A Halachic Perspective on the Parent-Child Privilege

Erica Smith-Klocek

Follow this and additional works at: https://scholarship.law.stjohns.edu/tcl

Part of the Legislation Commons, and the Litigation Commons

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.
A HALACHIC PERSPECTIVE ON THE PARENT-CHILD PRIVILEGE

Recently, several news events have given rise to a renewed interest in parent-child testimonial privileges. First, the parents of Amy Grossberg refused to testify against their daughter, a teenager accused of killing her newborn baby. Then, Monica Lewinsky’s mother suffered an anxiety attack while testifying before a grand jury that was investigating a sexual relationship between her daughter and President Clinton. The grand jury testimony of Monica Lewinsky’s mother gave rise to public sympathy and questions about how a prosecutor can force a mother to choose between betraying her daughter or lying under oath. This was followed by interest in the Senate about a possible


3 See Ruth Ann Leach, Why Doesn't Monica's Mom Refuse to Testify?, NASHVILLE BANNER, Feb. 17, 1998, at A11 (suggesting that Marcia Lewis should have refused to testify and face imprisonment rather than violate “the precious bonds of trust she enjoys with her child”); Ruth Marcus, Starr Pushing Envelope, Former Prosecutors Say Grilling Lewinsky's Mother is Perfectly Legal and a Tactic Justice Officials Often Use, MILWAUKEE J. SENTINEL, Feb. 15, 1998, at 1; Eric Zorn, With Ma on Stand, Lawyers Can Mine the Mother Lode, CHI. TRIB., Feb. 12, 1998, at 1 (commenting on the “crazy” inconsistency in the law which protects spousal communications but not confidences to parents).
"parent-child immunity" bill that would allow parents to refuse to testify against their children.\(^4\)

The idea of a parent-child privilege, however, is not new. In fact, it was recognized almost three thousand years ago in Jewish Law. Several commentators have suggested that the justifications for allowing a spousal privilege, preserving family unity and privacy, are the same justifications for allowing a parent-child privilege. Almost every state and the federal system recognize a privilege as to communications between spouses. Only four states\(^5\) and one federal district,\(^6\) however, have recognized any sort of testimonial privilege between parents and children.

Part I of this Note discusses the disqualification of parents and children as witnesses as it existed in Jewish Law. Part II briefly outlines existing privileges in American Law. Part III discusses how American courts have considered claims of privilege between parents and children. Finally, this Note concludes that a parent-child privilege utilizes the same rationale underlying the widely recognized spousal privileges. American courts have been reluctant to extend privilege to the parent-child relationship because, unlike the spousal privilege, it was not recognized in the common-law. Courts considering a parent-child privilege have been, thus far, unwilling to explore other


\(^5\) New York is the only state to have judicially permitted parents and children to claim a parent-child privilege. Three other states, Idaho, Minnesota, and Massachusetts have statutes that permit parents or children to assert the privilege. See IDAHO CODE § 9-203(7) (1998); MASS. ANN. LAWS ch. 233, § 20 (Law. Co-op. 1986); MINN. STAT. ANN § 595.02(1)(j) (West 1999). For further discussion, see infra notes 64–89 and accompanying text.

\(^6\) See infra notes 75–78 and accompanying text (discussing In re Agosto, 553 F. Supp. 1298 (D. Nev. 1983)).
legal systems as possible sources from which to derive a rule to protect familial relationships. The related-witnesses rule in Jewish law can provide courts with a historical source to consider in weighing the needs of the state and the integrity of familial relationships.

PART I – THE RULE IN JEWISH LAW

Jewish law is derived from three basic sources: the Torah, exegetical interpretation, and logic and observation. The Torah was revealed to Moses at Mt. Sinai in both written and oral form. It is comprised of the Five Books of Moses and the Oral Law. The Oral Law, which interprets and supplements the written Torah, was transmitted as an oral tradition to each generation. The Oral Law contains rules for the application of Torah law, halachah, and historical and moral narrative, aggadah.

The Mishnah was the earliest authoritative codification of Oral Law. The Talmud, containing detailed commentary and debate on the Mishnah, was completed around 500 C.E. The Talmud is the most influential source of

---

6 See DAVID FELDMAN, The Structure of Jewish Law, in CONTEMPORARY JEWISH ETHICS 21 (1978); Levine, supra note 7, at 444–45.
9 Torah shebikh’tav. See FELDMAN, supra note 8, at 21.
10 Torah sheb’al peh. See id.
12 See FELDMAN, supra note 8, at 22.
13 The Mishnah was compiled by R. Judah the Patriarch of Palestine around 200 C.E. See FELDMAN, supra note 8, at 22; AARON KIRSCHENBAUM, A Historical Sketch of the Sources of Jewish Law, in EQUITY IN JEWISH LAW: HALAKHIC PERSPECTIVES IN LAW: FORMALISM AND FLEXIBILITY IN JEWISH CIVIL LAW 289, 290 (1991) [hereinafter KIRSCHENBAUM, SOURCES OF JEWISH LAW]. The Mishnah recorded some differing opinions among authorities interpreting halachah and is by no means a complete codification of the Oral Law. See BREITOWITZ, supra note 11, at 308.
14 The Talmud is a legal work that contains debate, discussion, and analysis, called G’mara. See FELDMAN, supra note 8, at 23. These debates occurred primarily in the academies of Babylonia. See id. Contemporaneously to the development of the Babylonian G’mara, commentary and teachings of the Sages were recorded in Palestine. See id. Thus, the commentary on the Mishnah that developed in Palestine is termed the “Palestinian Talmud,” or Talmud Yerushalmi. See id.; Levine, supra note 7, at 445 n.17. The Babylonian Talmud, Talmud Bavli, a far
halachah from the oral tradition. Other sources of commentary and codes of law, most notably the Code of Maimonides,\(^5\) the *Tur*,\(^6\) and the *Shulchan Aruch*,\(^7\) were written after the completion of the Talmud.\(^8\) Together, these sources serve as guides for the practical application of halachah.

The Oral Torah included hermeneutic principles, interpretive techniques for deriving rules from the text of the Torah.\(^9\) Rules derived from the Torah or explicitly stated in the Torah carry the authority of the Torah itself.\(^2\) There is at least one difference, however, between derived and stated rules. Rules of conduct, *mitzvot*, which are

more comprehensive work, is the authoritative source of Jewish Law. See FELDMAN, *supra* note 8, at 24; BREITOWITZ, *supra* note 11, at 308; Levine, *supra* note 7, at 445 n.17.

\(^1\) Maimonides, Rabbi Moses Ben Maimon (Rambam) (b. 1135–d. 1204), wrote the *Mishne Torah* as a comprehensive, practical handbook for halachic application. See FELDMAN, *supra* note 8, at 26–27.

\(^2\) *Tur* is the common name of the *Arba'ah Turim*, or “The Four Rows.” See BREITOWITZ, *supra* note 11, at 311; FELDMAN, *supra* note 8, at 29–30; KIRSCHENBAUM, SOURCES OF JEWISH LAW, *supra* note 13, at 300. These four books were written by Rabbi Yaakov Ben Asher (b. 1275–d. 1340), the son of Rosh. See *infra* note 18. The *Tur* was unique in that it incorporated decisions from both the German and the French schools of thought. See BREITOWITZ, *supra* note 11, at 311.

\(^3\) The *Shulchan Aruch* is currently regarded as the leading code of Orthodox Jewish Law. See BREITOWITZ, *supra* note 11, at 311; KIRSCHENBAUM, SOURCES OF JEWISH LAW, *supra* note 13, at 300. This work was prepared by R. Yosef Karo (b. 1488–d. 1575), as an abridgment of his *Bait Yosef*, a comprehensive commentary and analysis of the *Tur*. See BREITOWITZ, *supra* note 11, at 311; FELDMAN, *supra* note 8, at 31. R. Karo, a Sephardi, relied heavily on Sephardic authorities. See KIRSCHENBAUM, SOURCES OF JEWISH LAW, *supra* note 13, at 300–01. Only after Rabbi Isserles of Poland supplemented the *Shulhan Aruch* with Ashkenazic commentary did R. Karo's code become widely accepted. See *id.* at 301.

\(^4\) There are several widely used works that were written from the completion of the Talmud to the present day. Among those of influential authority are commentaries by Rabbi Shlomo Ben Yitzchak (Rashi, 1040–1105) of France. See BREITOWITZ, *supra* note 11, at 309; FELDMAN, *supra* note 8, at 25; KIRSCHENBAUM, SOURCES OF JEWISH LAW, *supra*, note 13, at 298. Further commentaries supplementing Rashi, are termed *Tosafot*. See FELDMAN, *supra* note 8, at 25–26. Other influential scholars during the middle ages were R. Isaac Alfasi (Rif) (d. 1103); Nahmanides, R. Moses Ben Nahman (Ramban) (b. 1195–d. 1270); R. Solomon ben Adret (Rashba) (b. 1215–d. 1310); and Asheri, R. Asher Ben Yeheil (Rosh) (b. 1250–d. 1327). See FELDMAN, *supra* note 8, at 28–29; KIRSCHENBAUM, SOURCES OF JEWISH LAW, *supra* note 13, at 298–301.


\(^6\) See *id.* Rules with the authority of the Torah are termed *d'oraita*. See *id.*
expressly stated in the Torah without discussing the underlying rationale, may not be limited or disregarded based on a belief that the rationale for the rule no longer applies. At the same time, if the rationale for the rule is expressly stated in the Torah, then application of that rule can be limited to the rationale for the rule. On the other hand, for rules that are derived from the Torah through extensive interpretation, the rationale for the rule may act to expand or restrict the scope of that rule.

The procedural rule in Jewish Law that prevented family members from testifying was derived from a passage of the Torah, which states, "[t]he fathers shall not be put to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death for his own sin." This was interpreted to prohibit all relatives, including spouses, parents, and children, from testifying against one another. The Talmud notes that the rationale

---

21 See Levine, supra note 7, at 458–60.
22 See id. at 460–61.
23 See id. at 463.
25 See 16 ENCYCLOPEDIA JUDAICA 587 (1996) (citing Yad, Edu 13:1). As between parents and children, see id. (citing Sif. Deut. 280; Sanh. 27b). "The Mishnah lists as disqualified relatives: father, brother, uncle, brother-in-law, stepfather, father-in-law, and their sons and sons-in-law (Sanh. 3:4); the rule was extended to cover nephews and first cousins (Yad, Edu 13:3; Sh.Ar., HM 33:2). Where the relationship is to a woman, the disqualification extends to her husband (Yad, Edu 13:6; Sh.Ar., HM 33:10)." 16 ENCYCLOPEDIA JUDAICA 587 (1996) (citations in original).

In the small, closely knit, Jewish communities of the Middle Ages, almost every member of the community was related to one another in some form. See 2 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 737 (1994). Since the rule disqualified all witnesses from testifying either against or in favor of their kinsmen, many communities adopted local enactments that permitted the testimony of relatives. See id. These enactments were supported in responsa by Rashba and Asheri. See id. at 737–39. This view was adopted in the Shulhan Arukh, which stated, "[i]t is the current practice to accept witnesses from the community with regard to their enactments and decrees, charitable endowments, and all other matters; and they are competent to testify even as to their relatives, since it has become accepted that they may testify." Id. at 739 (quoting Sh. Ar. HM 37:22).
for this rule was not based on the fear that family members would testify falsely.\textsuperscript{26} Indeed, it is a single comprehensive rule that protects all family members from having to testify in matters concerning their relatives. Jewish law prevented disturbances that occur when family members are called to testify against their loved ones. By not permitting family members to testify at all, the Jewish rule also prevented the trier of fact from drawing any negative inferences when a family member refused to testify in favor of a defendant.

The rule in Jewish law reflects a choice by a society to favor the sanctity of the family over the fact-finding need of the government. This procedural rule, which predates the common-law, was not adopted in the United States. Instead, American courts extend a far more limited protection to individuals whose family members are accused of wrongdoing.

PART II – PRIVILEGES IN AMERICAN LAW

American courts recognize several testimonial privileges. The common-law recognized only the spousal and attorney-client privileges.\textsuperscript{27} Wigmore, whose treatise on evidence is frequently cited by courts, requires four conditions be satisfied before a privilege will arise. These are:

1. The communications must originate in 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.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby

however, that the situations posed to Rashba and Asheri were monetary matters in localities that had adopted enactments permitting testimony by related witnesses. See id. at 737–39. Thus the rule disqualifying relatives from testimony remained part of the Shulhan Aruch. See 16 ENCYCLOPEDIA JUDAICA 587 (1996) (citing Sh. Ar., HM 33:2; Sh. Ar., HM 33:3; Sh. Ar. HM 33:10).

\textsuperscript{26} See KIRSCHENBAUM, SELF-INCRIMINATION, supra note 24, at 40.

A HALACHIC PERSPECTIVE

gained for the correct disposal of litigation.\textsuperscript{28}

In the federal system, Rule 501\textsuperscript{29} provides a basis for recognizing privileges that are not otherwise explicitly stated in the Federal Rules.

The attorney-client privilege is the oldest evidentiary privilege that was recognized by common law.\textsuperscript{30} The right of the barrister not to disclose his client's secrets was derived from a "gentleman's" oath and honor.\textsuperscript{31} This rationale was later replaced by the view that a privilege of confidentiality promotes full disclosure by the client, which is essential to the attorney's ability to effectively represent the client, outweighing the state's interest in seeking the truth.\textsuperscript{32} The privilege has long been recognized in every jurisdiction in the United States\textsuperscript{33} and is now considered to be a required

\textsuperscript{28} 8 JOHN HENRY WIGMORE, EVIDENCE § 2285 (McNaughton 1961).
\textsuperscript{29} Rule 501 of the Federal Rules of Evidence states:

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

\textsuperscript{30} See 8 WIGMORE, supra note 28, § 2290; Ann M. Stanton, Child-Parent Privilege for Confidential Communications: An Examination and Proposal, 16 Fam. L.Q. 1, 7 (1982).
\textsuperscript{31} See 8 WIGMORE, supra note 28, § 2286, at 530–31.
\textsuperscript{32} See MCCORMICK ON EVIDENCE § 87, at 313–15 (John W. Strong ed., 4th ed. 1992); 8 WIGMORE, supra note 28, § 2290, at 542. Perhaps the most concise yet complete rationale for the privilege is the statement that:

Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much. And, surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for the truth itself.

Daniel R. Coburn, Child-Parent Communications: Spare the Privilege and Spoil the Child, 74 DICK. L. REV. 599, 605 (1970) (quoting Pearse v. Pearse, 1 De G. & Sm. 28–29 (1846)).
\textsuperscript{33} See Coburn, supra note 32, at 604; Comment, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 YALE L.J. 1226, 1227 (1962); Stanton, supra note 30, at 9. Six jurisdictions, Connecticut, District of Columbia, Massachusetts, Rhode Island,
ethical responsibility.34 Only the client may claim the privilege, which is only established upon a showing that there existed an attorney-client relationship,35 there was a communication,36 and that the communication was confidential.37 Some courts have also noted constitutional grounds supporting the privilege in the Fifth, Sixth, and Fourteenth Amendments.38

The physician-patient relationship was not recognized in the common law.39 The first state to recognize such a privilege was New York, in 1828.40 The underlying rationale for the privilege is to promote patient disclosure by shielding them from possible embarrassment or invasion of privacy, and thus allow physicians to accurately diagnose and treat their illnesses.41


See Keir v. State, 11 So.2d 886, 888 (Fla. 1943); MCCORMICK, supra note 32, § 88 at 322; 8 WIGMORE, supra note 28, §§ 2294–2304 (detailing the situations in which the privilege does and does not apply).

See MCCORMICK, supra note 32, § 89 at 327; 8 WIGMORE, supra note 28, §§ 2306–09 (distinguishing between communications and acts for purposes of applying the privilege).

See MCCORMICK, supra note 32, § 91 at 333; 8 WIGMORE, supra note 28, §§ 2311–16 (detailing what types of information will be considered confidential and under what circumstances).

See Caldwell v. United States, 205 F.2d 879, 881 (D.C. Cir. 1953); Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951).


See 8 WIGMORE, supra note 28, § 2380 at 819–20 (citing 2 N.Y. Rev. Stat. 1828, 406 (pt. 3, c. 7, art. 9, § 73)).

See MCCORMICK, supra note 32, § 98 at 369 (“The rationale traditionally asserted to justify suppression in litigation of material facts learned by a physician is the encouragement thereby given to the patient freely to disclose all matter which may aid in the diagnosis and treatment of disease and injury.”). Wigmore, however, criticizes this justification. Applying the four requirements of privilege, see supra note 28 and accompanying text, Wigmore argues that apart from venereal disease and abortion, most people openly describe the facts of their illnesses in great detail. See 8 WIGMORE, supra note 28, § 2380a at 829. Furthermore, Wigmore does not believe disclosure of confidential communications would actually deter patients from
The priest-penitent relationship, though not protected at common-law, is now protected by statute in most states. In order for the privilege to be asserted, the penitent must have intended for the communication to be confidential and that the communication was made to an ordained clergyman.

In American law, there are two dimensions of marital privileges. First, some statutes either provide a right to refuse or disqualify spouses from giving adverse testimony against the other spouse. Second, many jurisdictions recognize a privilege that protects confidential seeking assistance of physicians. See id. at 831–32. Thus, according to Wigmore, the injury to the physician-patient relationship does not outweigh the interests of the state. See id. at 830.

See WIGMORE, supra note 28, § 2394 at 869 (finding that post-Restoration courts declined to recognize any privilege as to confessions). In pre-sixteenth century England, however, ecclesiastical law and secular law were so intertwined that English courts likely gave deference to the need for confidentiality. See 2 SCOTT N. STONE & ROBERT K. TAYLOR, TESTIMONIAL PRIVILEGES § 6.01 (2d ed. 1995).

See 8 WIGMORE, supra note 28, § 2395 at 873. For state statutes, see id. (Supp. 1991) (citing, e.g., ALA. CODE § 12-21-166 (1986); ARIZ. REV. STAT. ANN. § 12-2233 (West 1982); CAL. EVID. CODE §§ 1030–34 (West 1966); DEL. UNIF. R. EVID. 505 (1980); ILL. COMP. STAT. ANN. ch. 110, § 8-803 (West 1982); MICH. COMP. LAWS ANN. § 600.2156 (West 1986); MINN. STAT. ANN. § 595.02(c) (West Supp. 1999); N.Y. C.P.L.R. 4505 (McKinney 1992); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1976); TEX. R. EVID. 505 (1982); VT. R. EVID. 505 (1983)).

See Begens, supra note 39, at 713. But see People v. Brown, 368 N.Y.S.2d 645 (Sup. Ct. 1974) (finding that defendant's statement to his minister was privileged, even though overheard by police).

Proposed Rule 506(b) provided: "[a] person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual advisor." 2 STONE & TAYLOR, supra note 42, § 6.04 (quoting PROPOSED FED. R. EVID. 506(b)). While the proposed federal rule defined a clergyman as "a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him," id. (quoting PROPOSED FED. R. EVID. 506(a)(1)), states vary as to what they consider to be a "clergyman." See id. § 6.05.

Most states apply this rule only in criminal cases. See 2 STONE & TAYLOR, supra note 42, § 5.02. This rule takes several forms: (1) absolute disqualification, recognized in Hawaii, Ohio, Pennsylvania, Texas and Wyoming; (2) disqualification but allowing testimony upon consent of the non-witness spouse, recognized in Mississippi, Montana, Nebraska, and New Jersey; (3) a power to prevent the spouse from giving adverse testimony, recognized in Alaska, Arizona, Colorado, Idaho, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, Virginia, Washington, and West Virginia; or (4) a privilege not to testify adversely against one's spouse, recognized in Federal courts, Alabama, California, Connecticut, District of Columbia, Georgia, Louisiana, Maryland, Massachusetts, Oregon, Rhode Island, and Utah. See id.
communications made within the marital relationship.\(^{47}\)

Interestingly, the early common-law protection extended to spouses was very similar to the protection in Jewish Law. In Jewish Law, family members, including spouses, were not permitted to testify in judicial proceedings.\(^{48}\) At common-law, spouses were entirely disqualified from testifying either for or against each other.\(^{49}\) This rule could not be waived by agreement or dissolution of the marriage.\(^{50}\)

In *Trammel v. United States*,\(^{51}\) the Supreme Court recognized a shift in the development of the spousal privilege that limited the ability of the defendant to prevent his or her spouse from testifying as to marital communications. In *Trammel*, the testimony of the defendant's wife constituted almost the entirety of the government's case against the defendant for conspiracy to import heroin.\(^{52}\) The defendant claimed that spousal privilege should have permitted him to prevent his wife's testimony from being used against him.\(^{53}\) The Court

---

\(^{47}\) *See* id. § 5.01. In federal court and many states, both spouses are granted a privilege to refuse to disclose and prevent the other spouse from disclosing confidential communications. *See* ARIZ. REV. STAT. ANN § 12-2232 (West 1994); CAL. EVID. CODE § 980 (West 1986); COLO. REV. STAT. § 13-90-107(a) (1998); DEL. UNIF. R. EVID. 504 (1999); FLA. STAT. ANN. § 90-504 (West 1999); IDAHO CODE § 9-203.1 (1998); KAN. STAT. ANN. § 60-428 (1994); MICH. COMP. LAWS ANN. § 600.2162 (West 1986); MINN. STAT. ANN. § 595-02(a) (West Supp. 1999); MONT. CODE ANN. § 26-1-802 (1991); NEB. REV. STAT. § 27-505 (1995); NEV. REV. STAT. ANN. § 49.295(1)(a) (Michie 1996); N.J. STAT. ANN. § 2A:84A-22 (West 1994); N.Y. C.P.L.R. 4502(b) (McKinney 1992); OR. REV. STAT § 40.255(2) (1997); UTAH CODE ANN § 78-24-8(1) (1996); VA. CODE ANN. § 8.01-398 (Michie 1992); WASH. REV. CODE. ANN. § 5.60.060(1) (West Supp. 1999); WIS. STAT. ANN. § 905.05 (West 1993); W. VA. CODE ANN § 57-3-3 (Michie 1997); *see also* Blau v. United States, 340 U.S. 332, 333 (1951) (holding that "marital communications are presumptively confidential").

\(^{48}\) *See* supra note 24–26 and accompanying text (discussing the halachic disqualification of related witnesses).

\(^{49}\) *See* 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 706 (2d. Amer. ed. 1828). The rationale for the prohibition against spouses testifying on behalf of one another was based on the assumption that husband and wife's interests were identical. *See* id. Testimony by spouses against one another was proscribed by a public policy concern against distrust and dissention within the household. *See* id.

\(^{50}\) *See* id.


\(^{52}\) *See* id. at 43.

\(^{53}\) *See* id. at 41–42.
discussed its holding in *Hawkins v. United States,*[54] where it had held that the spousal privilege was "a rule which bars the testimony of one spouse against the other unless both consent."[55] The Court found that "[w]hen one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve."[56] The Court thus modified the spousal privilege rule and held that only the testifying spouse could assert the privilege against giving adverse testimony.[57]

Lower courts have imposed some other limitations on the spousal privilege. The privileged communication must have been made during a valid marriage.[58] The privilege is generally limited to verbal communications between spouses, not acts.[59] A spouse may be prevented from asserting the privilege if compelling testimony would be in the best interests of a child.[60] Additionally, the testifying spouse, not the defendant-spouse, can only assert the privilege against adverse testimony.[61]

Marital

---

[55] Trammel, 445 U.S. at 46 (quoting Hawkins v. United States, 358 U.S. 74, 78 (1958)). In *Hawkins*, the Court had justified the broad spousal privilege stating, "the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences." *Hawkins*, 358 U.S. at 79.
[56] Trammel, 445 U.S. at 52.
[57] See id. at 53.
[58] See United States v. Knox, 124 F.3d 1360, 1365 (10th Cir. 1997) (requiring the defendant to prove that the communication with his former spouse occurred prior to their divorce); United States v. Acker, 52 F.3d 509, 515 (4th Cir. 1995) (prohibiting defendant from asserting marital privilege as to man she lived with for 25 years where the state of residence did not recognize common-law marriage); State v. Walker, 691 A.2d 1341, 1358 (Md. 1997) (finding that spousal privilege "does not preclude the admission of out-of-court statements made by [a] spouse prior to the marriage"); Commonwealth v. Diaz, 661 N.E.2d 1326, 1329 (Mass. 1996) (declining to extend spousal privilege to woman defendant who lived with for six years).
[60] See People v. Eveans, 660 N.E.2d 240, 246–47 (Ill. App. Ct. 1996) (finding a child interest exception to spousal privilege); *Bahe*, 128 F.3d at 1446 (applying child interest exception for spousal testimony relating to abuse of a minor child, even where neither spouse is the parent of that child).
[61] See *Knox*, 124 F.3d at 1365; United States v. Ramos-Oseguera, 120 F.3d
"[c]ommunications . . . are presumed to be confidential," but the privilege is deemed to be waived if disclosed to third parties.63

Many privileges currently accepted in the United States are recognized in order to preserve the integrity of socially desirable relationships. Some of those relationships, such as the attorney-client, physician-patient, and priest-penitent, are protected in order to encourage individuals in need of assistance to seek advice or treatment. Some privileges are justified by the desire to shield communications within some relationships from public knowledge. This rationale, otherwise known as the privacy argument, has been used as additional justification for the spousal privileges and the physician-patient privilege. The parent-child privilege can be justified under both rationales. Children are encouraged to communicate with their parents to seek advice and guidance. Preserving the confidentiality of communications within this relationship is essential to family unity and trust.

PART III – THE PARENT-CHILD PRIVILEGE IN AMERICAN LAW

A. Jurisdictions That Recognize a Privilege

New York is the only state to judicially recognize a parent-child testimonial privilege. The leading New York case is In re Application of A & M.64 The parents of the defendant refused to testify in a grand jury proceeding as to alleged admissions by their 16-year old son regarding his involvement in an arson.65 The parents claimed that the communications with their son should be recognized as


62 Savage, 695 A.2d at 824; see also United States v. Taylor, 92 F.3d 1313, 1332 (2d Cir. 1996) (holding that the government bears the burden of defeating the presumption that marital communications are made privately).

63 See Taylor, 92 F.3d at 1331 (upholding admission of telephone recording under third party disclosure exception); State v. Clark, 570 N.W.2d 195, 203 (N.D. 1997) (finding privilege did not extend to police officer to whom wife repeated defendant's statements).

64 403 N.Y.S.2d 375 (4th Dep't 1978).

65 See id. at 377.
privileged since their son sought their guidance and counsel in confidence. The court agreed that "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.'" The court acknowledged that parent-child communications were not protected by any statutory privilege, but stated:

It would be difficult to think of a situation which more strikingly embodies the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to his mother and father. There is nothing more natural, more consistent with our concept of the parental role, than that a child may rely on his parents for help and advice.

The court found that when the state attempts to intrude upon familial relationships, which are constitutionally protected by the right of privacy, it must show a legitimate state purpose that will be carefully examined by the court. The court then concluded that the societal interest in "protecting and nurturing the parent-child relationship" outweighed the State's interest in finding fact. Thus the parents, although required to appear before the grand jury, could assert their constitutionally protected privacy when questioned about confidential communications occurring within the familial relationship of parent and child.

In the twenty years since In re A & M, New York courts have extended the parent-child privilege to some grandparents and have found that the privilege is not limited by the age of the child. New York does, however,

---

66 See id.
67 Id. at 381 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
68 Id. at 378.
69 See id.
70 Id. at 380.
71 See id. at 382.
72 See In re Ryan, 474 N.Y.S.2d 931, 932 (Fam. Ct. Monroe County 1984) (extending privilege to grandmother where she was the primary caretaker of the juvenile and the juvenile had permanently resided with her for 15 years).
73 See People v. Fitzgerald, 422 N.Y.S.2d 309, 314 (Westchester County Ct. 1979) (finding that the privilege protects an ongoing parent-child relationship and is thus not limited by the age of either party).
require that the communication be made “in confidence and for the purpose of obtaining support, advice or guidance.”

Only one federal court has judicially recognized a parent-child privilege. In In re Agosto, a son claimed he would suffer irreparable harm if he were forced to testify against his father before a grand jury. In considering the son’s privacy claim, the court stated, “the Supreme Court has determined that there is a ‘private realm of family life which the state cannot enter.’” The court noted, however, that the realm of family privacy may be encroached when the state can show a compelling state interest that outweighs the interest in preventing intrusion by the state.

Three other states have chosen to recognize a form of parent-child privilege by statute. All three states limit this right to minor children. Idaho and Minnesota prohibit

---

74 In re Mark G., 410 N.Y.S.2d 464, 465 (4th Dep't 1978); see also People v. Robertson, 539 N.Y.S.2d 785, 786 (2d Dep’t 1989) (holding that the defendant’s statements to his mother in the presence of police officers were not protected by the parent-child privilege because the defendant did not intend for his communications to be confidential); People v. Tesh, 508 N.Y.S.2d 560, 561 (2d Dep’t 1986) (finding that “the defendant’s communications to his mother were made in the presence of third parties, thus negating any assertion of a privileged communication”); People v. Gloskey, 482 N.Y.S.2d 82, 84 (3d Dep’t 1984) (requiring that the testifying witness wishes to remain silent and that the context of the conversation “confirm an aura of confidentiality”).


76 Id. at 1299.

77 Id. at 1312 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

78 See id. at 1312.

79 Section 9-230(7) of the Idaho Code provides:

Any parent, guardian or legal custodian shall not be forced to disclose any communication made by their minor child or ward to them concerning matters in any civil or criminal action to which such child or ward is a party. Such matters so communicated shall be privileged and protected against disclosure; excepting, this section does not apply to a civil action or proceeding by one against the other nor to a criminal action or proceeding for a crime committed by violence of one against the person of the other, nor does this section apply to any case of physical injury to a minor child where the injury has been caused as a result of physical abuse or neglect by one or both of the parents, guardian or legal custodian.


80 Section 595.02(i) of the Minnesota Statutes provides:

A parent or the parent’s minor child may not be examined as to any communication made in confidence by the minor to the minor’s parent. A communication is confidential if made out of the presence of persons not members of the child’s immediate family living in the same household.

This exception may be waived by express consent to disclosure by a parent entitled to claim the privilege or by the child who made the communication
the state from forcing a parent to testify against his or her child in both criminal and civil proceedings.

Lastly, in Massachusetts, the statute\textsuperscript{81} was passed in response to the decision in \textit{Three Juveniles v. Commonwealth}.\textsuperscript{82} In \textit{Three Juveniles}, the adolescent children and parents objected to the compelled grand jury testimony of the children against their father in a murder investigation.\textsuperscript{83} A narrow majority rejected an absolute privilege permitting the children not to testify.\textsuperscript{84} Furthermore, the court declined to consider whether a privilege existed as to confidential communications between parents and children.\textsuperscript{85} The dissenters, on the other hand, would have recognized a privilege based upon public policy grounds, finding that the "violence done to the child, the damage to family unity, and the consequent injury to society that may result from the State's coercing an unemancipated minor to testify against a parent" outweighed the state's
interest in enforcing its criminal laws. The dissenters believed that requiring a child to incriminate his or her parent would be an "unrealistic demand" that would disrupt the normal relationship between parent and child. The dissenters found that both the privacy interest in the family and the societal interest in promoting the unity of the family, as demonstrated in the recognition of a parent-child privilege, supported the extension of a parent-child testimonial privilege. The Massachusetts legislature agreed. The statute it passed, however, does not permit a parent to refuse to testify against his or her own child.

B. Jurisdictions That Have Declined to Recognize a Privilege

The majority of U.S. jurisdictions have overwhelmingly declined to extend any testimonial privilege to the parent-child relationship. Most notably, in Port v. Heard, the court held the parents in contempt for refusing to testify before a grand jury regarding the involvement of their seventeen-year-old son in a capital murder investigation. The parents based their claim on two legal theories, privacy, and free exercise of religion. The parents contended that rabbinical law prohibited them from testifying against their son. The court found that Agosto and Greenburg were "extreme departures from the traditional rule in federal courts that, other than the spousal privilege, there is no privilege which permits a person not to testify against his or her family members." The court distinguished the parent-child relationship from the spousal relationship because "only the most extraordinary events can ever destroy the relations of parent and child, brother and sister," whereas

---

86 Id. at 1206 (O'Connor, J., dissenting).
87 Id. at 1209 (O'Connor, J., dissenting).
88 See id. (citing Moore v. City of East Cleveland, 431 U.S. 494 (1977)).
89 See id.
90 See id.
91 The Massachusetts statute only addresses a situation where a minor child is called to testify against a parent. The statute does not actually create a testimonial privilege, but actually disqualifies the child as a witness. See MASS. ANN. LAWS ch. 233, § 20; see also Note, Parent-Child Loyalty, supra note 82, at 913.
93 See id. at 1216.
94 See id. at 1215.
95 See id. at 1218.
96 Id. at 1219.
the marital relationship is easily dissolved.\textsuperscript{96} Apparently, the court did not believe that helping convict one's own son in a capital murder case was an "extraordinary event" that could destroy the parents' relationship with their child. In addressing the Port's equal protection argument, the court applied a rational basis test because the distinction between the spousal and parent-child relationships did "not involve either fundamental rights or inherently suspect classifications."\textsuperscript{97} The court characterized the legislature's omission of protecting the parent-child relationship as a "policy" consideration and therefore concluded the legislature's determination, in not considering a testimonial privilege for parents and children, was reasonable.\textsuperscript{98}

Several other courts have declined to extend a parent-child privilege, preferring instead to defer to the legislature.\textsuperscript{99} Even where courts have found they could judicially create a testimonial privilege, they have declined to do so. In \textit{State v. Maxon},\textsuperscript{100} the Supreme Court of Washington found that it had the authority to judicially establish a parent-child privilege, but found no state or federal constitutional right of privacy that would require a parent-child privilege.\textsuperscript{101} The court, upon applying the Wigmore test,\textsuperscript{102} found that considerations such as the loss of valuable evidence outweighed the public policy arguments in favor of a parent-child privilege.\textsuperscript{103}

\section*{C. Claiming a Parent-Child Privilege Under the Free-Exercise Clause}

A few courts have addressed claims of parent-child privilege under Jewish Law. In \textit{In re Grand Jury
Proceedings (Greenburg), a federal district court recognized a conflict between compelling a mother to testify against her daughter and the mother’s ability to freely exercise her religion. The court distinguished Smilow v. United States on the basis that the court in Smilow was skeptical of the religious basis of the witness’s claim. While the Greenberg court declined to create a common law parent-child privilege, it did recognize a limited privilege under the First Amendment.

Recently, the parents of Amy Grossberg, a teen accused of killing her newborn child, asserted both a parent-child privilege and a free exercise of religion issue when subpoenaed to testify about their daughter in her criminal trial. In addressing the claim of parent-child privilege, the court followed the Third Circuit’s holding in In re Grand Jury and declined to judicially recognize such a privilege. The Grossbergs then contended that compelled testimony against their daughter would violate their beliefs and freedom to exercise their religion under Jewish law. Distinguishing between the freedom to believe and the freedom to act, the court determined that since “the Grossbergs’ freedom to act, not their freedom to believe, is implicated by any testimony about their daughter, . . . the Grossbergs’ freedom to act must yield to the compelling state interest in hearing everyone’s evidence.”

In these cases, parents have asserted that compelling them to testify against their child violated their rights under the Free Exercise Clause. These cases are

105 See id. at 582.
106 465 F.2d 802, 804 (2d Cir. 1971) (denying claim by witness that testifying would result in “[d]ivine punishment and ostracism from the Jewish Community”).
107 See Greenberg, 11 Fed. R. Evid. Serv. at 583.
108 See id. at 587.
110 103 F.3d 1140 (3rd Cir. 1997).
111 See Grossberg, 1998 WL 117975, at *2 (“[A] basis for a parent-child testimonial privilege has not been established.”).
112 See id. at *3.
113 See id. (citing In re Marriage of Gove, 572 P.2d 458, 461 (Ariz. Ct. App. 1977)).
114 Id.
problematic because, as discussed above, even though the rule in Jewish Law was widely recognized, the bar against testimony does not necessarily rise to the authority of a mitzvah. Moreover, permitting this claim for Jews but not adherents to other religions could rise to the level of government endorsement of Judaism and thus violate the Establishment Clause.

D. Academic Discussion of a Parent-Child Privilege

Several commentators have argued in favor of recognizing a parent child privilege. Philip Kraft found that these arguments typically fall into at least one of four categories. The first group of commentators argues that a

115 See, e.g., Coburn, supra note 32, at 633 (proposing that compelling a juvenile’s parents to testify as to confidential communications infringes upon the juvenile’s constitutional rights); Bruce N. Lemons, From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege? 1978 BYU L. REV. 1002, 1029 (1978) (analyzing existing privileges and finding that “it simply cannot be argued that the relationships now protected by the panoply of privilege are more important to society . . . than the parent-child relationship”); Marianne E. Scott, Comment, Parent-Child Testimonial Privilege: Preserving and Protecting the Fundamental Right to Family Privacy, 52 U. CIN. L. REV. 901, 920 (1983) (“It is critical to a child’s emotional and psychological development that he know that he may explore his problems in an atmosphere of trust and understanding without fear that his confidences will be revealed to others at a later time.”); Stanton, supra note 30, at 67 (arguing that the benefits of a parent-child privilege will outweigh the state’s need for the evidence the testimony would otherwise provide); Wendy Meredith Watts, The Parent-Child Privileges: Hardly a New or Revolutionary Concept, 28 WM. & MARY L. REV. 583, 619–31 (1987) (proposing a model statute allowing for both an adverse testimonial privilege and a confidential communications privilege); Yolanda L. Ayala & Thomas C. Martyn, Note, To Tell or Not to Tell? An Analysis of Testimonial Privileges: The Parent-Child and Reporter’s Privileges, 9 ST. JOHN’S J. LEGAL COMMENT. 163, 180 (1993) (“The parent-child privilege enables the family institution to grow, and in turn, strengthens the love and mutual trust between the parent and child.”); Begens, supra note 39, at 735 (“Adoption of a parent-child privilege . . . is essential to maintaining open lines of communication between a child and his or her parents, thus protecting family harmony.”); Note, Parent-Child Loyalty, supra note 82, at 928 (“Compelling parents and children to testify against each other is likely not only to rip apart families but also to invite perjury and to reduce public respect for the judicial system.”). See generally Susan Levine, Comment, The Child-Parent Privilege: A Proposal, 47 FORDHAM L. REV. 771 (1979) (arguing that today, given the high rates of divorce, a privilege is most needed in order to foster communications with parents for guidance and advice).

116 See Philip Kraft, The Parent-Child Testimonial Privilege: Who’s Minding the Kids?, 18 FAM. L.Q. 505, 510–16 (1985) (revealing these arguments to be either the classic, evidentiary argument, the privacy argument, the repugnancy argument, or the no-win argument).
parent-child privilege ought to be recognized because it would satisfy the four conditions of the Wigmore test. The next group posits that a parent-child privilege can be based on the constitutionally protected privacy interest. A third argument for recognition of a parent-child privilege is that it is simply repugnant to either force a child to betray his or her parent or to force an unwilling parent to assist in the prosecution of his or her child. Finally, there is the "no-win" argument which asserts that continued denial of a testimonial privilege will result in perjury, refusals to testify that lead to contempt charges, or the destruction of the parent-child relationship.

Therefore, all but four states have chosen to place the state's interest in obtaining evidence above the sanctity of the parent-child relationship. Courts choosing to recognize a parent-child privilege have largely based their reasoning in the constitutional right of privacy. Most courts, however, have overwhelmingly declined to extend any testimonial privilege to protect communications between parents and their children.

CONCLUSION

In contrast to American law, which draws the line of privilege at marriage, Jewish law protected a much broader class of family members. Thus we are presented with two legal systems that stand on opposite ends of a spectrum measuring the societal value placed on family relationships. While the rule in Jewish law was much broader than any privilege that has been suggested to American courts, it can serve as a historical marker that could allow courts and legislatures to strike a more equitable balance between the state's need for evidence and fostering open communication within families.

Erica Smith-Klocek

---

117 See WIGMORE, supra note 28, at 2285; Kraft, supra note 116. See generally Coburn, supra note 32; Lemons, supra note 115; Levine, supra note 115; Stanton, supra note 30.
118 See Kraft, supra note 116, at 512–14. See generally Lemons, supra note 115; Levine, supra note 115; Stanton, supra note 30.
119 See Kraft, supra note 116, at 514–15.
120 See id. at 515–16 (citing Clark, Questioning the Recognition of a Parent-Child Testimonial Privilege, 45 ALB. L. REV. 142 (1980)).