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The Parent-Child Privilege in Context

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THE PARENT-CHILD PRIVILEGE IN CONTEXT

By Catherine J. Ross[*]

A renewed interest in creating a parent-child privilege has been in the air since 1996 when the Supreme Court first recognized a novel privilege in *Jaffee* v. *Redmond*.[1] A solicitous social and legal response to the relationship between child and parent grows, in large part, from the recognition that children possess unique vulnerabilities. Although the concept of children's vulnerability is a common justification for state paternalism, much of the growing scholarship on children and the law considers how to reconcile children's rights with their vulnerabilities.

The argument for a testimonial privilege is strongest in the case of a minor child living with a parent who is the subject of a *subpoena testificandum* through which the state seeks to compel the parent to testify against his or her child. And yet most jurisdictions in the United States do not even recognize a privilege that covers confidential communications from minors to their parents.

To date, discussion of a possible parent-child privilege has occurred within the community of evidence scholars in isolation from the growing literature of juvenile rights and juvenile justice—the very context in which such a privilege is likely to matter most. This isolation is consistent with the generalized nature of evidence law, which must be equally applicable across substantive lines. In this instance, however, the "Chinese wall" between evidentiary rules and substantive law has diminished the quality of the debate. Proponents of a parent-child privilege have tended to rely almost exclusively on sentiment and social policy arguments rather than on arguments based on rights.

I propose a new look at the parent-child privilege grounded in the constitutional rights of children and their parents. I argue that many of the constitutional rights accorded to minors cannot be exercised

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1. 518 U.S. 1 (1996) (the psycho-therapist privilege).

meaningfully absent free and open communication with their parents. Parents, as the common law and the Constitution have long recognized, are the primary default guardians of their children's rights as well as of their daily needs. In light of children's dependency, parents may be the conduits through which children can best realize their rights.[2]

The first part of my argument explores the existing law of privilege under the common law. The marital privilege model, as refined in *Trammel* v. *United States*,[3] offers two distinct privileges that can be asserted in the context of the relationship between a parent and a child. The broader privilege (like the common law marital privilege) would protect the parent against being compelled 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. A narrower privilege—which I refer to as the "essential parent-child privilege"—would prevent disclosure of confidential communications from a minor child to the parent in order to foster meaningful and necessary communications that serve numerous social policy goals and constitutional interests.

I reinterpret the precedents concerning the status of a parent-child privilege in two ways. First, I suggest that very few reported cases deal with the essential parent-child privilege that I propose, in part because we may be operating under a *de facto* privilege regime in which families rely on the good faith and sensibilities of judges and prosecutors rather than on a rule of law. Second, I demonstrate 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. Most judges who have considered claims of parent-child privilege 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.[4] To help clarify

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

3. 445 U.S. 40 (1980).

4. The majority opinion in the most recent comprehensive federal decision rejecting a parent-child privilege, collapsed all of the categories that I set out. *See In re* Grand Jury (Doe), 103 F.3d 1140 (3d Cir. 1996). But in a compelling dissent, Judge Mansmann offered a more nuanced interpretation of the precedents, as well as of the companion cases before the court. *See id.* at 1158 (Mansmann, J., dissenting).

the range of cases, I offer a taxonomy of parent-child privileges that have been asserted. [See Table One.] The erroneous fusion of these distinctive claims has generated a misperception that previous courts have already refused to create an essential parent-child privilege covering confidences from a minor to a parent.

After expanding on the literature that grounds a call for a parent-child privilege in arguments based on moral sensibility (compelled parental testimony offends our most basic human principles) and pragmatism (coerced parents will lie), I turn to my central argument: an essential parent-child privilege is key to the meaningful exercise of a minor's constitutional rights under the Fifth and Sixth Amendments. Under *In re Gault* and its progeny, minors, like adults, have the right to counsel, the right to be free from self-incrimination, and the right to be silent in the face of interrogation.[5] Adult advice and mediation may be the most effective means of preserving these rights or of assuring that any waiver of these rights is truly knowing and intelligent. A parent is the natural conduit through which a minor can request counsel or retain a private attorney. The more fully informed a parent is about the circumstances of the child's involvement, the more a parent of normal competence will be able to help the child exercise constitutional rights and plan a legal strategy. As the Supreme Judicial Court of Massachusetts held, a parent "practically speaking," is the only avenue through which a fifteen-year-old can "effectively evaluate and, if he wished, exercise the right to counsel."[6]

I do not claim that there is a textual or even a penumbral constitutional right for a child to talk to his or her parents in confidence. My argument is best regarded as an "ancillary" constitutional claim. Because alternative theories that might protect parent-child communications (such as joint interest or agency) prove unsuccessful, a privilege protecting communications from a child to a parent is necessary in order to achieve meaningful constitutional rights for minors.

Parents frequently ask children in trouble, "what happened?" The question may serve as a shorthand for a number of concerns, including "have you broken the law?" and "how much trouble are we dealing with

5. *See In re* Gault, 387 U.S. 1 (1967).

6. *See* Commonwealth v. Cain, 722 N.E.2d 455 (Mass. 1972). *See also In re* A Grand Jury Subpoena, 722 N.E.2d 450, 457 n.15 (Mass. 2000) (expressly reserving the question whether a parent advising a juvenile with regard to the exercise or waiver of rights could be compelled to answer questions about the content of the conversations).

here?" The lack of a privilege for parents jeopardizes the parent's ability to keep as confidences the admissions a parent coaxes from his or her child. The parent's need to know is compelling. Only with knowledge can a parent give intelligent guidance. Parents who believe that their child is above reproach often urge the child to waive rights, and to tell law enforcement officers "the truth;" the resulting statement may be an admissible confession to a serious crime.

My research supports the commentators who argue that Federal Rule of Evidence 501 gives the courts wide discretion to expand the privilege doctrine on a case-by-case basis (although there is no reason to object to federal or state legislation that would achieve the same results). In *Jaffee*, the Supreme Court made clear that when a court recognizes a new privilege "it is neither necessary nor feasible to delineate its full contours . . . ."[7] Nonetheless, since a number of key issues are likely to arise under a parent-child privilege, I shall explore some of its contours including: who is a parent for purposes of the privilege? Does the privilege belong to the parent or the child? Should the privilege apply if a minor is tried as an adult? And, is there a crime-fraud or co-conspirator exception?

7. *See* Jaffee v. Redmond, 518 U.S. 1, 18 (1996).

Table 1.

TAXONOMY OF PARENT-CHILD PRIVILEGES ASSERTED

CATEGORY	**WITNESS**	**PARTY WHOSE INTERESTS ARE 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