *Prince v. Massachusetts*[244]—that "the custody, care and nurture of the child reside first in the parents."[245] Commentators have criticized these laws for diminishing family autonomy and for an implicit presumption that concerned parents can always control their children's behavior.[246]

To the extent that parental liability statutes have a mens rea component, they send conflicting normative messages to parents. On the one hand, society expects parents to control and discipline their children, and will hold them responsible based on the outcome of their efforts. On the other hand, if parents don't know what their children are doing, they may not be held accountable. Neither of these positions adequately serves the needs of families, much less of society. The starting point of parental supervision is knowledge, which the law should encourage by assuring privacy to confidential communications from a child to his or her parents.

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[237] *See* In the Matter of C.P., 543 N.E.2d 410 (Ind. Ct. App. 1989) (allowing a mother to consent to disclosure of information concerning her daughter's psychotherapy to pursue the mother's claim that her daughter was incorrigible).

[238] Jaffee v. Redmond, 518 U.S. 1, 17-18 (1996). Where the "confidence" is unintentional, as when a parent reads a diary, it probably does not constitute a confidence because a minor has a limited expectation of privacy in the family home. These questions, however, are best left to case-by-case resolution sensitive to specific facts.

[239] AM. PSYCHOL. ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS 636 (1981).

[240] Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976); AM. PSYCHOL. ASS'N, *supra* note 239, at 636.

[241] *See generally* Naomi R. Cahn, *Pragmatic Questions About Parental Liability Statutes*, 1996 WIS. L. REV. 399 (arguing that juveniles are neither fully responsible adults nor completely dependent children and discussing the use of parental liability statutes); Paul W. Schmidt, *Dangerous Children and the Regulated Family: The Shifting Focus of Parental Responsibility Laws*, 73 N.Y.U. L. REV. 667 (1998) (examining parent responsibility laws that hold parents criminally liable for crimes committed by their children).

[242] Schmidt, *supra* note 241, at 678 (quoting California's Street Terrorism Enforcement and Prevention Act of Sept. 23, 1988, ch. 1256 § 2, 1988 Cal. Stat. 4178, 4182 (codified at CAL. PENAL CODE §§ 186.20-.28, 272 (West. Supp. 1998)).

[243] 262 U.S. 390 (1923).

[244] 321 U.S. 158 (1944).

[245] *Id.* at 166.

[246] Schmidt, *supra* note 241.

C. CHILDREN IN ADULT COURTS

The most dramatic and controversial trend in juvenile justice in the last decade has been the increasing transfer of juvenile offenders into adult court, a process known as waiver.[247] While waiver is almost as old as the juvenile court itself,[248] the accelerating pace of transfers is part of a broad attack on the juvenile justice system.[249] New laws in most states make it easier to try children as young as ten-years -old as adults.[250] The stakes are high. As the Supreme Court put it, transfer to adult court creates a potential "difference between five years' confinement and a death sentence."[251] At a minimum, transfer means that the child will be tried in a court charged solely with imposing punishment and seeking retribution rather than one whose mission includes rehabilitation.[252]

One question is sure to arise when courts apply the parent-child privilege proposed here: should the transfer of a minor to criminal court affect the application of the privilege? All fifty states and the federal government have adopted statutes governing transfer of minors to adult court. Each uses at least one of the following three methods to achieve transfer: (1) judicial waiver of juvenile court jurisdiction following a hearing; (2) prosecutorial discretion to file charges initially in adult court rather than in juvenile court; and (3) mandatory statutory exclusion from juvenile court jurisdiction based on the nature of the offense or the history of the offender.[253] Where the transfer process involves a hearing, judges weigh a number of factors, including the sophistication or maturity of the minor.[254] More frequently, if transfer is accomplished by prosecutorial discretion or mandated by statute, the nature of the offense is deemed to transform the child into an adult who no longer deserves the more solicitous consideration presumably offered by the juvenile courts.[255] One might argue that if the minors waived into adult courts

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[247] *See* Irene Merker Rosenberg, *Teen Violence and the Juvenile Courts: A Plea for Reflection and Restraint*, 37 HOUS. L. REV. 75, 79, 85 (2000). For specifics by jurisdiction see Donna W. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 88-97 (2000); Lisa Beresford, Comment, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783 (2000).

[248] Stephen Wizner, *On Youth Crime and the Juvenile Court*, 36 B.C. L. REV. 1025, 1033 (1995) (noting that four years after its founding, the Chicago juvenile court transferred fourteen children accused of serious crimes to the adult criminal court).

[249] Catherine R. Guttman, Note, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 515 (1995) (arguing that transfer and other increasingly punitive laws "threaten the very core of the juvenile justice system"). The rush to try juveniles as adults is susceptible to numerous criticisms that are beyond the scope of this Article. *See e.g.*, Donna M. Bishop et al., *Juvenile Justice Under Attack: An Analysis of the Causes and Impact of Recent Reforms*, 10 U. FLA. J.L. & PUB. POL'Y 129 (1998); James Herbie DiFonzo, *Parental Responsibility for Juvenile Crime*, 80 OR. L. REV. 1 (2001); Catherine J. Ross, *Disposition in Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System*, 36 B.C. L. REV. 1037, 1041-45 (1995) [hereinafter Ross, *Disposition in a Discretionary Regime*].

[250] Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1456 n.3 (2001) (stating that twenty-nine states currently allow the prosecution of ten-year-olds for at least one offense). Some states do not set any minimum age for trial in an adult criminal court and theoretically allow children younger than the age of ten to be tried as adults. Ross, *Disposition in a Discretionary Regime*, *supra* note 249, at 1044.

[251] Kent v. United States, 383 U.S. 541, 557 (1966). The stakes remain as high today, as demonstrated by the recent decision to try seventeen-year-old accused sniper John Lee Malvo first in Virginia, where a minor prosecuted as an adult can be subjected to the death penalty, rather than in another jurisdiction. Eric Lichtblau & Jayson Blair, *Ashcroft Decides Virginia Will Try the Sniper Cases First*, N.Y. TIMES, Nov. 8, 2002, at A1 (stating that should Malvo be tried as an adult, he would face the death penalty in Virginia).

[252] Ross, *Disposition in a Discretionary Regime*, *supra* note 249, at 1058.

[253] Guttman, *supra* note 249, at 520-25 (describing and critiquing the three modes of transfer).

[254] Randall Salekin et al., *Juvenile Waiver to Adult Criminal Courts: Prototypes for Dangerousness, Sophistication-Maturity, and Amenability to Treatment*, 7 PSYCHOL. PUB. POL'Y. & L. 381 (2001); *see also Kent*, 383 U.S. at 541.

[255] Guttman, *supra* note 249, at 527 (arguing that children should not be transferred for committing "so-called 'adult' crimes" unless they are shown to be mature, since in this context "adult status garners a sanction, not a privilege"); *see* DiFonzo, *supra* note 249, at 27-31 (arguing that the justice system should not "confuse[ ] malevolence with maturity," since teenagers are at best "semiautonomous"). A number of commentators have criticized the juvenile justice system for diminishing the rights available to children without delivering on the promise of individualized, rehabilitative justice. *See, e.g.*, Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991); Janet E. Ainsworth, *Youth Justice in a Unified Court: A Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927 (1995); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991).

are sufficiently mature to be tried as adults, they should not receive the protection afforded by a parent-child privilege. But such a bright-line approach would undermine the privilege at its roots.

Even if there has been an individualized determination that a juvenile is "mature" and thus should be tried in adult court, the rationale behind the essential parent-child privilege mandates that the privilege follow the child. First, as the Supreme Court observed in *Jaffee*, a privilege must be predictable to be meaningful.[256] We can hardly expect a parent to pause at the police precinct to ask about the local laws on waiver of juveniles before asking a child, "What happened?" Second, if transfer to adult court caused the parent-child privilege to evaporate, a minor facing a transfer hearing would be well advised not to confide in his or her parents. If the minor lost the first round and was tried as an adult, the parents could then be forced to testify in a criminal hearing based on what they learned in confidence from the child while the child remained under the jurisdiction of the juvenile court. Loss of the parent-child privilege when a child is tried as an adult would in fact deprive the minor of the benefits of informed advice from his or her parents before the court made a decision about waiver, including a consideration of whether the particular child was "mature" enough to be tried as an adult. Third, because the potential consequences of transfer are so dire (including loss of confidentiality, incarceration with adults, and sentences extending well into adulthood), the juvenile's need for adult guidance may be even greater after transfer than in the context of the juvenile justice system. A teenage defendant needs the help of parents in navigating the criminal justice system at least as much as the teenage delinquent seeking to exercise Fifth and Sixth Amendment rights in the juvenile justice system.

D. CO-CONSPIRATORS

In the "Type I A" cases at the heart of the parent-child privilege, "the parent is not a co-defendant or a co-witness to a criminal act, and is not alleged to be hiding the instrumentality or fruits of the act."[257] All of the major privileges recognized today are inapplicable when the participants in the conversation for which a privilege is claimed are engaged in a criminal conspiracy, or are discussing on-going or future crimes.[258] In each instance, it is appropriate for a court to categorize the "purpose of the communication."[259]

A parent-child privilege may reasonably be subjected to a similar inquiry. The zone of privacy was not intended to include criminal enterprises composed of family members, such as the "family drug business[es]" commonly noted in reported cases[260] or collaborations to engage in insider trading.[261] For example, the Mississippi Supreme Court correctly declined to follow New York's application of a parent-child privilege in a case where a father and his two sons aged thirteen and sixteen murdered a used car dealer in the course of a robbery. The trial court permitted the younger boy to testify against his father in exchange for being prosecuted as a juvenile. In affirming that decision, the Mississippi Supreme Court

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[256] Jaffee v. Redmond, 518 U.S. 1, 17-18 (1996).

[257] *In re* Grand Jury (Doe), 103 F.3d 1140, 1161 (3d Cir. 1997) (Mansmann, J., dissenting) (explaining why she would recognize a parent-child privilege in this Virgin Islands case involving a father subpoenaed to testify against his son).

[258] Trammel v. United States, 445 U.S. 40, 46 (1980) (discussing the marital privilege); United States v. Zolin, 491 U.S. 554 (1989) (discussing the crime-fraud exception to the attorney-client privilege). Similarly, a physician-patient privilege will apply only where the patient consulted with the physician for the purpose of diagnosis and treatment. CHARLES ALFRED MCCORMACK, EVIDENCE § 99 (3d ed. 1954).

[259] *E.g.*, Cox v. Miller, 296 F.3d 89, 92 (2d Cir. 2002) (explaining that under New York law, the "priest-penitent privilege" applies only to communications made "in confidence and for the purpose of obtaining spiritual guidance" and citing People v. Carmona, 627 N.E.2d 959, 962 (N.Y. 1993)).

[260] *E.g.*, State v. Holmes, 460 S.E.2d 915 (N.C. Ct. App. 1995). The U.S. Attorneys' Manual expressly finds that a "specific justification" exists for compelling testimony from close family relatives where the witness and the relative participated in "a common business enterprise" or "illegal conduct." U.S. DEP'T OF JUSTICE, *supra* note 117, § 9-23.211.

[261] 144 CONG. REC. H2270 (daily ed. Apr. 23, 1998) (statement of Rep. Frank) (observing that "very often those involved in insider trading are relatives, they are adult children, the adult stockbroker, son of a lawyer father or mother").

called the case "vastly different" from the New York precedent, that involved confidences "in expectation of guidance through counseling or moral support."[262]

Where communications take place in the service of criminal activity, the *Trammel* Court's conclusion that such conversations are not part of marital intimacy is applicable.[263] Courts may also develop a boundary between appropriate and legal parental counsel that would be protected by a privilege, and overt acts undertaken in response to confidential communications that cross the line to misprision of a felony or to make the parent a co-conspirator after the fact.[264]

I. CONCLUSION

In order for minors to exercise constitutional rights in a meaningful way, they often need a mediator, who in most instances, at least in the initial stages, will be a parent. Parents cannot give intelligent advice unless they are free to ask, "What happened?" without running the risk that they could be called as witnesses against their children or jailed for refusing to testify.

The taxonomy offered here of discrete types of privileges that courts and commentators have erroneously lumped together under the rubric of "parent-child privilege" facilitates accurate interpretation of existing case law and should clear the way to a more precise discussion of the possible goals of such privileges. In this Article I have focused on the narrow, essential parent-child privilege—a privilege that protects confidential communications from minors to their parents. I have grounded this claim of privilege in the legal rights of children rather than appealing to sentiment and invocation of social norms. Although I have argued that it is appropriate for the courts to take the lead in developing a common law parent-child privilege, legislative responses would also be fruitful. And, even though I argue that the essential parent-child privilege has the strongest justification as a function of its relationship to a meaningful realization of the constitutional rights accorded to juveniles, further expansion of the doctrine in light of reason and experience may prove desirable.

The essential parent-child privilege has deep roots in the vision of the family as a private sphere that offers a refuge from the state—a refuge in which parents can nurture their children along the difficult path to adulthood. But it is also a necessary real world ancillary to a minor's constitutional rights in the juvenile justice system.

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[262] Cabello v. State, 471 So. 2d 332, 340 (Miss. 1985) (distinguishing People v. Fitzgerald, 422 N.Y.S.2d 309 (N.Y. Crim. Ct. 1979)).

[263] If the communication is also made "during the course and in furtherance of the conspiracy" it may be admissible non-hearsay. FED. R. EVID. 801(2)(E).

[264] The federal crime of misprision has been construed to require "both knowledge of a crime and some affirmative act of concealment or participation." Branzburg v. Hayes, 408 U.S. 665, 696 n.36 (1972).