An Examination of the State and Federal Courts' Treatment of the Parent-Child Privilege

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AN EXAMINATION OF THE STATE AND FEDERAL COURTS' TREATMENT OF THE PARENT-CHILD PRIVILEGE

INTRODUCTION

Who would a child most likely go to if he or she got into trouble with the law? Optimally, a child would seek the guidance of his or her parents. Recently, "family values" has been the topic of much discussion. Society has become very

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1 See In re Application of A and M, 403 N.Y.S.2d 375, 378 (4th Dep't 1978) (asserting that "[t]here 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 New York court acknowledged that:

- Child psychologists and behavioral scientists generally agree that it is essential to the parent-child relationship that the lines of communication remain open and that the child be encouraged to 'talk out' his problems. It is therefore critical to a child's emotional development that he know that he may explore his problems in an atmosphere of trust and understanding without fear that his confidences will later be revealed to others.

2 See 144 CONG. REC. H2270 (daily ed. Apr. 23, 1998) ("If we truly respect family values, we must protect the ability of parents and children to have full trust in each other and not fear the court's subpoena to get in between them.") (statement of Rep. Nadler). See, e.g., Craig W. Christensen, Legal Ordering of Family Values: The Case of Gay and Lesbian Families, 18 CARDOZO L. REV. 1299, 1316–26 (1997) (discussing contemporary family law as it relates to heterosexual couples and speculating its future course); Linda R. Crane, Family Values and the Supreme Court, 25 CONN. L. REV. 427, 448–54 (1993) (discussing the social issues related to unwed fathers asserting parental rights); James Donald Moorehead, Of Family Values and Child Welfare: What Is in the "Best" Interests of the Child?, 79 MARQ. L. REV. 517, 518–21 (1996) (discussing how society responds to parental abuse and neglect); Russell G. Pearce, Foreword to Symposium on "Should the Family Be
concerned with striving to maintain the familial sanctum, yet the law generally does not protect confidential communications between parent and child. This means that a parent may be called to testify against his or her child in a civil or criminal proceeding or, vice versa, a child may be called to testify against a parent. This occurs more frequently than many realize.

A number of privileges are recognized under both the common and statutory laws. The law recognizes a spousal

Represented as an Entity?": Reexamining the Family Values of Legal Ethics, 22 SEATrLE U. L. REV. 1 (1998) (discussing the pros and cons of legal representation of families as single entities); Suzanne Carol Schuelke, Prison Visitation and Family Values, 77 MICH. B.J. 160, 163–64 (1998) (discussing how visits from family members and preserving family bonds diminishes the chances that inmates will return to prison).

Supporting "family values" is also a popular political stance to take these days. See, e.g., Clinton Makes a Play for Family Values, DAILY MAIL, Jan. 21, 1999, at 4 (suggesting that President Clinton’s proposal concerning tax credits for parents staying home to take care of their children and a patients bill of rights boosts his popularity ratings); Chris Murphy, The Race for Congress: Ron Greer Touts His Family Values, WIS. ST. J., Sept. 1, 1998, at 2A (discussing 1998 Wisconsin Congressional candidate, Ron Greer, and his prevalent use of “family values” issues in his campaign); Andrea Peyser, Bill’s Wife Turns Family Values Inside Out, N.Y. POST, Sept. 24, 1998, at 16 (suggesting that Hillary Clinton lectures on family values for the sole reason of effectuating her political programs).

See In re Grand Jury Proceedings (Unemancipated Minor Child), 949 F. Supp. 1487, 1495 (E.D. Wash. 1996) (“[I]n 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.”). District Judge Claiborne recognized this paradox when he stated:

To damage the parent-child relationship would result in damage to the child’s relationship to society as a whole. In an age in which Americans bemoan the lack of loyalty or sense of responsibility which some family members seem to exhibit toward one another, resulting in massive government support programs, it is paradoxical that, on the other hand, the government would seek to employ information-gathering tactics which further undermine the integrity and supportive structure of the family unit.


See generally Doug Most, A Court Has Ears Inside the Home. Parent-Child Secrets Not Safe, RECORD, Dec. 7, 1997, at A01 (discussing how the parents of Amy Grossberg fought subpoenas by Delaware prosecutors); Need for Parent/Child Privilege, National Association of Criminal Defense Lawyers, CHAMPION, Apr. 1998, at 11 (“At no time before has the need for a ‘parent-child privilege’ been so clear as when America . . . saw Marcia Lewis visibly shaken and trembling after her ordeal before the Washington grand jury convened by Independent Counsel Kenneth Starr.”) (quoting Gerald B. Lefcourt); Barry Siegel, Choosing Between Their Son and the Law, L.A. TIMES, June 13, 1996, at A1 (discussing how parents were held in contempt of court for refusing to testify against their son who had confessed committing a rape to them).
privilege, an attorney-client privilege, a doctor-patient privilege, a priest-penitent privilege, a psychotherapist-patient privilege, and a reporter-source privilege. The policy concerns justifying these widely accepted privileges are just as important in the parent-child context. The law holds parents responsible for the caring of their children in all aspects of their lives.

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5 See Jaffee v. Redmond, 518 U.S. 1, 11 (1996) (modifying spousal privilege to "further[] the important public interest in marital harmony") (quoting Trammel v. United States, 445 U.S. 40, 53 (1979)).

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

7 See 3 WEINSTEIN'S FEDERAL EVIDENCE § 514.01(1) (2d ed. 1998) (stating that the privilege encourages "full and frank disclosure by patients to facilitate proper medical treatment"). No physician-patient privilege was recognized under federal common law. See id. § 514.02. But, the majority of the states recognize the privilege. See id. § 514.11. Federal courts may recognize the privilege in accordance with state law or under the lawyer-client or psychotherapist-patient privilege. See id. § 514.03. The privilege may also be recognized under a constitutional right to privacy analysis. See id. § 514.05.

8 See Trammel, 445 U.S. at 51 (stating that "privileges between priest and penitent... are rooted in the imperative need for confidence and trust"); United States v. Nixon, 418 U.S. 683, 709 (1974) (stating that "generally... a priest may not be required to disclose what has been revealed in professional confidence"); see also 3 WEINSTEIN'S FEDERAL EVIDENCE, supra note 7, § 506.03(2)( noting that the rationale behind the privilege is that "[civilized society presumes that a communication made in reasonable confidence that it will not be disclosed will be protected]."

This privilege had its origin in the Roman Catholic Canon Law. See Michael J. Mazza, Should Clergy Hold the Priest-Penitent Privilege?, 82 MARQ. L. REV. 171, 174–75 (1998) (explaining how papal order at the end of the ninth and thirteenth centuries barred priests from disclosing the sins heard during confession and warning that if such a disclosure was made the priest would be stripped of his status).

9 See Jaffee, 518 U.S. at 10 (quoting Trammel, 445 U.S. at 51) (asserting that the "psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust'").

10 See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE—DOCTRINE & PRACTICE, § 5.40 (1995) (stating that the privilege has been widely adopted by the states and many federal courts recognize the privilege). The rationale underlying the privilege is that if it were not recognized, "the newsgathering function would be impaired." Id.

11 The analogies that can be drawn between these legally recognizable privileges and the parent-child privilege will be addressed throughout this Note.

12 See Richard C. Burke & Anna Maria Maxwell, Annual Survey of South Carolina Law, 48 S.C. L. REV. 107, 115–22 (1996) (discussing the West Virginia primary caretaker doctrine in domestic relations cases); Felicia C. Strankman, Comment, Children's Medical Care in California: Conflicts Between Parent, Child, and State, 36 SANTA CLARA L. REV. 899, 900–25 (1996) (discussing legal reaction to parental refusal of medical care for their children); see also Carl E. Schneider, On
Courts have consistently found that parents have a duty to provide their children with maintenance, care, and guidance. Furthermore, as criminal penalties become harsher and courts are less-forgiving of juvenile offenders, children are more likely to need the guidance and care of their parents. It is important to recognize that "when a minor is arrested for a crime, it is only natural that, in the first instance, he should regard his parents, rather than a lawyer, as a source of assistance and advice."

The majority of state and federal courts do not recognize a parent-child testimonial privilege protecting confidential communications made between children and their parents.

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13 See Ascuito v. Farricelli, 711 A.2d 708, 713 (Conn. 1998) (stating that the duty of a parent to provide guidance for their child does not end with divorce); Lastowski v. Norge Coin-O-Matic, Inc., 355 N.Y.S.2d 432, 434 (2d Dep't 1974) (noting that parents owe a moral duty to their children to provide care, maintenance, and guidance); Boehm v. C.M. Gridley & Sons, 63 N.Y.S.2d 597, 592 (Sup. Ct. 1946) (same); In re O'Donnell, 61 N.Y.S.2d 822, 824 (Child. Ct. New York County 1946) (sentencing a parent to three months in warehouse for her neglect and failure to provide children with spiritual guidance); In re Fujimoto's Guardianship, 226 P.505, 506 (Wash. 1924) (stating that minors are entitled to guidance and care from their parents, irrespective of the parent's nationality).


15 People v. Harrell, 450 N.Y.S.2d 501, 503 (2d Dep't 1982), aff'd, 449 N.E.2d 1263 (N.Y. 1983); see also People v. Burton, 491 P.2d 793, 798 (Cal. 1971) (asserting that it is "common knowledge" that a child who is in trouble with the law will call his parents before calling an attorney).

16 The various courts' treatment of the parent-child testimonial privilege will be
Conversely, legal scholars have consistently argued for the adoption of a parent-child privilege based on a variety of legal theories, sometimes looking to history to bolster their arguments. The English common law never recognized a parent-child testimonial privilege. Scottish law, on the other hand, held that a parent could not be compelled to testify against his or her child. The parent-child privilege is also currently recognized in France, Sweden, Germany, Yugoslavia, Israel, and

addressed throughout this Note.


Czechoslovakia. It is interesting to note that “both ancient Jewish law and Roman law entirely barred family members from testifying against each other, based on a desire to promote the solidarity and trust that support the family unit.” The Roman Catholic church has also recognized the privilege under Canon Law.

Recently, the Bill Clinton/Monica Lewinsky scandal brought the parent-child privilege into the spotlight, specifically because of the strong public response to Independent Counsel Kenneth Starr's subpoena of Monica Lewinsky's mother to testify before the grand jury. This investigation brought mainstream attention to the issue unlike ever before, calling for a review of the protection afforded to parent-child communications.

This Note asserts that the parent-child testimonial privilege should become pervasive law in the United States. This Note will also address arguments that have been made which weigh

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19 See id.
20 Covey, supra note 17, at 883.
21 See Parent-Child Loyalty and Testimonial Privilege, supra note 17, at 929 n.12.
against adoption of the privilege. Part I of this Note examines the statutory and common laws of the various states with regard to the parent-child privilege. Part II examines treatment of the privilege under Federal law. Part III outlines various constitutional justifications in support of the parent-child privilege such as the right to privacy and freedom of religion issues.

I. STATE LAW

A. Statutory Law

The majority of states have not instituted statutory law recognizing a parent-child privilege. Only Idaho23 and Minnesota24 have instituted a one-way parent-child privilege in statutory form protecting communications made by a minor child to his or her parents. These statutes generally provide for the abrogation of this privilege when there is a possibility that a child has been injured or neglected by his or her parent.25

The Minnesota statute further recognizes that the communication will be considered confidential even if it is communicated in front of another member of the child's immediate family.26 The parent-child privilege, however, can be voluntarily waived or will be deemed waived if it is not raised by the parent or the child at the time information regarding the confidential communication is sought.27

Additionally, a Massachusetts statute recognizes a one-way privilege which provides that a minor child cannot testify

23 See Idaho Code § 9-203 (7) (Michie 1998) (stating that "[a]ny 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").
24 See Minn. Stat. Ann. § 595.02 (j) (West Supp. 1999) (stating that "[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").
25 See Idaho Code § 9-203 (7) (Michie 1998) (noting that the parent-child privilege will not apply to a case of physical injury to a child where the injury has been caused by a parent, guardian, or legal custodian); Minn. Stat. Ann. § 595.02 (j) (West Supp. 1999) (recognizing various criminal and civil actions as exempted from the privilege, such as crimes committed by the parent upon the child and parental rights proceedings).
26 Minn. Stat. Ann. § 595.02 (j) (West Supp. 1999) (stating that "[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").
27 See id.
against a parent with whom the child resides. The privilege only applies, however, if the victim is not a member of the parent’s family and does not reside in the child's household.

Various organizations are urging Congress and the other states to follow the lead of Idaho, Minnesota, and Massachusetts in adopting a parent-child privilege. The National Association of Criminal Defense Lawyers is currently lobbying for Congress and state legislatures to adopt its version of a proposed parent-child privilege statute. Further, the American Bar Association has formed a committee which has drafted a model statute recognizing the parent-child testimonial privilege.

B. Common Law

New York is the only state that recognizes a common law parent-child testimonial privilege. In In re Application of A and M, the District Attorney sought to compel the parents of a sixteen year old boy to testify to admissions he made to his parents regarding a fire that was set. The court adopted a

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28 See MASS. ANN. LAWS ch. 233 § 20 (Law Co-op Supp. 1998) (stating that “[a]n unemancipated, minor child, living with a parent, shall not testify before a grand jury, trial of an indictment, complaint or other criminal proceeding, against said parent”).
29 See id.
30 See CHAMPION, supra note 4, at 11. A portion of the proposed statute would state the following: No parent, guardian or legal custodian shall be compelled to testify or disclose any communication made in confidence by a child to the parent, guardian or legal custodian, absent an explicit waiver by the child, in any administrative, civil or criminal action or grand jury proceeding other than an action relating to alleged violence or sexual abuse against the child. Id. at 10.
31 For a copy of the American Bar Association’s Model Parent-Child Privilege Statute §§ 101–04 see Watts, supra note 17 at 619–31 and 25 WRIGHT & GRAHAM, supra note 18. The proposed statute would cover only children who have not reached the age of majority and would protect parents and children from testifying about confidential communications made between the parties. See MODEL PARENT CHILD PRIVILEGE STAT. §§ 101(b), 102–03. There are some exceptions where the privilege would not attach, for example, if the parent and child are opposing parties. See id. § 103(d).
32 See, e.g., People v. Harrell, 450 N.Y.S.2d 501, 505 (2d Dep't 1982) (upholding the privilege for a 17 year old's in-custody communications to his mother), aff'd, 449 N.E.2d 1263 (N.Y. 1983); In re Ryan, 474 N.Y.S.2d 931 (Fam. Ct. Monroe County 1984) (refusing to admit statements made by a juvenile to his grandmother); People v. Fitzgerald, 422 N.Y.S.2d 309, 314 (Westchester County Ct. 1979) (discussing the application and upholding the validity of the parent-child privilege).
33 403 N.Y.S.2d 375 (4th Dep't 1978).
34 Id. at 377.
parent-child privilege and accepted the argument that the boy spoke to his parents while seeking guidance within the privacy of the family home, and expected the communications to be held in confidence.\(^{35}\)

The court based its holding on the theory of a constitutional right to family privacy.\(^{36}\) The Appellate Division recognized 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.'\(^{37}\) The court further asserted:

Surely the thought of the State forcing a mother and father to reveal their child's alleged misdeeds, as confessed to them in private, to provide the basis for criminal charges is shocking to our sense of decency, fairness and propriety. It is inconsistent with the way of life we cherish and guard so carefully and raises the specter of a regime which encourages betrayal of one's offspring.\(^{38}\)

The court also recognized the inherent danger that the "public trust in our system of justice" would be diminished if parents who refuse to testify against their children were sent to jail for contempt or perjury.\(^{39}\) Upon balancing these important interests against the state's legitimate fact-finding interests, the court concluded that the state's interests were not compelling enough to overcome the privilege.\(^{40}\)

The validity of the common law parent-child testimonial privilege was upheld in People v. Fitzgerald.\(^{41}\) In Fitzgerald, the court declared that the existence of a parent-child privilege was "grounded in law, logic, morality and ethics."\(^{42}\) The court also

\(^{35}\) See id. The court acknowledged, however, that there was an absence of factual findings with regard to the circumstances under which the admissions were communicated. See id.

\(^{36}\) See infra Part III and accompanying footnotes for a discussion of constitutional considerations addressed by various federal courts.

\(^{37}\) Application of A and M, 403 N.Y.S.2d at 381 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)). The court refused to extend the marital privilege to cover this communication. See id. at 377. The court also declined to extend the attorney-client privilege, even though the boy's father was an attorney. See id. at 377-78.

\(^{38}\) Id. at 380.

\(^{39}\) Id.

\(^{40}\) See id. at 381 (concluding that a protected communication privilege exists for statements made by a child to his parents).

\(^{41}\) 422 N.Y.S.2d 309 (Westchester County Ct. 1979).

\(^{42}\) Id. at 310. But see People v. Johnson, 644 N.E.2d 1378, 1379 (N.Y. 1994)
based the privilege's validity on the constitutional right to privacy within the family. In Fitzgerald, a twenty-three year old made admissions to his father concerning a hit and run car accident. The court, in refusing to force the father to testify about what his son had told him, recognized the important interest underlying the privilege in protecting the integrity of the parent-child relationship.

It is important to note that the Fitzgerald court did not limit the privilege to minor children. The court asserted that the mutual trust and understanding that exists between a parent and child cannot be intruded upon by the State because of an age barrier. Recently, however, the New York Court of Appeals and at least one lower court have refused to apply the privilege to admissions made by twenty-eight year old defendants.

In People v. Hilligas, a New York Supreme Court declined to recognize a parent-child privilege to cover communications made by an adult defendant. The court reasoned that the nature of the parent-child relationship changes when the child becomes an adult and, as a result, the State's interest outweighs the privacy interests involved. The court stated that "[t]he adult child is more likely to seek advice and guidance from persons other than their parents." In some situations "[t]he role of the parent as advisor and counselor ... is diminished when the child becomes an adult. The court apparently overlooked the fact that often the role of the parent as advisor increases. Logically, a person may be more willing to communicate with a

(mem.) (affirming the denial of a parent-child privilege where the child was 28 years old); People v. Hilligas, 670 N.Y.S.2d 744, 747 (Sup. Ct. 1998) (denying the use of the parent-child privilege once the child has reached adulthood).

43 Fitzgerald, 422 N.Y.S.2d at 312 (finding that a parent-child privilege stems from a right to privacy granted by the Constitution).

44 See id. at 310 (discussing defendant's admission to his father while alone).

45 See id.

46 See id. at 313–14 ("The parent-child relationship of mutual trust, respect and confidence, if it exists at all in the individual case, is one that should be and must be fostered throughout the life of the parties.").

47 See Johnson, 644 N.E.2d at 1379 (refusing to apply privilege to admissions made by a 28 year old child); Hilligas, 670 N.Y.S.2d at 747 (denying use of the parent-child privilege for an adult defendant).


49 See id. at 747 (denying the application of the parent-child privilege upon finding the parent-child relationship to diminish when the child reaches adulthood).

50 Id. (stating that adult children will more likely seek advice from attorneys, clergy, psychologists, and siblings).

51 Id.
parent as he or she gets older because the person’s fear of
discipline is significantly diminished. The person may feel more
comfortable discussing experiences with his or her parents which
were inappropriate to discuss when he or she was younger.
Adults often need the advice and guidance of their parents more
so than children.

The New York courts have seemingly further limited the
application of the parent-child privilege under certain
circumstances. In People v. Johnson, the New York Court of
Appeals refused to recognize the parent-child privilege because
the defendant was twenty-eight years old, another family
member was present when the communication was made, and
the child’s mother had previously testified to the grand jury. Thus, Johnson calls Fitzgerald’s validity into question because
their facts are similar. In both cases, the defendant was an
adult and the parent had previously testified to communications
which they wanted protected. Moreover, the Fitzgerald Court
stated that the privilege cannot be waived by a prior disclosure
of the confidential communication by the parent. Johnson is
distinguishable because there is arguably no familial privilege
generally protecting communications between family members,
and the communication was not confidential because a third
party was present when it was made. This appears to be a

See, e.g., Johnson, 644 N.E.2d at 1379 (denying application of the parent-
child privilege where the child wishing to assert it was an adult); People v. Major,
675 N.Y.S.2d 260 (4th Dep’t 1998) (rejecting defendant’s claim of parent-child
privilege); In re Terrance W., 674 N.Y.S.2d 529 (4th Dep’t 1998) (mem.) (same); In re
privilege where the statement was not made in confidence); Hilligas, 670 N.Y.S.2d
at 747 (declining to apply the parent-child privilege); People v. Romer, 579 N.Y.S.2d
306, 308 (Sup. Ct. 1991) (finding no parent-child privilege where communication
was made by a parent to a child); Berggren v. Reilly, 407 N.Y.S.2d 960, 962 (Sup.
Ct. 1978) (mem.) (finding “no privilege recognized in law for a conversation between
a parent and his child”).

See id. at 1379 (finding the parent-child privilege inapplicable).

See People v. Fitzgerald, 422 N.Y.S.2d 309, 316 (Westchester County Ct.
1979) (finding no waiver of the parent-child privilege under such circumstances).
There may be a waiver, however, if it is in the best interests of the child because the
court is seeking to maintain the familial relationship. The court uses an example
where its assistance is needed by the parents in order to control the child’s behavior.
See id. at 315 (citing occasions where the parent would not want to disclose
information).

See supra note 34 and accompanying text.
valid distinction because in *In re Mark G.*, the New York Appellate Division held that the parent-child privilege would not attach to communications that were neither made in confidence nor for the purpose of obtaining guidance.

Under New York common law, the parent-child privilege is generally limited to protecting communications that are made by the child to the parent. In *People v. Romer*, the court found that a communication made by a father to his son was not protected because parents generally do not seek guidance from their children. The court asserted that the purpose of the parent-child privilege under *Fitzgerald* was to protect the child's ability to disclose information to his parents without fear that the communication would be later revealed through testimony in court. As a result, the court in *Romer* declined to apply the parent-child privilege to a letter written by a father to his son.

The majority of states addressing the issue of whether a common law parent-child testimonial privilege exists have declined to recognize it. The most common argument asserted

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67 410 N.Y.S.2d 464 (4th Dep't 1978) (mem.).
58 See id. at 465–66 (finding no privilege where there is no wish for the communication to be held in confidence).
60 See id. at 308 (concluding that the parent-child privilege does not exist where the communication is from parent to child).
61 See id. (distinguishing the case from *Fitzgerald*).
62 See id. (finding the communication was not covered by the parent-child privilege).
by these courts is that it is the legislature's role, rather than the judiciary's, to create a parent-child privilege. A privilege addressing communications between parent and child involves carefully balancing the individual and governmental interests involved, which these courts have concluded is the role of the legislature.

Some state courts have refused to recognize the parent-child


Generally, courts do not recognize communications made between siblings as privileged. See State v. Wright, 378 N.W.2d 727, 733 (Iowa Ct. App. 1985) (finding “no authority establishing a privilege for sibling communications”); Willoughby, 532 A.2d at 1022 (holding that neither the state nor the federal constitution recognizes an intra-familial privilege).

64 See, e.g., In re Terry, 787 Cal. Rptr. at 915 (stating that the legislature is the best forum to decide who should own the privilege, whether it is waivable, and what exceptions should exist); Gilroy, 313 N.W.2d at 518 (refusing to recognize privilege absent statutory authority); Three Juveniles, 455 N.E.2d at 1205-06 (asserting that courts in recent years have “tended to leave the creation of evidentiary privileges to legislative determination”); Dixon, 411 N.W.2d at 763 (basing its rejection of the privilege on the premise that adoption should be up to the legislature); Bruce, 655 S.W.2d at 68 (declining to follow Fitzgerald and concluding that the creation of a parent-child privilege is not a matter for the courts); In re Gail D., 525 A.2d at 339 (deferring to the legislature while acknowledging their power to create a parent-child testimonial privilege); Good, 417 S.E.2d at 645 (stating that courts are reluctant to create privilege without legislative direction).

65 See Sanders, 457 N.E.2d at 1245 (“The expansion of existing testimonial privileges and acceptance of new ones involves a balancing of public policies which should be left to the legislature.”); see also Three Juveniles, 455 N.E.2d at 1207-08 (finding that the state's interest in obtaining all relevant information must predominate over generalizations favoring the preservation of the family).
privilege when it is based on a constitutional right to privacy argument. In *State v. Willoughby*, the Maine Supreme Judicial Court upheld contempt citations against parents who refused to testify against their son at his murder trial. The court reasoned that "[a]n order to testify in court... in no way directly regulates conduct essential to family life." The court found that the right to privacy would not be substantially impaired by its refusal to apply a familial privilege. In *In re Diana Hawkins*, the Ohio Court of Appeals asserted that intrafamilial communications are not protected under a penumbral right of privacy analysis. The court concluded the right to privacy found in *Griswold v. Connecticut* is limited to the marital relationship.

Another argument advanced in declining to apply the parent-child privilege is that "the creation of new privileges are disfavored." Other courts refuse to recognize the parent-child privilege on the ground that "[t]estimonial privileges are not lightly created nor expansively construed, for they are in derogation of the search for truth." This argument arises

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8 See Willoughby, 532 A.2d at 1021 (holding that the United States and Maine Constitutions do not recognize the parent-child privilege); *Inquest Proceedings*, 676 A.2d at 793–94 (asserting that even if a fundamental right exists, the state's "interest in the... fact-finding process is sufficiently compelling" to outweigh any familial privacy interest) (citing Maxon, 756 P.2d at 1301, quoting Donald Cofer, Comment, *Parent-Child Privilege: Constitutional Right or Spurious Analogy?, 3 U. Puget Sound L. Rev. 177, 210–11); Maxon, 756 P.2d at 1300 (holding that the familial right of privacy does not extend to confidential communications made between parents and their children); see also Part III, infra notes 143–60 and accompanying text discussing constitutional considerations applicable to the recognition of the parent-child testimonial privilege).
9 532 A.2d 1021 (Me. 1897).
10 See id. at 1026 (affirming a contempt judgment against parents who refused to answer the prosecutor's questions).
11 Id. at 1023.
12 See id. (finding no "intrafamily testimonial privilege in the Supreme Court's privacy decisions").
14 See id. at *2–3 (finding that the right to privacy does not create a parent-child privilege).
15 381 U.S. 479 (1965).
16 See Hawkins, 1983 WL 4091 at *2–3 (finding no absolute right to a privilege).
17 Gibbs v. State, 426 N.E.2d 1150, 1156 (Ind. Ct. App. 1981) (disfavoring the creation of new privileges and noting that the defendants in the case had cited "no authority, binding or persuasive, ancient or modern, in common or civil law, to support such a privilege").
mostly in federal cases and will be addressed in the next section.\textsuperscript{77}

Although a majority of the states have declined to recognize the parent-child testimonial privilege, some states have left the door open for its adoption.\textsuperscript{78} For example, in \textit{State v. Gilroy}\textsuperscript{79} the Iowa Supreme Court refused to adopt the privilege absent statutory authority.\textsuperscript{80} Although the court in Gilroy did not adopt a parent-child privilege, it did acknowledge \textit{Fitzgerald}\textsuperscript{81} and distinguished it because the communications between the father and his daughter in Gilroy were not confidential.\textsuperscript{82}

In \textit{Three Juveniles v. Commonwealth},\textsuperscript{83} the Supreme Judicial Court of Massachusetts distinguished the case sub judice from the typical parent-child privilege situation, reasoning different policy considerations are relevant when a child is called to testify against a parent.\textsuperscript{84} The court declined to adopt a parent-child

\textsuperscript{77} See generally Part II, infra notes 93--142 and accompanying text.

\textsuperscript{78} See Cabello v. State, 471 So. 2d 332, 340 (Miss. 1985) (stating that for the privilege to be recognized, it needs to be mutually asserted and "largely directed to the confidences a son or daughter might reveal to a parent in expectation of guidance through counseling or moral support"). \textit{But see} State v. Gilroy, 313 N.W.2d 513, 518 (Iowa 1981) (declining to adopt a parent-child privilege absent statutory authority); \textit{Three Juveniles}, 455 N.E.2d at 1206 (refusing to adopt a parent-child privilege where communication is made from parent to child, due to lack of support from case law and the legislature).

\textsuperscript{79} 313 N.W.2d 513 (Iowa 1981).

\textsuperscript{80} See \textit{id.} at 518.

\textsuperscript{81} See supra notes 41--46 and accompanying text for a discussion of the New York case.

\textsuperscript{82} See \textit{Gilroy}, 313 N.W.2d at 518 (distinguishing \textit{Fitzgerald} because \textit{Gilroy} concerned testimony as to a parent's actions rather than confidential communications which could "be placed under such privilege").

\textsuperscript{83} 455 N.E.2d 1203 (Mass. 1983).

\textsuperscript{84} See \textit{id.} at 1206.
privilege, finding the need in protecting such a communication weaker because "a parent does not need the advice of a minor child in the same sense that a child may need the advice of a parent." Three justices, including Chief Justice Hennessey, dissented in this case. The dissenters disagreed with the majority's balancing analysis, which consisted of weighing "the public's interest in obtaining every person's testimony against public policy considerations in favor of erecting a testimonial privilege." Instead, the dissenters argued:

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 in the circumstances of this case are too high a price to pay for the enforcement of our criminal laws.

The Vermont Supreme Court, in In re Inquest Proceedings, refused to adopt a parent-child privilege, yet found it important to distinguish between competent adult defendants and children. The court recognized that special circumstances exist when minors or incompetent adults are involved in certain proceedings, but found the adult in this case to be competent. The court asserted that "[t]he relationship between an adult child and a parent is not one requiring confidentiality for its full and satisfactory maintenance.

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86 Id. at 1206. The court recognized that while some courts supported a privilege for communications by a child to a parent, no state acknowledged such a privilege for the converse situation. See id. at 1206 n.4, 1206–07. Nonetheless, the court in Three Juveniles did not have to decide the issue of whether such privilege exists. See id. at 1206 (stating that "the case before us does not currently involve . . . the question of confidential communications between parent and child"). Instead the court focused on "what the children may have seen and heard in nonconfidential circumstances." Id. at 1207. The court determined that "[c]onfidential communications aside, [there is] no basis for concluding that a constitutional right of privacy requires that the children and their parents be given a testimonial privilege." Id. at 1208.

87 Id. at 1207.

88 Id. at 1208. The dissent further asserted that "[s]ociety's interest in its children should be recognized as sufficiently important to outweigh the need for probative evidence in the administration of criminal justice in the circumstances presented by this case." Id. at 1209.

89 676 A.2d 790 (Vt. 1996).

90 See id. at 793.

91 See id. (referring to criminal delinquency proceedings). The court found that although the adult son may have had learning disabilities, he was not incompetent. See id.

92 Id.
II. FEDERAL LAW

Rule 501 of the Federal Rules of Evidence provides that a privilege "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." Rule 501 further provides that privileges shall be determined in accordance with state law in civil actions and proceedings. The Supreme Court has asserted that "Congress manifested an affirmative intention not to freeze the law of privilege" when it enacted Rule 501. The Supreme Court also recognized that the purpose behind Rule 501 "was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.'" The Court further acknowledged that privileges should be strictly construed due to the important purpose securing evidence serves in the administration of justice.

Recently, in Jaffee v. Redmond, the Supreme Court held that confidential communications between licensed psychotherapists and their patients were privileged under Federal Rule 501. The Court's decision in Jaffee is important in the parent-child context because the Court utilized its authority under Rule 501 to create new privileges where sufficiently important interests outweigh the public's need for probative evidence. The Court recognized the important private interests underlying the psychotherapist privilege in stating that "[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a

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94 See id.
95 Trammel v. United States, 445 U.S. 40, 47 (1980). The Court modified the broad spousal privilege under the Hawkins rule, so that only the witness-spouse could invoke it. See id. at 53. The Court was careful to note that confidential communications between spouses are always protected. See id. at 51.
96 Id. at 47 (quoting 120 Cong. Rec. 40891 (1974) (statement of Rep. Hungate)).
97 See id. at 50 (stating that privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth'") (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)); see also supra note 65–66, 76, infra note 100 and accompanying text for a discussion of the government interest in obtaining evidence.
99 See id. at 15 (adding that these confidential communications are privileged insofar as they relate to the patient's diagnosis or treatment).
100 See id. at 9 (citing Trammel, 455 U.S. at 50 and Elkins, 364 U.S. at 234).
frank and complete disclosure of facts, emotions, memories, and fears.”

Recently, the House of Representatives proposed a bill to amend Federal Rule 501 to explicitly create a parent-child testimonial privilege. The bill provides that “[a] witness may not be compelled to disclose the content of a confidential communication with a child or parent of the witness.” The bill further provides that the principles that currently apply to the spousal privilege should also apply to the parent-child privilege. Proponents of the bill argue that unless the privilege is adopted, families will be destroyed because children will not confide in their parents. Opponents argue that the refusal of the majority of the federal and state courts to adopt the privilege should be respected. In addition, opponents believe that the scope of the proposed privilege is overbroad.

Most courts recognize their authority to create a new parent-child privilege under Federal Rule 501. Only two federal courts, however, have been brave enough to find a parent-child privilege against the majority view. The majority of cases that

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101 Id. at 10.
102 See H.R. 522, 106th Cong. (1999). A similar bill was introduced in the Senate in 1998. See S. 1712, 105th Cong. (1998). That bill limited the privilege power to cases not involving drug dealing, but it never got past the judiciary committee. See id.
104 See id. (referring to common law principles as interpreted by the courts).
105 See id. at H2268–69, H2271 (statements of Reps. Lofgren, Nadler, and Jackson-Lee) (stressing the importance of children confiding in parents and arguing for protection of such confidences).
106 See id. at H2269 (statement of Rep. Coble).
107 See id. at H2269–71 (statements of Reps. Coble, Frank, and Hyde). Mr. Coble suggested that a privilege protecting only minor children would be inappropriate. See id. at H2269.
108 See United States v. Dunford, 148 F.3d 385, 390–91 (4th Cir. 1998) (quoting Rule 501 but noting that this case did not warrant finding a parent-child privilege because the father was abusing his children); In re Grand Jury, 103 F.3d 1140, 1149 (3d Cir. 1997), cert denied, Roe v. United States, 520 U.S. 1253 (1997) (declining to use this authority to create such a privilege); In re Grand Jury Proceedings (John Doe), 842 F.2d 244, 245–48 (10th Cir. 1988) (same); United States v. Ismail, 756 F.2d 1253, 1258 (6th Cir. 1985) (asserting that “this power must be used sparingly”); In re Grand Jury Proceedings (Unemancipated Minor Child), 949 F. Supp. 1487, 1493–94 (E.D. Wash. 1996) (describing additional principals other than those in Rule 501 that should be considered when deciding whether there is a privilege); In re Agosto, 553 F. Supp. 1298, 1325 (D. Nev. 1983) (“[T]his court is free to extend present law to deal with those situations encountered in which constitutional protection is deemed essential.”).
109 See Agosto, 553 F. Supp. at 1325 (holding that there was a parent-child
PARENT-CHILD PRIVILEGE

have declined to recognize the parent-child privilege under Rule 501 have relied on the narrow view of *Trammel v. United States.* Generally, the federal courts have argued two theories: (1) that there was not a common law parent-child privilege;¹¹

privilege protecting confidential conversations that further protected the child from being forced to testify); *In re Grand Jury Proceeding (Greenberg),* 11 Fed. R. Evid. Serv. 579, 589 (D. Conn. 1982) (determining that the “parent-child privilege is available to a mother though only insofar as it rests on her religious conviction that she cannot testify against her daughter willingly or under legal compulsion”); *see also Grand Jury Proceedings (Unemancipated Minor Child),* 949 F. Supp. at 1494 (recognizing the privilege as valid under federal law). For examples of courts which have refused to adopt the privilege see *Dunford,* 148 F.3d at 391 (holding that the circumstances of the case did not warrant the recognition of the privilege); *Grand Jury,* 103 F.3d at 1146–57 (rejecting the parent-child privilege on various grounds); *In re Erato,* 2 F.3d 11, 16 (2d Cir. 1993) (refusing to recognize the privilege in the case of an emancipated adult child); United States v. Harris, No. 87-5840, 1988 WL 74154, at *2 (6th Cir. July 19, 1988) (“A parent-child privilege did not exist at common law and this circuit has not recognized such a privilege.”); *Grand Jury Proceedings (John Doe),* 842 F.2d at 249 (upholding contempt order against a 15 year old who refused to testify against his mother); United States v. Davies, 768 F.2d 893, 899 (7th Cir. 1985) (rejecting the application of the parent-child privilege to criminal cases); Port v. Heard, 764 F.2d 423, 436 (5th Cir. 1985) (upholding a contempt sanctions against parents who refused to testify against their son); *Ismail,* 756 F.2d at 1258 (refusing to recognize privilege in the case of an emancipated adult); *In re Grand Jury Subpoena (Santarelli),* 740 F.2d 816, 817 (11th Cir. 1984) (upholding contempt charge against son who refused to testify against his father); United States v. (Under Seal), 714 F.2d 347, 349 n.4 (4th Cir. 1983) (refusing to recognize the privilege in the case of an emancipated child); United States v. Harris, No. 87-5840, 1988 WL 74154, at *2 (6th Cir. July 19, 1988) (“A parent-child privilege did not exist at common law and this circuit has not recognized such a privilege.”); *Grand Jury Proceedings (John Doe),* 842 F.2d at 249 (upholding contempt order against a 15 year old who refused to testify against his mother); United States v. Davies, 768 F.2d 893, 899 (7th Cir. 1985) (refusing to recognize the privilege in the case of an emancipated adult); *In re Matthews,* 714 F.2d 223, 225 (2d Cir. 1983) (refusing to apply privilege to protect communications between son-in-law and his in-laws); United States v. Jones, 683 F.2d 817, 819 (4th Cir. 1982) (refusing to recognize a privilege where a son’s testimony against his father did not involve their relationship or any conversation between them); United States *ex rel. Riley v. Franzen,* 653 F.2d 1153, 1160 (7th Cir. 1981) (recognizing the reluctance of the courts to adopt the parent-child privilege); *In re Grand Jury Proceedings (Starr),* 647 F.2d 511, 512–13 (5th Cir. 1981) (declining to create a privilege which would bar child’s testimony against her mother and stepfather); United States v. Penn, 647 F.2d 876, 885 (9th Cir. 1980) (declining to create parent-child privilege); *In re Three Children,* 24 F. Supp.2d 389, 390 (D.N.J. 1998) (stating “it is well-settled that there is no general parent-child testimonial privilege”); United States v. Duran, 884 F. Supp. 537, 541 (D.D.C. 1995) (determining that a father’s letter to his son was admissible because “[t]he general rule in most federal courts is that there is no parent-child privilege”); *In re Kinoy,* 326 F. Supp. 423, 436 (S.D.N.Y. 1970) (stating that there is “no such thing” as a parent-child privilege).


¹¹ See *Erato,* 2 F.3d at 16 (stating that “there is no privilege, other than the spousal privilege, permitting a person not to testify against family members”); Penn, 647 F.2d at 885 (stating that a family privilege does not exist); Harris, 1988 WL 74154, at *2 (noting that there was no common law parent-child privilege); *Ismail,* 756 F.2d at 1258 (same); *Grand Jury Subpoena (Santarelli)*, 740 F.2d at 817 (same); *Matthews,* 714 F.2d at 224 (noting that the only privilege protecting someone from
and (2) that *Trammel* narrowed the scope of the spousal privilege by proclaiming that privileges should be strictly construed because of the importance of obtaining evidence.\textsuperscript{112} The court in *In re Agosto*,\textsuperscript{113} however, recognized the parent-child privilege and asserted that Rule 501 should be liberally construed based on its legislative history.\textsuperscript{114}

It is significant that a few pre-*Jaffee* federal courts have declined to adopt the parent-child testimonial privilege on the facts of the cases directly before them.\textsuperscript{115} For example, the Second Circuit, in *In re Erato*,\textsuperscript{116} stated that “at least in [a case involving a minor child] the argument would be available that compelling a parent to inculpate a minor child risks a strain on the family relationship that might impair the mother’s ability to provide parental guidance during the child’s formative years.”\textsuperscript{117} The Fourth Circuit has also acknowledged that a parent-child privilege may be applicable in the case of an unemancipated minor child.\textsuperscript{118} In addition, the Sixth Circuit refused to “address situations involving . . . unemancipated minors who generally

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\textsuperscript{111}See *Grand Jury Proceedings (Starr)*, 647 F.2d at 512–13 (rejecting the parent-child privilege); *Duran*, 884 F. Supp. at 541 (explaining that a parent-child privilege is non-existent).

\textsuperscript{112}See *Grand Jury Proceedings (John Doe)*, 842 F.2d at 245–46 (describing the effect of *Trammel* and stressing the importance of obtaining evidence); *Davies*, 768 F.2d at 898 (same); *Ismail*, 756 F.2d at 1258 (same); *Grand Jury Subpoena (Santarelli)*, 740 F.2d at 817 (explaining the need to gather evidence); *(Under Seal)*, 714 F.2d at 349 n.4 (noting that witnesses can be forced to testify against family members); *Jones*, 683 F.2d at 818–19 (discussing *Trammel*); see also supra notes 65–66, 76, 100 and accompanying text for a discussion of the government’s interest in obtaining evidence.

\textsuperscript{113}553 F. Supp. 1298 (D. Nev. 1983).

\textsuperscript{114}See infra notes 148–52 and accompanying text for a discussion of *In re Agosto*.

\textsuperscript{115}See *Erato*, 2 F.3d at 16 (deciding a parent-child privilege did not exist based on the facts of the case); *Harris*, 1988 WL 74154, at *2 (explaining that if a parent-child privilege existed it would be based on the spousal privilege, and the circumstances here were such that the father could not use it, because his son did not obtain the information at issue through a confidential communication); *Ismail*, 756 F.2d at 1258 (limiting its holding to emancipated adults); *Jones*, 683 F.2d at 819 (finding an emancipated adult child’s testimony is not privileged under the circumstances); see also infra notes 148–52 and accompanying text for a discussion of *Agosto*.

\textsuperscript{116}2 F.3d 11 (2d Cir. 1993).

\textsuperscript{117}Id. at 16.

\textsuperscript{118}See *Jones*, 683 F.2d at 819 (noting that under different facts such a privilege might apply).
require much greater parental guidance and support.”

The majority of the cases which declined to recognize the parent-child privilege were decided before Jaffee. In the two years since Jaffee, two of the three federal courts that addressed the issue indicated that they might be willing to recognize a parent-child testimonial privilege if the facts warranted recognition. In United States v. Dunford, the Fourth Circuit admitted in dicta that “there 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 so much under stress in today’s society.” Although the privilege has not been adopted by the Fourth Circuit, the court suggested a “narrowly defined” privilege would be warranted under certain circumstances. The court in Dunford, however, decided that such a privilege was not appropriate where a father was abusing his children and the privilege would not serve to protect “the beneficial family unit that history has celebrated.” In In re Grand Jury Proceedings (Unemancipated Minor Child), a federal district court stated that “reason and experience, as well as the public interest, are best served by the recognition of some form of a parent-child privilege.” The court ultimately did not allow the use of the parent-child privilege because the child had not made a sufficient factual showing. Since Jaffee, it appears that federal courts are not as adamant as they once were against recognizing the parent-child privilege.

119 Ismail, 756 F.2d at 1258.
120 See supra notes 96–101 and accompanying text for a discussion of Jaffee and supra note 109 for cases declining to create a parent-child privilege.
121 See United States v. Dunford, 148 F.3d 385, 391 (4th Cir. 1998) (declining to recognize the privilege because the defendant was charged with risking his children’s safety); In re Grand Jury Proceedings (Unemancipated Minor Child), 949 F. Supp. 1487, 1497 (E.D. Wash. 1996) (declining to apply the privilege because there was no evidence that the communications made were “intended to be confidential” or that the testimony would harm the parent’s interests).
122 148 F.3d 385 (4th Cir. 1998).
123 Id. at 391.
124 Id. The court indicated the proposed privilege’s limits would exclude situations in which “the family fractures itself or the child waives the privilege or where ongoing criminal activity would be shielded by assertion of the privilege.” Id.
125 Id.
127 Id. at 1497.
128 See id. The court was looking for proof that would have been sufficient for the “marital communications privilege” or the “adverse spousal testimony privilege.” Id.
The policy reasons and analogies used to support the creation of other new privileges also support the adoption of a parent-child privilege. The Supreme Court, in *Jaffee*, analogized the new psychotherapist-patient privilege to the spousal and attorney-client privileges by claiming that all are “‘rooted in the imperative need for confidence and trust.’” The parent-child privilege can be similarly analogized. In comparing a parent-child privilege to the spousal, priest-penitent, and psychotherapist privileges, the court in *In re Grand Jury Proceeding (Unemancipated Minor)* stated that “[i]n this Court’s experience—as a judge, parent, child, and spouse—there is no meaningful distinction between the policy reasons behind the marital communications privilege and those behind a parent-child privilege.” Further, and more importantly, “[t]he same needs that are met by confessing to a priest, divulging fears and wrongdoing to a psychotherapist, or confiding in a spouse are present—and should be encouraged to be fulfilled—in the context of parent-child relationships.”

The Third Circuit is the only federal court that expressly declined to recognize the parent-child privilege in the wake of *Jaffee*. In *In re Grand Jury*, the Third Circuit articulated several arguments militating against the adoption of a parent-child privilege. The court found the following rationales convincing: (1) the majority of courts which had addressed the issue declined to find the privilege; (2) an analysis of Federal Rule of Evidence 501 does not support recognition of the

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130 *See Grand Jury*, 103 F.3d 1140, 1161–62 (3d Cir. 1997), cert denied, *Roe v. United States*, 520 U.S. 1253 (1997) (Mansmann, J., concurring and dissenting) (asserting that protecting the parent-child relationship is as compelling as and analogous to the spousal privilege); *United States v. Ismail*, 756 F.2d 1253, 1258 (6th Cir. 1985) (stating that “[a]nalogous to the spousal privilege, the parent-child privilege purportedly would serve the public interest in preserving the harmony and confidentiality of the parent-child relationship”); *In re Agosto*, 553 F. Supp. 1296, 1325 (D. Nev. 1983) (asserting that the parent-child privilege is analogous to both the spousal privilege “which is based upon love and affection” and the psychotherapist privilege “which is based upon [ ] guidance and [a] ‘listening ear’ “); *see also* 144 CONG. REC. H2269 (Apr. 23, 1998) (statement of Rep. Lofgren) (asserting that the relationship between a parent and a child is “as precious as that between husband and wife”).
132 *Id.*
133 *See Grand Jury*, 103 F.3d at 1140.
134 *See id.* at 1146.
privilege; (3) the privilege would not protect the familial relationship nor serve any social policy; and (4) the creation of a privilege should be left to Congress.\textsuperscript{135} In reviewing \textit{Jaffee}, the Third Circuit found the Supreme Court had "relied on the fact that all fifty states had enacted some form of a psychotherapist privilege" in justifying its decision to recognize a psychotherapist-patient privilege.\textsuperscript{136} In the present case, however, no state within the Third Circuit had statutorily adopted the parent-child privilege.\textsuperscript{137} Moreover, the court found that "confidentiality—in the form of a testimonial privilege—is not essential to a successful parent-child relationship."\textsuperscript{138} In the court's view, the "truth-seeking function of the judicial system" outweighed the interest in a confidential parent-child relationship.\textsuperscript{139}

In his dissent, Circuit Judge Mansmann recognized the reluctance of the majority to create a new privilege haphazardly and yet posited "that where compelled testimony by a parent concerns confidential statements made to the parent by his child in the course of seeking parental advice and guidance, it is time to chart a new legal course."\textsuperscript{140} According to Judge Mansmann, the court should have exercised its authority under Federal Rule 501 to develop privileges as deemed necessary and "recognize[d]...
a limited privilege."\(^{141}\) Moreover, the dissent correctly asserted that "the protection of strong and trusting parent-child relationships, outweighs the government’s interest in disclosure."\(^{142}\)

### III. CONSTITUTIONAL CONSIDERATIONS

Although this Note has touched briefly on some of the constitutional considerations involved in the recognition of the parent-child privilege,\(^ {143}\) this section will more clearly articulate the constitutional arguments that arise in this context. Proponents of the parent-child privilege rely on both privacy and free exercise principles in support of the privilege.\(^ {144}\)

The analysis utilized in support of the Supreme Court's recognition of a familial right to privacy also supports the creation of the parent-child privilege.\(^ {145}\) For example, in *Moore v. City of East Cleveland*,\(^ {146}\) the Court stated that "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition."\(^ {147}\) Just as the right to

\(^{141}\) *Id.*

\(^{142}\) *Id.* Judge Mansmann asserted:

An effective parent-child relationship is one deserving of protection. It rests upon a relationship of mutual trust where the child has the right to expect that the parent will act in accordance with the child's best interest. If the state is permitted to interfere in that relationship by compelling parents to divulge information conveyed to them in confidence by their children, mutual trust, and ultimately the family, are threatened. *Id.* at 1160.

\(^{143}\) See *supra* notes 36–37, 66–74 and accompanying text for a discussion of constitutional considerations addressed by the various state courts.


\(^{145}\) See, *e.g.*, *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977) (stressing the importance of the family relationship); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (noting the Court's recognition of the importance of family and stating the family is protected by the Due Process Clause, the Equal Protection Clause, and the Ninth Amendment); *Griswold v. Connecticut*, 381 U.S. 479, 482–86 (1965) (reaffirming constitutional right to privacy theory and including familial relationships and decisions within that right); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing "the private realm of family life which the state cannot enter"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925) (defending a parent's right to decide how to raise and educate his or her children free from state interference); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (same).


\(^{147}\) *Id.* at 503.
privacy protects the family as an institution, so does the parent-child privilege which would protect confidences shared within the familial institution.

The court in In re Agosto\textsuperscript{148} recognized that the family unit would be adequately protected by the creation of a parent-child testimonial privilege. The court stated that although the government has an important interest in gathering evidence, “this goal does not outweigh an individual’s right of privacy in his communications within the family unit, nor does it outweigh the family’s interests in its integrity and inviolability, which spring from the rights of privacy inherent in the family relationship itself.”\textsuperscript{149} The court also asserted that the interests of society would be jeopardized by forcing children to testify against their parents, since this would destroy the structure of the family unit.\textsuperscript{150}

As logical as the constitutional guarantee of privacy appears to be in the context of the parent-child privilege, the majority of courts that have addressed the privacy argument in this context have rejected it.\textsuperscript{151} These courts summarily assert that the privacy interest in a parent-child privilege is not fundamental enough to warrant protection.\textsuperscript{152}


\textsuperscript{149} Id. at 1325; see also In re Grand Jury Proceedings (Unemancipated Minor Child), 949 F. Supp. 1487, 1496 (E.D. Wash. 1996) (recognizing importance of parent-child relationship); United States v. Penn, 647 F.2d 876, 889–90 (9th Cir. 1980) (Fletcher, J., dissenting), cert. denied, 449 U.S. 903 (1980) (asserting that the parent-child relationship should be protected by the Constitution).

\textsuperscript{150} See Agosto, 553 F. Supp. at 1326.

\textsuperscript{151} See Grand Jury Proceedings (John Doe) v. United States, 842 F.2d 244, 246 (10th Cir. 1988) (recognizing that the Fifth Circuit has held that “the [parent-child] privilege is not fundamental enough to afford it constitutional protection on privacy grounds”); United States v. Davies, 788 F.2d 893, 896 (7th Cir. 1986), (refusing to create a new privilege in light of the narrowness of privileges under Trammel); Port v. Heard, 764 F.2d 423, 428–30 (5th Cir. 1985) (asserting the parent-child privilege is not fundamental enough to be protected by the right to privacy).

\textsuperscript{152} See Port, 764 F.2d at 428–29 (determining that the right of privacy does not create a constitutional right against child-incrimination). But see In re Agosto, 553 F. Supp. 1298, 1325–26 (D. Nev. 1983) (viewing family relationships as worthy of strong constitutional protection and advocating the parent-child testimonial privilege based on that ideal); In re A and M, 403 N.Y.S.2d 375, 378–79 (4th Dep’t 1978) (discussing the right of privacy and asserting that the constitution does confer this right upon the family unit thus allowing a parent-child privilege to be invoked although it is not statutorily protected). For examples of courts that have declined to recognize the privilege based on common law ground see In re Grand Jury Subpoena (Santarelli), 740 F.2d 816, 817 (11th Cir. 1984) (finding no parent-child privilege under Federal Rule of Evidence 501); Matthews v. United States, 714 F.2d 223,
In addition to the privacy arguments, free exercise principles have been proposed in support of the parent-child privilege. In *In re Greenberg*, the district court recognized a limited parent-child privilege based on the Free Exercise Clause of the First Amendment. The court noted that the Jewish religion does not allow parents to testify against their children. The court held that "the grand jury's particular interest in obtaining testimony... does not outweigh Mrs. Greenberg's First Amendment interests" in religious freedom.

Since *Greenberg*, however, litigants have argued unsuccessfully that to be compelled to testify against one's parent would unjustifiably impinge on their religious beliefs. For example, in *In re Grand Jury Proceedings (John Doe)*, the Tenth Circuit acknowledged that freedom of religion is a fundamental right, but recognized that the right to the free exercise thereof is not absolute. The court held that the "First Amendment privileges asserted here are outweighed by the government's interests in investigating crimes and enforcing the criminal laws of the United States." Perhaps these courts forget that "a consequence of nearly all the protections of the Bill of Rights" is the possibility that law enforcement efforts may be hindered, yet that is "a consequence that was originally and ever since deemed justified by the need to protect individual rights."

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224–25 (2d Cir. 1983) (finding no privilege to testify against in-laws); see also *Grand Jury Proceeding (John Doe)*, 842 F.2d at 246 (citing *Port* for the proposition that the Supreme Court has recognized familial rights of privacy as "fundamental" but has excluded the parent-child testimonial privilege from the list of such rights).

153 11 Fed. R. Evid. Serv. 579, 584 (D. Conn. 1982) (stating the mother would "be allowed to raise her religiously-based parent-child privilege" when testifying against her daughter's interest). The court refused to create a common law parent-child privilege. See *id.* at 587.

154 See *id.* at 582.

155 *Id.* at 584. The court, however, did state that "[i]n general... the interest of the grand jury in obtaining testimony must prevail over a witness's First Amendment religious rights." *Id.* at 583.

156 For examples of unsuccessful free exercise arguments, see *Grand Jury Proceedings (John Doe)*, 842 F.2d at 247 (asserting that testifying would violate Free Exercise Clause); *Port*, 764 F.2d at 431–32 (asserting that Judaism prohibits parents from testifying against their son); *In re Three Children*, 24 F. Supp. 2d 389, 389–90 (D.N.J. 1998) (asserting that testifying against parents is prohibited by Jewish faith); *Agosto*, 553 F. Supp. at 1300–01 (claiming that the Catholic faith requires that he "honor [his] father and mother" and thus he should not testify).

157 842 F.2d 244 (10th Cir. 1988).

158 See *id.* at 247.

159 *Id.* at 248 (citations omitted).

CONCLUSION

Courts must remember that a healthy family life is the most important thing to a child. The family institution is essential to the preservation of our society. The law protects confidences that are made in the spousal, attorney-client, priest-penitent, and psychotherapist-patient relationships. The parent-child relationship deserves the same protection. Children should be able to confide in their parents without fear that someday these confidences will be used against them. The Constitution, Federal Rules of Evidence, and society's goals support the creation of a parent-child privilege so that a child's confidences will be protected.

Maureen P. O'Sullivan