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Towards a Parent-Inclusive Attorney-Client Privilege

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TOWARD A PARENT-INCLUSIVE ATTORNEY-CLIENT PRIVILEGE

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Few state or federal courts recognize a parent-child testimonial or communication privilege. Yet, courts recognize privileges between spouses, clergy-penitent, and therapist-patient. Supported by the Wigmore test that legitimized these privileges, this paper argues that the attorney-client privilege should still exist even if (1) a client's parent is included in an attorney-client meeting in an advisory capacity; (2) the child discloses contents of the attorney-client communications to the child's parent; or (3) the child discusses the contents of the attorney-client communications with the child's parent.

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I. INTRODUCTION

Jane, an eighteen-year-old college freshman who has never previously been away from home, is sexually assaulted in her dorm. When she reports the assault to law enforcement, she is interrogated for three hours about her past sexual history and then released. She calls her mom, sobbing. Her mom drives all night to be with her daughter. The next day, they retain an attorney. "Sorry," he says, "you cannot sit in on my meeting with your daughter. For me to allow you to do so would waive the attorney-client privilege. What's more, she cannot talk with you about anything she and I discuss at that meeting. Doing so might also waive the privilege." Jane is devastated yet again. She has always relied on her mother's counsel and support, and has never needed it more than today. She must now face the ordeal of a hostile legal system alone.

Modern American law recognizes several types of privileged communications: attorney-client, marital, clergy-penitent, physician-patient, psychotherapist-patient, and, in a few states, parent and minor child.[1] Each form of privilege is an exception to the principle famously articulated by the Duke of Argyll in 1742 and affirmed by the United States Supreme Court in *United States v. Bryan*—"the public has a claim to every man's evidence" to determine the truth.[2] Exceptions are justified and their scope determined by what has come to be known as the Wigmore test, under which communications must meet four conditions to be considered privileged:

> (1) the communications must originate in a confidence that they will not be disclosed;
> (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
> (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and

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[1] *See* Note, *Parent-Child Loyalty & Testimonial Privilege*, 100 HARV. L. REV. 910, 911–12 (1987) (discussing the privileges that courts have recognized).

[2] 12 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 675 (T.C. Hansard 1812).

> (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[3]

Citing the Wigmore test, commentators have repeatedly urged adoption of parent-child privileges similar to the privileges that protect communications between spouses,[4] for the most part to no avail.[5] In 2005, Congress considered H.R. 3433, the Parent-Child

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[3] JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 8, § 8 (Tillers *rev. ed*. 1983).

[4] *See, e.g.*, Daniel R. Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 622–32 (1970) (arguing that communication within the child-parent relationship generally satisfies the Wigmore test); Maureen P. O'Sullivan, *An Examination of the State and Federal Courts' Treatment of the Parent-Child Privilege*, 39 CATH. LAW. 201, 206 (2017) ("[T]he parent-child privilege should become pervasive law in the United States."); David A. Schlueter, *The Parent-Child Privilege: A Response to Calls for Adoption*, 19 ST. MARY'S L.J. 35, 45 (1987) ("[V]irtually every commentator addressing the issue has urged either legislative or judicial adoption a parent-child privilege." (citations omitted)); Wendy Meredith Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 608 (1987) ("[T]he proposed parent-child confidential communications privilege satisfies each condition of the Wigmore test."); Yolanda L. Ayala & Thomas C. Martyn, Note, *To Tell or Not To Tell? An Analysis of Testimonial Privileges: The Parent-Child and Reporter's Privileges*, 9 ST. JOHN'S J. LEGAL COMMENT. 163, 172 (1993) ("After examining the issue in light of Wigmore's postulate, the parent-child privilege should undoubtedly be accepted because it satisfies each condition of the Wigmore test."); Jeffrey Begens, Comment, *Parent-Child Testimonial Privilege: An Absolute Right or an Absolute Privilege?*, 11 U. DAYTON L. REV. 709, 723 (1986) ("Recognition of a parent-child privilege should result when applying . . . [the] Wigmore standard."); Betsy Booth, Comment, *Underprivileged Communications: The Rationale for a Parent-Child Testimonial Privilege*, 36 SW. L.J. 1175, 1177 (1983) ("The proposed privilege for confidential communications between parent and child arguably satisfies Dean Wigmore's four criteria, and thus merits recognition as a rule of evidence."); Jennifer A. Clark, Note, *Questioning the Recognition of a Parent-Child Testimonial Privilege*, 45 ALB. L. REV. 142, 150 (1980) ("[T]he proposed parent-child privilege . . . meets the four criteria established by Dean Wigmore . . . ."); J. Tyson Covey, Note, *Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege*, 1990 U. ILL. L. REV. 879, 881–82 (1990) (articulating the Wigmore test in a discussion concerning whether Illinois should create a parent-child privilege); Gregory W. Franklin, Note, *The Judicial Development of the Parent-Child Testimonial Privilege: Too Big for its Britches?*, 26 WM. & MARY L. REV. 145, 168 (1984) ("Courts should not compel disclosure of confidential communications between minors and their parents concerning matters of guidance and support. This conclusion is consistent . . . with the Wigmore formula . . . ."); *cf.* Nissa M. Ricafort, Note, Jaffee v. Redmond: *The Supreme Court's Dramatic Shift Supports the Recognition of a Federal Parent-Child Privilege*, 32 IND. L. REV. 259, 294–95 (1998) (arguing that to recognize a parent-child privilege, courts should abandon the Wigmore test in favor of a more flexible approach). *But see* Jessica L. Perry, *Parent-Child Privilege*, 36 BRANDEIS J. FAM. L. 143, 146 (1998) (noting that the Third Circuit has held that a parent-child relationship does not satisfy the Wigmore criteria).

[5] *See infra* Part II.E.

Privilege Act,[6] which proposed to amend Article V of the Federal Rules of Evidence by adding a new Rule 502. This new evidence rule would have recognized both an adverse testimonial privilege and a confidential communications privilege between parent and child, regardless of whether the child had reached the age of majority.[7] Viewed as overbroad,[8] the proposed Act died in the House.

This paper proposes a more narrowly tailored solution than what was proposed in H.R. 3433 or by past commentators. Specifically, this paper proposes an expansion of the Wigmore test in three narrow circumstances. Attorney-client privilege should still exist if (1) a client's parent is included in an attorney-client meeting in an advisory capacity; (2) the child discloses contents of the attorney-client communications to the child's parent; or (3) the child discusses the contents of the attorney-client communications with the child's parent. The attorney-client privilege should not be deemed waived in any of the three situations above, so long as the relevant communications are not disclosed to anyone else.

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[6] Parent-Child Privilege Act of 2005, H.R. 3433, 109th Cong. § 2 (2005). Similar proposals made by earlier sessions of Congress include the Parent-Child Privilege Act of 1998, H.R. 4286, 105th Cong. (1998), and the Parent-Child Privilege Act of 1999, H.R. 522, 106th Cong. (1999).

[7] The latter would have protected the

> [C]ommunication 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.

H.R. 3433, § 2(a), proposed Rule 502(a)(2). For purposes of the proposed rule, the term "child" was defined to include:

> [T]he 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 . . . irrespective of whether or not [the person who meets this definition] has attained the age of majority in the place in which that person resides.

Id., proposed Rule 502(a)(1).

[8] *Cf.* 144 CONG. REC. H1407–1430 (daily ed. Apr. 23, 1998) (collecting statements of Reps. Coble, Frank, and Hyde with regard to the 1998 proposal).

Unlike H.R. 3433, this paper does not propose a general testimonial privilege or confidential-communications privilege between parent and child. Nor does it advocate a reciprocal child-inclusive privilege, which might allow children to become privy to their parents' attorney-client confidential matters. This paper's proposal is designed solely to allow parents to help their young adult children navigate a legal system that can intimidate the best of us. In jurisdictions that have chosen or ultimately choose to adopt broader parent-child privileges, the proposed rule complements such privileges. Nevertheless, recognition of a general parent-child privilege is not a prerequisite to adoption of the rule proposed here.

A parent-inclusive attorney-client privilege not restricted to children of a particular age would allow parents to assist their adult children of whatever age who are not capable of navigating the legal system by themselves. Should an age limitation make the proposal more acceptable, however, modern developmental psychology suggests that a cut-off in the mid-twenties—for example, a rule applicable only if the child is age twenty-five or younger—might be appropriate.

This paper proceeds as follows. Part II explores the Wigmore test to justify and shape currently recognized communication privileges. The same rationale that applies to existing privileges applies equally to the limited expansion of the attorney-client privilege for which this paper advocates. Part III explores the problem of waiver. Part IV then argues in favor of a limited expansion of the attorney-client privilege—to make it parent-inclusive. This limited expansion is justified given both the role of the attorney and modern evidence regarding the developmental capacity and decision-making abilities of adult children. Part V explores another alternative sometimes used in cases involving minor children—treating the parent as agent of the child. While plausible, a solution founded in the law of agency is problematic, and a parent-inclusive attorney-client would avoid these problems. Part VI concludes.

II. COMMUNICATION PRIVILEGES UNDER THE WIGMORE TEST

A. A BRIEF HISTORY

During a 1742 debate in the House of Lords, the Duke of Argyll famously stated that "the public has a claim to every man's

evidence" in order to determine the truth.[9] Even before the Duke announced this principle, English courts had held that certain types of communications were privileged, and therefore immune from discovery or disclosure, notwithstanding the fact that they might be of value to the truth-seeking process.[10] Historically, such common-law privileges were limited to communications of a kind deemed specially worthy of protection because of the close and sensitive relationship between the parties to the communications.[11]

Before recognizing categorical communication privileges, courts made case-by-case determinations of the need for privacy by balancing the "validity of the right sought and the 'need' for protection against society's interest in ascertaining the truth."[12] Privilege was recognized only in cases in which the court found that "the privacy interest outweighed society's interest."[13] Over time, however, the law of privilege evolved into a series of *per se* rules, applied without need for *ex post* case-by-case balancing.[14] Under a *per se* approach, parties could rely on the existence of such privileges in their day-to-day dealings without having to risk an after-the-fact judicial determination that, on their particular facts, society's interest outweighed their interest in privacy.

The law of privilege has continued to evolve in the modern era through both judicial and legislative action. Prior to 1975, no federal statutory scheme addressed the question; federal courts therefore relied on Anglo-American common law.[15] In 1975, Congress enacted

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[9] COBBETT, *supra* note 2, at 675.

[10] 8 WIGMORE, *supra* note 3, at § 2290 (John T. Mcnaughton Rev. 1961) (English courts recognized a form of the modern attorney-client privilege as early as 1577).

[11] *See* Jeffrey J. Lauderdale, *A New Trend in the Law of Privilege: The Federal Settlement Privilege and the Proper Use of Federal Rule of Evidence 501 for the Recognition of New Privileges*, 35 U. MEM. L. REV. 255, 260–61 (2005) ("[Prior to 1975], the only privileges consistently respected were the attorney-client, spousal, governmental secrets, and voting privileges.").

[12] *Privileges*, ELEC. PRIVACY INFO. CTR., http://www.epic.org/privacy/privileges (last visited Nov. 4, 2018).

[13] *Id.*

[14] *See* Steven Plitt & Joshua D. Rogers, *The Battle to Define the Scope of Attorney-Client Privilege in the Context of Insurance Company Bad Faith: A Judicial War Zone*, 14 U.N.H. L. REV. 105, 106 (2015) (arguing that courts have adopted the "functional equivalent of a *per se* waiver rule" for privilege in the context of insurance company bad faith).

[15] *See Privileges*, *supra* note 12 (explaining that the early American legal system looked to English common law for foundation principles of privilege).

Federal Rule of Evidence 501 validating this practice. In its original version, the Rule provided that

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.[16]

In the years following the implementation of Rule 501, there was some initial uncertainty as to whether and to what extent courts could create or modify privileges under the Rule.[17] Yet in 1996, the Supreme Court recognized a new psychotherapist-patient privilege in *Jaffee v. Redmond*.[18] Since *Jaffee,* however, no federal court has recognized another type of communication privilege.

Today, communication privileges remain limited to situations involving relationships that meet the Wigmore test.[19] Under that test, communications made in confidence are not protected from

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[16] FED. R. EVID. 501 (1975) (amended 2011). Today's Rule 501 is substantively identical. It reads as follows:

> 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.

FED. R. EVID. 501.

[17] Diane Marie Amann & Edward J. Imwinkelried, *The Supreme Court's Decision to Recognize a Psychotherapist Privilege in* Jaffee v. Redmond*, 116 S. Ct. 1923 (1996): The Meaning of "Experience" and the Role of "Reason" Under Federal Rule of Evidence 501*, 65 U. CIN. L. REV. 1019, 1031–32 (1997) (noting that the text of Rule 501 did not provide significant clarity to courts as to what extent courts could create new privileges under Rule 501).

[18] 518 U.S. 1, 17 (1996) ("[W]e hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.").

[19] *See supra* Parts II.B—D.

disclosure simply because of their confidential nature.[20] Confidentiality protections only arise if "premised upon a public policy expressed by statute or in furtherance of an overriding public concern of constitutional dimension."[21] The primary reason for this limitation is the fact that "privileges contravene the fundamental principles that a public has a right to every person's evidence."[22] In addition to the most quintessential form of communication privilege—the attorney-client privilege—courts now recognize marital privileges, the clergy-penitent privilege, and psychotherapist-patient privilege.[23] A minority of jurisdictions have created a parent-minor child privilege, although the scope of this privilege is far from certain.[24] Each of the non-attorney-client communication privileges supports this paper's premise that a parent-inclusive attorney-client relationship should be recognized.[25]

B. MARITAL PRIVILEGES

Marital privileges promote and encourage trust, candor, and confidence between spouses and thereby foster and preserve the marital relationship.[26] The Supreme Court discussed the spousal testimonial privilege in *Trammel v. United States*: "the modern justification for this privilege . . . is its perceived role in fostering the harmony and sanctity of the marriage relationship."[27] Two distinct marital privileges exist and are sometimes confused: the spousal testimonial privilege and the marital communications privilege.[28] Courts have noted that these "privileges should be

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[20] Kelly Korrell, Annotation, *Testimonial Privilege for Confidential Communications Between Relatives Other than Husband and Wife—State Cases*, 62 A.L.R. 5th 629, § 2[a] (1998).

[21] *Id.*

[22] *Id.*

[23] *See, e.g.*, COLO. REV. STAT. ANN. § 13-90-107 (West 2017) (listing persons covered by Colorado testimonial privileges).

[24] *See infra* Part II.E.

[25] For a discussion of the attorney-client privilege itself, see *infra* Part IV.

[26] *See* Korrell, *supra* note 20 (explaining that the privilege is intended to promote confidence between spouses and "aid in the preservation of the marriage status").

[27] 445 U.S. 40, 44 (1980).

[28] *Privileges*, *supra* note 12.

narrowly construed because they undermine the search for the truth."[29]

1. Spousal Testimonial Privilege

The spousal testimonial privilege entitles a spouse to refuse to testify against their partner, regardless of whether communications are involved.[30] For example, testimony regarding the clothing the witness's spouse was wearing on the morning in question is precluded. Communications are subject to the privilege as well. Generally, the privilege arises upon marriage, and terminates upon divorce.[31] In effect, the testimonial privilege works as a complete bar to testimony, regardless of subject matter, so long as the events in question occurred during the marriage.[32]

Thirty-one states and the District of Columbia recognize some form of spousal testimonial privilege.[33] As with many of the communication privileges, the structure and scope of the spousal testimonial privilege varies from state to state.[34] Seventeen states have restricted the privilege to criminal cases; others recognize it in both civil and criminal proceedings.[35] In a majority of jurisdictions, including the federal courts, the spousal testimonial privilege can be waived by the witness spouse alone.[36] Under this construction, the defendant spouse cannot prevent the witness spouse from testifying.[37]

It is not clear that an analogous parent-child testimonial privilege is required to solve the problem this paper is trying to

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[29] State v. Ballard, 752 A.2d 735, 747 (N.J. Super. Ct. App. Div. 2000) (citing State v. Szemple, 640 A.2d 817, 820 (N.J. 1994)).

[30] 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:39, at 729 (3d ed. 2007). A minority of states have construed this privilege to allow one spouse to prevent the testimony of their partner, but this is not the case under federal law. *Id.* at 729–30.

[31] 1 MCCORMICK ON EVIDENCE § 81 (Kenneth S. Broun ed., Thomson/West 6th ed. 2006).

[32] 2 MUELLER & KIRKPATRICK, *supra* note 30, at 730..

[33] Pamela A. Haun, Note, *The Marital Privilege in the Twenty-First Century*, 32 U. MEM. L. REV. 137, 158 (2001).

[34] *Id.*

[35] *Id.*

[36] *Id.* at 158–59.

[37] *Id.* at 158. A minority of states have applied one of two alternate constructions. One view, held by approximately six states, grants the decision of whether the witness spouse may testify to the defendant spouse instead. *Id.* at 159. Another view, held by three states, allows either spouse to invoke the privilege. *Id.*

solve—that of allowing parents to help their children navigate a sometimes–hostile legal system. Therefore, unlike the Parent-Child Privilege Act and the recommendations of many scholars, this paper does not propose a testimonial bar that exists in the spousal testimonial privilege.

2. Spousal Communications Privilege

The spousal communications privilege, by contrast, only prevents testimony by a spouse with regard to *confidential communications* made during the marriage.[38] Consistent with the Wigmore test, most states require that the communication must have been made privately by one spouse to the other during the marriage and must not have been intended for disclosure to any other person.[39] To deter people from entering marriage for the purpose of preventing information from being discoverable, communications made prior to marriage are generally not protected.[40]

This privilege is recognized by all U.S. jurisdictions, with the possible exception of Connecticut.[41] "All but a few states allow the communications privilege to be invoked in both civil and criminal proceedings."[42] Unlike the testimonial privilege, nearly all states permit the non-witness spouse to invoke this privilege, although there are some differences among the states regarding the rights of the witness spouse.[43]

The proposed parent-inclusive attorney-client privilege, although much narrower, is similar to the spousal communications

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[38] *See* Wolfe v. United States, 291 U.S. 7, 14 (1934) ("Communications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged; but, wherever a communication . . . was obviously not intended to be confidential, it is not a privileged communication."); *see also* Blau v. United States, 340 U.S. 332, 333 (1951) (affirming the *Wolfe* presumption of confidentiality).

[39] Haun, *supra* note 33, at 140. However, "conversations between married spouses are presumptively confidential, and the party seeking disclosure has the burden of overcoming the presumption." 2 MUELLER & KIRKPATRICK, *supra* note 30, at § 5-40, 753 (citing Pereira v. United States, 347 U.S. 1, 6 (1954)).

[40] *See* Steven N. Gofman, Note, *Honey the Judge Says We're History: Abrogating the Marital Privileges via Modern Doctrines of Marital Worthiness*, 77 CORNELL L. REV. 843, 853–54 (1992) ("[C]ourts and legislatures may deny the marital privileges to those marriages entered into as a fraud on the court, for example, when the couple marries solely for the purpose of raising marital privilege.").

[41] Haun, *supra* note 33, at 159.

[42] *Id.* at 159–60.

[43] *See id.* at 160–62 (discussing differences in states' application of the privilege).

privilege. Like the spousal privilege, the proposed privilege relates to communications originally made in confidence, subject to the condition that they not be disclosed. As is true in the case of the spousal privilege, confidentiality is essential to the full and satisfactory maintenance of the advisory relationship between a parent and the child and, indeed, of the relationship between the child and the attorney. Although perhaps not given the extraordinary esteem accorded by some to the marital relationship, the advisory relationship between parent and child is almost certainly one which in the opinion of the community ought to be sedulously fostered.

C. CLERGY-PENITENT PRIVILEGE

It is similarly well-settled that a communication between an individual and a clerical or other spiritual adviser is protected—so long as it was intended as confidential or regarded by the clergy member as such.[44] Historically, the privilege "dates back to pre-Reformation Europe and the Roman Catholic Church's canon law."[45] Catholics were then (and are still today) required to confess their sins to a priest; their confessions were subject to the "seal of the confessional," which meant that under no circumstances, even if a judge issued a court order, could a priest reveal what he had heard.[46] A priest who disclosed the contents of a confession was subject to excommunication.[47]

Today, all U.S. jurisdictions recognize the clergy-penitent privilege.[48] In general, "the privilege may be asserted by a clergyperson or party in any legal proceeding, enabling the claimant to refuse to testify without subjecting himself or herself to possible sanctions by the court."[49] States vary as to who is regarded as the holder of the privilege: some hold that the privilege belongs to the penitent, not the clergy member;[50] others hold that the privilege

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[44] *See* 81 AM. JUR. 2D *Witnesses* §§ 466, 469–74 (2018) (describing the clergy-penitent privilege and general requirements for it to apply).

[45] Lori Lee Brocker, *Sacred Secrets: The Clergy-Penitent Privilege Finds Its Way Into the News*, OR. ST. B. BULL., Dec. 1996, at 15.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 16.

[49] *Id.*

[50] *Id.*

belongs to both the clergy member and the penitent—either may therefore assert the privilege.[51]

In *Trammel v. United States*, the Supreme Court opined that the clergy-penitent privilege "recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."[52] Thus, in order to assert the privilege, the penitent must show that the "information [was] imparted in confidence and for the purposes of obtaining spiritual guidance."[53]

Due to the intimate and religious nature of the clergy-penitent relationship, some even view the privilege as constitutionally required, although the issue has never been tested.[54] One scholar described the underlying policy for this privilege as the recognition that "American society recognizes that adherents of all religions should feel free to seek spiritual advice and counseling from clergy with the assurance that their communications will not be disclosed."[55] As a result, courts and the public are both "generally repulsed by the law's intrusion into such an intimate relationship."[56] A further problem arises from the fact that clergy may believe themselves answerable to a higher authority than the court and may therefore refuse to testify regardless of the punishment a court threatens to impose for failing to do so.[57] Practically, the clergy-penitent privilege "prevents embarrassment to the judiciary."[58]

The advisory relationship between parent and child may—in many cases—resemble the clergy-penitent relationship. Children

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[51] *Id.*

[52] 445 U.S. 40, 51 (1980).

[53] 81 AM. JUR. 2D *Witnesses* § 471 (2018).

[54] *See* James W. Hilliard, *The Public's Right to Evidence—Sometimes: The Clergy Testimonial Privilege*, 83 ILL. B.J. 182, 183 (1995) ("It has been argued that the free exercise clause of the First Amendment prohibits government from compelling clergy to disclose confidential communications . . . ."). *But see id.* ("However, commentators have not given this theory great weight. The generally accepted view is that the privilege is probably not required by the federal Constitution.").

[55] *Id.*

[56] *Id.*

[57] *See id.* ("Generally, clergy will refuse to testify, regardless of the punishment a court may impose.").

[58] *Id.*

seek their parents' advice for many of the same reasons they seek the advice of clergy. And like the priests who refuse to testify, it is often the case that parents refuse to testify against their children regardless of the punishment a court threatens to impose for failing to do so. As the community does not blame either priests or parents when they do not testify, both types of testimony seem to be the kind of which the community seeks to sedulously foster.

D. THERAPIST-PATIENT PRIVILEGE

Since the U.S. Supreme Court's 1996 decision in *Jaffee v. Redmond*, all U.S. jurisdictions have come to recognize "some form of evidentiary privilege for confidential statements by patients to psychotherapists for the purpose of seeking treatment"[59]—for all the reasons articulated by Wigmore.[60]

Arguably, recognition of this paper's proposed parent-inclusive attorney-client privilege is *more* clearly justified under the Wigmore test than the therapist-patient privilege. Family is more central to American culture and tradition than psychotherapy, lending credence to the argument that it is at least as clear that the advisory relationship between parent and child should be sedulously fostered by both law and society.

Both relate to communications originally made in confidence, subject to a condition that they not be disclosed. Confidentiality is essential to the full and satisfactory maintenance of both the therapist-patient relationship and the advisory participation of the parent in the attorney-client relationship of his or her child. And in each case, failure to recognize a privilege may leave the person from whom testimony would otherwise be sought—parent or therapist—ignorant of the relevant facts; failure to recognize a privilege may therefore not advance the quest for truth at all.

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[59] George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The* Tarasoff *Duty and the* Jaffee *Footnote*, 74 WASH. L. REV. 33, 33 (1999).

[60] *Cf.* United States v. Zolin, 491 U.S. 554, 562–63 (1989) ("The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—'ceas[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing.'" (quoting 8 Wigmore, § 2298, p. 573)).

E. PARENT-CHILD PRIVILEGE

1. Current Law

Few state or federal courts recognize any parent-child testimonial or communication privilege.[61] Statutes in Idaho and Minnesota protect confidential communications made by minor children to their parents.[62] Massachusetts, by contrast, statutorily prohibits an unemancipated minor child from testifying against his or her custodial parent in any criminal proceeding in which the victim was not a member of the household; it does not, however, prohibit the parent from testifying against his or her child.[63] New York is the only state in which a parent-child privilege has been recognized as a matter of common law,[64] although the scope of the privilege in that state remains unclear. A New York intermediate appellate court first recognized the privilege in 1978 in *In re A and M*,[65] in which a prosecutor sought to force the parents of a 16-year-old boy to testify with regard to statements the boy had made to them regarding the setting of a fire. The court noted that the boy had made the statements while seeking guidance from his parents, with the expectation that his communications would remain confidential.[66] The court reasoned that "[t]he 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."[67] The court also noted psychological and behavioral science research that open communication was necessary to both the parent-child relationship and to the child's emotional development.[68] Following this reasoning, the court held that the

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[61] An excellent federal and 50-state review of the question as of November 2017 appears in Sullivan, *supra* note 4.

[62] IDAHO CODE ANN. § 9-203(7) (West 2018); MINN. STAT. ANN. § 595.02 1(j) (West 2013).

[63] MASS. GEN. LAWS ch. 233, § 20 (2018).

[64] *See, e.g.*, People v. Harrell, 450 N.Y.S.2d 501, 504 (N.Y. App. Div. 1982) ("[I]n certain circumstances, [communications between parent and child] have been shielded from inquiry."); *In re* Ryan, 474 N.Y.S.2d 931, 923 (N.Y. Fam. Ct. 1984) (holding statements made by defendant to grandmother, where grandmother was primary caregiver, to be protected by a parent-child privilege); People v. Fitzgerald, 422 N.Y.S.2d 309, 311 (N.Y. Cty. Ct. 1979) (holding that parent-child privilege applied).

[65] 403 N.Y.S.2d 375, 377 (N.Y. App. Div. 1978).

[66] *Id.* at 378.

[67] *Id.* at 432.

[68] *Id.* ("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

"communications made by a minor child to his parents within the context of the family relationship may, under some circumstances, lie within the private realm of family life which the state cannot enter."[69]

The parent-child privilege was extended by a New York trial court the following year in *People v. Fitzgerald*, where a 23-year-old made statements to his father regarding a hit-and-run car accident.[70] Citing *In re A and M*, Wigmore, and the federal and state Constitutions, the court held "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.'"[71] The court opined 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."[72] As to whether the privilege should be limited to minor children, the court reasoned:

> Not only do logical, ethical and moral considerations mandate the extension of such a fundamental right beyond any arbitrary age, but if, as this Court believes, such a parent-child "privilege" flows from the constitutional right to privacy inherent in such a relationship, the State is forbidden under law to create such an artificial barrier as age to limit that right to certain persons only, due to the ongoing nature of such a relationship . . . No other previously recognized privilege has as its basis a necessity of meeting a minimum or maximum age. It is the nature of the

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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.").

[69] *Id.* at 380 (internal quotations omitted). But see *In re Mark G.*, decided the same year as *In re A and M*, where the same court declined to consider statements not made in confidence or for the purpose of obtaining guidance as privileged. *See* 410 N.Y.S.2d 464, 465–66 (N.Y. App. Div. 1978).

[70] 422 N.Y.S.2d at 317.

[71] *Id.* at 312 (alteration in original) (internal citations omitted).

[72] *Id.* (internal citations omitted).

> relationship and the nature of the communication which govern.[73]

No other reported New York decision has yet followed *Fitzgerald*, and a few courts have scaled back the privilege for adult children. In 1994, a memorandum decision in *People v. Johnson* by the Court of Appeals, New York's highest court, declined to extend parent-child testimonial privilege to a twenty-eight year old defendant who had a conversation with his mother about a crime he committed against a family member.[74] Four years later, a New York trial court noted that "[a]lthough the Court of Appeals didn't hold that a parent-child privilege would never exist for an adult child, that it considered the child's age a factor in determining that no privilege existed is significant in our analysis and surely not an endorsement of the *Fitzgerald* holding."[75] It therefore rejected *Fitzgerald* altogether.[76]

While the scope of the privilege afforded by New York may be unclear, what is clear is that New York does not privilege communications running from parent to child. In *People v. Romer*,[77] a New York trial court rejected an attempted application of the privilege to exclude a letter from father to son, distinguishing *Fitzgerald*:

> The Court in *Fitzgerald*, concerned that children in our society may find themselves in a position where they

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[73] *Id.* at 314 (internal citations omitted).

[74] 644 N.E.2d 1378 (N.Y. 1994) (mem.) ("[A] parent-child testimonial privilege . . . 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 mother testified before the Grand Jury hearing evidence against defendant; and the conversation concerned a crime committed against a member of the household.").

[75] People v. Hilligas, 670 N.Y.S.2d 744, 746 (N.Y. Sup. Ct. 1998) (citing Johnson, 644 N.E.2d at 1379).

[76] *See Hilligas*, 670 N.Y.S.2d at 747 ("The reasons for applying the parent-child privilege as provided in *A and M* were all based on the need for a young, minor child to seek guidance and advice from his or her parents. *Fitzgerald*, reasoning that it was the nature of the relationship and the nature of the communication, and not the age of the child, which must govern, held that the need to protect that relationship into a child's adulthood continued to outweigh the State's interest in investigating serious crimes. This court finds, contrary to *Fitzgerald*, however, that once a child reaches adulthood, the nature of the relationship between child and parent undergoes such a significant change that it no longer outweighs the State's interest in investigating serious crimes.").

[77] 579 N.Y.S.2d 306 (N.Y. Sup. Ct. 1991).

> need to share their thoughts and concerns with their parents without fear that the disclosure will later be compelled testimonially from their parents, has found a limited parent-child privilege . . . . [T]he communication here goes in the opposite direction from the communication in the *Fitzgerald* case. Here it goes from father to son. This is not the letter of the offspring seeking guidance from parents. Indeed, Romer seeks no guidance from the son at all. The situation is wholly different from that presented in *Fitzgerald*. In short, the letter to Kenneth Romer is not covered by the parent-child privilege as it exists in this state today.[78]

Outside New York, reported state decisions have uniformly rejected recognition of any common law parent-child privilege.[79] Three federal district courts, citing *Fitzgerald*, have recognized such a privilege, although in the context of objections by children being

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[78] *Romer*, 579 N.Y.S.2d at 308.

[79] *See, e.g.*, Stewart v. Superior Ct., 787 P.2d 126, 128 (Ariz. Ct. App. 1989) (declining to recognize the privilege and noting that "the weight of authority is against" recognition); *In re* Terry W., 130 Cal. Rptr. 913, 914 (Cal. Ct. App. 1976) (finding that the arguments for creating such a privilege were persuasive, but "do not establish that the privilege is constitutionally compelled or that it exists by statutory construction"); People v. Agado, 964 P.2d 565, 568 (Colo. App. 1998) (declining to adopt the privilege); Marshall v. Anderson, 459 So. 2d 384, 386 (Fla. Dist. Ct. App. 1984) (holding that Florida statute prevented the court from adopting the privilege); People v. Sanders, 457 N.E.2d 1241, 1244 (Ill. 1983) (refusing to adopt a common law privilege where all other state privileges are statutorily-granted); Gibbs v. State, 426 N.E.2d 1150, 1156 (Ind. Ct. App. 1981) (declining to recognize the privilege); Cissna v. State, 352 N.E.2d 793 (Ind. Ct. App. 1976) (same); State v. Gilroy, 313 N.W.2d 513, 518 (Iowa 1981) (same); State v. Willoughby, 532 A.2d 1020, 1021 (Me. 1987) (finding no support for the privilege in Federal or Maine Constitutions); Three Juveniles v. Commonwealth, 455 N.E.2d 1203, 1204 (Mass. 1983) (declining to recognize the privilege); People v. Amos, 414 N.W.2d 147, 149 (Mich. Ct. App. 1987) (same); People v. Dixon, 411 N.W.2d 760, 763 (Mich. Ct. App. 1987); Cabello v. State, 471 So. 2d 332, 340 (Miss. 1985) (distinguishing *Fitzgerald*); State v. Bruce, 655 S.W.2d 66, 68 (Mo. Ct. App. 1983) (declining to recognize the privilege); *In re* Gail D., 525 A.2d 337, 340 (N.J. Super. Ct. App. Div. 1987) (declining to rule on the merits of the privilege); *In re* Diana Hawkins, C.A. No. 3430, 1983 WL 4091, at *2 (Ohio Ct. App. May 11, 1983) (declining to recognize the privilege); *In re* Frances J., 456 A.2d 1174, 1178 (R.I. 1983) ("[W]e do not deem this case an appropriate vehicle for the consideration of adoption of a new privilege . . . ."); State v. Good, 417 S.E.2d 643, 644–45 (S.C. Ct. App. 1992) (declining to create a privilege between a guardian *ad litem* and a minor); De Leon v. State, 684 S.W.2d 778, 782 (Tex. App. 1984) (declining to recognize the privilege); *In re* Inquest Proceedings, 676 A.2d 790, 792 (Vt. 1996) (same); State v. Maxon, 756 P.2d 1297, 1298 (Wash. 1988) (same).

compelled to testify against their parents.[80] All other federal cases, including all cases in the Courts of Appeals, have declined to recognize any such privilege, either generally or on the facts presented.[81]

2. Wigmore test

Even though most jurisdictions have not recognized the parent-child privilege exception, such an exception should exist under the Wigmore test. First, like spousal communications privilege, this article's proposed test applies to communications that originate in a confidence that they will not be disclosed. Second, confidentiality between a parent and a child is essential to the full and satisfactory

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[80] *See In re* Grand Jury Proceedings, Unemancipated Minor, 949 F. Supp. 1487, 1496 (E.D. Wash. 1996) (finding that federal law recognized a parent-child privilege under certain circumstances); *In re* Agosto, 553 F. Supp. 1298, 1326 (D. Nev. 1983) (allowing child's Catholic faith to bar testifying against his parents for the sake of the family unit); *In re* Grand Jury Proceedings (Greenberg), 1982 WL 597412, at *4 (D. Conn. June 25, 1982) (finding the parent-child privilege applicable in the narrow exception provided by existing religious privilege). Two of these cases involved religious convictions against testifying. *See Agosto*, 553 F. Supp. at 1326; *Grand Jury Proceeding (Greenberg)*, 1982 WL 597412, at *4.

[81] *See, e.g.*, United States v. Dunford, 148 F.3d 385, 391 (4th Cir. 1998) (holding that no privilege existed where father was abusing his children); *In re* Grand Jury, 103 F.3d 1140, 1142 (3d Cir. 1997) (declining to recognize the privilege); *In re* Erato, 2 F.3d 11, 16 (2d Cir. 1993) (declining to recognize a parent-child privilege for emancipated adult children); United States v. Harris, 852 F.2d 569, (6th Cir. 1988) (unpublished table decision) (recognizing no parent-child privilege at common law); United States v. Ismail, 756 F.2d 1253, 1257–58 (6th Cir. 1985) (refusing to extend evidentiary privilege to emancipated adult children); Port v. Heard, 764 F.2d 423, 431 (5th Cir. 1985) (finding the denial of a parent-child privilege to not be a violation of equal protection); United States v. Davies, 768 F.2d 893, 900 (7th Cir. 1985) (finding no privilege between parents and children in criminal cases); *In re* Grand Jury Proceedings of John Doe, 842 F.2d 244, 248 (10th Cir. 1998) (affirming the district court's finding that the facts of the case presented no parent-child privilege); *In re* Grand Jury Subpoena of Santarelli, 740 F.2d 816, 817 (11th Cir. 1984) (reaffirming Fifth Circuit precedent that no parent-child privilege exists); *In re* Matthews, 714 F.2d 223, 224–25 (2d Cir. 1983) (declining to create privilege); *In re* Antitrust Grand Jury Investigation,*)*, 714 F.2d 347, 349 n.4 (4th Cir. 1983) (restating circuit rule that "no privilege protects a witness from being compelled to give a grand jury evidence against his family"); United States v. Jones, 683 F.2d 817, 819 (4th Cir. 1982) (finding no confidential communications); *In re* Grand Jury Proceedings, 647 F.2d 511, 512–13 (5th Cir. 1981) (declining to create a parent-child testimonial privilege); United States *ex rel.* Riley v. Franzen, 653 F.2d 1153, 1160 (7th Cir. 1981) (same); United States v. Penn, 647 F.2d 876, 885 (9th Cir. 1980) (same); *In re* Three Children, 24 F. Supp. 2d 389, 390 (D.N.J. 1998) (finding it well-settled law within the circuit that there is "no general parent-child testimonial privilege"); United States v. Duran, 884 F. Supp. 537, 541 (D.D.C. 1995) ("The general rule in most federal courts is that there is no parent-child privilege."); *In re* Kinoy, 326 F. Supp. 400, 406 (S.D.N.Y. 1970) (stating that there is "no such thing" as parent-child privilege).

maintenance of the advisory relationship between a parent and child, and, indeed, of the relationship between the child and his or her attorney. Third, the advisory relationship between a parent and a child is almost certainly one which in the opinion of the community ought to be sedulously fostered. Finally, it seems obvious that effectively excluding parents from attorney-client communications seriously impairs their ability to help their children navigate the legal system.

Yet in the absence of legislative guidance, courts are understandably reluctant to create broad common law testimonial or communication-based privileges between parents and children. First, parent-child relationships are complex and diverse—far more so than the relationships between attorney and client, priest and penitent, or psychotherapist and patient. Relationships between spouses may also be complex and diverse but they, at the very least, can signal a continuing commitment to the marriage—a commitment marital privileges are intended to reinforce. Parents and children do not have the same signal of continuing commitment. It is hard to create a broad rule when the relationship that a parent has with their child varies so much.

Second, confidentiality may not be required to ensure the "full and satisfactory maintenance" of the parent's advisory relationship with the parent's child. A child who reposes a confidence in a parent has no assurances that the parent will not disclose that confidence to his or her spouse, the child's teacher, or even the police. The converse is also true: a parent who reposes confidences in his or her child, particularly a minor child, can never be completely certain that the statements will remain confidential. This lack of certainty may have nothing to do with the parent-child relationship in question; it may simply reflect the fact that children do not always exhibit perfect judgment. There may be contexts in which parents and children do meet this second element of the Wigmore test; indeed, those contexts may represent the majority of cases. The problem is that the diversity of the real world makes it difficult for courts to establish widely-applicable common law guidance, especially where legislatures hesitate to codify an acceptable policy.

Nevertheless, the narrow attorney-client privilege proposed here addresses the courts concerns. First, the parent-inclusive attorney-client privilege proposed here does not depend on the recognition of

any generally-applicable parent-child privilege and is more advantageous to a broad rule covering all types of communications between a child and his or her parent. The relationship it seeks to protect is distinct and unique. It includes not two parties, but three: parent, child, and the child's attorney. By its very nature, it is limited to cases in which there is already evidence of a strong parent-child bond: The parent is willing to spend time, and very often money, to help solve her child's legal problems. And the child affirmatively seeks her parent's guidance and support. Before turning to whether the expansion of attorney-client privilege to permit the inclusion of parents is appropriate, however, this paper will consider the attorney-client privilege and the problem of waiver.

F. ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege—"the oldest of privileges for confidential communications"[82]—will generally be recognized when "legal advice . . . is sought from a professional legal advisor in his capacity as such, the communication[] [is] relat[ed] to that purpose, [and is] made in confidence by the client."[83] Thus, such communications are immediately and, except in unusual circumstances, permanently protected from disclosure.[84] In general, a lawyer may not reveal any information relating to the representation without the client's informed consent.[85] Informed consent is limited to situations in which the client gives consent only "after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[86] A lawyer must also "make reasonable efforts to prevent the inadvertent or

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[82] *Sucharew*, 66 P.3d at 64.

[83] Aaron W. Rapier, *The Role of the Attorney-Client Privilege, the Work Product Doctrine, and the Fifth Amendment Privilege Against Self-Incrimination in Corporate Counsel's Response to a Federal Grand Jury Subpoena*, J. DUPAGE CTY. B. ASS'N, Dec. 2000, at 1.

[84] *See* Fed. R. Evid. 502 (2011).

[85] MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR. ASS'N 2018). The attorney's obligation of confidentiality attaches even before the party retains the attorney—communications by prospective clients are protected as well. *Id.* r. 1.18(b) (AM. BAR. ASS'N 2018).

[86] *Id.*, r. 1.0(e) (AM. BAR. ASS'N 2018).

unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[87]

The attorney-client privilege is the corollary to the attorney's obligation of confidentiality. Both rest on three assumptions: First, modern law can be incredibly complex to those persons attempting to vindicate rights or comply with obligations under the law; therefore, such persons often require assistance of counsel.[88] Second, in order for a lawyer to provide effective legal advice reflecting all of the pertinent facts, a client must feel free to disclose all such facts to the lawyer.[89] Third, clients are less likely to "disclose personal, embarrassing, or unpleasant facts unless they could be assured that" such facts remain confidential.[90]

Maintaining confidentiality "contributes to the trust that is the hallmark of the [attorney-client] relationship."[91] A client is less likely to disclose information to his or her lawyer, incriminating or otherwise, if the client believes the lawyer, voluntarily or under compulsion, may later use that information against him or her. A lawyer not subject to obligations of confidentiality and the attorney-client privilege would likely be less effective, because the client would not be as forthcoming with essential information. The attorney-client privilege is therefore central to the role of attorneys in the U.S. legal system.[92]

III. THE PROBLEM OF WAIVER

A. WAIVER OF COMMUNICATION PRIVILEGES GENERALLY

There are several ways in which the testimonial or confidential communications privileges may be waived. One way is that a communication will not be protected if third parties are present when the communication is made.[93] This is true, for example, in the

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[87] *Id.,* r. 1.6(c) (AM. BAR. ASS'N 2018).

[88] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (AM. LAW INST. 2018).

[89] *Id.*

[90] *Id.*

[91] MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 2 (AM. BAR. ASS'N 2018).

[92] 32 AM. JUR. 3D *Proof of Facts* § 189 (1995).

[93] 8 WIGMORE, *supra* note 3, at § 2336 ("Commonly, the presence of a third person within hearing will negative [sic] a marital confidence; so too, the intended transmission of the communication to a third person.") (internal emphasis omitted).

context of the marital privilege.[94] Some jurisdictions have found that the privilege is waived even if the communication was overheard by a third party "either accidentally or by eavesdropping."[95]

Written communications are subject to the same possibility of waiver if they come into a third party's hands. For example, letters between husband and wife "disclosing anything of confidential nature are privileged 'at least as long as they remain in the hands of either party to the marriage.'"[96] If they come into a third party's hands, however, the rule changes.[97] In *State v. Young*, a defendant-husband dictated to his secretary a confidential letter for his wife.[98] The third party who had taken the dictation and reduced it to writing was permitted to testify to the contents of letter, notwithstanding a claim of privilege.[99] In the process, the third party was allowed to refresh his memory by reviewing the letter, and to testify that he was the person who had written the letter on defendant's behalf.[100]

Most states have enacted statutes addressing the issue of waiver.[101] For example, Maine has adopted a statute providing that voluntarily disclosure or consent to a disclosure waives the privilege.[102]

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[94] *See* Pereira v. United States, 347 U.S. 1, 6 (1954) ("Although marital communications are presumed to be confidential, that presumption may be overcome by proof of facts showing that they were not intended to be private."); MUELLER & KIRKPATRICK, *supra* note 30, at 753 ("The [spousal confidences] privilege applies only to communications that are confidential . . . .").

[95] *See* State v. Szemple, 640 A.2d 817, 821 (N.J. 1994), *superseded by statute*, N.J. Stat. Ann. § 2A:84A-23 (West 2018) ("[T]he privilege does not protect against the testimony of third persons who have overheard (either accidentally or by eavesdropping) . . . communication between husband and wife." (quoting 1 MCCORMICK ON EVIDENCE § 82, at 303 (J.S. Strong ed., 4th ed. 1992)).

[96] *Szemple*, 640 A.2d at 822 (quoting 81 AM. JUR. 2D *Witnesses* § 330 (2018)).

[97] *See id.* at 821 ("[T]he marital-communications privilege does not apply to a written communication between spouses that comes into the possession of a third party without the consent of the recipient spouse.").

[98] 117 A. 713, 715 (1922).

[99] *Id.*

[100] *Id.*

[101] *See* Haun, *supra* note 33, at 162–63 (discussing state statutes addressing the waiver issue).

[102] ME .R. EVID. 510 provides:

> (a) General Rule. A person who has a privilege under these rules waives the privilege if the person or the person's predecessor while holding the privilege voluntarily discloses or consents to the disclosure of any significant part of

B. WAIVER IN THE ATTORNEY-CLIENT CONTEXT

The same problem of waiver arises in the attorney-client context. The attorney-client privilege is not absolute.[103] The privilege may be lost or waived either voluntarily[104] or accidentally.[105] For example, in *In re Grand Jury*,[106] a client testified in a deposition about financial information the client had previously communicated to his lawyer. The lawyer was later required to testify before a grand jury regarding this subject.[107] Over the lawyer's objections, the court found that "where a client [voluntarily] reveals portions of her conversation with her attorney, those revelations amount to a waiver of the attorney-client privilege as to the remainder of the conversation or communication about the same subject matter."[108] Consequently, the lawyer was ordered to testify.[109]

Since the intention of the privilege is to encourage sharing of otherwise confidential information between client and attorney, "conduct . . . inconsistent with this goal . . . may constitute a waiver of the privilege."[110] Thus, as a general rule, the attorney-client privilege is waived if the communication is made in the presence of a third party.[111] With few exceptions, this is true even if the third party is there to provide moral support and encouragement to the client obtaining legal advice.[112] Such was the case in the *People v. Doss*,[113] where the court found that a third party who helped the defendants convey important information to their attorney was

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the privileged matter.

(b) Exception. This rule does not apply if the disclosure is itself privileged.

[103] *See* Fed. R. Evid. 502 (2011).

[104] *See* MUELLER & KIRKPATRICK, *supra* note 30, at 665 ("A client who voluntarily discloses the content of communications covered by the attorney-client privilege, or any significant part of the content, waives the privilege.").

[105] *See id.* at 685 ("Courts split on the question whether accidental or inadvertent disclosure waives the protection of attorney-client privilege.").

[106] 651 N.E.2d 696, 698–99 (Ill. App. Ct. 1995).

[107] *Id.*

[108] *Id.* at 700.

[109] *Id.*

[110] Thomas R. Mulroy, Jr. & W. Joseph Thesing, Jr., *Confidentiality Concerns in Internal Corporate Investigations*, 25 TORT TRIAL & INS. L.J. 48, 53 (1989).

[111] *See id.* ("As a general rule, disclosure of confidential client information to third parties constitutes a waiver of the attorney-client privilege.").

[112] *See* People v. Doss, 514 N.E.2d 502, 504–05 (Ill. App. 1987).

[113] *Id.*

neither the defendants' agent or advisor; the third party's presence waived the attorney-client privilege.[114]

Courts are more lenient when the client is a minor child, although the technical basis for such leniency is not always clear. For example, in *State v. Sucharew*,[115] an Arizona intermediate appellate court held that the attorney-client privilege was not waived when the parents of the minor client were present during conversations with the lawyer. Noting that the parents had hired and paid for the lawyer's services, the court found that "[t]he clear indication is that [the parents] were taking an understandable parental interest and advisory role in their minor son's legal affair."[116] In general, however, courts do not extend this privilege to an adult child even when the facts are the same in all respects save the defendant's age.[117]

IV. A PROPOSED PARENT-INCLUSIVE ATTORNEY-CLIENT PRIVILEGE

A. ROLE OF ATTORNEYS IN THE U.S. LEGAL SYSTEM, AND THE POSSIBLE ROLE OF PARENTS

Attorneys perform many roles in the U.S. legal system. First and foremost, they serve as the client's legal advisor. In that role, the lawyer is not only required to provide the client with "an informed understanding of the client's rights and obligations," but also to explain the practical implications of those rights and obligations.[118] As one group of scholars noted "the lawyer has a duty, as a counselor, to become actively involved in the client's affairs and to advise the client in the most general sense."[119] Contrary to the

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[114] *Id.* at 505.

[115] 66 P.3d 59, 65 (Ariz. Ct. App. 2003).

[116] *Id.*

[117] *See supra* notes 74–76 and accompanying text.

[118] MODEL RULES OF PROF'L CONDUCT Preamble (AM. BAR ASS'N 2018).

[119] Margaret Ann Wilkinson et al., *Mentor, Mercenary or Melding: An Empirical Inquiry into the Role of the Lawyer*, 28 LOY. U. CHI. L.J. 373, 376 (1996). At least two of the ABA's Model Rules of Professional Conduct imply that lawyers have a duty to counsel. Model Rule 1.2 states that a "lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2018).This implies that a lawyer has a duty to explore with the client what the law is, how it applies to the client's situation, and the consequences of each proposed course of action. Model Rule 1.4 states that "[a] lawyer shall explain a matter to the extent

image of the lawyer as a hired gun, "[t]he everyday practice of law is consumed with the humane arts of counseling, negotiation, mediation, and empathy."[120] Good lawyering is not command-centered: "Sue my former employer!" It is rather, as some have called it, "client-centered."[121]

In addition to being a counselor to the client, the lawyer also acts as the client's advocate. As an advocate, the "lawyer zealously asserts the client's position under the rules of the adversary system."[122] The lawyer is also called upon to act as negotiator for the client.[123] In that capacity, the "lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others."[124] Finally, a lawyer is a dispassionate evaluator, required to assess the client's legal situation without bias as accurately as possible.[125] A criminal lawyer carries an even heavier burden because the client's freedom, and in some cases life, are at stake. In both the civil and criminal realms, a lawyer is required to

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reasonably necessary to permit the client to make informed decisions regarding the representation" and that a lawyer is required to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." *Id.*, r. 1.4(a)(2), (b). This implies that a lawyer has a duty to explore with the client her objectives, options for accomplishing those objectives, and the legal and non-legal consequences of each course of action before moving forward with the representation.

120 Pearl Goldman & Leslie Larkin Cooney, *Beyond Core Skills and Values: Integrating Therapeutic Jurisprudence and Preventive Law into the Law School Curriculum*, 5 PSYCHOL. PUB. POL'Y & L. 1123, 1128 (1999) (citing Rudolph J. Gerber, *Legal Education and Combat Preparedness*, 34 AM. J. JURIS. 61, 69 (1989)).

121 The client-centered approach:

> Presents lawyering as a coherent process, a series of behaviors and mental habits focused on the solution of problems, both in disputes or in transactions. Lawyering integrates law with non-legal realities, including both conceptual and affective elements . . . . It advises preparation, prediction and development of alternative solutions. Finally, the focus on counseling places client decision-making at the center of lawyering.

Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161, 190 (2002); *see also* DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 5–8 (Thomson Reuters 3ed. 2012) (discussing justifications for the "client-centered" approach).

122 MODEL RULES OF PROF'L CONDUCT Preamble (AM. BAR ASS'N 2018).

123 *Id.*

124 *Id.*

125 *Id.*

convey, in an effective way, adequate information to the client so that the client can make an informed decision.[126]

The difficulty of the lawyer's task depends on many factors, including whether the client is experienced in legal matters and in making decisions related to those matters.[127] Equally important is the client's level of sophistication, educational background, mental capacity, and maturity. A lawyer must take these factors, among others, into account when determining what information or advice to disclose and how best to enable the client to make fully-informed decisions.[128]

It is in this context that parental participation and advice are likely to be most helpful. When the client is a young adult inexperienced in legal matters and unaware of their potential consequences, a parent can be a useful intermediary and secondary counselor. Although the lawyer may best understand the law, the parent may have better insight as to whether, when her child nods as the lawyer speaks, the child actually understands or is merely being agreeable. The parent may be able to suggest familiar analogies and draw on shared experiences to help explain what might otherwise be alien legal concepts. The parent may also help overcome trust issues common between unsophisticated clients and their often-intimidating lawyers. In other words, the parent may help make the lawyer more effective, thereby enhancing the quality of the child's representation and the performance of the legal system as a whole.

The Australian Juvenile Mediation Process serves as an example of successful parental involvement in the attorney-client relationship.[129] Parental involvement there has demonstratively been shown to helped both the victim and the offender understand

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[126] *Id.*, r. 1.0 cmt. 6.

[127] *Id.*

[128] *See id.* (noting that lawyers should also consider whether clients are independently represented by other counsel in determining whether consent is informed).

[129] *See generally*, Jacqueline J. Larsen, *Restorative Justice in the Australian Criminal Justice System*, AUSTL. INST. OF CRIMINOLOGY RES. & PUB. POL'Y SERIES 147 (2014), http://www.aic.gov.au/publications/current%20series/rpp/121-140/rpp127/05_restorative.html.

the fairness of outcomes and has even reduced recidivism among participants.[130]

B. MODERN EXTENDED ADOLESCENCE

1. The Age of Legal Majority

The age of legal majority is the age at which an individual is deemed competent to exercise full legal rights, such as in the civil or political context.[131] At English common law, the age of legal majority was twenty-one for both men and women.[132] Early American jurisprudence adopted the English age of majority, which remained largely unchanged until the twentieth century.[133]

The movement to lower the age of majority in the United States began during World War II, when President Roosevelt pushed Congress to lower the draft age from twenty-one to eighteen.[134] By the peak of the Vietnam War, the argument "old enough to fight, old enough to vote" had become politically compelling.[135] Congress accordingly proposed and the states ratified the 26th Amendment to the Constitution, lowering the nationwide voting age to eighteen.[136] States, for the most part, followed suit. Today, Alabama and Nebraska treat individuals who have reached their nineteenth

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[130] *See id.* (collecting studies which examined the effectiveness of inclusive restorative justice programs on the parties involved).

[131] *See Age*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "age of majority" as "[t]he age, usually defined by statute as 18 years, at which a person attains full legal rights, especially civil and political rights such as the right to vote"). Relatedly, the "age of capacity" is defined as the age "at which a person is legally capable of agreeing to a contract, maintaining a lawsuit, or the like." *Id.*

[132] *See* 1 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 927 (David S. Garland and Lucius P. McGehee eds., 2d ed. 1806).

[133] *See* Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 64 (2016) (noting the evolution from the Colonial age of majority at twenty-one to eighteen following the lowering of the draft age and other historical events).

[134] *See* Andrew Glass, *Congress Changes Draft Age, Nov. 11, 1942*, POLITICO (Nov. 11, 2014, 7:42 AM), http://www.politico.com/story/2014/11/this-day-in-politics-congress-draft-november-11-1942-112752 (describing events leading to the lowering of the draft age during World War II).

[135] *See* Hilary Parkinson, *Record of Rights Vote: "Old Enough to Fight, Old Enough to Vote"*, NATIONAL ARCHIVES (Nov. 13, 2013), https://prologue.blogs.archives.gov/2013/11/13/ records-of-rights-vote-old-enough-to-fight-old-enough-to-vote (describing the ratification process of the 26th Amendment).

[136] U.S. CONST. amend. XXVI, § 1 ("The rights of the citizens of the United States, who are eighteen year of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

birthday as adults;[137] in all other states, the age of legal majority is eighteen.[138] Nevertheless, most states treat a married individual as "emancipated," which means that the individual "assumes most adult responsibilities" even if the individual is younger than the age of majority.[139]

Lowering the age of legal majority, however, does not make today's eighteen-year-olds any more mature or reflect any real changes in the pace at which they develop psychologically.[140] Rather, it is a political compromise reflecting the demands our country places on eighteen -year-olds.[141] Under this view, young adults have emerged out from under the umbrella of control of their parents and are exposed to the freedoms and responsibilities of a fully functioning member of society. This social transition is stereotypically evidenced by independent living arrangements, financial independence, and marriage. In the meantime, however, neuroscience has moved in the opposite direction, concluding that the human brain is not fully formed until significantly later.

2. The Neuroscience of Maturity

Recent advancements in neuroscience suggest that full developmental maturity does not occur until well after age eighteen.[142] Magnetic resonance imaging is used to study the growth and development of the human brain from childhood into

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[137] ALA. CODE § 26-1-1(a) (2018); NEB. REV. ST. § 43-2101 (2018).

[138] In Wisconsin, the age of legal majority for criminal law purposes is seventeen; for all other purposes, it is eighteen. WIS. STAT. § 990.01(3) (2017). In Mississippi, persons under the age of twenty-one are considered minors, MISS. CODE ANN. § 1-3-27 (2018), but persons over the age of eighteen maintain certain rights, such as the right to enter contracts for personal property. MISS. CODE ANN. § 93-19-13 (2018).

[139] *See* Kathleen Michon, *Emancipation of Minors*, NOLO, https://www.nolo.com/legal-encyclopedia/emancipation-of-minors-32237.html (last accessed Feb. 1, 2019). Some states, however, have statutory minimum age, which mandates that an individual be of a certain age before the state will legally recognize the marriage. *See id.* (discussing how California requires the person being married to be at least fourteen years old).

[140] *See Adolescence, Brain Development, and Legal Culpability*, JUV. JUST. CTR., AM. BAR ASS'N 3 (2004), https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf (quoting one researcher as stating that "[t]he evidence is now strong that the brain does not cease to mature until the early 20s. . . .").

[141] *See supra* notes 133–136 and accompanying text.

[142] *See Adolescence, Brain Development, and Legal Culpability*, *supra* note 140, at 3 (noting that "we refer to those under 18 as 'minors' and 'juveniles'—because, in so many respects, they are *less than adults*." (emphasis in original)).

adulthood.[143] By creating three-dimensional models to map changes in the brain, scientists have discovered that during the teenage years the brain experiences an intense overproduction of "gray matter," the brain tissue that "does the thinking."[144] Next, a period of "pruning" takes place, "during which the brain discards gray matter at a rapid rate."[145] This is similar to the pruning of a tree to stimulate health and growth. The pruning process is accompanied by "myelination, a process in which white matter," the fatty tissue responsible for insulating and protecting the brain, "develops."[146] Contrary to prior belief, this process, integral to the development of the frontal cortex and advanced cognition, does not finish until well into the twenties.[147]

During this pruning process, the "part of the brain that is helping organization, planning and strategizing is not done being built yet."[148] As Dr. Ruben C. Gur, Director of the Brain Behavior Laboratory at the University of Pennsylvania, states, "[t]he evidence now is strong that the brain does not cease to mature until the early twenties in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics."[149] These discoveries challenge the notion that eighteen-year-olds (or nineteen-year-olds in Alabama and Nebraska) have the same capacity to exercise judgment and foresee the consequences of their actions as fully developmentally mature adults.

3. The Sociology of Maturity

Studies of demographic change suggest that modern young adults experience a stage of significant uncertainty and insecurity

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[143] *See id.* at 1 ("[Advances in MRI technology] allow scientists to safely scan children over many years, tracking the development of their brains.").

[144] *See id.* at 2; *see also* Elizabeth R Sowell, *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860 (1999) ("In regions of frontal cortex, we observed reduction in gray matter between adolescence and adulthood, probably reflecting increased myelination in peripheral regions of the cortex that may improve cognitive processing in adulthood.").

[145] *See* ADOLESCENCE, *supra* note 140, at 2

[146] *See id.*

[147] *See id.*

[148] *Inside the Teen Brain: Interview with Jay Giedd*, PBS FRONTLINE (2002), https://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html.

[149] Declaration of Ruben C. Gur, Patterson v. Texas, 536 U.S. 984 (2002).

after reaching the age of majority. Awareness of this intermediate life phase has garnered much attention in the world of social science and in mainstream media. In 2005, *Time Magazine* heralded a new generation of young adults, noting that "[t]he years from 18 until 25 and even beyond have become a distinct and separate life stage, a strange, transitional never-never land between adolescence and adulthood" where traditional markers like marriage and financial independence are put off.[150] This new phase, described as "emerging adulthood" by some, "is neither adolescence nor young adulthood but is theoretically and empirically distinct from them both."[151] The emerging adult has left the dependency of childhood and adolescence, but has not yet fully shouldered the responsibilities of adulthood.[152] This modern trend is demonstrated by a greater proportion of young adults continuing in school, getting married later, bouncing from job to job, and returning home for prolonged periods.[153]

The current young adult generation, sometimes known as "millennials," exhibit trends that demonstrate an increasingly dependent relationship with their parents. According to the Pew Research Center, a study conducted in 2014 found that "for the first time in more than 130 years, adults ages 18 to 34" are more likely to live "at home" with their parents than with a spouse or partner.[154] Another Pew study, conducted in 2017, reported that millennials, aged twenty-five to thirty-five, were more likely than previous generations to live at home with a parent, despite rising employment rates among this age group.[155]

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[150] Lev Grossman, *Grow Up? Not So Fast*, TIME MAGAZINE (Jan. 16, 2005), http://www.time.com/time/magazine/article/0,9171,1018089,00.html.

[151] Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOL. 469, 469 (2000).

[152] *See id.* (noting that emerging adults "hav[e] not yet entered the enduring responsibilities that are normative in adulthood").

[153] *See id.* at 474.

[154] *See* Richard Fry, *For First Time in Modern Era, Living with Parents Edges Out Other Living Arrangements for 18- to 34-Year-Olds*, PEW RES. CTR. (May 24, 2016) http://www.pewsocialtrends.org/2016/05/24/for-first-time-in-modern-era-living-withparents-edges-out-other-living-arrangements-for-18-to-34-year-olds/.

[155] Richard Fry, *It's becoming more common for young adults to live at home—and for longer stretches*, PEW RES. CTR. (May 5, 2017) http://www.pewresearch.org/fact-tank/2017/05/05/its-becoming-more-common-for-young-adults-to-live-at-home-and-forlonger-stretches/.

There are several explanations as to why millennials are more frequently living with their parents. Economic factors leading to millennials' decision to live at home include debt, cost of living, and the labor market.[156] In addition, millennials are less likely to marry than earlier generations, which means that they are less likely to move in with a spouse or partner.[157] Most interesting, however, is the trend of millennial emotional dependence on the parental unit. Studies find that young adults today, more than any previous generation, are turning to their parents for advice and support.[158] One study even suggests that adolescence lasts from ages ten to twenty-four.[159]

Notably, just as the characteristics of the young adult cohort have changed, so has the traditional relationship between adult children and their parents. Much of this change relates to modern young adults who remain dependent on their parents to some degree even after leaving home. While most leave home around age eighteen or nineteen, roughly a third return and leave again multiple times.[160] Many young adults who have left their parents' homes remain financially dependent on their parents for several more years.[161] Some researchers have theorized that "the parental home can be seen as a 'safe base' as [children] negotiate the transitions of early adulthood."[162] Thus, the premise that at age eighteen adults become fully independent and less reliant on the counsel of their parents ignores modern reality.[163]

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[156] *Id.*

[157] Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RES. CTR. (Sept. 24, 2014), http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/.

[158] *See* Samantha Raphelson, *Some Millennials—And Their Parents—Are Slow to Cut the Cord*, NPR (Oct. 21, 2014 6:40 AM) *https*://www.npr.org/2014/10/21/356951640/some-millennials-and-their-parents-are-slow-to-cut-the-cord.

[159] *See* Kate Silver, *Adolescence now lasts from 10 to 24*, BBC NEWS (Jan. 18 2018), https://www.bbc.com/news/health-42732442 (discussing a recent study in the Lancet Child & Adolescent Health journal).

[160] *See id.*; Barasch Gitelson & Dana McDermott, *Parents and Their Young Adult Children: Transitions to Adulthood*, 85 CHILD WELFARE 853, 857 (2005).

[161] *Id.*

[162] *Id.*

[163] While many people argue this appears to reflect a quality of laziness or entitlement, the delay of responsibility may be due in fact to a healthy cynicism and a more serious approach to life. *See* Grossman, *supra* note 150 (noting that multiple scientists have rejected the argument that young adults are lazy, and instead posit that "they're reaping the fruit of decades of American affluence and social liberation.").

Equally compelling are studies of modern young adults' conceptions of themselves, which now indicate that those characteristics of parent-child relationships, once assumed to disappear at adulthood, continue for several years after the transition. Developmental psychologist Jeffrey Arnett, for example, examined how young people themselves view the transition into adulthood.[164] When asked whether they considered themselves to be adults, only sixty-three percentage of twenty-one to twenty-four year-olds answered "yes."[165] Others have found that among the millennial generation, there exists an "unprecedented" closeness between millennials and their parents.[166] Relationships between parents and their adult children have become stronger, not weaker.

These sociological trends, fully consistent with the findings of developmental psychology, are reflected across both law and business practice. Adult children between ages eighteen and twenty-one face restrictions on the ability to purchase and consume alcohol. The Uniform Minimum Drinking Age Act of 1984 allowed the federal government to withhold a percentage of federal highway funds from any state that permitted lawful purchase or possession of an alcoholic beverage by persons under twenty-one.[167] This statute reflected Congress' legislative judgment that individuals in that age range have less ability to exercise sound judgment in their alcohol consumption decisions. According to the Center for Disease Control, consumption of alcohol by those under twenty-one years of age is "strongly linked" to alcohol poisoning-related deaths, motor vehicle accidents caused by driving under the influence, suicide, violence, "changes in brain development," school performance difficulties, and "alcohol dependency later in life."[168] The current minimum drinking age of twenty-one is not, however, evidence that individuals above that age but still within their early twenties have

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[164] *See generally* Jeffrey Jensen Arnett, *Learning to Stand Alone: The Contemporary American Transition to Adulthood in Cultural and Historical Context*, 41 HUM. DEV. 295 (1998).

[165] *Id.* at 304.

[166] Raphelson, *supra* note 158.

[167] 23 U.S.C. § 158(a)(1)(A) (2012).

[168] CTR. FOR DISEASE CONTROL, FACT SHEETS – AGE 21 MINIMUM LEGAL DRINKING AGE, https://www.cdc.gov/alcohol/fact-sheets/minimum-legal-drinking-age.htm (last visited Oct. 29 2018).

better judgment; it reflects rather the political difficulties of setting the drinking age limit any higher.

Car insurance and car rental companies recognize that those below the age of twenty-five do not have the same capacity for foresight and judgment as older adults. Car insurance premiums decrease significantly once a driver turns twenty-five years old.[169] Most car rental companies either do not rent to or add a surcharge for drivers under twenty-five years old.[170] These restrictions are not arbitrary—those under twenty-five are higher risk drivers and more likely to have accidents.[171]

Similarly, the Affordable Care Act (ACA) allows adult children up to age twenty-six to remain on health insurance plans owned by a parent, reflecting the modern reality that many young adults are not able to acquire their own health insurance plans at age eighteen, notwithstanding their typically excellent actuarial profiles.[172] Prior to the ACA's protection, young adults had the highest uninsured rate of any age group,[173] consistent with sociological evidence that this cohort is less prepared to be self-sufficient than its predecessors.

All of this means that today's young adults may be less developmentally mature, independent, and experienced in the ways of the world than the law stereotypically assumes. A significant number of their cohort still rely on advice from their parents in many areas of life. Lawyers should be encouraged to allow these young adults to consult with their parents and listen to their advice. When adult children wish to rely on their parents advice, lawyers

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[169] *How Age Affects Auto Insurance Rates*, DMV.ORG, https://www.dmv.org/insurance/how-age-affects-auto-insurance-rates.php (last visited Oct. 29, 2018).

[170] William Lipovsky, *Rent a Car at Age 18: Here's Who Will Rent to You*, FIRST QUARTER FIN. (Sept. 27, 2018), https://firstquarterfinance.com/rent-a-car-at-age-18/.

[171] *See Auto Insurance Rates*, *supra* note 169; *see also Emergency Department Visits for Motor Vehicle Traffic Injuries: United States, 2010–2011*, NAT'L CTR. FOR HEALTH & HUM. SERVICES DATA BRIEF (2015), https://www.cdc.gov/nchs/data/databriefs/db185.htm (noting that "the emergency department visit rate for motor vehicle traffic injuries was highest among persons aged 16–24 years").

[172] *Young Adults and the Affordable Care Act: Protecting Young Adults and Eliminating Burdens on Families and Businesses*, CTR. FOR CONSUMER INFO. & INS. OVERSIGHT, https://www.cms.gov/CCIIO/Resources/Files/adult_child_fact_sheet.html (last accessed Oct. 28, 2018).

[173] *Id.*

should be able to include parents in counseling and decision-making conferences.

C. THE CASE FOR A PARENT-INCLUSIVE ATTORNEY-CLIENT PRIVILEGE

Under this paper's proposed new rule, inclusion of a client's parent in attorney-client meetings in an advisory capacity, disclosure to a client's parent of attorney-client communications, and discussion between parent and child of the contents of such communications should not be treated as waiving the attorney-client privilege—so long as the relevant communications are not disclosed to anyone else. The Wigmore test requires that, to be privileged, communications must meet four conditions: (1) the communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[174] As explored in Part II *supra*, the parent-child relationship, like other important relationships, should be protected under this test.

1. Rule applied to minor children

In the case of a minor child, the proposal solves an important practical problem. As a practical matter, parents often need to be present at any meeting between their minor child and that child's attorney. Although treating the parent as an agent may mitigate this issue somewhat, it is not always a fully satisfactory solution. [175] As will be discussed more fully in Section IV below, treating a parent as the child's agents is not always fully satisfactory. In the context of a client who is a minor child, the proposed rule easily meets the Wigmore test.

First, communications made in the course of attorney-client meetings clearly "originate in a confidence that they will not be

[174] *See supra* Part II. JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 8, § 8 (Tillers *rev. ed*. 1983).

[175] *See infra* Part IV.

disclosed,"[176] as do attorney-client communications disclosed to the client's parent. With appropriate cautionary warnings from the attorney, any discussion between parent and child of the contents of such communications should also meet the confidentiality requirement.

Second, confidentiality is clearly essential to the full and satisfactory maintenance of the attorney-client relationship. If the client's parents are to participate in an advisory capacity, confidentiality is equally essential to their participation. (3)

Third, the advisory relationship between parent and child is "one which in the opinion of the community ought to be sedulously fostered."[177] Indeed, parental guidance on matters of import to the child is often required by law as part of a parent's duty of support. It is undisputed that "[t]he law requires of parents that they provide care, maintenance and guidance for their unemancipated minor child."[178] To require that parents provide such guidance, but impose as a penalty loss of the attorney-client privilege if they do, would seem a cruel joke.

Finally, a rule that requires loss of the attorney-client privilege if confidential information is disclosed to the client's parents wreacks substantial injury to both the attorney-client relationship and the parent-child's advisory relationship. The resulting informational benefits to the finder of fact are ephemeral; any such rule is likely to result in such confidential information not being disclosed to the client's parents in the first place.

In sum, this paper's proposed rule should clearly be recognized—with respect to inclusion of parents of minor children within the attorney-client privilege—when such parents participate in their child's confidential attorney-client communications in an advisory capacity.

2. Rule applied to non-minor children

The harder question is whether the proposed privilege should disappear when the child reaches the age of majority. In essence, it must be determined whether it is the case, as the *Hilligas* court asserted in declining to follow *Fitzgerald*, that "once a child reaches

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[176] *Wigmore, supra* note 3 and accompanying text.
[177] *Id.*
[178] *Id.*

adulthood, the nature of the relationship between child and parent undergoes such a significant change that it no longer outweighs the State's interest in investigating serious crimes."[179]

One major problem is that the legal age of majority is not defined solely by reference to an individual's ability to make fully informed adult decisions. Historically, it has also reflected considerations having nothing to do with emotional or judgmental maturity. As has been noted, for example, about half of all states have no absolute minimum age for marriage, and married individuals are by law emancipated adults.[180] According to data compiled by Unchained at Last, an advocacy group opposed to child marriage, within the past fifteen years over 200,000 minors married within the United States.[181] The youngest were three girls age ten and one boy age eleven. [182] If so many children can become emancipated adults by way of marriage, the age of majority must not necessarily indicate an individual's ability to make an informed decision.

It is not as though on our eighteenth or twenty-first birthday, or upon being married at some younger age, we become magically endowed with the level of judgment and sophistication necessary to make sound adult decisions. Yet current attorney-client privilege law must somehow contends this to be true. The issue is especially troublesome in the area of criminal law, where clients must often make life-altering choices. Obviously, it is the responsibility of the lawyer to advise the client of available options and make recommendations as to which path is best.[183] A young adult, even if emancipated, may still benefit from the advice of a trusted parent

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[179] People v. Hilligas, 670 N.Y.S.2d 744, 746 (N.Y. Sup. Ct. 1998).

[180] *See supra* note 139 and accompanying text.

[181] Chris Baynes, *More than 200,000 children married in US over the last 15 years*, INDEPENDENT, (July 8, 2017 3:29 PM), *available at* https://www.independent.co.uk/news/world/americas/200000-children-married-us-15-years-child-marriage-child-brides-new-jersey-chris-christie-a7830266.html. The youngest were three girls age ten and one boy age eleven. *Id.*

[182] *Id.*

[183] *See* MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2018) ("[A] lawyer shall . . . consult with the client as to the means by which [the objectives of the representation] are to be pursued."); *id.* r. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

to help make mature and fully considered decisions.[184] For the parent to offer an emancipated child informed advice, the parent needs to be present at the relevant attorney-client meetings and privy to the lawyer's confidential advice.[185]

Herein lies the rub. Under current law, the presence of the parent during such confidential meetings or the disclosure to the parent of such confidential communications may waive the attorney-client privilege, and may even subject the parent to a subpoena to testify at trial against his or her own child.[186] Imagine a girl married at age ten who, at age thirteen, wants a divorce because her husband is beating her. Can her mother attend meetings with the child's attorney without jeopardizing the attorney-client privilege? Not under current law.

From a prosecutor's standpoint, compelling the parent to testify against a child may seem an easy way to prove a case. The parent, however, faces an impossible dilemma.[187] Should the parent comply, destroy the child's life, and sever the family relationships built over a lifetime she has spent her life building?[188] Refuse and go to jail for contempt?[189] Lie and face perjury charges?[190] In one case, an adult-child witness placed in a similar quandary contemplated suicide as the cleanest way out, chose to testify against his parent, and then was ostracized from his community for so doing.[191] In the long run,

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[184] *See* Franklin, *supra* note 4, at 151 ("The parent, for example, often must serve as the child's legal advisor, spiritual counselor, and physical and emotional health expert.").

[185] *See id.* ("The necessity for confidentiality is comparable to that within the professional relationships . . . . Parents must establish an atmosphere of trust to facilitate free and open communication.").

[186] *See, e.g.*, People v. Hilligas, 670 N.Y.S.2d 744, 744 (N.Y. Sup. Ct. 1998) ("The People's motion to compel defendant's mother to answer questions before the Grand Jury concerning conversations she had with defendant relating to the alleged homicide for which he was arrested is granted."). One of the most famous examples of this occurred in February 1998, when Independent Counsel Kenneth Starr subpoenaed Monica Lewinsky's mother, Marcia Lewis, to testify before a grand jury about her daughter's confessions to her regarding her relationship with then-President Clinton. *See* John M. Broder, *Monica Lewinsky's Mother Fails in Bid to End Testimony*, N.Y. TIMES (Mar. 26, 1988), https://www.nytimes.com/1998/03/26/us/monica-lewinsky-s-mother-fails-in-bid-to-endtestimony.html.

[187] *See* Franklin, *supra* note 4, at 169 (noting that "[a] parent confronted with the government's demand for [] testimony" has three inadequate options).

[188] *See id.*

[189] *See id.*

[190] *See id.*

[191] United States v. Ismail, 756 F.2d 1253, 1256 n.3 (6th Cir. 1985).

of course, parents will simply be excluded from the confidential advice given by a child's attorney, and prosecutors will have to go back to proving their cases the old-fashioned way. From society's perspective, where the parent has done what we expect good parents to do—retained an attorney for his or her child and participated in an advisory capacity in the resolution of the child's legal problems—this seems profoundly counterproductive.[192]

It may be objected that the most likely course of events is that the child will first consult his or her parents and that only then will an attorney become involved and attorney-client privilege attach. There are two solutions, both consistent with this paper's proposed rule. First, a court might hold that parent-child communications prior to retention of the attorney are not privileged unless the jurisdiction separately recognizes a parent-child communication privilege. Such a holding would still allow the parent to participate in the child's attorney-client meetings and be privy to the child's attorney-client confidential communications.

Alternatively, a court might hold that so long as the family promptly retains legal counsel, the parent-inclusive attorney-client privilege relates back to and includes the parent-child communications that led to the retention of legal counsel. Current law already applies attorney-client privilege to communications by prospective clients and thus already covers communications prior to creation of the attorney-client relationship.[193]

1. Should there be an age limit?

Finally, there is the question of whether the proposed rule should include an age limit—that is, whether, for example, it should only be available if the child is age twenty-five or younger. Neuroscience and sociology both suggest a particular need for continued parental participation and advice past age eighteen, up through some time in the mid-twenties.[194] Such an age-limited rule

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[192] *See* Franklin, *supra* note 4, at 168–69 (recognizing the parent-child relationship as one that society has an interest in protecting).

[193] *See* MODEL RULES OF PROF'L CONDUCT r. 1.18 (AM. BAR ASS'N 2018) (recognizing an attorney's duties to a prospective client prior to the formation of an attorney-client relationship).

[194] *See supra* Part IV.C; *see also* Karen Fingerman, *The Ascension of Parent-Offspring Ties*, 29 THE PSYCHOLOGIST 114, 117 (Feb. 2016), https://thepsychologist.bps.org.uk/volume-29/february/ascension-parent-offspring-ties (concluding that "parent-child ties typically are

would go a long way towards solving the problem this proposed rule seeks to solve.

It is, however, unclear that any such age limit is needed. Parents of thirty-year-olds are far less likely to become involved in their children's legal affairs.[195] If they do choose to become so are involved, it is probably because of the seriousness of their child's problems, the strength of the particular parent-child bond, a perceived inability of the adult child adequately to handle his or her own affairs without parental assistance, or a combination of the the foregoing. In such cases, the rule proposed by this paper might still be warranted. In other words, a parent-inclusive attorney-client privilege might may be self-limiting as a practical matter even without an age limit, and an age limit might well preclude its application to cases—expected to be rare—in which it ought to apply.

V. PARENT AS AGENT

An alternative possible solution to the problem addressed here—–that of allowing parents to help their children navigate a sometimes hostile legal system—would be to treat the parent as an agent for the child, whether adult or minor. The parent-as-agent solution encounters significant problems that this paper's proposed rule avoids. Before explaining why the parent-inclusive attorney-client privilege is preferable, I will discuss why the parent-as-agent solution has garnered support.

A. SUPPORT FOR A PARENT-AS-AGENT SOLUTION

Some jurisdictions already recognize an expanded attorney-client privilege that includes both agents of the lawyer and agents of the client "necessary" to the representation of the client.[196] Other

highly involved, functional and serve as sources of support" and that these ties are "highly rewarding"). *But see* Franklin, *supra* note 4, at 171 ("As children grow older, they develop more associations. Although these outside contacts may never supplant entirely relationships with their parents, the parents' role as the primary shaping force in the children's lives ends.").

[195] *See* Franklin, *supra* note 4 at 170 (noting that "an adult's need for parental guidance" is less than a child's because an adult "can seek professional aid directly").

[196] *See* Michael H. Berger, *Preservation of the Attorney-Client Privilege: Using Agents and Intermediaries to Obtain Legal Advice*, COLO. LAW., May 2001, at 51 (examining "under what

jurisdictions extend the privilege to any third party who serves as a "facilitator" and is therefore "essential or necessary for the client to obtain legal advice."[197] The two approaches appear to merge in § 70 of the Restatement (Third) of the Law Governing Lawyers, which states that "[a] person is a confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer . . . and if the client reasonably believes that the person will hold the communication in confidence."[198] According to the Restatement, in determining whether a third person is an agent or facilitator, courts will look at various factors including: (1) "the customary relationship between the client and the asserted agent"; (2) "the nature of the communication"; and (3) "the client's need for the third person's presence to communicate effectively with the lawyer or to understand and act upon the lawyer's advice."[199]

If we treat parents as agents for their children, therefore, their participation in attorney-client communications may be treated as participation on behalf of their principals. This should not waive the attorney-client privilege any more than participation by a corporate agent waives the corporation's attorney-client privilege.

California's attorney-client privilege, for example, extends to persons "who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted."[200] Similarly, the Connecticut Supreme Court has stated, albeit in dictum, that "[t]he presence of certain third parties . . . who are agents . . . of an attorney or the client, and who are necessary to the consultation, will not destroy [the attorney-client privilege.]"[201] The Oklahoma Supreme Court has likewise noted that the attorney-client privilege exists even if a third person is present, so long as the third person's

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circumstances an individual may involve non-attorney advisors in the attorney-client relationship without waiving the privilege").

197 *Id.*

198 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 cmt. f (AM. LAW INST. 2000).

199 *Id.*

200 CAL. EVID. CODE § 952 (West2003).

201 State v. Gordon, 504 A.2d 1020, 1025 (Conn. 1985).

presence was reasonably necessary for transmission of the communication.[202]

An agent is "[s]omeone who is authorized to act for or in place of another."[203] Although minor children rarely consciously designate their parents to act as agents, the law nevertheless treats parents as their children's agents for many purposes. Arguably, treating a parent as her child's agent for attorney-client privilege purposes should be an easy step. Under this logic, a parent's participation as an agent in confidential attorney-client communications, therefore, should not waive the attorney-client privilege. This was the case in *Gerheiser v. Stephens*, for example, where the court found that the defendant's mother's conversation with her minor child's lawyer was protected by the privilege.[204] The court stated that the mother was acting as the agent of the minor child in procuring legal representation.[205]

The agent may also provide support. The Restatement also states that "[a]n agent for communication need not take a direct part in client-lawyer communications, but may be present because of the Client's psychological or other need."[206] A parent's role may be as small as providing emotional support or as large as helping her child make decisions that will affect the rest of his or her life.

Additionally, parents may make the attorney-client relationship more effective in at least two ways. First, they may be able to facilitate communications between their children and their children's attorney. Setting aside language and cultural differences, which arise in a minority of situations, a parent may be aware of gaps in the child's linguistic or comprehension skills that are not apparent to others. The parent's active participation may facilitate conveyance of information necessary to allow the child to make informed decisions.

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[202] *See* Walling v. Walling (*In re* Guardianship of Walling), 727 P.2d 586, 592 (Okla. 1986) (finding that although the law permits the privilege to extend to third parties reasonably necessary for communication, the communication at issue was not privileged).

[203] *Agent*, BLACK'S LAW DICTIONARY (10th ed. 2009).

[204] Gerheiser v. Stephens, 712 So. 2d 1252, 1254 (Fla. Dist. Ct. App. 1998) ("As a preliminary matter, we agree with the trial court that Gerheiser's conversation with Brabham was protected by the attorney-client privilege, as she was acting as an agent for her son for the purpose of securing legal representation for him.").

[205] *Id.*

[206] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 cmt. f (AM. LAW INST. 2000).

Second, a parent is more likely to share an ongoing, trusting relationship with the child than the child's lawyer. Acting as the child's agent, the parent may be able to assist both lawyer and child by persuading the latter to adopt the lawyer's suggested course of action when the lawyer is unable to do so. Trust plays a vital role to ensure that a lawyer provides the client with effective representation. Therefore, a parent who encourages the child to trust the lawyer more will similarly provide a vital role in ensuring the lawyer can effectively represent the client.

B. PROBLEMS WITH A PARENT-AS-AGENT SOLUTION

There are, however, four problems with the parent-as-agent solution.

1. Judicial Reluctance to Treat Parents as Agents of Adult Children

First, courts have been reluctant to treat parents as agents of their adult children for attorney-client privilege purposes.[207] Although courts have been relatively comfortable treating parents as agents for their minor children, they have generally not been willing to extend such an agency or facilitation theory to parents of adult children.[208] When a child reaches the age of majority, he or she (at least in contemplation of the law) no longer needs anyone to act on his or her behalf.[209] Courts have consistently held that adult children are expected to have the requisite capacity for effective communication; thus, it no longer seems appropriate or necessary for parents to act as an agent or facilitator for the adult child.

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[207] *See, e.g.*, Brown v. State, 395 S.E.2d 73, 74 (Ga. Ct. App. 1990) (holding that an adult burglary defendant's mother and sister's eavesdropping on the defendant's communications with attorney in which he admitted to committing the charged crime revoked the attorney–client privilege); State v. Fingers, 564 S.W.2d 579, 579 (Mo. Ct. App. 1978) (holding that the presence of an adult criminal defendant's father during a conference constituted waiver of the attorney-client privilege).

[208] *See, e.g.*, Jay M. Zitter, Annotation, *Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Family Members or Companion, Confidant, or Friend of Attorneys or Client or Attesting Witnesses for Client's Will*, 67 A.L.R. 6th 341, § 7 (2011) (detailing various instances of courts eliminating attorney-client privilege because of a parent's involvement in the communication).

[209] *See, e.g.*, 42 AM. JUR. 2D *Infants* § 1 (2018) ("Majority is the age at which the disabilities of infancy are removed, and hence, a person who has reached his or her majority is entitled to the management of his or her own affairs and to the enjoyment of civic rights.").

Treating parents as agents of their adult children also exacerbates a scope of agency problem that seems easier to ignore in the case of minor children—the determination of circumstances where parents should properly be treated as agents of their adult children. Normally, when we deliver information to an agent, we have, in contemplation of the law, delivered it to the agent's principal.[210]

When a lawyer delivers information to client's parent, should the lawyer then be treated as having discharged any obligations to the client? Agents have the power make decisions on behalf of their principals within the scope of their agency.[211] In what situations can parents make decisions on behalf of their adult children? This problem may even be problematic in the case of minor children. Can a parent accept a plea bargain offer on behalf of a 17-year-old child? The scope of any agency depends on the agreement and conduct of the various parties. There is no one-size-fits-all answer to the question of scope. Once we begin using a parent-as-agent solution, even for minor children, we risk opening a Pandora's box.

2. Potential Overbreadth: The Right of Principals to Choose Their Own Agents

Second, principals normally have the right to choose their own agents.[212] If courts use agency law to admit parents to attorney-client communications without finding waiver, it is not clear why they should not then also admit the client's sister or best friend on the same agency theory.

If we use a parent-as-agent solution, the next case may well involve a client who tells her lawyer or the court: "This is my BFF. She's the smartest person I know. If anyone can understand what's going on, she will. I always rely on her advice. I'd really like her to

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[210] *See* RESTATEMENT (THIRD) OF AGENCY § 5.02 (AM. LAW INST. 2006) ("A notification given to an agent is effective as notice to the principal if the agent has actual or apparent authority to receive the notification, unless the person who gives the notification knows or has reason to know that the agent is acting adversely to the principal . . . .").

[211] *See id.* § 2.02 ("An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act.").

[212] *See id.* § 3.01 ("Actual authority [of an agent] is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf.").

sit in on my meeting with my lawyer." For many courts, this would be a step too far. Yet it follows, seemingly inevitably, from a parent-as-agent solution, where its rationale has potential to expand to other types of "agent" viewed relationships. One key virtue of the proposed parent-inclusive attorney-client privilege rule is that it is limited by its terms to parents.

3. Potential Under breadth: The Subsequent Discussion Problem

Third, a parent-as-agent solution does not privilege the discussions that a parent and child will inevitably have after their meeting with the lawyer. This solution does not appear to protect subsequent discussions between principal (the client) and agent (the parent). If those discussions are discoverable, the whole purpose of admitting the parent to the attorney-client meeting in the first place is defeated.

If our purpose is to structure the attorney-client privilege so as to allow parents to help their children work through their legal problems, we should expect—indeed, encourage—parents and their children to discuss the issues raised at the attorney-client meeting after the meeting is over. The proposed rule would extend the privilege to such discussions so long as the relevant communications are not disclosed to anyone else. It defeats the purpose of any such solution to hold that parent and child waive the privilege if they continue to talk about what went on at the meeting after they leave. Yet a parent-as-agent solution implies that continuing discussions would be legally problematic.

4. Collateral Consequences of Modifying Existing Agency Law

Finally, many jurisdictions have well-settled rules applying agency law to attorney-client communications that are not limited to parent-child agency.[213] Modifying the law governing application of the attorney-client privilege to agents or facilitators may have collateral consequences beyond the parent-child context. Upending those generally-applicable rules to permit a parent-as-agent solution to the problem addressed here may be a price some courts are unwilling to pay.

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[213] *See generally* ATTORNEY-CLIENT PRIVILEGE: STATE LAW HIGHLIGHTS, Westlaw (database updated May 2018) (providing a state survey of statutes and caselaw controlling attorney-client privilege).

Some jurisdictions, for example, appear to be comfortable extending the attorney-client privilege to agents of the attorney, but less comfortable extending it to agents of the client.[214] Covered agents of the lawyer might include the lawyer's secretaries, paralegals, legal assistants, stenographers, and clerks.[215] In *Miller v. District Court*, for example, a psychiatrist was retained to assist defense counsel in a criminal matter by examining the defendant.[216] The defendant entered a plea of not guilty by reason of impaired mental condition.[217] The prosecution learned about the defendant's examination and subpoenaed the psychiatrist as a witness.[218] The Colorado Supreme Court ordered the trial court to quash the contempt citation issued when the psychiatrist refused to testify regarding his communications with the defendant.[219] The Court explained its holding by stating that "[t]he agency rule recognizes that the complexities of practice prevent attorneys from effectively handling clients' affairs without the help of others. The assistance of these agents 'being indispensable . . . the privilege must include all persons who act as the attorney's agents.'"[220] Similarly, in *United States v. Kovel*, the court found that the attorney-client privilege was protected where an accountant was employed by the lawyer and participated in the attorney-client communication at the request of the lawyer.[221]

Some states, however, narrowly construe agency or facilitation statutes to apply only to corporations or other entities inherently incapable of communication other than through agents.[222] It is also telling that in neither *Miller* nor *Kovel* did the court's rationale appear to extend to agents of the client. Additionally, at least one

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[214] *See* Berger, *supra* note 196 at 52 (reasoning that Colorado probably would not extend attorney-client privilege to agents of the client).

[215] *Id.*

[216] Miller v. District Court, 737 P.2d 834, 835 (Colo. 1987), *superseded by statute,* COLO. REV. STAT. § 13-90-107 (1987), *as recognized in* Gray v. District Court, 884 P.2d 286, 290–91 (Colo. 1994).

[217] *Id.*

[218] *Id.*

[219] *Id.* at 836, 840.

[220] *Id.* at 838 (citing 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE, § 2301 (1961)).

[221] United States v. Kovel, 296 F.2d 918, 921–22 (2d Cir. 1961).

[222] *See, e.g.*, Zurich Am. Ins. v. Superior Court, 66 Cal. Rptr. 3d 833, 841 (Cal. Ct. App. 2007) (reasoning that privilege must apply to lower level employees within a company in certain circumstances).

other court has found that the presence of an accountant during the lawyer-client consultation destroyed the privilege.[223] Treating the client's parent as the attorney's agent, however, would further complicate existing agency law. For all of the foregoing reasons, the solution urged by this paper seems superior to a parent-as-agent solution. Even the latter, however, would likely be a better solution than none.

VI. CONCLUSION

This paper proposes a rule that inclusion of a client's parent in attorney-client meetings in an advisory capacity, disclosure to client's parent of attorney-client communications, and discussion between parent and child of the contents of such communications should not be treated as waiving the attorney-client privilege, so long as the relevant communications are not disclosed to anyone else. Such a rule is supported by both the state of modern adolescence and by the Wigmore test. Expanding the attorney-client privilege in this limited way to make it parent-inclusive would allow parents to help their children negotiate the legal system without requiring creation of any separate parent-child privilege.

If Jane, the eighteen-year-old college freshman whose story introduces this paper, were to live in a jurisdiction that has adopted this proposed rule, when her mother arrives the following day, they can both meet with Jane's attorney. Privy to the attorney's advice, Jane's mother can help her more effectively cope with the trying weeks and months to come, providing informed support as Jane attempts to negotiate the difficult, painful issues raised by the sexual assault to which she has been subject. The jurisdiction will have made its legal system more effectively accessible to those we most want to help.

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[223] Himmelfarb v. United States, 175 F.2d 924, 939 (9th Cir. 1949).