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

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In contrast to the Australian juvenile justice system, the American juvenile justice system has evolved into a formal adjudicatory system, with an emphasis on deterrence and incapacitation. Zero-tolerance policies, waivers for transferring youth to the adult criminal court, and greater numbers of youth in detention illustrate a paradigm shift in America's treatment of its youth.14 These legislative prescriptions, designed to address public safety concerns and school decorum, increased the need for procedural requirements in the adjudicating of such matters.16 The adversarial nature of juvenile delinquency proceedings combined with adherence to constitutional protections effectively narrows the opportunities for community reedress.

This article adopts a comparative approach toward the promotion of the legal and social utility of a testimonial exemption10 for parents and their children. The article will contrast Australia's widespread acceptance of a parent-child testimonial exemption with the general rejection of the privilege in the United States. The differences in the Australian and American approaches to juvenile crime explain, in part, why Australia recognizes a parent-child testimonial exemption, while the majority of the American states do not. Both juvenile justice systems rely on the involvement of parents, whether it is for the fulfillment of a diversionary plan or parental assent to a plea agreement, but the correlation between Australia's restorative approach and the parent-child exemption is significant.

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

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

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

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

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

19. See Sandra Pavelka, Restorative Juvenile Justice Legislation and Policy, 4 INT'L J. RESTORATIVE JUSTICE 100, 100 (2004) (examining the restorative justice programs in several states and noting that the modern day restorative justice movement continues to evolve at the state and community levels).
I. THE HISTORY OF A PARENT-CHILD PRIVILEGE IN THE UNITED STATES

In the United States, courts have recognized an evidentiary privilege for spouses, psychotherapists and their patients, and lawyers and their clients. Individual states have also identified relationships deemed worthy of a testimonial privilege, some of which include relationships not recognized under federal common law. For instance, most states recognize a clergy-communicant privilege. Some states recognize a privilege between victims and domestic violence or sexual assault counselors. Surprisingly, given the importance of parent-child relationships, the United States has not adopted a federal common law or statutory parent-child privilege.

Connecticut, Idaho, Massachusetts, Minnesota, and New York have a parent-child testimonial privilege. Massachusetts does not recognize a privilege protecting parents from testifying against their children; rather it protects children from testifying against their parent in proceedings other than domestic violence cases. Connecticut's parent-child privilege is the most protective because it extends to communications and observations made by the parent.

The U.S. Congress has considered a "parent-child evidentiary privilege" bill in four separate legislative sessions. Senator Patrick Leahy (D-VT) introduced legislation instructing the Attorney General and the Judicial Conference of the United States to study "important questions" concerning the establishment of a privilege to protect parent-child communications in both civil and criminal cases.
following the treatment of Monica Lewinsky's mother, Marcia Lewis, by Independent Counsel Kenneth Starr. Leacy explained:

This is not the Star Chamber of hundreds of years ago. This is not the Spanish Inquisition. No child, no matter what their age, expects his or her conversations with a parent to be disclosed to prosecuting attorneys. Compelling a parent to betray his or her confidence is repugnant to fundamental notions of family, fidelity, and privacy. Indeed, I can think of nothing more destructive of the family and family values, nor more undermining of frank communications between parent and child, than the example of a zealous prosecutor who decides to take advantage of close-knit ties between mother and daughter, of a prosecutor who said, if a mother loves a daughter and a daughter will go to a mother to talk to that mother, then we are going to grab the mother. Great family values, Mr. President. Great family values, Mr. Starr. At the same time in the House of Representatives, U.S. Representative Zoe Lofgren (D-CA), introduced H.R. 3577, the "Confidence in the Family Act," which proposed a parent-child privilege in federal criminal and civil proceedings and an amendment to the Federal Rules of Evidence. Among Representative Lofgren's main reasons for proposing the legislation was her belief that the parent-child relationship deserves the protection of a testimonial privilege for the same reasons that the spousal relationship does. According to Lofgren, "the relationship between mother and daughter, between father and daughter, between father and son is as valuable, as precious as that between husband and wife." Representative Lofgren referred to the lack of such a privilege as a "trilemma" of cruel choices for parents compelled to testify against their children: perjury, betrayal of the child's confidence, or potential jail time for contempt of court.

Lofgren's proposed privilege made no distinction between adult and minor children. The privilege would have extended to any relationship where an individual had a legal right to act as a parent. This included foster care and long-term custody relationships. Some lawmakers suggested that they would support a parent-child privilege applicable only to minor children in civil cases: the implication being that shielding incriminatory communications between children and parents from a criminal investigative arm of the government was contrary to public policy. The legislation was modeled after the spousal privilege, but left to the courts to determine its applicability in specific cases. The over-breadth of Lofgren's bill was largely responsible for its failure. The "Confidence in Family Act" was rejected by a vote of 162 to 256 on April 23, 1998.


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

31. See 144 CONG. REC. S1508-02, S1508-10 (1998). Mr. Starr subpoenaed Ms. Lewis to testify before the grand jury investigating President Clinton as to statements Ms. Lewinsky was believed to have made to her mother concerning her relationship with President Clinton. Despite her lawyers' best efforts and public sentiment opposing the intrusion into the private conversations between mother and daughter, no privilege barred Mr. Starr from compelling the information. Id.
35. See id. at H2269 (statement of Rep. Lofgren).
36. See id. at H2271-72.
38. H.R. 3577, at § 2, para. 4.
39. Id.
from testifying against his parent, unless the inquiry involves domestic violence or child abuse. The proposed parent-child privilege completes the circle by protecting parents from being forced to testify against their children in the same way children are protected from being forced to testify against their parents. Furthermore, the proposed bill gives parents the same privilege afforded them in their relationships with their spouse, attorney, clergy, and health care provider. 50 The privilege would not extend to either the parent or the child, if the victim is a family member who resides in the household. Last, the Massachusetts legislation expands the existing definition of “parent” to meet the complex and varied family situations that are part of today’s society. The privilege offers a more inclusive definition of “parent,” changing from “the natural or adoptive mother or father of said child” to “the biological or adoptive parent, stepparent, foster parent, legal guardian of a child, or any other person that has the right to act in loco parentis for such child.” On June 10, 2010 the bill was reported favorably by the Joint Committee on the Judiciary. The newly numbered bill, S. 2473, was referred to the Senate Committee on Ethics and Rules. 53 Drafting legislation for a parent-child privilege involves a myriad of considerations, such as whether the protections should apply to adult children, and criminal and civil proceedings. As evidenced on the federal level, legislation that was not limited to parents and their minor children, or to criminal proceedings weakened majority support. On the state level, the Illinois legislature considered a bill that would have amended the Civil Procedure Code to create a parent-child privilege. The privilege, which was supported by the Illinois State Bar Association, could be asserted by either the parent or the child, and extended to communications between adult children and their parents as well as between parents and minors. The majority of the opposition to the legislation focused on its breadth. Legislators 54 expressed concern that the legislation would upset the proper adjudication in abuse and neglect proceedings, as well as custody disputes, because parents would exercise the privilege to prevent their children from testifying. 55 Ultimately, a vote on the bill was postponed indefinitely. 56

During the 2009 legislative session, the Oregon legislature considered a narrowly tailored bill, which proposed to create an evidentiary privilege in criminal cases for confidential communications between children under the age of eighteen and their parents. The legislation was designed to allow either the child or the parent/guardian to whom the communication was made to assert the privilege. The Senate approved the legislation but it did not gain sufficient traction in the House. Also in the past year, North Dakota’s highest court considered the constitutionality of a parent-child privilege in a case involving a mother subpoenaed to testify against her minor child in a delinquency case. The Court declined to recognize a parent-child privilege in the state constitution but left open the possibility that such a reform could be achieved through legislative action. 57

Legal protections, such as evidentiary privileges, are given to some relationships as an expression of their societal worth. The concern in any debate about admissibility of relevant evidence is the danger of removing evidence from the trial of fact’s deliberation toward a fair and just determination. In a criminal prosecution, any mechanism that limits the availability of relevant evidence to the fact finder is controversial. However, as noted above, in the United States evidentiary privileges already exist for certain relationships. 58

The relationship between parents and children is equally deserving of a legal privilege. 59 The absence of legal protections for parent-child communications is inconsistent with society’s expectations of parents and with the value placed on the parent-child relationship. The parent-child relationship shares many characteristics with those relationships that have been accorded an evidentiary privilege. For example, the spousal privilege, which is recognized in nearly all fifty states and under

Axman, at 1.

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

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


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

53. Id.


55. Id.

56. H.R. 90th Gen. Assem., Reg. Sess., at 11–12 (Ill. 1998) (Statement of Rep. Burke), http://www.ilga.gov/house/transcripts/transtr90/04/04258.pdf (“Many of you here are quite familiar with the attorney-client privilege. There exists in law, the unbreakable secrecy of the confessional and the privileged communication between a doctor and patient. In some cases even the media has attempted to claim this exemption. Are these relationships any more important than that of a parent to child? And what might the effect [sic] be if these secret entitled communications were corrupted and society would lose confidence in the confidentiality of communication with these parties? I submit to this Body, that certain relationships must remain sacred, incorruptible, inviolate and secure.”). 57. Id. at 19.

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

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

60. Id. at 33.


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

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


66. See Farber, supra note 7, at 568–74 (arguing that since parents act as advisors and counselors to their children they are as deserving, if not more so, than other relationships that enjoy an evidentiary privilege).
federal common law, protects an intimate personal relationship.\textsuperscript{67} As one commentator noted,

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

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

Most courts that have refused to recognize a parent-child privilege have done so in cases involving an adult child compelled to testify against his parent or a parent testifying against an adult child.\textsuperscript{73} The U.S. Supreme Court has never decided a case involving judicial recognition of a parent-child privilege. In 1984, the Court declined certiorari in a case involving three adolescent children compelled to testify before a grand jury investigating their father for murder.\textsuperscript{74} \textit{Three Juveniles} was the first and last time the parent-child privilege was presented to the U.S. Supreme Court for review.

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

Since \textit{Jaffe}, only three federal courts have considered recognition of a parent-child privilege.\textsuperscript{83} One of those cases, \textit{In re Grand Jury}, involved a criminal investigation of an eighteen-year-old, whose father was subpoenaed to testify before
a grand jury concerning conversations he had with his son. 84 The father said that if he were forced to testify, it would irreparably harm their close and loving relationship. 85 The court refused to quash the subpoena, explaining that a confidential communication between parent and child is not indispensable to the survival of that relationship. 86 Stating that typically parents and children are not aware that there is no testimonial privilege covering the communication between them, the court found that it is irrelevant to the parent’s and child’s decision to discuss private matters between them. 87 Indeed, ignorance of the law may not be a factor before sharing potentially incriminating information with one’s parent or one’s child. But as the parent is made aware of the absence of any legal protection for their communications, there will likely be some parents and children who alter their behavior so as not to place themselves at risk of self-incrimination. 88

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

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

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

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

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

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

85. Id. I will be living under a cloud in which if my son comes to me or talks to me, I’ve got to be very careful what he says, what I allow him to say. I would have to stop him and say, “you can’t talk to me about that. You’ve got to talk to your attorney.” It’s no way for anybody to live in this country.

86. Id. at 1152. 87. Id.

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

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

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

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


93. Id.

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


96. Id. at 425.

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

98. Port, 764 F.2d at 425.
prevents parents from testifying against their children.99 The court considered and rejected arguments that such a privilege derives from the right to privacy, the First Amendment right to exercise one's religion, or the Fourth Amendment right to equal protection under the law.100 In dicta, the court added it may have decided differently if the issue had been whether it would recognize a common law privilege under Federal Rule 501, but it was not raised because state laws and rules of evidence controlled.101 The court noted the Ports' argument that the forced disclosure of confidential communications by a parent impedes a parent's ability to foster trust and potentially threatens the "sanctity and integrity of the family unit."102 Furthermore, the court stated that appellants could have made an even stronger argument as to the psychological and social strain that testifying against one's own child may cause.103

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

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

106. See id. at 1328 ("I would be unjust for society to teach that while a child should listen to his parents, he does so at the risk of being required to testify against them.").
107. See id. at 1326 ("If the government in its zeal to pursue law enforcement goals steps into the realm of constitutionally privileged relationships, the courts must intervene. In our democratic system of justice which is based in part on respect for the law, if the law places family members in a position of choosing between loyalty to a special, life-long bond as opposed to invidiously testifying to confidential and private matters, then the law would not merely be inviting perjury, but perhaps even forcing it. The reluctance to testify or the fabrications which family members would invent to protect one another would bring the government no closer to the truth so zealously seeks.").
108. Id. at 1330 (quoting Brown v. Guy, 476 F. Supp. 771, 773 (D. Nev. 1979)).
110. Id.
112. Researching Australian Law, supra note 111.
or territory laws, and where jurisdiction is conferred on these courts by the Commonwealth Parliament, they also decide cases arising under federal laws.\textsuperscript{116}

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

B. Federal Law of the Commonwealth of Australia

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


\textsuperscript{117} See, e.g., Neglected Children and Juvenile Offenders Act 1903 (NSW); Children's Court Act 1906 (Vic); Children's Courts Act 1907 (Qld); State Children Act 1907 (WA); The Children's Charter 1918 (Tas); State Children Act 1895 (SA).

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

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

\textsuperscript{120} Id.

\textsuperscript{121} AUSTL. LAW REFORM COMM'N, REPORT NO. 84, SLEEP AND HEARD: PRIORITY FOR CHILDREN IN THE LEGAL PROCESS §§ 2.78, 2.89-105 (1997).


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

\textsuperscript{124} Evidence Act 1995 (Cth) s 4.

\textsuperscript{125} Id. s 18

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

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

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

\textsuperscript{127} Services Act of 1986, and a domestic violence offense within the meaning of the Domestic Violence Act 2001 of the ACT. Id. s 19.

\textsuperscript{128} Cth, Parliamentary Debates, House of Representatives, 15 Dec. 1993, 4087 (Duncan Kerr, Minister for Justice).

\textsuperscript{129} Id.

\textsuperscript{130} Id.

\textsuperscript{131} Id.

\textsuperscript{132} Id.

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

\textsuperscript{134} Evidence Act 1995 (NSW) s 18; Evidence Act 2001 (Tas) s 18.

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


\textsuperscript{137} Id. para. 80. Additionally, Queensland abolished spousal non-compellability and privilege altogether. Evidence Act 1977 (Qld) s 8. Some scholars have argued that such an approach is the fairest, in that it denies any and all arbitrariness in pre-determining which relationships are more deserving than
found that the principles underlying the spousal exemption were equally applicable to the exemption of parents and children.\(^{138}\) The Commission's concern was with procedures that could be used to disrupt familial relationships (outside of spousal harmony) to a greater extent than the interests of the community really require.\(^{139}\) While bearing in mind the desirability of making available all relevant evidence to the courts, the Commission recommended a procedure by which a judge could weigh the necessity of the evidence against requiring family members to betray confidences and bring punishment to those they love.\(^{140}\)

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

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

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138. See e.g., Lee Struesser, A Comparison of the Law of Evidence, 2 J. AUSTRALASIAN L. TEACHERS ASSN '07, 76 (2009) ("The attraction of abolishing the rule completely is that it is simple, fair and is not arbitrary. Simplicity is a quality to be admired. It provides certainty in application. It is also the fairest of solutions. Everyone is treated the same. No one person or group is left out. De facto spouses, same sex partners, siblings, parents, children are treated exactly the same.").

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

140. Id. Id.


142. Id. s 10(1).

143. Id. s 18(3).

144. Id. s 18(6).

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

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

147. Id. s 18(6).

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

149. Id. s 18(9).

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

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


153. Id. para. 26.

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

155. Id. para. 22-26.

156. Id. para. 26.


158. Id. para. 26.

159. Id. para. 74.

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

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

commenting on the objection, the court's ruling on the objection, or the witness's failure to testify.\(^{161}\) The Evidence Act is modeled after the pre-existing Victoria Crimes Act and South Australia's Evidence Act.\(^{162}\)

Also in 1995, section 18 of the Evidence Act was adopted in its entirety in New South Wales.\(^{163}\) The Court of Criminal Appeal of New South Wales issued one of its most notable decisions applying this relatively new provision of its evidence code.\(^{164}\) In Regina v. Fowler, the Court upheld a district court’s ruling compelling evidence from the defendant’s mother concerning statements she made to her regarding the alleged offense.\(^{165}\) In the trial, the Crown sought to compel the mother to give evidence, but pursuant to section 18 of the Evidence Act, she objected to testifying on behalf of the government against her son.\(^{166}\) Having determined that the relationship between mother and son would be affected by requiring her to testify, the trial court balanced the nature and extent of the harm to the parent-child relationship against the government’s need for the mother’s testimony.\(^{167}\) The district court concluded that the desirability of Ms. Fowler testifying outweighed any harm that would be done to her relationship with her son, and required she testify against her son.\(^{168}\) The Court of Criminal Appeal found no error in the lower court's application of the balancing test and upheld the ruling.\(^{169}\) In light of all the evidence presented, including Ms. Fowler's disclosure of her son's statements to her about the crime, Mr. Fowler was convicted of armed assault.\(^{170}\) His conviction was affirmed on appeal.\(^{171}\)

Fowler is one of the few reported cases where a parent was compelled to testify against his or her child in a criminal proceeding.\(^{172}\) Among the reported cases, more common is the situation where a child is compelled to testify against his or her parent in a criminal proceeding.\(^{173}\) In addition, as most decisions are not reported, criminal
cases involving evidence law are not frequently published. Finally, infractions of criminal laws handled in youth court are not commonly, if ever, published. This makes it difficult to assess how frequently parents or children in Australia seek exemption from testifying under state or federal law.

C. The South Australia Evidence Act

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

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

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

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

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

165. Evidence Act 1929 (SA) s 21.
167. Evidence Act 1929 (SA) s 21(2).
168. Id. s 21(3)(a).
169. Id. s 21(3)(b).
171. Id. at 578 (quoting SA, Parliamentary Debates, House of Assembly, 25 Mar. 1993, 2662-63 (Hon, GJ Crafter, Minister of Housing, Urban Development and Local Government Relations)).
172. Id.
173. Id.; Evidence Act 1929 (SA) s 21(3)(a).
175. Id. s 21(7).
176. Id. s 21(3)(a)(ii).
177. Evidence Act 1995 (Cth) s 18F(a).
have a right to make an objection under this section, the court is to satisfy itself that
the person is aware of the effect of this section as it may apply to the person.\textsuperscript{178} In
comparison, the South Australia Act requires the court to consider whether an
exemption should be applied, even if the individual has not applied for an
exemption.\textsuperscript{179} If an individual is mentally impaired or is a young child and is unaware
or unable to claim the privilege, there does not seem to be a duty under the federal
Evidence Act to consider an exemption, but under the South Australia Act, there is
such a duty. According to section 21, paragraph 3a:

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

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

\section*{D. The Victoria Crimes Act of 1958}

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

- nature of the [offense] charged; the importance in the case of the facts
  which the proposed witness is to be asked to depose; the availability of
  other evidence to establish those facts and the weight likely to be attached
to the proposed witness's testimony as to those facts; the nature, in law and
in fact, of the relationship between the proposed witness and the accused;
the likely effect upon the relationship and the likely emotional, social and
economic consequences if the proposed witness is compelled to give the
evidence; and any breach of confidence that would be involved.\textsuperscript{187}

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

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

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

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

\begin{itemize}
  \item 187. Id.
  \item 188. Crimes Act 1958 (Vic) s 400(3).
  \item 189. R v Ngo [2002] VSCA 188, paras. 1, 2.
  \item 190. Id. para. 1.
  \item 191. Id. para. 5.
  \item 192. R v Ryan (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, 15 Apr. 1991).
  \item 193. Id.
  \item 194. Id.
  \item 195. See Evidence Act 1995 (Cth) s 19 (specifying that the section 18 exemption does not apply to
certain crimes).
\end{itemize}
the victim to the grandmother attesting to sexual abuse by the defendant. As might be expected in such a case, the judge rejected the grandmother’s request for exemption, finding that “the interests of the community in obtaining the grandmother’s evidence was paramount and outweighed the prospects of further damaging the relationship between the proposed witness and her son.”

E. The Victoria Evidence Act 2008


The Evidence Act 2008 brought about slight modifications to the compellability exemption to reflect uniformity with its corresponding federal section. Perhaps the most relevant change broadened the former exemption’s coverage: the 2008 Act includes the giving of evidence, as well as evidence of a communication. This modification allows a court more options in terms of exclusion. For instance, a judge may compel a parent to testify against his child but permit the witness to refrain from testifying as to any communications between the parent and child. Protecting the confidences between parent and child may be viewed as more socially vital than compelling a parent to testify as to observations, even if they might have the effect of convicting the child. A child may more readily accept a parent’s compliance with a court order (especially after the parent has sought exemption) and testimony as to observations made or facts known about the child than the divulgence of words shared with the parent during a subjectively private exchange. In contrast to the United States, where forty-five states offer no legal protection for these communications, the fact that, in Australia, judicial discretion exists is significant.

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

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

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


201. Id. at 3. See also Judical Coll. of Vic., Introduction to the Uniform Evidence Act in Victoria: Significant Changes 1 (2009) (noting that Victoria’s 2008 Evidence Act is “largely uniform” with the federal Evidence Act 1995, as well as legislation in New South Wales, Norfolk Island, and Tasmania).

202. Vic. Law Reform Comm’n, Report No. 2, supra note 200, at 217; see Evidence Act 2008 (Vic) s 18 (providing an exemption to the requirement to give evidence for a person who is the "spouse, de facto partner, parent or child of an accused...").

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

204. See, e.g., In re A&M, 61 A.D. 2d 426, 429 (N.Y. App. Div. 1978) (“Although the communication [between parent and child] is not protected by a statutory privilege, we do not conclude that it may not be shielded from disclosure. It would be difficult to think of a situation which more strikingly embodies the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to his mother and father.”).

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


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

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


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

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

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

III. The Correlation Between Restorative Justice and the Parent-Child Testimonial Exemption: The Australian Example

For more than a decade, the volume of cases in children's courts throughout Australia has declined significantly. This is due in large part to restorative justice practices widely accepted and utilized with great effectiveness. Restorative justice programs in Australia largely derive from the conferencing model developed in New Zealand in the late 1980's. The principal means of facilitating resolution of the conflict is a practice called family group conferencing (FGC). In FGC, the offender, the victim, their respective families, friends, and teachers convene for the purpose of facilitating a discussion that leads to reconciliation, appropriate reparations, and support to assist the juvenile in not re-offending. "In both the New Zealand and the Australian models, it is the individual offender and his or her family that is the primary focus of any intervention . . . Within both, the family and the individual are seen as the things to be changed, on the assumption that the delinquency itself represents a symptom of family and individual malfunction." The conferencing process is quintessential restorative justice. The group discusses reasons for the crime, the impact of the crime, and ways to mitigate or resolve the harm caused. The conference or meeting is facilitated by a public official. Proponents of restorative justice argue that this type of face-to-face interaction helps the young offender to recognize the impact his or her actions had on others. Likewise, participating in determining the reparations most appropriate for the victim and the community gives the offender a stake in the outcome. Most states in Australia use FGC to divert cases from the formal court process.

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


219. Id. at 25.


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

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

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

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

225. In New South Wales the child admit to the offense as a prerequisite to the conferencing process. Young Offenders Act 1997 s 36(b).
commentator described the value of this diversionary process, "[c]ompared to courtroom interactions, there is greater potential for an offender at a conference to explain what happened, for an offender's parent or supporter to say how the [offense] affected them, and for a victim to speak directly to an offender about the impact of the [offense] and any lingering fears."226

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

(i) to promote acceptance by the child concerned of responsibility for his or her own [behavior], and (ii) to strengthen the family or family group of the child concerned, and (iii) to provide the child concerned with developmental and support services that will enable the child to overcome the offending [behavior] and become a fully autonomous individual . . . .230

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

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

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

Within the first twelve months that the Young Offenders Act 1997 authorized juvenile conferencing, 928 conferences were held involving 1155 juvenile offenders.235 The Attorney General described the objectives of conferencing as:

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

In South Australia, police and judges can make referrals for conferencing if either decides that a matter should not be formally prosecuted.236 Conferences are convened by youth justice coordinators who are either appointed or are youth court magistrates.237 In Western Australia, conferences are organized by juvenile justice teams comprised of a youth justice coordinator, police officer, Ministry of Education officer, and an Aboriginal community worker.238 In the Australian Capital Territory, Tasmania, and the Northern Territory, police officers even function as conferencing facilitators.239 Ordinarily, juvenile justice teams convene family meetings to deal with juveniles who have been apprehended for minor offenses.240 Recent studies show that in Western Australia, conferencing had a dramatic effect on reducing the number of cases in the Children's Court. In 1995, formal charges against youth dropped twenty-two percent and admissions to detention centers dropped thirty percent.241

226. Kathleen Daly, Revisiting the relationship between retributive and restorative justice, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 33, 46 (Heather Strang & John Braithwaite, eds., 2000).
228. Young Offenders Act 1997 (NSW) s 9(1).
229. Young Offenders Act 1997 (NSW) s 9(1).
230. Young Offenders Act 1997 (NSW) s 9(1).
231. See Criminal Procedure Act 1986 (NSW) sch 1 (defining indictable offenses). Excludeable offenses are sexual offenses, offenses causing death, certain offenses, some traffic offenses, and offenses relating to violence orders. Id. s 8.
232. Id. ss 34(1)(a)(i)–(iii).
233. See Young Offenders Act 1997 (NSW) s 67(1) ("Any statement, confession, admission or information made or given by a child during the giving of a caution or a conference under this Act is not to be admitted in evidence in any subsequent criminal or civil proceedings.").
234. The NSW Scheme—Juvenile Justice, NSW GOVERNMENT, JUVENILE JUSTICE, DEPT OF HUMAN SERVICES, http://www.djj.nsw.gov.au/conferencing_scheme.htm (last visited Oct. 13, 2010) ("One unique aspect of the scheme is that it is different from other statutory schemes in the way it is set up. It has a standing conference convener, a Juvenile Justice Convener who is employed by the Department of Human Services and who is contracted to organize and facilitate youth justice conferencing as needed.").
235. NSW, Young Offenders Bill: Reading Before the Legislative Council, 21 May 1997, 8960 at 3 (J.W. Shaw, Attorney General).
236. AUSTL. LAW REFORM COM'MN, REPORT NO. 84, supra note 121, para. 18.47.
237. Id.
238. Id. para. 18.48.
239. STRANG, supra note 217, at 22–27.
240. AUSTL. LAW REFORM COM'MN, REPORT NO. 84, supra note 121, paras 18.46, 18.48.
241. Id. para. 18.48.


233. Young Offenders Act 1997 (NSW) s 36.
234. See id. s 37 ("[T]he child is not entitled to be dealt with by holding a conference if, in the opinion of the specialist youth officer to whom the matter is referred, it is more appropriate to deal with it by commencing proceedings against the child or by giving a caution because it is not in the interests of justice for the matter to be dealt with by holding a conference.").
235. Daly and Hayes, supra note 227, at 2.
237. NSW, Young Offenders Bill: Reading Before the Legislative Council, 21 May 1997, 8960 at 3 (J.W. Shaw, Attorney General).
In Victoria juvenile conferencing “is not legislatively based and relies on existing provisions of the Children’s and Young Persons Act of 1989.”244 It operates solely in the Melbourne children’s court and is modeled on New Zealand’s family group conferencing scheme.245 Those participating in the program are juveniles who have admitted their offense, who would otherwise go to court and who are likely to be given a Supervisory Order.246 A distinctive feature of the program is that it uses conferences for young offenders with prior court appearances as opposed to just first-time offenders or minor offenses.247

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

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

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

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

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

Cautioning is another diversionary method used by police to deal with young people who commit offenses.258 As with all diversionary tactics in the Australian juvenile justice system, parents are informed of the juvenile’s misconduct and expected to assist the juvenile with staying out of the formal court process. An informal caution involves minor intervention with the juvenile such as taking the child home or calling his or her parents, ending with a warning to cease the suspicious behavior.259 A formal caution is administered at the police station with a parent present and record of the incident that involved police contact remains on file with police.260 Each jurisdiction’s process for issuing a caution, whether formal or
informal, operates differently. In Queensland, a caution may only be given to a child who admits to committing the offense and consents to being dealt with through this process. The caution must be given in the presence of another person of the child’s or his or her parents’ choosing. The child must be given notice of, inter alia, the substance of the offense, the police officer’s name and rank, and the nature and effect of a caution.

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

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

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

261. *Youth Justice Act 1992 (Qld)* s 16(1).
262. *Id.* s 16(2).
263. *Id.* ss 20(1), (2).
264. *Young Offenders Act 1994* (WA) ss 21, 23A.
265. *Young Offenders Act 1993* (SA) s 6(1).
266. *Id.* ss 6(2), 6(3).
268. *Id.* s 20(3).
269. *Id.* s 29(1).
270. *AUSTL. LAW REFORM COMM’N, REPORT NO. 84, supra* note 121, para. 2.81.
271. *Id.*
272. *Id.*
273. *Id.*
274. See infra Part IV.

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

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

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

275. CUNNEN & WHITE, supra note 8, at 18.
276. *Id.* *Parens patriae* is defined as "parent of his or her country." BLACK'S LAW DICTIONARY, *supra* note 17, at 1144 (8th ed. 2004).
277. Judge Julian Mack set forth the predominant philosophy of the juvenile court in an influential law review article: [The criminal court] but put one question, "Has he committed this crime?" It did not inquire, "What is the best thing to do for this lad?" It did not even punish him in a manner that would tend to improve him; the punishment was visited in proportion to the degree of wrongdoing evidenced by the single act.... Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.

278. See Marygold S. Mell, *Juvenile Justice Reform in Context*, 1996 Wis. L. REV. 375, 378-79 (1996) (noting that the juvenile court was based on a "nonadversarial clinical-therapeutic model" in which evidentiary rules did not apply and the presence of an attorney was discouraged). Because rehabilitation was the goal, dispositions were necessarily open-ended rather than time-limited; in most jurisdictions, commitments to juvenile corrections departments were indeterminate, extending until the child turned twenty-one, or until the juvenile corrections department made a determination that the youth had been rehabilitated. See *id.* at 380.
Beginning with the birth of the civil rights movement in the United States, the American juvenile justice system gradually evolved into a rights-based, autonomous system where due process superseded informality and benevolence. Following the landmark case of *In re Gault*, those adjudicated in juvenile court were guaranteed many of the same procedural protections that applied to adults in criminal proceedings. Most notably, *Gault* granted juveniles the right to counsel and the right against self-incrimination. Justice Fortas, writing for the majority, explained that the juvenile justice system in the United States had taken on a different character since its inception; he described a system where judges have “unbridled discretion” as inferior to a system with “principle and procedure” at its core. *Gault* affirmed that “[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.” Three years later in the case *In re Winship*, the U.S. Supreme Court determined that the beyond a reasonable doubt standard should apply to juvenile proceedings. *Gault* and *Winship* mandated procedural parity for juveniles largely because of the liberty interest at stake in both juvenile and adult criminal proceedings.

Interestingly, at the same time that due process rights were being instituted into juvenile adjudications, there was a rise in the number of children arrested and prosecuted in the American juvenile justice system. Juvenile crime in the United States rose to its highest level in the 1990s. From 1985 to 1997, the number of juvenile delinquency cases rose by sixty-one percent. The murder arrest rate among juveniles was at its highest in 1993 at 14.4 murder arrests per 100,000 juveniles. The spike in juvenile crime caused major revision to the policies and penalties imposed on children in the juvenile justice system. A number of states enacted legislation that imposed harsher penalties on juvenile offenders, including being adjudicated as an adult in the criminal justice system. (*In re Gault*, 387 U.S. 1, 55 (1967) (holding that “the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults”).

279. *In re Gault*, 387 U.S. 1, 55 (1967) (holding that “the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults”).
280. Id. at 56, 55.
281. Id. at 18.
282. Id. at 20.
286. Id. Between 1997 and 2005, delinquency cases declined by nine percent. Id.
289. As crime rates increased in the 1980s and 1990s, many states saw trying juveniles in adult courts as a solution. *Id. at 2. Between 1992 and 1996, forty-three states and the District of Columbia modified their criminal codes with respect to juveniles who commit violent or serious offenses. *Id. Further, thirty-six states and the District of Columbia imposed laws that would try juveniles as young as fourteen as adults for violent crimes and for crimes deemed serious “such as aggravated stalking, larceny and larcenous assault, . . . violation of drug laws near a school or park, sodomy, and oral copulation.” *Id. Within forty of the nation’s largest urban counties, over 7,100 juvenile defendants were charged in adult court with felonies in 1998 alone. GERARD A. RAINVILLE & STEVEN K. SMITH, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JUVENILE FELONY DEFENDANTS IN CRIMINAL COURTS 1 (2003), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/djdcc98.pdf. A survey conducted by the U.S. Department of Justice found that of prosecutors’ offices handling juvenile cases, almost two-thirds transferred at least one juvenile case to criminal court in 1994. See National Survey of Prosecutors 1994, OFFICE OF JUSTICE PROGRAMS, http://bjs.ojp.usdoj.gov/content/pub/nsc/JPSSC.TXT (last updated Mar. 1997). Nineteen percent of prosecutors’ offices had a specialized unit to deal with those juvenile cases that were transferred to criminal court. Id.
291. SICKMUND, supra note 285, at 3. During the same time period, the number of adjudicated delinquency cases resulting in residential placement dropped from thirty-two percent in 1985 to twenty-two percent in 2005, the number of cases resulting in formal probation increased slightly from fifty-five percent to sixty-one percent, and the number of cases resulting in other court sanctions increased by seven percent. Id.
292. *Id. at 1. There were three percent fewer arrests of juveniles in 2008 than in 2007, and the juvenile crime rate fell two percent. Puzzanchera, supra note 287, at 1.
295. *Id. at 66.
296. *Id. at 58.
297. *See Feld, supra note 15, at 691–92 ("[T]he sentences that delinquents charged with crimes receive are now based on the idea of just deserts rather than the child’s "real needs." ").

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

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

One bright spot is that America has begun to look for examples around the globe for alternative approaches to juvenile crime. Restorative justice offers a sound
approach; it is a model well designed to address juvenile transgressions. Evidence of restorative justice in the United States first appeared in the late 1970s among the Mennonite community. 298 Mennonites sought to apply their philosophy to the criminal justice system by conducting victim-offender dialogues as a means toward reconciliation. 299 The United States is slowly moving in the direction of more institutionalized support for restorative justice practices with juveniles. In the 1990s, the Balanced and Restorative Justice Project (BARJ) was created, bringing more visibility to restorative justice. 300 BARJ provided technical assistance and training for juvenile justice systems interested in adopting restorative justice practices. 301 In 1994, the American Bar Association endorsed victim-offender mediation (VOM) and provided guidelines for its use and development in courts. 302 A study conducted in 2000 found that at least nineteen states have passed legislation promoting restorative justice elements in their juvenile justice systems. 303 Additionally, twenty-nine states have statutes that promote VOM 304 or some aspect of restorative justice. 305

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

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

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

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

308. Umbreit & Greenwood, supra note 306, at 239.
309. Id. at 240.
310. Id.
justice system programs. Two studies concluded that reoffending youths tended to incur less serious charges than their counterparts. Another study reported little or no difference in recidivism rates between youths participating in VOM and youths processed through traditional means.

Limited use of family group conferencing has been adopted in the United States. While not as robust or institutionalized as in Australia, the format and principles are much the same. For example, a Milwaukee, Wisconsin community conferencing program brings together victims, offenders, and community members to discuss crimes and decide how offenders will make amends. Twelve different sites in the First Judicial District of Minnesota utilize FGC. A juvenile diversion program in Honolulu, Hawaii developed around FGC in 1999. This program, between March and September 2000, 102 first-time juvenile offenders participated in conferences instead of traditional police diversion programs, and eighty-five conferences were held. Satisfaction rates among participants in family group conferences were extremely high. In one study conducted on the twelve sites in the First Judicial District of Minnesota, post-conference telephone interviews were conducted with 105 victims, 103 juvenile offenders, and 130 support persons to generate satisfaction rates with the FGC experience. The results showed that ninety-three percent of victims and ninety-four percent of offenders were satisfied with how their cases were handled; ninety-two percent of support people indicated they were satisfied with the outcome; ninety percent of victims felt the offender was held adequately accountable; and ninety-eight percent of victims, ninety-nine percent of support persons and ninety-four percent of offenders would recommend the program to others.

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

Jurisdictions choosing to implement restorative justice practices have seen a positive impact on recidivism rates. In the Milwaukee program, from 2002 to 2003, 43 percent of forty-seven offenders were charged with another crime, compared to 13.5 percent of fifty-two non-participating juvenile offenders. The Honolulu program reported an overall rate of recidivism (within six months) of twenty-eight percent for juveniles who had conferences. However, the recidivism rate was only eleven percent right after the last conference held between the participating parties. Additionally, “juveniles who had conferences for non-violent offenses were less likely to escalate to violent crimes, compared to juveniles similarly situated who did not confer.” Out of the 102 conference juveniles, fifty-nine committed non-violent offenses and only one was rearrested within the following six months for a violent crime. In the group of similarly situated juveniles without conferences, twenty-five out of eighty-two juveniles were arrested for non-violent crimes, and six were arrested for violent crimes within the following six months.

The Pennsylvania group conferencing study found that “group conferencing had a more positive impact on recidivism rates for participants whose offenses were relatively more violent.” Notably the Indianapolis program, which works in tandem with the police department to offer FGC where young offenders and their families meet the individuals they victimized and work toward reparation and reconciliation, has seen “significant reduction in recidivism among these [young] offenders.” In a meta-analysis performed by William Bradshaw and David
Roseborough involving nineteen studies and 11,950 juveniles from twenty-five different sites, they found that VOM and FGC together contributed to a twenty-six percent reduction in recidivism.

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

V. CONCLUSION

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

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