

To Testify or Not to Testify: A Comparative Analysis of Australian and American Approaches to a Parent-Child Testimonial Exemption

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delinquency proceedings. The law encourages parents' presence prior to police interrogation to advise the child whether or not to speak to police.¹¹ Almost all jurisdictions require some form of parental involvement in their child's juvenile proceedings, including summoning parents to appear in court or requiring parents to approve the child's plea agreement.¹² For an unemancipated minor, parents are usually financially responsible for their child's legal expenses.¹³ Many courts automatically assign the costs and probation fees to parents, even for indigent defendants.¹⁴

In contrast to the Australian juvenile justice system, the American juvenile justice system has evolved into a formal adjudicatory system, with an emphasis on deterrence and incapacitation. Zero-tolerance policies, waivers for transferring youth to the adult criminal court, and greater numbers of youth in detention illustrate a paradigm shift in America's treatment of its youth.¹⁵ These legislative

11. See Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1286 n.56 (2004) ("Several state supreme courts have commented on the great weight given to the presence or absence of a parent in determining the validity of a juvenile's waiver."); State v. Presha, 748 A.2d 1108, 1110 (N.J. 2000) ("[C]ourts should consider the absence of a parent or legal guardian from the interrogation area as a *highly significant fact* when determining whether the State has demonstrated that a juvenile's waiver of rights was knowing, intelligent, and voluntary.") (emphasis added); Commonwealth v. Jones, 328 A.2d 828, 831 (Pa. 1974) ("*An important factor*, therefore, is whether the juvenile had access to the advice of a parent, attorney, or other adult who was primarily interested in his welfare, before making a decision to waive constitutional rights.") (emphasis added).

12. See, e.g., ALASKA STAT. § 47.12.050(a) (2010) (requiring "each parent" and guardian to receive notice of the proceedings against the juvenile); MASS. GEN. LAWS ANN. ch. 119, § 55 (West 2008) (requiring that a parent or guardian receives a summons from the court for the juvenile proceeding); IOWA CODE ANN. § 232.43(5)(c) (West 2000) (the court may reject a juvenile's plea agreement if the juvenile's parents do not agree to the terms); 42 PA. CONS. STAT. ANN. § 6335(a) (West 2000) (requiring that a parent receives a summons for the juvenile's hearing); N.Y. FAM. CT. ACT § 312.1(1) (McKinney 2008) (requiring that the court issue a summons for a parent to appear at the juvenile's initial court appearance).

13. See, e.g., CAL. PENAL CODE § 987.4 (West 2004) (allowing a court to order "the parent or guardian of [a] minor to reimburse the [state] for all or any part of such expense, if it determines that the parent or guardian has the ability to pay such expense . . ."); COLO. REV. STAT. § 19-2-706(2)(b) (2002) (mandating that the state seek reimbursement for the cost of an appointed counsel for a juvenile defendant where the parents refused to retain counsel); N.H. REV. STAT. ANN. § 604-A:9(I-a) (2003) (permitting the state to collect the cost of providing a public defender to a juvenile from the juvenile defendant or the person liable for the juvenile's support commensurate with present or future ability to pay).

14. See Andrea L. Martin, *Balancing State Budgets at a Cost to Fairness in Delinquency Proceedings*, 88 MINN. L. REV. 1638, 1657-58 (2004) (acknowledging that legal expenses are generally considered "necessaries" that a parent is financially responsible for, despite difficulties associated with the classification of such expenses as "necessaries").

15. As juvenile offenses both increased and became more violent, "[g]enerally held public perceptions concerning the extent and nature of juvenile crime . . . resulted in a 'get-tough' public sentiment toward delinquency and a series of 'get-tough' approaches to the treatment of young offenders." George Smith & Gloria Dabiri, *The Judicial Role in the Treatment of Juvenile Delinquents*, 3 J.L. & POL'Y 347, 364 (1995). Get-tough approaches included: "prosecuting younger children as adults for certain crimes, as well as imposing mandatory, longer and more restrictive placements." *Id.* This trend, promulgated by public fear and legislative action, resulted in a nineteen percent increase in admissions to juvenile facilities between 1983 and 1993. *Id.* at 365. The transformation of procedural requirements in juvenile proceedings, combined with increases in juvenile crime rates and corresponding public fear, significantly altered the American juvenile justice system from the 1970s onward. See generally Barry Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 691-92 (1991) (noting that juvenile courts frequently transfer cases to criminal courts and sentence juvenile offenders based on a theory of

prescriptions, designed to address public safety concerns and school decorum, increased the need for procedural requirements in the adjudicating of such matters.¹⁶ The adversarial nature of juvenile delinquency proceedings combined with adherence to constitutional protections effectively narrows the opportunities for community redress.

This article adopts a comparative approach toward the promotion of the legal and social utility of a testimonial exemption¹⁷ for parents and their children. The article will contrast Australia's widespread acceptance of a parent-child testimonial exemption with the general rejection of the privilege in the United States. The differences in the Australian and American approaches to juvenile crime explain, in part, why Australia recognizes a parent-child testimonial exemption, while the majority of the American states do not. Both juvenile justice systems rely on the involvement of parents, whether it is for the fulfillment of a diversionary plan or parental assent to a plea agreement, but the correlation between Australia's restorative approach and the parent-child exemption is significant.

There are efforts afoot in the United States to reverse the legislative get-tough mentalities that catapulted the American juvenile justice system on an increasingly adversarial and punitive trajectory.¹⁸ Most notable is the restorative justice movement, which is assuming a stronger foothold throughout localities in the United States.¹⁹ For instance, thirty-six states have legislatively approved some facet of the principles behind restorative justice for one or more aspects of their juvenile justice

"just desserts" rather than the child's "real needs").

16. See Feld, *supra* note 15, at 709-10 (discussing how change in juvenile law and policy "de-emphasize[s] rehabilitation and the child's 'best interests,' and emphasizes the importance of protecting public safety, enforcing children's obligations to society, applying sanctions consistent with the seriousness of the offense, and rendering appropriate punishment to offenders"). An example of this is the express purpose of Minnesota's juvenile court: "to promote the public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law prohibiting certain behavior and by developing individual responsibility for lawful behavior." MINN. STAT. § 260B.001, subd. 2 (2009).

17. In the United States, a rule of evidence that bars otherwise relevant evidence is characterized as an evidentiary privilege. See BLACK'S LAW DICTIONARY 1317 (9th ed. 2009) (defining "testimonial privilege" as "[a] right not to testify based on a claim of privilege; a privilege that overrides a witness's duty to disclose matters within the witness's knowledge, whether at trial or by deposition."). Under Australian common law and statutory authority, an otherwise competent and compellable witness can apply to the court for an exemption from testifying. See, e.g., AUSTL. LAW REFORM COMM'N, REPORT No. 38: EVIDENCE, Summary, para. 13 (1987), available at <http://www.austlii.edu.au/au/other/alcrc/publications/reports/38/> (noting that certain jurisdictions allow a spouse, who is otherwise a compellable witness, to "seek exemption from the trial judge" in criminal proceedings). This article will use the two terms interchangeably. Australia's Evidence Act 1995 and its state counterparts provide for exemptions to the compellability of specific persons, such as spouses, parents, and children. See *infra* Part II (discussing the development of the parent-child exemption in Australian federal and state evidence laws).

18. See C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 680-81 (2005). In an attempt to balance rehabilitative goals for young offenders and demand for public protection, at least seventeen states have implemented "extended juvenile jurisdiction" or "blended sentencing" laws, which give judges discretion over whether or not to impose adult sentences to juvenile offenders should juvenile sentences prove to be ineffective at rehabilitation. *Id.*

19. See Sandra Pavelka, *Restorative Juvenile Justice Legislation and Policy*, 4 INT'L J. RESTORATIVE JUSTICE 100, 100 (2004) (examining the restorative justice programs in several states and noting that the modern day restorative justice movement continues to evolve at the state and community levels).

system.²⁰ The American Bar Association has endorsed use of restorative justice victim-offender mediation in the courts.²¹ Throughout the country, courts, police departments, law school clinics, and youth advocacy groups are instituting restorative justice practices with varied success. Studies have tracked a correlation between restorative justice and lower recidivism rates among juvenile offenders, high rates of participant satisfaction, and effective school implementation.²² These positive results are leading to increased support and greater visibility for restorative justice in the United States.

As this article will discuss, there is a mutually supportive relationship between restorative justice and the parent-child privilege. While the privilege has much to recommend it, with or without restorative justice as the crime prevention model, the discussion of why a parent-child privilege should be recognized under U.S. law would not be complete if it did not consider the implications of the restorative justice approach for these kinds of evidentiary issues. Australia offers a looking glass into the positive results that flow from the coexistence of a parent-child privilege and restorative justice, making the comparison between these two countries all the more worthwhile.

This article begins, in Part I, by explaining the history of the parent-child privilege in the United States. In Part II, the article turns to the Australian experience, looking at the origins of the parent-child testimonial exemption and where it is today. Part III explains how in Australia the restorative approach to juvenile offending and the parent-child testimonial exemption work in tandem to promote, preserve, and strengthen family stability. In Part IV, the article argues that the United States' increased use of restorative justice practices among young offenders provides traction for recognizing a parent-child privilege because of the mutually supportive relationship between the two. In conclusion, this article suggests that by adopting a testimonial parent-child privilege such as in Australia, the American legal system can likewise promote parent-child relationships that encourage honest communication between parents and children without the fear of compelled disclosure and incrimination.

20. Hon. T. Bennett Burkemper Jr., et al, *Restorative Justice in Missouri's Juvenile System*, 63 J. MO. B. 128, 130 (2007) [hereinafter Burkemper]. However, it should be noted that the degree of implementation of restorative justice principles ranges from state to state, and range from the adoption of a single basic principle to a more comprehensive change in how the legal system deals with juvenile offenders. See Marlyce Nuzum, *Summaries of State Restorative Justice Legislation*, <http://www.stopviolence.com/restorative/rjleg-detail.htm> (last visited Sept. 6, 2010). For example, Kansas legislation permits a court to order a juvenile offender to make restitution to victims, but does not employ specific restorative justice terminology and does not address the philosophy of restorative justice as a whole. On the other hand, Alaska employs a more targeted approach, as its legislation directs the Department of Corrections to study the principles of Restorative Community Justice and to produce a plan for implementing these principles. *Id.*

21. A.B.A. Endorsement of Victim-Offender Mediation/Dialogue Programs, 1994 A.B.A. Res., available at <http://www.vorp.com/articles/abaendors.html> [hereinafter A.B.A. Endorsement].

22. See MARK UMBREIT, et al., CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING, *RESTORATIVE JUSTICE DIALOGUE: EVIDENCE-BASED PRACTICE* (2006) (describing the results of several studies on the effectiveness of restorative justice programs in juvenile offense cases).

I. THE HISTORY OF A PARENT-CHILD PRIVILEGE IN THE UNITED STATES

In the United States, courts have recognized an evidentiary privilege for spouses, psychotherapists and their patients, and lawyers and their clients.²³ Individual states have also identified relationships deemed worthy of a testimonial privilege, some of which include relationships not recognized under federal common law. For instance, most states recognize a clergy-communicant privilege.²⁴ Some states recognize a privilege between victims and domestic violence or sexual assault counselors.²⁵ Surprisingly, given the importance of parent-child relationships, the United States has not adopted a federal common law or statutory parent-child privilege.²⁶ Only Connecticut, Idaho, Massachusetts, Minnesota, and New York have a parent-child testimonial privilege.²⁷ Massachusetts does not recognize a privilege protecting parents from testifying against their children; rather it protects children from testifying against their parent in proceedings other than domestic violence cases.²⁸ Connecticut's parent-child privilege is the most protective because it extends to communications *and* observations made by the parent.²⁹

The U.S. Congress has considered a "parent-child evidentiary privilege" bill in four separate legislative sessions.³⁰ Senator Patrick Leahy (D-VT) introduced legislation instructing the Attorney General and the Judicial Conference of the United States to study "important questions" concerning the establishment of a privilege to protect parent-child communications in both civil and criminal cases

23. *Trammel v. United States*, 445 U.S. 40, 47-50 (1980) (discussing the history of spousal privilege); *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996) (recognizing a psychotherapist-patient privilege); *Swidler & Berlin v. United States*, 524 U.S. 399, 407-08 (1998) (holding that attorney-client privilege survives the death of the client).

24. 81 Am. Jur. 2d. *Witnesses* § 493 (2009).

25. See e.g., ARIZ. REV. STAT. ANN. § 12-2239 (2003); CAL. EVID. CODE § 1035.4 (West 2009); MASS. GEN. LAWS ANN. ch. 233 § 20K (West 2004); 23 PA. CONS. STAT. ANN. § 6116 (West 2001).

26. Farber, *supra* note 7, at 553.

27. IDAHO CODE ANN. § 9-203(7) (2003) (a parent or guardian "shall not be forced to disclose any communication made by their minor child or ward to them concerning matters in any civil or criminal action to which such child or ward is a party" unless the case involves violence against the adult); CONN. GEN. STAT. ANN. 46b-138a (West 2009) (parent of a minor who is accused in a juvenile court matter "may elect or refuse to testify for or against the accused child" regardless of whether the source of the parent's knowledge is a confidential communication or personal observation, with the exception that the parent must testify if he or she is the victim of violence allegedly inflicted by the child); MINN. STAT. ANN. § 595.02 (West 2003) (a parent may not be compelled to testify "as to any communication made in confidence by the minor to the minor's parent," except in certain enumerated situations); MASS. GEN. LAWS ANN. ch. 233 § 20 (West 2004) (a minor child "shall not testify before a grand jury, trial of an indictment, complaint or other criminal proceeding, against said parent, where the victim in such proceeding is not a member of said parent's family and who does not reside in the said parent's household"). Some New York courts have recognized a confidential privilege between parents and their children. See, e.g., *In re A & M*, 61 A.D.2d at 435 (N.Y. App. Div. 1978) ("We conclude, however, the communications made by a minor child to his parents within the context of the family relationship may, under some circumstances, lie within the "private realm of family life which the state cannot enter.").

28. MASS. GEN. LAWS ANN. ch. 233 § 20 (West 2004).

29. CONN. GEN. STAT. ANN. § 46b-138a (West 2009); Catherine J. Ross, *Implementing Constitutional Rights for Juveniles: The Parent-Child Privilege in Context*, 14 STAN. L. & POL'Y REV. 85, 99 (2003).

30. H.R. 3577, 105th Cong. (1998); H.R. 522, 106th Cong. (1999); H.R. 733, 107th Cong. (2001); H.R. 538, 108th Cong. (2003).

following the treatment of Monica Lewinsky's mother, Marcia Lewis, by Independent Counsel Kenneth Starr.³¹ Leahy explained:

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. Compelling a parent to betray his or her child's confidence is repugnant to fundamental notions of family, fidelity, and privacy. Indeed, I can think of nothing more destructive of the family and family values, nor more undermining of frank communications between parent and child, than the example of a zealous prosecutor who decides to take advantage of close-knit ties between mother and daughter, of a prosecutor who said, if a mother loves a daughter and a daughter will go to a mother to talk to that mother, then we are going to grab the mother. Great family values, Mr. President. Great family values, Mr. Starr.³²

At the same time in the House of Representatives, U.S. Representative Zoe Lofgren (D-CA), introduced H.R. 3577, the "Confidence in the Family Act," which proposed a parent-child privilege in federal criminal and civil proceedings and an amendment to the Federal Rules of Evidence.³³ Among Representative Lofgren's main reasons for proposing the legislation was her belief that the parent-child relationship deserves the protection of a testimonial privilege for the same reasons that the spousal relationship does.³⁴ According to Lofgren, "the relationship between mother and daughter, between father and daughter, between father and son is as valuable, as precious as that between husband and wife."³⁵ Representative Lofgren referred to the lack of such a privilege as a "trilemma" of cruel choices for parents compelled to testify against their children: perjury, betrayal of the child's confidence, or potential jail time for contempt of court.³⁶

Lofgren's proposed privilege made no distinction between adult and minor children.³⁷ The privilege would have extended to any relationship where an individual had a legal right to act as a parent.³⁸ This definition included foster care and long-term custody relationships.³⁹ Some lawmakers suggested that they would support a parent-child privilege applicable only to minor children in civil cases: the

implication being that shielding inculpatory communications between children and parents from a criminal investigative arm of the government was contrary to public policy.⁴⁰ The legislation was modeled after the spousal privilege, but left to the courts to determine its applicability in specific cases.⁴¹ The over-breadth of Lofgren's bill was largely responsible for its failure.⁴² The "Confidence in Family Act" was rejected by a vote of 162 to 256 on April 23, 1998.⁴³

A separate bill introduced by Representative Robert Andrews (D-NJ), termed "The Parent Child Privilege Act," sought to amend the Federal Rules of Evidence to establish a parent-child privilege.⁴⁴ Similar to the spousal privilege, the proposed legislation created an adverse testimonial privilege and a confidential communications privilege.⁴⁵ Andrews first introduced this bill in 1998, and thereafter in 1999, 2001, 2003, and 2005.⁴⁶ Each time the legislation has failed to clear the House Judiciary Committee.⁴⁷

On the state level, Massachusetts is considering amending its evidence rules to include a parent-child privilege. During the 2009-2010 legislative session, the Massachusetts legislature considered a bill in support of a parent-child privilege that would protect parents from being forced to testify in any criminal proceeding against their child.⁴⁸ Currently Massachusetts has a statute that disqualifies the child witness

40. See Jefferson, *supra* note 37, at 456-57 (listing the reasons why many lawmakers opposed the parent-child privilege).

41. 144 CONG. REC. H2268.

42. Jefferson, *supra* note 37, at 456-57.

43. See *id.* at 456 n. 216.

44. H.R. 4286, 105th Cong. (1998).

45. The bill included the standard exceptions for testimonial privileges:

- 1) in any civil action or proceeding by the parent against the child or the child against the parent;
- 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 child's parent;
- 4) in any action or proceeding in which the custody, dependency, deprivation, abandonment, support or nonsupport, abuse, or neglect of child, or termination of parental rights, with respect to the child, is at issue; . . .
- 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 property of the child, a parent of the child, or any member of the or household of the parent or child.

Id. The bill also assigns a guardian *ad litem* or attorney for a minor child to represent the child's interests with respect to the privilege. *Id.*

46. H.R. 4286, 105th Cong. (1998); H.R. 522, 106th Cong. (1999); H.R. 733, 107th Cong. (2001); H.R. 536, 108th Cong. (2003); H.R. 3433, 109th Cong. (2005).

47. *Id.*

48. "An Act Relative to Testimony in Criminal Proceedings," S. 2473, 186th Gen. Ct. Mass. (2010), available at <http://www.mass.gov/legis/bills/senate/186/st02pdf/st02473.pdf>. Senator Creem originally introduced legislation in support of a parent-child privilege in 2000. Kris Axtman, *Do Parents Belong on the Witness Stand?*, CHRISTIAN SCI. MONITOR, Feb. 17, 2000, at 1 [hereinafter Axtman]. In a Massachusetts case involving two teenagers arrested for rape whose parents were subpoenaed to testify before the grand jury regarding communications they had with their sons pertaining to the rape accusation, the Supreme Judicial Court stayed enforcement of the subpoenas in order to allow the legislature the opportunity to consider the important social policy issue affecting children and families inherent in establishing a parent-child privilege. *In re Grand Jury Subpoena*, 722 N.E.2d 450, 451-52, 457 (2000). Senator Creem has gone on record regarding the injustice that can occur as a result of the lack of legal protections for communications between children and their parents: "We would hope that if children came to their parents, they would be able to share their problems But as it stands now, if my children come to me, I have to say, 'Go talk to your priest, go talk to your doctor, because I can't hear it.'"

31. See 144 CONG. REC. S1508-02, S1508-10 (1998). Mr. Starr subpoenaed Ms. Lewis to testify before the grand jury investigating President Clinton as to statements Ms. Lewinsky was believed to have made to her mother concerning her relationship with President Clinton. Despite her lawyers' best efforts and public sentiment opposing the intrusion into the private conversations between mother and daughter, no privilege barred Mr. Starr from compelling the information. *Id.*

32. 144 CONG. REC. S803-01, S804 (1998). The bill was read twice and referred to the Senate Committee on the Judiciary, but never made it out of the Judiciary Committee. The Library of Congress, Bill Summary & Status for S.1721, <http://ecip.loc.gov/cgi-bin/bdquery/z?d105:s.01721>: (last visited Sept. 23, 2010).

33. H.R. 3577, 105th Cong. (1998).

34. 144 CONG. REC. H2268-69 (1998) (introducing the bill and some of Rep. Lofgren's arguments in favor of the privilege).

35. See *id.* at H2269 (statement of Rep. Lofgren).

36. See *id.* at H2271-72.

37. See Shonah Jefferson, *The Statutory Development Of The Parent-Child Privilege: Congress Responds To Kenneth Starr's Tactics*, 16 GA. ST. U.L. REV. 429, 457 (1999) (discussing the failure of legislation via House Judiciary deliberations on Lofgren bill).

38. H.R. 3577, at § 2, para. 4.

39. *Id.*

from testifying against his parent, unless the inquiry involves domestic violence or child abuse.⁴⁹ The proposed parent-child privilege completes the circle by protecting parents from being forced to testify against their children in the same way children are protected from being forced to testify against their parents. Furthermore, the proposed bill gives parents the same privilege afforded them in their relationships with their spouse, attorney, clergy, and health care provider.⁵⁰ The privilege would not extend to either the parent or the child, if the victim is a family member who resides in the household.⁵¹ Lastly, the Massachusetts legislation expands the existing definition of "parent" to meet the complex and varied family situations that are part of today's society.⁵² The privilege offers a more inclusive definition of "parent," changing from "the natural or adoptive mother or father of said child" to "the biological or adoptive parent, stepparent, foster parent, legal guardian of a child, or any other person that has the right to act *in loco parentis* for such child."⁵³ On June 10, 2010 the bill was reported on favorably by the Joint Committee on the Judiciary.⁵⁴ The newly numbered bill, S. 2473, was referred to the Senate Committee on Ethics and Rules.⁵⁵

Drafting legislation for a parent-child privilege involves a myriad of considerations, such as whether the protections should apply to adult children, and civil and criminal proceedings. As evidenced on the federal level, legislation that was not limited to parents and their minor children, or to criminal proceedings weakened majority support. On the state level, the Illinois legislature considered a bill that would have amended the Civil Procedure Code to create a parent-child privilege.⁵⁶ The privilege, which was supported by the Illinois State Bar Association, could be asserted by either the parent or the child, and extended to communications between adult children and their parents as well as between parents and minors.⁵⁷ The majority of the opposition to the legislation focused on its breadth.⁵⁸ Legislators

Axtman, at 1.

49. See MASS. GEN. LAWS ANN. ch. 233 § 20 ("An unemancipated, minor child, living with a parent, shall not testify before a grand jury, trial of an indictment, complaint or other criminal proceeding, against said parent, where the victim in such proceeding is not a member of said parent's family and who does not reside in the said parent's household.").

50. See Axtman, *supra* note 48, at 1 ("If passed, parent-child confidentiality would be similar to that already granted priest and penitent, lawyer and client, therapist and patient—though many argue the secrecy between a parent and a child is paramount to all those.").

51. S. 2473, 186th Gen. Court, Joint Comm. on the Judiciary (Mass. 2010), <http://www.malegislature.gov/Bills/Details/8793>.

52. Compare ch. 233 § 20 with S. 2473.

53. *Id.*

54. S. 2473, 186th Gen. Court, Joint Comm. on the Judiciary (Mass. 2010), <http://www.malegislature.gov/Bills/Details/8793>.

55. *Id.*

56. H.R. 90th Gen. Assem., Reg. Sess., at 11–12 (Ill. 1998) (Statement of Rep. Burke), <http://www.ilga.gov/house/transcripts/htrans90/t040298.pdf> ("Many of you here are quite familiar with the attorney-client privilege. There exists in law, the untouchable secrecy of the confessional and the privileged communication between a doctor and patient. In some cases even the media has attempted to claim this exemption. Are these relationships any more important than that of a parent to child? And what might the affect [sic] be if these secret entitled communications were corrupted and society would lose confidence in the confidentiality of communication with these parties? I submit to this Body, that certain relationships must remain sacred, incorruptible, inviolate and secure.").

57. *Id.* at 19.

58. The legislation proposed in the House was devoid of certain exceptions that are commonly included with such privileges, such as in cases alleging physical abuse. See *id.* at 18–19 (making no mention

expressed concern that the legislation would upset the proper adjudication in abuse and neglect proceedings, as well as custody disputes, because parents would exercise the privilege to prevent their children from testifying.⁵⁹ Ultimately, a vote on the bill was postponed indefinitely.⁶⁰

During the 2009 legislative session, the Oregon legislature considered a narrowly tailored bill, which proposed to create an evidentiary privilege in criminal cases for confidential communications between children under the age of eighteen and their parents.⁶¹ The legislation was designed to allow either the child or the parent/guardian to whom the communication was made to assert the privilege. The Senate approved the legislation but it did not gain sufficient traction in the House.⁶² Also in the past year, North Dakota's highest court considered the constitutionality of a parent-child privilege in a case involving a mother subpoenaed to testify against her minor child in a delinquency case.⁶³ The Court declined to recognize a parent-child privilege in the state constitution but left open the possibility that such a reform could be achieved through legislative action.⁶⁴

Legal protections, such as evidentiary privileges, are given to some relationships as an expression of their societal worth. The concern in any debate about admissibility of relevant evidence is the danger of removing evidence from the trier of fact's deliberation toward a fair and just determination. In a criminal prosecution, any mechanism that limits the availability of relevant evidence to the fact finder is controversial. However, as noted above, in the United States evidentiary privileges already exist for certain relationships.⁶⁵

The relationship between parents and children is equally deserving of a legal privilege.⁶⁶ The absence of legal protections for parent-child communications is inconsistent with society's expectations of parents and with the value placed on the parent-child relationship. The parent-child relationship shares many characteristics with those relationships that have been accorded an evidentiary privilege. For example, the spousal privilege, which is recognized in nearly all fifty states and under

of certain commonly recognized exceptions to familial privilege).

59. See *id.* at 14–26 (discussing concerns about the scope of the privilege for certain proceedings and the possibilities of "conspiracies" between adult children and their parents to block information).

60. *Id.* at 33.

61. S. 313, 75th Leg. Assem., Reg. Sess. (Or. 2009), <http://www.leg.state.or.us/09reg/measpdf/sb0300.dir/sb0313.b.pdf>.

62. See 75th Or. Leg. Assem. Rep. (2009 Reg. Sess.), Status Report for Senate Measures upon Adjournment, June 29, 2009, at S-55 (stating that the bill was in committee upon adjournment of the regular session).

63. *In re O.F.*, 773 N.W.2d 206, 211 (N.D. 2009).

64. See *id.* at 211 (stating that the legislature is better suited to amend the state constitution to add a parent-child privilege, if it is so inclined).

65. See *Trammel v. United States*, 445 U.S. 40, 47–50 (1980) (discussing the history of spousal privilege); *Jaffee v. Redmond*, 518 U.S. 1, 9–10 (1996) (recognizing a psychotherapist-patient privilege); *Swidler & Berlin v. United States*, 524 U.S. 399, 407–08 (1998) (holding that attorney-client privilege survives the death of the client).

66. See Farber, *supra* note 7, at 568–74 (arguing that since parents act as advisors and counselors to their children they are as deserving, if not more so, than other relationships that enjoy an evidentiary privilege).

federal common law, protects an intimate personal relationship.⁶⁷ As one commentator noted,

The child-parent relationship resembles the husband-wife relationship in that both involve a fundamental and private family bond. The child-parent relationship ideally encompasses aspects found in the marital relationship—mutual love, intimacy and trust.... The fact that the child-parent relationship is part of the institution of the family that it is hoped is promoted by a marital privilege makes the protection of children's private conversations with parents even more appealing.⁶⁸

At the heart of the psychotherapist-patient and attorney-client relationships is a commitment of trust and privacy that, if eroded, harms the patient or the client and threatens the integrity of the profession.⁶⁹ The virtue of both of these professional privileges is that patients and clients will reveal honest and accurate information to their therapists and lawyers, without fear of recrimination.⁷⁰ Similarly, children share some of the most personal information with their parents in order to receive the benefit of their parents' counsel. Children rely on parents to support and guide them through an oftentimes complicated and frightening legal process.⁷¹ Parents sometimes work in conjunction with the child's attorney, assisting in the legal decision making.⁷² The essence of inter-generational loyalty is threatened when the government is permitted to force parents and children to divulge confidences shared between them.

Most courts that have refused to recognize a parent-child privilege have done so in cases involving an adult child compelled to testify against his parent or a parent testifying against an adult child.⁷³ The U.S. Supreme Court has never decided a case

involving judicial recognition of a parent-child privilege. In 1984, the Court declined *certiorari* in a case involving three adolescent children compelled to testify before a grand jury investigating their father for murder.⁷⁴ *Three Juveniles* was the first and last time the parent-child privilege was presented to the U.S. Supreme Court for review.

In 1996, the Supreme Court expanded the list of evidentiary privileges recognized under Federal Rule of Evidence 501 by creating a psychotherapist-patient privilege.⁷⁵ *Jaffee v. Redmond* involved the compulsion of statements that a police officer made to her licensed social worker during psychotherapy sessions following an incident where the officer shot and killed a man while on duty.⁷⁶ Police officer Mary Lu Redmond and the department she worked for at the time were sued under a federal civil action after Redmond killed the plaintiff.⁷⁷ The plaintiff, the administrator of the decedent's estate, sought a clinical social worker's notes, which were taken during her counseling sessions with Redmond.⁷⁸ Resting on the belief that protecting the communications between psychotherapists and patients promotes sufficiently important social interests, the Court continued the expansion of common law privileges under Rule 501 by recognizing a psychotherapist-patient privilege.⁷⁹ The Court reasoned that the psychotherapist-patient relationship is dependent on trust and privacy.⁸⁰ The ethical rules governing licensed psychotherapists and clinical social workers mandate confidentiality, except in instances where the law requires disclosure.⁸¹ Without an assurance of confidentiality, many patients would never divulge the intimate details of their personal relationships, habits, and professional conduct to their therapists.⁸² From the therapist's perspective, the lack of a guarantee that the patient's communication will be kept confidential compromises the therapist's assistance and the integrity of the profession.

Since *Jaffee*, only three federal courts have considered recognition of a parent-child privilege.⁸³ One of those cases, *In re Grand Jury*, involved a criminal investigation of an eighteen-year-old, whose father was subpoenaed to testify before

67. See GEORGE FISHER, EVIDENCE 836 (2d ed. 2008). From its inception under English common law, it was felt that "the alarm and unhappiness occasioned to society by invading its sanctity and compelling the public disclosures of confidential communications between husband and wife would be far a greater evil than the disadvantages which may occasionally arise from the loss of light which such revelations might throw on questions in dispute." *Id.* at 840 (quoting COMMISSIONERS ON COMMON LAW PROCEDURE, SECOND REPORT 13 (1853)).

68. See Nissa M. Ricafort, *Jaffee v. Redmond: The Supreme Court's Dramatic Shift Supports the Recognition of a Federal Parent-Child Privilege*, 32 IND. L. REV. 259, 289 (1998) (quoting Ann M. Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1, 6-7 (1982)).

69. *Jaffee*, 518 U.S. at 12-13; *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

70. Farber, *supra* note 7, at 560-62. See generally *Jaffee*, 518 U.S. 1; *Upjohn*, 449 U.S. 383 (comparing the parent-child privilege and many of the common law and statutory privileges).

71. Waiver of counsel among juveniles is significantly higher than their adult counterparts; one-third of public defender offices surveyed in a 1993 national study on the issues pertaining to juvenile representation reported that some percentage of youth waive their right to counsel at the detention hearing. See AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 44, available at <http://www.njdc.info/pdf/cjfull.pdf>. Twenty-one percent said the right is waived one to ten percent of the time; whereas four percent of respondents said it is waived fifty-one to eighty percent of the time. *Id.* In a 2002 indigent juvenile defense assessment, experts estimated that in one county in Virginia, fifty percent of youth waived counsel regardless of the seriousness of the offense. See AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 23-24 (2002).

72. See Farber, *supra* note 7, at 569-70 (asserting that in the juvenile justice system, parents often work closely with attorneys, providing important personal background about the child, helping the child to identify the pros and cons of legal choices, and very often paying for the child's legal services).

73. See, e.g., *United States v. Davies*, 768 F.2d 893, 900 (7th Cir. 1985) (refusing to recognize a

privilege between an adult defendant and the defendant's adult child); *United States v. Ismail*, 756 F.2d 1253, 1258 (6th Cir. 1985) (holding no error where district court permitted defendant's adult son to testify against him, over asserted parent-child privilege); *United States v. Jones*, 683 F.2d 817, 819 (4th Cir. 1982) (refusing to extend privilege to emancipated adult child's testimony that involved "no communication between father and son").

74. *Three Juveniles v. Commonwealth*, 455 N.E.2d 1203 (Mass. 1983), *cert. denied*, 465 U.S. 1068 (1984).

75. See *Jaffee*, 518 U.S. at 1-2 (establishing a common law privilege for psychotherapist and patient under Fed. R. Evid. 501).

76. *Id.* at 3-4.

77. *Id.* at 4-5.

78. *Id.*

79. *Id.* at 11-12.

80. *Id.* at 10-11.

81. *Jaffee*, 518 U.S. at 13 n.12, 18 n.19.

82. See *id.* at 11-12 ("Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.")

83. See generally *In re Grand Jury*, 103 F.3d 1140 (3d Cir. 1997) (consolidating appeals from two District Courts); *In re Grand Jury Proceedings (Unemancipated Minor Child)*, 949 F. Supp. 1487 (E.D. Wash. 1996) (denying motion to quash grand jury subpoena where motion was based on parent-child privilege).

a grand jury concerning conversations he had with his son.⁸⁴ The father said that if he were forced to testify, it would irreparably harm their close and loving relationship.⁸⁵ The court refused to quash the subpoena, explaining that a confidential communication between parent and child is not indispensable to the survival of that relationship.⁸⁶ Stating that typically parents and children are not aware that there is no testimonial privilege covering the communication between them, the court found that it is irrelevant to the parent's and child's decision to discuss private matters between them.⁸⁷ Indeed, ignorance of the law may not be a factor before sharing potentially incriminating information with one's parent or one's child. But as the public is made aware of the absence of any legal protection for their communications, there will likely be some parents and children who alter their behavior so as not to place themselves at risk of self-incrimination.⁸⁸

Furthermore, the court's explanation does nothing to address the concerns of those parents and children whose conversations are being compelled by the government. There was public outcry when Special Prosecutor Ken Starr subpoenaed Monica Lewinsky's mother and forced her to reveal the substance of her conversations with her daughter concerning President Clinton.⁸⁹ If the Ken Starr spectacle teaches us anything, it should be that intruding on the personal nature of the parent-child relationship shocks the conscience of many Americans, and the parent-child relationship should be afforded the same level of confidentiality as other recognized confidential relationships.

The Court of Appeals in *In re Grand Jury* hypothesized that "the parent-child privilege is probably one of the least important considerations in any child's decision as to whether to reveal an indiscretion, legal or illegal, to a parent."⁹⁰

84. *In re Grand Jury*, 103 F.3d at 1142-43. The case before the court of appeals presented two separate matters, both involving the same legal question: should the court recognize a parent-child privilege? *Id.* at 1142. One case involved a parent witness; the other involved an adult child witness. *Id.* at 1142-44. The case discussed herein came from the Virgin Islands, while the Delaware case involved the testimony of a sixteen-year-old daughter as to her knowledge of the crime her father was being investigated for, but not specifically statements the father made to her. *Id.* at 1143. The witnesses in both cases sought to quash the grand jury subpoenas, and asserted a parent-child privilege as grounds for their appeals. *Id.*

85. *Id.*
I will be living under a cloud in which if my son comes to me or talks to me, I've got to be very careful 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.

Id.

86. *Id.* at 1152.

87. *Id.*

88. Likewise, lawyers will advise their clients against having discussions with their parents/children.

89. See, e.g., Ruth Marcus, *Starr Pushing Envelope, Former Prosecutors Say Grilling Lewinsky's Mom is Perfectly Legal and a Tactic Justice Officials Often Use*, MILWAUKEE J. SENTINEL, Feb. 15, 1998, at 1 (noting that numerous federal prosecutors have criticized Starr's aggressive approach and lack of restraint); Richard T. Cooper et al., *Monica's Mom, the Reluctant Starr Witness Controversy*, L.A. TIMES, Apr. 2, 1998, at E1 (discussing the unique and intense pressure that Starr's questioning placed on Lewinsky's mother); Jerry Seper, *Lewinsky's Mom Cites "Hell" of Testimony, Requests Delay*, WASH. TIMES, Feb. 24, 1998, at A6 (noting that Lewinsky's mother asked to delay her testimony before a grand jury because of the stress that she was experiencing); Eric Zorn, *With Ma on Stand, Lawyers Can Mine the Mother Lode*, CHI. TRIB., Feb. 12, 1998, at 1 (commenting on the legal inconsistency which protects spousal communications but not confidences to parents).

90. *In re Grand Jury*, 103 F.3d at 1153.

Notwithstanding, when criminal culpability is or becomes a concern, then legal recognition of the privilege is necessary. A child may disclose incriminating information to his or her parent for the purpose of seeking guidance, counsel, and support, which results in the parent learning of the child's culpability. A parent-child privilege would allow a parent to prospectively rely on the guarantee that his or her communications with the child will be confidential.⁹¹

Another rationale used to deny a testimonial privilege to parents and their children weighs the value of acquiring the information against the harm caused from eliciting the information. Dean Wigmore, one of the foremost experts on evidence law, devised criteria to evaluate whether communications within a particular relationship are worthy of an evidentiary privilege.⁹² Under the Wigmore test, four conditions must be met: (1) the communications must originate in a confidence that they will not be disclosed; (2) 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; and (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.⁹³ The fourth criterion has been the greatest source of disagreement in evaluating whether an evidentiary privilege should be recognized—it is also the most relevant to this article. The language used in the Australian parent-child exemption is strikingly similar to Wigmore's fourth condition.⁹⁴

A case that poignantly illustrates the tension between a parent's unwillingness to testify against his child and the government's purported need for the parent's testimony is *Port v. Heard*.⁹⁵ The parents of David Port were so adamant that testifying against their seventeen-year-old son would be the ultimate act of betrayal that they both went to jail to maintain their loyalty to their child. Bernard and Odette Port were subpoenaed to testify before the grand jury investigating their son for murder.⁹⁶ The Ports refused to testify against their son despite a judge's order.⁹⁷ They were ultimately jailed for contempt of court; Bernard Port spent approximately two months in jail, while Odette Port spent four.⁹⁸ On review, the question before the appellate court was whether there is a constitutionally based privilege that

91. See Susan Levine, Comment, *The Child-Parent Privilege: A Proposal*, 47 FORDHAM L. REV. 771, 788 (1979) ("The most salient effect of both the marital confidential communications privilege and child-parent privilege is not so much that they encourage open communication (although this may well be true in some instances), but that they protect the confidentiality of a communication once it has been made.").

92. See 8 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (John T. McNaughton rev., Little Brown and Co. 1904).

93. *Id.*

94. Compare WIGMORE, *supra* note 92, § 2285 (explaining that for a privilege to apply, the "injury [caused by disclosing the allegedly privileged communications]... must be greater than the benefit thereby gained for the correct disposal of litigation"), with *Evidence Act 1995* (Cth) s 18(6)(Austl.) (stating that the "nature and extent of [the harm that would be suffered by the person] outweighs the desirability of having the evidence given").

95. *Port v. Heard*, 764 F.2d 423 (5th Cir. 1985).

96. *Id.* at 425.

97. Peter Carlson, *A Texas Murder Case Raises an Exquisite Question: Must Parents Testify Against Their Child?*, PEOPLE, Oct. 15, 1984, at 146. Bernard Port was quoted as telling the judge, "I've worked so hard to be a father, I just couldn't testify," while Odette Port stated, "A mother's instinct is to protect. And I would feel unnatural doing just the opposite." *Id.*

98. *Port*, 764 F.2d at 425.

prevents parents from testifying against their children.⁹⁹ The court considered and rejected arguments that such a privilege derives from the right to privacy, the First Amendment right to exercise one's religion, or the Fourteenth Amendment right to equal protection under the laws.¹⁰⁰ In dicta, the court added it may have decided differently if the issue had been whether it would recognize a common law privilege under Federal Rule 501, but it was not raised because state laws and rules of evidence controlled.¹⁰¹ The court noted the Ports' argument that the forced disclosure of confidential communications by a parent impedes a parent's ability to foster trust and potentially threatens the "sanctity and integrity of the family unit."¹⁰² Furthermore, the court stated that appellants could have made an even stronger argument as to the psychological and social strain that testifying against one's own child may cause.¹⁰³

The paucity of reported cases involving a parent compelled to testify against his or her minor child makes it difficult to assess how frequently this phenomenon occurs.¹⁰⁴ However, we know from cases such as *Port v. Heard*, as well as media accounts that this phenomenon is occurring, even if only occasionally.¹⁰⁵ Moreover, there has never been a research study that has examined the frequency or the context with which prosecutors compel, or even contemplate compelling, parents to testify against their children. Despite the lack of such empirical data, some courts have used the lack of published decisions as an important justification for rejecting a parent-child testimonial privilege.¹⁰⁶

Only one federal court in the United States has endorsed an evidentiary privilege for parent-child communications.¹⁰⁷ *In re Agosto* held that a parent-child privilege is fundamental in protecting the privacy of familial relationships and the

99. *See id.*

100. *See id.* at 430-32.

101. *Id.* at 430.

102. *Id.* at 429.

103. *Id.* at 430.

104. A contributing factor to the few reported cases involving compulsion of parental testimony is that juvenile prosecutions go to trial even less often than adult criminal cases, and the cases that go to trial are even less frequently appealed than adult criminal cases. Second, due to the private nature of juvenile proceedings, information about the proceedings is difficult to obtain. *See infra* note 162 (discussing the low rate of reporting for juvenile cases).

105. Examples of parents compelled to testify against their children include Arthur and Geneva Yandow, subpoenaed to appear before a Vermont grand jury to testify against their twenty-five-year-old son. Barry Siegel, *Choosing Between Their Son and the Law*, L.A. TIMES, June 13, 1996 at 1. Both parents protested that they could not testify against their child. "I can't betray my son," Arthur Yandow told the judge. "I couldn't live with myself . . . I'd lose him forever . . . I'd be the instrument of destroying my family and my son," said Geneva Yandow. *Id.* In response, the judge jailed the Yandows for contempt of court. *Id.* Only after their son was indicted, without his parents' testimony, were the Yandows released. *Id.* They spent forty-one days in jail. *Id.* The parents of eighteen-year-old Amy Grossberg, who was charged with the murder of her newborn baby, were subpoenaed to testify about what their daughter told them about the death of her son. Doug Most, *A Court Has Ears Inside the Home; Parent Child Secrets Not Safe*, THE RECORD, Dec. 7, 1997 at A1. Parents of two teenagers charged with killing two Dartmouth college professors agreed to cooperate with investigators in turn for not having to testify before a grand jury. *Police Talk to Dartmouth Suspects' Parents*, N.Y. TIMES, Mar. 18, 2001, at A28.

106. *See In re Grand Jury*, 103 F.3d at 1147 (noting that eight federal courts of appeal had rejected the privilege).

107. *See In re Agosto*, 553 F. Supp. 1298, 1325 (D. Nev. 1983) (deeming parent-child privilege deserving of constitutional protection on privacy grounds).

inviolability and integrity of the family.¹⁰⁸ The court stressed the importance of intervening in matters that place an individual in a position of choosing between loyalty to his family and loyalty to the state.¹⁰⁹ In a lengthy opinion with high praise for a common law parent-child privilege, the court cited another federal decision in stating that:

The family has been traditionally recognized by society as the most basic human and psychological unit, and when the state intrudes with its vast resources in an attempt to disassemble that unit, then every safeguard under the law must be abundantly exercised by the Court to guarantee that the inherent imbalance of experience and expertise between parent and state is minimized to the greatest extent humanly possible.¹¹⁰

II. THE TESTIMONIAL EXEMPTION FOR PARENTS AND CHILDREN IN AUSTRALIA

A. *The Australian Legal System*

The Commonwealth of Australia contains six states and two major territories: New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, the Australian Capital Territory, and the Northern Territory.¹¹¹ There are also a number of minor territories including the Norfolk Islands and seven other territories in the Indian Ocean, South Pacific Ocean, and Antarctica.¹¹² Australia is a common law country based on the English legal system.¹¹³ The Australian Constitution of 1901 united six separate colonies (New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia) under the British rule into states of the Commonwealth of Australia.¹¹⁴ Similar to the United States, the Australian legal system is comprised of a federal and a state court system, each with its own constitution.¹¹⁵ "State and Territory Courts decide cases brought under state

108. *See id.* at 1328 ("It would be unjust for society to teach that while a child should listen to his parents, he does so at the risk of being required to testify against them.").

109. *See id.* at 1326 ("If the government in its zeal to pursue law enforcement goals steps into the realm of constitutionally privileged relationships, the courts must intervene. In our democratic system of justice which is based in part on respect for the law, if the law places family members in a position of choosing between loyalty to a special, life-long bond as opposed to involuntarily testifying to confidential and private matters, then the law would not merely be inviting perjury, but perhaps even forcing it. The reticence to testify or the fabrications which family members would invent to protect one another would bring the government no closer to the truth it so zealously seeks.").

110. *Id.* at 1330 (quoting *Brown v. Guy*, 476 F. Supp. 771, 773 (D. Nev. 1979)).

111. *Researching Australian Law*, HARV. L. SCH., <http://law.harvard.libguides.com/australia> (last visited Sept. 27, 2010).

112. *Id.*

113. Nicholas Pengelley & Sue Milne, *Researching Australian Law*, LLRX.COM, <http://www.llrx.com/features/researchingaustralianlaw.htm#Background> (last updated Mar. 21, 2009).

114. *Researching Australian Law*, *supra* note 111.

115. *About Australia: Our Government*, AUSTRALIAN GOV'T, <http://australia.gov.au/about-australia/our-government> (last visited Sept. 27, 2010).

or territory laws, and where jurisdiction is conferred on these courts by the Commonwealth Parliament, they also decide cases arising under federal laws.¹¹⁶

In the beginning of the twentieth century, several Australian states and territories established separate courts for children.¹¹⁷ These courts are termed "children's courts," and all hearings, including trials, are conducted by a magistrate or judge, without a jury.¹¹⁸ Children's courts have jurisdiction over all summary offenses.¹¹⁹ For more serious offenses (e.g., car theft, burglary, etc.), the accused can elect to have the case adjudicated either in the children's court or a higher court; however, the children's court reserves the right to decline jurisdiction and refer the case to a higher court.¹²⁰ Generally, the most common offenses in children's court are non-violent offenses such as burglary, motor vehicle theft, and offenses against public order.¹²¹ For the most serious offenses such as homicide, where the offense might result in a sentence of life imprisonment, a minor is automatically tried in the Supreme Court.¹²² Criminal responsibility begins at ten years of age in all Australian states and territories.¹²³

B. Federal Law of the Commonwealth of Australia

The Evidence Act of 1995 ("Evidence Act") codified Australian evidence rules at the federal level. The Evidence Act is applicable to all federal courts and the ACT courts.¹²⁴ Section 18 of the Evidence Act establishes a testimonial exemption for spouses, de facto partners, parents, and children.¹²⁵ The exemption applies only in criminal proceedings and entitles any person in one of the specified relationships with the accused to object to giving evidence as a witness for the prosecution.¹²⁶

116. Attorney General's Department, *The Courts*, AUSTRALIAN GOV'T, http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalsystemandjustice_TheCourts (last visited Sept. 27, 2010). In cases where federal and state law may overlap, federal law preempts the state law to the extent it is inconsistent. *About Australia: State and Territory Government*, AUSTRALIAN GOV'T, <http://australia.gov.au/about-australia/our-government/state-and-territory-government> (last visited Sept. 27, 2010).

117. See, e.g., *Neglected Children and Juvenile Offenders Act 1905* (NSW); *Children's Court Act 1906* (Vic); *Children's Courts Act 1907* (Qld); *State Children Act 1907* (WA); *The Children's Charter 1918* (Tas); *State Children Act 1895* (SA).

118. CUNNEEN & WHITE, *supra* note 8, at 267. In Victoria, Queensland, Western Australia, and South Australia, the children's court is headed by a judge. In states where the court is headed by a judge, the judge conducts the appellate review for the matters determined by magistrates. *Id.*

119. *Id.* Summary offenses are the less serious offenses in the Criminal Code, such as those that are generally heard in a magistrate's court. *Id.*

120. *Id.*

121. AUSTL. LAW REFORM COMM'N, REPORT No. 84, SEEN AND HEARD: PRIORITY FOR CHILDREN IN THE LEGAL PROCESS §§ 2.78, 2.89-105 (1997).

122. See AUSTL. INST. OF HEALTH & WELFARE, JUVENILE JUSTICE IN AUSTRALIA 2007-08 128 (2009) available at <http://www.aihw.gov.au/publications/juv/juv-5-10853/juv-5-10853.pdf> ("The Supreme Court deals with all charges of homicide regardless of the age of the offender.")

123. *Criminal Code 2002* (ACT) s 25; *Children (Criminal Proceedings) Act 1987* (NSW) s 5; *Criminal Code 2008* (NT) s 43AP; *Criminal Code 1899* (Qld) s 29; *Young Offenders Act 1993* (SA) s 5; *Children, Youth and Families Act 2005* (Vic) s 344. See also AUSTL. INST. OF HEALTH & WELFARE, *supra* note 122, at 7. *But see Crimes Act 1900* (ACT) ss 252A, 252B (specifying when a police officer may arrest a child under ten years of age).

124. *Evidence Act 1995* (Cth) s 4.

125. *Id.* s 18

126. *Id.*; section 19 provides that section 18 does not apply in the ACT when the person is charged with certain offenses against a person under sixteen years of age, certain offenses under ACT's Children's

The Evidence Act of 1995 was conceived in response to a need to produce a comprehensive law of evidence among federal courts.¹²⁷ At the outset, the Evidence Bill had three objectives. The first objective was to craft a body of evidence law to apply in federal courts.¹²⁸ Prior to the Evidence Act, federal courts applied the evidence laws in the state or territory in which the case was being adjudicated, causing a lack of uniformity among the courts.¹²⁹ The second objective of the bill was to provide a modern law of evidence for Australia.¹³⁰ Before the Evidence Act, the existing evidence law caused cost and delay in proceedings and the exclusion of relevant evidence because of overly technical rules of evidence.¹³¹ The third aim of the bill was to provide a "substantially uniform" body of evidence law throughout Australia.¹³² Two of the six Australian states, South Australia and Victoria, already had statutorily created parent-child testimonial exemptions.¹³³ New South Wales and Tasmania followed suit after the Evidence Act was passed.¹³⁴

During the 1980's, at the request of the Attorney General, the Australian Law Reform Commission (Commission)¹³⁵ conducted an inquiry into the feasibility of including parents and children among those persons that could be excluded from giving evidence in a criminal proceeding.¹³⁶ Prior to 1995, several states limited non-compellability of a witness to spouses.¹³⁷ Nevertheless, the Commission's review

Services Act of 1986, and a domestic violence offense within the meaning of the Domestic Violence Act 2001 of the ACT. *Id.* s 19.

127. Cth, Parliamentary Debates, House of Representatives, 15 Dec. 1993, 4087 (Duncan Kerr, Minister for Justice).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. See *Evidence Act 1929* (SA) s 21 (providing that where a prospective witness is a "close relative," such as a parent or child of the accused, the prospective witness may apply to the court for an exemption from his or her obligation to testify); *Crimes Act 1958* (Vic) s 400 (providing that the presiding magistrate or judge "shall exempt the accused's . . . mother, father or child . . . from giving evidence on behalf of the prosecution" where certain conditions are met).

134. *Evidence Act 1995* (NSW) s 18; *Evidence Act 2001* (Tas) s 18.

135. Australian Law Reform Commission (ALRC) was established in 1975 as an independent statutory corporation, operating under the Australian Law Reform Commission Act of 1996. *About the Australian Law Reform Commission*, AUSTRALIAN GOV'T, <http://www.alrc.gov.au/about> (last visited Sept. 27, 2010). The ALRC's focus is on federal laws and legal processes. *Id.* The ALRC conducts inquiries—called references—into various areas of law reform at the request of the Attorney-General of Australia. *Id.* When conducting an inquiry, the ALRC has several objectives: simplify and modernize the law; improve access to justice; "remove obsolete or unnecessary laws, and eliminate defects in the law; suggest new or more effective methods for administering the law and dispensing justice; ensure harmonisation among Commonwealth, state and territory laws where possible; [and] monitor overseas legal systems to ensure Australia compares favorably with international best practice." *Id.* While accountable to the federal Parliament for its budget and activities, the ALRC is not under the control of government. *Id.* Over eighty-five percent of the ALRC's reports have been either substantially or partially implemented, making it one of the most effective and influential agents for legal reform in Australia. *Id.*

136. AUSTL. LAW REFORM COMM'N., REPORT No. 38, *supra* note 17, paras. 79-80 (1987), available at <http://www.austlii.edu.au/other/alrc/publications/reports/38/ALRC38Ch5.html#ALRC38Ch5Legalcompotence>.

137. *Id.* para. 80. Additionally, Queensland abolished spousal non-compellability and privilege all together. *Evidence Act 1977* (Qld) s 8. Some scholars have argued that such an approach is the fairest, in that it denies any and all arbitrariness in pre-determining which relationships are more deserving than

found that the principles underlying the spousal exemption were equally applicable to the exemption of parents and children.¹³⁸ The Commission's concern was with procedures that could be used to disrupt familial relationships (outside of spousal harmony) to a greater extent than the interests of the community really require.¹³⁹ While bearing in mind the desirability of making available all relevant evidence to the courts, the Commission recommended a procedure by which a judge could weigh the necessity of the evidence against requiring family members to betray confidences and bring punishment to those they love.¹⁴⁰

Under the Evidence Act, a parent is defined as a biological parent, an adoptive parent, or a person with whom the child is living as if the child were a member of the person's family.¹⁴¹ A child is defined as an adopted child, biological child, an ex-nuptial child, or a child living with the person as if the child were a member of the person's family.¹⁴² The exemption must be asserted by the witness prior to or as soon as practicable after the prospective witness becomes aware of his right to do so.¹⁴³

The court employs a balancing test to assess the appropriateness of compelling the witness to testify. The court must relieve the witness of testifying in the event that two conditions are met: (1) "there is a likelihood that harm would or might be caused (whether directly or indirectly)" to the proposed witness, or to the relationship between the witness and the accused, if the witness testifies, and (2) "the nature and extent of the harm outweighs the desirability of having the evidence given."¹⁴⁴ The Evidence Act provides criteria for courts to consider in determining the compellability of the witness.¹⁴⁵ Such factors include the nature and gravity of the offense charged; the substance and importance of the proffered evidence; the existence of alternative evidence available to the government; the nature of the relationship between the witness and the accused; and whether, upon giving the evidence, the proposed witness would have to divulge information that was received in confidence from the accused.¹⁴⁶ If the court finds that the nature and extent of the harm to the witness and/or the relationship between the witness and the accused outweighs the desirability of admitting the evidence, the court will exclude the witness from testifying.¹⁴⁷ Otherwise, the proposed witness shall be competent and compellable to testify against the accused.¹⁴⁸ Section 18 forbids the prosecution from

others. See, e.g., Lee Struesser, *A Comparison of the Law of Evidence*, 2 J. AUSTRALASIAN L. TEACHERS ASS'N 73, 76 (2009) ("The attraction of abolishing the rule completely is that it is simple, fair and is not arbitrary. Simplicity is a quality to be admired. It provides certainty in application. It is also the fairest of solutions. Everyone is treated the same. No one person or group is left out. De facto spouses, same sex partners, siblings, parents, children are treated exactly the same.").

138. See AUSTL. LAW REFORM COMM'N, REPORT No. 38, *supra* note 17, para. 80 (stating that the policy concerns underlying the spousal privilege, such as the unwillingness to disrupt family relationships, supported extending the privilege to "appropriate family relationships," such as parents and children).

139. *Id.*

140. *Id.*

141. *Evidence Act 1995* (Cth) Dictionary, pt 2, subcl 10(2).

142. *Id.* s 10(1).

143. *Id.* s 18(3).

144. *Id.* s 18(6).

145. *Id.* s 18(7). The criteria are meant to provide a constructive assessment tool rather than an exhaustive list of factors. *Id.*

146. *Evidence Act 1995* (Cth) s 18(7).

147. *Id.* s 18(6).

148. See *id.* ss 18(6)-18(7) (implying that if the judge finds that the given factors do not weigh in favor of excluding testimony, the prospective witness can be compelled to testify).

commenting on the objection, the court's ruling on the objection, or the witness's failure to testify.¹⁴⁹ The Evidence Act is modeled after the pre-existing Victoria Crimes Act and South Australia's Evidence Act.¹⁵⁰

Also in 1995, section 18 of the Evidence Act was adopted in its entirety in New South Wales.¹⁵¹ The Court of Criminal Appeal of New South Wales issued one of its most notable decisions applying this relatively new provision of its evidence code.¹⁵² In *Regina v. Fowler*, the Court upheld a district court's ruling compelling evidence from the defendant's mother concerning statements he made to her regarding the alleged offense.¹⁵³ In the trial, the Crown sought to compel the mother to give evidence, but pursuant to section 18 of the Evidence Act, she objected to testifying on behalf of the government against her son.¹⁵⁴ Having determined that the relationship between mother and son would be affected by requiring her to testify, the trial court balanced the nature and extent of the harm to the parent-child relationship against the government's need for the mother's testimony.¹⁵⁵ The district court concluded that the desirability of Ms. Fowler testifying outweighed any harm that would be done to her relationship with her son, and required she testify against her son.¹⁵⁶ The Court of Criminal Appeal found no error in the lower court's application of the balancing test and upheld the ruling.¹⁵⁷ In light of all the evidence presented, including Ms. Fowler's disclosure of her son's statements to her about the crime, Mr. Fowler was convicted of armed assault.¹⁵⁸ His conviction was affirmed on appeal.¹⁵⁹

Fowler is one of the few reported cases where a parent was compelled to testify against his or her child in a criminal proceeding.¹⁶⁰ Among the reported cases, more common is the situation where a child is compelled to testify against his or her parent in a criminal proceeding.¹⁶¹ In addition, as most decisions are not reported, criminal

149. *Id.* s 18(8).

150. See *Crimes Act 1958* (Vic) s 400 (providing for a similar balancing test with factors roughly identical to those in the federal Evidence Act); *Evidence Act 1929* (SA) s 21 (directing the court to weigh the risk of serious harm to the relationship between the accused and the prospective witness, or to the witness, in considering whether to grant an exemption).

151. See *Evidence Act, 1995*, (NSW) Introductory Note ("This Act is in most respects uniform with the Evidence Act 1995 of the Commonwealth."). Section 18 of the New South Wales Evidence Act conforms to the federal Evidence Act. *Id.* s 18.

152. *R v Fowler* [2000] NSWCCA 352.

153. *Id.* para. 26.

154. *Id.* para. 21. The reported opinion is sparse with details; however, the decision indicates that the defendant's mother testified during voir dire that she believed that forcing her to give evidence would cause "tremendous strain on her relationship with her son." *Id.* para. 24.

155. *Id.* paras. 22-26.

156. *Id.* para. 26.

157. *Fowler*, [2000] NSWCCA, para. 26.

158. *Id.* paras. 2, 63.

159. *Id.* para. 74.

160. But see *R v Braun* [1997] NSWSC 507 (Unreported, Supreme Court, 24 Oct. 1997). *Braun* involved a twenty-two-year-old defendant who admitted to her parents that she started a fire that killed her brother. The prosecutor in the matter elected not to compel either parent to testify against their daughter, anticipating that the parents would likely invoke section 18 of the Evidence Act and the court would exclude the parents from testifying. *Id.* para. 19.

161. See, e.g., *R v Fajloun* [2007] NSWDC 367 (concerning a son who was called as a government witness and who raised a section 18 objection because his father was the accused. The court performed

cases involving evidence law are not frequently published.¹⁶² Finally, infractions of criminal laws handled in youth court are not commonly, if ever, published.¹⁶³ This makes it difficult to assess how frequently parents or children in Australia seek exemption from testifying under state or federal law.¹⁶⁴

C. *The South Australia Evidence Act*

The South Australia Evidence Act of 1929 was created to codify common law evidentiary rules, such as the absolute spousal privilege, and consolidate certain acts relating to evidence in South Australia. Part II of the Act relates to witnesses, and section 21 states that a close relative of a person charged with a crime shall be compellable to give evidence for the prosecution subject to the provisions of this section.¹⁶⁵ In 1983, the Act was amended to recognize a privilege for "close relatives" as well as spouses to object to giving evidence when the effect of giving such evidence would be damaging to the individual or to the relationship.¹⁶⁶ The amended Act states that where a person is charged with an offense, and a close relative of the accused is a prospective witness against the accused in any proceedings related to the charge, the prospective witness may apply to the court for an exemption from the obligation to give evidence against the accused.¹⁶⁷ If, by giving this evidence, there would be a substantial risk of serious harm to the relationship between the prospective witness and the accused, or serious harm of a material, emotional, or psychological nature to the prospective witness, the court may decide to grant the exemption.¹⁶⁸ The judge will weigh this potential harm with "the nature and gravity of the alleged offense and the importance to the proceedings of the evidence that the prospective witness is in a position to give" and determine if there is sufficient "justification for exposing the prospective witness to the risk."¹⁶⁹

the balancing test and found that no harm would be done in requiring the son to testify against his father.). In *R v YL* [2004] ACTSC 115, the child witness's attorney made a section 18 objection to the seven-year-old child being forced to testify against his step-mother. The judge found that the child was compellable but would not require the child to be brought to court against his will.

162. See Dietrich Fausten et al., *A Century of Citation Practice on the Supreme Court of Victoria*, 31 MELB. U. L. REV. 733, 743 (2007) (stating that only a "relatively small number" of decisions are reported in the Victorian Reports). Although the study focuses on the Supreme Court of Victoria, the supreme courts of the other states and territories "share many of the same characteristics as the Supreme Court of Victoria." *Id.* at 737. Thus it is possible to infer from the Victoria study that the small number of reported cases in juvenile proceedings does not necessarily imply that compulsion of parental testimony is not occurring in children's courts.

163. See KELLY RICHARDS, AUSTL. INST. OF CRIMINOLOGY, JUVENILES' CONTACT WITH THE CRIMINAL JUSTICE SYSTEM IN AUSTRALIA 110 (2009) ("Children's court outcomes, and factors influencing these outcomes, are areas on which few data exist. It is unknown, for example, what proportion of juvenile convictions are formally recorded by the children's courts and the implications of this.").

164. Interviews with lawyers who practice in youth and criminal court could help determine whether or not compulsion of parental testimony is occurring and under what circumstances. To date no such study in the United States or Australia has been conducted.

165. *Evidence Act 1929* (SA) s 21.

166. *R v T, T* [2004] 90 SASR 567, 577.

167. *Evidence Act 1929* (SA) § s 21(2).

168. *Id.* s 21(3)(a).

169. *Id.* s 21(3)(b).

As noted above, in 1983 the legislature recognized the need to "make a provision for circumstances where the close relative of an accused, for example a young child, may not be able to fully appreciate their right to apply to be exempt from giving evidence against the accused."¹⁷⁰ The Supreme Court Judges echoed this recognition in their 1991 Annual Reports, noting that the procedure for exemption might need to be modified when the witness is a young child or mentally ill:

The Supreme Court Judges in their 1991 Annual Report adumbrated that the procedure is inappropriate where the close relative is a young child or mentally impaired. The Judges recommended that the section be amended to give the court a discretion to dispense with the section's requirements, wholly or in part, where by reason of the prospective witness's immaturity or impaired mental condition, the court considers it proper to do so. The section is amended as recommended by the Judges.¹⁷¹

The judges recommended that the court eliminate the need for such a witness to apply for an exemption, and that the court should decide whether or not there should be an exemption without the witness submitting an application or formally objecting.¹⁷² This recommendation was adopted, altering the Act to declare that if the prospective witness is a young child or is mentally impaired, the court should consider whether to grant an exemption *even if* no application for such exception has been made.¹⁷³ If the proceeding is a jury trial, the objection to testifying must be heard only by the judge in the absence of the jury.¹⁷⁴ This section defines "close relative" as "spouse, domestic partner, parent or child."¹⁷⁵

The 1929 South Australia Evidence Act, although similar to the federal Evidence Act of 1995, provides more detailed protections for a potential witness. The South Australia Act specifies the criteria that the court should consider, specifically the potential for serious harm of a material, emotional, or psychological nature to the prospective witness.¹⁷⁶ In contrast, the federal Act outlines more general criteria such as direct or indirect harm to the person.¹⁷⁷ Practically, the difference in language may produce the same result. However, the South Australia legislation acknowledges that forcing persons in relationships defined by love, support, and nurturance to testify against one another may produce tangible and intangible harm.

The South Australia Act offers a more detailed description of how the court should ensure that individuals who may not be aware of this privilege are informed of their right to object to giving evidence against a close relative. The federal Evidence Act contains only one sentence that alludes to the possibility of a judge ensuring they are aware of the privilege: "If it appears to the court that a person may

170. *R v T, T* [2004] 90 SASR at 577.

171. *Id.* at 578 (quoting SA, Parliamentary Debates, House of Assembly, 25 Mar. 1993, 2662-63 (Hon. GJ Crafter, Minister of Housing, Urban Development and Local Government Relations)).

172. *Id.*

173. *Id.*; *Evidence Act 1929* (SA) s 21(3)(a).

174. *Evidence Act 1929* (SA) s 21(4)(a).

175. *Id.* s 21(7).

176. *Id.* s 21(3)(a)(ii).

177. *Evidence Act 1995* (Cth) s 18(6)(a).

have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person.¹⁷⁸ In comparison, the South Australia Act requires the court to consider whether an exemption should be applied, even if the individual has not applied for an exemption.¹⁷⁹ If an individual is mentally impaired or is a young child and is unaware or unable to claim the privilege, there does not seem to be a duty under the federal Evidence Act to consider an exemption, but under the South Australia Act, there is such a duty. According to section 21, paragraph 3a:

If the prospective witness is a young child, or is mentally impaired, the court should consider whether to grant an exemption under subsection (3) even though no application for exemption has been made and, if of opinion that such an exemption should be granted, may proceed to grant the exemption accordingly.¹⁸⁰

In addition, case law interpreting the South Australia Act suggests that certain individuals should be given representation when presenting a potential exemption to a judge.¹⁸¹

D. The Victoria Crimes Act of 1958

The compellability exemption for parents and children originated in section 400 of the 1958 Crimes Act.¹⁸² Section 400 applies to any proceeding against an accused, and allows the presiding judge to exempt the accused's "wife, husband, mother, father or child . . . from giving evidence on behalf of the prosecution."¹⁸³ Any person included in one of these categories who wishes not to testify must make an application for an exemption to the judge, who then applies a balancing test.¹⁸⁴ The assessment by the court is threefold: to determine if the community's interest in obtaining the evidence of the proposed witness is outweighed by (1) the likelihood of damage to the relationship between the accused and the proposed witness; (2) the harshness of compelling the proposed witness to give the evidence; or (3) the combined effect of the two measures.¹⁸⁵ Similar to the Commonwealth's Evidence Act, the Victoria Crimes Act contains factors to be considered as part of the balancing test.¹⁸⁶ The factors include the:

nature of the [offense] charged; the importance in the case of the facts which the proposed witness is to be asked to depose; the availability of

178. *Id.* s 18(4).

179. *Evidence Act 1929 (SA)* s 21(3a).

180. *Id.*

181. *R v Andrews* [2005] 92 SASR 442 (providing that a person applying for the exemption may have legal representation under certain circumstances, such as when the person is "suffering from the mental illness or other condition which is the basis of the application").

182. *Crimes Act 1958 (Vic)* s 400. Victoria also had an Evidence Act of 1958 in place, but the compellability exemption is not mentioned in that Act. See *Evidence Act 1958 (Vic)* div. 2 (making no mention of an exemption for parent-child communications).

183. *Crimes Act 1958 (Vic)* s 400(3).

184. *Id.*

185. *Id.*

186. *Id.* s 400(4).

other evidence to establish those facts and the weight likely to be attached to the proposed witness's testimony as to those facts; the nature, in law and in fact, of the relationship between the proposed witness and the accused; the likely effect upon the relationship and the likely emotional, social and economic consequences if the proposed witness is compelled to give the evidence; and any breach of confidence that would be involved.¹⁸⁷

If a judge finds that any of these concerns singlehandedly or in combination with one another outweigh the community's interest in having the witness compelled to testify, then he must exempt the witness.¹⁸⁸

For example, in *Regina v. Ngo*, the applicant was found guilty of one count of robbery and appealed his conviction and sentence.¹⁸⁹ At the time of the offense, he was thirty years old.¹⁹⁰ The Crown planned to call the applicant's mother as a witness at trial, but the judge excused her from providing evidence pursuant to section 400 of the Crimes Act.¹⁹¹ Although the appellate opinion does not go into detail about why the trial judge excluded the mother's evidence, this case shows that there are situations where the community's interest in hearing the evidence is outweighed by considerations for preserving the relationship between a child and his mother.

Similarly, in *Regina v. Annette Ryan*, the mother of the defendant applied for exemption under section 400 of the Crimes Act when the prosecution sought her testimony in an attempted robbery trial against her daughter.¹⁹² During opening statements, the government told the jury that the defendant's mother would testify about a conversation she had with her daughter concerning the composite sketch of the alleged assailant that was published in the local newspaper.¹⁹³ The court granted the mother's request to be exempt from testifying, and despite the omission of the evidence, the defendant was convicted.¹⁹⁴

Although section 400 of the Crimes Act does not categorically exclude certain crimes from the compellability exemption, like its federal counterpart,¹⁹⁵ for all intents and purposes the balancing test allows a judge to assign whatever weight he deems appropriate to the seriousness of the offense in his determination. Case law demonstrates that judges do not always grant the exemption to parents compelled to testify against their children, even though being forced to give evidence against their child is an experience that will likely alter the parent-child relationship. In *Regina v. G.A.M.*, the defendant was charged with seven counts of sexually interfering with his thirteen-year-old stepdaughter.¹⁹⁶ The grandmother of the victim, also being the mother of the accused, was called to give evidence at trial about statements made by

187. *Id.*

188. *Crimes Act 1958 (Vic)* s 400(3).

189. *R v Ngo* [2002] VSCA 188, paras. 1, 2.

190. *Id.* para. 1.

191. *Id.* para. 3.

192. *R v Ryan* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, 15 Apr. 1991).

193. *Id.*

194. *Id.*

195. See *Evidence Act 1995 (Cth)* s 19 (specifying that the section 18 exemption does not apply to certain crimes).

196. *R v G.A.M.* [2003] VSCA 185, para. 1.

the victim to the grandmother attesting to sexual abuse by the defendant.¹⁹⁷ As might be expected in such a case, the judge rejected the grandmother's request for exemption, finding that "the interests of the community in obtaining the grandmother's evidence was paramount and outweighed the prospects of further damaging the relationship between the proposed witness and her son."¹⁹⁸

E. The Victoria Evidence Act 2008

As part of a national effort toward the establishment of uniformity among the laws of evidence in Australia, the Victorian Law Reform Commission (VLRC) began a comprehensive review of the evidence law in Victoria.¹⁹⁹ The VLRC began its work in 2004 with the state's 1958 Evidence Act.²⁰⁰ Following suit with the promulgation of new evidence acts in New South Wales (1995), the Commonwealth (1995), Tasmania (2001), and Norfolk Island (2004), Victoria enacted its new Evidence Act in 2008.²⁰¹ By implementing this new legislation, section 400 of the Crimes Act 1958 was repealed and relocated in the Evidence Act 2008 under section 18, to correspond with the sections in the uniform evidence acts.²⁰²

The Evidence Act 2008 brought about slight modifications to the compellability exemption to reflect uniformity with its corresponding federal section. Perhaps the most relevant change broadened the former exemption's coverage: the 2008 Act includes the giving of evidence, as well as evidence of a communication.²⁰³ This modification allows a court more options in terms of exclusion. For instance, a judge may compel a parent to testify against his child but permit the witness to refrain from testifying as to any communications between the parent and child. Protecting the confidences between parent and child may be viewed as more socially vital than compelling a parent to testify as to observations, even if they might have the effect of convicting the child.²⁰⁴ A child may more readily accept a parent's compliance with a

197. *Id.* para. 4.

198. *Id.* para. 5.

199. VIC. LAW REFORM COMM'N, COMPLETED REPORTS: EVIDENCE, <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Evidence/> (last updated Aug. 2, 2008). The VLRC, an independent, government-funded organization, was established under the Victoria Law Reform Commission Act 2000 as a central agency to propel law reform in Victoria. See *About Us*, VIC. LAW REFORM COMM'N, <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/About+Us/> (last updated Oct. 8, 2010). The Commission's purpose is to solicit community input and advise the Attorney-General on how to improve and update Victorian Law; like the ALRC, the VLRC researches issues the Attorney-General refers to it, but may also recommend minor changes to the law without a reference. *Id.*

200. VIC. LAW REFORM COMM'N, IMPLEMENTING THE UNIFORM EVIDENCE ACT: REPORT 2 (2006), http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/law+reform/home/completed+projects/evidence/lawreform++implementing+the+uniform+evidence+act_+report.

201. *Id.* at 3. See also JUDICIAL COLL. OF VIC., INTRODUCTION TO THE UNIFORM EVIDENCE ACT IN VICTORIA: SIGNIFICANT CHANGES 1 (2009) (noting that Victoria's 2008 Evidence Act is "largely uniform" with the federal Evidence Act 1995, as well as legislation in New South Wales, Norfolk Island, and Tasmania).

202. VIC. LAW REFORM COMM'N, REPORT No. 2, *supra* note 200, at 217; see *Evidence Act 2008* (Vic) s 18 (providing an exemption to the requirement to give evidence for a person who is the "spouse, de facto partner, parent or child of an accused . . .").

203. *Evidence Act 2008* (Vic) s 18(2).

204. See, e.g., *In re A&M*, 61 A.D. 2d 426, 429 (N.Y. App. Div. 1978) ("Although the communication [between parent and child] is not protected by a statutory privilege, we do not conclude that it may not be shielded from disclosure. It would be difficult to think of a situation which more strikingly embodies the

court order (especially after the parent has sought exemption) and testimony as to observations made or facts known about the child than the divulgence of words shared with the parent during a subjectively private exchange. In contrast to the United States, where forty-five states offer no legal protection for these communications, the fact that, in Australia, judicial discretion exists is significant.

Perhaps less significant, but nevertheless worthy of mention, is the slight variation in the balancing test a judge employs under the new Evidence Act versus the old Crimes Act. Under the Crimes Act, a judge was explicitly instructed to consider the interest of the community in obtaining the evidence.²⁰⁵ This language is entirely omitted from the Evidence Act; instead, the statute instructs the judge to focus on the likelihood of harm that may be caused to the witness or the relationship between the witness and the defendant.²⁰⁶ The judge must also find that this likely harm "outweighs the desirability of having the evidence given."²⁰⁷ In the Crimes Act, the exemption requirement could be met if a judge found "the likelihood of damage to the relationship between" the witness and the defendant outweighed the community's interest, the harshness of compelling the witness outweighed the community's interest, or a combined effect of both of these factors.²⁰⁸ Thus, the exemption requirements could be met in more ways under the Crimes Act than in the current Evidence Act.

Unlike the Commonwealth and New South Wales Evidence Acts, the Victoria Evidence Act 2008 does not contain an equivalent to the federal act's section 19, which allows for spouses, parents, and children to be compelled to give evidence in certain criminal proceedings.²⁰⁹ Through an inquiry process conducted by the VLRC, Victoria Legal Aid, along with other advocacy groups, voiced its opposition to an exception provision, explaining that "in its experience the court's discretion in these matters was appropriately exercised and that even when a witness is not ultimately exempted from giving evidence, the process of applying for exemption had significant benefits."²¹⁰ For example:

The witness has an opportunity to explain the nature and importance of their relationship to the defendant and the judicial officer has an opportunity to explain the policy reasons compelling the witness to give evidence. This dialogue often reduces the stress for the witness and [minimizes] damage to the relationship between the witness and defendant (a victim, in relevant cases). This beneficial process would not occur if [section] 400 applications were prohibited for particular offences.²¹¹

intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to his mother and father.").

205. *Crimes Act 1958* (Vic) s 400(3).

206. *Evidence Act 2008* (Vic) s 18(6)(a).

207. *Id.* s 18(6)(b).

208. *Crimes Act 1959* (Vic) s 400(3).

209. VIC. LAW REFORM COMM'N, REPORT No. 2, *supra* note 200, at 23, para. 2.31.

210. *Id.* at 23-24, para. 2.32.

211. *Id.*

Similarly, the Victoria police were not in favor of any exceptions to the non-compellability rule because they believed that it could result "in children being automatically compelled to give evidence, [and] may endanger both the child and the family unit."²¹² Furthermore, the VLRC found that "the certainty of the compellability of a witness" that section 19 would provide does not provide assurance to prosecutors because they will always face difficult witnesses who are unwilling to confirm statements.²¹³ Given these inquiries, the VLRC concluded that, "section 18 provides an adequate means for ensuring that witnesses are required to give evidence in appropriate circumstances and excused when there are greater overriding concerns," thus making section 19 superfluous.²¹⁴

As noted above, the parent-child exemption weighs the present and potential future harm caused to the person and/or to the parent-child relationship against the desire for the evidence in the proceeding. Such a balancing test favors exemption in the juvenile justice context because the significance of harm (present and future) to the parent-child relationship is even greater when it involves a minor child and his or her parent. Forcing a parent to divulge personal information shared with him by his minor child in order to assist the government in securing a conviction against the child has a strong probability of fracturing the family unit, causing severe psychological strain, and furthering deep feelings of betrayal on the part of the child. Likewise, forcing a parent to testify against his child undermines the primary objective of prosecuting the child in juvenile court—restoring the order upset by the juvenile and emboldening the family unit to help the juvenile not reoffend. Naturally, this would include repairing, nurturing, and maintaining a supportive community to which the offender may return. For a juvenile, family is often the key component for ensuring a successful transition to becoming a productive member of society.

III. THE CORRELATION BETWEEN RESTORATIVE JUSTICE AND THE PARENT-CHILD TESTIMONIAL EXEMPTION: *THE AUSTRALIAN EXAMPLE*

For more than a decade, the volume of cases in children's courts throughout Australia has declined significantly.²¹⁵ This is due in large part to restorative justice practices widely accepted and utilized with great effectiveness.²¹⁶ Restorative justice programs in Australia largely derive from the conferencing model developed in New

212. *Id.* at 24, para. 2.33.

213. *Id.* at 24–25, para. 2.35.

214. *Id.* at 26, para. 2.37.

215. AUSTL. INST. OF CRIMINOLOGY, *supra* note 163, at xiv. During 2007–2008, half of all juveniles in New South Wales who were considered "persons of interest" and who came into contact with the police were diverted by a warning, caution, or a youth justice conference, while approximately twenty-six percent of such juveniles were proceeded against in court. *Id.* at 54. Similarly, 2005 police data for South Australia indicates that nearly half of all juveniles apprehended were dealt with through diversionary means (either a formal caution or family group conferencing), whereas forty-two percent were referred to the youth court. *Id.* at 55.

216. *See id.* at 67 (noting the decline in children's court cases and "[t]he emergence of a general trend [toward] diverting juveniles from the criminal justice system" in favor of "drug and alcohol courts and programs, family group conferencing, youth justice conferencing, juvenile justice teams and Indigenous-specific courts and programs").

Zealand in the late 1980's.²¹⁷ The principal means of facilitating resolution of the conflict is a practice called family group conferencing (FGC).²¹⁸ In FGC, the offender, the victim, their respective families, friends, and teachers convene for the purpose of facilitating a discussion that leads to reconciliation, appropriate reparations, and support to assist the juvenile in not re-offending.²¹⁹ "In both the New Zealand and the Australian models, it is the individual offender and his or her family that is the primary focus of any intervention . . . Within both, the family and the individual are seen as the things to be changed, on the assumption that the delinquency itself represents a symptom of family and individual malfunction."²²⁰

The conferencing process is quintessential restorative justice. The group discusses reasons for the crime, the impact of the crime, and ways to mitigate or resolve the harm caused.²²¹ The conference or meeting is facilitated by a public official.²²² Proponents of restorative justice argue that this type of face-to-face interaction helps the young offender to recognize the impact his or her actions had on others.²²³ Likewise, participating in determining the reparations most appropriate for the victim and the community gives the offender a stake in the outcome.²²⁴ Most states in Australia use FGC to divert cases from the formal court process.²²⁵ As one

217. HEATHER STRANG, RESTORATIVE JUSTICE PROGRAMS IN AUSTRALIA: A REPORT TO THE CRIMINOLOGY RESEARCH COUNCIL 4 (2001). Following decades of dissatisfaction with the treatment of juveniles in the criminal justice system, the New Zealand legislature enacted the Children, Young Persons and Their Families Act, which sought to increase participation among offenders, victims and their families in reaching resolution of the conflict. *Id.*

218. Mark Umbreit & Howard Zehr, *Restorative Family Group Conferences: Differing Models and Guidelines for Practice*, 60 FED. PROBATION 24 (1996).

219. *Id.* at 25.

220. Kenneth Polk, *Family Conferencing: Theoretical and Evaluative Concerns*, in FAMILY CONFERENCE AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM? 123, 130 (Christine Alder and Joy Wundersitz eds., 1994).

221. Umbreit & Zehr, *supra* note 218, at 25. A family group conference is intended to be a "relatively informal, loosely structured meeting" in which the participation of families and victims is considered a key feature of the process. Christine Alder & Joy Wundersitz, *New Directions in Juvenile Justice Reform in Australia*, in FAMILY CONFERENCE AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM? 1, 7 (Christine Alder and Joy Wundersitz eds., 1994). The offender and his or her extended family (and, in some systems, a legal advocate) are "brought together with the victim, her/his supporters, and any other relevant parties to discuss the offending and to negotiate appropriate responses." *Id.* For a more comprehensive overview on conferencing in Australia, see Kathleen Daly, *Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects*, in RESTORATIVE JUSTICE FOR JUVENILES: CONFERENCE, MEDIATION & CIRCLES, 59–84 (Allison Morris and Gabrielle Maxwell eds., 2001).

222. Umbreit & Zehr, *supra* note 218, at 25. Some populations refer to the conferences as "circles," after the native/indigenous custom. *See STRANG, supra* note 217, at 6 (noting that "sentencing circles with their hybrid indigenous and formal justice characteristics," though used in New Zealand, had not been tried in Australia).

223. *See Umbreit & Zehr, supra* note 218, at 25 (noting that "FGCs provide victims an opportunity to express what impact the crime had upon their lives, to receive answers to any lingering questions about the incident, and to participate in holding offenders accountable for their actions").

224. Garth Luke and Bronwyn Lind, *Reducing Juvenile Crime: Conferencing versus Court*, 69 CRIME & JUST. BULL. 1 (2002) ("At a conference, which is facilitated by a trained conference convenor, the young offender(s), family, victims and other supporters discuss the offending and its impact in order to encourage acceptance of responsibility by the offender, negotiate some form of restitution to the victim or community and help to reintegrate the offender back into his/her family and community.").

225. In New South Wales must the child admit to the offense as a prerequisite to the conferencing process. *Young Offenders Act 1997* s 36(b).

commentator described the value of this diversionary process, “[c]ompared to courtroom interactions, there is greater potential for an offender at a conference to explain what happened, for an offender’s parent or supporter to say how the [offense] affected them, and for a victim to speak directly to an offender about the impact of the [offense] and any lingering fears.”²²⁶

The seminal juvenile-justice legislation in New South Wales, the Young Offenders Act, institutionalized conferencing state-wide and transferred oversight of the practice to the Department of Juvenile Justice.²²⁷ Any juvenile between the ages of ten and seventeen who commits a summary or indictable offense is eligible for conferencing.²²⁸ Offenses include assault, breaking and entering, theft, and property damage offenses.²²⁹ Section 34 of the Act sets forth the principles and purposes of conferencing as follows:

(i) to promote acceptance by the child concerned of responsibility for his or her own [behavior], and (ii) to strengthen the family or family group of the child concerned, and (iii) to provide the child concerned with developmental and support services that will enable the child to overcome the offending [behavior] and become a fully autonomous individual²³⁰

The conferencing model relies on sustained communication between parents and kids, which may often be incriminating for the child. Also included in the Young Offenders Act is the prohibition against any statement made by a child during a caution or a conference being admitted in future court proceedings.²³¹

The mechanisms by which conferences are facilitated differ slightly among states. For example, in New South Wales, a conference is run by a convenor, who is a member of the community trained and paid by the state.²³² In order to be eligible

226. Kathleen Daly, *Revisiting the relationship between retributive and restorative justice*, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 33, 46 (Heather Strang & John Braithwaite, eds., 2000).

227. Kathleen Daly & Hennessey Hayes, *Restorative Justice and Conferencing in Australia*, 186 TRENDS & ISSUES IN CRIME & CRIM. JUST. 3 (2001). The Act established a hierarchy of pre-trial interventions of juveniles ranging from police warnings to cautions, to juvenile conferences. *Young Offenders Act 1997* (NSW) s 9(1). The Act established a hierarchy of pre-trial interventions of juveniles ranging from police warnings to cautions, to juvenile conferences. *Young Offenders Act 1997* (NSW) s 9(1).

228. *Young Offenders Act 1997* (NSW) s 4 (defining “child” as “a person who is of or over the age of [ten] years and under the age of [eighteen] years”); *id.* s 35 (providing that a conference can be held for any offense under the Act, including summary and indictable offenses, which are covered by the Act pursuant to section 8(1)).

229. See *Criminal Procedure Act 1986* (NSW) sch 1 (defining indictable offenses). Excludable offenses are sexual offenses, offenses causing death, certain drug offenses, some traffic offenses, and offenses relating to violence orders. *Id.* s 8.

230. *Id.* ss 34(1)(a)(i)–(iii).

231. See *Young Offenders Act 1997* (NSW) s 67(1) (“Any statement, confession, admission or information made or given by a child during the giving of a caution or a conference under this Act is not to be admitted in evidence in any subsequent criminal or civil proceedings.”).

232. *The NSW Scheme—Juvenile Justice*, NSW GOVERNMENT, JUVENILE JUSTICE, DEP’T OF HUMAN SERVICES, http://www.djj.nsw.gov.au/conferencing_scheme.htm (last visited Oct. 13, 2010) (“One unique aspect of the scheme that is different from other statutory schemes is the identity of conference convenors. These are individuals who live and work in the local communities and who are engaged by contract to [organize] and facilitate youth justice conferences as needed.”); JUVENILE JUSTICE, NEW SOUTH WALES GOV’T HUMAN SERVICES, YOUTH JUSTICE CONFERENCE CONVENOR INFORMATION PACKAGE 9 (stating

for conferencing, the offender must have admitted to the offense and agreed to participate in the conferencing process.²³³ Referrals for conferences are made by police specialist youth officers.²³⁴ The tone set for the discussions is intended to be compassionate, as opposed to the adversarial tenor of youth court. The youthful offender is “given the opportunity to talk about the circumstances associated with the [offense] and why [he or she] became involved in it. The young person’s parents or supporters discuss how the offense has affected them.”²³⁵

Within the first twelve months that the Young Offenders Act 1997 authorized juvenile conferencing, 928 conferences were held involving 1155 juvenile offenders.²³⁶ The Attorney General described the objectives of conferencing as:

to encourage discussion between those affected by the offending [behavior] and those who have committed it in order to produce an agreed outcome plan which restores the harm done and aims to provide the offender with developmental and support services which will enable the young person to overcome his or her offending [behavior].²³⁷

In South Australia, police and judges can make referrals for conferencing if either decides that a matter should not be formally prosecuted.²³⁸ Conferences are convened by youth justice coordinators who are either appointed or are youth court magistrates.²³⁹ In Western Australia, conferences are organized by juvenile justice teams comprised of a youth justice coordinator, police officer, Ministry of Education officer, and an Aboriginal community worker.²⁴⁰ In the Australian Capital Territory, Tasmania, and the Northern Territory, police officers even function as conferencing facilitators.²⁴¹ Ordinarily, juvenile justice teams convene family meetings to deal with juveniles who have been apprehended for minor offenses.²⁴² Recent studies show that in Western Australia, conferencing had a dramatic effect on reducing the number of cases in the Children’s Court. In 1995, formal charges against youth dropped twenty-two percent and admissions to detention centers dropped thirty percent.²⁴³

the pay rate of convenors and mandating training provided by the Juvenile Justice department), available at <http://www.djj.nsw.gov.au/Career%20documents/YJC%20Information%20Pack%20v4.1.pdf>.

233. *Young Offenders Act 1997* (NSW) s 36.

234. See *id.* s 37 (“[T]he child is not entitled to be dealt with by holding a conference if, in the opinion of the specialist youth officer to whom the matter is referred, it is more appropriate to deal with it by commencing proceedings against the child or by giving a caution because it is not in the interests of justice for the matter to be dealt with by holding a conference.”).

235. Daly and Hayes, *supra* note 227, at 2.

236. LILY TRIMBOLI, N.S.W. BUREAU OF CRIME STAT. & RES., AN EVALUATION OF THE NEW SOUTH WALES YOUTH JUSTICE CONFERENCING SCHEME 13 (2000).

237. NSW, *Young Offenders Bill*: Reading Before the Legislative Council, 21 May 1997, 8960 at *3 (J.W. Shaw, Attorney General).

238. AUSTL. LAW REFORM COMM’N, REPORT No. 84, *supra* note 121, para. 18.47.

239. *Id.*

240. *Id.* para. 18.48.

241. STRANG, *supra* note 217, at 22–27.

242. AUSTL. LAW REFORM COMM’N, REPORT No. 84, *supra* note 121, paras. 18.46, 18.48.

243. *Id.* para. 18.48.

In Victoria juvenile conferencing "is not legislatively based and relies on existing provisions of the Children's and Young Persons Act of 1989."²⁴⁴ It operates solely in the Melbourne children's court and is modeled on New Zealand's family group conferencing scheme.²⁴⁵ Those participating in the program "are juveniles who have admitted their offense, who would otherwise go to court and who are likely to be given a Supervisory Order."²⁴⁶ A distinctive feature of the program is that it uses conferences for young offenders with prior court appearances as opposed to just first-time offenders or minor offenses.²⁴⁷

Evaluations of the conferencing process reveal high levels of satisfaction among participants. In Queensland, data collected by the Department of Justice indicates that of the 351 offenders, parents, and victims interviewed about their experience with conferencing, ninety-seven to 100 percent said their experience was fair and they were satisfied with the resolution.²⁴⁸ An evaluation of the youth justice conferencing scheme in New South Wales found exceptionally high levels of satisfaction with the conference experience among victims, offenders, and offender supporters.²⁴⁹ Over ninety percent felt the conference was fair to both the victim and the offender, and felt they had the opportunity to express their views and were treated with respect.²⁵⁰ At least seventy-nine percent responded that they were satisfied with the way their case had been dealt with by the justice system.²⁵¹ Similarly, Western Australia conducted an evaluation of family meetings. In the Perth portion of the study, which surveyed 265 offenders, parents, and victims who participated in family meetings during 1996 and 1997, between ninety to ninety-five percent of participants stated that "they felt that they or their children were treated fairly in the process."²⁵² In Victoria, satisfaction studies were completed during a small pilot project between 1995 and 1997.²⁵³ Evaluation of the Victoria program revealed that "victims found the process helpful and healing" and "young people said that the conference had a beneficial impact on them."²⁵⁴

What all these juvenile conferencing schemes have in common is the involvement of lay people who are important to the offender and the victim. All of these supporters facilitate the restoration and rehabilitation process by bearing witness to the dialogue between the offender and victim, helping to construct the appropriate reparations, and pledging their support to provide constructive assistance to keep the juvenile from reoffending. The parents of the offender are

244. STRANG, *supra* note 217, at 10.

245. *Id.* The Victoria program derives from an alternate dispute resolution model, rather than from a restorative justice philosophy. *Id.*

246. *Id.*

247. *See id.* (explaining that the program "is an attempt by the Court to deal effectively with young offenders at risk of progressing through the justice system").

248. Daly & Hayes, *supra* note 227, at 4. *But see* Jeremy Prichard, *Parent-Child Dynamics in Community Conferences: Some Questions for Reintegrative Shaming, Practice and Restorative Justice*, 35 AUSTL. & N.Z. J. CRIMINOLOGY 330, 330 (2002) (noting that qualitative observations of the behavior of parents in thirty-four juvenile conferences in Tasmania revealed a sense of disillusionment, shame, and diminishing sense of responsibility among the parents).

249. TRIMBOLI, *supra* note 236, at vii.

250. *Id.*

251. *Id.*

252. Daly & Hayes, *supra* note 227, at 4.

253. STRANG, *supra* note 217, at 10.

254. Daly & Hayes, *supra* note 227, at 5.

critical to this process: typically they are the primary means of support and guidance for the child. Logically, a legal paradigm which delegates the responsibility to assist the juvenile in not re-offending directly to the family should ensure that its rules and procedures do not undermine the parent-child relationship. Hence, it stands to reason that Australia's legal system would include a mechanism to exempt a parent from testifying against one's child when it would be harmful to the parent-child relationship.

As has been demonstrated with juvenile conferencing, support for the parent-child relationship is a fundamental part of Australia's response to juvenile crime. Moreover, Australia's commitment to promoting and sustaining parental involvement is explicit in its youth justice legislation.²⁵⁵ For instance, section 30 of the Queensland Youth Justice Act of 1992 states that the child's parents may benefit by, "(i) being involved in decision making about the child's behaviour; and (ii) being encouraged to fulfill their responsibility for the support and supervision of the child; and (iii) being involved in a process that encourages their participation and provides support in family relationships" ²⁵⁶ Similarly, the main objectives of Tasmania's Youth Justice Act are "to enhance and reinforce the roles of guardians, families and communities in (i) minimising the incidence of youth crime; and (ii) punishing and managing youths who have committed offences; and (iii) rehabilitating youths who have committed offences and directing them towards the goal of becoming responsible citizens" ²⁵⁷

Open and honest communication between parent and child is a key ingredient to maintaining meaningful parental participation in a child's life. The existence of laws that protect the confidentiality of communication between parents and their children is inextricably intertwined with the juvenile justice system's mission to enhance the role of parents to help their children become responsible and law-abiding citizens.

Cautioning is another diversionary method used by police to deal with young people who commit offenses.²⁵⁸ As with all diversionary tactics in the Australian juvenile justice system, parents are informed of the juvenile's misconduct and expected to assist the juvenile with staying out of the formal court process. An informal caution involves minor intervention with the juvenile such as taking the child home or calling his or her parents, ending with a warning to cease the suspicious behavior.²⁵⁹ A formal caution is administered at the police station with a parent present and record of the incident that involved police contact remains on file with police.²⁶⁰ Each jurisdiction's process for issuing a caution, whether formal or

255. *See, e.g., Youth Justice Act 1992* (Qld) s 2(e) (listing among the objectives of the Act, "to recognise the importance of families of children . . . in the provision of services designed to rehabilitate children who commit offenses" and "reintegrate" juvenile offenders back into the community); *Young Offenders Act 1993* (SA) s 3 ("family relationships between a youth, the youth's parents and other members of the youth's family should be preserved and strengthened"); *Young Offenders Act 1997* (NSW) s 7(f) ("parents are to be [recognized] and included in justice processes involving children and . . . are to be [recognized] as being primarily responsible for the development of children").

256. *Youth Justice Act 1992* (Qld) s 30(b)(i)-(iii).

257. *Youth Justice Act 1997* (Tas) s 4(f).

258. *See* AUSTL. INST. OF CRIMINOLOGY, *supra* note 215, at 26.

259. CUNNEEN & WHITE, *supra* note 8, at 371.

260. *Id.*

informal, operates differently. In Queensland, a caution may only be given to a child who admits to committing the offense and consents to being dealt with through this process.²⁶¹ The caution must be given in the presence of another person of the child's or his or her parents' choosing.²⁶² The child must be given notice of, *inter alia*, the substance of the offense, the police officer's name and rank, and the nature and effect of a caution.²⁶³

In Western Australia, an oral or written caution can be administered for minor offenses, and a cautioning certificate must be issued.²⁶⁴ In South Australia, police officers have statutory power to give an informal caution to a person who admits the commission of a minor offense.²⁶⁵ Thereafter, no further proceedings may be taken against the child regarding this offense, and no official record is kept.²⁶⁶ In New South Wales, police can formally caution a child who admits an offense and consents to being cautioned.²⁶⁷ An officer must consider the degree of violence involved and the harm caused to the victim.²⁶⁸ In addition, a caution must be expressed in language readily capable of being understood by children.²⁶⁹

Whether police elect to use warnings, informal cautions, or formal cautions is largely within an officer's discretion. In Queensland, between 1995 and 1996, 15,681 formal cautions were issued to children.²⁷⁰ During the same period in South Australia, 3,161 informal police cautions and 2,511 formal police cautions were issued, and 1,180 family conferences were held.²⁷¹ In Western Australia, 8,268 cautions were given to 7,021 children in 1995.²⁷² There was no data on diversionary programs in Victoria, but approximately 9,000 children receive police cautions annually.²⁷³

Because the Australian diversionary process funnels children out of the formal court process to begin with, it is difficult to make comparisons among Australian jurisdictions regarding sentencing outcomes. For example, it is difficult to determine if a higher detention rate in one state is indicative of a more punitive approach or whether the less serious cases were diverted through cautioning or conferencing. But when comparing Australian juvenile detention rates to the United States, the rate of pre-trial and post-trial detention in the United States is proportionately higher than any state or territory in Australia.²⁷⁴ Once again, we can find support in the Australian juvenile justice system for the proposition that judges and other stakeholders are deliberately involving parents in the effort to keep kids out of detention and using incarceration as a last resort.

261. *Youth Justice Act 1992* (Qld) s 16(1).

262. *Id.* s 16(2).

263. *Id.* ss 20(1), (2).

264. *Young Offenders Act 1994* (WA) ss 22, 23A.

265. *Young Offenders Act 1993* (SA) s 6(1).

266. *Id.* ss 6(2), 6(3).

267. *Young Offenders Act 1997* (NSW) s 19.

268. *Id.* s 20(3).

269. *Id.* s 29(1).

270. AUSTL. LAW REFORM COMM'N, REPORT NO. 84, *supra* note 121, para. 2.81.

271. *Id.*

272. *Id.*

273. *Id.*

274. *See infra* Part IV.

The Australian experience demonstrates that restorative justice is not at odds with reducing juvenile crime. In fact, Australia's widespread use of restorative justice throughout the justice system is testament to its success. Although there is no empirically-based causal connection between restorative justice and the parent-child exemption, there is a significant correlation between the two. The role of parents is vital to the success of the Australian experience. Without the exemption, a parent's role would be compromised by the fear that if the child divulges incriminating information to the parent, he or she could be forced to reveal it. A legal system which places responsibility directly on the family to support the juvenile to not re-offend needs to have as part of its infrastructure a set of rules that protect the sanctity of the family as well as promote open and honest communication within it.

IV. THE CRIMINALIZATION OF THE AMERICAN JUVENILE JUSTICE SYSTEM: AN IMPEDIMENT TO RECOGNITION OF A PARENT-CHILD PRIVILEGE

Despite their present differences, there are historical parallels between the U.S. and Australian juvenile justice systems. The first juvenile courts in Australia and the United States were established in the late nineteenth century.²⁷⁵ Both have their origins in the doctrine of *parens patriae*, where the best interests of the child are paramount.²⁷⁶ Courts acted *in loco parentis*, where judges treated the children that came before them like sons and daughters in need of guidance.²⁷⁷ From their inception, delinquency proceedings were deemed civil, not criminal, and many of the due process protections afforded to adult criminal defendants were unavailable to children.²⁷⁸

275. CUNNEEN & WHITE, *supra* note 8, at 18.

276. *Id.* *Parens patriae* is defined as "parent of his or her country." BLACK'S LAW DICTIONARY, *supra* note 17, at 1144 (8th ed. 2004).

277. Judge Julian Mack set forth the predominant philosophy of the juvenile court in an influential law review article:

[The criminal court] put but one question, "Has he committed this crime?" It did not inquire, "What is the best thing to do for this lad?" It did not even punish him in a manner that would tend to improve him; the punishment was visited in proportion to the degree of wrongdoing evidenced by the single act . . . Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.

Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

278. See Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 378-79 (1996) (noting that the juvenile court was based on a "nonadversarial clinical-therapeutic model" in which evidentiary rules did not apply and the presence of an attorney was discouraged). Because rehabilitation was the goal, dispositions were necessarily open-ended rather than time-limited; in most jurisdictions, commitments to juvenile corrections departments were indeterminate, extending until the child turned twenty-one, or until the juvenile corrections department made a determination that the youth had been rehabilitated. *Id.* at 380.

Beginning with the birth of the civil rights movement in the United States, the American juvenile justice system gradually evolved into a rights-based, autonomous system where due process superseded informality and benevolence. Following the landmark case of *In re Gault*, those adjudicated in juvenile court were guaranteed many of the same procedural protections that applied to adults in criminal proceedings.²⁷⁹ Most notably, *Gault* granted to juveniles the right to counsel and the right against self-incrimination.²⁸⁰ Justice Fortas, writing for the majority, explained that the juvenile justice system in the United States had taken on a different character since its inception; he described a system where judges have "unbridled discretion" as inferior to a system with "principle and procedure" at its core.²⁸¹ *Gault* affirmed that "[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."²⁸² Three years later in the case *In re Winship*, the U.S. Supreme Court determined that the beyond a reasonable doubt standard should apply to juvenile proceedings.²⁸³ *Gault* and *Winship* mandated procedural parity for juveniles largely because of the liberty interest at stake in both juvenile and adult criminal proceedings.²⁸⁴

Interestingly, at the same time that due process rights were being instituted into juvenile adjudications, there was a rise in the number of children arrested and prosecuted in the American juvenile justice system. Juvenile crime in the United States rose to its highest level in the 1990s.²⁸⁵ From 1985 to 1997, the number of juvenile delinquency cases rose by sixty-one percent.²⁸⁶ The murder arrest rate among juveniles was at its highest in 1993 at 14.4 murder arrests per 100,000 juveniles.²⁸⁷ The spike in juvenile crime caused major revision to the policies and penalties imposed on children in the juvenile justice system.²⁸⁸ A number of states enacted legislation that imposed harsher penalties on juvenile offenders, including being adjudicated as an adult in the criminal justice system.²⁸⁹

279. *In re Gault*, 387 U.S. 1, 55 (1967) (holding that "the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults").

280. *Id.* at 36, 55.

281. *Id.* at 18.

282. *Id.* at 20.

283. *In re Winship*, 397 U.S. 358, 368 (1970).

284. *Gault*, 387 U.S. at 55; *Winship*, 397 U.S. at 368.

285. See Melissa Sickmund, *Delinquency Cases in Juvenile Court, 2005*, OJJDP FACT SHEET (Office of Juvenile Justice and Delinquency Prevention), June 2009, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/224538.pdf> (showing that the number of juvenile cases reached a peak in the mid-1990s).

286. *Id.* Between 1997 and 2005, delinquency cases declined by nine percent. *Id.*

287. Charles Puzanchera, *Juvenile Arrests 2008*, JUVENILE JUSTICE BULLETIN (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention), Dec. 2009, at 1, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/228479.pdf>.

288. JAMES AUSTIN ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 1 (2000), available at <http://www.ncjrs.gov/pdffiles1/bja/182503.pdf>.

289. As crime rates increased in the 1980s and 1990s, many states saw trying juveniles in adult courts as a solution. *Id.* at 2. Between 1992 and 1996, forty-three states and the District of Columbia modified their criminal codes with respect to juveniles who commit violent or serious crimes. *Id.* Further, thirty-six states and the District of Columbia imposed laws that would try juveniles as young as fourteen as adults for violent crimes and for crimes deemed serious "such as aggravated stalking, lewd and lascivious assault . . . , violation of drug laws near a school or park, sodomy, and oral copulation." *Id.* Within forty of the nation's largest urban counties, over 7,100 juvenile defendants were charged in adult court with

The 1990's marked an important shift away from the treatment toward punishment of juveniles accused of crimes, which led to a greater number of juveniles adjudicated as adults and incarcerated for longer periods of time.²⁹⁰ Between 1985 and 2005, the number of delinquency cases involving detention increased by forty-eight percent.²⁹¹ In 2005, juvenile courts handled an estimated total of 1.7 million delinquency cases, forty-six percent more cases than in 1985.²⁹² In 2008, an estimated 2.11 million arrests of persons under the age of eighteen were made by law enforcement agencies in the United States.²⁹³ Since the 1990's, pre-trial detention and post-trial detention have been more frequently imposed by judges. In 2005, over 140,000 juveniles—that is approximately twenty-two percent of all adjudicated delinquents—were in detention, correctional, or shelter facilities.²⁹⁴ For juveniles adjudicated as delinquent for violent offenses, 172 out of every 1000 resulted in out-of-home placement (approximately seventeen percent).²⁹⁵ Sixty percent of juveniles received formal probation as their disposition.²⁹⁶

The American juvenile justice system, in an effort to redress juvenile crime, has been transformed into a retributive system of justice akin to the adult criminal justice system.²⁹⁷ Greater reliance on incarceration and probation has minimized the role of family in the adjudicatory and dispositional phases of a case. In all but five states, obtaining all relevant evidence for prosecution is preferable to an evidentiary privilege for parents and their children. Quite possibly, the substantive and procedural convergence of the juvenile and adult criminal justice systems perpetuates the absence of a parent-child privilege in the United States.

One bright spot is that America has begun to look for examples around the globe for alternative approaches to juvenile crime. Restorative justice offers a sound

felonies in 1998 alone. GERARD A. RAINVILLE & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JUVENILE FELONY DEFENDANTS IN CRIMINAL COURTS 1 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jfdcc98.pdf>. A survey conducted by the U.S. Department of Justice found that of prosecutors' offices handling juvenile cases, almost two-thirds transferred at least one juvenile case to criminal court in 1994. See *National Survey of Prosecutors 1994*, OFFICE OF JUSTICE PROGRAMS, <http://bjs.ojp.usdoj.gov/content/pub/ascii/JPSCC.TXT> (last updated Mar. 1997). Nineteen percent of prosecutors' offices had a specialized unit to deal with those juvenile cases that were transferred to criminal court. *Id.*

290. Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 413 UTAH L. REV. 413, 415-16 (2003).

291. SICKMUND, *supra* note 285, at 3. During the same time period, the number of adjudicated delinquency cases resulting in residential placement dropped from thirty-two percent in 1985 to twenty-two percent in 2005, the number of cases resulting in formal probation increased slightly from fifty-five percent to sixty-one percent, and the number of cases resulting in other court sanctions increased by seven percent. *Id.*

292. *Id.* at 1. There were three percent fewer arrests of juveniles in 2008 than in 2007, and the juvenile crime rate fell two percent. Puzanchera, *supra* note 287, at 1.

293. Puzanchera, *supra* note 287, at 1. Juveniles accounted for sixteen percent of all violent crime arrests and twenty-six percent of all property crime arrests. *Id.* In 2005 juveniles under the age of sixteen at the time of referral to court "accounted for 57 [percent] of all delinquency cases handled." SICKMUND, *supra* note 285, at 2.

294. CHARLES PUZANCHERA & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2005, 50-51 (2008).

295. *Id.* at 66.

296. *Id.* at 58.

297. See Feld, *supra* note 15, at 691-92 ("[T]he sentences that delinquents charged with crimes receive are now based on the idea of just deserts rather than the child's 'real needs.'").

approach; it is a model well designed to address juvenile transgressions. Evidence of restorative justice in the United States first appeared in the late 1970s among the Mennonite community.²⁹⁸ Mennonites sought to apply their philosophy to the criminal justice system by conducting victim-offender dialogues as a means toward reconciliation.²⁹⁹ The United States is slowly moving in the direction of more institutionalized support for restorative justice practices with juveniles. In the 1990s, the Balanced and Restorative Justice Project (BARJ) was created, bringing more visibility to restorative justice.³⁰⁰ BARJ provided technical assistance and training for juvenile justice systems interested in adopting restorative justice practices.³⁰¹ In 1994, the American Bar Association endorsed victim-offender mediation (VOM) and provided guidelines for its use and development in courts.³⁰² A study conducted in 2000 found that at least nineteen states have passed legislation promoting restorative justice elements in their juvenile justice systems.³⁰³ Additionally, twenty-nine states have statutes that promote VOM³⁰⁴ or some aspect of restorative justice.³⁰⁵

Victim-offender mediation is the most commonly used restorative justice practice in the United States.³⁰⁶ Typically, VOM involves juveniles accused of property offenses and minor assaults.³⁰⁷ The victim must be willing to participate, and the offender must acknowledge that he committed the wrong.³⁰⁸ A majority of VOM programs have a mediator initially meet with crime victims and offenders separately to prepare them for later dialogue together.³⁰⁹ After the separate sessions, there is a mediation session where the goal is to allow the parties to engage in a dialogue where emotional and informational needs are met and where a plan is created for the offender to rectify his misdeeds.³¹⁰

Satisfaction rates among victims and offenders of VOM are consistently higher than the satisfaction rates among those who had gone through the formal court

298. See MARGARITA ZERNOVA, *RESTORATIVE JUSTICE: IDEALS AND REALITIES* 8 (2007) (noting that the first recorded usage of the restorative justice approach occurred in Canada in 1974, and that the idea soon caught on among the Mennonite community in the United States).

299. See *id.* (noting that the approach used by the Mennonites was a conference between the offenders and victims, and required the offenders to "bring back a report of the damage [the victims] have suffered").

300. See Burkemper, *supra* note 20, at 130 (noting that "vast growth" in restorative justice programs occurred with the formation of the BARJ). The Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice developed the BARJ project. *Id.*

301. *Id.* Thirty-six states have passed legislation allowing the use of BARJ "in one or more aspects of their juvenile justice systems." *Id.* The thirty-six states include: Arizona, California, Colorado, Illinois, Iowa, Minnesota, New York, Ohio, Oregon, Pennsylvania, Texas, Vermont, and Wisconsin. *Id.*

302. A.B.A. Endorsement, *supra* note 21.

303. Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 523 (2007).

304. *Id.*

305. Joanne Katz & Gene Bonham, Jr., *Restorative Justice in Canada and the United States: A Comparative Analysis*, 2006 J. INST. JUST. INT'L STUD. 187, 191 (2006).

306. Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 673 (2005). A survey conducted in 1999 found more than 300 VOM programs in North America. Mark S. Umbreit & Jean Greenwood, *National Survey of Victim Offender Mediation Programs in the United States*, 16 MEDIATION Q. 235, 235 (1999).

307. William R. Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 137 (2003).

308. Umbreit & Greenwood, *supra* note 306, at 239.

309. *Id.* at 240.

310. *Id.*

process. One study reported that "79 [percent] of juvenile crime victims were satisfied with the justice system referral of their case to mediation, and 83 [percent] of victims felt the mediation process was fair."³¹¹ Reasons for victims were significantly more likely to be satisfied and to experience fairness than those in a comparison group that went through the traditional court process.³¹² In fact, nine out of ten victims would recommend VOM programs to other participants.³¹³ Victim willingness to participate in VOM ranged from "a desire to receive restitution, to hold the offender accountable, to learn more about the 'why' of the crime, to share their pain with the offender, to avoid court processing, to help the offender change behavior, or to see the offender adequately punished."³¹⁴

An analysis conducted by William Nugent, Mona Williams, and Mark Umbreit compared fifteen studies of VOM and recidivism rates.³¹⁵ Eleven of the fifteen studies showed that VOM participants "reoffended at a lower rate than nonparticipants."³¹⁶ A separate study conducted by some of the same authors compared one-year re-offense rates among approximately 1300 juveniles.³¹⁷ The sample involved 619 juvenile offenders who participated in VOM and 679 who did not.³¹⁸ For those who participated in VOM, one-third were less likely to commit another offense than their non-VOM counterparts who were matched by age, sex, offense, and racial/ethnic characteristics.³¹⁹ Additionally, "less than one in five (18 percent) [VOM] juveniles committed a crime within a year, compared to more than one in four (or 27 percent) of [non-VOM] juveniles."³²⁰ Those VOM juveniles who re-offended within a year committed less serious offenses than their non-VOM counterparts.³²¹

Several studies on VOM programs in the United States found lower rates of recidivism for VOM participants than for offenders who went through traditional

311. Burkemper, *supra* note 20, at 130. Typically, when participants were asked about the fairness of the process and the resulting agreement, over eighty percent felt that the process was fair to both sides and that the resulting agreement was fair. Umbreit et al., *supra* note 303, at 538. Umbreit found that eighty percent of burglary victims in Minneapolis who participated in VOM indicated that they felt the criminal justice system was fair, as compared with only thirty-eight percent of burglary victims who did not go through VOM. *Id.* at 538-39. Half of the VOM studies that Umbreit reviewed addressed restitution cases, and of those cases, 90 percent or more generated agreements. *Id.* at 540. Eighty to ninety percent of the resulting contracts were reported as completed. *Id.* However, some comparative studies report higher rates of restitution or completion rates for VOM than comparison groups while other studies report no difference. *Id.*

312. Umbreit et al., *supra* note 303, at 538.

313. *Id.* at 534.

314. *Id.* at 531.

315. Nugent, *supra* note 307, at 140. The fifteen studies included nineteen different locations and 9307 juveniles. *Id.*

316. *Id.* at 148. The remaining four studies showed that non-VOM groups had lower re-offense rates. *Id.*

317. Burkemper, *supra* note 20, at 129.

318. Umbreit et al., *supra* note 303, at 545-46.

319. *Id.*

320. Burkemper, *supra* note 20, at 129.

321. *Id.* An evaluation of the 22nd Circuit Court in Missouri found that 27.1 percent of juvenile offenders who completed a victim-offender dialogue program had re-offended, while 41.1 percent in the control group of youths who did not participate in the VOM re-offended. *Id.* at 132.

justice system programs.³²² Five out of six VOM programs in California showed reduced recidivism rates.³²³ Two studies concluded that reoffending youths tended to incur less serious charges than their counterparts.³²⁴ Another study reported little or no difference in recidivism rates between youths participating in VOM and youths processed through traditional means.³²⁵

Limited use of family group conferencing has been adopted in the United States.³²⁶ While not as robust or institutionalized as in Australia, the format and principles are much the same.³²⁷ For example, a Milwaukee, Wisconsin community conferencing program brings together victims, offenders, and community members to "discuss crimes and decide how offenders will make amends."³²⁸ Twelve different sites in the First Judicial District of Minnesota utilize FGC.³²⁹ A juvenile diversion program in Honolulu, Hawaii developed around FGC in 1999.³³⁰ In this program, between March and September 2000, 102 first-time juvenile offenders participated in conferences instead of traditional police diversion programs, and eighty-five conferences were held.³³¹ Satisfaction rates among participants in family group conferences were extremely high. In one study conducted on the twelve sites in the First Judicial District of Minnesota, post-conference telephone interviews were conducted with 105 victims, 103 juvenile offenders, and 130 support persons to generate satisfaction rates with the FGC experience.³³² The results showed that ninety-three percent of victims and ninety-four percent of offenders were satisfied with how their cases were handled; ninety-two percent of support people indicated they were satisfied with the outcome; ninety percent of victims felt the offender was held adequately accountable; and ninety-eight percent of victims, ninety-nine percent

322. Umbreit et al., *supra* note 303, at 544.

323. *Id.* at 544-45 (citing AUDREY EVJE & ROBERT CUSHMAN, THE JUDICIAL COUNCIL OF CALIFORNIA, CENTER FOR FAMILIES, CHILDREN, AND THE COURTS, A SUMMARY OF THE EVALUATIONS OF SIX CALIFORNIA VICTIM OFFENDER RECONCILIATION PROGRAMS 2 (2000), available at <http://www.courtinfo.ca.gov/programs/cf-cc/pdffiles/vorp.pdf>).

324. *Id.* at 545.

325. *Id.*

326. Estimates from 2001 show ninety-four active FGC programs in the United States. Reimund, *supra* note 306, at 677.

327. See generally Tina S. Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 WASH. U. J. L. & POL'Y 301, 309-10 (2007) (describing the family group conferencing model). There are typically two forms of family group conferencing, one involving a script that uses specially-trained facilitators like police officers, and another form run by a paid social service coordinator. *Id.* Four fundamental assumptions of conferences must be adhered to: "(1) family and extended family are respected and the focus must be on strengthening family and social supports; (2) power must be given to all participants; (3) conferences must be culturally sensitive and respectful to families; and (4) victims must be involved in the process and get what is needed to repair the harm done to them . . ." See William Bradshaw & David Roseborough, *Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism*, 69 FED. PROBATION 15, 16 (2005).

328. STATE OF WIS. LEGISLATIVE AUDIT BUREAU, AN EVALUATION: RESTORATIVE JUSTICE, MILWAUKEE AND OUTAGAMIE COUNTIES 4 (2004), available at <http://oja.state.wi.us/docview.asp?docid=6395&locid=97>.

329. Claudia Fercello & Mark S. Umbreit, *Practicing Restorative Justice: Family Group Conferencing and Juvenile Crime in the Suburban Metro Area*, CURA REP. (U. of Minn. Center for Urban and Regional Affairs, Minneapolis, Minn.), June 2000, at 16.

330. Loren Walker, *Conferencing: A New Approach for Juvenile Justice in Honolulu*, 66 FED. PROBATION 38, 39 (2002).

331. *Id.*

331. *Id.*

332. Fercello & Umbreit, *supra* note 329, at 16.

of support persons and ninety-four percent of offenders would recommend the program to others.³³³

Three studies of family group conferencing in Minnesota, Pennsylvania, and Indianapolis revealed that ninety-five percent of victims indicated that the process or outcome of group conferencing was fair.³³⁴ Eighty-nine percent of juvenile offenders in the Minnesota study said the resulting conference agreement was fair.³³⁵ There were also high agreement rates among the participants in the Minnesota group conferencing study.³³⁶ The Pennsylvania group conferencing study found that youths who participated in conferencing were "more likely to experience fairness in the justice system than court-referred youth (97 [percent] versus 87 [percent])."³³⁷ A study conducted on the Honolulu program showed that 100 percent of the conferences had resulted in agreements.³³⁸

Jurisdictions choosing to implement restorative justice practices have seen a positive impact on recidivism rates. In the Milwaukee program, from 2002 to 2003, 4.3 percent of forty-seven offenders were charged with another crime, compared to 13.5 percent of fifty-two non-participating juvenile offenders.³³⁹ The Honolulu program reported an overall rate of recidivism (within six months) of twenty-eight percent for juveniles who had conferences.³⁴⁰ However, the recidivism rate was only eleven percent right after the last conference held between the participating parties.³⁴¹ Additionally, "juveniles who had conferences for non-violent offenses were less likely to escalate to violent crimes, compared to juveniles" similarly situated who did not conference.³⁴² Out of the 102 conference juveniles, fifty-nine committed non-violent offenses and only one was rearrested within the following six months for a violent crime.³⁴³ In the group of similarly situated juveniles without conferencing, seventy-five out of eighty-two juveniles were arrested for non-violent crimes, and six were arrested for violent crimes within the following six months.³⁴⁴

The Pennsylvania group conferencing study found that "group conferencing had a more positive impact on recidivism rates for participants whose offenses were relatively more violent."³⁴⁵ Notably the Indianapolis program, which works in tandem with the police department to offer FGC where young offenders and their families meet the individuals they victimized and work toward reparation and reconciliation, has seen "significant reduction in recidivism among these [young] offenders."³⁴⁶ In a meta-analysis performed by William Bradshaw and David

333. *Id.* at 16-18.

334. Umbreit et al., *supra* note 303, at 539.

335. Fercello & Umbreit, *supra* note 329, at 17.

336. Umbreit et al., *supra* note 303, at 540-41.

337. *Id.* at 539.

338. Walker, *supra* note 330, at 4.

339. STATE OF WIS. LEGISLATIVE AUDIT BUREAU, *supra* note 328, at 5.

340. Walker, *supra* note 330, at 5.

341. *Id.*

342. *Id.*

343. *Id.* at 5-6.

344. *Id.* at 6.

345. Umbreit et al., *supra* note 302, at 547.

346. See Umbreit et al., *supra* note 302, at 524 (citing EDMUND F. MCGARREL ET AL., RETURNING JUSTICE TO THE COMMUNITY: THE INDIANAPOLIS JUVENILE RESTORATIVE JUSTICE EXPERIMENT 48

Roseborough involving nineteen studies and 11,950 juveniles from twenty-five different sites, they found that VOM and FGC together contributed to a twenty-six percent reduction in recidivism.³⁴⁷

Restorative justice practices like VOM and FGC expand the family's role in a juvenile's rehabilitation. While restorative justice is not on a trajectory to become the leading approach to addressing juvenile crime in America, it continues to gain momentum across the country. The success of restorative justice among youth is largely based on communication between parents and their children, which is why protecting these relationships through a legal privilege is essential for replicating some of the successes experienced in Australia. Likewise, support for a parent-child testimonial privilege will gain traction in the United States if or when restorative justice becomes more popular and widely used.

V. CONCLUSION

An exemption for parent-child communications fits logically within Australia's restorative approach to juvenile justice. Much of the success that Australia has experienced with respect to a decline in the number of children prosecuted in the juvenile courts is testament to the diversionary practices that rely on parents as active participants. A restorative approach depends upon open dialogue between stakeholders. Parents are stakeholders in their children's social, physical, and moral development. The restorative model is designed to allow parents, among others, to see and hear how their child's actions have affected other members of their community. It provides an opportunity for parents and children to speak candidly about the child's conduct without fear of incrimination and gives parents ample opportunity to participate in reconstituting a parent-child relationship that can assist the rehabilitative effort. Diversion places a large responsibility on the juvenile and his family to identify the root causes for the delinquent behavior and find appropriate ways to address it in a relatively short time frame. To be successful, parents need to have accurate and truthful information in order to assess their children's needs, know whether their child is complying with requirements, and access the appropriate services when needed. For all of these reasons, a rule which exempts parents and their children from being compelled to provide information against one another fits squarely within a restorative approach.

The American model embodies the virtues of autonomy and due process. The juvenile justice system, not unlike the adult criminal justice system, is decidedly rule-based, which ensures a certain degree of procedural conformity. A parent-child testimonial privilege is consistent with the framework utilized by the American criminal justice system. This article offers the Australian experience as a lens through which to view the legal and social utility of a parent-child privilege. A parent-child privilege will not be a panacea for juvenile crime, but it is one more resource that can aid families in assisting wayward youth. The Australian experience teaches us that the fewer barriers we erect to intra-family communication, the more resilient and successful the efforts toward rehabilitation will be.

(2000)).

347. Bradshaw, *supra* note 327, at 18.