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Kids Say the Darnedest Things: A Call for Adoption of a Statutory Parent-Child Confidential Communications Privilege in Response to Tougher Juvenile Sentencing Guidelines

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COMMENTS

KIDS SAY THE DARNEDEST THINGS: A CALL FOR ADOPTION OF A STATUTORY PARENT-CHILD CONFIDENTIAL COMMUNICATIONS PRIVILEGE IN RESPONSE TO TOUGHER JUVENILE SENTENCING GUIDELINES

I. INTRODUCTION

As a child, you probably heard it all: "If everyone else jumped off a bridge, would you jump, too?;" or "Two wrongs do not make a right;" or perhaps the all-time favorite, "I don't know; ask your father." These simple sayings basically characterize the current judicial and legislative status of the law regarding confidential communications made by a child to a parent. Only one state currently recognizes the privilege at common law;[1] only two states have enacted legislation

1. *See* John Caher, *New York Commission Ponders Parent-Child Privilege*, LEGAL INTELLIGENCER, Nov. 10, 2000, at 4 (stating that "New York has no statutory parent-child privilege," but the "courts have recognized a common law privilege solely derived from the constitutional right of privacy"); Margaret Graham Tebo, *Parent Privilege: Lawmakers Seek to Protect Parent-Child Conversation*, A.B.A. J., July 2000, 18, 18 (2000).

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granting the privilege;[2] and many court decisions have said that if the privilege is to be granted, it should be created by the legislative branch, not the judicial branch.[3] One thing our parents never had to say to us when we sought their advice and guidance was: "Anything you say may be used against you in a court of law."[4] However, as more parents are called to testify against their children in grand jury proceedings, criminal trials, and juvenile proceedings,[5] that warning may soon become the mantra of parents in almost every state.

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2. IDAHO CODE § 9-203(7) (Michie Supp. 1997) (stating that child-to-parent communications "concerning matters in any civil or criminal action to which such child or ward is a party" are privileged, subject to exceptions); MINN. STAT. ANN. § 595.02(1)(j) (West 2000) (stating that child-to-parent communications "made in confidence by the minor to the minor's parent" are privileged, subject to exceptions); *cf.* MASS. GEN. LAWS ANN. ch. 233, § 20 (West 2000). While Massachusetts has a statute that may be used to prevent a child from testifying against a parent, the privilege is not reciprocal and is considered by some to not be a privilege, but rather, a witness disqualification rule. *See* Shannon P. Duffy, *3rd Circuit: No Parent-Child Privilege*, LEGAL INTELLIGENCER, Jan. 13, 1997, at 1 ("The Massachusetts statute also does not create a testimonial privilege . . . but 'rather it is best described as a witness-disqualification rule,' because the statute only bars a minor child, under certain circumstances, from testifying against a parent, and does not extend to children of all ages in all circumstances.") (quoting *In re* Grand Jury, 103 F.3d 1140, 1147 n.13 (3d Cir. 1997)). *But see* Catherine B. Sarson, Comment, *The Child-Parent Testimonial Privilege: Attempts at Codification Have Missed Their Mark*, 12 GEO. J. LEGAL ETHICS 861, 862 & n.7 (1999) (including Massachusetts as one of "[t]hree states [that] have codified this privilege," which she terms "a child-parent privilege").

3. *In re* Grand Jury, 103 F.3d 1140, 1147 n.13 (3d Cir. 1997) ("[W]e believe the recognition of such a privilege, if one is to be recognized, should be left to Congress."); *In re* Grand Jury Subpoena, 722 N.E.2d 450, 451 (Mass. 2000); *see also* Betsy Booth, Comment, *Underprivileged Communications: The Rationale for a Parent-Child Testimonial Privilege*, 36 Sw. L.J. 1175, 1190 (1983) (stating that some "state courts have recognized the reasons for the privilege, but have deferred to the legislature creation of the privilege").

4. Tebo, *supra* note 1, at 18.

5. *See* State v. Grossberg, No. IN96-12-0127, 1998 WL 117975, at *1 (Del. Super. Ct. Jan. 23, 1998); Daniel J. Capra, *Laws of Evidentiary Privilege*, N.Y. L.J., May 8, 1998, at 3, 39 (stating that "[t]he absence of any parent-child privilege became a matter of public and political outcry when Independent Counsel Kenneth Starr subpoenaed Monica Lewinsky's mother to testify before the District of Columbia grand jury"); *see also* Caher, *supra* note 1, at 4 (quoting Michael J. Hutter, Law Review Commission member and professor at Albany Law School as saying, "'There have been numerous instances over the years in which prosecutors have subpoenaed children to testify against the parents, parents to testify against their kids . . . . We recognize that many times legitimate law enforcement needs will demand that, but to do it on a routine basis seems very unseemly'"); Richard Connelly, *More Teen-Agers Being Taken to the Adult Woodshed: Harris County's Republican Judges Are Getting Tough on Violent Juvenile Crime—Too Tough, Say Some Defense Lawyers*, TEX. LAW., Jan. 29, 1996, at 2 ("'We take the position of listening to the victims and the families of victims, not of the defendants. . . . For the families it's a punishment issue. They see these crimes as being so heinous that they should be punished and we shouldn't be worried about the consequences to [the defendants]!'") (alteration in original) (quoting Elizabeth Godwin, Chief Prosecutor of the Juvenile Division for Harris County, Texas); E-mail from Ed Kinkeade, Justice, Court of Appeals, Fifth District, Dallas, Texas, to David L. Cheatham (Jan. 10, 2001, 08:37:40 CST) ("In adult cases I can recall parents testifying as State's witnesses, even in at least one capital case. Prosecu-

This Comment addresses the need for a narrowly tailored, statutorily created privilege protecting confidential communications made to a parent by a child who is seeking advice or guidance and how crucial that privilege has become for today's juveniles, who face tougher guidelines for juvenile sentencing and adult certification. Part II provides an overview of the historical background of the parent-child privilege and its current legal status, both at the state and federal levels. Part III explains how the "get-tough" legislation that has made juvenile courts parallel to adult courts, along with the movement to completely abolish juvenile courts, necessitates legislative approval of a parent-child privilege. Part IV discusses past proposals for parent-child privileges that have failed and proposes that the reason for their failure is that the proposals were overly broad. Finally, Part V proposes a narrowly tailored statute designed to protect only those confidential communications from the child to the parent when the child is seeking parental guidance or advice.

II. OVERVIEW OF THE PARENT-CHILD PRIVILEGE

A. *General Overview of Privileges*

A privilege is "a limitation on admissibility which the courts or the legislature have deemed necessary to protect some other compelling interest."[6] "Evidentiary privileges . . . may, depending on the state, be enacted by the legislature, established by the courts, or in the same jurisdictions instituted by either. Federal courts are authorized under the Federal Rules of Evidence to recognize privileges in accordance with common law"[7] and "in the light of reason and experience."[8] "Privileges are generally disfavored because they often suppress otherwise reliable evidence and thus impede the discovery of truth."[9] Therefore, "[t]he rules of privilege are a reflection of the historic tension between the high importance given to fact-finding in the legal

tors in my experience will call any witness that will help prove their case.") (on file with the Texas Wesleyan Law Review). *But see* David A. Schlueter, *The Parent-Child Privilege: A Response to Calls for Adoption*, 19 ST. MARY'S L.J. 35, 54 (1987). Mr. Schlueter claims that "[f]ew prosecutors are willing to incur public wrath and criticism for needless use of testimony of either a child or a parent against the other," and that "the fear of abuse is simply not sufficiently well-founded to justify the codification of a parent-child privilege." *Id.* While Mr. Schlueter offers no proof for the first of these two assertions, assuming, *arguendo*, its validity in 1987, the recent trend appears to be otherwise.

6. Schlueter, *supra* note 5, at 37.

7. *Need for Parent/Child Privilege*, THE CHAMPION, Apr. 1998, at 10.

8. FED. R. EVID. 501 advisory committee's note; *see also In re* Erato, 2 F.3d 11, 16 (2d Cir. 1993).

9. Schlueter, *supra* note 5, at 38.

process and the impediment to that goal created by developing human values and priorities."[10]

In order to be recognized at common law, the relationship usually[11] must meet the four requirements established by Dean Wigmore:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[12]

The underlying policy behind privileges is that there are some "relationship[s] that society deems more important than the search for truth in a court proceeding."[13] Examples of acceptable relationships that have traditionally fallen into this category are relationships between attorney and client, husband and wife, and penitent and clergy.[14]

B. *Historical Perspective*

The debate over parent-child privileges has been ongoing for over twenty years.[15] "This issue was the topic of much scholarly discourse in the late seventies and early eighties, but eventually faded from the spotlight."[16] Although most commentators support its conclusion,[17]

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10. David O. Boehm, *Lawyer's Bookshelf*, 72 N.Y. ST. B.J. 51, 51 (2000) (reviewing LAWRENCE N. GRAY, EVIDENTIARY PRIVILEGES (GRAND JURY, CRIMINAL AND CIVIL TRIALS) (1999)).

11. *See* Shonah P. Jefferson, Note, *The Statutory Development of the Parent-Child Privilege: Congress Responds to Kenneth Starr's Tactics*, 16 GA. ST. U. L. REV. 429, 436–37 & n.55 (1999) (acknowledging that while in some situations the communications between husband and wife do not meet all of Wigmore's conditions, courts have still recognized the marital privilege because of important policy reasons).

12. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (John T. McNaughton ed., rev. ed. 1961) (emphasis omitted).

13. Booth, *supra* note 3, at 1176; *see also* IDAHO CODE § 9-203 (Michie 1998) (stating that "[t]here are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate").

14. FED. R. EVID. 501 advisory committee's note; TEX. R. EVID. 503; Caher, *supra* note 1, at 4.

15. *See* Sarson, *supra* note 2, at 861; *see also* Caher, *supra* note 1, at 4 ("The Law Review Commission, an agency established in 1934 to examine New York statutes and advise the Legislature on areas where it believes reforms are warranted, has been calling for some form of child-parent privilege for nearly 20 years.").

16. Sarson, *supra* note 2, at 861 (footnote omitted).

17. *E.g.*, Schlueter, *supra* note 5, at 45 (acknowledging that "virtually every commentator addressing the issue has urged either legislative or judicial adoption of a parent-child privilege").

the privilege covering the parent-child relationship has not gained widespread judicial or legislative favor.[18]

Some proponents of the parent-child privilege argue the necessity of the privilege because of the "cruel trilemma" of requiring a parent to testify against his or her child.[19] The parent can either (1) testify against her child, thereby breaching the confidence the child has placed in her and risking damage to the relationship with her child; (2) commit perjury, thereby setting a bad example for her child; or (3) refuse to testify, thereby risking contempt of court.[20] While these are difficult choices, one opponent has made the compelling argument that the mere discomfort and difficulty of being placed in such a situation does not justify the privilege.[21] While the cruel trilemma in its entirety may not justify the parent-child privilege, it is the court's forcing a parent to involuntarily breach the confidence of the child and the resulting damage from that breach that forms the basis of most proponents' primary argument.[22]

Proponents of the parent-child privilege argue that the privilege fosters "important public policy interests such as the protection of strong and trusting parent-child relationships; the preservation of the family; safeguarding of privacy interests and protection from harmful government intrusion; and the promotion of healthy psychological development of children."[23] They fear that forced disclosure of confidences will damage the relationship between the parent and the child, resulting in fewer future communications and possibly resulting in additional delinquent behavior from the child.[24] "[P]arental influence is probably the most important factor in a child's emotional development."[25] Thus, proponents feel that a parent-child privilege is warranted because encouragement and protection of "the important family values of trust and open communication between parent and

18. *See supra* notes 1–2; *see also* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE ch. 501, at 501–34 to 501–35 (Joseph M. McLaughlin ed., 2d ed. 2001) (stating that "[m]ost federal courts that have addressed the issue have declined to recognize a parent-child privilege," and that "[t]he two district courts that have recognized the privilege have not been followed by any other federal court") (footnotes omitted).

19. *See* Schlueter, *supra* note 5, at 54–55; Jefferson, *supra* note 11, at 442–43.

20. Schlueter, *supra* note 5, at 54.

21. *Id.* at 55.

22. *See In re* Grand Jury, 103 F.3d 1140, 1146 (3d Cir. 1997); *see also* Tebo, *supra* note 1, at 18 (stating that "[s]uch an intrusion seems contrary to the political focus on family values"); Booth, *supra* note 3, at 1178 (stating Dean Wigmore's test "raise[s] considerations of the importance and fragility of the family unit" and that a parent-child privilege should protect the privacy interests of the parents in raising and educating the child).

23. *Grand Jury*, 103 F.3d at 1146.

24. Booth, *supra* note 3, at 1178 (stating that "sociological research indicates that juvenile delinquency may be related to a lack of communication within the family").

25. Susan Levine, Comment, *The Child-Parent Privilege: A Proposal*, 47 FORDHAM L. REV. 771, 781 (1979).

child"[26] outweigh the evidentiary benefit gained by forced disclosure in grand jury or court proceedings.[27] As an attorney who represented the parents of a sixteen-year-old child accused of rape reasoned, "'Society as a whole encourages a kid in trouble to go to the parents, and we need to protect that above all else.'"[28]

Opponents of the parent-child privilege argue that the second element of the Wigmore test[29] is not satisfied because most children and parents are not aware of the privilege's existence or non-existence; thus, these opponents feel that adding the privilege will do nothing to foster the open communication between a parent and child.[30] The argument, however, apparently "lacks empirical support."[31] At least one proponent has conceded that perhaps the idea has "logical appeal, however, since the average layman presumably is not concerned with the law of evidence,"[32] but the proponent still argues that even without specific knowledge of the privilege, "a family member . . . may well believe that family confidences will remain private."[33] Furthermore, in today's more litigious society, the "average layman" may have a much better understanding of the law than in years past.[34]

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26. *Need for Parent/Child Privilege*, *supra* note 7, at 10; *see also* Booth, *supra* note 3, at 1178 (stating that communication between the child and parent is necessary in order for the parent to teach the child values and morals and that a child "will not trust a parent" with future confidential communications if that trust is broken by a parent's forced testimony).

27. *Need for Parent/Child Privilege*, *supra* note 7, at 10.

28. Tebo, *supra* note 1, at 18 (quoting attorney John C. Koslowsky); *see generally In re* Grand Jury Subpoena, 722 N.E.2d 450 (Mass. 2000).

29. *See supra* notes 12–13 and accompanying text.

30. *See In re* Grand Jury, 103 F.3d 1140, 1152–53 (3d Cir. 1997); Booth, *supra* note 3, at 1179; Schlueter, *supra* note 5, at 56 (stating that "there is little reason to believe that the parent and child would ever depend on such a privilege in making statements to one another").

31. Booth, *supra* note 3, at 1180 & n.43 (noting that Mark Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CAL. L. REV. 1353, 1372–74 (1973) (observing that this proposition originated in Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 682 (1929), but lacked supporting authority) the idea caught on, but has apparently never been supported with empirical data).

32. *Id.* at 1180.

33. *Id.*

34. In a random survey of adults working in non-legal careers, twenty-four respondents were asked, "Are you aware that in Texas, there is a spousal privilege, such that in most circumstances, a spouse will not be made to testify against the other spouse in a criminal proceeding (the so-called 'spousal exception')?" Sixteen respondents answered, "yes," that they were aware, and eight respondents answered "no." In question two, the same respondents were told to "suppose the following hypothetical: You are a parent, and your minor child comes to you seeking guidance and confides that he has committed a criminal act. May you claim a parental privilege and refuse to testify against your son?" Seven respondents answered, "yes," that they could claim a parental privilege, and seventeen respondents answered "no." While the survey did not include enough respondents to be conclusive, it is interesting to note that 66.7% of respondents answered question one correctly, and 70.8% answered question two

Opponents also argue that the parent-child privilege does not meet the fourth requirement of the Wigmore test.[35] They believe that any injury to the parent-child relationship resulting from the disclosure "would be relatively insignificant" while "the impairment of the truth-seeking function" would be substantial.[36] Proponents, on the other hand, dispute this claim, citing the damage to the relationship from lost trust as well as the damage to the social and emotional development of the child.[37]

C. *Current Status of Parent-Child Privilege: Confusing Terminology Used in a Broad and General Sense Equals a Detriment to Judicial Creation of the More Narrow Parent-Child Confidential Communications Privilege*

Discussion of a parent-child privilege can become confusing at best, due largely in part to the vast amount of varying material that has been written, legislated,[38] or adjudicated on the topic.[39] There are two separate possibilities when speaking generally of parent-child privilege: one refers to the more narrow confidential communications privilege, and one refers to the broader testimonial privilege.[40] The confidential communications privilege protects only those private communications made in confidence[41] while the testimonial privilege allows "a witness [to] refuse to give [any] adverse testimony against [her] parent or child."[42] Within each of these two categories, one must distinguish between referring to acts or communications as between parent-to-child, child-to-parent, or both.[43] Because the parent-child privilege is often discussed in very general terms, the distinction can become confusing.

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correctly. This may indicate that people in today's society are more aware of legal issues. (Survey on file with the Texas Wesleyan Law Review.) An in-depth study, beyond the scope of this Comment, should be conducted by parties on both sides of the issue.

35. 8 WIGMORE, *supra* note 12, § 2285, at 527; *see also supra* note 12 and accompanying text.

36. *See In re* Grand Jury, 103 F.3d 1140, 1153 (3d Cir. 1997); Schlueter, *supra* note 5, at 57.

37. *See* Three Juveniles v. Commonwealth, 455 N.E.2d 1203, 1208–09 (Mass. 1983) (O'Conner, J., dissenting); Sarson, *supra* note 2, at 868; *see also* Amee A. Shah, Comment, *The Parent-Child Testimonial Privilege-Has the Time for It Finally Arrived?*, 47 CLEV. ST. L. REV. 41, 44 (1999) (stating that "the parent-child privilege arguably passes these tests").

38. *See supra* note 2.

39. *See infra* note 62.

40. Capra, *supra* note 5, at 39; Schlueter, *supra* note 5, at 43 (calling the testimonial privilege "the privilege not to take the stand" and the communications privilege "the privilege not to reveal the contents of a particular communication").

41. Schlueter, *supra* note 5, at 43 ("Under the confidential communications privilege, a witness may take the stand and relate what he observed and what he heard, so long as what he heard is not confidential.") (footnote omitted).

42. Capra, *supra* note 5, at 39.

43. *See supra* note 2.

An excellent illustration of this confusion is exhibited in the case of *In re Grand Jury*.[44] The case presented three different grand jury appeals, all with parent-child privilege issues.[45] In the appeal from the District Court of the Virgin Islands, the grand jury subpoenaed a father to testify, presumably about conversations with the target of the grand jury investigation, his eighteen-year-old son.[46] "[T]he father moved to quash the subpoena, asserting that those conversations were privileged from disclosure under Fed. R. Evid. 501."[47] The district court, although sympathetic to the father's plight, denied the father's motion to quash because other courts that had addressed the issue, including the Third Circuit Court of Appeals, failed to recognize the privilege.[48] In the appeal from Delaware, "a sixteen year old minor daughter was subpoenaed to testify before the grand jury, as part of an investigation into her father's participation in an alleged interstate kidnapping."[49] The daughter filed a motion to bar her testimony, claiming both a parent-child testimonial privilege *and* a parent-child confidential communications privilege.[50] The district court denied the order, and the daughter refused to testify.[51] She was found in contempt for refusing to testify, and she appealed.[52] The appellants made the traditional public policy arguments for the parent-child privilege,[53] which the court recognized as having been advanced by many different legal commentators and academicians.[54] The court held that no parent-child privilege existed for the following reasons:

(1) The overwhelming majority of all courts—federal or state—have rejected such a privilege.
   (a) Eight federal Courts of Appeals have rejected such a privilege and none of the remaining Courts of Appeals have recognized such a privilege.
   (b) Every state supreme court that has addressed the issue has rejected the privilege, and only four states have protected parent-child communications in some manner.
   (c) No state within the Third Circuit has recognized a parent-child privilege.
(2) No reasoned analysis of Federal Rule of Evidence 501 or of the standards established by the Supreme Court or by this court supports the creation of a privilege.

44. *See generally In re* Grand Jury, 103 F.3d 1140 (3d Cir. 1997) (illustrating the overall confusion between parent-to-child and child-to-parent communications).
45. *Id.* at 1142.
46. *Id.* at 1142–43.
47. *Id.* at 1143.
48. *Id.*
49. *Id.*
50. *Id.* (emphasis added).
51. *Id.* at 1143–44.
52. *Id.* at 1144.
53. *See supra* notes 22–23 and accompanying text.
54. *Grand Jury*, 103 F.3d at 1146.

(3) Creation of such a privilege would have no impact on the parental relationship and hence would neither benefit that relationship nor serve any social policy.
(4) Although we have the authority to recognize a new privilege, we believe the recognition of such a privilege, if one is to be recognized, should be left to Congress.[55]

The majority did not address the adverse testimonial privilege,[56] even though it was asserted in the Delaware case.[57] Instead, "[a] divided court refused to recognize the narrower privilege for confidential communications between parent and child; implicit in this resolution is that the broader adverse testimony privilege was rejected as well."[58]

The majority's decision is misleading, however, because the court failed to distinguish why the federal courts of appeals it cited in the opinion rejected the parent-child privilege.[59] For example, while it is true that the court of appeals did not recognize the privilege in *In re Erato*, that court did acknowledge a possible justification for a privilege relating to *minor* children:

> [H]er case presents a weaker claim for recognition of a parent-child privilege than might be presented in a case involving a minor child. At least in that situation the argument would be available that compelling a parent to inculpate a minor child risks a strain on the family relationship that might impair the mother's ability to provide parental guidance during the child's formative years. However we might rule in that context, we decline to recognize a parent-child privilege under the present circumstances. We see no basis for recognizing in federal law a new privilege that would permit a mother to assert a parent-child privilege to avoid testifying against her adult son regarding transactions in which she appears to have benefited from her son's allegedly criminal activity by receiving allegedly stolen assets at a below market value price.[60]

Moreover, with the exception of only one case,[61] each federal court of appeals case listed in the *In re Grand Jury* opinion did not involve parents being compelled to testify against minor children; rather, most involved situations of teenage or adult children being compelled to

55. *Id.* at 1146–47.

56. *See supra* notes 40–43 and accompanying text.

57. *See Grand Jury*, 103 F.3d at 1143 ("The motion sought to bar the testimony of the daughter claiming a parent-child privilege which would cover *testimony and confidential communications.*") (emphasis added).

58. Daniel J. Capra, *A 'New' Privilege: Parent-Child*, N.Y. L.J., May 9, 1997, at 3, 3.

59. *See Grand Jury*, 103 F.3d at 1147–49 (citing jurisdictions that have not recognized a parent-child privilege as well as distinguishing two cases which have recognized the privilege).

60. *In re* Erato, 2 F.3d 11, 16 (2d Cir. 1993).

61. *Grand Jury*, 103 F.3d at 1147 (citing Port v. Heard, 764 F.2d 423 (5th Cir. 1985), as refusing to recognize a parent-child privilege).

testify against their adult parents.[62] Additionally, the court's analysis may have been applicable to the daughter in the Delaware case, but it was not applicable to the facts of the Virgin Islands case. While "common law is obviously an important factor to consider in determining whether a parent-child privilege should be recognized under Rule 501, . . . some court must be the first to establish a 'new' common law rule."[63] By relying on prior case law that *generally* discusses a parent-child privilege in its *broadest* sense, instead of focusing on the specific need for a narrowly tailored privilege covering only those confidential communications between the child and parent, the court failed to fulfill its duty under Federal Rule of Evidence 501.[64] The court should have recognized the requisite narrow parent-child confidential communications privilege. As long as courts continue to speak of parent-child privileges in general, rather than more narrow and specific terms, it is unlikely that there will ever be a judicially created parent-child privilege that is narrowly structured to protect only those confidential communications between a child and his parent. The courts must distinguish between the two different parent-child privileges and decide, using "reason and experience,"[65] to find a narrow parent-child communications privilege.

In *Jaffee v. Redmond*,[66] the Supreme Court stated that courts are not to "freeze the law governing the privileges of witnesses in federal

62. *See id.* (citing *Erato*, 2 F.3d at 16 (refusing to find privilege for adult mother who had apparently benefited from her adult son's alleged criminal activity); Grand Jury Proceedings of John Doe v. United States, 842 F.2d 244 (10th Cir. 1988) (involving teenager who was being compelled to testify against adult mother); Kaprelian v. United States, 768 F.2d 893 (7th Cir. 1985) (involving the testimony of teenage daughter against adult father); Port v. Heard, 764 F.2d 423, 428–31 (5th Cir. 1985) (holding that the parents of teenage son accused of murder could not claim parent-child privilege); United States v. Ismail, 756 F.2d 1253 (6th Cir. 1985) (holding that adult child must testify against adult parents if subpoenaed); *In re* Grand Jury Subpoena of Santarelli, 740 F.2d 816 (11th Cir. 1984) (per curiam) (involving the testimony of son against his adult father); United States v. Jones, 683 F.2d 817 (4th Cir. 1982) (declining to find privilege to allow adult child to refuse to testify against adult father); *In re* Grand Jury Proceedings, 647 F.2d 511, 512–13 (5th Cir. Unit A May 1981) (per curiam) (refusing to find privilege to prevent child from testifying against mother and stepfather); United States v. Penn, 647 F.2d 876, 879, 885 (9th Cir. 1980) (en banc) (holding that drug evidence against adult parents not excluded even though officers found drugs by bribing defendant's five-year-old child)). Of these cases, *Port v. Heard* is the only case that is applicable based on the facts of the Virgin Island proceeding.

63. Capra, *supra* note 58, at 3.

64. *See supra* notes 7–8 and accompanying text.

65. *See supra* note 8 and accompanying text.

66. 518 U.S. 1, 15 (1996) (holding that confidential communications between a client and her licensed psychiatrist or psychologist, or a licensed social worker in the course of psychotherapy, is privileged); *see also* Maureen P. O'Sullivan, Comment, *An Examination of the State and Federal Courts' Treatment of the Parent-Child Privilege*, 39 CATH. LAW. 201, 217 (1999) (stating that the *Jaffee* holding is important because the Supreme Court exercised its power under Federal Rule of Evidence 501 to create a new privilege at common law).

trials"[67] but should apply the "open-ended common law approach of current Rule 501."[68] The *In re Grand Jury* court noted this,[69] yet it failed to find a parent-child privilege at common law because the Supreme Court and other federal courts have "declined to exercise their power under Rule 501 expansively."[70] Thus, while the federal courts have it within their discretion to find a narrow parent-child confidential communications privilege, most of the courts appear reluctant to make that decision.

Opponents do not believe that a common law parent-child privilege should be found. They claim that the "parent-child privilege was not on the list of privileges sent by the Advisory Committee to the Supreme Court in 1972," and thus, was not regarded by the Advisory Committee to be "sufficiently important to warrant privilege protection."[71] This argument is not persuasive. While it "does have some weight because [the list] was prepared by experts in the field and was approved by the Supreme Court,"[72] it was *rejected* by Congress, and even as the *In re Grand Jury* majority noted, many experts still advocate a parent-child privilege.[73] In her dissent, Justice Mansmann stated:

> This case . . . does not require that we apply the law as it exists with respect to testimonial privilege. Instead, we are asked to determine what the law in this area ought to be. While most courts have declined to recognize a parent-child testimonial privilege, they have done so in contexts far different from the one presented here. I am convinced that this is an appropriate case in which to recognize and set parameters for a limited privilege.[74]

Unfortunately, the majority disagreed.[75] The *In re Grand Jury* court concluded that the privilege "would have no impact on the parental relationship and hence would neither benefit that relationship nor serve any social policy,"[76] but that assertion has no empirical data to support it.[77] However, the court's statement that "recognition of such

67. *Jaffee*, 518 U.S. at 8–9.

68. Capra, *supra* note 58, at 36.

69. *In re* Grand Jury, 103 F.3d 1140, 1149 (3d Cir. 1997) (citing Trammel v. United States, 445 U.S. 40, 47 (1980)).

70. *Id.*

71. Capra, *supra* note 58, at 36.

72. *Id.*

73. *See Grand Jury*, 103 F.3d at 1146; Capra, *supra* note 58, at 36.

74. *Grand Jury*, 103 F.3d at 1158 (Mansmann, J., concurring and dissenting). While Justice Mansmann uses the terminology "testimonial privilege," she specifies at the beginning of her dissent that she is referring to "an evidentiary privilege which could be invoked to prevent compelling that parent to testify regarding *confidential communications* made to the parent by his child." *Id.* (emphasis added).

75. *Id.* at 1150.

76. *Id.* at 1147.

77. *See supra* notes 30–34 and accompanying text.

a privilege, if one is to be recognized, should be left to Congress,"[78] seems to be an open invitation to legislatures to decide on the matter. Certainly, a statutory approach to the creation of a parent-child privilege would be a better choice than waiting for the "perfect" case to compel the courts to decide in favor of a parent-child privilege covering the confidential communications of a minor child to his parent.[79] The truth is that many minors cannot afford the luxury of waiting.

III. TOUGHER GUIDELINES IN JUVENILE DETENTION AND ADULT CERTIFICATION PROCEEDINGS: NEW FUEL FOR AN OLD DEBATE

While the traditional arguments for a parent-child privilege[80] are compelling, the fact remains that these arguments have met only limited success. Currently, only New York recognizes a parent-child privilege at common law,[81] and only two states, Idaho and Minnesota, have laws protecting communications made from the child to the parent.[82] Massachusetts has a law involving parent-child communications,[83] but it is seen as "backward[ ]" because it allows the parent to prevent the child from testifying against the parent, but not vice-versa.[84] Perhaps one explanation for the privilege's limited success is that the lack of a parent-child privilege has simply not been seen as a widespread problem that demands immediate attention. In 1987, one opponent stated, "Few prosecutors are willing to incur public wrath and criticism for needless use of testimony of either a child or a parent against the other," and "the fear of abuse is simply not sufficiently well-founded to justify the codification of a parent-child privilege."[85] While no proof was offered for the first of these two assertions, assuming, *arguendo*, their validity in 1987, the recent trend appears to be otherwise.[86]

78. *Grand Jury*, 103 F.3d at 1147.

79. *Need for Parent/Child Privilege*, *supra* note 7, at 10.

80. *See supra* notes 19–28 and accompanying text.

81. *See* Caher, *supra* note 1, at 4.

82. IDAHO CODE § 9-203(7) (Michie 1998); MINN. STAT. ANN. 595.02(1)(j) (West 2000); *see* Tebo, *supra* note 1, at 18.

83. MASS. GEN. LAWS ch. 233, § 20 (1986).

84. Sarson, *supra* note 2, at 871. A bill introduced in the Massachusetts legislature in 2000 would have extended the privilege to similarly protect the child. E-mail from Stacey Stein, Aide to Massachusetts Senator Cynthia Stone Creem, to David L. Cheatham (Jan. 5, 2001, 09:24:52 CST) (on file with the Texas Wesleyan Law Review). The bill passed in the Senate, but died in the House of Representatives before it was enacted. *Id.* However, Senator Creem plans to re-introduce the bill during the 2001–2002 session. *Id.*

85. Schlueter, *supra* note 5, at 54.

86. *See supra* note 5.

Responding to rising juvenile crime, most state legislatures have taken a "get-tough" approach to juvenile crime.[87] As a result, many states now allow "increased waiver of juvenile jurisdiction to the adult criminal courts; opening juvenile records for use in later adult criminal cases; lowering the age of a child subject to juvenile sanctions or waiver; and providing stiffer punishment[,] . . . including terms of incarceration in adult prisons."[88] "[T]he surge in get-tough laws sending more juveniles to adult courts has led some prosecutors to seek grand jury and even criminal court testimony from parents,"[89] re-sparking the parent-child privilege debate.[90] A Texas court of appeals justice stated, "In [non-juvenile] cases I can recall parents testifying as State's witnesses, even in at least one capital case. Prosecutors . . . will call any witness that will help prove their case."[91] One prosecutor, responding to questions regarding the increased use of the adult certification process, certainly sounded that tenacious when she stated:

> We take the position of listening to the victims and the families of victims, not of the defendants. . . . There's a lot of anger expressed about the issue of younger offenders. . . . For the families [of the victims,] it's a punishment issue. They see these crimes as being so heinous that they should be punished and we shouldn't be worried about the consequences to [the defendants].[92]

Although Monica Lewinsky was not a minor at the time, "[t]he absence of any parent-child privilege became a matter of public and political outcry when Independent Counsel Kenneth Starr subpoenaed [her] mother to testify before the District of Columbia grand jury."[93] The case of Amy Grossberg,[94] the teenager accused of killing her newborn child, also drew national attention, and likewise, Grossberg's parents were subpoenaed to testify against her.[95]

Other cases may not have drawn the national attention of the Lewinsky investigation or the Amy Grossberg murder trial, but they nevertheless show the rising trend of minor children facing tougher juvenile sentencing and adult certification guidelines. For example, at ages "11 and 13, Nathaniel Abraham and Nathaniel Brazill were too young to see a standard Hollywood slasher film without adult accompaniment, [b]ut they were old enough, when arrested for murder, to

87. Justice Ed Kinkeade, *Appellate Juvenile Justice in Texas—It's a Crime! Or Should Be*, 51 BAYLOR L. REV. 17, 20 (1999).

88. *Id.* (citing Jeffrey A. Butts, *Speedy Trial in the Juvenile Court*, 23 AM. J. CRIM. L. 515 (1996)).

89. Tebo, *supra* note 1, at 18; *see also supra* note 5 and accompanying text.

90. *See* Capra, *supra* note 5, at 3.

91. E-mail, *supra* note 5.

92. Connelly, *supra* note 5, at 2 (quoting the Chief Prosecutor of the Juvenile Division for Harris County, Texas) (second alteration in original).

93. Capra, *supra* note 5, at 39.

94. State v. Grossberg, No. IN96-12-00127, 1998 WL 117975, at *1 (Del. Super. Ct. Jan. 23, 1998).

95. *See* Caher, *supra* note 1, at 4.

be tried as adults."[96] At age seventeen, Douglas Thomas committed murder.[97] "In some states, that[ ] [i]s too young to undergo body-piercing without parental consent, [but] [i]n Virginia, that was old enough to send Mr. Thomas on his way to the death chamber."[98] One attorney who defends juveniles was not surprised when his client, an eleven-year-old girl found guilty by a juvenile judge of sexually molesting a five-year-old girl, received two years probation and court-ordered counseling.[99] He was shocked, however, when "the girl's name, face and address were posted on a police Web site [as a result of] a new law that expanded sex offender registration information available to the public on juveniles as well as adults."[100] In Dallas, "[a] 15-year-old boy accused of holding his pregnant teacher and 19 classmates hostage" was lucky—he was not certified to stand trial as an adult.[101] Had he been certified and convicted as an adult, the boy could have faced up to ninety-nine years in prison.[102]

Certainly, these kids are no angels. It is difficult, at best, to find compassion for the "fourteen-year-old Kentucky boy [who] shot and killed three of his classmates in a school hall as they prayed before class;"[103] or the "twelve-year-old twin sixth-graders [who] set fire to their elementary school so they would have the next Monday off;"[104] or the ten and twelve-year-old kids who "pulled the fire alarm of their elementary school and shot four classmates and a teacher as the students fled from the building."[105] However, these kids *are still children*, and all hope of rehabilitation should not be lost.[106] While rehabilitating juvenile offenders is difficult, at best, why make rehabilitative ef-

96. *Laws Muddying 'Age of Majority:' Young Face Adult Charges, Teen Rules*, DALLAS MORNING NEWS, Dec. 5, 2000, at 16A [hereinafter *Laws Muddying 'Age of Majority'*]. While Nathaniel Abraham *faced* a possible life sentence, "[t]he judge . . . instead sentenced the boy to youth detention, with release scheduled when he turns 21." *Id.*

97. *Id.*

98. *Id.* "Only the United States and Somalia, among all United Nations members, have not ratified a convention outlawing such executions." *Id.* (citing an unnamed Justice Department report).

99. John Council, *No More Kid Stuff: The Line Between Juvenile and Adult Crime Continues to Blur*, TEX. LAW., Nov. 8, 1999, at 1 (reporting an interview with Fort Worth, Texas, attorney Mike Berger).

100. *Id.* Note that Randy Burton, a child advocate in Houston, Texas, states, "He believes juvenile sex offenders have usually been sexually assaulted themselves" and that "young offenders have a chance at being rehabilitated." *Id.* at 30. Therefore, he agrees that placing the child's picture and information on the internet makes her "a target for pedophiles." *Id.* at 1.

101. Jennifer Emily, *Teen in School Hostage Case to Stand Trial as Juvenile: Carrollton Boy Accused of Holding Teacher, Classmates at Gunpoint*, DALLAS MORNING NEWS, Dec. 19, 2000, at 32A.

102. *Id.*

103. Kinkeade, *supra* note 87, at 22.

104. *Id.*

105. *Id.*

106. The debate over whether the goal for these children should be rehabilitation or punishment is beyond the scope of this Comment.

forts all the more difficult by alienating parents from their children by forcing parents to divulge confidential communications made to them by their children?

"Family lawyers say there was no apparent need for a . . . privilege exempting parents from testifying against their kids when most cases were handled in juvenile court, where the rules of evidence and the potential consequences for the accused are more relaxed."[107] However, many states have recently passed "get-tough" measures for juvenile offenders, allowing more juveniles to be certified to stand trial as adults as well as imposing tougher penalties on juvenile offenders.[108] For example, "[f]or decades, Texas juvenile law . . . dealt with children in a pseudo-criminal fashion" that was more focused "on rehabilitation than branding them as criminals."[109] In 1995, the Texas Legislature rewrote the laws, "dr[awing] a fine line between juvenile and adult criminal law."[110] However, subsequent legislative changes have blurred this distinction.[111] "The key component of the 1995 rewrite was dropping the adult certification age to 14, while expanding the length of sentences that could be given in juvenile court to 40 years."[112] Texas juveniles who are detained[113] for more serious charges face either determinate sentencing or adult certification.[114]

> Determinate sentencing involves sending a juvenile to the Texas Youth Commission. If the child doesn't reform, TYC officials can ask a court to send the juvenile to an adult prison to serve out the rest of his term beginning at age 16. If he's reformed, TYC can also parole the juvenile.[115]

Adult certifications allow juveniles to be tried in the adult criminal system and are not uncommon. For example, in Texas, adult "certifications [of minors] jumped from 273 in fiscal 1993 to 715 in fiscal 1994, according to the Office of Court Administration."[116] In Harris County, Texas, alone, 156 juveniles were certified as adults in 1995.[117] Not only are certifications more common, but also the increase in the number of hearings on the dockets has greatly shortened the amount

107. Tebo, *supra* note 1, at 18.

108. Kinkeade, *supra* note 87, at 20.

109. Council, *supra* note 99, at 30.

110. *Id.*

111. *Id.*

112. *Id.*

113. The Texas juvenile justice system is considered quasi-criminal, rather than criminal, and thus uses the terminology "detained" rather than "arrested." *See id.* at 30; Kinkeade, *supra* note 87, at 20–21.

114. Council, *supra* note 99, at 30.

115. *Id.*

116. Connelly, *supra* note 5, at 2.

117. *Id.*

of time each hearing receives.[118] "'Certifications used to be the capital murder of juvenile practice back when I was a juvenile prosecutor in 1978,' [according to] Houston solo practitioner Wayne Hill . . . [but now,] 'I've been in hearings that lasted an hour and a half.'"[119] Texas is not alone in its expeditious handling of juvenile proceedings. "[J]udges in some states have handled sixty cases a day, which equates to roughly six minutes per case."[120] Another Houston attorney was quoted as saying, "'Prosecutors are asking for certification more [often], and a bigger percentage of those requests are [sic] being granted.'"[121] Hill added, "'It's not only the extremely violent cases or habitual offenders anymore. I've seen first-time offenders get certified. I've handled cases where it's just amazing that they would seek certification.'"[122] Defense attorneys fear that these certification procedures incarcerate some youths who may have been excellent candidates for rehabilitation through the Texas Youth Commission.[123] Texas may be softening ever so slightly, however. In 1999, the Chief of the Juvenile Division for the Tarrant County District Attorney's Office remarked that "'there's been a change in philosophy'" by the District Attorney, such that whereas prosecutors once would have sought adult certification in robbery cases involving a gun, now those cases are receiving determinate sentencing.[124]

If Texas juvenile laws seem harsh, remember that "Texas actually falls somewhere in the middle when compared to how other states treat juvenile criminals."[125] For example, while Texas allows a fourteen-year-old to be tried as an adult, Oklahoma lowers that age to as young as seven, and as of 1999, thirty-seven states "d[id] not specify the lowest age a juvenile [may] be before being certified as an adult."[126] In California, the law presumes that minors as young as fourteen who are charged with a felony will be tried as adults.[127] "[I]n Massachusetts, courts impose a mandatory six-month sentence for juveniles convicted of carrying an unlicensed firearm. Furthermore, any juvenile charged or convicted of murder is automatically trans-

118. *Id.* (quoting Houston solo practitioner Wayne Hill as stating that certification proceedings once were time-consuming processes but have now been greatly streamlined).

119. *Id.*

120. Kinkeade, *supra* note 87, at 23 (citing Fox Butterfield, *With Juvenile Courts in Chaos, Some Propose Scrapping Them*, N.Y. TIMES, July 21, 1997, at A1).

121. Connelly, *supra* note 5, at 2 (quoting Houston solo practitioner Ronnie Harrison).

122. *Id.* (quoting Houston solo practitioner Wayne Hill).

123. *Id.* at 2.

124. Council, *supra* note 99, at 30 (quoting Mitch Poe, chief of the juvenile division for the Tarrant County District Attorney's Office).

125. *Id.*

126. *Id.*

127. Kinkeade, *supra* note 87, at 29 (citing *Summary of Bills Passed in Assembly, Senate*, L.A. TIMES, June 1, 1996, at A24).

ferred to the adult system."[128] Even more startling, in Massachusetts, "[j]uveniles as young as fourteen years of age serve sentences in adult prison if they have a prior record of serious crimes."[129]

With its tough stance on juvenile crime, it makes sense that Massachusetts is one of three states that statutorily recognizes some form of a parent-child privilege.[130] From a logical perspective, however, the Massachusetts statute seems backward[131] and has actually been called a "witness disqualification rule."[132] Currently, the Massachusetts statute allows a parent to prevent her child from testifying against her, but the privilege is not reciprocal.[133] Efforts are underway to change that injustice. Democratic Senator Cynthia Stone Creem co-sponsored a measure in 2000 that would "disqualify[ ] . . . parents from testifying against their unemancipated minor children, except when the victim of an alleged crime is another household member."[134] The bill was introduced in direct response[135] to *In re Grand Jury Subpoena*,[136] a case in Massachusetts's highest court. In that case, involving a sixteen-year-old who was accused of rape, "[t]he justices found no state parent-child testimonial privilege existed to allow the boy's parents to quash a prosecutor's grand jury subpoena."[137] However, the court continued the stay on the subpoenas, as they related to confidential communications between the juveniles and their parents, in order to give the state legislature time to address the issue.[138] Additionally, the court "d[id] not preclude the possibility that particular confidential communications may be privileged under the Fifth Amendment to the United States Constitution or art. 12 of the Declaration of Rights of the Massachusetts Constitution."[139] Meanwhile, the proposed bill passed the Massachusetts Senate, but the House of Representatives did not take up the issue before the end of the 2000 legislative session; therefore, Senator Creem has re-filed the bill for the 2001–2002 legislative session.[140]

128. *Id.* at 23 (citing MASS. ANN. LAWS ch. 119 §§ 58, 61 (Law. Co-op. 1994 & Supp. 2001)).

129. *Id.* (citing MASS. ANN. LAWS ch. 119 § 61 (Law. Co-op. 1994 & Supp. 2001); Gabrielle Crist, *Juvenile Crime Curbed in Massachusetts*, FORT WORTH STAR-TELEGRAM, July 13, 1997, at 26A)).

130. *See In re* Grand Jury, 103 F.3d 1140, 1146–47 n.13 (3d Cir. 1997).

131. Sarson, *supra* note 2, at 871 (stating that "[t]he Massachusetts statute, when viewed in light of the policies underlying [parent-child] privilege . . . is backwards").

132. *Grand Jury*, 103 F.3d at 1146–47 n.13.

133. MASS. GEN. LAWS ANN. ch. 233, § 20 (West 2000).

134. Tebo, *supra* note 1, at 18.

135. *Id.*

136. 722 N.E.2d 450 (Mass. 2000).

137. Tebo, *supra* note 1, at 18.

138. *Grand Jury Subpoena*, 722 N.E.2d at 457.

139. *Id.* at 458 n.17.

140. E-mail, *supra* note 84.

Because the "get-tough" trend in the juvenile justice system appears to be working,[141] it should not be abandoned.[142] However, the increased ramifications that juvenile offenders face in light of the get-tough system greatly increase the need for protecting a parent's role in the process. For instance, prior to 1995, Texas's role in the juvenile justice system was that of a "parent," who "was present to rehabilitate rather than punish," always "act[ing] in the best interest of the child."[143] After legislative reform and the resulting shift in focus from rehabilitation to the get-tough system,[144] the role of the State as "parent" was abandoned. Because the State is no longer acting in this quasi-parental capacity, now, more than ever, a parent's role in rehabilitation is crucial. It is a cruel irony that most states do not allow a narrow parent-child privilege covering only those confidential communications between a troubled child seeking guidance or advice from her parent. Such exclusion "seems contrary to the political focus on family values."[145]

One of the early New York cases recognizing a parent-child privilege at common law was *In re A & M.*[146] The court recognized the natural importance of the parental role in offering guidance to the troubled child when it stated:

> It would be difficult to think of a situation which more strikingly embodies the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to his mother and father. There is nothing more natural, more consistent with our concept of the parental role, than that a child may rely on his parents for help and advice.[147]

While the court in another New York case, *In re Richard W.*,[148] did not address the issue of a parent-child privilege, it did recognize the important role that a parent serves in juvenile delinquency proceed-

141. *See* Jennifer Emily, *Juvenile Homicide Arrests Show Drop: Dallas County Figures Reflect U.S. Trend*, DALLAS MORNING NEWS, Dec. 15, 2000, at 33A (reporting that "juvenile crime dropped [thirty-six] percent from 1994 to 1999 and is at its lowest level since 1988"). The newspaper also reported that juvenile homicide arrests in Dallas County, Texas, alone decreased by seventy-five percent since 1993, reflecting a national trend. *Id.*

142. *But see Laws Muddying 'Age of Majority,' supra* note 96 (reporting that West Virginia Supreme Court Justice Larry Starcher "is dismayed by the get-tough-on-kids approach," and stating that Justice Starcher believes that courts should not "drop the ax too early" when dealing with juvenile offenders).

143. Kinkeade, *supra* note 87, at 23 (footnotes omitted).

144. *Id.*

145. Tebo, *supra* note 1, at 18. While Tebo seems to generally support a parent-child privilege, and it might be inferred that she supports legislative approval, nothing in her Article indicates whether she favors a broad or narrow statute, judicial approval, or both judicial and legislative approvals. *Id.*

146. *In re* A & M, 403 N.Y.S.2d 375 (N.Y. App. Div. 1978).

147. *Id.* at 378.

148. 377 N.E.2d 471 (N.Y. 1978) (per curiam).

ings.[149] The *In re Richard W.* case involved determining the admissibility of a child's voluntary admission of guilt to the prosecutor.[150] The child had previously denied the allegations against him, but after the interrogation ended and the child spoke with his mother for some time, he asked "to speak with the Assistant District Attorney again."[151] After being reminded of his rights, and with his mother in his presence, the child confessed his guilt.[152] In holding that the child's admission was properly admitted as evidence in his delinquency proceeding, the *In re Richard W.* court showed great respect for the parent's role when the court stated:

> However extensive may be a parent's right and a minor child's entitlement to the exercise of the responsibilities of parental guidance and influence . . . , if it be established that such guidance or influence is not exercised by the parent independently but at the behest or on behalf of the prosecutor, such circumstance should weigh heavily to indicate the involuntariness of the child's confession.[153]

If it is only natural for a child in trouble to turn to his parents for advice and guidance,[154] is it fair to force the parents to breach that trust via forced testimony about the confidential communications between the parent and the parent's child? The *In re A & M* court asked, "Shall it be said to those parents, 'Listen to your son at the risk of being compelled to testify about his confidences?'"[155] The answer to that court's rhetorical question must be a resounding "no." As one father facing a grand jury subpoena to testify against his minor son put it:

> 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.[156]

IV. THE PARENT-CHILD PRIVILEGE PROPOSALS MUST BE NARROW IN SCOPE IN ORDER TO GAIN WIDESPREAD APPROVAL

With many scholars and practitioners calling for the recognition of a parent-child privilege, why has such recognition gained only limited success? The primary reason is that most proposals have been overly

149. *See id.* at 471.
150. *In re* Richard W., 388 N.Y.S.2d 32, 33 (N.Y. App. Div. 1976), *aff'd*, 377 N.E.2d 471 (N.Y. 1978) (per curiam).
151. *Id.*
152. *Id.*
153. *Richard W.*, 377 N.E.2d at 471.
154. *In re* A & M, 403 N.Y.S.2d 375, 378 (N.Y. App. Div. 1978).
155. *Id.*
156. *In re* Grand Jury, 103 F.3d 1140, 1143 (3d Cir. 1997).

broad.[157] For example, a recent bill was proposed to amend the Federal Rules of Evidence to include a parent-child privilege.[158] The proposed bill would have allowed for both a "confidential communication privilege" *and* "an adverse testimonial privilege" that "would protect a person subject to a parent-child relationship from testifying adversely to his or her opposite in the relationship."[159] While the proposed bill narrowed the scope by providing such a witness the ability to waive the privilege,[160] the addition of the adverse testimonial privilege made the proposal too broad in scope.[161]

As one proponent of parent-child privilege stated, "The sweeping scope of this privilege as codified in these states, and as proposed by numerous scholars, seems to explain why state courts and legislatures [have been] less than eager to create a parent-child privilege."[162] The Fourth Circuit echoed that sentiment in *United States v. Dunford* when it stated, "[E]ven if such a privilege were to be recognized, it would have to be narrowly defined and would have obvious limits, perhaps such as where the family fractures itself or the child waives the privilege or where ongoing criminal activity would be shielded by assertion of the privilege."[163] Certainly, a review of the vast amount of scholarly writings on the subject yields no consensus on how narrow or how broad the privilege should be.[164] For example, "[t]he [New York State] Law Review Commission, an agency established in 1934

157. Sarson, *supra* note 2, at 862; *see also* Jefferson, *supra* note 11, at 450 (stating that because it is more limited in scope, "the confidential communications privilege has a better chance of gaining recognition from legislators and judges" than does the adverse testimonial privilege).

158. *Lawmaker Proposes Bill to Add New Parent-Child Privilege*, FED. DISCOVERY NEWS, Apr. 1999, at 5.

159. *Id.*

160. *See id.*

161. *See* Sarson, *supra* note 2, at 874–75.

162. *Id.* at 862 (footnote omitted).

163. United States v. Dunford, 148 F.3d 385, 391 (4th Cir. 1998).

164. *See generally* Booth, *supra* note 3, at 1195–96 (advocating creation of a parent-child confidential communications privilege in Texas but stating that the privilege could already exist under the right to privacy in the United States Constitution); Jefferson, *supra* note 11, at 468 (advocating that the "legislature is the appropriate body to recognize a parent-child privilege" if such a privilege is to be recognized, and that if recognized, the privilege should apply only to minor child-to-parent confidential communications and that "parent" should be construed broadly); Sarson, *supra* note 2, at 876–82 (advocating a narrow parent-child privilege that would cover only confidential child-to-parent statements, that would only apply in criminal cases, that would only apply to unemancipated, minor children, and that could be waived by the parent, over the child's objection); Shah, *supra* note 37, at 58–59 (advocating a broad, statutorily created parent-child privilege that would apply to both adverse testimony and confidential communications, that would be reciprocal, allowing both parent and child to claim the privilege and refuse to testify against the other, and that would apply to both adult and minor children); Erica Smith-Klocek, Comment, *A Halachic Perspective on the Parent-Child Privilege*, 39 CATH. LAW. 105, 124 (1999) (advocating that courts and legislatures look to Jewish law to find additional support for recognition of a parent-child privilege).

to examine New York statutes and advise the Legislature on areas where it believes reforms are warranted, has been calling for *some* form of child-parent privilege for nearly 20 years."[165] When a lawmaker recently asked the commission to draft a new proposed version of a parent-child privilege, "the commission held a roundtable [discussion] at Brooklyn Law School, where the issue was debated, but no clear consensus emerged."[166] One member of the commission, an Albany Law School professor, commented, "'There were 30 people there, and there were 32 positions on everything we talked about.'"[167]

In New York, "a proposal advanced by the New York State Bar Association was passed by the State Senate with little discussion and no fanfare."[168] The measure would have added a bilateral parent-child privilege "in which a parent or child could refuse to testify and could also prohibit the other side from testifying against them. It contained no age limit — so for the purposes of that bill, once a child, always a child."[169] Understandably, once the proposal arrived at the Assembly, the legislation was put on hold.[170] Now, the New York State Law Review Commission's most recent proposal "would create a unilateral privilege that would prohibit only forced disclosure by either a parent or a child. In other words, if a parent or child wanted to testify against a child or parent," they could.[171] While the new, narrower proposal is better than the original Senate bill, it remains overly broad. There may be some merit to allowing a child to refuse to testify against his or her parent,[172] but due to the much more serious penalties brought about by the get-tough juvenile sentencing and adult certification guidelines, it is much more crucial at this juncture to focus on offering the alleged child-offender the protection of knowing that he may seek the trusted advice of a parent at a time when that child needs such guidance the most.

The proposal from the National Association of Criminal Defense Lawyers also allows the child to refuse to testify against the parent,[173] and likewise, faces the same dilemma. According to the association, the proposal calls for the privilege to cover only confidential communications but extends that privilege to prevent both the parent and the child from being compelled to testify against the other, subject to an

165. Caher, *supra* note 1, at 4 (emphasis added).
166. *Id.*
167. *Id.* (quoting Michael J. Hutter).
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *See* Jessica Perry, Note, *The Parent-Child Testimonial Privilege: An Argument for Qualified Recognition*, 37 BRANDEIS L.J. 97, 114 (1998) (arguing that "[c]reating a privilege that would only protect communications made from children to parents . . . ignores the potential for psychological harm to a child forced to testify against his or her parent").
173. *See Need for Parent/Child Privilege*, *supra* note 7, at 10.

express waiver by the opposite in the relationship, allowing that person to testify.[174] The parent or child would not be *compelled* to disclose the confidential communications between the parent and the child, but the parent or child could *permit* the other to disclose the confidential communications.[175] The association also states that the proposal will "allow the parent or child the option to disclose the communication over the objection of the other."[176] This provision addresses the concern that a parent who wants to testify will be made a "prisoner of the privilege" if the parent can be prevented from testifying simply by the child invoking the privilege.[177] The association's proposal strives to strike a balance between protecting the parent-child confidential communications and promoting law enforcement goals by favoring disclosure,[178] increasing the proposal's opportunity for adoption. However, by allowing the child to testify over the objection of the parent in a proceeding against the child, it may rob that parent of her right to control the upbringing of her child.[179]

In order for the parent-child privilege to gain widespread approval among the vast majority of states that currently do not recognize such a privilege, some proponents will need to lessen the amount of protection they seek to offer via the privilege.[180] Simply put, the proposed statute in each state will have to be very narrow in scope; otherwise, there is no hope in the foreseeable future of widespread state approvals.[181]

V. A Proposed Statute, Narrowly Tailored to Gain Widespread Approval, Yet Broad Enough to Foster, Not Diminish, the Parent-Child Relationship

While each state legislature will want to tailor its statute to meet the concerns of constituents and the specific needs of its state,[182] the fol-

174. *Id.*
175. *Id.*
176. *Id.*
177. Capra, *supra* note 5, at 39.
178. *See Need for Parent/Child Privilege*, *supra* note 7, at 10.
179. *See generally* Booth, *supra* note 3, at 1181–85 (discussing the constitutional right to privacy as a possible basis for establishing a parent-child privilege).
180. *See* Sarson, *supra* note 2, at 862–63.
181. *Id.*
182. *Compare id.* at 877 (stating that one reason the privilege should only apply in criminal cases is that the constitutionally protected right against self-incrimination extends to criminal but not civil cases), *with* Kinkeade, *supra* note 87, at 20–21 (stating that "the bifurcated system of civil and criminal appeals in Texas still sends juvenile cases to the Texas Supreme Court rather than the Texas Court of Criminal Appeals," and that "[a]lthough Texas courts acknowledge the quasi-criminal nature of juvenile cases . . . the courts have steadfastly held that the civil rules of appellate procedure predominate under section 56.01(a) of the Texas Family Code," such that while juveniles are now punished much the same as adults are, they are not afforded the same protections upon appeal as their adult counterparts).

lowing proposal, based on a modified version of the Idaho parent-child privilege statute,[183] is offered as a guideline. It is designed to be narrowly tailored enough to gain widespread approval, yet just broad enough to foster, not diminish, the parent-child relationship. This encourages state legislatures to enact a parent-child confidential communications privilege statute similar to the following:

> Any parent, guardian or legal custodian shall not be forced to disclose any confidential communication made by their minor child or ward to them concerning matters in any criminal or civil action[184] to which such child or ward is a party. Such matters so communicated shall be privileged and protected from disclosure; excepting, this section does not apply to a criminal action or proceeding for a crime committed by violence of the child as against another family or household member, nor does this section apply if the parent, guardian or legal custodian shall choose, in the best interest of the child, to voluntarily disclose such confidential communications.[185]

VI. CONCLUSION

While juveniles may be committing "adult" crimes that warrant "adult" punishments, the fact remains that these juveniles are still minor children who need adult guidance, especially when facing a system with such harsh, life-changing consequences. Because the goal of the juvenile justice system has increasingly moved from rehabilitation of the juvenile offender to mere punishment and incarceration, the parent's role in the child's rehabilitation has become even more crucial. Thus, the parent-child relationship should be fostered by promoting open communication and trust between the parent and her child, not diminished by allowing an overly zealous prosecutor to force a parent to divulge those confidential communications and destroy the child's trust. After all, it is only natural for a child in trouble to turn to her parent, as the child has few other viable options. Due to the present get-tough philosophy toward juvenile offenders, recognition of a parent-child confidential communications privilege is urgently needed so these juveniles can have the benefit of adult guidance at a time when these minor children need it the most.

While historical arguments for a parent-child privilege have been strong, the privilege has not gained widespread approval because most proposals have been overly broad. Therefore, proponents of the parent-child privilege should seek passage in their states' legislatures of only those narrowly tailored statutes that cover parent-child confidential communications. By seeking these narrowly tailored proposals now, while the need for such protection is at its greatest, proponents

183. *See* IDAHO CODE § 9-203(7) (Michie 1998).
184. *See supra* note 182.
185. IDAHO CODE § 9-203(7).

have the best opportunity to see the long overdue parent-child privilege finally gain the widespread recognition it deserves.

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