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THE STATUTORY DEVELOPMENT OF THE PARENT-CHILD PRIVILEGE: CONGRESS RESPONDS TO KENNETH STARR’S TACTICS

INTRODUCTION

“One of the most disturbing spectacles we have seen from Mr. Starr's inquest is that of a mother being hauled before a grand jury to reveal her intimate conversations with her own daughter.”

In February 1998, Independent Counsel Kenneth Starr shocked some members of the American public when he subpoenaed Monica Lewinsky’s mother, Marcia Lewis, to testify before a grand jury about her daughter's personal confessions concerning her relationship with President Clinton. Legal commentators speculate that Mr. Starr subpoenaed Marcia Lewis because he needed corroborating evidence to show what Monica Lewinsky actually saw, heard, and said. Apparently, the only way for Kenneth Starr to get that evidence was to subpoena the person in whom Ms. Lewinsky confided most and with whom she would have been most truthful. Marcia Lewis was an important witness because she was her daughter’s confidant: Ms. Lewinsky admitted to her mother that she was having a sexual relationship with President Clinton, admitted that she planned to lie about it, and called her mother when FBI agents confronted her at a Virginia hotel. After two full days of testimony, Marcia Lewis’s attorneys said she was so overwhelmed and emotionally drained that she could not return.

2. See 144 CONG. REC. S1508-02, S1508 (daily ed. Mar. 6, 1998) (statement of Sen. Leahy); (“I recently spoke on the floor about the disgust that I share with most Americans about the tactics of Special Prosecutor Kenneth Starr and the disturbing spectacle of hauling a mother before a grand jury . . . .”) see also World News Tonight (ABC television broadcast, Feb. 10, 1998) available in 1998 WL 7291937 [hereinafter World News] (reporting how Marcia Lewis spent several hours testifying before a grand jury about what her daughter told her).
4. See id.
5. See World News, supra note 2.
for the third day of testimony. Marcia Lewis’s lawyer commented, “Right now at a time when they could probably use each other’s support, these proceedings cause them to be drawn further apart.”

Before Marcia Lewis’s testimony, the average American probably did not think that courts could force people to testify against their parents or children. It is not surprising then that many Americans were surprised by Kenneth Starr’s tactics. The reality is, however, that neither the judiciary nor the Federal Rules of Evidence recognize a need to protect the confidentiality of communications between parents and children. However, legal scholars and some practitioners have supported the recognition of a parent-child privilege for many years.

6. See Internight, supra note 3 (quoting Billy Martin, Ms. Lewis’s attorney). News reports stated that Lewis emerged from the courthouse looking “distraught” and “teary-eyed.” Id.

7. Id. (quoting Billy Martin).

8. The large number of state and federal cases in which parents and children have asserted this privilege supports this response. See infra note 10 and accompanying text. Even one member of Congress thought it was illegal: “Frankly, I always assumed it was in the law. It was only when we read about the situation with Ms. Lewis being compelled to testify against her daughter by the independent counsel that I, to my surprise, found there was no such privilege.” 144 CONG. REC. H2242, H2289 (daily ed. Apr. 23, 1998) (statement of Rep. Nadler).


10. See FED. R. EVID. 501; see also In re Grand Jury, 103 F.3d 1140 (3d Cir. 1997) cert. denied, Roe v. United States, 520 U.S. 1253 (1997); In re Ebro, 2 F.3d 11 (2d Cir. 1993); In re Doe, 842 F.3d 244 (10th Cir. 1998); United States v. Davies, 763 F.2d 893 (7th Cir. 1985); Fort v. Heard, 764 F.2d 423 (5th Cir. 1985); United States v. Ismail, 756 F.2d 1253 (8th Cir. 1985); In re Santarelli, 740 F.2d 618 (11th Cir. 1984); In re Mathews, 714 F. 2d 223 (2d Cir. 1983); In re Starr, 647 F.2d 511 (6th Cir. 1981); United States v. Penn, 647 F.2d 879 (9th Cir. 1980); United States v. Duran, 884 F. Supp. 537 (D.D.C. 1995); In re Kinoy, 326 F. Supp. 400 (S.D.N.Y. 1970) [hereinafter Cases]. See generally Eric Zorn, With Ma on Stand, Lawyers Can Mine the Mother Lodge, CHI. TRIB., Feb. 12, 1998, at 1, available in 1998 WL 2824576. Judges find it difficult to recognize a parent-child privilege when the “broad benefits . . . are hard to quantify . . ., and the specific cost to prosecutors is obvious.” Id. Some legal scholars see it the other way. See id.

Despite this support, courts have declined to recognize the privilege. Most recently, in *In re Grand Jury*, the Third Circuit held that common-law principles do not support the creation of a parent-child privilege. The court further held that Congress should determine whether courts should recognize such a privilege.

Congress belatedly responded to the judiciary's refusal to create this privilege primarily in reaction to Kenneth Starr's tactics. Members of both the House and the Senate introduced three bills in 1998 and one in 1999 that recognized a parent-child privilege.

This Note addresses the federal legislation calling for protection of communications between children and their parents. Part I discusses the current privilege law and the arguments for and against the parent-child privilege. Part II

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12. 103 F.3d 1140 (3d Cir. 1997).
14. *See id.* at 1154; *see also* 144 CONG. REC. S803, S804 (daily ed. Feb. 23, 1998) (statement of Sen. Leahy). Senator Leahy admits that the Third Circuit is correct, Congress should be the body to consider the parent-child privilege issue. *See id.*
discusses the response of the federal judiciary to the issue. Part III discusses Congress's role in recognizing parent-child privileges and the federal legislation introduced in 1998 and 1999. Part IV focuses on the bill that Senator Patrick Leahy introduced directing the Attorney General and the Judicial Conference to study whether the Federal Rules of Evidence should be amended to "recognize a parent-child privilege in cases not involving violent or drug trafficking conduct."\(^{17}\)

I. PRIVILEGE LAW IN THE UNITED STATES

A. The Federal Rules of Evidence and the Development of Privileges

A privilege is "a limitation on admissibility which the courts or the legislature have deemed necessary to protect some other compelling interest."\(^{18}\) The "public... has a right to every man's evidence," and any exemptions are exceptional.\(^{19}\) Courts should therefore recognize privileges "only within the narrowest limits required by principle."\(^{20}\) Advocates for recognizing such a privilege must show that an extraordinary need for recognition exists, and absent that showing, that the asserted privilege "yield[s] to [a] demonstrated, specific need for evidence."\(^{21}\) Generally, in the absence of a statute or common-law ruling, the law does not require a jurisdiction to recognize any privilege except those with constitutional underpinnings, like the privilege against self-incrimination.\(^{22}\)

The non-enacted portions of Article V of the Federal Rules of Evidence contained thirteen privileges, nine of which specifically defined nonconstitutional privileges that the federal courts should recognize.\(^{23}\) Instead of adopting these specific

18. Schluter, supra note 11, at 37; see also JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2285 at 527 (McNaughten rev. 1961) (defining privilege as "an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice").
19. WIGMORE, supra note 18, § 2192, at 70.
20. Id. at 73.
23. See FED. R. EVID. 501 House Judiciary Committee's note. These privileges
privileges, Congress took an approach that allowed the courts to flexibly address privilege claims. Federal Rule of Evidence 501 states that courts should recognize privileges under the common law, "as they may be interpreted . . . in the light of reason and experience."

Using this "light of reason and experience," federal courts have recognized a privilege for those confidential communications between priest and penitent, attorney and client, psychotherapist and patient, and husband and wife. The courts recognized these privileged communications to protect relationships that society values highly and that are "peculiarly vulnerable" to deterioration under a court's scrutiny. The underlying policy is that courts and legislatures should recognize privileges by balancing society's interest in encouraging communication within certain relationships against society's interest in having parties disclose all facts to a court.

A witness can assert two separate privileges: the confidential communications privilege and the adverse testimonial privilege. The confidential communications privilege prohibits disclosure of confidential communications between priest and penitent, attorney and client, physician and patient, and psychotherapist and patient. The policy behind the confidential communications privilege is to protect and foster those relationships society recognizes as important. The "adverse testimonial privilege" is a "broader privilege that

24. See id.
25. Id.
27. Davies, 768 F.2d at 897 (quoting United States v. Byrd, 750 F.2d 585, 589 (7th Cir. 1984)).
30. See Trammel, 445 U.S. at 51 (noting the policy behind the priest-penitent privilege, the attorney-client privilege, and the physician-patient privilege); see also In re Lifschutz, 467 P.2d 557, 558 (Cal. 1970) (noting that the potential range of confidential communications spans a large area of settings: social, business, medical, and spiritual).
31. See Capra, supra note 29.
excludes testimony concerning anything a witness observes or hears. This privilege applies only to husbands and wives and is unpopular with some judges and attorneys because it can prevent admission of valuable information.

B. The Parent-Child Privilege, An Overview

1. Two Privileges, One Broad and One Narrow

Proponents of the parent-child privilege asserted a need for two separate privileges. The first is an adverse testimonial privilege that mirrors the marital testimonial privilege. This privilege would prevent courts from compelling parents and children to give adverse testimony that could damage or destroy the relationship. The second is a confidential communications privilege that would prevent the disclosure of confidential communications between parents and children in order to strengthen an important societal relationship.

2. Evidentiary Requirements

Most courts and legal scholars use Dean Wigmore's four-pronged test to determine whether or not confidential communications within a relationship are privileged. A relationship must meet all four of Wigmore's conditions to be recognized at common law.

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

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32. Schluter, supra note 11, at 43.
33. See Trammel, 445 U.S. at 51 ("No other testimonial privilege sweeps so broadly. The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications.").
34. See Capra, supra note 29.
36. See Capra, supra note 29.
37. See id.
38. See WIGMORE, supra note 18, § 2285, at 527. See also Booth, supra note 11, at 1177 (stating that Wigmore's four conditions provide the rationale for judicial recognition of privileges).
39. See WIGMORE, supra note 18, § 2285, at 527.
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(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 gained for the correct disposal of litigation.40

Supporters of the parent-child privilege assert that the relationship between parent and child meets all four of Wigmore's conditions.41 The parent-child relationship meets Wigmore's first condition because the privilege is meant only to protect confidential communications between parent and child.42 The relationship meets Wigmore's second condition because confidentiality is essential to maintaining the relationship between parents and children.43 The parent-child relationship satisfies Wigmore's third condition because "the State has a compelling interest in fostering the parent-child relationship."44

Wigmore's fourth condition sets forth a balancing test.45 In order to understand how a relationship satisfies Wigmore's fourth condition, one commentator has separated the condition into two factors: the "expected injury" to the parent-child relationship and the "expected benefit to justice."46 Injury may occur because children may lose confidence and trust in both their parents and the legal system, and parents may lose appreciation for the social utility of the legal system.47 The judge

40. Id. (emphasis in original).
41. See In re Grand Jury, 103 F.3d 1140, 1159 n.5 (3d Cir. 1997) (Mansmann, J., concurring and dissenting), cert. denied sub nom. Roe v. United States 520 U.S. 1253 (1997); In re Agosto, 553 F. Supp. 1298, 1308-09 (D. Nev. 1983); see also Daniel R. Coburn, Child-Parent Communications: Spare the Privilege and Spoil the Child, 74 DICK. L. REV. 599, 623-32 (1970) (stating that the parent-child privilege meets all four conditions); Begens, supra note 11, at 723 (same); Booth, supra note 11, at 1177 (stating that the parent-child privilege arguably satisfies the four conditions).
42. See Begens, supra note 11, at 721; see also Coburn, supra note 41, at 623 (discussing the difficulty of imagining no "relationship which, by its inherent nature, spawns communications of a confidential nature with a greater degree of frequency").
43. See Begens, supra note 11, at 721; Coburn, supra note 41, at 623-25.
44. Begens, supra note 11, at 723; see also Coburn, supra note 41, at 625.
45. See WIGMORE, supra note 18, § 2285, at 527.
46. Coburn, supra note 41, at 625.
47. See id. at 625-28.
must weigh the "expected benefit to justice" factor on a case-by-case basis.\textsuperscript{48}

Opponents of the privilege assert that the parent-child relationship fails to meet conditions two and four of Wigmore's requirements; therefore, the relationship's confidential communications are not privileged.\textsuperscript{49} According to this reasoning, the privilege fails the second condition because family members do not confide in one another based on the existence of a testimonial privilege.\textsuperscript{50} The parent-child relationship is not based on a promise of confidentiality, and confidentiality is not essential to a successful parent-child relationship.\textsuperscript{51} Parents and children often share information in the presence of other family members and other people without damaging their sense of trust.\textsuperscript{52} Once this information is shared in the presence of others, the parent or child's expectation of confidentiality is destroyed; yet the parent-child relationship remains intact.\textsuperscript{53} The privilege thus fails Wigmore's fourth condition because "any injury to the parent-child relationship resulting from non-recognition" is minimal compared to the substantial impairment of the truth-seeking process.\textsuperscript{54}

Wigmore's conditions may not be dispositive in determining whether a privilege exists.\textsuperscript{55} For instance, in some circumstances the communications between husband and wife do not meet his fourth condition, but both the state and federal courts still

\textsuperscript{48} See \textit{id.} at 631; see also Begens, supra note 11, at 723 (recommending the application of this condition on a case-by-case basis).

\textsuperscript{49} See \textit{In re Grand Jury}, 103 F.3d 1140, 1152 (3d Cir. 1997), cert. denied sub nom. Roe v. United States 520 U.S. 1253 (1997); \textit{In re Inquest}, 876 A.2d 790, 792-93 (Vt. 1999); \textit{State v. Maxon}, 756 F.2d 1297, 1301-02 (Wash. 1988); see also Ausburn, supra note 11, at 187-89 (explaining that family relationships, unlike privileged relationships, are not formed because of a promise of confidentiality).

\textsuperscript{50} See \textit{In re Grand Jury}, 103 F.3d at 1152 (holding that confidentiality is not essential to a successful parent-child relationship); \textit{Inquest}, 876 A.2d at 793 (holding that the "relationship between an adult child and a parent is not one requiring confidentiality for its full and satisfactory maintenance"); \textit{Maxon}, 756 P.2d at 1301; see also Ausburn, supra note 11, at 187.

\textsuperscript{51} See \textit{In re Grand Jury}, 103 F.3d at 1152 ("A privilege should be recognized only where such a privilege would be indispensable to the survival of the relationship that society deems should be fostered.").

\textsuperscript{52} See Covey, supra note 11, at 810.

\textsuperscript{53} See \textit{In re Grand Jury}, 103 F.3d at 1153.

\textsuperscript{54} Id.

\textsuperscript{55} See Ausburn, supra note 11, at 199-200 (asserting that courts must move away from Wigmore's utilitarian rationale to recognize a parent-child privilege).
recognize the marital privilege because of its important policy implications.\textsuperscript{56}

Other supporters of a parent-child privilege have applied a standard developed by Douglas Manley.\textsuperscript{57} Manley asserted five considerations for recognizing a testimonial privilege:

(1) Instinctive revulsion against the betrayal of a confidence.
(2) A sense of compassion even for a transgressor, \textit{i.e.}, a feeling that there should be for every man some sanctuary beyond the reach of society's law where he may safely confide his guilty secrets in an attempt to ease his troubled spirit.
(3) A sense of fair play related to the Norman view of a lawsuit as a species of contest or sporting event wherein it would be too easy, and hence unfair and against the "rules of the game," to hound a man to his doom by convicting him through the lips of his own intimate friends, family, or medical, legal, or spiritual advisors.
(4) A desire to preserve the proper functioning of certain socially valuable relationships even at the cost of occasional suppression of truth and injustice in such, presumably comparatively few, particular cases.
(5) A feeling of individual and professional pride and self-importance in being the inviolable repository of others' secrets.\textsuperscript{58}

According to one supporter, Manley's first condition is no longer a justification for a privilege, but if it were, it would apply to parent-child communications.\textsuperscript{59} The "sanctuary" in Manley's second condition applies to the parent-child relationship because children rely on their parents for guidance, and privacy in those conversations is essential to ensure the child's confidence in the relationship.\textsuperscript{60} The "sense of fair play" in the third condition applies to parent-child communications because without the privilege, "a child may not mature into a responsible

\textsuperscript{56} See WIGMORE, supra note 18, \S 2285, at 523.
\textsuperscript{57} See In re Agosto, 553 F. Supp. 1296, 1307 (D. Nev. 1983); see also Begens, supra note 11, at 718 (discussing the Manley standard with approval).
\textsuperscript{58} Begens, supra note 11, at 718 (quoting Manley, Patient, Penitent, Client, and Spouse in New York, 21 N.Y. ST. B.A. BULL. 288, 290 (1949)).
\textsuperscript{59} See id. at 718, 720. Condition one is problematic because the commentator fails to explain why it is no longer required. See id. at 718.
\textsuperscript{60} See id.
adult." The parent-child relationship satisfies Manley's fourth condition because the relationship is a socially valuable institution. The State relies on parents to instill educational and moral values in their children. Finally, according to this same supporter, Manley's fifth condition is also no longer required for the creation of testimonial privileges. If courts were to apply this standard to communications between parent and child, a parent-child testimonial privilege, under certain circumstances, should be recognized.

3. Prosecutorial Discretion and the Parent-Child Privilege

"'Most prosecutors are loath to [compel parents to testify against their children].'"

The prosecuting attorney decides whether or not to ask a court to compel a parent or child to testify against the other. Most prosecutors refuse to compel parents to testify about their children's activities and vice versa. However, in drug-related cases, it is a common practice because the crimes are often so severe. Prosecutors must balance their need for information with the possibility that their tactics might offend the jury, especially in cases where wrongdoing is not drug related.

61. Id. at 719.
62. See id.
63. See id. at 719-20.
64. See id. at 720. The commentator fails to explain why it is no longer required. See id.
65. See id.
69. See Marcus, supra note 67 (quoting Joseph diGenova, former United States attorney) ("It is everyday common practice to force parents to come in and testify in drug cases, in drug conspiracies, in fraud cases.").
70. See Laurie Asseo, Some Thoughts of a Disturbing Sight—Monica . . ., ASSOCIATED PRESS POL. SERV., Feb. 17, 1998, available in 1998 WL 7387491; see also Gay, supra note 68. Bess Myerson, a former Miss America, was charged with bribing a New York State
Some proponents speculate that legislators have failed to recognize the privilege because prosecutors generally have shown such discretion.71

4. Social Policy Arguments

Supporters of the parent-child privilege assert four social policy arguments in support of parent-child privileges: the importance of the family, preservation of family harmony, natural repugnancy,72 and "the cruel trilemma."73

a. The Importance of the Family and Preservation of Family Harmony74

"For certain predicaments—legal, ethical, moral—nothing beats the counsel of parents. They’ve got decades of experience on you, they’ve got your life in context and ideally, they have a selfless concern for your best interests."75

Families are very important: home and family are the first social organizations to which a child is exposed.76 The "sanctity, serenity, freedom and organization" of the family greatly affects a child’s personality and development.77 Children first learn who they are through their relationships with their families, and their mental and moral growth often depends upon the stability of their family relationships.78

Supreme Court Justice. See id. Prosecutors subpoenaed the justice’s daughter as a key prosecution witness. See id. Presumably, this tactic alienated the jury; it acquitted Myerson. See id.

71. See In re Unemancipated Minor Child, 949 F. Supp. 1487, 1491 (E.D. Wash. 1996) (speculating that the scarcity of authority on the topic of parent-child privilege may reflect that state and federal prosecutors have a “deep-seated sense of respect for the family”); see also 144 CONG. REC. S803, S803 (daily ed. Feb. 23, 1996) (statement of Sen Leahy) (“We have to assume the reason we have not had legislation on this before is that prosecutors showed some discretion.”).
72. See Booth, supra note 11, at 1178-80; Watts, supra note 11, at 610-11.
73. Schlueter, supra note 11, at 54-55.
74. See infra Part I.B.5 (discussing the constitutional underpinnings of the family).
75. Zorn, supra note 10.
76. See Coburn, supra note 41, at 616.
77. Id.
78. See id.
Supporters of the parent-child confidential communications privilege assert that parents and children need the privilege to protect the significance of the family relationship because it ensures an atmosphere of privacy.\textsuperscript{79} This atmosphere of privacy enables families to work out their problems without fear of disclosure.\textsuperscript{80} Furthermore, proponents assert that families need the privilege to protect the nuclear family, which some claim is in danger of extinction.\textsuperscript{81} In fact, some attribute the increase in juvenile delinquency to the decline of communication within the family.\textsuperscript{82} Proponents cite studies showing that delinquency, crime, suicide, and mental illness "are closely associated with the damaging relationships in failing families."\textsuperscript{83} The closeness of the relationship between parent and child could be hurt if a court forced parents to disclose their children's secrets on the witness stand.\textsuperscript{84}

Opponents assert that because very few parents and children know about the privilege, they would not rely on it when they discuss potentially incriminating matters.\textsuperscript{85} The privilege would thus fail to benefit society.\textsuperscript{86} Parent-child relationships that would break or sever without the privilege are not the types of relationships the law seeks to preserve.\textsuperscript{87} Healthy family relationships should be able to withstand the strain of compelled testimony and thus need no protection.\textsuperscript{88} Furthermore, no empirical evidence or data supports the proposition that a court's failure to recognize the privilege

\textsuperscript{79} See Booth, supra note 11, at 1178.
\textsuperscript{80} See id.
\textsuperscript{81} See Watts, supra note 11, at 610-11. But see Schlueter, supra note 11, at 53 (arguing that these statements have superficial appeal but no empirical evidence to support them).
\textsuperscript{82} See Booth, supra note 11, at 1178-79; Coburn, supra note 41, at 616.
\textsuperscript{83} Coburn, supra note 41, at 610 n.114.
\textsuperscript{84} See Booth, supra note 11, at 1178 (noting that not only will the relationship between parent and child be damaged, but the child's development will eventually suffer because the ability to request and receive advice from parents is a necessary part of a child's development).
\textsuperscript{85} See Schlueter, supra note 11, at 56. But see Booth, supra note 11, at 1179-80 (asserting that regardless of whether a privilege exists or not, family members have the expectation that family confidences will remain private).
\textsuperscript{86} See Covey, supra note 11, at 891.
\textsuperscript{87} See id.
\textsuperscript{88} See id. at 892.
disrupts family harmony. Children can differentiate between a court compelling a parent to testify and a parent testifying voluntarily.

b. Natural Repugnancy

“The concept that a parent could be compelled to testify against his or her own daughter or son is shocking to a lot of people. It is shocking to me.”

The second policy behind the parent-child privilege is that it does not seem fair or just to force a parent or child to betray the other’s confidences. There is a “natural repugnance in every fair-minded person to compelling” a parent or child “to be the means of the other’s condemnation.”

Critics argue that repugnance is not an issue because “[f]ew prosecutors are willing to incur public wrath and criticism for needless use of testimony of either a child or a parent against the other.” Further, critics argue that courts should not resort to a “blanket exclusion of otherwise reliable evidence” simply because the compelled testimony may be repugnant to society.

89. See Ausburn, supra note 11, at 189 (suggesting that studies are inconclusive); Schlueter, supra note 11, at 53 (stating that no “convincing empirical data” exists). But see Coburn, supra note 41, at 624 n.146 (“Studies have shown that if this information is revealed, the child’s already tenuous relationship with his family may deteriorate beyond repair.”); Covey, supra note 11, at 892 (arguing that empirical evidence of benefits is not the primary goal of the privilege).

80. See Covey, supra note 11, at 893.


82. See Watts, supra note 11, at 611-12 (suggesting that the compelled disclosure of confidential communications between parent and child conjures up images of the actions of totalitarian governments that subordinate certain relationships to the interests of the state).

83. WIGMORE, supra note 18, § 2228, at 217 & n.2 (referring to the husband/wife relationship).

84. Schlueter, supra note 11, at 54. Kenneth Starr was willing to take the risk, despite criticism from fellow prosecutors: “Starr is really pushing the envelope here a little bit.” Marcus, supra note 67 (quoting James Cole, former Justice Department prosecutor).

85. See Schlueter, supra note 11, at 54; see also WIGMORE, supra note 18, § 2228, at 217-18 (arguing that the duty of establishing the truth should not be obstructed by sentimental considerations).
c. The Cruel Trilemma

"[M]any prosecutors and many judges have grave doubt about the veracity of [parents'] testimony, because some parents choose to fudge the truth..." "

In *United States v. Ismail*,[97] a distraught son initially chose to perjure himself at a grand jury hearing rather than tell the truth to implicate his father.[98] He later confessed to the perjury, broke down on the witness stand and admitted that he contemplated suicide rather than testify against his father.[99] In *State v. DeLong*,[100] the court sentenced a fifteen year-old girl to jail for contempt because she refused to testify against her adoptive father, who sexually abused her.[101] In *Port v. Heard*,[102] a father and stepmother went to jail because they refused to testify against his son.[103]

These cases illustrate the fourth policy behind the recognition of the parent-child privileges called the "cruel trilemma."[104] The cruel trilemma consists of three choices that parents or children have when a court forces them to testify: (1) they can perjure themselves to protect their parents or children;[105] (2) they can tell the truth and risk destroying or severely damaging the relationship;[106] or, (3) they can refuse to testify and go to jail for contempt of court.[107]

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97. 756 F.2d 1253 (6th Cir. 1985).
98. See id. at 1256.
99. See id. at 1258 n.3.
100. 458 A.2d 877 (Me. 1983).
101. See id. at 878.
102. 764 F.2d 423 (5th Cir. 1985).
103. See id. at 425; see also *State v. Willoughby*, 532 A.2d 1020, 1021 (Me. 1987) (holding murder defendant's parents and sister in criminal contempt for refusing to testify against him).
104. See *Port*, 764 F.2d at 425; *Ismail*, 756 F.2d at 1258; *DeLong*, 458 A.2d at 878.
105. See *Ismail*, 756 F.2d at 1258; see also Coburn, supra note 41, at 628 (discussing the cruel trilemma); Watts, supra note 11, at 613-15 (same). But see Schueler, supra note 11, at 54-55 (dismissing proponents' cruel trilemma arguments).
106. See *Ismail*, 756 F.2d at 1258 n.3 (describing how the defendant's son was ostracized in his Pakistani community after testifying against his father); Watts, supra note 11, at 613-15; see also Gay, supra note 68 (describing how Josh Nichols, 13, suffered from nightmares because prosecutors ordered him to testify before a grand jury concerning his father's involvement in the Oklahoma City bombing).
107. See *Port*, 764 F.2d at 425; see also *Willoughby*, 532 A.2d at 1021 (Me. 1987) (holding murder defendant's parents and sister in criminal contempt for refusing to testify.
A former Fulton County, Georgia prosecutor related her experience with parent-child compelled testimony:

[I do not] like privileges because they are barriers to the truth, but there may as well be a parent-child privilege because most prosecutors do not put relatives on the stand. Their testimonies are unreliable. They either lie or say they do not remember. Unlike other statements, which can normally be corroborated by other physical evidence, these statements cannot.\textsuperscript{108}

The State does not further its interest in "ascertaining the truth . . . by creating a situation that invites perjury."\textsuperscript{109} Because perjury does not further the best interests of justice, privileges help the truth-seeking process by eliminating those situations in which perjured testimony is most likely.\textsuperscript{110}

A parent or child who refuses to testify may debilitate the legal system just as much as those individuals who choose to perjure themselves: "The social values advanced or the lessons learned by the imprisonment of the parents in such cases are difficult to discern . . . . Parents or children should not be incarcerated for what could be interpreted as the crime of family loyalty."\textsuperscript{111}

5. Constitutional Arguments

Advocates of the parent-child privilege assert four constitutional arguments supporting a parent-child privilege: (1) the right to family privacy and autonomy, (2) the free exercise of religion, (3) the freedom from self-incrimination, and (4) the right to informational privacy.\textsuperscript{112}

\textsuperscript{108} Interview with Suzanne Ockleberry, former Fulton County Prosecutor (Nov. 9, 1999).

\textsuperscript{109} Watts, supra note 11, at 614.

\textsuperscript{110} See id.

\textsuperscript{111} Id. at 613-15.

\textsuperscript{112} See \textit{In re Doe}, 842 F.2d 244, 246-47 (10th Cir. 1988); Port v. Heard, 764 F.2d 423, 431 (5th Cir. 1985). See generally Ausburn, supra note 11, at 201-04.
a. Right to Family Autonomy and Privacy

The Supreme Court has recognized the importance of the family, its relational interests and its members' right to privacy.113 In Moore v. City of East Cleveland,114 the Supreme Court held that its decisions established that the sanctity of the family is entitled to constitutional protection because "the institution of the family is deeply rooted in this Nation's history and tradition."115 In Prince v. Massachusetts,116 the Court held that the "custody, care and nurture" of children resides foremost in their parents, and the primary function and freedom of parents "include[s] preparation for obligations the state can neither supply nor hinder."117

Proponents of the parent-child privilege assert that the Constitution supports the recognition of the privilege.118 Supporters have presented the following arguments for a constitutional parent-child testimonial privilege: (1) a constitutional right to privacy exists, (2) the United States Supreme Court has recognized the importance of the family, and (3) the Court has recognized that certain confidential communications deserve protection; therefore, a constitutional basis exists for recognizing a parent-child privilege to "nurture and protect the family unit."119

Despite overwhelming support for this argument from legal scholars, parents and children have not been successful when

115. Id. at 503; see also Yoder, 406 U.S. at 232.
117. Id at 166.
118. See In re Agosto, 553 F. Supp. 1298 (D. Nev. 1983) (holding a parent-child privilege could be constitutionally protected); People v. Fitzgerald, 422 N.Y.S.2d 309 (1970) (holding that the New York and United States Constitutions create a constitutional right to assert a parent-child privilege); Watts, supra note 11, at 600-05. But see In re Doe, 842 F.2d 244 (10th Cir. 1988) (holding that no constitutional protection exists for asserting a parent-child privilege); Port v. Heard, 764 F.2d 423 (5th Cir. 1985) (same); United States v. Penn, 647 F.2d 878 (9th Cir. 1980) (same); Ausburn, supra note 11, at 187-88 (asserting that the right to autonomy argument has major limitations as a basis for a parent-child privilege); Schlueter, supra note 11, at 47-49 (arguing for no constitutional protection).
119. Schlueter, supra note 11, at 47.
they raise this issue in court. In Port v. Heard, the plaintiffs raised the familial right to privacy, equal protection, and free exercise of religion as constitutional foundations for a privilege not to testify against their son. The Fifth Circuit Court of Appeals held that the Constitution does not protect parents from the state’s power to compel them to reveal their child’s confidences because no constitutional foundation existed under the family autonomy doctrine.

Opponents of the parent-child privilege further assert that even if a parent-child privilege existed, it would be qualified, not absolute, because the Supreme Court has never held that the right to privacy "absolutely requires any privilege in private communications among family members." The right to autonomy developed by the Supreme Court justifies only a qualified privilege, subject to strict-scrutiny analysis. Therefore, if a state can show a compelling interest that uses the least intrusive means, the privilege is defeated. Furthermore, compelled testimony only places an indirect burden on family

120. See In re Doe, 842 F.2d 244 (10th Cir. 1988); Port v. Heard, 764 F.2d 423 (5th Cir. 1985); United States v. Penn, 647 F.2d 876 (9th Cir. 1980); Diehl v. State, 698 S.W.2d 712 (Tex. Crim. App. 1985); State v. Maxon, 756 P.2d 1297 (Wash. 1988). But see In re Unemancipated Minor Child, 949 F. Supp. 1487 (E.D. Wash. 1996) (noting that constitutional protection could be given to parent-child communications under certain factual records); In re A & M, 403 N.Y.S.2d 375 (N.Y. App. Div. 1978) (reasoning that the integrity of family relational interest deserves statutory protection). 121. 764 F.2d 423 (5th Cir. 1985).

122. See Port, 764 F.2d at 428, 430-31; see also State v. Willoughby, 532 A.2d 1020, 1022 (Me. 1987) (holding that the Supreme Court right of privacy decisions do not extend to parent-child privilege); Maxon, 756 P.2d at 1301 (holding that parent-child privilege would only be vaguely rooted in constitutional theory and infringement caused by non-recognition is indirect and incidental). But see Unemancipated Minor Child, 949 F. Supp. at 1491 (noting that the court’s ruling does not suggest the Constitution could never protect parent-child communications under certain factual situations); Agosto, 553 F. Supp. at 1298 (holding that there is constitutional support for a parent-child privilege under right of privacy decisions); A & M, 403 N.Y.S.2d at 380 (reasoning that the integrity of family relational interests deserves constitutional protection); Diehl, 698 S.W.2d at 715-22 (Levy, J., dissenting) (arguing that judicial repudiation of parent-child privilege is incompatible with the traditions, values, and conscience of our nation).
123. See Port, 764 F.2d at 429-30.

124. Schluter, supra note 11, at 46-47 (relying on the Supreme Court’s ruling in Bowers v. Hardwick, 478 U.S. 186 (1986), to “signal the Court’s reluctance to further expand the concept of privacy”); see also Ausburn, supra note 11, at 197-99 (asserting that the right to privacy is not a compelling rational for recognition of a parent-child privilege).

125. See Ausburn, supra note 11, at 197-98; Schluter, supra note 11, at 46-48.

126. See Ausburn, supra note 11, at 198; Schluter, supra note 11, at 46-48.
relationships. To establish a constitutional violation, the testimony must directly and substantially burden a parent’s child rearing decisions. In In re Doe, the Tenth Circuit refused to recognize a parent-child privilege under the constitutional argument because it found that expanding privileges runs contrary to the Supreme Court’s restriction of recognized privileges in Trammel v. United States.

b. Free Exercise of Religion

Some parents and children have argued that the parent-child privilege has constitutional protection under the Free Exercise Clause. In Doe, a fifteen-year-old refused to testify against his mother and siblings, arguing that his Mormon faith prohibited his testimony. In refusing to acknowledge a privilege, the court held that First Amendment privileges are “outweighed by the government’s interest in investigating crimes and enforcing [criminal laws].”

The court in Port similarly held that the plaintiffs could not rely upon their Jewish faith to keep from testifying against their son in a grand jury hearing. The court employed the strict scrutiny analysis and held that the state was justified in burdening the plaintiffs’ religious liberty because it used the least restrictive means of getting the information.

127. See Ausburn, supra note 11, at 198; Schlueter, supra note 11, at 49.
128. See Ausburn, supra note 11, at 198; Schlueter, supra note 11, at 49.
129. 842 F.2d 244 (10th Cir. 1988).
130. See Doe, 842 F.2d at 245 (referring to Trammel v. United States, 445 U.S. 40 (1980)).
131. See Doe, 842 F.2d at 247; Port v. Heard, 764 F.2d 423, 431-32 (5th Cir. 1985).
132. See Doe, 842 F.2d at 245.
133. Id. at 248. The court also emphasized that the minor had been granted immunity from prosecution. See id. The court’s logic is questionable because the minor must still face the guilt of betraying his family.
134. See Port, 764 F.2d at 431-32.
135. See id. at 432; see also Branzburg v. Hayes, 408 U.S. 665, 682 (1972) (stating that “neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information . . . received in confidence”).
1999] STATUTORY DEVELOPMENT OF PARENT-CHILD PRIVILEGE 447

c. Right to Informational Privacy

One scholar asserts a constitutional parent-child privilege under the right to prevent public disclosure of private information.\textsuperscript{136} Lower courts have formulated a two-prong test to determine whether a right to informational privacy exists. They consider: (1) Whether the individual has a "legitimate or reasonable expectation of privacy . . ."; (2) if so, they "balance the individual's interest in confidentiality against the state's interest in disclosure."\textsuperscript{137} Courts could apply this two-pronged test to family communications to develop a constitutional family privilege that protects the witness's rights while allowing the state to justly adjudicate a trial.\textsuperscript{138}

d. Freedom from Self-Incrimination

The Supreme Court has held that the Miranda rights and the constitutional privilege against self-incrimination apply to juveniles.\textsuperscript{139} Minors are especially vulnerable because sometimes their confessions to police are "the product of ignorance of rights or of adolescent fantasy, fright, or despair."\textsuperscript{140} Courts therefore want to protect a child's right to be certain that the right to counsel and the right to remain silent are "knowingly and voluntarily waived."\textsuperscript{141} When prosecutors force parents to testify against their minor children, especially in juvenile delinquency hearings, they subrogate a juvenile's

\textsuperscript{136} See Ausburn, supra note 11, at 200.
\textsuperscript{137} Id. at 204.
\textsuperscript{138} See id. at 209-10 ("Courts apparently have not considered the informational privacy rights of a witness called upon to testify against family members. The history of the right, however, indicates that given even the narrowest construction, informational privacy would allow a witness to avoid testifying against a family member in certain circumstances.").
\textsuperscript{139} See In re Gault, 387 U.S. 1, 13 (1967); see also State v. Gibson, 718 P.2d 759, 761 (Or. Ct. App. 1986) (stating that under the Fifth Amendment and Miranda, when a juvenile states she wants an attorney, the interrogation stops until an attorney is present); Michelet P. v. Gold, 419 N.Y.S.2d 704, 208-09 (N.Y. App. Div. 1979) (stating that New York law suggests that at least one of a juvenile's parents must be informed of the child's Miranda rights because of the special problems that may occur with respect to a juvenile's privilege against self-incrimination).
\textsuperscript{140} Gault, 387 U.S. at 55.
\textsuperscript{141} Michelet P., 419 N.Y.S.2d at 708-09; see also Gibson, 718 P.2d at 760.
privilege against self-incrimination. Recognition of a parent-child privilege would prevent this from occurring.

6. Other Precedents

a. Familial Testimonial Privilege in Europe

Protecting confidential familial communications is not a new or radical concept. Ancient Jewish and Roman law prevented the compelled testimony of family members in order to promote solidarity and trust within the family unit. The Napoleonic Code contained similar prohibitions. Today, the laws of the Netherlands, France, Germany, Sweden, and all other civil law countries of Western Europe prohibit parents and children from being compelled to disclose confidential communications.

Courts have refused to accept European law as precedent. In United States v. Jones, the defendant presented the recognition of the parent-child privilege in Europe as support for recognition in the United States. The court held that European law was irrelevant. The mother in In re Erato asserted that she had a parent-child privilege under Dutch law, but the court held that she could not assert that privilege under United States law.

142. See Coburn, supra note 41, at 614. But given that adults who go before the juvenile courts must be given their constitutional rights, is this really a threat? See United States v. Moreland, 258 U.S. 433 (1922).
143. See Coburn, supra note 41, at 614-17.
144. See Covey, supra note 11, at 883; Watts, supra note 11, at 592-93.
145. See Covey, supra note 11, at 883.
146. See Watts, supra note 11, at 592-93.
147. See In re Erato, 2 F.3d 11, 13 (2d Cir. 1993).
148. See Covey, supra note 11, at 883; Watts supra note 11 at 593.
149. See Erato, 2 F.3d at 13-14; United States v. Jones, 683 F. 2d 817, 819 (4th Cir. 1982).
150. 683 F.2d 817 (4th Cir. 1982).
151. See id. at 818.
152. See id. ("Our law, of course, derives from England, which does not lie within the confines of 'continental' Europe. The differences between Roman law and the common law are sufficient to reduce such authority to a status of practical irrelevance.").
153. 2 F.3d 11 (2d Cir. 1993).
b. Justice Department Guidelines

The Justice Department's guidelines suggest that close relatives, parents, children, grandparents and grandchildren, should ordinarily not be compelled to testify against family members.\textsuperscript{155} The guidelines make exceptions for cases when the family member is involved in criminal activity, or when "overriding prosecutorial concerns" exist.\textsuperscript{158}

C. The Parent-Child Privilege Compared to Other Recognized Privileges

1. The Marital Privilege

The parent-child privilege and the marital privilege are alike in that they advance the same goals.\textsuperscript{157} The marital adverse testimonial privilege prohibits a court from compelling one spouse to testify against another in criminal cases in order to protect marital harmony.\textsuperscript{158} The marital confidential communications privilege prohibits a court from compelling one spouse to disclose the confidential communications made within the marital relationship to protect and further marital intimacy.\textsuperscript{159} Both the marital and parent-child relationships are based upon love and affection and are bonded by loyalty and tradition.\textsuperscript{160} "Protecting the harmony of the parent-child relationship and furthering free and open communication between parents and children are important societal values – at least as important as furthering marital harmony and intimacy."\textsuperscript{161} Furthermore, the natural repugnance associated with compelling a husband or wife to disclose confidential communications or testify against the other also applies to parents and children.\textsuperscript{162}

\textsuperscript{155} See Marcus, supra note 67.
\textsuperscript{156} Id.
\textsuperscript{157} See interview with Andrea Curcio, Professor, Georgia State University College of Law (Nov. 19, 1998) [hereinafter Curcio Interview].
\textsuperscript{158} See Dennis D. Prater et al., Evidence: The Objection Method 853 (1997).
\textsuperscript{159} See id.
\textsuperscript{161} Curcio Interview, supra note 157.
\textsuperscript{162} See In re Unemancipated Minor Child, 949 F. Supp. 1487, 1494 (E.D. Wash. 1996) (reasoning that no meaningful distinction exists between the policy reasons behind the marital communications privilege and those behind a parent-child privilege); see also
Even Dean Wigmore, one of the marital privilege’s harshest critics, noted that if a privilege exists for spouses using the above rationales, it should also exist for parents and children.\textsuperscript{163} He wrote: “One may note here the inconsistency of the law in conceding the privilege for the testimony of wife or husband against each other, but in ignoring it for the testimony of parent and child, brothers and sisters, which equally involves the tender sentiments of domestic life.”\textsuperscript{164} Further, children, like spouses, probably provide prosecutors with “some of the most fertile sources of incriminating evidence.”\textsuperscript{165}

Some commentators, legislators, and judges support a parent-child privilege that bars adverse testimony and the disclosure of confidential communications.\textsuperscript{166} Others propose a confidential communications privilege that is narrower than the marital privilege.\textsuperscript{167} Because its scope is more narrow, the confidential communications privilege has a better chance of gaining recognition from legislators and judges.\textsuperscript{168}

2. The Other Privileges

Parent-child communications share certain characteristics with the professional privileges; for example, children approach their parents for advice, guidance, and therapy much like adults who go to see a psychotherapist or clergyman.\textsuperscript{169} A therapeutic

\begin{footnotesize}
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\item WIGMORE, supra note 18, § 2228, at 217.
\item See WIGMORE, supra note 18, § 2228, at 217 n.2.
\item Id.
\item Unemancipated Minor Child, 949 F. Supp. at 1491.
\item See In re Grand Jury, 103 F.3d 1140, 1158 (3d Cir. 1997) (Mansmann, J., concurring and dissenting); In re A & M, 403 N.Y.S.2d 375, 381 (N.Y. App. Div. 1978); S. 1721, 105th Cong. (1988); H.R. 3577, 105th Cong. (1998); see also Goldman et al., supra note 9 (proposing a parent-child confidential communications privilege).
\item See Three Juveniles v. Commonwealth, 455 N.E.2d 1203, 1207 (Mass. 1983) (arguing that the adverse testimonial privilege is too broad: “Society's interest in the preservation of the family does not require such a broad rule, either as a matter of common law privilege or constitutional right”).
\item See Unemancipated Minor Child, 949 F. Supp. at 1494-95 (reasoning that the same needs that are met by conferring to a priest or by divulging fears and wrongdoings to a psychotherapist are present in a parent-child relationship); Agosto, 553 F. Supp. at
\end{enumerate}
\end{footnotesize}
relationship exists when the communicators can explore problems without fear that the listener will reveal the shared confidences to others later. The relationships between priest and penitent, therapist and patient, and attorney and client share this characteristic. A parent and child may share this same relationship when a child seeks help from a parent out of fear that someone else will punish the child for the behavior. The court may frustrate the successful resolution of a child’s problem if it compels the parent to testify against the child. The same outcome would occur in the relationship between priest and penitent or therapist and patient were there not a confidential communications privilege for those relationships.

Critics of the parent-child privilege assert that just because “less altruistic relationships are protected does not justify codification . . . of additional privilege[s].” Furthermore, unlike the people protected under the professional privileges, parents and children do not depend upon their conversations being privileged before they make statements to one another. Consider, however, the statement of the father in In re Grand Jury:

[If my son comes to me or talks to me, I’ve got to be very careful what he says, what I allow him to say. I would have to stop him and say, ‘you can’t talk to me about that. You’ve got to talk to your attorney.’ It’s no way for anybody to live in this country.]

1325-26 (reasoning that the parent-child relationship and psychotherapist-patient relationship are both based upon the “guidance and ‘listening ear’” that one party provides the other, and confidentiality is just as much a necessary requirement for the healthy maintenance of a parent-child relationship as is the professional relationship; see also Begens, supra note 11, at 727. But see Schlueter, supra note 11, at 56 (arguing that parents and children would never depend upon the privilege when confiding in one another).

170. See Coburn, supra note 41, at 618.
172. See Coburn, supra note 41, at 618-19.
173. See id. at 619-20.
174. See id. at 618-19.
175. Schlueter, supra note 11, at 56.
176. See id.
178. Id. at 1143.
II. FEDERAL COURT RECEPTION OF THE
PARENT-CHILD PRIVILEGE

Nine of thirteen circuit courts and two district courts have refused to recognize a parent-child privilege.\(^{179}\) At the same time, none of the circuit courts and only two district courts have recognized the privilege.\(^ {180}\)

A. Federal Courts Refusing to Recognize a Parent-Child Privilege

In *Grand Jury*, the Third Circuit combined the appeals of a Delaware daughter who refused to testify against her father and a Virgin Islands father forced to reveal confidences shared by his son.\(^ {181}\) The father and his eighteen-year-old son “ha[d] an excellent relationship, very close, very loving relationship.”\(^ {182}\) In refusing to recognize the privilege, the court reasoned: (1) an overwhelming majority of federal and state courts have rejected the privilege; (2) no reasoned analysis of Federal Rule of Evidence 501 or Supreme Court standards supports the creation of a privilege; (3) the creation of the privilege has no impact on the parent-child relationship and would neither benefit the relationship nor serve any social policy; and (4) the recognition of such a privilege should be left to Congress.\(^ {183}\)

Judge Mansmann concurred and dissented in *Grand Jury*.\(^ {184}\) Although she agreed that the court correctly derived the adverse testimonial privilege to the Delaware daughter, she disagreed with the court’s result concerning the confidential communications between the Virgin Islands father and son.\(^ {185}\) She reasoned that recognition of a confidential communications privilege is necessary for many reasons: to advance the public policy of protecting “strong and trusting parent-child relationships,” to preserve the family, to safeguard the privacy interests of the family, and to promote the healthy psychological

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181. *See id.* at 1142-43.

182. *Id.* at 1143.

183. *See id.* at 1146-47.

184. *See id.* at 1157 (Mansmann, J., concurring and dissenting).

185. *See id.* at 1157-58 (Mansmann, J., concurring and dissenting).
development of children. Judge Mansmann would recognize a narrow privilege that bars compelled testimony concerning confidential communications made in the “course of seeking parental advice and guidance.”

The Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have also refused to recognize a parent-child privilege. However, four of these courts made distinctions when the children were adults who had to testify against their parents. In dicta, these courts noted that they might have recognized a privilege in the case of an unemancipated minor child who confided in a parent. The courts expressed a desire to encourage children to confide in their parents.

B. Federal Courts Recognizing a Parent-Child Privilege

The district courts in In re Agosto and In re Unemancipated Minor Child recognized two very different parent-child privileges. The Agosto court recognized a broad testimonial privilege applying not only to confidential communications, but also to adverse testimony. The holding makes sense in light

186. Id. at 1158 (Mansmann, J., concurring and dissenting).
187. Id. at 1165 (Mansmann, J., concurring and dissenting).
188. See In re Erato, 2 F.3d 11 (2d Cir. 1993); In re Doe, 842 F.2d 244 (10th Cir. 1988); United States v. Davies, 768 F.2d 803 (7th Cir. 1985); Port v. Heard, 764 F.2d 423 (5th Cir. 1985); United States v. Ismail, 756 F.2d 1253 (6th Cir. 1985); In re Santarelli, 740 F.2d 816 (11th Cir. 1984); United States v. Jones, 683 F.2d 817 (4th Cir. 1982); United States v. Penn., 647 F.2d 870 (9th Cir. 1980) [hereinafter No PCP Cases].
189. See Erato, 2 F.3d at 16 (implying a parent-child privilege may exist if compelling a parent to “inculcate a minor child” would strain the relationship and impair the mother’s ability to provide parental guidance during the child’s formative years); Port, 764 F.2d at 430 (noting that were it a Rule 501 case, its holding might be different because the interests at stake present a “compelling argument in favor of recognition”); Ismail, 756 F.2d at 1258 (noting that the court was not addressing situations involving unemancipated minors who generally require more support and parental guidance than emancipated adults); Jones, 683 F.2d at 819 (“In particular, we do not endeavor to decide to what extent the age of the child and whether or not emancipation has occurred may or may not affect the decision as to whether any familial privilege exists.”).
190. See No PCP Cases, supra note 188.
191. See id.
194. See Agosto, 553 F. Supp. at 1325 (“[C]harles Agosto may claim the parent-child privilege not only for confidential communications which transpired between his father and himself, but he may likewise claim the privilege for protection against being compelled to be a witness and testify adversely against his father in any criminal proceeding.”). The privilege, like the spousal privilege, should also apply to grand jury
of the court's rationale: the court could see no difference between the policies behind the spousal privilege and the parent-child privilege.\textsuperscript{185} It reasoned that if the policies are the same, the privileges should be the same.\textsuperscript{186}

In \textit{Unemancipated Minor Child}, a seventeen-year-old who was still living with his parents refused to testify against his father.\textsuperscript{197} The district court ruled that there was an insufficient basis for "deriving a blanket" parent-child privilege to quash the subpoena under the facts in the case.\textsuperscript{198} However, the court ultimately concluded that reason, experience, and the public interest were best served by recognizing some form of parent-child privilege on a case-by-case basis.\textsuperscript{199} The court refused to define the precise limits of the privilege because definition is "a task being best left to the legislative actors."\textsuperscript{200}

III. CONGRESSIONAL RECOGNITION OF THE PARENT-CHILD PRIVILEGE

A. \textbf{Why It Is Up to Congress to Recognize the Parent-Child Privilege}

Many federal and state courts have refused to recognize a parent-child privilege because judges have held that courts should defer to legislatures in creating and defining privileges.\textsuperscript{201} In the case of the parent-child privilege, only a

\textsuperscript{185} \textit{See id.}
\textsuperscript{186} \textit{See id.} at 1325-26.
\textsuperscript{187} \textit{See id.} at 1326.
\textsuperscript{188} \textit{See Unemancipated Minor Child}, 949 F. Supp at 1488-89.
\textsuperscript{189} \textit{Id.} at 1491 (noting that its ruling did not suggest that constitutional protection could never be given parent-child communications "if presented in light of a more fully developed factual record").
\textsuperscript{190} \textit{Id.} at 1497.
\textsuperscript{191} \textit{Id.; see also In re Grand Jury, 103 F.3d 1140, 1147 (3d Cir. 1997), cert.denied, Roe v. United States, 520 U.S. 1253 (1997) (holding that the recognition of a parent-child privilege should be left to Congress); Port v. Heard, 764 F.2d 423, 430 (5th Cir. 1985) (holding that recognition of a parent-child privilege is more properly a concern of the legislature due to the delicate balancing of interests).}
\textsuperscript{200} \textit{Compare Grand Jury, 103 F.3d at 1147 (holding that Congress should decide whether to recognize the parent-child privilege), and Port, 764 F.2d at 430 (holding that recognizing a parent-child privilege is more appropriate for the legislature because of the "delicate balancing of the interests" required), with Unemancipated Minor, 949 F. Supp. at 1497 (holding that reason, experience, and the public interest are best served by the recognition of some form of a parent-child privilege, but the legislature should
handful of courts have established the privilege because so many other courts have "recently, and emphatically" rejected the privilege and because courts are loath to recognize new privileges.\footnote{See Capra, supra note 29.} Further, if legislatures have not established a privilege, courts are wary of instituting one.\footnote{See id.}

The existence of a parent-child privilege depends upon social policy considerations and difficult questions of scope.\footnote{See id.} These decisions are perhaps better made by the legislature because statutes are easier to administer, and a statute relieves a court of evaluating whether a common law privilege applies on a case-by-case basis.\footnote{See Grand Jury, 103 F.3d at 1154-55, \textit{Port}, 784 F.2d at 430, \textit{Unemancipated Minor}, 949 F. Supp. at 1487; \textit{see also In re'Terry W.}, 59 Cal. App. 3d 747, 749 (Cal. Ct. App. 1976); \textit{People v. Sanders}, 437 N.E.2d 1241, 1245 (Ill. 1983); \textit{People v. Dixon}, 411 N.W.2d 760, 763 (Mich. Ct. App. 1987); \textit{In re Gail D.}, 525 A.2d 337, 339 (N.J. Super. Ct. App. Div. 1987); \textit{State v. Good}, 417 S.E.2d 643, 645 (S.C. Ct. App. 1992). \textit{See generally Capra}, supra note 29; \textit{Covey}, supra note 11, at 889.} The central issue that a legislature must consider in establishing a new privilege is whether the importance of confidentiality in a relationship outweighs society's interest in having access to all relevant evidence.\footnote{See Covey, supra note 11, at 881.} As one court summed it up: "[Recognizing a parent-child privilege] is primarily the responsibility of the legislature. To the extent that such policies conflict with truth-seeking or other values central to the judicial task, the balance that courts draw might not reflect the choice the legislature would make."\footnote{\textit{Sanders}, 457 N.E.2d at 1245.}

\textbf{B. H.R. 3577, H.R. 4286, and H.R. 522}

both federal civil and criminal proceedings and amended the Federal Rules of Evidence.209 Because these legislators were concerned that Kenneth Starr compelled Monica Lewinsky's mother to testify before a grand jury about her confidential conversations with her daughter, they introduced legislation to protect other parents and children from a similar quandary.210 Representative Lofgren believes that parents and their children should be “shielded from [such] a trauma” and that amending the Federal Rules of Evidence would not significantly damage the “administration of justice.”211 Representative Andrews introduced the “Parent-Child Privilege Acts of 1998 and 1999,” which recommended amending the Federal Rules of Evidence to establish a parent-child privilege.212 The text of each bill is located in Appendices A and B.


The House Judiciary Committee rejected the “Confidence in the Family Act” for several reasons. First, legislators were uncomfortable with the scope of the bill; they did not

210. See 144 Cong. Rec. H2242, H2268 (daily ed. Apr. 23, 1998) (statement of Rep. Lofgren). “[This legislation is important because] I think many of us, without going into any of the details, recently observed a situation in which a mother was asked in a very high profile case to testify about confidences that her daughter had placed in her.” Id. See generally Griffith, supra note 15 (commenting on various Congressional actions in response to Kenneth Starr's investigation of President Clinton).
understand whether the privilege would apply to unemancipated minors, stepparents, or grandparents.\textsuperscript{217} Second, the privilege is essentially untested at the state level, and legislators were hesitant to pass a bill when they could not anticipate its consequences.\textsuperscript{218} Third, legislators were uncomfortable with extending a privilege equally to both adult children and minor children.\textsuperscript{219} However, the legislators implied that they might support a privilege that applies to minors only.\textsuperscript{220} Fourth, legislators were hesitant about extending a privilege in criminal cases, but suggested that a civil privilege might be acceptable.\textsuperscript{221} Fifth, although most legislators thought the bill addressed an important subject that deserved “thoughtful consideration,” they did not want to create for the first time a federal privilege.\textsuperscript{222} Sixth, legislators thought the bill was too broad.\textsuperscript{223} Finally, the legislators did not think it was “a good idea in anger against Kenneth Starr to bring this forward at this point without knowing a lot more about it.”\textsuperscript{224}

In light of the information revealed in the House Judiciary Committee debates, Senate Bill 1721, introduced by Senator Leahy from Vermont, appeared to have the best chance of passing the Judiciary Committee. The bill called for a study that

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\item \textsuperscript{218} \textit{See id.} Consider, however, that three states, Idaho, Massachusetts, and Minnesota, have enacted some form of the parent-child privilege. \textit{See} IDAHO CODES § 9-203(7) (1990); MASS. GEN. LAWS ch. 233, § 20 (1989); MINN. STAT. § 595.02(1)(l) (1988). Legislators can look at these states to anticipate the consequences.
\item \textsuperscript{219} \textit{See} 144 CONG. REC. H2242, H2270 (daily ed. Apr. 23, 1998) (statement of Rep. Frank) (“This bill extends the privilege equally to a 35-year-old child of a 60-year-old accused criminal as it does to a 35-year-old mother of an 8-year-old child, or vice versa.”).
\item \textsuperscript{220} \textit{See id.} (“The state of Massachusetts has such a privilege for minor children only. Now, that is an interesting idea I would like to explore. Maybe there ought to be some kind of privilege for minors. But that is not in this bill.”).
\item \textsuperscript{221} \textit{See id.} Rep. Frank also noted: “[E]ven in civil cases, I note when I read about insider trading . . . that very often those involved . . . are adult relatives, the adult stockbroker son of a lawyer father or mother. Well, I do not know that I want to give those people a privilege.” \textit{Id.}
\item \textsuperscript{222} \textit{Id.} at H2271 (statement of Rep. Hyde) (“But what we are doing here . . . is creating for the first time a Federal privilege, because section 501 of the Federal Rules of Evidence says there are no Federal privileges. We follow the State law.”).
\item \textsuperscript{223} \textit{See id.} at H2270 (statement of Rep. Frank) (“Having one blanket to cover all of these situations seems to me to be a mistake.”).
\item \textsuperscript{224} \textit{Id.} (statement of Rep. Frank) (“I understand a lot of my colleagues were unhappy with what Kenneth Starr did. I have been often unhappy about what Kenneth Starr did . . . . Hard cases make bad law we are told. Well, it can also be bad law if we react too quickly because we have a specific objection to a particular act.”).
\end{enumerate}
addressed many of the legislators' concerns about the "Confidence in the Family Act" before urging the Judicial Conference to amend the Federal Rules of Evidence. Senate Bill 1721 remained in the Senate Judiciary Committee until the Regular Session adjourned on November 18, 1998. The Senator may reintroduce the bill at a later date when he garners more support for it; the parent-child privilege is still an issue that Senator Leahy feels strongly about.

IV. SENATOR LEAHY'S PARENT-CHILD PRIVILEGE

Senator Patrick Leahy from Vermont introduced Senate Bill 1721 in the 105th Congress. His distaste for Kenneth Starr's tactics was evident: "No attorney, no doctor, no clergyman, no psychotherapist, no spouse would, in most states, be faced with the awful choice of the mother caught in the machinations of Mr. Starr's expanding investigation." Senator Bill 1721 recommended that the U.S. Attorney General perform a study of the methods the states have taken to protect confidential communications between parents and children. The study should also note whether or not the privilege has been used in matters not involving drug trafficking or violence. The Attorney General would then have developed guidelines for federal prosecutors that identified when the communications between parents and children should be afforded the same privileges as "preferred professional

227. See Interview with Beryl T. Howell, General Counsel, Minority Staff, Senate Judiciary Committee (Oct. 17, 1998).
228. See 144 CONG. REC. S1508-02, S1508 (daily ed. Mar. 6, 1998).
229. Id. at S904 (daily ed. Feb. 23, 1998) (statement of Sen. Leahy) ("This is the United States of America. This is not the Star Chamber of hundreds of years ago. This is not the Spanish Inquisition. No child, no matter what their age, expects his or her conversations with a parent to be disclosed to prosecuting attorneys ... ").
230. See id. at S1509 (daily ed. Mar. 6, 1998). The text of Senate Bill 1721 stated: "The Attorney General ... shall ... study and evaluate the manner in which the States have taken measures to protect the confidentiality of communications between children and parents ... "). Id. See Appendix, Section C for the full text of the bill.
231. See S.B. 1721, 105th Cong. (1998) ("The Attorney General ... shall ... study and evaluate ... in particular, whether such measures have been taken in matters that do not involve allegations of violent or drug trafficking conduct.").
relationships." The guidelines would have also identified the circumstances and types of cases in which the "communications should be subject to government scrutiny." The bill directed the Judicial Conference to perform a study and report whether the Federal Rules of Evidence should be amended to recognize a parent-child privilege.

Senate Bill 1721 recommended that the Attorney General answer the following questions in the course of preparing the study: (1) what kinds of communications are confidential? (2) what are the applicable constitutional limits? (3) should the privilege be qualified or absolute? (4) should the privilege apply in criminal and civil proceedings? (5) should the privilege have an age limit? and (6) what are the parameters of the familial relationships subject to the privilege? This section attempts to address some of the questions that Senator Leahy's bill recommended the Attorney General answer. The analysis focuses mainly on state law instead of federal law because the study specifically directed the Attorney General to focus on the states. Section II, supra, addresses federal law on this issue. See Appendix D for the entire text of Senate Bill 1721.

The parent-child confidential communications privilege should be applied in light of state law. Currently, only three states—Idaho, Massachusetts, and Minnesota—have parent-child privilege statutes. State courts in seventeen states have decided parent-child privilege cases. All but one of the state

232. See 144 CONG. REC. S1508-02, S1509.
233. Id.
234. See id.
235. See id. at S1509-10.
236. See id. at S1509; Covey, supra note 11, at 909.
courts, New York, have declined to recognize a parent-child privilege.239

A. What Kinds of Communications Are Confidential?

The parent-child privilege statutes in Idaho and Minnesota define confidential communications as those communications made between a minor child and his parent.240 The Minnesota statute allows for confidentiality even if the parent and child talk in the presence of members of their immediate family living in the same home.241 The Minnesota statute applies only to communications minors make to their parents and does not apply to communications made from parents to minors.242

A New York court has held that no privilege exists when there is a lack of confidentiality.243 At a minimum, a minor child must divulge the communications to his parents within the family relationship.244 Further, the communication must be divulged to obtain support, advice, or guidance.245

The justification for this limitation is that children seek advice from their parents more often than parents seek their children for advice.246 The goal of the confidential communications privilege is to protect troubled people who are
looking for guidance.\textsuperscript{247} Communications flowing from parent to child do not meet this standard.\textsuperscript{248} Furthermore, children are more likely than parents to expect confidentiality in their communications.\textsuperscript{249}

However, another goal of the parent-child confidential communications privilege is to protect children from the “potentially destructive trauma” of being forced to testify against their parents.\textsuperscript{250} The natural repugnancy argument applies to children who testify against their parents, but this argument is not nearly as compelling in these cases because the communication is unrelated to the child’s needs.\textsuperscript{251}

In New York, Idaho, and Minnesota, communication should be confidential if: (1) it is solely between a minor and his parent or guardian,\textsuperscript{252} and (2) it is made in confidence by the minor to his parent.\textsuperscript{253}

\textbf{B. What Are the Applicable Constitutional Limits?}

Most state courts have declined to recognize a parent-child privilege because judges cannot find a basis for it under principles of family autonomy or the right to privacy. However, the Constitution itself does not prohibit Congress from recognizing the privilege.\textsuperscript{254} Unfortunately, the parent-child privilege may be difficult to apply in grand jury proceedings.\textsuperscript{255} Federal common law limits a witness’s right to assert a privilege in grand jury proceedings, even if the witness has valid privilege claims.\textsuperscript{256}

\textsuperscript{247} See id.
\textsuperscript{248} See id.
\textsuperscript{249} See id.
\textsuperscript{250} See id.
\textsuperscript{251} See Franklin, supra note 11, at 172-73.
\textsuperscript{253} See IDAHO CODE § 9-203(7) (1990); MINN. STAT. § 595.02(1)(d) (1988); A & M, 403 N.Y.S.2d at 381.
\textsuperscript{256} See Branzburg v. Hayes, 408 U.S. 655, 682 (1972) (“Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a
C. Should the Privilege Be Qualified or Absolute?

The Supreme Court, in *Jaffee v. Redmond*,257 addressed whether or not a psychotherapist-patient privilege was absolute or qualified.258 The Court rejected the balancing component of the lower court's ruling that the psychotherapist-patient privilege required an assessment of whether, in the interests of justice, the evidentiary need outweighed the patient's privacy interest.259 The Court reasoned that participants in a confidential communication should have some degree of certainty that their discussions will be protected: "An uncertain privilege, or one which . . . results in widely varying applications by the courts, is little better than no privilege at all."260 Congress would have precedent for making the parent-child privilege absolute because the therapeutic nature of parent-child communications is similar to therapist-patient communications.261

D. Should the Privilege Apply in Criminal and Civil Proceedings?

All of the state statutes recognize the parent-child privilege in both civil and criminal proceedings.262 However, the privilege has limitations and exceptions.263 The Idaho and Minnesota statutes apply in all civil actions except where the parent and child are adversarial parties.264 The Minnesota statute also excludes the privilege in civil actions by one spouse against the other or by a parent or child against the other.265 The Minnesota statute also excludes the privilege in actions for child custody, dependency, deprivation or abandonment, child support or non-support, child abuse or neglect, and termination of parental

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258. *See id.* at 1832.
259. *See id.* at 1835.
260. *Id.* at 1832 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).
The privilege also does not apply in proceedings when a child or parent's physical or mental capacity is an issue. In contrast, the Massachusetts statute recognizes no civil exceptions to the privilege.

The Massachusetts statute prohibits courts from applying the privilege in criminal cases when the victim is either a member of the parent's family or lives in the same household. The Idaho and Minnesota statutes prohibit parties from asserting the privilege when a parent, parent's spouse, or child commits a crime against the person or property of the other. Additionally, the Minnesota statute creates an exception when a child commits a crime or an act of delinquency against the person or property of a parent or child of a parent.

Legislatures must balance several policies when determining the scope of the parent-child privilege. The goal of Senate Bill 1721 was to create a parent-child privilege that did not compromise public safety or the integrity of the judicial system. The bill's drug trafficking and violent crime exceptions furthered this purpose.

Supporters of the parent-child privilege also claim it would preserve the sanctity of the family and promote family harmony. In each of the Idaho, Massachusetts, and Minnesota exceptions, the healthy family relationship has evidently already been broken, otherwise the families would not be in court. Drafting a federal parent-child privilege that did not contain these exceptions would be contrary to the policy behind

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266. See id.
267. See id.
269. See id.; see also State v. DeLong, 456 A.2d 877, 882 (Me. 1983) (holding no privilege because the crime was within the family); In re Gail D., 525 A.2d 337 (N.J. Super. Ct. App. Div. 1987) (holding no privilege when father accused of murdering mother); People v. Johnson, 602 N.Y.S.2d 160, 161 (N.Y. App. Div. 1993) (holding no privilege when the crime was committed against a member of the household).
270. See IDAHO CODE § 9-203(7) (1990); MINN. STAT. § 595.02(1)(a) (1988).
271. See MINN. STAT. § 595.02(1)(a) (1988).
272. See supra note 29, at 5.
274. See id.
275. See id.
276. See supra note 11, at 911.
the privilege and would compromise the integrity of the judicial system.\textsuperscript{277}

\textbf{E. Should the Privilege Have an Age Limit?}

The parent-child confidential communications privilege is designed to "promote a healthy environment for the psychological development of children."\textsuperscript{278} The dilemma as to whether a parent-child privilege should apply to adult children is well settled in state law.\textsuperscript{279} The state parent-child privileges apply only to minor children.\textsuperscript{280} With one exception, the state courts that have recognized a parent-child privilege have only applied it to minors.\textsuperscript{281}

However, one New York court has extended the protection to adult children.\textsuperscript{282} In \textit{People v. Fitzgerald},\textsuperscript{283} the court held that a confidential privileged communication existed between a twenty-three-year-old and his father.\textsuperscript{284} The court ruled that if mutual trust and understanding exist between parent and child, the relationship cannot be subject to state intrusion merely because of an artificial age barrier.\textsuperscript{285} "The parent-child relationship of mutual trust, respect, and confidence...must be fostered throughout the life of the [parent and child]."\textsuperscript{286} The court reasoned that the closeness of the family unit may increase as children grow into adulthood and can better appreciate the wisdom of their parents.\textsuperscript{287}

The court in \textit{People v. Johnson}\textsuperscript{288} later limited the holding in \textit{Fitzgerald}. The court emphatically held that a parent-child privilege would not apply when the defendant was twenty-eight

\textsuperscript{277} See id.
\textsuperscript{279} See \textsc{Idaho Code} § 9-203(7) (1990); \textsc{Mass. Gen. Laws} ch. 23, § 20 (1986); \textsc{Minn. Stat.} § 595.02(1)(j) (1988).
\textsuperscript{280} See \textsc{Idaho Code} § 9-203(7) (1990); \textsc{Mass. Gen. Laws} ch. 23, § 20 (1986); \textsc{Minn. Stat.} § 595.02(1)(j) (1988).
\textsuperscript{283} Id.
\textsuperscript{284} See id. at 310, 317.
\textsuperscript{285} See id. at 314.
\textsuperscript{286} Id. at 313.
\textsuperscript{287} See id. at 313-14.
years old at the time of the conversation with his mother, another family member was present, the mother testified before the grand jury hearing, and the crime was committed against a member of the household. 289

Minor children emotionally depend on their parents for everything. 290 However, as children approach adulthood, they develop more outside relationships, and their parents’ roles as advisors diminish. 291 The policies that favor a parent-child privilege for minors arguably do not apply to adults. 292 As children become adults, they are better able to solve their problems on their own, and their need for parental guidance decreases. 293 As adults, they can seek professional help on their own accord, an option they do not have as minors. 294 Finally, as children mature, their expectation of confidentiality decreases along with their need for parental guidance. 295 The argument for parent-child confidentiality between parents and adult children therefore becomes less compelling. 296

The catalyst for Senate Bill 1721 involved confidential statements made by Monica Lewinsky, an adult child, to her mother. 297 State court precedent and policy do not support legislated recognition of a privilege under those facts. Only those confidential communications made between minors and their parents should be entitled to protection. 298

289. See id.
290. See Franklin, supra note 11, at 170.
291. See id.; Covey, supra note 11 at 802.
292. See Franklin, supra note 11, at 170.
293. See Covey, supra note 11, at 802.
294. See Franklin, supra note 11, at 170.
295. See id. at 171.
296. See id.
298. See Franklin, supra note 11, at 171. But see Covey, supra note 11, at 803 (arguing that the privilege should apply to minors and adults).
F. What are the Parameters of Familial Relationships Subject to the Privilege?

With "today's rapidly changing family structures" it may be difficult to determine whom the privilege should cover. The Idaho statute extends the privilege to a child's or ward's parent, guardian, or legal custodian. The Minnesota and Massachusetts statutes use the word "parent" without defining it.

State common law provides a little more guidance than the state statutes. Confidential communications between minor and adult children and their uncles or siblings are not privileged. Confidential communications between minor children and their guardians or grandparents who have reared them are privileged.

The "Confidence in the Family Act" broadly defined "parent" as any person, even a foster parent or relative with long-term custody of the child, whom the court recognizes is acting as a parent. This broad definition seems preferable to the narrower or ambiguous definitions in the state statutes because it leaves some latitude for "unusual situations" where a child's caretaker fulfills a parental role, but is not the child's legal guardian. "Children need to rely on some source of moral guidance and direction," and a broader definition protects this source in its various forms.

The concern with the broader definition is that it may open the floodgates for "abuse and overextension." The court in

299. See Covey, supra note 11, at 900.
303. See Wright, 378 N.W.2d at 733; Good, 417 S.E.2d at 844.
304. See Michele P. v. Gold, 419 N.Y.S.2d 704, 709 (N.Y. App. Div. 1979) (holding privilege extended to guardian when minor made inculpatory statements in private); In re Ryan, 474 N.Y.S.2d 931, 932 (N.Y. Fam. Ct. 1984) (holding that privilege extends to grandmother who for 15 years continuously provided a home, financial support, and other necessities).
306. See Covey, supra note 11, at 901.
307. Id.
308. See id.
People v. Sanders illustrated the significance of extending a confidential communications privilege to parents and children: "Were we to recognize such a privilege under our judicial authority, it would be impossible to contain it logically from spreading to conversations with other relatives in whom a person might normally confide, or even to close friends." This argument is called the "slippery slope" because siblings and other close confidantes can raise the natural repugnancy and cruel trilemma arguments in favor of a privilege.

The distinction between the parent-child relationship and these other relationships lies in the expectation of confidentiality in different types of relationships and the relatively easy identification of the parent-child relationship. When children are born or adopted, many legal obligations and privileges arise between parent and child. Other relationships do not have this legal expectation of confidentiality even though they may have a high degree of trust and love within the relationship. Parent-child relationships are easily defined with definite expectations. Other intimate relationships are not so easily identified because it is difficult to define the relationship and the expectations within it. Furthermore, society has an interest in protecting the family that it does not have in protecting other intimate relationships.

309. 457 N.E.2d 1241 (Ill. 1983).
310. Id. at 1245; see also Jaffee v. Redmond, 518 U.S. 1, 22, 116 S.Ct. 1923, 1934 (1996) (Scalia, J., dissenting) ("For most of history, men and women have worked out their difficulties by talking to inter alios, parents, siblings, best friends and bartenders—none of whom was awarded a privilege against testifying in court.").
311. See Covey, supra note 11, at 894, 902; see also Internight, supra note 3 (statement of Jennifer McVeigh, sister of Oklahoma bomber Timothy McVeigh) ("I think he knows I didn't really have a choice, but myself, I still wonder. I have a lot of guilt inside that—you know, that I talked to them and maybe I somehow hurt him in doing that.").
312. See Covey, supra note 11, at 898.
313. Id. at 898.
314. See id. at 897.
315. See id. at 896.
316. See id. at 897.
317. See id. at 899.
CONCLUSION

Courts disfavor privileges because they are barriers to the truth, but certain relationships are so socially desirable that courts recognize privileges to protect their confidential nature. Our jurisprudence has held that the family is an institution that needs protection. Legal scholars, some judges, and some legislators support protection for the sanctity of the family through the recognition of a parent-child testimonial privilege.

Congress has recently heeded calls for recognition of a parent-child because many legislators were outraged by Kenneth Starr’s decision to force Monica Lewinsky’s mother to testify to a grand jury about their confidential communications regarding President Clinton. The courts have correctly held that the legislature is the more appropriate body to recognize a parent-child privilege. Congress appears to be the parent-child privilege’s last hope for receiving federal recognition.318

Senator Leahy’s bill took a sensible approach to analyzing how Congress should address the parent-child privilege.319 Should Congress decide to recognize the parent-child privilege, it should only protect confidential communications between minors and their parents in the context of parental advice and counseling. The privilege should only apply to statements made by the minor to the parent. The privilege should extend to all persons who act as parents, including biological parents, legal guardians, foster parents, adoptive parents, family members who are stand-in parents, and step-parents who reside in the same household with the minor. The privilege should apply in civil and criminal cases, except when recognition of the privilege would fly in the face of the policies behind the privilege. The privilege should not apply in cases involving drug trafficking or violent crimes. The privilege should be absolute, like some of the currently recognized professional privileges and should only apply to confidential communications. The only concern with the privilege described above is whether or not its

318. See Goldman et al., supra note 9, at 11 (proposing that the most expeditious way to establish the privilege is by congressional and state legislative action).
319. The approach is sensible because the study will answer many of the legislators’ questions and concerns.
narrowness swallows the privilege to such an extent that it is not useful.\textsuperscript{320}

These concerns aside, a narrowly tailored parent-child privilege should protect the delicate relationships between mothers, fathers, and children without unduly burdening the government's search for the truth.

\textit{Shonah P. Jefferson}\textsuperscript{321}

\begin{quote}
\textsuperscript{320} The majority of state cases involved violent crimes that would not be covered under Leahy's privilege. Most prosecutors exercise discretion in compelling family members to testify. Drug trafficking is an exception to the privilege here.

\textsuperscript{321} The Author acknowledges with appreciation the assistance of Professors Bernadette Hartfield and Andrea Curcio of Georgia State University College of Law in the writing of this Note.
\end{quote}
APPENDICES

A. Parent-Child Privilege Act of 1998 (H.R. 4286)\textsuperscript{322}

SECTION 1. SHORT TITLE

This Act may be cited as the "Parent-Child Privilege Act of 1998."

SECTION 2. PARENT-CHILD PRIVILEGE

(a) In General.—Article V of the Federal Rules of Evidence is amended by adding at the end the following:

"Rule 502. Parent-Child Privilege"

(a) Definitions.—For purposes of this rule, the following definitions apply:

(1) The term 'child' means the son, daughter, stepchild, or foster child of a parent or the ward of a legal guardian or of any other person who serves as the child's parent. A person who meets this definition is a child for the purposes of this rule, irrespective of whether or not that person has attained the age of majority in place in which the [sic] that person resides.

(2) The term "confidential communication" means a communication between a parent and the parent's child, made privately or solely in the presence of other members of the child's family or an attorney, physician, psychologist, psychotherapist, social worker, clergy member, or other third party who has a confidential relationship with the parent or the child, which is not intended for further disclosure except to other members of the child's family or household or to other persons in furtherance of the purposes of the communication.

(3) The term "parent" means a birth parent, adoptive parent, stepparent, foster parent, or legal guardian of a child, or any other person that a court has recognized as having acquired the right to act as a parent of that child.

(b) Adverse Testimonial Privilege.—In any civil or criminal proceeding governed by these rules, and subject to the exceptions set forth in subdivision (d) of this rule—

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(1) a parent shall not be compelled to give testimony as a witness adverse to a person who is, at the time of the proceeding, a child of that parent; and
(2) a child shall not be compelled to give testimony as a witness adverse to a person who is, at the time of the proceeding, a parent of that child; unless the parent or child who is the witness voluntarily and knowingly waives the privilege to refrain from giving such adverse testimony.
(c) Confidential Communications Privilege.—(1) In any civil or criminal proceeding governed by these rules, and subject to the exceptions set forth in subdivision (d) of this rule—
(A) a parent shall not be compelled to divulge any confidential communication made between that parent and the child during the course of their parent-child relationship; and
(B) a child shall not be compelled to divulge any confidential communication made between that child and the parent during the course of their parent-child relationship; unless both the child and the parent or parents of the child who are privy to the confidential communication voluntarily and knowingly waive the privilege against the disclosure of the communication in the proceeding.
(2) The privilege set forth in this subdivision applies even if, at the time of the proceeding, the parent or child who made or received the confidential communication is deceased or the parent-child relationship is terminated.
(d) Exceptions.—The privileges set forth in subdivisions (c) and (d) of this rule shall be inapplicable and unenforceable—
(1) in any civil action or proceeding by the child against the parent, or the parent against the child;
(2) in any civil action or proceeding in which the child’s parents are opposing parties;
(3) in any civil action or proceeding contesting the estate of the child or of the child’s parent;
(4) in any action or proceeding in which the custody, dependency, deprivation, abandonment, support or nonsupport, abuse, or neglect of the child, or the
termination of parental rights with respect to the child, is at issue;
(5) in any action or proceeding to commit the child or a parent of the child because of alleged mental or physical incapacity;
(6) in any action or proceeding to place the person or the property of the child or of a parent of the child in the custody or control of another because of alleged mental or physical capacity; and
(7) in any criminal or juvenile action or proceeding in which the child or a parent of the child is charged with an offense against the person or the property of the child, a parent of the child or any member of the family or household of the parent or the child.

(e) Appointment of a Representative for a Child Below the Age of Majority.—When a child who appears to be the subject of a privilege set forth in subdivision (b) or (c) of this rule is below the age of majority at the time of the proceeding in which the privilege is or could be asserted, the court may appoint a guardian, attorney, or other legal representative to represent the child’s interests with respect to the privilege. If it is in furtherance of the child’s best interests, the child’s representative may waive the privilege under subdivision (b) or consent on behalf of the child to the waiver of the privilege under subdivision (c).

(f) Non-Effect of this Rule on Other Evidentiary Privileges.—This rule shall not affect the applicability or enforceability of other recognized evidentiary privileges that, pursuant to rule 501, may be applicable and enforceable in any proceeding governed by these rules.

B. Confidence in the Family Act (H.R. 3577)

SECTION 1. SHORT TITLE
This Act may be cited as the ‘Confidence in the Family Act.’

SECTION 2. PARENT-CHILD TESTIMONIAL PRIVILEGES IN FEDERAL CIVIL AND CRIMINAL PROCEEDINGS.
Rule 501 of the Federal Rules of Evidence is amended—
(1) by designating the 1st sentence as subdivision (a);
(2) by designating the 2nd sentence as subdivision (c); and
(3) by inserting after the sentence so designated as subdivision (a) the following new subdivision:
(b)(1) A witness may not be compelled to testify against a child or parent of the witness.
(2) A witness may not be compelled to disclose the content of a confidential communication with a child or parent of the witness.
(3) For purposes of this subdivision, ‘child’ means, with respect to an individual, a birth, adoptive, or step-child of the individual, and any person (such as a foster child or a relative of whom the individual has long-term custody) with respect to whom the court recognizes the individual as having a right to act as a parent.
(4) The privileges provided in this subdivision shall be governed by principles of the common law, as they may be interpreted by the courts of the United States in the light of reason and experience, that are similar to the principles that apply to the similar privileges of a witness with respect to a spouse of the witness.

C. S.B. 1721

SECTION 1. CONFIDENTIALITY OF PARENT-CHILD COMMUNICATIONS IN JUDICIAL PROCEEDINGS.

(a) STUDY AND DEVELOPMENT OF PROSECUTION GUIDELINES.—The Attorney General of the United State shall—

(1) study and evaluate the manner in which the States have taken measures to protect the confidentiality of communications between children and parents and, in particular, whether such measures have been taken in matters that do not involve allegations of violent or drug trafficking conduct;
(2) develop guidelines for Federal prosecutors that will provide the maximum protection possible for the confidentiality of communications between children and parents in matters that do not involve allegations of violent or drug trafficking conduct, within any applicable constitutional limits, and without compromising public safety or the integrity of the judicial system, taking into account—

(A) the danger that the free communication between a child and his or her parent will be inhibited and familial privacy and relationships will be damaged if there is no
assurance that such communications will be kept confidential;
(B) whether an absolute or qualified testimonial privilege for communications between a child and his or her parents in matters that do not involve allegations of violent or drug trafficking conduct is appropriate to provide the maximum guarantee of familial privacy and confidentiality without compromising public safety or the integrity of the judicial system; and
(C) The appropriate limitations on a testimonial privilege for such communications between a child and his or her parents, including—
(i) whether the privilege should apply in criminal and civil proceedings;
(ii) whether the privilege should extend to all children, regardless of age, unemancipated or emancipated, or be more limited;
(iii) the parameters of the familial relationship subject to the privilege, including whether the privilege should extend to stepparents or grandparents, adopted children, or siblings;
(iv) whether disclosure should be allowed absent a particularized showing of a compelling need for such disclosure, and adequate procedural safeguards are in place to prevent unnecessary or damaging disclosures; and
(3) prepare and disseminate to Federal prosecutors the finds made and guidelines developed as a result of the study and evaluation.

(b) REPORT AND RECOMMENDATIONS.—Not later than one year after the date of enactment of this Act, the Attorney General of the United States shall submit a report to Congress on—
(1) the findings of the study and the guidelines required under subsection (a); and
(2) recommendations based on the findings on the need for and appropriateness of further action by the Federal Government.

(c) REVIEW OF FEDERAL RULES OF EVIDENCE.—Not later than 180 days after the date of enactment of this Act, the
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Judicial Conference of the United States shall complete a review and submit a report to Congress on—
(1) whether the Federal Rules of Evidence should be amended to guarantee that the confidentiality of communications by a child to his or her parent in matters that do not involve allegations of violent or drug trafficking conduct will be adequately protected in Federal court proceedings; and
(2) if the rules should be so amended, a proposal for amendments to the rules that provides the maximum protection possible for the confidentiality of such communications, within any applicable constitutional limits and without compromising public safety or the integrity of the judicial system.