You Can't Tell Mom or Dad: What is the Significance of Family Post-Dobbs if Congress and the Federal Courts Do Not Recognize a Parent-Child Privilege?

Michael L. Fox**[*] **& Mark D. Fox**[**]

I. INTRODUCTION 61
A. Nearly Non-Existent Family Privilege - A Brief Background ..63
B. Families and Parenting Under Current Evidentiary Law - What Impact by Dobbs? 71
II. SELECT PRIVILEGES ACROSS THE CENTURIES AND IN PRESENT EVIDENTIARY LAW 76
A. Attorney-Client 76
B. Clergy-Penitent 79
C. Physician/Therapist-Patient 83
D. Marital or Spousal Privilege 84
III. THE URGENT CASE IN SUPPORT OF A PARENT-CHILD COMMUNICATION & TESTIMONIAL PRIVILEGE 88
A. The Law on Parent-Child Communication and Testimonial Privilege is Unsettled & Far from Uniform Nationwide 88

[*]Associate Professor of Business Law and Chair of the School of Business, Mount Saint Mary College; Adjunct Associate Professor of Law in Professional Responsibility, Columbia University School of Law. B.A., *summa cum laude* & Phi Beta Kappa, Bucknell University; J.D., *Harlan Fiske Stone Scholar*, Columbia University School of Law. Prior to academia, Prof. Fox served as a law clerk to a U.S. district judge, and practiced law with private firms in New York City and New York's Hudson Valley. He frequently lectures and writes (including two books) on topics including DEI law, electronics & law and evidentiary matters.

[**]United States Magistrate Judge (*retired*), United States District Court, Southern District of New York (1988-2008). B.A., SUNY Buffalo; J.D., Brooklyn Law School. In November 1996, Judge Fox was appointed by then-Chief Justice of the United States William H. Rehnquist to the Committee on Security and Facilities of the Judicial Conference of the United States. In 1999, he was re-appointed to a second term on that Committee by Chief Justice Rehnquist. Prior to his appointment to the federal bench, Judge Fox practiced law as an assistant district attorney, public defender, and private practitioner in New York City, New York's Hudson Valley, and across New York State; and he has lectured for bar associations and other groups on various aspects of law including trial practice.

The authors thank Tiffany N. Gagliano, J.D., Vice President for Legal Affairs and Strategy, and Former Dean of the School of Business, Mount Saint Mary College, for her thoughts and feedback that greatly benefited this article.

B. Preventing the Irretrievable Destruction of Family Life 97
C. The Psychological and Emotional Impacts of Testifying Against Family.....103
D. Reasonable Limits for a Privilege to Balance Protection with the Search for Justice - Including Creation of a Privilege Only for Communications, and Not Actions Observed.....105
IV. PROPOSED LANGUAGE FOR A NEW *FEDERAL RULE OF EVIDENCE 503* PARENT-CHILD COMMUNICATION & TESTIMONIAL PRIVILEGE, AND FOR STATE RULES TO FOLLOW SUIT.....110
V. CONCLUSION 118

The family is the test of freedom; because the family is the only thing that the free man makes for himself and by himself.[1]

As the family goes, so goes the nation and so goes the whole world in which we live.[2]

I. INTRODUCTION

In 2004, the authors of this article, father and son, advocated for the creation of a parent-child privilege as an important protection for families under the law.[3] The idea concerning a federal, national parent-child privilege is not a new one, either in evidentiary law discussions or in legal scholarship, with law review and law journal notes and articles having addressed it in numerous iterations since at least 1969.[4]

---

1 G.K. Chesterton, FANCIES VERSUS FADS, "Dramatic Unities" (1923), cited in Robert Andrews, THE COLUMBIA DICTIONARY OF QUOTATIONS (Colum. Univ. Press 1993) at 313.

2 Pope John Paul II, *Observer* (London, Dec. 7, 1986), cited in Andrews, THE COLUMBIA DICTIONARY OF QUOTATIONS, *supra* note 1, at 314.

3 Mark D. Fox & Michael L. Fox, *Family Unity or Family Crisis: Revisiting the Need for a Parent-Child Communication Privilege*, JOAN FULLAM IRICK PRIVACY PROJECT: PHASE II at 41 (INT'L ASS'N OF DEFENSE COUNSEL 2004).

4 For a sample of those articles, notes and comments, *see, e.g.,* Brittany Libson, *Promoting Parental Guidance: An Argument for the Parent Child Privilege in Juvenile Adjudications*, 53 AM. CRIM. L. REV. 137 (2016); Catherine Chiantella Stern, *Don't Tell Mom the Babysitter's Dead: Arguments for a Federal Parent-Child Privilege and a Proposal to Amend Article V*, 99 GEO. L.J. 605 (2011); Hillary B. Farber, *Do You Swear To Tell the Truth, The Whole Truth, and Nothing But the Truth Against Your Child?*, 43 LOY. L.A. L. REV. 551 (2010); Michael D. Moberly, *Children Should Be Seen and Not Heard: Advocating the Recognition of a Parent-Child Privilege in Arizona*, 35 ARIZ. ST. L.J. 515 (2003); David L. Cheatham, *Kids Say the Darndest Things: A Call for Adoption of the Statutory Parent-Child Confidential Communications Privilege in Response to Tougher Juvenile Sentencing Guidelines*, 8 TEX. WESLEYAN L. REV. 393 (2002); Shonah P. Jefferson, *The Statutory Development of the Parent-Child Privilege: Congress Responds to Kenneth Starr's Tactics*, 16 GA. ST. U. L. REV. 429 (1999); Nissa M. Ricafort, *Jaffe v. Redmond: The Supreme Court's Dramatic Shift Supports the Recognition of a Federal Parent-Child Privilege*, 32 IND. L. REV. 259 (1998); Wendy Meredith Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583 (1987); Gregory W. Franklin, *The*

However, with little to no progress having been made at the federal or state level, the authors return to this topic almost a generation later to re-examine and further advocate for the privilege in our modern society.[5]

This article explores the history and background of evidentiary privileges, dating back to the Roman *privata lex*[6], in order to better understand where we are now in the United States' justice system. Thereafter, we will examine the status of four of the major privileges in modern evidentiary law: the clergy-penitent privilege, the physician/therapist-patient privilege, the marital or spousal communication privilege, and what is perhaps the cornerstone and keystone privilege in law, the attorney-client privilege. This article then explores the arguments concerning the creation of a parent-child privilege, discusses the unsettled nature of said privilege across jurisdictions of the United States, and addresses the argument that such a privilege would avoid irretrievable destruction of family life in the United States given the psychological and emotional impacts of testifying against a member of one's nuclear family. In addition, while advocating for the creation of a privilege, we also acknowledge the need for reasonable limits of a privilege to balance protection with the search for truth and justice. Finally, the text of a proposed *Rule 503 Parent-Child Communication & Testimonial Privilege* is set forth, modeled after prior proposals, including failed legislation previously introduced in Congress.[7]

Judicial Development of the Parent-Child Testimonial Privilege: Too Big for Its Britches?, 26 WM. & MARY L. REV. 145 (1984); Susan Levine, Comment, *The Child-Parent Privilege: A Proposal*, 47 FORDHAM L. REV. 771 (1979); Daniel Coburn, *Parent-Child Communications: Spare the Privilege and Spoil the Child*, 74 DICKINSON L. REV. 599, (1969–70).

5 It should be noted that other legal scholars have expanded the consideration of new potential privileges to include a sibling testimonial privilege. *See, e.g.*, Michael D. Moberly, *Am I My Brother's Secret-Keeper? Contemplating the Recognition of a Sibling Testimonial Privilege*, 41 AM. J. TRIAL ADVOC. 239 (2017). While such is beyond the scope and advocacy of the present article, should Congress, the State Legislatures and the Courts eventually implement parent-child communication and testimonial privileges in all jurisdictions, then a sibling testimonial privilege would certainly seem the next logical step, for similar legal reasoning and public policy considerations of family unity, harmony, and protection.

6 *See In re* Agosto, 553 F. Supp. 1298, 1306 (D. Nev. 1983) ("The word 'privilege' itself, a derivative of the Latin phrase 'privata lex', is described as 'a prerogative given to a particular person or class of persons'"); *see also* Fox & Fox, *supra* note 3, at 41 (INT'L ASS'N OF DEFENSE COUNSEL 2004) ("'Privilege' is derived from the Latin phrase, 'privata lex.' . . . Although privata lex was a term developed in the days of ancient Rome, privileges protecting special relationships existed centuries before Rome coined a term for them") (citing and quoting Watts, *supra* note 4, at 590).

7 The majority of argument advanced in this article concerns the need for children to be able to confide in, and seek the guidance of, their parents or guardians—such that

A. Nearly Non-Existent Family Privilege - A Brief Background

The present state of the law in the absence of a parent-child communication privilege places a Hobson's choice[8] on the shoulders of both parents and children. Imagine a 16-year-old child commits a crime, and in their fear and confusion, they go to the counselors they have known for their entire life—their parents (or parent). After providing advice to their child, the parent is thereafter subpoenaed by the prosecutor's office, which is seeking any information the parent may have about the child's alleged crime, or is subpoenaed by a private attorney representing a plaintiff claiming injury. Or, vice versa, imagine a parent with adult children, and the parent finds himself or herself in a difficult situation where legality is at issue. They consult the people with whom they have the closest relationship, their adult children, only in this hypothetical, the children are not attorneys. After providing advice to the parent, the children thereafter find they are the subject of a subpoena from an investigating prosecutor or a private attorney representing a plaintiff claiming injury.

In the above circumstances, the burden on parents or children is significant. Do they testify against their parent/child as compelled by a subpoena; allow themselves to be held in contempt of court for refusing to comply with the subpoena; or commit perjury under oath to protect their parent/child and families?

So far, only a few states (Colorado, Idaho, Massachusetts, Minnesota, and Washington) have acted through legislation to even address or speak about parent-child privilege—and not all have created a stand-alone or wholesale privilege by any means, as addressed below.

In Idaho, the privilege only concerns communications from a minor child or ward to a parent or guardian:

a parent-child communication and testimonial privilege is essential and must be codified in the laws of the United States. However, it is no less true that there are times when parents, particularly older parents, seek the counsel of their adult children when it comes to legal matters, regardless of whether those adult children are attorneys. Therefore, despite what may be more of a focus on why children need a privilege so they may consult with a parent without fear of legal reprisal, any ultimate parent-child communication and testimonial privilege that is created should be a "360-degree" privilege protecting communications from parent to child or child to parent, regardless of whether the child is a minor or adult, and in a range of identified circumstances, as set forth in the proposed Rule 503, contained in Section IV *infra.*

8 A Hobson's choice is one in which it appears someone may freely choose from several alternatives, and yet the outcome is the same for all, or there is no true alternative. In the present example, despite having several "options", all have gravely negative outcomes. *See Hobson's choice*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/Hobson%27s%20choice#:~:text=1,or%20more%20equally%20objectionable%20alternatives (last visited Oct. 7, 2023).

> (7) Any parent, guardian or legal custodian shall not be forced to disclose any communication made by their minor child or ward to them concerning matters in any civil or criminal action to which such child or ward is a party. Such matters so communicated shall be privileged and protected against disclosure; excepting, this section does not apply to a civil action or committed by violence of one against the person of the other, nor does this section apply to an case of physical injury to a minor child where the injury has been caused as a result of physical abuse or neglect by one or both of the parents, guardians or legal custodians.[9]

Minnesota's legislation, similarly, provides a "one-way" privilege for a child confiding in their parent in a confidential communication (although the statute does not explicitly provide for wards and guardians, or other similar "parental" relationships):

> (j) A parent or the parent's minor child may not be examined as to any communication made in confidence by the minor to the minor's parent. A communication is confidential if made out of the presence of persons not members of the child's immediate family living in the same proceeding in which the parent is charged with a crime committed against the person or property of the communicating child, the parent's spouse, or a child of either the parent or the parent's spouse, or in which a child is charged with a crime or act of delinquency committed against the person or property of a parent or a child of a parent, nor to an action or proceeding termination of parental rights, nor any other action or proceeding on a petition alleging child abuse, child neglect, abandonment or nonsupport by a parent.[10]

In Colorado, the law seems to provide for a limited parent-child privilege, which only appears to exist for communications between parent and child when another individual—usually subject to privilege in their own right—is also present:

> (l)(I) A parent may not be examined as to any communication made in confidence by the parent's minor child to the parent when the minor child and the parent were in the presence of an attorney representing the minor child, or in the presence of a physician who has a confidential relationship with the minor child pursuant to paragraph (d) of this subsection (1), or in the presence of a mental health professional who has a confidential relationship with the minor child pursuant to paragraph (g) of this subsection (1), or in the presence of a

9 IDAHO. ST. § 9-203(7) (2022); *see also* IDAHO R. EVID. 514.

10 MINN. ST. 595.02(1)(j) (2020).

> clergy member, minister, priest, or rabbi who has a confidential relationship with the minor child pursuant to paragraph (c) of this subsection (1). The exception may be waived by express consent to disclosure by the minor child who made the communication or by failure of the minor child to object when the contents of the communication are demanded. This exception does not relieve any physician, mental health professional, or clergy member, minister, priest, or rabbi from any statutory reporting requirements.[11]

The State of Washington's statutes contain a similar provision: "(b) A parent or guardian of a minor child arrested on a criminal charge may not be examined as to a communication between the child and his or her attorney if the communication was made in the presence of the parent or guardian. *This privilege does not extend to communications made prior to the arrest*."[12] But, again, this language does not provide for a stand-alone parent-child privilege.

The Commonwealth of Massachusetts' statute and evidentiary rule, cited below, resembles a parent-child privilege, but is, in reality, a witness disqualification provision:

> (2) Disqualification. A parent shall not testify against the parent's minor child and a minor child shall not testify against the child's parent in a proceeding before an inquest, grand jury, trial of an indictment or complaint, or any other criminal, delinquency, or youthful offender proceeding in which the victim in the proceeding is not a family member and does not reside in the family household. In a case in which the victim is a family member and resides in the family household, the parent shall not testify as to any communication with the minor child that was for the purpose of seeking advice regarding the child's legal rights.[13]

Under the rule, a child is permitted to call a parent to testify on the child's behalf at trial, but neither the government nor the prosecution may compel a parent to testify against the child.[14] That certainly sounds like a parent-child privilege, but on further analysis, it falls short. The *Vigiani* Court specifically parses and examines the language in

---

11 CO. ST. § 13-90-107(1)(l)(I) (2022). A stand-alone parent-child privilege is not recognized in the State of Colorado. *See* People v. Agado, 964 P.2d 565, 568 (Colo. Ct. Apps. 1998).

12 WA. ST. 5.60.060(2)(b) (2022) (emphasis added).

13 MA. R. EVID. § 504 (2022).

14 *See* Commonwealth v. Vigiani, 170 N.E.3d 1135, 1139–1140, 1140 n.5 (Mass. 2021).

Massachusetts Statute 233, Section 20,[15] subsections Second and Fourth thereof.[16] In particular, the Court noted that while Section 20, subsection Second utilized the language "be compelled," Section 20, subsection Fourth did not—thereby indicating, according to the Court, that Section 20 created not a spousal privilege, but a parent-child witness disqualification.[17]

Indeed, the Massachusetts Supreme Judicial Court held that it would not judicially create a parent-child privilege, as that was best left to the prerogative of the state legislature:

> Because we conclude that the Legislature, in the first instance, is the more appropriate body to weigh the relative social policies and address whether and how such a privilege should be created; because the Legislature has not, to date, considered whether to create such a privilege; and because this case involves a number of competing legislative policies regarding children and families which also must be balanced, we decline to create a privilege for parents at this time and on these facts.[18]

As previously commented by the authors of this article on the topic:

> [t]his Massachusetts statute [ch. 233, §20] was passed in response to the case *Three Juveniles* [*v. Commonwealth*], 455 N.E.2d 1203 (Mass. 1983), in which the Court ruled that children would have to testify against their father in his trial for murder. The Court granted no privilege or disqualification to the children, so the Legislature chose to act and pass this somewhat weak and narrow statute.[19]

---

15 MASS. ANN. LAWS 233 § 20 ("**Second**, Except as otherwise provided in section seven of chapter two hundred and seventy-three and except in any proceeding relating to child abuse, including incest, neither husband nor wife shall be compelled to testify in the trial of an indictment, complaint or other criminal proceeding against the other;… **Fourth**, A parent shall not testify against the parent's minor child and a minor child shall not testify against the child's parent in a proceeding before an inquest, grand jury, trial of an indictment or complaint or any other criminal, delinquency or youthful offender proceeding in which the victim in the proceeding is not a family member and does not reside in the family household; provided, however, that for the purposes of this clause, 'parent' shall mean the biological or adoptive parent, stepparent, legal guardian or other person who has the right to act in loco parentis for the child; provided further, that in a case in which the victim is a family member and resides in the family household, the parent shall not testify as to any communication with the minor child that was for the purpose of seeking advice regarding the child's legal rights") (emphasis added).

16 *See Vigiani*, 170 N.E.3d at 1140–41, 1140 n.5 (Mass. 2021).

17 *Id.*

18 *In re* Grand Jury Subpoena, 722 N.E.2d 450, 451 (2000) (footnotes omitted).

19 Fox & Fox, *supra* note 3, at 44 n.18 (citing Yolanda L. Ayala & Thomas C. Martyn, *To Tell or Not to Tell? An Analysis of Testimonial Privileges: The Parent-Child and Reporter's Privileges*, 9 ST. JOHN'S J. LEGAL COMMENT. 163, 170 (1993)).

In a similar vein, the State of Connecticut enacted legislation impacting a child's or parent's right to refuse to testify in certain proceedings:

> In any juvenile proceeding in the Superior Court, the accused child shall be a competent witness, and at his or her option may testify or refuse to testify in such proceedings. The parent or guardian of such child shall be a competent witness but may elect or refuse to testify for or against the accused child except that a parent or guardian who has received personal violence from the child may, upon the child's trial for offenses arising from such personal violence, be compelled to testify in the same manner as any other witness. No unfavorable inferences shall be drawn by the court from the accused child's silence.[20]

However, in view of the language and its similarity to that of the Massachusetts statute, the Connecticut provision appears to be (1) a reaffirmation of the child's Fifth Amendment rights, and (2) is a witness disqualification of the parent, at their option. If viewed as creating a privilege, it would seem to be weak when compared to the language in the statutes or common law of those jurisdictions that have created an outright parent-child privilege.

The State of New Mexico has an interesting statutory provision in cases of delinquency or neglect, where the law provides for a social worker-client privilege that initially reads differently until the language is parsed:

> A child alleged to be delinquent or in need of supervision and a parent, guardian, or custodian who allegedly neglected a child has a privilege to refuse to disclose, or to prevent any other person from disclosing, confidential communications, either oral or written, between the child, parent, guardian, or custodian and a probation officer or a social services worker which are made during the course of a preliminary inquiry.[21]

Not a privilege between parent and child, at all.

Finally, for the sake of completeness in this discussion, the State of California has an evidentiary statute pertaining to marital

---

20 CONN. GEN. STAT. §§ 46b–138a (2022).

21 N.M. R. REV. Rule 11-509(B); *see also* N.M. R. REV. Rule 11-509(C) ("Who may claim the privilege. The privilege provided in Paragraph B of this rule may be claimed by the child in a criminal proceeding or in a children's court proceeding; or by the parent, guardian, or custodian who allegedly abused or neglected a child. The claim of privilege may be asserted by the attorney, the probation officer, or the social services worker on behalf of the child, parent, guardian, or custodian") (emphasis omitted). *But see* State v. Neswood, 51 P.3d 1159, 1163 (N.M. Ct. App. 2002) (allowing social worker's testimony about general information, not her opinion about the child's credibility or whether abuse actually occurred).

communications, which provides: "[t]here is no privilege under this article in a proceeding under the Juvenile Court Law, Chapter 2[.]"[22] In the annotation section, reference is made to a section of the *California Jurisprudence 3d*, wherein it comments: "In the absence of statute, there is no parent-child privilege in juvenile court proceedings analogous to the attorney-client bar to disclosure of confidential communications."[23]

From a nationwide review, no other states have statutory provisions for, or in recognition of, a parent-child privilege. Furthermore, as evaluated in greater detail in Section III.A, few state and federal court decisions create or recognize a common law parent-child privilege. Even if a jurisdiction does provide for a parent-child privilege, much like the operation of other privileges, the presence of a third person to the communication (whether written or oral) will destroy the privilege, and there will be no shelter for the statement or the witnesses in a legal proceeding.[24]

Courts crisscrossing the United States, both in time and geography, have repeatedly viewed litigation, discovery, and trials—both civil and criminal—as a method advancing the "search for truth".[25] While evidentiary privileges may exist in both statute and common law[26] that

22 CAL. EVID. CODE § 986 (Deering 2022).

23 Eclavea et al., 27A CAL. JUR. 3D *Delinquent and Dependent Children* § 206 (2022) (citing *In re* Terry W., 59 Cal. App. 3d 745 (Ca. Ct. App. 1976)).

24 *See* State v. Stevens, 580 N.W.2d 75, 79 (Minn. Ct. App. 1998).

25 *See* Nix v. Whiteside, 475 U.S. 157, 166 (1986) ("[c]ounsel's duty of loyalty . . . is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth."); Williams v. Fla., 399 U.S. 78, 82 (1970) ("The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played."); United States v. Byrd, 750 F.2d 585, 592 (7th Cir. 1984) (holding the communications privilege does not apply to separated couples); Tiedman v. Am. Pigment Corp., 253 F.2d 803, 808 (4th Cir. 1958) ("It is, of course, true that a trial is not a sporting event, and discovery is founded upon the policy that the search for truth should be aided."); Meyer v. Turn Services, L.L.C., No. 16-12787, 2016 LEXIS 155448 at *6 (E.D. La. Nov. 9, 2016) ("To permit plaintiff's deposition not go forward before production of the surveillance evidence that all parties know exists undermines the search for truth . . . . "); Offen v. Brenner, 553 F. Supp. 2d 565, 571 (D. Md. 2008) (" . . . the 'evaluation and investigation of facts and opinions for the purpose of determining what, if anything, is to be raised or used in pending litigation is as integral a part of the search for the truth' . . . ."); United States v. Pollock, 417 F. Supp. 1332, 1344 (D. Mass. 1976); *In re* Castellano, 46 A.D.2d 792, 792, (N.Y. App. Div. 1974); Clevite Corp. v. Beckman Instruments, Inc., 257 F. Supp. 50, 52 (S.D. Ca. 1966) ("a trial is not a sporting event but a search for truth.").

26 *See* Magney v. Truc Pham, 466 P.3d 1077, 1082 (Wash. 2020) ("There are two types of privileges: common law privileges and statutory privileges. Common law privileges, such as the attorney-client privilege, are those privileges whose codifications are 'merely declaratory of the common law.' . . . The court has more latitude to interpret common law privileges . . . . In contrast, when a privilege is created by statute and thus is not a privilege found within the common law, it is considered to be in derogation of—

shield certain information from disclosure in discovery or use at trial, courts have been more reticent in expanding those privileges, and generally look at privileges with a wary eye.[27] "Privileges are to be applied more deliberately than other evidentiary rules because they suppress otherwise admissible evidence."[28]

From time to time, courts are presented with arguments and claims for privileges that are not set forth explicitly in a statute. While problematic when not spelled out by a legislature in statute, such situations do not necessarily prevent said courts from recognizing privileges in appropriate circumstances—although most have resisted doing so. The *Federal Rules of Evidence* provide, at Rule 501, that:

> The common law–as interpreted by United States courts in the light of reason and experience–governs a claim of privilege unless any of the following provides otherwise:
>
> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.
>
> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.[29]

that is, an exemption from—the common law, and the statute must be strictly construed.") (citations omitted). The *Truc Pham* Court discussed that while the attorney-client privilege is a creation of common law, with courts having latitude to interpret it, psychologist-patient, physician-patient and marital counseling privileges are created by statute (in the State of Washington), and therefore must be strictly construed according to the provisions of said statutes, since they are legislatively created in derogation of the common law; *Id.* (and as discussed later – in derogation of the search for truth). *See also* Clark Cnty Sch. Dist. v. Las Vegas Rev.-J., 429 P.3d 313, 318 (Nev. 2018) ("It is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly.") (internal quotation marks and citations omitted); Camperlengo v. Blum, 83 A.D.2d 661, 662, (N.Y. App. Div. 1981) ("At the outset, it must be recognized that the privilege here involved is wholly a creature of statute and not an inherent right recognized by common law."); United States v. MHC Surgical Ctrs. Assoc., 911 F. Supp. 358, 359 (N.D. Ind. 1995).

27 *See* Glazer v. Chase Home Fin. LLC, No. 1:09-cv01262, 2015 U.S. Dist. LEXIS 183166*4 (N.D. Ohio June 15, 2015) ("because the privilege is in derogation of the search for truth, it is to be construed narrowly.") (citing *In re* Grand Jury Investigation 723 F.2d 447, 451 (6th Cir. 1983)); Cienfuegos v. Off. of the Architect of the Capitol, 34 F. Supp. 3d 1, 2 (D.D.C. 2014) ("Indeed, privileges are 'not lightly created nor expansively construed, for they are in derogation of the search for truth' . . . They may be created, however, 'to protect weighty and legitimate competing interests.'") (citing United States v. Nixon, 418 U.S. 683, 709 (1974)); Netherlands Ins. Co. v. Nat'l Cas., 283 F.R.D. 412, 416 (C.D. Ill. 2012).

28 *Stevens*, 580 N.W.2d at 79 (citing State v. Lender, 124 N.W.2d 355, 358 (1963)).

29 FED. R. EVID. 501 (2022); *see also* FED. R. EVID. 502 (2022) (providing the rules governing "Attorney-Client Privilege and Work Product; Limitations on Waiver").

A New York State intermediate appellate court, in the face of a request to recognize a parent-child privilege in proceedings before a grand jury, outlined what is required for an evidentiary privilege to exist:

> Notwithstanding the absence of a statutory privilege, we may, nevertheless, draw from the principles of privileged communications in determining in what manner the protection of the Constitution should be extended to the child-parent communication.
>
> Four fundamental conditions must be established in order for a privilege to arise:
>
> > (1) the communications must originate in confidence that they will not be disclosed;
> > (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
> > (3) the relation must be one which, in the opinion of society, ought to be sedulously fostered; and
> > (4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.[30]

Despite having set forth the four factors above, however, the New York court in *A. & M.* ultimately held that "although there are persuasive arguments to apply a privilege in these circumstances, we believe that the creation of a privilege devolves exclusively on the Legislature."[31]

---

[30] *Matter of A. & M.*, 61 A.D.2d 426, 434 (App. Div. 4th Dep't 1978) (citing 8 John Henry Wigmore, EVIDENCE, § 2285 (McNaughton rev. 1961)).

[31] *Id.* at 434–35, 381. Although the Court cited, in a footnote, to an article in a New York State Bar Association publication, "in which the author asserts that a privilege is justified if it satisfies certain inveterate human instincts and desires which are:
(1) instinctive revulsion against betrayal of a confidence;
(2) a sense of compassion even for a transgressor, i.e., a feeling that there should be for every man some sanctuary beyond the reach of societies' law, where he may safely confide his guilty secrets in an attempt to ease his troubled spirit;
(3) a sense of fair play related to the Norman view of a lawsuit as a species of contest or sporting event wherein it would be too easy, and hence unfair and against the "rules of the game" to hound a man to his doom by convicting him through the lips of his own intimate friends, family, or medical, legal or spiritual advisers;
(4) a desire to preserve the function of certain socially valuable relationships, even at the cost of occasional suppression of truth and injustices in such, reasonably few, particular cases;
(5) a feeling of individual and professional pride and self-importance in being the inviolable repository of others' secrets." *Id.* at 434 n.8 (citing and quoting Manley,

New York's limited, common-law parent-child privilege will be examined further in Section III.A, *infra*.

B. Families and Parenting Under Current Evidentiary Law - What Impact by Dobbs?

The present state of the law is unworkable given the unreasonable burdens and potential burdens placed on parents and families. When considering whether to overrule precedent or an existing state law, the Court should consider the workability of the law at issue.[32] The Supreme Court of the United States has held: "[o]ur precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner."[33] The Court proceeded to discuss how to evaluate an "undue burden": "Problems begin with the very concept of an 'undue burden.' As Justice Scalia noted in his [*Planned Parenthood of Southeastern Pennsylvania v.] Casey* partial dissent, determining whether a burden is 'due' or 'undue' is 'inherently standardless.'"[34]

The present framework of the law concerning the lack of a parent-child communication and testimonial privilege is unworkable—not because the application and outcome from the lack of a parent-child privilege is unpredictable in and of itself—but rather because the lack of parent-child privilege in combination with other provisions of law in the United States as of 2022 is unworkable and inconsistent following the *Dobbs* decision and the overruling of *Roe v. Wade*[35] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[36] *Roe*, *Casey,* and

Patient, Penitent, Client, and Spouse in New York, 21 NYSBA BULLETIN 288, 290 (1949) (cleaned up)).

32 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2272 (2022).

33 *Id.* (citing Montejo v. La., 556 U.S. 778, 792 (2009); Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283–84 (1988)).

34 *Dobbs*, 142 S. Ct. at 2272 (citing Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 992 (1992); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2180 (2020) (Gorsuch, J., dissenting) ("[W]hether a burden is deemed undue depends heavily on which factors the judge considers and how much weight he accords each of them." (internal quotation marks and alterations omitted))).

35 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. at 2242.

36 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. at 2242–43. ("We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including . . . the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept

Dobbs were decided against a backdrop concerning varying readings and interpretations of sanctity, privacy, and unity of family.

After *Dobbs*, however, what has resulted is an unworkable condition. Women and families in a number of states may be compelled to bear children if they are pregnant since the laws in those states prohibit abortions for any (or very limited) reasons. Yet, later in life, these women may find themselves compelled to provide testimony against that very child should the child confide in their parent when in trouble with the law—confidences which are normally encouraged when the sanctity and unity of family is otherwise respected.[37] This is the heart of the very real Hobson's choice discussed earlier. In looking to Justice Gorsuch's language from his dissent in *June Medical Services*, as cited in *Dobbs*,[38] the need for parents and children to confide in each other without fear of the heavy hand of the state breaking down their door to demand testimony of one against the other should be granted ultimate weight in the decision whether to create and apply a parent-child communication and testimonial privilege. Unfortunately, the courts have routinely disagreed with this proposition, and indeed many have concluded the exact opposite—that despite there being a 'well recognized' sanctity of the family, when it comes to government wishing to obtain information, purportedly in a truth-seeking function, the rights, privacy and sanctity of the family are disregarded—a self-inconsistency the courts apparently share with Congress to this point. "The prevailing view in the federal courts, . . . is that 'generalized claims regarding the well-recognized sanctity of family life must give way to the overriding needs of the truth-seeking process.'"[39]

There are, however, courts that have recognized the sanctity and unity of family in the United States.[40] The *Unemancipated Minor* court

of ordered liberty.' . . . . The right to abortion does not fall within this category . . . . *Stare decisis* . . . does not compel unending adherence to *Roe*'s abuse of judicial authority.").

37 This self-contradictory position is maybe best understood by boiling it down to Congress' refusal to act because it does not wish to interfere with the sanctity and unity of family, until it benefits the government to do so.

38 *Dobbs*, 142 S. Ct. at 2272 (citing June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2180 (2020)).

39 State v. Maxon, 756 P.2d 1297, 1300 (1988) (en banc) (citing United States v. Davies, 768 F.2d 893, 899 (7th Cir. 1985)). Which is why we include exceptions in proposed Rule 503, Section IV, *infra*.

40 *See In re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. 1487, 1496 (E.D. Wash. 1996) ("Further, a parent-child privilege is justified by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth,' which also serves public ends. As recognized by numerous courts, politicians, and the general public, the relationship of parent to child is one that should be fostered and encouraged.") (citing Jaffee v. Redmond, 518 U.S. 1, 15 (1996) (internal citations omitted); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)

ultimately concluded that, "reason and experience, as well as the public interest, are best served by the recognition of some form of a parent-child privilege."[41] The Court envisioned the privilege to potentially be similar to that between spouses, "assuming that any judicially recognized privilege in the context of parent-child relations would be similar to the marital communications privilege . . . ."[42] However, the Court held that the child did not present evidence that the privilege applied to the specific circumstances in that case at bar and thus denied the motion to quash the grand jury subpoena without prejudice to further showing.[43]

In our modern world, nary a day passes without someone in political office, the court system, the news, or social media lamenting the breakdown of social values and family cohesiveness. Yet, despite such lamentations and the minority of courts finding ground for a parent-child privilege, many other court decisions still refuse to recognize such a privilege. Certain courts have actually stated that they could not identify any good that would result from such a privilege:

> Policy reasons against creating a parent-child privilege center on the loss of valuable evidence. We conclude that the loss of evidence concern outweighs the public policy arguments in favor of a parent-child privilege. We agree with the United States Supreme Court that excluding relevant evidence by creating a privilege is warranted only if the resulting public good transcends the normally predominant principle of using all rational means for ascertaining the truth. We do not, however, perceive any transcending good that would result from creating a parent-child testimonial privilege, and we decline to judicially recognize such a privilege in this state.[44]

("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition."); Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 844 (1977) ("the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promot[ing] a way of life through the instruction of children") (citing Wis. v. Yoder, 406 U.S. 205, 231–33 (1972)) (internal citations omitted); Wis. v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.")).

41 *In re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. at 1497.

42 *Id.*

43 *Id.* at 1497–98.

44 *Maxon*, 756 P. 2d at 1303 (citing Trammel v. United States., 445 U.S. 40, 50 (1980)).

The casual reader, or those unaware of procedures used in the investigation of crimes, may be unfamiliar with the fact that, unbelievably, in the United States today, there are jurisdictions that technically permit the use of deception (what might amount to lying) by police investigators when questioning suspects.[45] Yes, you read that correctly. Further, lying to minors who are the target of police questioning is also technically not prohibited.[46] This includes jurisdictions thought of as more "progressive" and protective of individual rights—such as New York State.[47] Of course, even though confessions obtained through the use of coercion or force may be suppressed ("thrown out" in the vernacular) by a judge, the use of deception creates a stickier wicket.[48] This becomes an even greater concern when the effects are viewed in light of minors versus adults. According to Professors Pollack and Weiss:

> according to the National Registry of Exonerations, 38% of exonerations for crimes allegedly committed by children under the age of 18 involved false confessions, compared with only 11% for adults. This 27% gap can be attributed to a number of factors, including: children's inability to process information as quickly as an adult, tendency to focus on short term gratification, deference to authority figures, and developmental vulnerabilities, among a host of other psychological and biological components. Simply put, juveniles are especially impressionable and highly susceptible to deceptive interrogation tactics. They require additional protections by our lawmakers to protect their liberty during criminal interrogations.[49]

Minors—children—are particularly susceptible to coercion and deception. They are among the most vulnerable in our society simply because their brains and emotional states have not yet fully developed.[50]

---

45 *See, e.g.*, Daniel Pollack & Helene M. Weiss, *Lying to Minors During Interrogations Should Be Illegal*, LAW.COM: N.Y. L.J. (Apr. 21, 2022, 10:00 AM), https://www.law.com/newyorklawjournal/2022/04/21/lying-to-minors-during-interrogations-should-be-illegal/.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*; *see also In re* Anthony L., 256 Cal.Rptr.3d 688, 697 (Ct. App. 2019) ("[d]evelopmental and neurological science concludes that the process of cognitive brain development continues into adulthood, and that the human brain undergoes dynamic changes throughout adolescence and well into young adulthood, and that, as recognized by the United States Supreme Court, children generally are less mature and responsible than adults; they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; they are more vulnerable

In addition, as cited by the First District California Court of Appeal in *In re Anthony L.*,

> [t]he Legislature also found that juveniles are less able than adults to understand the meaning of their *Miranda* rights and the consequences of waiving them, that adolescents tend to "ignore or discount future outcomes and implications" and disregard long-term consequences of important decisions, and that juveniles are more vulnerable to "psychologically coercive interrogations" than adults experienced with the criminal justice system…. For these reasons, the Legislature concluded, "in situations of custodial interrogation and prior to making a waiver of rights under [*Miranda*], youth under 18 years of age should consult with legal counsel to assist in their understanding of their rights and the consequences of waiving those rights."[51]

The discussion and recognition voiced by the California Court of Appeal is worthy of applause but should concomitantly sound a cautionary note. Considering that minors are impressionable, lack maturity and understanding in difficult and serious situations, and are therefore advised to consult with an attorney prior to speaking with law enforcement, communications which are privileged. Before consulting with an attorney, minors will often consult their parents because the minors lack maturity and understanding in difficult situations, communications that are not privileged. The next logical step in the process *must* also be acknowledged and codified—minors *must* be able to consult with their parent(s), seek guidance, and determine how best to retain the proper attorney and whether to make a knowing and intelligent waiver of their Fifth Amendment rights, without fear that those conversations will face compelled disclosure.[52] Anything less is an abdication of society's obligation to safeguard its children and a violation of parental constitutional rights.

Furthermore, in light of *Dobbs*, the Supreme Court has determined that, in the sphere of pregnancy, there is no federal constitutional protection or right to privacy that would shield abortion.[53] Thus, states

---

or susceptible to . . . outside pressures than adults; they have limited understandings of the criminal justice system and the roles of the institutional actors within it; and they characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.") (citing S. Res. 395 (Cal. 2017); J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011); Graham v. Florida, 560 U.S. 48, 78 (2010) (cleaned up)).

51 *In re* Anthony L., 256 Cal.Rptr.3d at 697-698 (citing Stats. 2017, ch. 681, § 1, subd. (b)–(c)).

52 *See* Miranda v. Arizona, 384 U.S. 436, 492 (1966).

53 *Dobbs*, 142 S. Ct. at 2279.

are free to compel that all fetuses in the womb must be brought to birth and life outside of the mother, regardless of circumstance.[54] In such a situation, post-*Dobbs*, should the United States then establish a uniform parent-child privilege so that the child may confide in their parent and the parent in their child when they are facing grave difficulties and troubles later in life? If not, if we do not believe that the sanctity of family goes that far past the potential for compelled birthing, then what exactly is it that we are compelling in the United States? Shall we presume that our legal system itself is contributing to the breakdown of trust and confidence in families? Put another way, is it possible not to conclude that such is the case? The answer will be found where the mantle has been laid—at the feet of Congress—and thus the Evidence Rule 503 proposed by this article.

II. SELECT PRIVILEGES ACROSS THE CENTURIES AND IN PRESENT EVIDENTIARY LAW

A number of jurisdictions have, through legislative action, court rules, or common law court decisions, recognized a number of privileges that prevent disclosure of certain information communicated by virtue of the participants in those communications having a specific relationship. This section will address four of those in particular: the attorney-client privilege, the clergy-penitent privilege, the physician-patient or therapist-patient privilege, and the marital or spousal privilege.

A. Attorney-Client

Courts have held that while it may certainly be said that the search for facts and truth in litigation and legal proceedings would be advanced by obtaining the information communicated from a client to their attorney, society and the legal system are better served by the existence of the attorney-client privilege and the shield it presents.[55] The

54 *Id*. Of course, the reverse side of the same coin is that states are also free to provide greater protections for abortion and termination of pregnancy under state laws and state constitutions—since after *Dobbs*, the U.S. Constitution does not preempt or control the field one way or the other. However, even in those states where abortion is available, if a child is born, that child deserves to grow up in a family where sanctity and unity provide a safe environ, within which they can seek guidance, and admit wrongs, without fear of creating witnesses for the prosecution or a plaintiff.

55 *See* Lien v. Wilson & McIlvaine, 1988 WL 58613 at *2 (N.D. Ill. June 2, 1988) ("It is now necessary to comment upon defendant's claim that the relevance of the document overcomes the privilege. It is a rare case, undoubtedly, in which access to attorney-client material would not aid the search for truth. It is axiomatic that the privilege may act in derogation of the truth. Nevertheless, it is believed that overall the search for truth is enhanced by a client's full and complete disclosure to one's attorney.").

attorney-client privilege is, in fact, the cornerstone of the relationship between a person and their lawyer within the legal system[56]—a bedrock principle and the oldest of the known common law privileges, which has existed for nearly 400 years.[57]

> The attorney-client privilege is the cornerstone upon which the attorney-client relationship is formed. The purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration." Moreover, the attorney-client privilege gives clients the right to refuse to disclose and to prevent others from disclosing confidential communications made between the attorney and client in the course of seeking or rendering legal advice. While this privilege is not absolute, it is to remain inviolate unless it is clearly waived. "Communications made by a client to his attorney, with a view to professional advice or assistance, are privileged; and courts will not require nor permit them to be divulged by the attorney, without the consent of his client, whose privilege it is." Notwithstanding, in certain limited situations, a waiver of the attorney-client privilege can be implied by the conduct of the one asserting it.[58]

---

56 *See* Sinclair Wyo. Refining Co. v. A&B Builders, Ltd., 2017 WL 10309305 at *9 (D. Wyo. Oct. 24, 2017) ("Attorney-client privilege and work-product are cornerstones of the judicial process"); Johnson Matthey, Inc. v. Research Corp., 2002 WL 1728566 at *2 (S.D.N.Y. July 24, 2002) ("The attorney-client privilege is one of the cornerstones of our system of justice, . . . but it is not inviolate and may be waived.") (citing Upjohn Co. v. U.S., 449 U.S. 383, 389(1981)); McClary v. Walsh, 202 F.R.D. 286, 294 (N.D. Ala. 2000) ("The court agrees with counsel for defendants that the attorney/client privilege is a cornerstone of Anglo–American law, and is virtually sacrosanct.")).

57 *See Upjohn*, 449 U.S. at 389 ("The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law."); People v. Radojcic, 998 N.E.2d 1212, 1221 (Ill. 2013); Hunt v. Blackburn, 128 U.S. 464, 470 (1888); Cohen v. Middletown Enlarged City Sch. Dist.,2007 WL 631298 at *1 (S.D.N.Y. Feb. 28, 2007) ("the attorney-client privilege is the oldest recognized testimonial privilege in Anglo-American jurisprudence, dating back to the 1600s, and is regarded as a bastion of the attorney-client relationship"); Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155, 158 n.10 (Del. Ct. of Ch. 2013) (citing and quoting Union Carbide Corp. v. Dow Chem. Co., 619 F. Supp. 1036, 1046 (D. Del. 1985) ("the attorney-client privilege 'dates back to the 16th century'")); People v. Radtke, 588 N.Y.S.2d 69, 70 (N.Y. Sup. Ct. 1992) ("The history of the attorney-client privilege dates back to the reign of Elizabeth I and, thus, appears to be the oldest of the confidential communication privileges"); State v. Longo, 789 S.W.2d 812, 814–815 (Mo. Ct. Apps. 1990); *In re* von Bulow, 828 F.2d 94, 100 (2d Cir. 1987).

58 G. Rand Smith Co., L.P.A. v. Footbridge Capital, LLC, 2002 WL 987846 at *2 (Ohio Ct. App. May 3, 2002) (citing Ward v. Graydon, Head & Ritchey, 770 N.E.2d 613, 617 (Ohio Ct. App. 2001), *abrogation on the issue of implied waiver and the Hearn test* (Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975)) *noted by* Jackson v. Greger, 854 N.E.2d

Most of the States have adopted and incorporated the attorney-client privilege specifically via statute.[59]

Several elements must be satisfied for the attorney-client privilege to apply. According to the Illinois Supreme Court,

> [t]his court has recognized the following essential elements for the creation and application of the attorney-client privilege:
> "'(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.'"[60]

In basic terms, the attorney-client privilege applies when there is "(1) a communication[,] (2) made between privileged persons[,] (3) in confidence[,] (4) for the purpose of obtaining or providing legal assistance for the client."[61] Absent an applicable exception, as discussed *infra*, the attorney-client privilege is held to protect communications between client and attorney, but is not technically held inviolate in legal proceedings like the work product privilege.[62]

487, 491 (Ohio 2006); Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981); Frank W. Schaefer, Inc. v. C. Garfield Mitchell Ag., Inc., 612 N.E.2d 442, 446–47 (Ohio Ct. App. 1992), *abrogation on the issue of implied waiver and the Hearn test also noted by* Jackson v. Greger; H & D Steel Service, Inc. v. Weston, Hurd, Fallon, Paisley & Howley, 1998 WL 413772 at *3 (Ohio Ct. App. July 23, 1998) (quoting King v. Barrett, 11 Ohio St. 261 (Ohio 1860))).

59 *See, e.g.*, KS. ST. 60-426 (2022); MT. ST. 26-1-803 (2021); NV. ST. 49.105 (2021); N.Y. CPLR 4503 (2022); PA. ST. 42 Pa.C.S.A. § 5928 (2022).

60 People v. Radojcic, 998 N.E.2d at 1221 (citing People v. Adam, 280 N.E.2d 205, 207 (1972)).

61 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 68 (2012); *see also* RESTATEMENT, § 69 ("A communication within the meaning of § 68 is any expression through which a privileged person, as defined in § 70, undertakes to convey information to another privileged person and any document or other record revealing such an expression"); RESTATEMENT, § 70 ("Privileged persons within the meaning of § 68 are the client (including a prospective client), the client's lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation").

62 Expedia, Inc. v. City of Columbus, 699 S.E.2d 600, 603 (Ga. Ct. App. 2010) ("Specifically, even were collateral appeals from discovery orders permissible, the confidentiality attaching to attorney-client communications is not inviolate, and those involved must always account 'for the possibility that they will later be required by law to disclose their communications for a variety of reasons—for example, because they misjudged the scope of the privilege, because they waived the privilege, or [as the special master here determined,] because their communications fell within the privilege's crime-fraud exception'"); Banks v. Office of Senate Sergeant-at-Arms, 222 F.R.D. 1, 4 (D.D.C. 2004) ("the 'mental impressions, conclusions, opinions or legal theories of an attorney . . . concerning the litigation' are never to be disclosed. FED. R. CIV. P. 26(b)(3).

In the federal system, the attorney-client privilege is governed by Federal Rule of Evidence 501, which requires courts to look to state law in civil cases when the state law provides the law of decision, or federal common law court decisions in the case of federal criminal cases.[63]

B. Clergy-Penitent

The clergy-penitent privilege, originally known as the priest-penitent privilege, and now also sometimes called the minister-penitent privilege, has a long and tortured history. That history also lacks clarity. It appears that the roots of the privilege may go back further than those for the vaunted attorney-client privilege—but communications in a confessional have not received the same protection under common law traditions,[64] thus relying on statutes or more recent court decisions.[65]

Hence, the attorney-client privilege may yield to several exceptions, but the work product privilege is, in this sense, inviolate").

63 *See* United States v. Cole, 569 F. Supp. 3d 696, 700 (N.D. Ohio 2021); *see also* FED. R. EVID. 501; *see generally* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

64 Rivers v. Rivers, 292 S.C. 21, 25 (Ct. App. 1987) ("Confidential communications made to clergymen were not privileged at common law.").

65 *Compare* Nestle v. Commonwealth, 22 Va. App. 336, 343–44 (1996) (interestingly, in the Commonwealth of Virginia, as opposed to other jurisdictions, the privilege is actually vested in the priest/minister, and not the layperson confessing to them: "[w]e hold that under Virginia law, the priest-penitent privilege belongs to the clergyman, not the layman . . . the United States Court of Appeals for the Fourth Circuit decided the identical issue, as it relates to the priest-penitent privilege for *civil* cases. In *Seidman*, the defendant contended that the confidential communications made to her priest enjoyed the protection of the priest-penitent privilege. The Court analyzed Code § 8.01-400, which is the civil counterpart to Code § 19.2-271.3, and which utilizes the same operative language found in Code § 19.2-271.3. The Court held that while most priest-penitent statutes 'explicitly prohibit the clergyman from disclosing the contents of a confidential communication without the consent of the person making the communication,' the language in Virginia's civil priest-penitent privilege statute 'plainly invests the priest with the privilege and leaves it to his conscience to decide when disclosure is appropriate.' The Court buttressed its conclusion by contrasting Code § 8.01-400's statutory language with other code sections, such as Code § 8.01-399 (physician-patient privilege) and Code § 8.01-400.2 (psychologist-client privilege). According to those provisions, the communicant must request or consent to the elicitation of the privileged testimony") (citing and quoting Seidman v. Fishburne–Hudgins Educ. Found., Inc., 724 F.2d 413, 415–16 (4th Cir. 1984)) *with* CT. ST. § 52-146b (2022) (privilege explicitly including a "rabbi or practitioner of any religious denomination accredited by the religious body to which he belongs").
See also N.Y. CPLR 4505 (2022) (clergy member must be acting in a spiritual capacity for the privilege to apply); Matter of Keenan v. Gigante, 47 N.Y.2d 160, 166–67, (1979), *cert. denied* Gigante v. Lankler, 444 U.S. 887 (1979); IL. ST. CH. 735 § 5/8-803 (2022) (the privilege in Illinois belongs to *both* the clergy and the one confessing); People v. Thomas, 18 N.E.3d 577, 597 (Ill. App. Ct. 2d Dist. 2014) (citing People v. Burnidge, 279 Ill.App.3d 127, 131 (Ill. Ct. App. 2d Dist. 1996); People v. Bole, 223 Ill.App.3d 247, 262–63 (Ill. Ct. App. 2d Dist. 1991); CAL. EVID. CODE § 1033 (Deering 2022) (in California, the clergy and the penitent hold the privilege); LA. CODE EVID. ANN. art 511 (2022) (both the penitent

> The privilege granted to *confessors* appears to have been established by the Roman Catholic Church as early as the Fifth Century. . . . While the common law history of the priest-penitent privilege is less than clear, most scholars agree that pre-Reformation England, out of respect for the Catholic church and the Seal of Confession, recognized a privilege protecting communications made to a *confessor*. With the advent of the Reformation and the rise of the Anglican Church in England, however, the privilege was greatly abrogated, if not completely abolished. Blackstone makes no mention of the privilege in his famed commentaries on the common law, and the case law, what little there is, appears unanimous in denying the privilege. Thus, most scholars conclude that the priest-penitent privilege is not a part of England's common law legacy. In fact, a privilege protecting confessional communications is not recognized in England today.[66]

The first state in the United States to recognize a clergy-penitent privilege appears to have been New York, in the early 1800s.[67]

> In *Phillips*, the defendant had been charged with trafficking in stolen goods. Prior to trial, Phillips confessed the offenses to his Catholic priest and gave him the stolen property so that it might be returned. When called upon at trial, the priest would not testify, refusing to violate the canons of his church. The court, relying upon the priest's freedom of religion as guaranteed by New York's constitution, held that he, in fact, could not be forced to reveal that which he had heard during the administration of the sacrament of Penance.[68]

However, the privilege was not extended to other religions and their clergy since the "seal of the confessional" applied only to Catholics and their priests.[69]

---

and clergy hold the privilege); Cox v. Miller, 296 F.3d 89, 102 (2d Cir. 2002) ("Today, however, every state has enacted the cleric-congregant privilege in some form. . . . The statutes differ in three principal respects: their definition of 'clergy,' their scope, and the question of to whom the privilege 'belongs,' i.e., who may claim or waive, the privilege–the cleric, the congregant, or both") (citing Ronald J. Colombo, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L. REV. 225, 231–232 & n. 39 (1998) (collecting statutes))).

66 *Nestle*, 22 Va. App. at 344–45 (citations and footnotes omitted) (citing *The Code of Canon Law in English Translation*, Canons 983, 984 (Collins, Trans. 1983); *Confessor*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

67 *Id*. at 345 (citing People v. Phillips, N.Y. Ct. Gen. Sess. 1813 (abstracted in 1 W.L.J. 109, 112–13 (1843)).

68 *Id*.

69 *Id*. at 345 (citing People v. Smith, 2 N.Y. City Hall Rec. 77 (1817)) ("den[ying] the privilege to a Protestant minister who refused to testify regarding confessions made to him by the defendant. . . . The court, distinguishing its case from *Phillips*, noted that the

By 1828, the New York State Legislature recognized the need to reconcile the split in case authority, which followed a split along religious and spiritual lines. Thus, in 1828, following the *Smith* decision, New York was the first state to provide all clergy, regardless of denomination, with an evidentiary privilege based on what they might hear in a confessional.[70] Pursuant to that original legislative action, protection extended to priests and ministers (although based on the statutory language it appears at least questionable whether it also applied to those of the Jewish, Muslim, or Buddhist faiths, among others):

> No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination. N.Y. Rev. Stat. § 72, pt. 3, ch. VII, tit. III, art. 8 (1828).[71]

As of 1996, "all fifty states have a statute recognizing some form of the priest-penitent privilege. Virginia first enacted a statute granting the privilege in civil trials in 1962 . . . and further enacted [another Code section] in 1985, granting the privilege in criminal trials."[72]

Different jurisdictions have different elements and burdens that must be met by a party seeking to hold their communications with a member of the clergy confidential and privileged in the face of a subpoena or other legal proceeding. For example, in the State of Connecticut, "[t]he privilege applies 'only to communications involving religious or spiritual advice, aid or comfort.' . . . For the privilege to apply, a penitent must demonstrate:

> (1) there was a communication; (2) the communication was confidential; (3) it was made to a member of the clergy within the meaning of the statute; (4) the communication was made

clergy in *Phillips* had been a Roman Catholic priest, bound by the rules of the Catholic church, while the clergy before it was Protestant and, as such, not bound by the seal of the confessional").

70 *Id*. at 345.

71 *Compare id*. *with* VA. CODE ANN. § 19.2-271.3 (2022) ("*No regular minister, priest, rabbi or accredited practitioner over the age of eighteen years, of any religious organization or denomination* usually referred to as a church, shall be required in giving testimony as a witness in any criminal action to disclose any information communicated to him by the accused in a confidential manner, properly entrusted to him in his professional capacity and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, where such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.") (emphasis added).

72 *Id*. at 345–46, 138 (citing VA. CODE § 8.01-400, enacted as § 8-289.2); VA. CODE. ANN. § 19.2-271.3 (2022).

> to the clergy member in his or her professional capacity; (5) the disclosure was sought as part of a criminal or civil case; and (6) the defendant did not waive the privilege."[73]

Furthermore, "[t]he party asserting the privilege bears the burden of establishing each element of the privilege."[74]

One last matter of note should be considered when studying the clergy-penitent privilege. The Virginia privilege, as created, is applied to the communications made to the minister or priest by the accused in a case, which seems to create the very real possibility in that state that a member of the clergy could be compelled to testify concerning a confession made to the clergy member by someone other than the accused/defendant in a criminal proceeding.[75] In such a light, there would appear to be a very large gap in the privilege in Virginia, as

---

[73] Mirlis v. Greer, 249 F. Supp. 3d 611, 616 (D. Conn. 2017) (citing Thopsey v. Bridgeport Roman Catholic Diocesan Corp., No. NNHCV106009360S, 2012 WL 695624, at *9–10 (Conn. Super. Ct. Feb. 15, 2012)); State v. Mark R., 17 A.3d 1 (Conn. 2011)). In other jurisdictions, the burden is similar, although not always identical. *See* State v. Martin, 91 Wn. App. 621, 626 (1998) (penitent bears the burden to "demonstrate that three elements were satisfied: (1) that his communication to Pastor Hamlin was a 'confession'; (2) that Pastor Hamlin received the confession in the course of the discipline to which he belonged; and (3) that the *confessor*, Martin, felt constrained by his religious doctrine to disclose his alleged criminal conduct to a clergy member"); State v. Archibeque, 223 Ariz. 231, 234 (App. 2009) ("A determination of whether the clergy-penitent privilege applies involves a three-step inquiry: (1) Is the person who received the confession a 'clergyman or priest'? (2) Was the confession made while the clergyman or priest was acting in his professional capacity? (3) Was the confession made in the course of discipline enjoined by the church to which the clergyman or priest belongs? If the answer to all three inquiries is affirmative, then the clergy-penitent privilege under § 13-4062(3) applies, unless the privilege is waived"); Nicholson v. Wittig, 832 S.W.2d 681, 689–90 n.1, 2 (Tex. App.—Houston [1st Dist.] 1992 no writ) ("Some cases identify three elements to the clergy privilege. . . . In *Edwards* . . . the privilege is considered to have the following elements: (1) the communication must be intended to be confidential; (2) it must be made to a member of the clergy who by his or her religious discipline is authorized to hear such communications; and (3) such clergy had a duty under the discipline of the religious organization to keep such communications secret. Other courts identify four elements to the clergy privilege. In *Rivers*, for example, the privilege is considered to have the following elements: (1) the communication must be confidential; (2) it must be disclosed to an ordained minister, priest, or rabbi; (3) it must be entrusted to the minister in his or her professional capacity; and (4) it must be one that is necessary to enable the minister to discharge his or her functions of the office") (citing *In re* Grand Jury Investigation, 918 F.2d 374, 384 (3d Cir. 1990); People v. Edwards, 248 Cal.Rptr. 53, 56 (Cal. Ct. App. 1st Dist. 1988); Rivers v. Rivers, 292 S.C. 21, 25–26, 354 (S.C. Ct. App. 1987)).

[74] *Mirlis*, 249 F. Supp. 3d at 616 (citing *Mark R.*, 300 Conn. at 598).

[75] *See* O'Dell v. Commonwealth, 234 Va. 672, 704 (Va. 1988) ("O'Dell also erroneously claims a 'priest-penitent' privilege justifies his failure to present the testimony of the minister who allegedly heard Pruett's confession of Schartner's murder. Code § 19.2–271.3 creates a 'priest-penitent' privilege in criminal cases, but limits the privilege to 'information communicated to [the minister] by the accused.' O'Dell, not Pruett, is the accused in this case.") (citing VA. CODE § 19.2–271.3).

discussed in *O'Dell*, where if the defendant is not the penitent, the clergy member could be compelled to testify.

In the federal system, there has been a federal common law recognition of a clergy-penitent privilege.[76]

C. Physician/Therapist-Patient

The physician-patient and therapist-patient privileges are generally statutory creations.[77]

When it comes to the elements necessary for consideration and application of the physician-patient privilege, courts have held:

> We have stated that the "physician-patient privilege is intended to promote free and full communication between a patient and his doctor so that the doctor will have the information necessary to competently diagnose and treat the patient."… We construe the statute liberally to carry out its manifest purpose…. The essential elements of the privilege are: (1) the relationship of physician-patient; (2) the acquisition of information during the relationship; and (3) the necessity and propriety of the information to enable the physician to treat the patient skillfully.[78]

"The therapist-client privilege statute, by its terms, addresses only the competency of registered nurses, psychologists, and licensed social workers."[79]

In the federal system, the courts are not clear concerning the recognition of a therapist-patient privilege—for instance, the Southern District of New York recognizes this privilege, while the Southern District of Florida and the Northern District of Indiana have held that federal common law does not recognize a therapist-patient privilege nor a physician-patient privilege, respectively.[80] The Supreme Court,

---

76 Cook v. City of Trimble, No. 03-2852 D/A, 2005 WL 8156633, at *2 (W.D. Tenn. 2005) (citing *Trammel*, 445 U.S. at 51; U.S. v. Nixon, 418 U.S. at 709).

77 *See generally* Maillaro v. New York Presbyterian Hosp., Civil Action No. 10–3474 (FLW), 2011 WL 4860027 (D. N.J. 2011) (citing and discussing New York and New Jersey statutes, and caselaw expounding thereon); State v. Eldrenkamp, 541 N.W.2d 877 (Iowa 1995); *see also* State v. Gibson, 476 P.2d 727, 729 (Wash. Ct. App. 1970) ("The physician-patient privilege in our state is statutory in nature").

78 *Eldrenkamp*, 541 N.W.2d at 881 (citing State v. Deases, 518 N.W.2d 784, 787 (Iowa 1994); Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)); *see also* Branch v. Wilkinson, 198 Neb. 649, 655 (1977).

79 State v. Expose, 872 N.W.2d 252, 260 (Minn. 2015) (citing MINN. STAT. § 595.02, subd. 1(g)).

80 *See, e.g.*, Sobel v. Cmty. Access, Inc., No. 03Civ.5642 LAKMHD, 2007 WL 2076977, at *1 (S.D.N.Y. July 18, 2007); Spakes v. Broward Cnty. Sheriff's Off., CASE NO. 06-61471-CIV-MARRA/JOHNSON, 2007 WL 9653285, at *1 (S.D. Fla. Aug. 8, 2007); Perry v. Wabash Cnty. Hosp., No. S90–377, 1991 WL 79569, at *2 (N.D. Ind. Feb. 25, 1991).

however, has recognized a common law psychotherapist-patient privilege.[81] Pursuant to Federal Rule of Evidence 501, though, if state law governs the rule of decision, then state law will determine if the privileges apply in that jurisdiction.

D. Marital or Spousal Privilege[82]

A spousal or marital privilege, while not as old as that of attorney and client, nevertheless dates back at least to the 1700s in England. Professor Blackstone wrote of it as follows:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and *cover*, she performs everything; . . . and her condition during her marriage is called coverture. . . . [I]n trials of any sort, they are not allowed to be evidence for, or against, each other: partly because it is impossible their testimony should be indifferent; but principally because of the union of person . . . .[83]

Jurisdictions tend to recognize several versions of a privilege that can be applied to married persons in the context of their marital union. Generally, the privileges are termed the "marital communications privilege" or "confidential marital communications privilege," and the "adverse spousal testimonial privilege" or "spousal privilege" (although different jurisdictions may recognize the privileges under slightly different names). In the federal system,

> At common law, there are two marital testimonial privileges available to preclude certain statements from entering into

81 *See Cook*, 2005 WL 8156633, at *2 (citing *Jaffee*, 518 U.S. 1).

82 Since the Supreme Court of the United States decided Obergefell v. Hodges, 576 U.S. 644, 669 (2015), it would appear that same-sex married couples enjoy the same marital privileges under the evidentiary law as do heterosexual couples. *See* Mize v. Pompeo, 482 F. Supp. 3d 1317, 1334 (N.D. Ga. 2020). ("'[T]he Constitution entitles same-sex couples to civil marriage on the same terms and conditions as opposite-sex couples.' . . . This includes equal access not just to the 'symbolic recognition' of marriage but also to the 'material benefits' that come with it. . . . These benefits arise in numerous areas, including 'taxation; inheritance and property rights; rules of intestate succession; **spousal privilege in the law of evidence**; hospital access . . . .' Ultimately, the government cannot 'den[y] married same-sex couples access to the constellation of benefits that the State has linked to marriage,' whatever those benefits might be.") (emphasis added) (citing Pavan v. Smith, 137 S. Ct. 2075, 2076, 2078 (2017); *Obergefell*, 576 U.S. at 669).

83 William Blackstone, Esq., COMMENTARIES ON THE LAWS OF ENGLAND (Book the First), *The Rights of Persons*, at 430–31 (Oxford 1765), as re-printed THE LEGAL CLASSICS LIBRARY, GRYPHON EDITIONS, LTD. (1983).

> evidence. . . . The adverse spousal testimony privilege permits an individual to refuse to testify in a criminal proceeding against her or his spouse. . . . The second marital privilege—the confidential marital communications privilege—is narrower than the adverse spousal testimony privilege and seeks only to protect the intimacy of private marital communications, but it can be invoked by either spouse to prevent the revelation of such communications.[84]

"'Both privileges depend on the existence of a valid marriage, as determined by state law.'"[85] While the adverse testimonial privilege is held by the spouse called to testify, (who may then refuse to testify against their spouse), both spouses hold the marital communications privilege, and therefore either may object or seek to maintain the confidentiality of a communication made within the marriage.[86]

The United States District Court for the Southern District of Illinois, in a 2012 opinion, set forth a clear and informative description of the privileges and exceptions applicable to married couples. The decision is quoted at length, given its expositive nature:

> "There are two clearly recognized marital privileges: the marital testimonial privilege and the marital communications privilege." . . . "Distinct differences exist between the purposes of the two privileges." . . . "The testimonial privilege looks forward with reference to the particular marriage at hand: the privilege is meant to protect against the impact of the testimony on the marriage." . . . "The marital communications privilege in a sense, is broader and more abstract: it exists to ensure that spouses generally, prior to any involvement in a criminal activity or a trial, feel free to communicate their deepest feelings to each other without fear or eventual exposure in a court of law." . . . Since both privileges are closely related, "to understand the one, it is necessary to understand the relationship between the two privileges." . . . The marital communications privilege "applies only to communications

---

84 U.S. v. Pugh, 162 F. Supp. 3d 97, 101 (E.D.N.Y. 2016) (citing Scott v. Woodworth, No. 12–CV–0020 (LEK) (CFH), 2013 WL 3338574, at *8 (N.D.N.Y. July 2, 2013)) (cleaned up); U.S. v. Premises Known as 281 Syosset Woodbury Rd., 71 F.3d 1067, 1070 (2d Cir. 1995) (quoting *In re* Grand Jury Subpoena, 755 F.2d 1022, 1027 (2d Cir. 1985), *vacated on other grounds sub nom.* U.S. v. Koecher, 475 U.S. 133, 106 S. Ct. 1253 (1986))). *See also* U.S. v. Helbrans, 570 F. Supp. 3d 83, 87–88 (S.D.N.Y. 2021) (citing, *inter alia*, Trammel, 445 U.S. at 53; *In re* Rsrv. Fund Sec. & Derivative Litig., 275 F.R.D. 154, 157 (S.D.N.Y. 2011); Blau v. U.S., 340 U.S. 332, 333 (1951)).

85 *Helbrans*, 570 F. Supp. 3d at 87–88 (citing United States v. Fomichev, 899 F.3d 766, 771 (9th Cir. 2018*), amended on denial of reh'g*, 909 F.3d 1078 (9th Cir. 2018) (quoting United States v. Lustig, 555 F.2d 737, 747 (9th Cir. 1977)).

86 *Pugh*, 162 F. Supp. 3d at 101.

> made in confidence between the spouses during a valid marriage." . . . "The privilege may be asserted by either spouse." . . . "It 'exists to ensure that spouses generally, prior to any involvement in criminal activity or a trial, feel free to communicate their deepest feelings to each other without fear of eventual exposure in a court of law.'" . . . "'[W]hile divorce removes the bar of incompetency, it does not terminate the privilege for confidential marital communications.'" . . . "Exceptions to the privilege result from the tension between the cost of reducing our ability to punish criminals and the value of increased spousal communication." . . . "For example, we only protect statements made in absolute confidence; that necessary element is lost when spouses permit third parties to witness their communications." . . . "Because testimony about first-hand observations would not affect the decision to confide in one's spouse, the privilege does not extend to descriptions of observations." . . . "In addition, we do not value criminal collusion between spouses, so any confidential statements concerning a joint criminal enterprise are not protected by the privilege." . . . The Seventh Circuit has also recognized a "business affairs" exception, where the spouse's marital relationship is merely incidental to the business transaction . . . .
>
> The marital testimonial privilege, on the other hand, "protects an individual from being forced to testify against his or her spouse." . . . "Only the testifying spouse can assert the privilege, and the privilege may be waived." . . . "The testimonial privilege, should the witness-spouse assert it, applies to all testimony against a defendant-spouse, including testimony on nonconfidential matters and matters which occurred prior to the marriage." . . . "The testimonial privilege, however, may not be asserted after a marriage is terminated, because there is no longer any reason to protect that particular marriage." . . . "Moreover, courts seem to agree that the testimonial privilege may not be asserted where the marriage between the defendant and the testifying spouse is in fact moribund, though legally still valid." . . . The Supreme Court has recognized an exception to the marital testimonial privilege for cases in which one spouse commits a crime against the other.[87]

[87] U.S. v. Nash, 910 F. Supp. 2d 1133, 1137–38 (S.D. Ill. 2012) (citing, *inter alia*, U.S. v. Westmoreland, 312 F.3d 302, 307 n.3 (7th Cir. 2002); U.S. v. Byrd, 750 F.2d 585, 589, 590 (7th Cir. 1984); U.S. v. Darif, 446 F.3d 701, 705, 707 (7th Cir. 2006); U.S. v. Short, 4 F.3d 475, 478 (7th Cir. 1993); Trammel v. U.S., 445 U.S. 40, 46 n.7 (1980) (citing Wyatt v. U.S., 362 U.S. 525, 526 (1960)).

The marital communications privilege applies only to those communications taking place *during* a marriage—meaning *after* the spouses are officially married, and for purposes of the spousal testimony privilege *only* while the marriage still exists.[88] The United States District Court for the Eastern District of New York set forth the elements necessary for application of the marital communications privilege: "[t]here are three prerequisites to the application of the spousal communications privilege: (1) a valid marriage at the time of the communication; (2) the privilege applies only to utterances or expressions intended by one spouse to convey a message to the other; and (3) the communication must have been made in confidence, which is presumed."[89] In addition, the *Pugh* Court stated, "'[b]ecause the marital privilege deprives fact-finders of potentially useful information,' . . . '[t]he party asserting . . . the marital communications privilege, bears the burden of establishing all of the essential elements involved . . . .'"[90] Additionally, courts have held that the privileges will not apply if the marriage is purely for the purpose of avoiding testimony in the first place (*e.g.* a marriage that is "collusive" in nature).[91]

Additionally, the marital or spousal privilege does not apply—is "destroyed"—by the presence of third persons who are not parties to the marital relationship. Thus, even communications between married spouses that would normally be privileged will not be granted protection under the evidence rules if a third person, including one or more of their children (who is old enough to understand the conversation), is present.[92]

Some jurisdictions, such as the State of New Mexico, have even begun to question or study whether the spousal communication privilege should remain in evidentiary rules, or whether the privilege has become "antiquated and no longer needed".[93]

---

88 *See* Antech Diagnostics, Inc. v. Veterinary Oncology & Hematology Ctr., LLC, Civ. No. 3:16CV00481(AWT), 2018 WL 2254543, at *9 (D. Conn. May 17, 2018) ("marital communications privilege attaches only to those communications made during a legally valid marriage"); Commonwealth v. Lewis, 39 A.3d 341, 347 (Pa. Super. Ct. 2012) ("the privilege applies to events occurring during the marriage but not to pre-marital events or communications, . . . the privilege is available as to all spousal adverse testimony as long as a valid marriage exists") (citations omitted).

89 *Pugh*, 162 F. Supp. 3d at 101 (citations omitted).

90 *Id*. at 102 (citations omitted).

91 *Lewis*, 39 A.3d at 347.

92 State v. Jones, 125 Idaho 477, 487–88 (1994), *cert. denied* Jones v. Idaho, 513 U.S. 901 (1994), *overruled on other grounds by* State v. Montgomery, 163 Idaho 40, 408 P.3d 38 (2017).

93 *See* State v. Gutierrez, 482 P.3d 700, 703, 719 (N.M. 2019) (Nakamura, C.J., questioning continued viability of spousal communication privilege in Rule 11-505

III. THE URGENT CASE IN SUPPORT OF A PARENT-CHILD COMMUNICATION & TESTIMONIAL PRIVILEGE

A. The Law on Parent-Child Communication and Testimonial Privilege is Unsettled & Far from Uniform Nationwide

The issue of a parent-child communication and testimonial privilege is one that varies jurisdiction to jurisdiction. New York State does not have a statutory recognition of such a privilege.[94] Rather, since 1978, the courts in New York have, in various degrees, recognized a compelling argument for the privilege, but have held that there is a constitutional right to confidential intrafamilial communications.[95]

> Although the communication is not protected by a statutory privilege, we do not conclude that it may not be shielded from

NMRA; "[w]e conclude that the spousal communication privilege has outlived its useful life and prospectively abolish it") (Vigil, C.J., order on rehearing, committing the question for further study to the Committee on the Rules of Evidence; "[w]e determine that whether the spousal communications privilege contained in Rule 11-505 should be modified or abolished in New Mexico should be the subject of comprehensive study and robust public discussion. Accordingly, we refer to the Rules of Evidence Committee the matter of whether Rule 11-505 should be amended or abolished or should remain unchanged"). *See also* Edmundo Carrillo, *New Mexico Supreme Court Reinstates Spousal Privilege Over Objection of Ex-Chief Justice*, ALBUQUERQUE J., online at https://www.abqjournal.com/1516458/new-mexico-supreme-court-reinstates-spousal-privilege-over-objection-of-exchief-justice-ex-court-to-ask-a-committee-to-study-the-rule-and-give-yes-or-no-recommendation.html (Nov. 9, 2020).

94 *In re* Kings County Grand Jury Subpoena Issued to Gloria L., 475 N.Y.S.2d 1000, 1002 (N.Y. Sup. Ct. 1984) (citing *Matter of A. & M.*, 61 A.D.2d 426, 429 (App. Div. 4th Dept. 1978)); Harry R. v. Esther R., 510 N.Y.S.2d 792, 795 (N.Y. Fam. Ct. 1986) ("A careful reading of [*Matter of A. & M.*] reveals that the court therein not only recognized the lack of any statutory parent-child privilege but also refused to include communications between parent and child under the marital privilege of C.P.L.R. 4502. Moreover, while acknowledging a need to protect certain child-parent communications, the court insisted that 'the creation of a privilege devolves exclusively on the Legislature' and declined to create such a privilege judicially. Specifically, the court indicated concern that creating a parent-child privilege could work against the child's interests in Family Court matters and limited its discussion as to any Constitutional right to privacy to those cases wherein all parties to the communication wish to preserve its confidentiality") (citing to and discussing *A. & M.*, 61 A.D.2d 426).

95 *Matter of A. & M.*, 61 A.D.2d at 432 (It should be noted that it is generally accepted (with one potential disagreement out of the Appellate Division of the New York State Supreme Court, First Department) that the separate Appellate Divisions in the State of New York exist for administrative convenience, and the holding of one Division is binding across the State absent a contrary decision by another Division or the Court of Appeals (New York's highest court)); *see* Mountain View Coach Lines, Inc. v. Storms, 102 A.D.2d 663, 664 (2d Dep't 1984) (citing, *inter alia*, Waldo v. Schmidt, 200 N.Y. 199, 202 (1910), and collecting other cases); *see also* M. Gordon, *Which Appellate Division Rulings Bind Which Trial Courts?*, N.Y.L.J. (Online, Sept. 8, 2009) (citing cases, and discussing status of the statewide binding nature of Appellate Division decisions); Michael L. Fox, PRIMER FOR AN EVOLVING EWORLD at p. 256 n. 37 (3d ed. Kendall Hunt Pub. Co. 2023).

> disclosure. It would be difficult to think of a situation which more strikingly embodies the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to his mother and father. There is nothing more natural, more consistent with our concept of the parental role, than that a child may rely on his parents for help and advice. Shall it be said to those parents, "Listen to your son at the risk of being compelled to testify about his confidences?
>
> . . .
>
> If we accept the proposition that the fostering of a confidential parent-child relationship is necessary to the child's development of a positive system of values, and results in an ultimate good to society as a whole, there can be no doubt what the effect on that relationship would be if the State could compel parents to disclose information given to them in the context of that confidential setting. Surely the thought of the State forcing a mother and father to reveal their child's alleged misdeeds, as confessed to them in private, to provide the basis for criminal charges is shocking to our sense of decency, fairness and propriety. It is inconsistent with the way of life we cherish and guard so carefully and raises the specter of a regime which encourages betrayal of one's offspring. And if, as seems likely, the parents refuse to divulge their child's confidences, the alternatives faced by the parents, i.e., risk of prosecution for contempt or commission of perjury, could seriously undermine public trust in our system of justice.[96]

---

[96] *Matter of A. & M.*, 61 A.D.2d at 429–434, (citations and footnotes omitted) (citing, *inter alia*, Coburn, *supra* note 4, at 628–629; Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974); Meyer v. Neb., 262 U.S. 390, (1923); Pierce v. Soc. of Sisters, 268 U.S. 510 (1925); Roe v. Wade, 410 U.S. 113, (1973); Wis. v. Yoder, 406 U.S. 205, (1972); Stanley v. Ill., 405 U.S. 645, (1972); Ginsberg v. N.Y., 390 U.S. 629, (1968); Griswold v. Conn., 381 U.S. 479, (1965); Poe v. Ullman, 367 U.S. 497, (1961); Smith v. Org. of Foster Families for Equality & Reform (OFFER), 431 U.S. 816, (1977); Branzburg v. Hayes, 408 U.S. 665, (1972)).

Of the numerous United States Supreme Court decisions cited by the *A. & M.* Court in support of its holding, it appears only *Roe v. Wade* has been expressly overruled. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)). The *Yoder* decision was technically overruled by Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990), concerning the issue of religious exercises and freedoms, but that decision was subsequently superseded by statutes—the Religious Land Use and Institutionalized Persons Act (RLUIPA) and Religious Freedom Restoration Act (RFRA). *See* Ramirez v. Collier, 142 S. Ct. 1264, 1277 (2022); *see also* Ruiz-Diaz v. U.S., 703 F.3d 483, 486 (9th Cir. 2012). While lower courts have perhaps disagreed with or declined to extend the other cited decisions over the years, they appear to remain good law.

The *A. & M.* Court held that a communication privilege between parents and children does not stem from that State's marital privilege, because the marital privilege only applies to communications between spouses made in a confidential manner—meaning not even their children may be present.[97] The *A. & M.* Court thereafter made it clear that while the court could see the foundation for a parent-child privilege, the court deferred to the New York State Legislature for its statutory creation, rather than creating the same via common law:

> Notwithstanding the absence of a statutory privilege, we may, nevertheless, draw from the principles of privileged communications in determining in what manner the protection of the Constitution should be extended to the child-parent communication.
>
> Four fundamental conditions must be established in order for a privilege to arise:
>
> > (1) the communications must originate in confidence that they will not be disclosed;
> > (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
> > (3) the relation must be one which, in the opinion of society, ought to be sedulously fostered; and
> > (4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.
>
> It is probable that all of these criteria may be met under the circumstances alleged to exist in the case at bar. Nevertheless, although there are persuasive arguments to apply a privilege in these circumstances, we believe that the creation of a privilege devolves exclusively on the Legislature. We conclude, however, that communications made by a minor child to his parents within the context of the family

[97] *Matter of A. & M.*, 61 A.D.2d at 428–429, (citing N.Y. CPLR 4502(b); Parkhurst v. Berdell, 18 N.E. 123, 127 (N.Y. 1888); People v. Melski, 176 N.E.2d 81, 84 (N.Y. 1961) (citing Wolfle v. U.S., 291 U.S. 7, 17 (1934))). Additionally, the court held that the attorney-client privilege did not apply in *A. & M.* because, although the child's father was an attorney, the child also consulted with their mother who was not an attorney, thus destroying the privilege through the presence of a non-attorney third-party. *Id.* at 429, 377–378 (citing N.Y. CPLR 4503).

> relationship may, under some circumstances, lie within the "private realm of family life which the state cannot enter."[98]

Therefore, the *A. & M.* Court held that there was no statutory parent-child privilege in New York State, and no parent-child privilege implicit in the statutory marital privilege.[99] While there was a constitutional recognition of intrafamilial privacy protected from State intrusion, that was not something that allowed a wholesale quashing of a grand jury subpoena served on the parents.[100] Instead, the parents were required to attend the grand jury proceedings, face questioning, and then assert their privacy privilege in response to specific questions—with the court deferring to the legislature for any specific statutory provision to be afforded the parent-child relationship.[101]

Other courts in New York State, however, have recognized a parent-child privilege, for instance, the case of *People v. Fitzgerald*.[102] In *Fitzgerald*, which followed (and cited to) *A. & M.*, the court unequivocally recognized that a parent-child privilege exists in New York—and was not waived in the case.[103]

> Given such imperative social considerations which ought to be fostered by the State for the benefit of the integrity of the parent-child relationship and being of the opinion that "the injury that would inure to the relation by the disclosure of the communication (is) greater than the benefit" to be derived by the State in its disposal of litigation, . . . this Court holds that a parent-child privilege does exist in this State, flowing directly from such rights as are granted by both the Federal and New York State Constitutions. . . which have fostered the recognition of what has come to be known as the "right to privacy." . . . New York State, by statute, recognizes the concept of a "right to privacy" in certain instances.[104]

The *Fitzgerald* Court went even further, though—and held that the privilege is not only applicable when a minor child is involved:

> While it is true that the "fostering of a confidential parent-child relationship is necessary to the child's development of a positive system of values," . . . it does not follow that this

98 *Matter of A. & M.*, 61 A.D.2d at 434–435 (citations and footnotes omitted) (citing, *inter alia*, 8 John Henry Wigmore, EVIDENCE, § 2285 (McNaughton rev. 1961); Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

99 *Matter of A. & M.*, 61 A.D.2d at 435.

100 *Id.*

101 *Id.*

102 People v. Fitzgerald, 422 N.Y.S.2d 309, 317 (Cnty. Ct. 1979).

103 *Id.* at 312, 316.

104 *Id.* (citing, *inter alia*, 8 John Henry Wigmore, EVIDENCE § 2285 (McNaughton rev. 1961); U.S. CONST., amend. IX & XIV; N.Y.S. Const., art. 1, § 6, § 1).

> fundamental relationship can arbitrarily be said by the State to cease at the stroke of midnight on the last day of the child's seventeenth year.
>
> The parent-child relationship of mutual trust, respect and confidence, if it exists at all in the individual case, is one that should be and must be fostered throughout the life of the parties. Indeed, in many cases the closeness of the family unit may well increase as the child becomes an adult and realizes that the advice, encouragement and training by the parents had value and merit then and equal substance in later years. While the "minor" of 17 years and the parent of 40 may often be in disagreement on the values and lessons of life, the "adult" of 27 and the parent of 50 may well have enjoyed a resurgence of common values, ideals and mutual trust and respect, one for the other.
>
> That such a relationship can indeed exist past the child's age of majority does not seem "absurd" to this Court. It is that very relationship, coupled with the confidential communication between the parties that such a parent-child "privilege", arising out of the right to privacy, can be said to protect. The mutual trust and understanding, if such exists, between the parent and child cannot be made subject to the intrusion of the State merely because of a proposed artificial barrier of age.
> . . .
> Therefore, this Court concludes that such a parent-child privilege as arising out of a constitutional right to privacy may not and should not be limited by the age of either party asserting such claim.[105]

Following *Fitzgerald*, the New York State Court of Appeals (that state's highest court)[106], issued an opinion that both qualified and cabined the extent of a parent-child privilege in New York (an opinion to which the Court has never returned, and which remains unaltered):

Moreover, a parent-child testimonial privilege (which defendant urges be adopted to preclude his mother's testimony) would not even arguably apply in that defendant was 28 years old at the time of the conversation with his mother; another family member was present; the

---

105 *Id.* at 313–14. *Cf.* People v. Hilligas, 670 N.Y.S.2d 744, 746–47 (N.Y. Sup. Ct. 1998) (disagreeing with *Fitzgerald*, and refusing to extend the privilege into the adulthood of a child).

106 *See* New York State Unified Court System, NYCOURTS.GOV (Jan. 29, 2023) https://ww2.nycourts.gov/courts/8jd/structure.shtml#:~:text=The%20Court%20of%20Appeals%20is,14%2Dyear%20term%20of%20office ("The Court of Appeals is New York State's highest court and court of last resort in most cases").

mother testified before the Grand Jury hearing evidence against defendant; and the conversation concerned a crime committed against a member of the household.[107]

Therefore, it would appear that, *Fitzgerald* notwithstanding, the parent-child privilege, to the extent it is recognized in New York, does not apply when adult children are involved—among other limitations.[108]

However, in February 2023, New York's Appellate Division Fourth Department reversed a juvenile's (a 15-year old facing felony charges) conviction, suppressing evidence and granting a new trial, expressly based on the acknowledgment of a parent-child privilege in New York law.[109] Although recognizing that in New York a parent-child privilege differs from attorney-client privilege in that it does not exist under the Sixth Amendment to the U.S. Constitution, nor explicitly under statute or common law, "[n]onetheless, a parent-child privilege has been recognized in certain circumstances and 'that privilege is rarely more appropriate than when a minor, under arrest for a serious crime, seeks the guidance and advice of a parent in the unfriendly environs of a police precinct.'"[110]

Citing to a series of cases, including *A. & M.*, the *Kemp* Court found that under the circumstances of the case before it, the police had violated the parent-child privilege protections enjoyed by the alleged juvenile offender and his father while the juvenile was in police custody.[111] Despite the presence of cameras in the detention area, the Court held that "a parent-child privilege did arise under the circumstances of this case . . . The application of the privilege is not dependent on a finding of police misconduct . . . The statements defendant now seeks to suppress were made in an attempt to utilize his father as such a source of assistance. 'It would not be consistent with basic fairness to exact as a price for that assistance, his acquiescence to the overhearing presence of government agents.'"[112] The *Kemp* Court

107 People v. Johnson, 644 N.E.2d 1378, 1379 (N.Y. 1994).

108 *See* People v. Stover, 178 A.D.3d 1138, 1145 (N.Y. 2019) ("[h]ere, the privilege would not apply, as defendant was 19 years old at the time of the conversation with Stover") (citing People v. Johnson, 84 N.Y.2d at 957; People v. Edwards, 135 A.D.2d 556, 557 (N.Y. 1987)).

109 People v. Kemp, 213 A.D.3d 1321 (N.Y. App. Div. 4th Dep't 2023).

110 *Id.* at *2 (citing *Matter of A. & M.*, 61 A.D.2d at 429; People v. Harrell, 87 A.D.2d 21, 25, 26 (N.Y. App. Div. 2d Dep't 1982), *aff'd* 59 N.Y.2d 620 (1983); People v. Bevilacqua, 45 N.Y.2d 508, 513 (1978)).

111 *Id.*

112 *Kemp*, 2023 WL 1877725 at *4 (citing *Harrell*, 87 A.D.2d at 24–26; *A. & M.*, 61 A.D.2d at 429).

further found no indicia of privilege waiver, because "most of defendant's statements to his father are inaudible as a direct result of defendant's efforts to prevent his conversation from being overheard and recorded. Defendant therefore attempted to speak 'to his father in confidence and for the purpose of obtaining support, advice or guidance' and it may easily be inferred from the father's warnings 'that the father wished to remain silent and keep [defendant's statements] confidential.'"[113] Concluding that the error of the court below was not harmless error, the court reversed and remanded for a new trial, with suppression of the recording evidence.[114] The court premised their reasoning on the existence of a parent-child privilege in the law of New York between a juvenile and their parent, stating "'[i]t would be difficult to think of a situation which more strikingly embodies the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to [a parent].'"[115]

On the federal side, three federal district courts have acknowledged a parent-child privilege in some form. The 1983 decision of the United States District Court for the District of Nevada in *In re Agosto* illustrated a painstaking and thorough analysis of parent-child privilege, where the court ultimately held the privilege to exist, resulting in the quashing of a grand jury subpoena.[116] This decision stands as one of the few instances where a federal court recognized and applied, outright, a parent-child evidentiary privilege. The *Agosto* Court identified three categories of privilege commonly recognized in law within the United States:

> "1) privileges to protect the rights of individuals, 2) privileges to protect the maintenance of the government, and 3) privileges which express the law's concern for the security of an individual as a participant in a relationship which is considered by the state to be important and in need of protection. The nature and value of the relationship is considered to be important as an end in itself."[117]

The Court continued, invoking legal tradition dating back to the Roman Empire:

113 *Id*. at *4 (quoting Matter of Mark G., 65 A.D.2d 917, 917 (N.Y. App. Div. 4th Dep't 1978)).

114 *Id.*

115 *Id*. at *2 (citing *Matter of A. & M.*, 61 A.D.2d at 429).

116 *In re* Agosto, 553 F. Supp. 1298, 1331 (D. Nev. 1983).

117 *Id.* at 1306 (citing Coburn, *supra* note 4, at 602).

> While a privilege is an exception to the general rule that every man must give his evidence in court, . . . certain ancient societies have recognized that this was not always a superior goal. . . . [T]he early Roman law recognized the rule of *testimonium domesticum* which provided that parents, children, patrons, freedmen, and slaves were prohibited by the *Lex Iulia* from being compelled to give testimony against each other. The rationale underlying this privilege was not directly related to self-incrimination but rather against the corruption of the intrafamilial relations which would ensue by making uncertain and suspicious what was instinctively assumed to demand the most unrestricted confidence or *uberrima fides*, the sanctity of the family based on mutual fidelity. Thus, it is not surprising that the specific policy of *uberrima fides* was consistently deemed superior to the general policy of the law, i.e., the correct settlement of controversies or the punishment of offenders.[118]

However, the decision was by no means universally accepted. In 1985, the United States Court of Appeals for the Seventh Circuit held that *Agosto* was wrongly decided, invoking now commonly used phrasing:

> What the *Agosto* court failed to recognize is that such privileges, whether they be those traditionally recognized by the common law or new ones which courts seek to engraft into the common law, "are not lightly created nor expansively construed, for they are in derogation of the search for truth." … The Court reaffirmed the narrowness of privileges under Rule 501 . . . when it modified the spousal privilege "so that the witness-spouse alone has a privilege to refuse to testify adversely,". . . and . . . where[] the Court refused to construct an evidentiary privilege barring the introduction of evidence of legislative acts in federal criminal prosecutions against state legislators. We thus believe that it would be inappropriate to engraft a parent-child privilege into Rule 501.[119]

In 1982, the United States District Court for the District of Connecticut, in *In re Grand Jury Proceedings (Greenberg)*, held—based on a reading of the First Amendment to the United States Constitution, as well as deference to an interpretation of Jewish Law—that a parent-child privilege existed prohibiting any requirement that a conservative

118 *Id.* at 1306 (citing Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175 (1960)).

119 United States v. Davies, 768 F.2d 893, 898 (7th Cir. 1985) (citing United States v. Nixon, 418 U.S. 683, 710 (1974); Trammel v. United States, 445 U.S. 40, 53 (1980); United States v. Gillock, 445 U.S. 360, 366 (1980)).

Jewish parent be compelled to testify against her child.[120] Although this is a very narrow and restrictive application of a privilege based on religious exercises, it has been heavily criticized by other courts and scholars alike.[121]

In 1996, the United States District Court for the Eastern District of Washington, in *In re Grand Jury Proceedings, Unemancipated Minor Child*, rejected the argument that there is a blanket parent-child privilege that must be recognized under the United States Constitution.[122] But the court did find that federal law recognizes a parent-child communication privilege.[123] Unfortunately, for the minor litigant in that case, the court held that the factual showings at bar did not support the assertion of the privilege in that matter.[124]

Despite a handful of progressive court decisions, most federal courts that have considered the question or proposition of a parent-child privilege, under a plethora of circumstances and variations, have either declined to recognize a privilege, or have rejected it.[125]

---

120 *In re* Grand Jury Proceedings (Greenberg), 1982 WL 597412 at *2, *6 (D. Conn. June 25, 1982). ("On this record, the court finds that Conservative Jews are prohibited by religion from testifying against their children and that Mrs. Greenberg devoutly embraces this tenet of her religion"). The Jewish faith, however, is not alone in this precept. "It is interesting to note that '[b]oth ancient Jewish law and Roman law entirely barred family members from testifying against each other, based on a desire to promote the solidarity and trust that support the family unit.' The Roman Catholic church has also recognized the privilege under Canon Law." Maureen P. O'Sullivan, *An Examination of the State and Federal Courts' Treatment of the Parent-Child Privilege*, 39 J. CATH. LEGAL STUD. 201, 206 (1999) (footnotes and citations omitted).

121 *Id.* at *6; *see also* Under Seal v. U.S., 755 F.3d 213, 218–19 (4th Cir. 2014) (identifying only a handful of federal courts that have recognized a parent-child privilege, in the face of multitudes that have not; and rejecting those decisions that have, including *Greenberg*); Watts, *supra* note 4, at 616.

122 *In re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. 1487, 1491 (E.D. Wash. 1996).

123 *Id.* at 1494 ("mindful of the presumption against recognizing new privileges and guided by 'reason and experience,' the Court must analyze whether a parent-child privilege should be recognized because there is a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth,' which also serves public ends. . . . The Court finds it does. . . . In this Court's experience—as a judge, parent, child, and spouse—there is no meaningful distinction between the policy reasons behind the marital communications privilege and those behind a parent-child privilege").

124 *Id.* at 1497.

125 *See* Under Seal v. United States, 755 F.3d at 218–20 (citing *In re* Grand Jury Proceedings (Alba), No. 93–17014, 1993 WL 501539, at *1 n.1 (9th Cir. Dec. 2, 1993) (per curiam) ("The holding in *Agosto* is contrary to our decision in *[United States v.] Penn*[, 647 F.2d 876, 885 (9th Cir. 1980) (en banc)], and contrary to the overwhelming weight of case law from other circuits that also reject the concept of a family privilege."); United States v. Penn, 647 F.2d 876, 885 (9th Cir. 1980); United States v. Dunford, 148 F.3d 385, 391 (4th Cir. 1998); *In re* Grand Jury, 103 F.3d 1140, 1146–47 (3d Cir. 1997);

B. Preventing the Irretrievable Destruction of Family Life

While the case is not concerned with the specific matter of parent-child privilege, *State ex rel. Children, Youth & Families Dep't v. Maria C.*, provides important language that directly impacts the present discussion regarding the importance of family and constitutional safeguards against the unregulated destruction of family by the government[126]

> '[T]he parent-child relationship is one of basic importance in our society . . . sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.' . . . 'Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.'. . . Thus, we have recognized that process is due when a proceeding affects or interferes with the parent-child relationship.[127]

The Supreme Court has similarly provided, when addressing a New York law concerning neglect proceedings in family court that might result in the separation of children from their parents, that "while there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds. . . . '[T]he State registers no gain towards its declared goals when it separates children from the custody

In re Erato, 2 F.3d 11, 16 (2d Cir. 1993); Grand Jury Proceedings of John Doe v. United States, 842 F.2d 244, 245–48 (10th Cir. 1988); United States v. Davies, 768 F.2d 893, 899 (7th Cir. 1985); United States v. Ismail, 756 F.2d 1253, 1258 (6th Cir. 1985); *In re* Grand Jury Subpoena of Santarelli, 740 F.2d 816, 817 (11th Cir. 1984) (per curiam); *In re* Grand Jury Proceedings (Starr), 647 F.2d 511, 512–13 (5th Cir. 1981) (per curiam); United States v. Jones, 683 F.2d 817, 819 (4th Cir. 1982)).

Note, though, that the United States Court of Appeals for the Second Circuit, while rejecting the privilege between an adult parent and adult child, did state that the: "case presents a weaker claim for recognition of a parent-child privilege than might be presented in a case involving a minor child. At least in that situation the argument would be available that compelling a parent to inculpate a minor child risks a strain on the family relationship that might impair the mother's ability to provide parental guidance during the child's formative years." *Erato*, 2 F.3d at 16.

There are state courts that have also refused to recognize a parent-child privilege or have held that state statutes or constitutional provisions cannot be read to include or extend to a parent-child privilege. *See, e.g.*, Cissna v. State, 352 N.E.2d 793, 795 (Ind. Ct. App. 1976); Cabello v. State, 471 So.2d 332, 340 (Miss. 1985) (distinguishing *Fitzgerald*, and stating "[w]e do permit under certain circumstances the testimony of a child against parent or spouse against spouse").

126 State *ex rel.* Children, Youth & Families Dep't v. Maria C.*,* P.3d 796, 811 (N.M. Ct. App. 2004).

127 *Id.* at 804 (citing State *ex rel.* Children, Youth & Families Dep't v. Anne McD., 995 P.2d 1060 (N.M. Ct. App. 2000); Santosky v. Kramer, 455 U.S. 745, 753 (1982); State *ex rel.* Children, Youth & Families Dep't v. Stella P., 986 P.2d 495 (N.M. Ct. App. 1999); State *ex rel.* Children, Youth & Families Dep't v. Rosa R., 992 P.2d 317 (N.M. Ct. App. 1999)).

of fit parents.'"[128] Thus, the first and primary goal of government and society—at least the officially stated goal—is the maintenance, preservation and wholeness of a family unit.[129]

As stated elsewhere herein, there is an argument to be made that the existence of privileges, and the expansion of said privileges in evidentiary law, serves to frustrate both governmental purposes—including prosecutorial purposes—and private purposes in civil matters. Yet, should governmental and third-party purposes be the only consideration? Is it not just as noble, and just as vital, to consider the protection of family constancy, family stability, and family harmony—particularly in this tumultuous and complicated world of external pressures and forces? Judges in other contexts have commented on the fact that the "search for truth" should not be utilized to impose on litigants and witnesses any burden that the system chooses to emphasize.[130]

---

128 *Santosky*, 455 U.S. at 766–67 (citing, *inter alia*, Stanley v. Illinois, 405 U.S. 645, 652, (1972)).

129 *See* Golan v. Saada, 142 S. Ct. 1880, 1891–92 (2022) (addressing the Hague Convention on the Civil Aspects of International Child Abduction and under what circumstances a child must be returned to their parent(s) in another nation when the child has been removed from that nation, and if returning the child would expose them to "grave risk of harm.").

The Court stated at one point in the decision: "a court 'is not bound to order the return of the child' if the court finds that the party opposing return has established that return would expose the child to a 'grave risk' of physical or psychological harm. . . . By providing that a court 'is not bound' to order return upon making a grave-risk finding, Article 13(b) lifts the Convention's return requirement, leaving a court with the discretion to grant or deny return.'" *Id.* at 1891–1892; *see also* Valentina Shaknes & Justine Stringer, *The Supreme Court Got at Least One Thing Right This Term*, N.Y. L.J. ONLINE (July 25, 2022 2:10 PM), https://www.law.com/newyorklawjournal/2022/07/22/the-supreme-court-got-at-least-one-thing-right-this-term/.

This lends further support to the argument that the government does take the position that the safety, health and protection of children are of paramount importance in setting policy and interpreting laws, but at the same the government should take more steps to establish some uniformity and consistency in accomplishing same (since technically *Saada* would stand for the proposition that the protection of a child might mean not returning them to their parent(s) in another nation).

130 *See* Warner v. Tchrs. Ret. Bd. of New York, 389 N.Y.S.2d 854, 856 (App. Div. 1976) (Lupiano, J., dissenting in part) (not addressing the issue of privilege, but rather more generally the matter of a litigation being the "search for truth") ("Finally, in direct response to the unwarranted assumption voiced by the majority that my views as expressed herein suggest a narrow limiting of the search for truth, I unequivocally declare that the law should always and primarily be concerned with the search for truth. However, this search is circumscribed with procedural and substantive safeguards, the propriety and relevance of which have been time-tested. Invocation of the canon, the search for truth, may not serve as a talisman to justify an otherwise unwarranted imposition on litigants.").

Some courts and judges acknowledge that parents are usually of primary importance in the raising of children in the United States, such that parental privacy is resident in the Constitution.[131] Furthermore, while it is acknowledged that good citizenship may require one to report a known felony to the authorities, rarely is one criminally convicted, absent more, for failing to actually report a crime (assuming one was not one of those who committed or assisted the commission of the crime).[132] For instance, misprision of felony still exists as a criminal offense in the United States: "Although the term 'misprision of felony' now has an archaic ring, gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship. . . . Misprision may be a sparsely prosecuted crime, but its parameters are clearly delineated in the caselaw."[133]

> In particular, the elements of a violation of 18 U.S.C. § 4 are as follows: (1) commission and completion of a felony offense by a principal; (2) actual knowledge by defendant of the commission of such a felony; (3) failure by defendant to notify authorities; and (4) an affirmative act by defendant to conceal the crime.[134]

In addition, the Ninth Circuit has emphasized that the person accused of misprision of felony "must 'know the facts that make [certain] conduct fit the definition of the offense'"—meaning knowledge that the underlying offense is a felony.[135]

---

131 *See* Alma S. v. Dep't of Child Safety, 425 P.3d 1089, 1095–1096 (Ariz. 2018) (Bolick, J., concurring) ("The primacy of parents in the upbringing of their children is a bedrock principle of American constitutional law . . . . The principle of parental sovereignty is one that has distinguished our exceptional nation from authoritarian regimes") (citing, *inter alia*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Stanley v. Ill., 405 U.S. 645, 651 (1972); *see also* Aaron T. Martin, *Homeschooling in Germany and the United States*, 27 ARIZ. J. INT'L. COMP. L. 225 (2010)).

132 United States v. Heyward, 22 M.J. 35, 36 n.2 (1986 C.M.A. LEXIS 17837) ("A citizen's obligation 'to raise the "hue and cry" and report felonies to the authorities' has been recognized throughout our history . . . Although 'gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship,' . . . it will not, standing alone, subject an individual to criminal prosecution in the absence of a special duty.") (citing Branzburg v. Hayes, 408 U.S. 665, 696 (1972); Roberts v. United States, 445 U.S. 552, 558 (1980)).

133 United States v. Weekley, 389 F. Supp. 2d 1293, 1297 (S.D. Ala. 2005) (citing United States. v. Ward, 757 F.2d 616, 620 (5th Cir. 1985)).

134 *Weekley*, 389 F. Supp. 2d at 1297 (citing United States v. Gebbie, 294 F.3d 540, 544 (3rd Cir. 2002); United States v. Cefalu, 85 F.3d 964, 969 (2d Cir. 1996); United States v. Adams, 961 F.2d 505, 508 (5th Cir. 1992)); *see also* Mendez v. Barr, 960 F.3d 80, 84 (2d Cir. 2020) (considering whether misprision components are evidence of a crime of moral turpitude)).

135 United States v. Olson, 856 F.3d 1216, 1220–21 (9th Cir. 2017) (citing Elonis v. United States, 575 U.S. 723, 735 (2015) (citing Staples v. United States, 511 U.S. 600, 608 n.3 (1994))).

Knowledge and "some affirmative act of concealment or participation" of the crime is required for a defendant to be convicted of misprision of felony.[136] "A misprision prosecution cannot succeed absent proof that the defendant took steps to conceal the crime; after all, 'mere failure to report a known felony would not violate 18 U.S.C. § 4.'"[137] In *Weekley*, the Fifth Amendment right against self-incrimination would have permitted the defendant to remain silent concerning the underlying crime. As such, the defendant would not have been in violation of 18 U.S.C. § 4 because of the Constitutional protection. However, the court did not apply the Fifth Amendment protection after finding the defendant affirmatively lied to investigating agents.[138] The removal of the Fifth Amendment protection brought misprision of felony into play, ultimately resulting in the defendant's conviction for that crime, and the trial court's refusal to dismiss the indictment post-conviction.[139]

The parent-child privilege urged by this article would, similar to the Fifth Amendment, permit someone with knowledge of a crime—but who is not a participant in the crime or an observer of the actual commission of the crime—to remain silent in the face of a subpoena or other instrument, or interrogation by investigators, if they are a qualifying "parent" or "child" under the proposed Rule 503 and their statements would concern knowledge obtained by them from their corresponding "parent" or "child" in a circumstance covered by the proposed Rule 503. In such a situation, the one claiming the legally provided privilege would have knowledge of a crime, but would not have been a participant in it, and, through their silence, would not be concealing the crime by an affirmative act (such as lying to investigators or prosecutors). Thus, such a person would not be guilty of misprision of felony.

Without such protections for parents and children to communicate with each other, the United States' doctrine is somewhat comparable to some specific policies from Nazi Germany and Soviet Russia. Regimes

136 *Weekley*, 389 F. Supp. 2d at 1297 (citing Itani v. Ashcroft, 298 F.3d 1213, 1216 (11th Cir. 2002) (citation omitted)).

137 *Weekley*, 389 F. Supp. 2d at 1297–98 (citing *Itani*, 298 F.3d at 1216 (11th Cir 2002); United States v. Davila, 698 F.2d 715, 717 (5th Cir. 1983) ("mere failure to report a felony is not sufficient" to sustain a misprision conviction, which also requires "some positive act designed to conceal from authorities the fact that a felony has been committed."); United States. v. Ciambrone, 750 F.2d 1416, 1418 (9th Cir. 1984) ("mere silence, without some affirmative act, is insufficient evidence of the crime of misprision of felony.") (citation omitted).

138 *Weekley*, 389 F. Supp. 2d at 1301–02.

139 *Id.*

such as those from the 1930s to the 1980s still represent what should be the very antithesis of our American system, highlighted by the history of German children ("Hitler Youth"[140] for instance), being expected to report family members—including parents—who dared speak or act in opposition to the government's or Führer's purpose and vision.[141] Thus, there is a more ominous question that must be considered when opposition to a parent-child communication and testimonial privilege takes the form of the argument, noted earlier, that it frustrates a governmental purpose and the search for truth in proceedings. That question is whether government purposes and the forces of a third party are always geared toward the "greater angels" of the national psyche. For instance, in what might be a rare, potentially unthinkable instance for an American law journal, this article now highlights a speech given by a German Nazi politician to German jurists in 1936 to emphasize the above point:

> There is no independence of law against National Socialism. Say to yourselves at every decision which you make: "How would the Führer decide in my place?" In every decision, ask yourselves: "Is this decision compatible with the National Socialist conscience of the German People?" Then you will have a firm iron foundation which, allied with the unity of the National Socialist People's State and with your recognition of the eternal nature of the will of Adolf Hitler, will endow your own sphere of decision with the authority of the Third Reich, and this for all time.[142]

The reader might inquire in horror as to why reference would be made here to a Nazi politician and propagandist. The answer is really

---

140 For a discussion/description of the "Hitler Youth" and related movements*, see generally* United States v. Baecker, 55 F. Supp. 403 (E.D. Mich. 1944); United States v. Bregler, 55 F. Supp. 837 (E.D.N.Y. 1944), United States v. Hauck, 155 F.2d 141 (2d Cir. 1946).

141 *See Heyward*, 22 M.J. at 38 (Everett, C.J., concurring) ("I certainly would not wish to live in a country like Nazi Germany, where children were motivated to report any seemingly disloyal thought or action of family members."); United States v. Reed, 24 M.J. 80, 84 (1987 C.M.A. LEXIS 822) (Everett, C.J., concurring) (citing and quoting *Heyward*); *see also* Paul D. Carrington, *The Twenty-First Wisdom*, 52 WASH. & LEE L. REV. 333, 352 (1995); Watts, *supra* note 4, at 584 n.1 ("We know that one of the horrors of Nazi Germany was children snitching on their parents. It seems to me common decency that you don't put a child before a grand jury on her mother's conduct.") (citing and quoting Burke, *Nevada Girl, 16, Ordered to Testify Against Mother*, NAT'L L.J., Mar. 9, 1981, at 3, col. 2 (quoting Irving Younger)); Fox & Fox, *supra* note 3, at 52 (citing and quoting Watts, *supra* note 4, at 593–594).

142 William L. Shirer, THE RISE AND FALL OF THE THIRD REICH 370 (Simon & Schuster 1st ed. 1960) (quoting Hans Frank, Commissioner of Justice and President of the German Law Academy); *see also* Andrews, THE COLUMBIA DICTIONARY OF QUOTATIONS, *supra* note 1 at 625.

quite simple; any legal or governmental system in which a child could be compelled or permitted to testify against a parent, or a parent against a child (absent extraordinary circumstances, such as abuse, neglect or emancipation proceedings, or conspiracy or co-commission of a crime) is akin to that system of both the Nazi and Soviet societies, in which family members routinely reported others in their family to authorities due to the latter's violation or perceived violation of party and governmental norms, strictures or directives.[143] At the time of the Nazis or Soviets, one would likely have argued that those reporting family members were simply doing what the government required, in the best interests of, and for the protection of, the nation and its peoples. Regrettably, such argument, flawed at its inception, did not account for universal good, truth and ethic, nor righteous law.[144] In this light, then, opposition to establishment of a limited parent-child communication and testimonial privilege in the evidentiary law of the United States should not prevail.[145]

The attorney-client privilege is based on the contractual relationship of strangers required for representation of a person's legal needs; the physician-patient and therapist-patient privileges are based on the contractual relationship of strangers required for treatment of a person's physical, mental and emotional health needs; the marital and spousal privilege is based on the social contractual relationship of marriage between two people who were once strangers; and the clergy-penitent privilege is based on religious law and recognition of respect for religious free exercise, although the relationship of clergy and penitent begins as two strangers united in faith. In contrast, a parent-child relationship (even between adoptive parents and child) begins with a basis of birth and natural (or legally cognizable) blood relation.[146]

143 *See Heyward*, 22 M.J. at 38; *Reed*, 24 M.J. at 84; Carrington, *The Twenty-First Wisdom*, *supra* note 141, at 352.

144 Consider the words of the ancient Roman Senator, orator and attorney, Marcus Tullius Cicero: "Salus populi suprema est lex," which among its many different translations means "the welfare of the people is the highest law," "the good of the people is the highest law," or "the good of the people is the greatest law." Marcus Tullius Cicero (Roman Republic, 106-43 B.C.E.), DE LEGIBUS (*On Laws*) begun 52 B.C.E. For more, see https://www.britannica.com/biography/Cicero.

145 One could even contend that the protection of the family unit, and preservation of family-child privacy and counsel from external interference, is of Biblical proportion. In the *Book of Exodus*, it is said: "He that curseth his father, or his mother, shall surely be put to death." *Exodus* 21:17. Could testimony under Oath, compelled or otherwise, resulting in a child's statement being utilized against a parent in a criminal or civil proceeding—or vice versa—be analogized to just such a Biblical proscription?

146 *See In re* Petition of R.A., 66 P.3d 146, 149 (Colo. Ct. Apps. 2002) ("Adoption is the act by which relations of maternity, paternity, and affiliation become legally recognized between persons not so related by birth") (citing Graham v. Francis, 265 P. 690 (Colo.

It is the foundation of both families and society. Should that not then result in a recognition of, and creation of, a federally recognized, national parent-child communication and testimonial privilege, for the support and protection of that most foundational of all relationships in our society—that of parent and child?[147]

C. The Psychological and Emotional Impacts of Testifying Against Family

The *A. & M.* decision, discussed in Section III.A, *supra*, did not solely cite to common law and statutory precedents in its decision, but also to psychological and social science texts to explain the underlying reason for the protection of parent-child communications from intrusion by the State or litigation fact-finding.[148] The Court further noted what could be the potential domestic and societal fallout if the parents were to either refuse a subpoena to testify against the child or if the parents lied under oath in an attempt to protect their child—a lie the child, if not the court or attorneys, would certainly be well aware of. "In addition, the child, in witnessing his parents' refusal to testify or giving false testimony, will most certainly question the fairness of the legal process or learn that punishment can be avoided by compounding unlawful conduct."[149] Additionally, the *A. & M.* Court determined that it would not be a simple "incidental burden" impacting the parents and their child, were the parents to be compelled to testify, but "[r]ather, the parents' relationship with their son would, in all likelihood, be destroyed by compelled disclosure."[150]

1928)); Stellmah v. Hunterdon Co-op. G.L.F. Serv., Inc., 219 A.2d 616, 620–621 (N.J. 1966) ("Adoption was unknown to the common law, although it was commonly practiced and regulated under the Civil Law of the both ancient Greece and Rome . . . . The first total regulation of the process was found in the Justinian Code from which our modern legislation derives its principles. Under this code, once the prescribed formalities were met, the adopted person was entitled to inherit from the adoptive father, both testate and intestate, and there was created the relation of paternity and filiation not before legally recognized.") (citations omitted); N.Y. DOM. REL. L. § 117(c) (2022).

147 *See generally* Fox & Fox, *supra* note 3; *see also In re* Grand Jury Proc., 949 F. Supp. at 1494–95.

148 *See Matter of A. & M.*, 61 A.D.2d at 432–33 n.4–5 (citing Lidz, T., *The Family: The Developmental Setting*, AM. HANDBOOK OF PSYCHIATRY (1974); Josselyn, I., ADOLESCENCE (1st ed. 1971); Thomas, G., PARENT EFFECTIVENESS TRAINING (1975); Conger, John Janeway, ADOLESCENCE AND YOUTH: PSYCHOLOGICAL DEVELOPMENT IN A CHANGING WORLD (2d ed. 1977); Karen Nelson, *Domestic Tranquility and the Right to Privacy: Is There a Right to Privacy Within the Family?*, 18 S. TEX. L.J. 121 (1977); Edward J. Bloustein, *Group Privacy: The Right to Huddle*, 8 RUTGERS CAMDEN L.J. 219 (1977)).

149 *Matter of A. & M.*, 61 A.D.2d at 433, 4 n.6 (citing Coburn, *supra* note 4, at 628–29).

150 *Matter of A. & M.*, 61 A.D.2d at 437 n.7 (citing *Branzburg*, 408 U.S. at 682).

Additionally, the New York courts have not turned a blind eye to the psychological and sociological considerations swirling around a parent-child privilege, and its requisite importance, in evidentiary law.

> Because the State has traditionally depended on the parent-child relationship to provide the care, nurture, education and moral training of children, the courts have been hesitant to interfere with the autonomy of the family unit. ". . . (T)he importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot(ing) a way of life' through the instruction of children, ... That is not to say that the State may never intrude its authority to regulate matters touching upon familial relationships, but only that when it attempts to do so, the governmental needs asserted must be carefully examined in order to insure that there exists a legitimate purpose in abridging this familial interest.
>
> . . .
>
> Having established that the integrity of family relational interests is clearly entitled to constitutional protection, we turn to an examination of the nature of the interest asserted in the case before us. The role of the family, particularly that of the mother and father, in establishing a child's emotional stability, character and self-image is universally recognized. The erosion of this influence would have a profound effect on the individual child and on society as a whole. Child psychologists and behavioral scientists generally agree that it is essential to the parent-child relationship that the lines of communication remain open and that the child be encouraged to "talk out" his problems. It is therefore critical to a child's emotional development that he know that he may explore his problems in an atmosphere of trust and understanding without fear that his confidences will later be revealed to others.
>
> For a young person to develop into a responsible mature adult, capable of regulating his own life and attaining a sense of self-worth, it is necessary for him to perceive in his parents a sense of fairness and decency and those feelings which give him a sense of being loved and cared for. These values become especially important during turbulent times, such as ours, in which we experience rapid social change and fluctuating mores.[151]

151 *Matter of A. & M.*, 61 A.D.2d at 430–33 (footnotes omitted) (citing, *inter alia*, T. Lidz, *The Family: The Developmental Setting*, AM. HANDBOOK OF PSYCHIATRY; I. Josselyn, *Adolescence*; *Branzburg*, 408 U.S. at 688; G. Thomas, PARENT EFFECTIVENESS TRAINING; J.

Thus, there are more than legal and evidentiary considerations in any evaluation of a parent-child communication and testimonial privilege. With family as the acknowledged foundation for the development of children into adults and parental guidance considered one of the driving forces for child maturation and decision-making as adults, great weight must be given to the sociological, psychological, and even biological impacts of state intrusion into the parent-child cocoon of trust, if there is no privilege preventing one from being compelled to testify against the other, absent extraordinary circumstances.[152]

D. Reasonable Limits for a Privilege to Balance Protection with the Search for Justice - Including Creation of a Privilege Only for Communications, and Not Actions Observed

There are limitations and exceptions to each and every privilege—none are held completely and unequivocally inviolate.[153] Even the venerable attorney-client privilege is subject to circumstances of waiver—including when the assertion and exercise of the privilege would deprive a party of the only source for information relevant to the proceedings.

Conger, ADOLESCENCE AND YOUTH: PSYCHOLOGICAL DEVELOPMENT IN A CHANGING WORLD; K. Nelson, *Domestic Tranquility and the Right to Privacy*; E. Bloustein, *Group Privacy: The Right to Huddle*).

152 *Cf.* Deborah A. Ausburn, *Circling the Wagons: Informational Privacy and Family Testimonial Privileges*, 20 GA. L. REV. 173, 199–202 (1985) (citing, *inter alia*, Whalen v. Roe, 429 U.S. 589, 600, (1977)).

While *Whalen* concerned the public disclosure of private information required by a New York State statute regarding disclosure to the state of certain prescribed medications, the case's holding should now be read and expanded to stand for the proposition that indeed in our 21st Century America, lack of privilege protection for parent-child confidences *would cause* "sufficiently grievous" harm to befall the family interest in privacy, and the compelling interest in children having inviolable parent relations to assist with their psychological and sociological development—something of paramount importance for the functioning of society, and something in which the United States can ill-afford a further break-down.

153 *See In re* Miller, 247 B.R. 704, 711 (Bankr. N.D. Ohio 2000) ("The crime-fraud exception to the attorney-client privilege holds that communications made between an attorney and his client, for the purpose of furthering the commission of a future or present crime or fraud, are not protected from disclosure by the attorney-client privilege. The purpose of this exception is to assure 'that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime.'") (citing U.S. v. Zolin, 491 U.S. 554, 563 (1989)); *In re* 2015–2016 Jefferson Cnty. Grand Jury, 410 P.3d 53, 59 (Colo. 2018) ("[t]hough designed to be sturdy and reliable, this shield of privilege may sometimes be pierced. The crime–fraud exception to the attorney–client privilege 'provides that communications between a client and his attorney will not be privileged if they are made for the purpose of aiding the commission of a future crime or of a present continuing crime'") (citing A v. Dist. Court, 550 P.2d 315, 324 (1976)).

> Because the purpose of the attorney-client privilege, the "oldest of the privileges for confidential communications," is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice," . . . the burden of breaching the privilege, once it is determined that the protection applies, is particularly high. . . . To find a waiver of the attorney-client privilege, General Dynamics must prove that "(1) the very subject of privileged communications was critically relevant to the issue to be litigated; (2) there was a good faith basis for believing such essential privileged communications existed; and (3) there was no other source of direct proof on the issue." . . . In essence, a waiver is found only where it would be unfair and inconsistent to permit the retention of the privilege.[154]

Additionally, when considering virtually all privileges, the presence of a third person who is not party to the relationship or required for the advising or counseling to advance the advice given under the privilege (for example, an accountant assisting an attorney in a case involving significant and complicated matters of tax and finance), destroys any privilege and protection that may exist under statute or common law—one of several circumstances that could result in a similar outcome.[155]

---

154 U.S. v. Davis, 131 F.R.D. 391, 398–99 (S.D.N.Y. 1990) (citing *Upjohn*, 449 U.S. at 389, 391); Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc., 111 F.R.D. 76, 790 (S.D.N.Y. 1986); Chase Manhattan Bank, N.A. v. Drysdale Sec. Corp., 587 F. Supp. 57, 58 (S.D.N.Y. 1984); Greater Newburyport Clamshell All. v. Pub. Serv. Co. of New Hampshire, 838 F.2d 13, 20 (1st Cir. 1988) ("the party seeking to pierce the privilege must show that the 'evidence will be unavailable to [it] if the privilege prevails.'"); Sedco Int'l, S.A. v. Cory, 683 F.2d 1201, 1206 (8th Cir.), *cert. denied*, 459 U.S. 1017 (1982); 8 John Henry Wigmore, EVIDENCE, § 2388 (McNaughton rev. 1961)).

155 For limits on clergy-penitent privilege, *see* Conti v. Watchtower Bible & Tract Society of New York, Inc., 235 Cal.App.4th 1214, 1229–30 (Ca. Ct. App. 1st Dist. 2015) ("The privilege for penitential communications does not apply unless the communication is made 'in the presence of no third person so far as the penitent is aware'"); Morales v. Portuondo, 154 F. Supp. 2d 706, 729 (S.D.N.Y. 2001) (citing N.Y. CPLR 4505; People v. Carmona, 82 N.Y.2d 603, 627 N.E.2d 959 (1993)).

For limits on attorney-client privilege, *see* People v. Radojcic, 998 N.E.2d 1212, 1221 (Ill. 2013) ("The crime-fraud exception . . . is one of the recognized limits to the attorney-client privilege. The exception is triggered 'when a client seeks or obtains the services of an attorney in furtherance of criminal or fraudulent activity.'…'[W]here the crime-fraud exception applies, no attorney-client privilege exists whatsoever'") (citing and quoting *In re* Marriage of Decker, 153 Ill.2d 298, 313, (Ill. 1992)); *see* U.S. v. Zolin, 491 U.S. 554, 556 (1989); Olson v. Accessory Controls & Equip. Corp., 254 Conn. 145, 155, (Conn. 2000) ("[w]e conclude further that, under the crime-fraud exception, otherwise privileged communications may be stripped of their privileged status if the communications have been procured with the intent to further a civil fraud"); Cavallaro v. U.S., 284 F.3d 236, 250 (1st Cir. 2012) (normally, disclosure of communications to

The same would be, and should be, no less true for a new parent-child communication and testimonial privilege. For instance, the privilege as proposed herein should not be invoked or available in cases where a child has witnessed a parent's illegal activity, or where the child has independent knowledge of a parent's violation of law—such as in

third-party waives attorney-client privilege); Lawson v. Spirit AeroSystems, Inc., 410 F. Supp. 3d 1195, 1204 (D. Kan. 2019) (same is this proper form); Lisa Zeiderman & Liza Trazzera, *The Divorce: The Limitations of Privilege*, N.Y. L.J. at 9, July 25, 2022. For limits on physician-patient and therapist-patient privilege, *see* People v. Sergio, 21 Misc.3d 451, 462–64 (Sup. Ct. Kings Cty. 2008) (exception pursuant to Tarasoff v. Regents of Univ. of Cal., 17 Cal.3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976), if patient is shown to be a danger to a third-party); Sorensen v. Barbuto, 177 P.3d 614, 617–18 (2008) (disclosure of information permitted if placed at issue in a litigation); Chung v. Legacy Corp., 548 N.W.2d 147, 150 (Iowa 1996); State v. Salas, 1 Wash. App. 2d 931, 950, 408 P.3d 383, 394 (Wash. Ct. Apps. 2018) ("[t]he general rule is that the presence of a third party vitiates the privilege. . . . There is an exception to the general rule if the third party is present as a '"needed and customary participant"' in the treatment consultation. . . . In other words, 'physician' includes 'agents of the physician' who are present during the consultation. . . . A police officer 'may be deemed to be an agent of the physician, present for the physician's protection as well as the detention of the prisoner.' . . . The privilege applies in criminal proceedings by virtue of RCW 10.58.010, . . . and so does the nurse-patient privilege. RCW 5.62.020") (citing State v. Gibson, 476 P.2d 727 (Wash. App. Ct. 1970)).

For the marital or spousal communication privilege, *see* U.S. v. Nash, 910 F. Supp. 2d 1133, 1137–38 (S.D. Ill. 2012); U.S. v. Neal, 532 F. Supp. 942, 946–47 (D. Colo. 1982) ("Because of this tension between society's desire to protect marital privacy and the duty of courts to find the truth, the marital privilege has been strictly limited to communications between persons actually married when the communication took place. . . . Moreover, certain exceptions to the privilege have been recognized. Three of those exceptions must be discussed in relation to this case. The first exception provides that communications made by a spouse who knows that a third person is present are not protected from disclosure. . . . A spouse who is aware of a third party's presence cannot be said to intend his or her statements only for the other spouse; thus the essence of confidential marital communication is absent. No justification exists, therefore, to prevent anyone present during the conversation from testifying about what either spouse said to the other. The second exception allows testimony of communications between spouses regarding a future crime, or a crime in progress when the conversation occurs. . . . This exception is rationalized on the ground that the public benefit advanced by protecting marital communication is minimal, if not nonexistent, when spouses exploit their privacy to plan or perform criminal acts. The third exception allows persons who overhear marital communications to testify about what the spouses said to each other. . . . A number of courts and commentators, however, recognize an exception to this exception when the third party is able to overhear the conversation only through the connivance or treachery of one spouse 'setting up' the other") (citing 8 John Henry Wigmore, EVIDENCE, §§ 2335, 2339 (McNaughton rev. 1961)); MCCORMICK ON EVIDENCE 164–65, 167–168, 199–200 (2d ed. 1972); U.S. v. Mendoza, 574 F.2d 1373, 1381 (5th Cir. 1978)). *But see* State v. Perez, 124 Ohio St.3d 122, 140, 920 N.E.2d 104, 126–127 (Ohio 2009) (disagreeing with *Neal* that marital communications may not be introduced "through other means", including potential surreptitious recording by one spouse; agreeing with Michigan Supreme Court, in People v. Fisher, 442 Mich. 560, 575 (1993), that "[i]n construing a statute, we may not add or delete words") (also citing State v. Hughes, 86 Ohio St.3d 424, 427, 715 (Ohio 1999)).

the case of Guy Reffitt, the January 6, 2021 capitol rioter, reported by his own son and daughter who were independently aware of his multiple crimes against the United States and democracy.[156] That case was not a situation where the parent utilized the sanctity of familial communications and privacy to seek the counsel of his children after the crime was committed; or the children, thereafter, utilized that private family communication to aid their father's prosecutors. In the same vein, the privilege as proposed herein should neither be invoked nor available in cases where a parent has witnessed a child's illegal activity or where the parent has independent knowledge of a child's violation of law. In these circumstances, it is not because of the trust and confidence in the familial relationship that a parent or child would learn evidence against the other—and that is the circumstance with which any parent-child privilege ought to be most concerned and ought to be best designed to protect against.

Similar to the privileges discussed elsewhere in this article, which must satisfy specified elements, we do not advocate for a blanket unqualified privilege. The parent-child communication and testimonial privilege, which we propose herein, would and should be limited to the following elements that we suggest be satisfied for the new privilege to apply in a criminal, civil, juvenile, or alternative dispute resolution matter:

(1) A parent or child, of any age, confides in the other concerning a matter that is intended to remain confidential;
(2) The communication is for the purpose of seeking advice or guidance behind the shield of trust and confidence presented by the family unit;
(3) There is no intention to disclose the information/communication to any other third-party, including another family member (*i.e.,* siblings), except for those who might further the advice and guidance to the communicants (such as an attorney, physician, therapist, clergy member, or accountant); and
(4) The purpose of the communication is not intended to and does not solely result in the secreting of physical evidence of a crime, fraud, conspiracy or act of sedition or treason against the United States, and is not intended between the communicants to further a crime, fraud, conspiracy or act of sedition or treason against the United States, whether

156 Veronica Stracqualursi, *Convicted US Capitol Rioter's Son Says He "Absolutely" Agrees With Father's Sentence*, CNN.com (Aug. 2, 2022).

> or not within the physical borders of the United States or its territories.[157]

Very much like the attorney-client relationship, the parent-child privilege should not be allowed to result in a parent or child disturbing, interfering with or hiding physical evidence, or preventing access to physical evidence by either law enforcement or opposing parties.[158]

Thus, the parent-child communication and testimonial privilege, as proposed in this article, would have the limited purpose of shielding from disclosure communications between parent and child, specifically intended to remain confidential, and made precisely because of the nature and trust inherent in a nuclear family setting. Given all of the foregoing, the next section of this article sets forth a proposed parent-

---

157 The latter provision being of particular importance and focus following the Insurrection of January 6, 2021, at the United States Capitol in Washington, D.C.

158 For the related issue in the attorney-client privilege, s*ee, e.g.*, State v. Taylor, 502 So.2d 534, 535 (Mem) (La. 1986) ("In *Green*, we held (1) physical evidence connected to the commission of a crime which has been received or recovered by an attorney on account of his representation of a client is not excluded by virtue of the application of the attorney-client privilege and (2) the state may not call to the stand and examine a client's attorney as to any facts regarding the physical evidence, including its location, retrieval, possession and subsequent delivery to authorities since such matters constitute 'information' within the meaning of the term. . . . To allow the state to elicit information from the attorney to meet its burden of proving authentication (i.e., connection of the physical evidence to the defendant) undermines the purpose of the attorney-client privilege so as to effectively render its principle meaningless") (citing State v. Green, 493 So.2d 1178 (La. 1986)); State v. Carlin, 7 Kan.App.2d 219, 223, 640 P.2d 324, 327 (Kan. Ct. Apps. 1982) ("while the privilege protected the attorney from being required to give testimony concerning information received by him from his client in the course of their relationship, such privilege did not extend to the murder weapon"); U.S. v. Province, 42 M.J. 821, 826 (U.S. Navy–Marine Corps. Ct. Crim. Apps.1995) ("[i]t is generally accepted that the attorney-client privilege protects confidential communications rather than documentary or physical evidence which pre-exists the formation of the attorney-client relationship") (citing cases).

There are, of course, instances where documents may be withheld pursuant to the attorney-client privilege, but only when explicit elements are satisfied: "A party may withhold documents from discovery on the basis of privilege if each of the following elements applies to the document: '(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with the communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.'" Santrade, Ltd. v. General Elec. Co., 150 F.R.D. 539, 542 (E.D.N.C. 1993) (citing Republican Party of N.C v. Martin, 136 F.R.D. 421, 425–26 (E.D.N.C. 1991) (quoting N.C. Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 513 (M.D.N.C. 1986); Burroughs Wellcome Co. v. Barr Labs., Inc., 143 F.R.D. 611, 615 (E.D.N.C. 1992)).

child communication and testimonial privilege, urging that Congress adopt the same for the reasons and arguments advanced herein.

IV. PROPOSED LANGUAGE FOR A NEW *FEDERAL RULE OF EVIDENCE 503*[159] PARENT-CHILD COMMUNICATION & TESTIMONIAL PRIVILEGE, AND FOR STATE RULES TO FOLLOW SUIT[160]

Pursuant to Federal Rule of Evidence 501, the Supreme Court of the United States could create a common law parent-child privilege, adopting the sparse but sound reasoning of the few courts discussed above.[161] However, absent that, while the Congress of the United States

159 It should be noted that in the 1970s, there was a movement to amend the *Federal Rules of Evidence* to codify a number of the privileges discussed above—a specific attorney-client privilege in a Rule 503, a specific spousal privilege in a Rule 505, and a specific clergy-penitent privilege in a Rule 506. The movement failed, and the generalities of Rule 501 are what remain. *See* Fox & Fox, *supra* note 3, at 42 (citing Yolanda L. Ayala & Thomas C. Martyn, *To Tell or Not to Tell? An Analysis of Testimonial Privileges: The Parent-Child and Reporter's Privileges*, 9 ST. JOHN'S J. LEGAL COMMENT. 163, 166 n. 9 (1993)).

160 The authors recognize that the proposed text of a Parent-Child Privilege has been previously introduced in Congress, such as in H.R.3577 (105th Congress) *Confidence in the Family Act* ("To provide parent-child testimonial privileges in Federal civil and criminal proceedings"), S. 1721 (105th Congress), H.R. 4286 (105th Congress) *Parent-Child Privilege Act of 1998*, H.R. 522 (106th Congress) *Parent-Child Privilege Act of 1999*, H.R. 733 (107th Congress) *Parent-Child Privilege Act of 2001*, H.R. 538 (108th Congress) *Parent-Child Privilege Act of 2003*, and H.R. 3433 (109th Congress) *Parent-Child Privilege Act of 2005*, all of which sought to amend Article V of the Federal Rules of Evidence. *See* Catherine Chiantella Stern, *Don't Tell Mom the Babysitter's Dead: Arguments for a Federal Parent-Child Privilege and a Proposal to Amend Article V*, 99 GEO. L.J. 605, 642-643 (2011); Shonah P. Jefferson, *The Statutory Development of the Parent-Child Privilege: Congress Responds to Kenneth Starr's Tactics*, 16 GA. ST. U. L. REV. 429, 470–475 (1999).
However, none of those proposals were passed by Congress (nor, it appears, even voted out of committee once referred to what became the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary). Furthermore, it appears that since 2005 no other bill has been introduced in Congress seeking to create any kind of parent-child privilege. *See* CONGRESS.GOV (https://www.congress.gov/search?q=%7B%22search%22%3A%22%5C%22parent-child+privilege%5C%22%22%7D).
Additionally, the authors recognize that other writers on this topic, such as Attorneys Stern and Cheatham, proposed new evidence rules to encompass the privilege. *See* Stern, *supra* note 4, at 644. While we concur with Attorney Stern's inclusion of an exception to the privilege for terrorism, among other things, with all respect to those other authors, we view this privilege matter in light of the state of the world in 2022–2023, and have shaped our proposal accordingly. The authors herein suggest certain adjustments and changes to the language of the prior Congressional bills, in an effort to urge Congress to consider the proposal advanced by this article as a way to rectify prior concerns and current problems, and thus resolve this issue of a parent-child communication privilege once and for all.

161 The Supreme Court of the United States has stated: "The common-law principles underlying the recognition of testimonial privileges can be stated simply. 'For more than three centuries it has now been recognized as a fundamental maxim that the public . . .

is empowered to create or amend the Federal Rules of Evidence and Federal Rules of Civil Procedure, through appropriate legislation,[162] the Supreme Court is technically concurrently empowered to accomplish the same through statutory delegation by Congress.[163] However, given the repeated statements of courts deferring to legislative bodies for the expansion of the evidentiary law and privileges to create a parent-child communication and testimonial privilege, the proposal contained herein is written for consideration and adoption by Congress. The preceding notwithstanding, there appears to be ample reason and statutory authority for the Supreme Court to act, as well, if it wishes, through the Judicial Conference of the United States, and forwarding the rule to Congress for approval.

This Section contains text for a new Rule 503 of the Federal Rules of Evidence. With all respect to colleagues and fellow scholars who have both written on this issue of a parent-child privilege in evidentiary law, the below reflects thoughts that differ somewhat from those advanced in other texts.[164] For instance, the following proposed legislation for the creation of a Parent-Child Communication and Testimonial Privilege is adapted from and modeled after specific sources, including scholarly articles, as well as proposed legislation in Congress, most specifically: H.R. 3577 *Confidence in the Family Act*, proposed in The U.S. House of Representatives on March 27, 1998, by Congresswoman Zoe Lofgren (see **Appendix A**, hereto); H.R. 3433 *Parent-Child Privilege Act of 2005*,

has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."' . . . Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a '"public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."'" Jaffee v. Redmond, 518 U.S. 1, 9, (1996) (citing and quoting U.S. v. Bryan, 339 U.S. 323, 331 (1950) (quoting 8 John Henry Wigmore, EVIDENCE § 2192 (3d ed. 1940); U.S. v. Nixon, 418 U.S. 683, 709, (1974); Trammel v. U.S., 445 U.S. 40, 50(1980) (quoting Elkins v. U.S., 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). In that light, and with the importance of family trust, unity and sanctity in mind under normal circumstances, it is submitted that a federal, national parent-child privilege would, indeed, be a public good that transcends any arguments giving prominence and precedence instead to truth-seeking at all costs.

162 U.S. CONST., art. III; Hanna v. Plumer, 380 U.S. 460, 473–74 (1965); Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941); Williams v. Powers, 135 F.2d 153, 156 (6th Cir. 1943).

163 28 U.S.C. §§ 2072, 2073; Sims v. Great Am. Life Ins. Co., 469 F.3d 870, 878–81 n.8 (10th Cir. 2006) ("Federal Rule of Evidence 402 states: 'All relevant evidence is admissible, *except as otherwise provided* by the Constitution of the United States, by Act of Congress, *by these rules*, or by other rules prescribed by the Supreme Court pursuant to statutory authority.'") (emphasis added by Court).

164 *See* Watts, *supra* note 4, at 619–31; Stern, *supra* note 4, at 643.

proposed in the U.S. House of Representatives on July 26, 2005, by then-Congressman Robert Andrews (see **Appendix B**, hereto); and S. 1721 proposed in the U.S. Senate on March 6, 1998, by Senator Patrick Leahy (see **Appendix C**, hereto). For ease of reading and comparison of this proposal with H.R. 3433 (the more substantive and inclusive of the three bills referenced above), revisions and changes in this proposed Bill are reflected as follows:

New language – **Bold** and underline
Deleted language – ~~Strikethrough~~

118TH CONGRESS
1ST SESSION

Proposed H. R. ___ or S. ___

To amend the Federal Rules of Evidence to establish a parent-child **communication and testimonial** privilege.

[IN THE HOUSE OF REPRESENTATIVES ***(or)*** **IN THE SENATE OF THE UNITED STATES**]

_____, 2023

Mr./Ms. _____ introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the Federal Rules of Evidence to establish a parent-child **communication and testimonial** privilege.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Parent-Child **Communication & Testimonial** Privilege Act of **2023**".~~2005".~~

SEC. 2. PARENT-CHILD COMMUNICATION AND TESTIMONIAL PRIVILEGE.

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

"Rule **503** ~~502~~. Parent-Child **Communication & Testimonial** Privilege

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

"(1) The term 'Alternative Dispute Resolution Proceeding" means any private arbitration, mediation or negotiation, separate from any proceedings in a court, whether court-ordered or agreed to by and between the parties, conducted pursuant to provisions of law.

"**(2)**~~(1)~~ The term 'child' means the son, daughter, stepchild, **legally adopted child, ward of a formally court-appointed Guardian *ad litem* (whether or not a licensed attorney), ward of a grandparent, sibling or other family member acting *in loco parentis* regardless of formal legal status at the time of the communication and the time of testimony,** or foster child of a parent or the ward of a legal guardian or of any other person who serves as the child's parent. A person who meets this definition is a child for purposes of this rule, irrespective of whether or not that person has attained the age of majority in the place in which that person resides **or in which the matter is pending**. **Child shall include an individual meeting the definition in this Rule, regardless of whether said person is a licensed attorney in any jurisdiction.**

"**(3)**~~(2)~~ The term 'confidential communication' means a communication between a parent and the parent's child, made privately or solely in the presence of **the parent and child, or in the presence of parent, child and** ~~other members of the child's family or~~ an attorney, physician, psychologist, psychotherapist, social worker**/counsellor**, clergy member, **accountant,** or other third party who has a **common**

law or statutorily recognized confidential relationship with the parent or the child, which is not intended for further disclosure except to other members of the child's family or household **who are licensed attorneys for purposes of legal advice and guidance,** or to other persons in furtherance of the purposes of the communication**, with the intention that the communication remain confidential**.

4) The term 'Courts of the United States' shall have the same meaning as elsewhere in these Rules, and means the United States courts of appeals, United States district courts, United States territorial district courts of Guam, the Virgin Islands, the Northern Mariana Islands and Puerto Rico, United States Court of Federal Claims, United States tax court, United States Court of Appeals for Veterans Claims, United States Court of International Trade, United States bankruptcy courts, and proceedings before all judges of the United States, including United States circuit judges, United States district judges, United States magistrate judges, United States bankruptcy judges, United States federal claims judges and United States tax court judges.

"**(5)**~~(4)~~ The term 'parent' means a birth parent, adoptive parent, stepparent, foster parent, ~~or~~ legal guardian of a child, **court-appointed Guardian *ad litem* (whether or not a licensed attorney), grandparent, sibling or other family member formally appointed by a court as a guardian of a child, or acting *in loco parentis* regardless of formal legal status at the time of the communication and the time of testimony,** or any other person that a court has recognized as having acquired the right to act as a parent of that child. **Parent shall include an individual meeting the definition in this Rule, regardless of whether said person is a licensed attorney in any jurisdiction.**

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

"(1) a parent shall not be compelled to give testimony as a witness**, in any civil or criminal proceeding in the Courts of the United States, or in any alternative dispute resolution proceeding governed by the Federal Rules of Evidence,** adverse to a person who is, at the time of the proceeding, a child of that parent; and

"(2) a child shall not be compelled to give testimony as a witness**, in any civil or criminal proceeding in the Courts of the United States, or in any alternative dispute resolution proceeding governed by the Federal Rules of Evidence,** adverse to a person who is, at the time of the proceeding, a parent of that child;

unless the parent or child who is the witness voluntarily and knowingly waives the privilege to refrain from giving such adverse testimony.

"(3) For purposes of the privilege set forth in subdivisions (b)(1) & (2), the privilege shall be held by both the parent and the child.

"(c) CONFIDENTIAL COMMUNICATIONS PRIVILEGE.— (1) In any civil or criminal proceeding governed by these rules, and subject to the exceptions set forth in subdivision (d) of this rule—

"(A) a parent shall not be compelled**, in any civil or criminal proceeding in the Courts of the United States, or in any alternative dispute resolution proceeding governed by the Federal Rules of Evidence,** to divulge any confidential communication made between that parent and the child during the course of their parent-child relationship; and

"(B) a child shall not be compelled**, in any civil or criminal proceeding in the Courts of the United States, or in any alternative dispute resolution proceeding governed by the Federal Rules of Evidence,** to divulge any confidential communication made between that child and the parent during the course of their parent-child relationship;

unless both the child and the parent or parents of the child who are privy to the confidential communication voluntarily and knowingly waive the privilege against the disclosure of the communication in the proceeding.

"(2) For purposes of the privilege set forth in subdivisions (c)(1)(A) & (B), the privilege shall be held by both the parent and the child.

"~~(2)~~ **(3)** The privilege set forth in this subdivision applies even if, at the time of the proceeding, the parent or child who made or received the confidential communication is deceased or the parent-child relationship has terminated.

"(d) EXCEPTIONS.—The privileges set forth in subdivisions **(b) and** (c) ~~and (d)~~ of this rule shall be inapplicable and unenforceable—

"(1) in any civil action or proceeding by the child against the parent, or the parent against the child**, when the subject of the otherwise confidential communications is at issue in the proceeding**;

"(2) in any civil action or proceeding in which the child's parents are opposing parties **to each other and/or the child, when the subject of the otherwise confidential communications is at issue in the proceeding**;

"(3) in any civil action or proceeding contesting the estate of the child or of the child's parent**, when the subject of the otherwise confidential communications is at issue in the proceeding**;

"(4) in any action or proceeding in which the custody, dependency, **emancipation,** deprivation, abandonment, support or nonsupport, abuse, or neglect of the child, or the termination of parental rights with respect to the child, is at issue**, and the subject of the otherwise confidential communications is at issue in the proceeding**;

"(5) in any action or proceeding to commit the child or a parent of the child because of alleged mental or physical incapacity**, and the subject of the otherwise confidential communications is at issue in the proceeding**;

"(6) in any action or proceeding to place the person or the property of the child or of a parent of the child in the custody or control of another because of alleged mental or physical capacity**, and the subject of the otherwise confidential communications is at issue in the proceeding**; ~~and~~

"(7) in any criminal or juvenile action or proceeding in which the child or a parent of the child is charged with an offense against the person or the property of the child, a parent of the child or any member

of the family or household of the parent or the child**, and the subject of the otherwise confidential communications is at issue in the proceeding**.

"(8) in any criminal or juvenile action in which the parent and child are both accused of collusion, cooperation, partnership or collaboration in the commission of a crime, commission of an attempted crime or conspiracy to commit a crime, and the subject of the otherwise confidential communications is at issue in the proceeding either directly in the case-in-chief or as impeachment or alibi evidence.

"(9) in any action or proceeding, including any criminal, civil or juvenile action or proceeding, or alternative dispute resolution proceeding, resulting from or involving domestic or international terrorism, treason, sedition or insurrection against the United States or any governmental subdivision thereof, regardless of whether within the physical boundaries of the United States or its territories, and/or if alleged or shown to have been conducted by child, parent or both in combination or as a result of concerted activity.

"(e) APPOINTMENT OF A REPRESENTATIVE FOR A CHILD BELOW THE AGE OF MAJORITY.—When a child who appears to be the subject of a privilege set forth in subdivision (b) or (c) of this rule is below the age of majority at the time of the proceeding in which the privilege is or could be asserted, the court may appoint a guardian, attorney, or other legal representative to represent the child's interests with respect to the privilege. If it is in furtherance of the child's best interests, the child's representative may waive the privilege under subdivision (b) or consent on behalf of the child to the waiver of the privilege under subdivision (c).

"(f) NON-EFFECT OF THIS RULE ON OTHER EVIDENTIARY PRIVILEGES.—This rule shall not affect the applicability or enforceability of other recognized evidentiary privileges that, pursuant to rule 501, may be applicable and enforceable in any proceeding governed by these rules."

(b) "(1) Under both the testimonial and communication privileges, the refusal to testify when the privileges are inapplicable is to be punishable as contempt.

"(2) In the event of an unauthorized disclosure of an otherwise privileged confidential communication, for which an exception is inapplicable, that disclosure shall also be punishable as contempt.

(c) ~~(b)~~ CLERICAL AMENDMENT.—The table of contents for the Federal Rules of Evidence is amended by after the item relating to rule**s** 501 **and 502** the following new item:

"Rule **503**~~502~~. Parent-child **communication & testimonial** privilege".

(c) EFFECT OF AMENDMENTS.—The amendments made by this Act shall apply with respect to communications made before, on, or after the date of the enactment of this Act."

V. CONCLUSION

It should be considered nothing less than a pervasive danger that in the present-day court system of the United States, a parent could be compelled or permitted to testify against a child who confided in that parent or sought advice from that parent at a critical time, or during a crisis event, in the child's life. In similar vein, no child of any age should be exposed to the psychological and emotional effects that stem from being compelled or subpoenaed to testify against their parent. As Elie Wiesel famously said: "Once you bring life into the world, you must protect it. We must protect it by changing the world."[165] Expanding on the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, protecting a life includes protecting the relationships that are called family—that which is often their greatest source of refuge and respite from the slings and arrows, and ever-accelerating stresses and demands, of the world. The change needed in this world is one where, in limited fashion, a parent-child communication and testimonial privilege exists to shield from the governmental authorities and civil third-parties conversations between parent and child, initiated by either in the privacy and sanctity of a family discussion, outside of the hearing of others.

As stated by the *In re Agosto* Court,

> If the state drives a wedge between a man and his family, the state will ultimately suffer. The practical effect of allowing the government to coerce testimony by parent and child against

165 Elie Wiesel, interview in *Writers at Work* (8th Series, ed. by George Plimpton, 1988), cited in Andrews, THE COLUMBIA DICTIONARY OF QUOTATIONS, *supra* note 1, at 140.

> one another is that individuals totally uninvolved in and innocent of the alleged wrongdoing will be jailed for contempt, solely because of a strong sense of family loyalty. The government, then, is essentially in a position of actively punishing selflessness and loyalty which are inculcated into the child by family, church, and even the state itself. It is inconsistent with a free society to place a child in the position of choosing between loyalty to his parent and loyalty to his state. In this instance, a child is delivered into a psychological double-bind in which he is scorned and branded as disloyal if he does testify and jailed if he does not. The child is required, then, to have a contingent loyalty to the family which reared him and taught him the basic values of honesty, integrity, and respect for authority.
>
> 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.
>
> . . .
>
> "*Indifference to personal liberty is but the precursor of the State's hostility to it*."[166]

A Federal Rule of Evidence 503, as proposed above, would accomplish protecting the family values that are so essential to the continuation of our constitutional democracy, and would re-affirm that oft-repeated American phrase that family is the most important thing in the world. To make that more than trite lip-service, Congress and the federal Courts should consider a new Federal Rule of Evidence 503.

166 *Agosto*, 553 F. Supp. at 1326 (citing and quoting U.S. v. Penn., 647 F.2d 876, 889 (9th Cir. 1980) (Kennedy, J., dissenting) (emphasis added)).

APPENDIX A[167]

105th CONGRESS
2d Session

H. R. 3577

To provide parent-child testimonial privileges in Federal civil and criminal proceedings.

IN THE HOUSE OF REPRESENTATIVES
March 27, 1998

Ms. Lofgren (for herself, Mr. Nadler, Mr. Conyers, Mr. Watt of North Carolina, Ms. DeLauro, Ms. Eshoo, Ms. Hooley of Oregon, Mrs. Lowey, Mrs. Mink of Hawaii, Mrs. Tauscher, Ms. Woolsey, Mr. DeFazio, Mr. Fazio of California, Mr. Hastings of Florida, and Mr. Miller of California) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To provide parent-child testimonial privileges in Federal civil and criminal proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Confidence in the Family Act".

SEC. 2. PARENT-CHILD TESTIMONIAL PRIVILEGES IN FEDERAL CIVIL AND CRIMINAL PROCEEDINGS.

Rule 501 of the Federal Rules of Evidence is amended—

167 The Bill reflected in this **Appendix A** was a proposal for a parent-child testimonial privilege. It was introduced in March 1998 by Rep. Zoe Lofgren (D-CA), but no action was taken on the Bill after it was referred to the Committee on the Judiciary, and its Subcommittee on Courts and Intellectual Property. *See* H.R. 3577, 105th Cong. (1998).

(1) by designating the 1st sentence as subdivision (a);

(2) by designating the 2nd sentence as subdivision (c); and

(3) by inserting after the sentence so designated as subdivision (a) the following new subdivision:

"(b)(1) A witness may not be compelled to testify against a child or parent of the witness.

"(2) A witness may not be compelled to disclose the content of a confidential communication with a child or parent of the witness.

"(3) For purposes of this subdivision, 'child' means, with respect to an individual, a birth, adoptive, or step-child of the individual, and any person (such as a foster child or a relative of whom the individual has long-term custody) with respect to whom the court recognizes the individual as having a right to act as a parent.

"(4) The privileges provided in this subdivision shall be governed by principles of the common law, as they may be interpreted by the courts of the United States in the light of reason and experience, that are similar to the principles that apply to the similar privileges of a witness with respect to a spouse of the witness."

APPENDIX B[168]

109TH CONGRESS
1ST SESSION

H. R. 3433

To amend the Federal Rules of Evidence to establish a parent-child privilege.

IN THE HOUSE OF REPRESENTATIVES
JULY 26, 2005
Mr. ANDREWS introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the Federal Rules of Evidence to establish a parent-child privilege.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Parent-Child Privilege Act of 2005".

SEC. 2. PARENT-CHILD PRIVILEGE.

168 The Bill reflected in this **Appendix B** is the last, and most recent, proposal for a parent-child privilege in the United States Congress. It was introduced in July 2005 by then-Rep. Robert Andrews (D-NJ), but no action was taken on the Bill after it was referred to Committee on the Judiciary, and its Subcommittee on Courts, the Internet, and Intellectual Property. *See* H.R. 3433, 109th Cong. (2005).

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

"Rule 502. Parent-Child Privilege

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

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

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

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

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

"(1) a parent shall not be compelled to give testimony as a witness adverse to a person who is, at the time of the proceeding, a child of that parent; and

"(2) a child shall not be compelled to give testimony as a witness adverse to a person who is, at the time of the proceeding, a parent of that child;

unless the parent or child who is the witness voluntarily and knowingly waives the privilege to refrain from giving such adverse testimony.

"(c) CONFIDENTIAL COMMUNICATIONS PRIVILEGE.— (1) In any civil or criminal proceeding governed by these rules, and subject to the exceptions set forth in subdivision (d) of this rule—

"(A) a parent shall not be compelled to divulge any confidential communication made between that parent and the child during the course of their parent-child relationship; and

"(B) a child shall not be compelled to divulge any confidential communication made between that child and the parent during the course of their parent-child relationship;

unless both the child and the parent or parents of the child who are privy to the confidential communication voluntarily and knowingly waive the privilege against the disclosure of the communication in the proceeding.

"(2) The privilege set forth in this subdivision applies even if, at the time of the proceeding, the parent or child who made or received the confidential communication is deceased or the parent-child relationship has terminated.

"(d) EXCEPTIONS.—The privileges set forth in subdivisions (c) and (d) of this rule shall be inapplicable and unenforceable—

"(1) in any civil action or proceeding by the child against the parent, or the parent against the child;

"(2) in any civil action or proceeding in which the child's parents are opposing parties;

"(3) in any civil action or proceeding contesting the estate of the child or of the child's parent;

"(4) in any action or proceeding in which the custody, dependency, deprivation, abandonment, support or nonsupport, abuse, or neglect of

the child, or the termination of parental rights with respect to the child, is at issue;

"(5) in any action or proceeding to commit the child or a parent of the child because of alleged mental or physical incapacity;

"(6) in any action or proceeding to place the person or the property of the child or of a parent of the child in the custody or control of another because of alleged mental or physical capacity; and

"(7) in any criminal or juvenile action or proceeding in which the child or a parent of the child is charged with an offense against the person or the property of the child, a parent of the child or any member of the family or household of the parent or the child.

"(e) APPOINTMENT OF A REPRESENTATIVE FOR A CHILD BELOW THE AGE OF MAJORITY.—When a child who appears to be the subject of a privilege set forth in subdivision (b) or (c) of this rule is below the age of majority at the time of the proceeding in which the privilege is or could be asserted, the court may appoint a guardian, attorney, or other legal representative to represent the child's interests with respect to the privilege. If it is in furtherance of the child's best interests, the child's representative may waive the privilege under subdivision (b) or consent on behalf of the child to the waiver of the privilege under subdivision (c).

"(f) NON-EFFECT OF THIS RULE ON OTHER EVIDENTIARY PRIVILEGES.—This rule shall not affect the applicability or enforceability of other recognized evidentiary privileges that, pursuant to rule 501, may be applicable and enforceable in any proceeding governed by these rules.".

(b) CLERICAL AMENDMENT.—The table of contents for the Federal Rules of Evidence is amended by after the item relating to rule 501 the following new item:

"Rule 502. Parent-child privilege".

(c) EFFECT OF AMENDMENTS.—The amendments made by this Act shall apply with respect to communications made before, on, or after the date of the enactment of this Act.

Appendix C[169]

105th CONGRESS
2d Session

S. 1721

To provide for the Attorney General of the United States to develop guidelines for Federal prosecutors to protect familial privacy and communications between parents and their children in matters that do not involve allegations of violent or drug trafficking conduct and the Judicial Conference of the United States to make recommendations regarding the advisability of amending the Federal Rules of Evidence for such purpose.

IN THE SENATE OF THE UNITED STATES
March 6, 1998

Mr. Leahy introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To provide for the Attorney General of the United States to develop guidelines for Federal prosecutors to protect familial privacy and communications between parents and their children in matters that do not involve allegations of violent or drug trafficking conduct and the Judicial Conference of the United States to make recommendations regarding the advisability of amending the Federal Rules of Evidence for such purpose.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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

169 This bill was introduced as S.1721 in the 105th Congress, on March 6, 1998, by Senator Patrick Leahy (D-VT). The bill was referred to the Senate Judiciary Committee, and while no further action was taken in that Congress, the language of the proposed legislation further informs with regard to the proposal in this article.

(a) Study and Development of Prosecutorial Guidelines.—The Attorney General of the United States shall—

(1) study and evaluate the manner in which the States have taken measures to protect the confidentiality of communications between children and parents and, in particular, whether such measures have been taken in matters that do not involve allegations of violent or drug trafficking conduct;

(2) develop guidelines for Federal prosecutors that will provide the maximum protection possible for the confidentiality of communications between children and parents in matters that do not involve allegations of violent or drug trafficking conduct, within any applicable constitutional limits, and without compromising public safety or the integrity of the judicial system, taking into account—

(A) the danger that the free communication between a child and his or her parent will be inhibited and familial privacy and relationships will be damaged if there is no assurance that such communications will be kept confidential;

(B) whether an absolute or qualified testimonial privilege for communications between a child and his or her parents in matters that do not involve allegations of violent or drug trafficking conduct is appropriate to provide the maximum guarantee of familial privacy and confidentiality without compromising public safety or the integrity of the judicial system; and

(C) the appropriate limitations on a testimonial privilege for such communications between a child and his or her parents, including—

(i) whether the privilege should apply in criminal and civil proceedings;

(ii) whether the privilege should extend to all children, regardless of age, unemancipated or emancipated, or be more limited;

(iii) the parameters of the familial relationship subject to the privilege, including whether the privilege should extend to stepparents or grandparents, adopted children, or siblings; and

(iv) whether disclosure should be allowed absent a particularized showing of a compelling need for such disclosure, and adequate procedural safeguards are in place to prevent unnecessary or damaging disclosures; and

(3) prepare and disseminate to Federal prosecutors the findings made and guidelines developed as a result of the study and evaluation.

(b) Report and Recommendations.—Not later than 1 year after the date of enactment of this Act, the Attorney General of the United States shall submit a report to Congress on—

(1) the findings of the study and the guidelines required under subsection (a); and

(2) recommendations based on the findings on the need for and appropriateness of further action by the Federal Government.

(c) Review of Federal Rules of Evidence.—Not later than 180 days after the date of enactment of this Act, the Judicial Conference of the United States shall complete a review and submit a report to Congress on—

(1) whether the Federal Rules of Evidence should be amended to guarantee that the confidentiality of communications by a child to his or her parent in matters that do not involve allegations of violent or drug trafficking conduct will be adequately protected in Federal court proceedings; and

(2) if the rules should be so amended, a proposal for amendments to the rules that provides the maximum protection possible for the confidentiality of such communications, within any applicable constitutional limits and without compromising public safety or the integrity of the judicial system.