

JAFFE V. REDMOND: THE SUPREME COURT'S DRAMATIC SHIFT SUPPORTS THE RECOGNITION OF A FEDERAL PARENT-CHILD PRIVILEGE

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“Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much.”¹

INTRODUCTION

The Supreme Court’s recent decision in *Jaffe v. Redmond*,² recognizing a federal psychotherapist-patient privilege, supports the recognition of a federal parent-child privilege. The *Jaffe* decision reflects a major shift in the Supreme Court’s approach to the creation of new privileges under Federal Rule of Evidence (“FRE”) 501.³ This shift to a more permissive view of new privileges, along with other legal and social policy arguments, supports a limited evidentiary privilege protecting communications between parents and children.

After a brief overview of the rationale for and historical development of current privilege law, this Note discusses competing approaches to the development of privileges. In Part III, after examining the Supreme Court’s decision in *Jaffe*, this Note explains the significance of the decision. In Part IV, this Note specifically analyzes a parent-child privilege by discussing: (A) the current state of the privilege; (B) the arguments previously advanced in support of the privilege; (C) federal and state court decisions rejecting the privilege; and (D) recent developments in reaction to the *Jaffe* decision. This Note then asserts that current legal arguments and social policies support the recognition of a limited parent-child privilege that courts should apply using a case-by-case balancing approach. Finally, the parameters of a parent-child privilege are defined.

I. RATIONALE FOR AND HISTORICAL DEVELOPMENT OF CURRENT PRIVILEGES

The law of privilege is an amazing area of law because it involves an area of communications that no one can reach—not a judge, a court, or the government. No other legal doctrine affords such protection to communications between citizens.⁴ “The word ‘privilege’ is derived from the Latin phrase ‘privata lex,’ meaning a private law applicable to a small group of persons as their special

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1. *Pearse v. Pearse*, 63 Eng. Rep. 950, 957 (1846).

2. 518 U.S. 1 (1996).

3. See Daniel Capra, *A “New” Privilege: Parent-Child*, N.Y. L.J., May 9, 1997, at col. 1.

4. Interview with Professor William F. Harvey, Professor Emeritus, Former Dean, Indiana University School of Law—Indianapolis (Nov. 24, 1997).

prerogative.”⁵ Privileges are different from other rules of evidence. They exclude reliable, relevant evidence in order to protect an interest deemed by a court or legislature to be more important than the interest served by admitting the evidence.⁶ Additionally, some scholars explain how some privilege rules are unique because they also affect behavior (such as the interaction between husband and wife) outside of the courtroom.⁷

Privileges are controversial because they inhibit the common-law principle that “the public has a right to every man’s evidence.”⁸ One goal of the adversarial judicial system is to place all relevant evidence before the trier of fact.⁹ Although privileges impede this goal, they have been a part of the American judicial system since the founding of our country. Based on English common law, two marital privileges and the attorney-client privilege were recognized in American common law. The first marital privilege evolved from the English spousal disqualification rule by which a wife was viewed as incompetent to testify against her husband.¹⁰ This incompetence stemmed from the medieval view of husband and wife as a single entity (since a wife did not have her own legal identity) and from the rule that one could not testify in any action in which he had an interest.¹¹ This spousal disqualification rule became ingrained in both English and American common law. It was finally abolished in England by the English Act of 1853, and replaced by a privilege that forbade a husband or wife from being compelled to disclose any communications made by the other during the marriage.¹² Eighty years later, the United States Supreme

5. Bruce Neal Lemons, *From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?*, 1978 BYU L. REV. 1002, 1003.

6. See David A. Schlueter, *The Parent-Child Privilege: A Response to Calls for Adoption*, 19 ST. MARY’S L.J. 35, 37 (1987) (citing H. WENDORF & D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL 62-63 (1983)).

7. See Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, The Expansive Antithesis, and the Contextual Thesis*, 73 NEB. L. REV. 511, 514 (1994).

8. *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 JOHN H. WIGMORE, EVIDENCE § 2192 (3d. ed. 1940)).

9. See Brian S. Faughnan, Comment, *Evidence—Jaffe v. Redmond: Establishing the “Psychotherapist-Patient Privilege” Under Rule 501 of the Federal Rules of Evidence*, 27 U. MEM. L. REV. 703, 705 (1997).

10. See *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1563, 1564 (1985) [hereinafter *Developments in the Law*]. Eventually this rule became gender neutral, and neither spouse was permitted to testify against the other. See Imwinkelried, *supra* note 7, at 512 n.4.

11. See Gregory W. Franklin, *The Judicial Development of the Parent-Child Testimonial Privilege: Too Big For Its Britches?*, 26 WM. & MARY L. REV. 145, 152 (1984). *But cf. Developments in the Law, supra* note 10, at 1564-65 (noting Dean Wigmore’s alternative explanation for the development of the spousal disqualification rule).

12. See MCCORMICK ON EVIDENCE § 78 (John W. Strong et al. eds., 4th ed. 1992).

Court also abolished the spousal disqualification rule in *Funk v. United States*,¹³ and replaced it with an adverse testimonial privilege which permits a witness to refuse to adversely testify against her spouse. The second marital privilege that developed from English common law was first recognized in the United States in the 1850's, and protects confidential marital communications.¹⁴ Both marital privileges are still recognized in the United States today and are justified on utilitarian grounds: the adverse testimony privilege "provides social benefits by preventing marital discord"¹⁵ and the confidential communications privilege "fosters openness between spouses by ensuring that none of their confidences will be revealed in court."¹⁶

The attorney-client privilege originated from Roman law and was also recognized at English common law.¹⁷ "[E]arly common law courts reasoned that the lawyer, as a gentleman, should not besmirch his honor by revealing his client's secrets."¹⁸ Inducing a client's candor with his or her attorney became the primary rationale for the privilege in the Nineteenth Century.¹⁹ It is this rationale that first influenced the recognition of the privilege by American courts and that primarily supports the recognition of the privilege today; some have suggested that privacy considerations also support the recognition of an attorney-client privilege.²⁰

Until well into the Nineteenth Century, Congress and state legislatures were content to allow the courts to develop expansions and exceptions to the English common law of privileges.²¹ At that time, faced with a "codification movement and enthusiastic scholars forcing it along, state legislatures began the attempt to codify evidence codes."²² This state legislative development of privileges continued, even though the judicial development of privileges virtually halted at the beginning of the Twentieth Century as judges increasingly came to view privileges as hindrances to litigation and impediments to the fact-finding

13. 290 U.S. 371 (1933).

14. See *Developments in the Law*, *supra* note 10, at 1565 (citing 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2333 (John T. McNaughton rev. ed. 1961) [hereinafter EVIDENCE IN TRIALS]).

15. *Id.* at 1577 (citing CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 66 (Edward W. Cleary ed., 3d ed. 1984) [hereinafter CLEARY] and EVIDENCE IN TRIALS, *supra* note 14, § 2228, at 216-17).

16. *Id.* (citing CLEARY, *supra* note 15, § 83 and EVIDENCE IN TRIALS, *supra* note 14, § 2332, at 642).

17. See Wendy Meredith Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 594 (1987) (citing Max Radin, *The Privilege of Confidential Communications Between Lawyer and Client*, 16 CALIF. L. REV. 487, 488 (1928)).

18. Franklin, *supra* note 11, at 148 (citation omitted).

19. See *id.*

20. See MCCORMICK ON EVIDENCE, *supra* note 12, § 87.

21. See Watts, *supra* note 17, at 588.

22. See *id.* (footnote omitted).

process.²³ Privilege development even extended to common-law privileges, and resulted in codification of the common law husband-wife and attorney-client privileges in most states.²⁴

The development of privilege law by state legislatures resulted in a wide disparity of privilege rules in the United States.²⁵ Because of this disparity, states recognize different privileges in state judicial actions. All states currently recognize some form of husband-wife and attorney-client privilege.²⁶ Most states also recognize a privilege to protect certain government information.²⁷ Additionally, due to the increasing acceptance of psychological counseling in the 1950's, all states recognize some form of psychotherapist-patient privilege.²⁸ Although probably not recognized at common law, all states have now adopted a clergyman-penitent privilege for confidential communications,²⁹ which is generally recognized to be held by the communicant.³⁰ A privilege for physician-patient communications also did not exist at common law.³¹ New York was the first state to enact a physician-patient privilege in 1828.³² Today, the rationale justifying this privilege is that for patients to get the best care, they need to freely "disclose all matters which may aid in the diagnosis and treatment of disease and injury."³³ Analogous to the attorney-client privilege, communications between accountants and their clients are currently privileged in about one-third of the states,³⁴ and a substantial number of states recognize a journalist-news source privilege held by the journalist.³⁵

The disparity in state-created privileges raised concern among legal scholars, lawyers, and jurists that prompted calls for national reform and unification of evidentiary rules.³⁶ One result of this concern was Congress' 1934 grant of power to the Supreme Court to promulgate rules of evidence for the federal appellate and district courts.³⁷ The Supreme Court is required to submit its proposed rules to Congress, which then has the discretion to accept or reject the

23. See MCCORMICK ON EVIDENCE, *supra* note 12, § 75 (citation omitted).

24. See *id.*

25. See Watts, *supra* note 17, at 588.

26. See MCCORMICK ON EVIDENCE, *supra* note 12, § 76.2.

27. See *id.*

28. See M. Leigh Svetanics, Note, *Beyond "Reason and Experience": The Supreme Court Adopts a Broad Psychotherapist-Patient Privilege in Jaffe v. Redmond*, 41 ST. LOUIS U. L. J. 719, 720 (1997).

29. See MCCORMICK ON EVIDENCE, *supra* note 12, § 76.2.

30. See *id.*

31. See *id.* § 98.

32. See Watts, *supra* note 17, at 595.

33. MCCORMICK ON EVIDENCE, *supra* note 12, § 98.

34. See *id.* § 76.2.

35. See *id.*

36. See Watts, *supra* note 17, at 588.

37. 28 U.S.C. § 2072 (1994).

rules as proposed, or to draft amendments to the rules.³⁸ Congress generally acquiesced to the rules promulgated by the Supreme Court until 1973, when the Court approved its Advisory Committee's draft of the Proposed Rules of Evidence and sent the draft to Congress for adoption.³⁹ Received by a skeptical Congress, the draft was highly debated with Proposed Article V that governed the application of privileges the "primary target for criticism" by Congress.⁴⁰ Proposed Article V recognized nine non-constitutional privileges, including "required reports, attorney-client, psychotherapist-patient, husband-wife, clergyman-communicant, political vote, trade secrets, secrets of state and other official information and identity of informer."⁴¹ Additionally, the proposed rules would have greatly narrowed the scope of the existing privileges⁴² and restricted the judicial development of privileges by freezing federal privilege law and denying federal courts the power to create new privileges.⁴³ After much debate and controversy, Congress rejected the proposed rule containing specific privileges and chose to adopt a much amended and broader privilege rule—FRE 501.⁴⁴ By granting federal courts the power to develop federal privilege law without any guidance as to how to exercise that power, the language of FRE 501, as adopted by Congress, has resulted in controversy over the scope of the federal courts' power to develop new privileges.⁴⁵

38. *Id.* § 2074.

39. *See* Imwinkelried, *supra* note 7, at 512 (citing COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES TRANSMITTING THE PROPOSED RULES OF EVIDENCE OF THE UNITED STATES COURTS AND MAGISTRATES, H.R. DOC. NO. 46 (1973)).

40. *Id.* at 513 (citing 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE 509-3 (1993)).

41. MCCORMICK ON EVIDENCE, *supra* note 12, § 75.

42. *See* Jeff. M. Sandlow, *Confidential Communication Between Parent and Child: A Constitutional Right*, 16 SAN DIEGO L. REV. 811, 816 (1979). The author suggests that by rejecting this narrowing of existing privileges, and by enacting broad privileges protecting confidential communication, Congress "was deferring to the societal mandate that a zone of privacy be maintained." *Id.* (footnote omitted).

43. *See* Imwinkelried, *supra* note 7, at 518.

44. As adopted, FRE 501 states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

45. *See* Imwinkelried, *supra* note 7, at 515; *See also infra* notes 47-55 and accompanying text.

II. COMPETING APPROACHES TO THE CREATION OF NEW PRIVILEGES

The controversy surrounding privilege law exists on two levels. The first involves the development of new privileges and results from differing federal court interpretations as to whether FRE 501 permits recognition of novel privilege claims. The second is much broader as it involves different justifications for and beliefs about the value and use of privileges in judicial proceedings. Both of these controversies have affected the decisions of federal courts addressing privilege claims, and both are evident in the Supreme Court's most recent ruling on a novel psychotherapist-patient privilege.⁴⁶

As adopted, FRE 501 does not provide clear guidelines for federal courts to use in addressing novel privilege claims. Federal courts have widely differed as to the proper statutory interpretation of FRE 501's mandate to "use principles of the common law" in light of "reason and experience" in developing privilege law.⁴⁷ One interpretation of the rule (referred to by some commentators as the "restrictive view") is that it precludes courts from recognizing any new privilege that did not exist at common law.⁴⁸ As one commentator has suggested, this view lacks evidentiary support.⁴⁹ Not only did Congress refuse to adopt the proposed privilege rule containing nine specific privileges, but it also rejected a prohibition on the judicial development of new privileges.⁵⁰ This suggests that Congress did not intend to preclude the development of new privileges. Additionally, the Supreme Court explicitly rejected this restrictive view of privileges when it noted that "[i]n rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privileges."⁵¹

A second interpretation of FRE 501 is that even if the rule does not preclude the recognition of new privileges, it "erects a 'strong presumption' against the creation of novel privileges."⁵² The Supreme Court followed this cautionary approach when it refused to recognize a privilege for peer review materials,

46. *Jaffe v. Redmond*, 518 U.S. 1 (1996); *see also infra* notes 73-120 and accompanying text.

47. FED. R. EVID. 501.

48. *See Imwinkelried, supra* note 7, at 524.

49. *See id.*

50. *See id.* at 525-28. The author notes that one court has used the restrictive view when evaluating a novel privilege claim. *See In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir. 1989). *See also* Daniel Capra, *The Federal Law of Privileges*, 16 LITIG. 32 (Fall 1989).

51. *Trammel v. United States*, 445 U.S. 40, 47 (1980).

52. *Imwinkelried, supra* note 7, at 528 (quoting Capra, *supra* note 50, at 35-36); *See also* Molly Rebecca Bryson, Note, *Protecting Confidential Communications Between a Psychotherapist and Patient: Jaffe v. Redmond*, 46 CATH. U. L. REV. 963 (1997). The author explained that "[l]ower courts' caution [in recognizing new privileges] stems from the reasonable inference that Congress did not support the recognition of new privileges when it chose to adopt the current language of Rule 501, rather than ratifying the nine privileges the Supreme Court recommended." *Id.* at 977.

stating that it did not want to use its power under Rule 501 “expansively.”⁵³ A third interpretation of FRE 501 takes two different forms, and both apply a more expansive approach to the creation of new privileges. Some federal courts believe that FRE 501 allows them to be *more* receptive to privilege claims than federal courts were permitted to be at common law.⁵⁴ Other commentators have suggested that federal courts are as free to recognize new privileges under FRE 501 as they were under the common law.⁵⁵

Federal courts have not only struggled with their authority (or lack thereof) to recognize new privileges, but have also struggled with which rationale or justification for privileges to apply when evaluating a novel privilege claim. Historically, courts have used two different approaches to the creation of new privileges. While both approaches balance the need for the protected evidence against the interests of the individual and society, the approaches vary regarding the use and value of testimonial privileges.⁵⁶

The first approach (one of the most influential approaches for the creation of new privileges) is the traditional utilitarian justification of Dean John H. Wigmore.⁵⁷ His approach “supports the idea of using a privilege to encourage open communications within a confidential relationship that relies on such communication for its success.”⁵⁸ Since this approach evaluates the effect that

53. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990). *See also* *United States v. Burtrum*, 17 F.3d 1299, 1301 (10th Cir. 1994) (refusing to recognize psychotherapist privilege in criminal cases); *Mason v. Stock*, 869 F. Supp. 828, 834 (D. Kan. 1994) (refusing to recognize self-critical analysis privilege).

54. *See Imwinkelried, supra* note 7, at 530. *See also In re John Doe*, 964 F.2d 1325 (2d Cir. 1992) (psychotherapist-patient privilege); *Covell v. CNG Transmission Corp.*, 863 F. Supp. 202, 205 (M.D. Pa. 1994) (psychiatrist-patient privilege); *United States v. D.F.*, 857 F. Supp. 1311, 1319-20 (E.D. Wis. 1994) (psychotherapist-patient privilege); *Mann v. University of Cincinnati*, 824 F. Supp. 1190, 1197-98 (S.D. Ohio 1993) (general medical privilege).

55. *See Imwinkelried, supra* note 7, at 535. Imwinkelried ultimately concludes that the context of FRE 501 shows that Congress did not “reach the merits of the question of whether the courts should be receptive or hostile to privilege claims” and that courts should therefore decide such claims by “balancing the loss of probative evidence against the extrinsic values fostered by the privileges.” *Id.* at 541.

56. *See* J. Tyson Covey, Note, *Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege*, 1990 U. ILL. L. REV. 879, 886 (1990).

57. Dean Wigmore’s approach uses the following four factors:

1. The communication must originate in confidence that it 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 must be greater than the benefit thereby gained for the correct disposal of the litigation.

8 JOHN H. WIGMORE, EVIDENCE § 2285 (McNaughton rev. ed. 1961) [hereinafter WIGMORE].

58. Svetanics, *supra* note 28, at 732.

judicial recognition of a particular privilege will have on behavior outside of the courtroom, the approach is often referred to as an instrumental justification for privileges.⁵⁹ Wigmore's approach balances the benefit to society from encouraging a particular class of communication against the cost of impeding the fact-finding process.⁶⁰ A strong believer in the duty to testify, Wigmore focuses on extrinsic social policy and the systematic effects of a privilege claim, and does not consider the specific harm to a litigant whose privilege claim is denied.⁶¹ A majority of courts have followed Wigmore's narrow and constrictive approach in considering novel privilege claims.⁶²

Wigmore's justification for privileges requires certainty. A privilege beneficiary will be encouraged and convinced to share confidences when she is able to predict with certainty that the judiciary will find the confidence privileged. If unable to predict the privilege's application, the beneficiary may not feel secure enough to share her confidences. Critics of Wigmore's approach suggest that there is a lack of empirical evidence demonstrating that knowing about a particular privilege influences one's decision to communicate certain information.⁶³ These critics "commonly assert that people typically know little or nothing about their privilege and that, even if they did, the knowledge would rarely alter their communicative behavior."⁶⁴

A competing view regarding the use and value of privileges is referred to as the humanitarian or privacy justification. Under this non-instrumental view, the value of one's privacy in confidential communications is the justification for the privilege.⁶⁵ "Rather than focusing on the systemic impact that compelled disclosures might have on behavior, the privacy rationale focuses on the protection that privileges afford to individual privacy."⁶⁶ Supporters of this view suggest that compelled disclosure of confidences results in both embarrassment from revealing one's secrets to the public, and harm from being forced to betray another's confidence.⁶⁷ The focus is on protecting an individual's privacy interests and not on the utilitarian goal of promoting the public good by

59. See *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1471, 1472 (1985) [hereinafter *Developments in the Law II*].

60. See *id.* at 1473.

61. See *id.* at 1473-74.

62. See Michael B. Bressman & Fernando R. Laguarda, *Jaffe v. Redmond: Towards Recognition of a Federal Counselor-Battered Woman Privilege*, 30 CREIGHTON L. REV. 319, 320 (1997).

63. See, e.g., *Developments in the Law*, *supra* note 10, at 1579-82; Imwinkelried, *supra* note 7, at 543; Daniel W. Shuman & Myron F. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893 (1982) (discussing a lack of empirical evidence supporting view that the existence of a psychotherapist-patient privilege is of consequence to patients); Svenatics, *supra* note 28, at 754.

64. *Developments in the Law II*, *supra* note 59, at 1474 (footnote omitted).

65. See Svenatics, *supra* note 28, at 734.

66. *Developments in the Law II*, *supra* note 59, at 1480.

67. See *id.* at 1481.

encouraging the sharing of confidences.⁶⁸

Since it does not attempt to influence the behavior of persons outside the courtroom, the privacy rationale (unlike Wigmore's approach) does not require certainty to be effective. Because certainty is not required, the privilege can be a qualified one that balances the harm of compelled disclosure against the harm of keeping the evidence out of the judicial proceeding.⁶⁹ This balancing process is different from that used by Wigmore's approach. Wigmore's balancing process determines whether the judicial system should recognize an absolute privilege in all proceedings. Under the privacy rationale, the balancing process determines if a privilege should be applied in a particular judicial proceeding. Critics argue that this balancing process is flawed since it is difficult to measure or quantify an individual's privacy interest.⁷⁰

Finally, a third approach to privilege law has been suggested by one commentator.⁷¹ Referred to as a "full utilitarian approach," this view considers both the systemic benefits to society of encouraging communications and the immediate benefits to an individual by protecting privacy.⁷² This approach is purported to be superior to the traditional utilitarian and privacy rationales since it balances all relevant interests.⁷³

III. THE SIGNIFICANCE OF *JAFFE V. REDMOND*

The Supreme Court's decision in *Jaffe v. Redmond*⁷⁴ reflects a dramatic shift in the Court's method of analyzing novel privilege claims. Prior to the *Jaffe* decision, the Supreme Court had used the language of FRE 501 to *limit* existing privileges and to *refuse to adopt* new privileges. This cautionary (and at times restrictive) approach by the Supreme Court greatly influenced the decisions of lower federal courts. Many federal courts declined to recognize new privileges because of their belief that FRE 501 did not give them the authority to honor any

68. See *id.* at 1483. The author suggests that the privacy rationale really is an instrumental approach that only has a different goal or focus than the traditional justification.

[O]rders to compel testimony have two consequences: the invasive disclosure itself and the indirect effects of disclosure on the relevant class of relationships. Thus, the privacy rationale and the traditional justification are both really instrumental approaches that differ only in that they focus, respectively, on the direct and the indirect consequences of compelling testimony.

Id. at 1486.

69. See CHARLES ALAN WRIGHT AND KENNETH W. GRAHAM, JR., 23 FEDERAL PRACTICE AND PROCEDURE, FEDERAL RULES OF EVIDENCE § 5422 (1995 & Supp. 1998). The authors further suggest that courts and legislature are more willing to create a qualified privilege that employs a balancing test "as it is less likely to produce injustice." *Id.*

70. See *Developments in the Law II*, *supra* note 59, at 1483.

71. See *id.* at 1484.

72. *Id.* at 1484-86.

73. See *id.* at 1484.

74. 518 U.S. 1 (1996).

privileges that did not derive from the common law.⁷⁵

The *Jaffe* decision involved a claim of psychotherapist-patient privilege, which arose after an on-duty police officer shot and killed a suspect. On June 27, 1991, Officer Mary Lu Redmond shot and killed Ricky Allen when Redmond responded to a police call to an apartment complex.⁷⁶ Redmond alleged that Allen ran out of the apartment building, chasing another man while brandishing a butcher knife. Allen also allegedly disregarded Redmond's repeated commands to drop the knife.⁷⁷ Redmond claimed that she shot Allen when she believed that he was about to stab the man he was chasing.⁷⁸ Petitioner, the administrator of Ricky Allen's estate, filed suit in the United States District Court for the Northern District of Illinois against Redmond and her employer, which at the time of the shooting, was the Village of Hoffman Estates, Illinois. Petitioner alleged that Redmond violated Allen's constitutional rights by using excessive force during the encounter at the apartment complex.⁷⁹ A jury found for the estate.⁸⁰ During the trial, the judge ordered Redmond to give the plaintiff some notes that had been made by Karen Beyer, a licensed clinical social worker who had counseled Redmond after the shooting.⁸¹ Redmond claimed that these notes were protected from involuntary disclosure by a psychotherapist-patient privilege. Even though the district judge rejected this argument, neither Beyer nor Redmond complied with the court's order. The district judge "advised the jury that the refusal to turn over Beyer's notes had no 'legal justification' and that the jury could therefore presume that the contents of the notes would have been unfavorable to respondents."⁸²

Redmond appealed and the Court of Appeals for the Seventh Circuit reversed and remanded for a new trial.⁸³ Using "reason and experience" according to FRE 501, and after balancing the importance of the patient's privacy interest against the evidentiary need for disclosure, the Seventh Circuit concluded that a psychotherapist-patient privilege should be recognized.⁸⁴ Since there was a conflict among the courts of appeals regarding the recognition of a federal psychotherapist-patient privilege,⁸⁵ the United States Supreme Court granted

75. See Bryson, *supra* note 52, at 980.

76. *Jaffe*, 518 U.S. at 4.

77. *Id.*

78. *Id.*

79. *Id.* at 5.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. See *id.* at 7. The majority cited the following decisions in noting the conflict among the appeals courts: *United States v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994); *In re John Doe*, 964 F.2d 1325 (2d Cir. 1992); *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989); *United States v. Corona*, 849 F.2d 562 (11th Cir. 1988); *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983); *United States v. Meagher*, 531 F.2d 752 (5th Cir. 1976).

certiorari and, in a 7-2 decision, affirmed the Seventh Circuit's ruling.⁸⁶ Writing for the majority, Justice Stevens turned to the legislative history of FRE 501 and noted that the development of new privileges should be determined on a "case-by-case basis."⁸⁷ Reasoning that the intent of FRE 501 was not to freeze the development of privilege law, Justice Stevens noted how federal courts are to "continue the evolutionary development of testimonial privileges."⁸⁸ He also relied heavily on language from the Court's earlier opinion in *Trammel v. United States*,⁸⁹ a case in which the Court actually *limited* the scope of the common law adverse spousal testimony privilege.

Acknowledging that evidentiary law is based on the maxim that the public has a right to every man's evidence,⁹⁰ the majority determined that exceptions may be justified by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."⁹¹ The majority then determined that reason and experience indicate that a "privilege protecting confidential communications between a psychotherapist and her patient 'promotes sufficiently important interests to outweigh the need for probative evidence.'"⁹² The Court enumerated both private and public interests that a psychotherapist-patient privilege would promote. Comparing the privilege to both the spousal and attorney-client privileges, the Court noted how the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust."⁹³ Using a utilitarian approach to privilege law,⁹⁴ the Court reasoned that effective psychotherapy depended on a patient's willingness to frankly and completely disclose information.⁹⁵ The Court also reasoned that the patient must believe a therapist's assurance of confidentiality in order to feel comfortable disclosing private information.⁹⁶ Accordingly, a psychotherapist-patient privilege would encourage the private interest of effective psychotherapy.⁹⁷ Such a privilege would also promote the public's interest in the mental health of its citizenry since the privilege "facilitat[es] the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem."⁹⁸ After balancing these private and public interests promoted by the privilege against the value of the evidence protected, the majority concluded, "the likely evidentiary

86. *Jaffe*, 518 U.S. at 8.

87. *Id.* (quoting S. REP. NO. 93-1277, at 13 (1974)).

88. *Id.* at 9 (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)).

89. 445 U.S. 40 (1980).

90. *Jaffe*, 518 U.S. at 9 n.8.

91. *Id.* at 9 (quoting *Trammel*, 445 U.S. at 50).

92. *Id.* (quoting *Trammel*, 445 U.S. at 51).

93. *Id.*

94. See *supra* notes 57-64 and accompanying text.

95. *Jaffe*, 518 U.S. at 10.

96. *Id.*

97. *Id.* at 10-11.

98. *Id.* at 11.

benefit that would result from the denial of the privilege is modest.”⁹⁹

The Court further supported its recognition of a psychotherapist-patient privilege by noting that all states had enacted some form of a psychotherapist-patient privilege and reasoning that “the existence of a consensus among the States indicates that ‘reason and experience’ support recognition of the privilege.”¹⁰⁰ Referring to its earlier decision in *Funk v. United States*,¹⁰¹ the court accepted the policy decisions of the states as reflective of the wisdom in recognizing a psychotherapist-patient privilege.¹⁰²

The Advisory Committee’s inclusion of a psychotherapist-patient privilege in its draft of privilege rules also seems to have influenced the Court’s recognition of an absolute psychotherapist-patient privilege.¹⁰³ In recognizing this absolute privilege, the Supreme Court explicitly rejected the Seventh Circuit’s balancing approach.¹⁰⁴ The Court determined that in order to promote full disclosure by a patient, the patient “must be able to predict with some degree of certainty whether particular discussions will be protected.”¹⁰⁵ Additionally, in one of the most controversial parts of its holding, the Court went a step further than the Seventh Circuit by extending the protection of the privilege to confidential communications made by a patient during therapy to a licensed social worker.¹⁰⁶

Justice Scalia, with the Chief Justice joining in part, strongly dissented.¹⁰⁷ Reminding the majority that the Court had previously used the language of FRE 501 to reject new privileges¹⁰⁸ and to narrow existing privileges,¹⁰⁹ Justice Scalia criticized the majority for ignoring “traditional judicial preference for the truth” and for “creating a privilege that is new, vast, and ill-defined.”¹¹⁰ Justice Scalia also questioned the majority’s determination that the private and public interests in psychotherapy justify creating a new privilege that excludes relevant evidence

99. *Id.*

100. *Id.* at 12-13.

101. 290 U.S. 371, 376-381 (1933) (finding that it was appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both “reason” and “experience”).

102. *Jaffe*, 518 U.S. at 13.

103. *See id.* at 13-14.

104. *Id.* at 17.

105. *Id.* at 18 (quoting *Upjohn v. United States*, 449 U.S. 383, 393 (1981)).

106. *Id.* at 17-18.

107. *Id.* at 18 (Scalia, J., dissenting).

108. *See* *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990) (rejecting privilege for peer review materials); *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984) (refusing to recognize an accountant-client privilege); *United States v. Gillock*, 445 U.S. 360 (1980) (rejecting privilege for legislative acts by a member of a state legislature).

109. *See* *United States v. Zolin*, 491 U.S. 554 (1989) (permitting in camera review of documents alleged to come within crime-fraud exception to the attorney-client privilege); *Trammel v. United States*, 445 U.S. 40 (1980) (limiting spousal adverse testimony privilege).

110. *Jaffe*, 518 U.S. at 19-20.

from a judicial proceeding.¹¹¹ The majority's willingness to extend the privilege to licensed social workers¹¹² and to rely on the legislative policy decisions of the states also prompted sharp criticism from Justice Scalia.¹¹³

The Supreme Court's decision in *Jaffe* provoked much scholarly debate about the wisdom of the Court's decision.¹¹⁴ The *Jaffe* decision is controversial mainly because it manifests the Supreme Court's first recognition of a novel privilege claim (one that was not recognized by the common law) under FRE 501. Some commentators argue that the majority's decision is sound because it reflects our current social climate,¹¹⁵ and because the privilege promotes important public and private interests that outweigh the need for the protected evidence.¹¹⁶

Several other commentators have assailed the decision on various grounds. The majority has been criticized for failing to apply correctly the balancing approach mandated by FRE 501,¹¹⁷ for expanding the privilege to licensed social workers¹¹⁸ and for creating an undefined privilege.¹¹⁹

[*Jaffe*] is a strange case as it creates a privilege that extends endlessly. Justice Stevens refers to Congress' earlier rejection of the Advisory Committee's recommendation of a psychotherapist-patient privilege, but then he ultimately decides to recognize the privilege. The court is flying in the face of its own history.¹²⁰

The majority has also been criticized for relying on the decisions of state legislatures in making federal law,¹²¹ and for stepping into a policy debate that Congress is better suited to handle.¹²²

The *Jaffe* decision has refueled the debate over the scope of federal courts' power to recognize new privileges. Since the adoption of the Federal Rules of Evidence in 1975, federal courts have been confused about the correct interpretation of FRE 501 and their institutional competence to recognize new

111. *Id.* at 20.

112. *Id.* at 21.

113. *Id.* at 25-26.

114. See, e.g., Bryson, *supra* note 52, at 963; Faughnan, *supra* note 9; M. Brett Fulkerson, Note, *One Step Forward, Two Steps Back: The Recognized But Undefined Federal Psychotherapist-Patient Privilege*, 62 MO. L. REV. 401 (1997); Jason L. Gunter, Note and Comment, *Jaffe v. Redmond: The Supreme Court Recognizes the Psychotherapist-Patient Privilege in the Federal Courts and Expands the Privilege to Include Social Workers*, 21 NOVA L. REV. 719 (1997); Svetanics, *supra* note 28.

115. See Gunter, *supra* note 114, at 719.

116. See Faughnan, *supra* note 9, at 719-20.

117. See Svetanics, *supra* note 28, at 753-54.

118. See Faughnan, *supra* note 9, at 720.

119. See Fulkerson, *supra* note 114, at 418-24.

120. Harvey, *supra* note 4.

121. See Svetanics, *supra* note 28, at 754.

122. See *id.* at 759.

privileges.¹²³ The Supreme Court's first opportunity to apply FRE 501 to an existing privilege was in 1980.¹²⁴ In *Trammel v. United States*, the Court acknowledged that FRE 501 gives federal courts the authority to develop privilege law, and then used its authority to *narrow* the adverse spousal testimony privilege.¹²⁵ Noting a trend in state law "toward divesting the accused of the privilege to bar adverse spousal testimony,"¹²⁶ the Court held that "the witness-spouse alone has a privilege to refuse to testify adversely."¹²⁷ The court reasoned that if one spouse is willing to testify against the other, then the privilege's justification of trying to preserve marital harmony is likely inappropriate.¹²⁸ The *Trammel* decision proved influential on lower courts in the coming years as "[t]he Court's restriction of the spousal privilege was an implicit signal to lower courts that it would not extend privileges broadly and would not advocate lower courts to do so either."¹²⁹

One month after *Trammel*, the Supreme Court addressed the first of two cases involving a novel privilege claim under FRE 501. In *United States v. Gillock*,¹³⁰ the Court declined to recognize a privilege for state legislators in federal criminal prosecutions.¹³¹ Using a restrictive view¹³² of FRE 501, the Court noted that during the legislative adoption process of FRE 501, "[n]either the Advisory Committee, the Judicial Conference, nor this Court saw fit . . . to provide the privilege sought by Gillock."¹³³ The Court also explained that while the existence of a state privilege should be taken into consideration, state recognition was not dispositive.¹³⁴

In 1990, the Court addressed a second novel privilege claim under FRE 501. In *University of Pennsylvania v. Equal Employment Opportunity Commission*,¹³⁵ the Court used a cautionary approach to privileges and refused to recognize a privilege protecting peer review materials in tenure decisions.¹³⁶ Acknowledging its authority to develop new privileges under FRE 501, the Court cautioned against using this authority expansively.¹³⁷ The Court defined a framework for reviewing novel privilege claims, explaining that a new privilege should not be adopted unless doing so "promotes sufficiently important interests to outweigh

123. See Bryson, *supra* note 52, at 966; see also *supra* notes 47-55 and accompanying text.

124. See *Trammel v. United States*, 445 U.S. 40 (1980).

125. *Id.* at 47, 53.

126. *Id.* at 49-50.

127. *Id.* at 53.

128. *Id.* at 52.

129. Bryson, *supra* note 52, at 978.

130. 445 U.S. 360 (1980).

131. *Id.* at 374.

132. See *supra* notes 48-51 and accompanying text.

133. *Gillock*, 445 U.S. at 367.

134. *Id.* at 368, n.8.

135. 493 U.S. 182 (1990).

136. *Id.* at 189.

137. *Id.*

the need for probative evidence."¹³⁸

The next novel privilege claim that the Supreme Court considered was the psychotherapist-patient privilege in *Jaffe v. Redmond*.¹³⁹ While applying the same analytical framework as it did in *University of Pennsylvania*,¹⁴⁰ the Court took a more liberal approach in recognizing a psychotherapist-patient privilege. *Jaffe* presented the Court with an opportunity to "kill two birds with one stone."¹⁴¹ Not only could the court address the conflict among the circuit courts regarding a psychotherapist-patient privilege, but it could also address the conflict regarding the correct approach to use in evaluating novel privilege claims under FRE 501.¹⁴² Unfortunately, the Court failed to clearly resolve either conflict. By creating an undefined privilege that extends to licensed social workers, the Court may have unwittingly caused more confusion about the application of the privilege. In addition, "[t]he Supreme Court's liberal methodology in *Jaffe* conflicts with the Court's more conservative earlier decisions, making the Court's approach to novel privilege claims under Rule 501 even more unclear."¹⁴³ Although the Court may have muddied the waters regarding the scope of federal courts' authority to develop privilege law, the Court's recognition of a psychotherapist-patient privilege has also implicitly encouraged federal courts to be more open to new privilege claims.

IV. EXAMINATION OF A PARENT-CHILD PRIVILEGE

Support for a parent-child privilege did not develop until the late 1970s and early 1980s when a few courts¹⁴⁴ began to recognize the privilege and a number of law review articles supporting the privilege were published.¹⁴⁵ In the federal court system, only district courts in Nevada and Connecticut recognized the parent-child privilege until 1996.¹⁴⁶ At the state level, only four states currently provide any type of protection for parent-child communications. New York, the

138. *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

139. 518 U.S. 1 (1996).

140. 493 U.S. 182 (1990).

141. *Svetanics*, *supra* note 28, at 757.

142. *See id.*

143. *Id.*

144. *See, e.g., In re Grand Jury Proceedings (Agosto)*, 553 F. Supp. 1298 (D. Nev. 1983); *People v. Fitzgerald*, 422 N.Y.S.2d 309 (1979); *In re A & M*, 403 N.Y.S.2d 375 (1978).

145. *See Covey*, *supra* note 56, at 882-83; *see also* Ellen Kandoian, *The Parent-Child Privilege and the Parent-Child Crime: Observations on State v. DeLong and In Re Agosto*, 36 ME. L. REV. 59 (1984); Sanford Levison, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631 (1984).

146. *See In re Grand Jury Proceedings (Agosto)*, 553 F. Supp. 1298 (D. Nev. 1983) (upholding both adverse testimonial and confidential communications parent-child privileges); *In re Grand Jury Proceedings (Greenberg)*, 11 Fed. R. Evid. Serv. (Callaghan) 579 (D. Conn. 1982) (upholding parent-child privilege based on the free-exercise clause and Jewish law which forbids parents and children from testifying against each other).

only state with a judicially recognized parent-child privilege, found that a parent-child privilege exists based on the right to privacy found in the Constitution.¹⁴⁷ Many other state courts facing this issue have determined that it would be more appropriate if the legislature recognized the privilege.¹⁴⁸ This is the sole option for some states in which judicial expansion of privilege law is forbidden.¹⁴⁹ Idaho,¹⁵⁰ Minnesota¹⁵¹ and Massachusetts¹⁵² are the only states that have some

147. See *People v. Fitzgerald*, 422 N.Y.S.2d 309, 314 (1979).

148. See, e.g., *People v. Sanders*, 457 N.E.2d 1241, 1244-45 (Ill. 1983); *State v. Gilroy*, 313 N.W.2d 513, 518 (Iowa 1981); *People v. Dixon*, 411 N.W.2d 760, 762 (Mich. Ct. App. 1987); *Grussing v. KVAM Implement Co.*, 478 N.W.2d 200, 205 (Minn. Ct. App. 1991); *In re Gail D.*, 525 A.2d 337, 339 (N.J. Super. Ct. App. Div. 1987).

149. See, e.g., NEV. REV. STAT. § 49.015 (1997); OKLA. STAT. tit. 12, § 2501 (1997).

150. IDAHO CODE § 9-203(7) (1998).

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

Id.

151. MINN. STAT. ANN. § 595.02(j) (West Supp. 1998).

A parent or the parent's minor child may not be examined as to any communication made in confidence by the minor to the minor's parent. A communication is confidential if made out of the presence of persons not members of the child's immediate family living in the same household. This exception may be waived by express consent to disclosure by a parent entitled to claim the privilege or by the child who made the communication or by failure of the child or parent to object when the contents of a communication are demanded. This exception does not apply to a civil action or proceeding by one spouse against the other or by a parent or child against the other, nor to a proceeding to commit either the child or parent to whom the communication was made or to place the person or property or either under the control of another because of an alleged mental or physical condition, nor to a criminal action or proceeding in which the parent is charged with a crime committed against the person or property of the communicating child, the parent's spouse, or a child of either the parent or the parent's spouse, or in which a child is charged with a crime or act of delinquency committed against the person or property of a parent or a child of a parent, nor to an action or proceeding for termination of parental rights, nor any other action or proceeding on a petition alleging child abuse, child neglect, abandonment or nonsupport by a parent.

Id.

152. MASS. GEN. LAWS ANN. ch. 233, § 20 (West Supp. 1998).

An unemancipated, minor child, living with a parent, shall not testify before a grand

form of statutory parent-child privilege for children less than eighteen-years-old and their parents. This sparse judicial recognition or legislative codification of a parent-child privilege may have resulted from a historical, unwritten practice forbidding parents and children from being called to testify against each other.¹⁵³ As explained by one court addressing a parent-child privilege claim, “the paucity of authority on this topic may reflect a deep-seated sense of respect for the family on the part of state and federal prosecutors.”¹⁵⁴ This historical practice of not calling parents and children to testify against each other reflects the value that society has put on family harmony.¹⁵⁵ Some scholars propose that a parent-child privilege protects this interest by preserving a witness’ interest in freely choosing between her loyalty to her family member and her obligation to the state to testify.¹⁵⁶ Under this view, the privilege belongs to the witness and cannot be invoked by the other person involved in the communication.¹⁵⁷ This rationale is similar to that of the adverse spousal testimony privilege, which prevents a witness from being forced to testify against her spouse, but allows the witness to testify voluntarily over her spouse’s objection.¹⁵⁸

A. Arguments Previously Advanced in Support of a Parent-Child Privilege

1. *Legal Arguments.*—A legal argument frequently advanced in support of a parent-child privilege is that the failure to recognize such a privilege violates a litigant’s constitutional right to privacy.¹⁵⁹ This argument is based on Supreme

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. For the purposes of this clause the term “parent” shall mean the natural or adoptive mother or father of said child.

Id.

153. See Doug Most, *A Court Has Ears Inside the Home; Parent-Child Secrets Not Safe*, THE RECORD, (N.J.), Dec. 7, 1997 at A1.

154. *In re Grand Jury Proceedings (Unemancipated Minor Child)*, 949 F. Supp. 1487, 1491 (E.D. Wash. 1996). The court further explained that this sense of respect for the family is “a reflection of the common law in action, whereby prosecutors presume that such testimony would be subject to some sort of parent-child privilege.” *Id.*

155. See Kandoian, *supra* note 145, at 82. The author further explains that “[t]he law of parent-child privilege is perhaps undeveloped because the parent-child bond is so revered in our culture that the thought of using forced testimony of children to prosecute parents has traditionally been considered beyond the bounds of decency in the minds of even the most zealous prosecutors.” *Id.* at 82-83.

156. See Kandoian, *supra* note 145, at 76.

157. See *id.*

158. See *supra* notes 10-16 and accompanying text.

159. See, e.g., Yolanda L. Ayala & Thomas C. Martyn, Note, *To Tell or Not to Tell? An Analysis of Testimonial Privileges: The Parent-Child and Reporter’s Privileges*, 9 ST. JOHN’S J. LEGAL COMMENT. 163, 175-76 (1993); Jeffrey Begens, *Parent-Child Testimonial Privilege: An Absolute Right or an Absolute Privilege?*, 11 U. DAYTON L. REV. 709, 724-27 (1986); Betsy Booth,

Court decisions recognizing fundamental family privacy rights.¹⁶⁰ In one unanimous Supreme Court decision,¹⁶¹ Justice Stevens explained how the constitutional right to privacy encompasses two distinct interests. These interests include the "individual interest in avoiding disclosure of personal matters" and a family or individual's interest "in the independence in making certain kinds of important decisions."¹⁶² Using this rationale and other Supreme Court decisions,¹⁶³ a few lower courts have recognized a parent-child privilege based on a constitutional right to privacy.¹⁶⁴ As the Federal District Court of Nevada explained in *In re Grand Jury Proceeding (Agosto)*:¹⁶⁵ "Testimonial privileges have been regarded as important safeguards of the right to privacy."¹⁶⁶ Recognizing a parent-child communications privilege and a testimonial disqualification for family members, the court stated:

While the government has an important goal in presenting all relevant evidence before the court in each proceeding, this goal does not outweigh an individual's right of privacy in his communications within the family unit, nor does it outweigh the family's interests in its integrity and inviolability, which spring from the rights of privacy inherent in the family relationship itself.¹⁶⁷

This privacy right argument was also persuasive to a New York Appellate Court when it found communications between family members were privileged since they fell under the constitutional right to privacy.¹⁶⁸

Despite these decisions, most courts have declined to find a parent-child privilege based on the constitutional right to privacy.¹⁶⁹ Critics of the privacy

Underprivileged Communications: The Rationale for a Parent-Child Testimonial Privilege, 36 SW. L.J. 1175, 1181-85 (1983); Sandlow, *supra* note 42, at 819-27; Ann M. Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1, 13-24 (1982), at 13-24; Watts, *supra* note 17, at 600-05.

160. See *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (holding that the Constitution protects the sanctity of the family); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (holding, in part, that parents have the right to assume the primary role in decisions concerning the upbringing of their children); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (finding that parents have a constitutional right to send their children to parochial school); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (finding constitutional protection of family autonomy based on an expansive interpretation of the Fourteenth Amendment).

161. *Whalen v. Roe*, 429 U.S. 589 (1977).

162. *Id.* at 599-600.

163. See *supra* notes 158-59.

164. See, e.g., *In re Grand Jury Proceeding (Agosto)*, 553 F. Supp. 1298 (D. Nev. 1983); *In re Application of A&M*, 61 A.D.2d 426 (1978).

165. *In re Grand Jury Proceeding (Agosto)*, 553 F. Supp. at 1298.

166. *Id.* at 1310.

167. *Id.* at 1325.

168. See *In re A & M*, 403 N.Y.S.2d 375, 434-35 (N.Y. App. Div. 1978).

169. See, e.g., *Port v. Heard*, 764 F.2d 423, 430 (5th Cir. 1985); *In re Grand Jury*

right theory point out that the Supreme Court has been hesitant to broadly construe any family right to privacy and that even when such a right is recognized, the right is not absolute.¹⁷⁰ The theory is also problematic because the very notion of constitutional privacy rights has been criticized as lacking explicit textual support in the Constitution.¹⁷¹

A second constitutional argument offered to support a parent-child privilege is "that compelling testimony from a child will violate the tenets of the family's religious beliefs and infringe upon the free exercise right provided by the first amendment."¹⁷² Both early Jewish and Roman law barred family members from testifying against one another.¹⁷³ Jewish law is based on the Torah (the five books of Moses) and its interpretation (The Tradition).¹⁷⁴ One of the Torah's rules "specifically 'forbids a parent from testifying against his or her children.'"¹⁷⁵ Similarly, ancient Roman law also respected the family. "Early Roman law recognized the rule of *testimonium domesticum*, which mandated that parents, children, patrons, freedmen, and slaves could not be compelled to give testimony against each other."¹⁷⁶

This free exercise of religion argument was presented to the District Court for the Southern District of Texas. In *Port v. Heard*,¹⁷⁷ two Jewish parents refused to testify in grand jury proceedings against their seventeen-year-old son. The parents maintained that since "rabbinical law prohibits Jewish parents and children from testifying against one another in canonical proceedings,"¹⁷⁸ the First Amendment's guarantee of free exercise of religion mandates the recognition of a parent-child privilege.¹⁷⁹ More recently, this free exercise argument was advanced in the highly publicized Delaware case of Amy Grossberg, a nineteen-year-old woman accused of murdering her newborn child.¹⁸⁰ In a pre-trial motion to suppress a subpoena, Grossberg's parents argued that their Jewish religion forbade them from testifying against their daughter, and

Proceedings (Unemancipated Minor Child), 949 F. Supp. at 1490; *Diehl v. State*, 698 S.W.2d 712, 717 (Tex. Ct. App. 1985) (Levy, J., dissenting) (commenting that the majority completely ignored the right to privacy parent-child privilege argument forwarded to quash evidence).

170. See Schlueter, *supra* note 6, at 47-50.

171. See Kandoian, *supra* note 145, at 80.

172. Schlueter, *supra* note 6, at 50 (citations omitted).

173. See Watts, *supra* note 17, at 591-93.

174. See *id.* at 591-92.

175. *Id.* (quoting *In re Grand Jury Proceedings (Greenburg)*, 11 Fed. R. Evid. Serv. (Callaghan) 579, 581 & n.6 (D. Conn. 1982)).

176. *Id.* at 592.

177. 594 F. Supp. 1212, 1215 (S.D. Tex. 1984).

178. *Id.* at 1218.

179. *Id.* at 1218-19. See also *In re Grand Jury Proceedings (Greenberg)*, 11 Fed. R. Evid. Serv. (Callaghan) at 582 (recognizing limited parent-child privilege based on the First Amendment).

180. See Todd Spangler, *Suspect's Folks May Be Forced to Tell All*, HARRISBURG PATRIOT & EVENING NEWS, Nov. 26, 1997, at B6.

they should not have to submit to interviews with prosecutors.¹⁸¹ The court rejected this argument, ruling that the prosecution has a right to interview the Grossbergs “to ensure a fair opportunity for rebuttal.”¹⁸²

Opponents of the free exercise theory point out that it would be difficult to codify a parent-child privilege based on religious beliefs because of the possible conflict among religious values.¹⁸³ In addition, opponents argue that since the freedom to practice one’s religion is not absolute, the need for reliable evidence in a trial would likely qualify as a compelling state interest supporting the denial of a parent-child privilege.¹⁸⁴

Another argument advanced by some litigants and scholars for the adoption of a parent-child privilege is that FRE 501 authorizes the judicial creation of new evidentiary privileges. Supporters of this expansive view argue that FRE 501’s broad language “left the door open for the judicial adoption of privileges such as the parent-child privilege[.]”¹⁸⁵ Most courts have rejected this argument, taking a much more restrictive approach to the creation of new privileges.¹⁸⁶

2. *Social Policy Arguments.*—Many scholars maintain that a parent-child privilege works to help preserve the family and foster the parent-child relationship. They suggest that the single event of forcing a child or parent to testify against the other may irreparably harm the parent—child relationship.¹⁸⁷ Building upon this theory, others argue that strong family relationships that foster communication and family loyalty help prevent juvenile delinquency.¹⁸⁸ One commentator explained: “Parents bear almost complete responsibility for the early socialization of their children, and studies show that this early training is the most significant influence in the child’s development of both a self image and an ability to interact with society.”¹⁸⁹ Responding to this theory, critics argue that there is no empirical data showing that the recognition of a parent-child

181. *See id.*

182. Matthew Futterman, *Grossberg’s Parents Must Give Testimony*, STAR LEDGER, Jan. 24, 1998, at 13.

183. *See* Schlueter, *supra* note 6, at 50.

184. *See id.* at 51-52.

185. Watts, *supra* note 17, at 606. The author continues by asserting that the legislative history behind the adoption of Rule 501 supports the proposition that a parent-child privilege should be recognized. The author refers to statements made by Representative Hungate immediately prior to the adoption of FRE 501:

Rule 501 is not intended to freeze the law of privilege as it now exists. The phrase “governed by the principles of the common law as they may be interpreted . . . in light of reason and experience” is intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.

Id. at 606-07 (citing 120 CONG. REC. 40, 891 (1974)).

186. *See supra* notes 47-51 and accompanying text.

187. *See* Covey, *supra* note 56, at 889.

188. *See, e.g.,* Ayala & Martyn, *supra* note 159, at 176-77.

189. Franklin, *supra* note 11, at 167 (citing ALAN COFFEY, THE PREVENTION OF CRIME AND DELINQUENCY 56 (1975)).

privilege promotes frank and confidential discussions between a parent and child.¹⁹⁰

Another social policy argument is based on the purported “natural repugnancy” of forcing a parent or child to testify against the other or to reveal confidential communications.¹⁹¹ Proponents of this theory suggest that people feel a natural revulsion to the idea of family members being forced to testify against each other.¹⁹² “[I]f there is one universal, indeed primeval, principle of morality, it is that one must not deliver one’s friends [or family members] to their enemies.”¹⁹³ Additionally, commentators often refer to totalitarian governments as a reminder of the consequences of unrestrained state power.¹⁹⁴ Critics reply that a parent-child privilege is not needed to restrain government power, as the natural repugnance of forcing a parent or child to testify against the other is sufficient to protect the parent-child relationship.¹⁹⁵

Somewhat related to this natural repugnancy theory is the view that forcing a parent or child to testify against the other harms the image of the judicial system. Supporters of this image theory “suggest that privileges should exist because they enhance public acceptance of the legal system.”¹⁹⁶ If citizens feel a natural repugnancy to the idea of parents and children testifying against each other, then these citizens will likely also be unhappy with and possibly unwilling to accept a legal system that employs such repugnant means.¹⁹⁷ Under this theory, the legal system as a whole ends up suffering the consequences of compelling a witness to testify against her child or parent because “[w]hether the witness succumbed to governmental pressure or refused to testify, the public could perceive the system as unfair.”¹⁹⁸

Another justification that focuses on the unfairness of forcing a parent or child to testify against the other is often referred to as the “Witnesses’

190. See Schlueter, *supra* note 6, at 53.

191. See Watts, *supra* note 17, at 611-13; see also *In re Grand Jury Proceedings* (Agosto), 553 F. Supp. 1298, 1305-06 (D. Nev. 1983).

192. See Covey, *supra* note 56, at 889.

193. *Id.* (quoting Peter Berger, Editorial, *Now, “Boat People” From Taiwan?*, N.Y. TIMES, Feb. 14, 1978, at 35, col. 4).

194. See Watts, *supra* note 17, at 611-12. The author states that “[t]he actions of totalitarian governments should serve as adequate reminders of the horrors which thrive when certain relationships are deemed subordinate to the state.” *Id.*

195. See Schlueter, *supra* note 6, at 54. “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. In short, the fear of abuse is simply not sufficiently well-founded to justify the codification of a parent-child privilege and is certainly not grounds for blanket exclusion of otherwise reliable evidence.” *Id.*

196. *Developments in the Law*, *supra* note 10, at 1585.

197. See Doug Most, *Judge Upholds Subpoena For Grossberg Parents, Couple Must Talk to Prosecutors*, BERGEN RECORD, Jan. 24, 1998, at A2. The author reports how a “potential downside” to prosecutors forcing parents to testify against their children “is that a jury could hold it against [a prosecutor] for trying to turn the parents against [their children].” *Id.*

198. *Developments in the Law*, *supra* note 10, at 1585.

Dilemma.”¹⁹⁹ Proponents of this theory maintain that calling a parent or child to testify against the other creates a dilemma for the witness. The witness must either (1) testify truthfully and condemn the accused-relative, (2) testify falsely and commit perjury, or (3) refuse to testify and risk contempt.²⁰⁰ The consequences of putting a child in the position of choosing between loyalty to a parent and loyalty to the state are especially grave. “This would necessarily require the State to actively punish selflessness and loyalty which are inculcated into children by their families, their churches, and even the State itself, and not only where such values are deemed consistent with the State’s purposes.”²⁰¹ Additionally, a few commentators²⁰² and at least one court²⁰³ have suggested that by forcing a witness into such a dilemma, the legal system as a whole will suffer. Presumably, the legal system will suffer because the witness may be strongly motivated to commit perjury and thus provide the trier of fact with unreliable evidence.²⁰⁴ As one commentator explained, “the government often has considerably more to lose than to gain when it attempts to compel parental testimony. The situation presents great potential for harm to the child, to the parent, and to the legal system.”²⁰⁵

C. *Analysis of Federal and State Court Decisions Rejecting a Parent-Child Privilege*

Despite the various legal and social theories that have been offered in support of a parent-child privilege, the majority of federal and state courts faced with such a claim have declined to recognize the privilege. A few common factors are present in federal court decisions rejecting the privilege. The following case analyses are representative of the numerous examples of these factors. The first factor is the influence of the Supreme Court’s cautionary approach to the development of privilege law. In *Grand Jury Proceedings of John Doe v. United States*,²⁰⁶ the Tenth Circuit rejected a claim of parent-child privilege based on a minor’s constitutional right to free exercise of religion. In that case, a fifteen-year-old boy refused to testify about his mother before a grand jury, claiming that such testimony would violate the free exercise of his Mormon religious beliefs.²⁰⁷ After noting that a parent-child privilege was not recognized at common law²⁰⁸ and that the two federal district court decisions recognizing a parent-child

199. See, e.g., Watts, *supra* note 17, at 613-15.

200. See *id.* at 613.

201. Diehl v. State, 698 S.W.2d 712, 720-21 (Tex. Ct. App. 1985).

202. See Franklin, *supra* note 11, at 169; Kandoian, *supra* note 145, at 71.

203. See *In re Grand Jury Proceedings (Agosto)*, 553 F. Supp. 1298, 1309-10 (D. Nev. 1983).

204. See *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910, 922 (1987).

205. Franklin, *supra* note 11, at 169.

206. 842 F.2d 244, 248 (10th Cir. 1988).

207. *Id.*

208. *Id.* at 246.

privilege had not been followed,²⁰⁹ the majority opinion observed the Supreme Court's reluctance to create new privileges and denied the boy relief.²¹⁰

In 1984, the Eleventh Circuit also relied on the Supreme Court's rationale when it heard an appeal from a district court's order forcing an adult witness to testify before a grand jury regarding the investigation of his father.²¹¹ The son claimed a common law parent-child privilege under FRE 501.²¹² The court noted that every other federal court of appeals that had considered a claim of a parent-child privilege had refused to recognize the privilege.²¹³ In addition, following the Supreme Court's rationale, the Eleventh Circuit noted that "[p]rivileges against forced disclosure' are 'exceptions to the demand for every man's evidence' and are 'not lightly created nor expansively construed, for they are in derogation of the search for truth.'"²¹⁴

A second common factor present in federal court decisions refusing to recognize a parent-child privilege is the idea that the privilege may be appropriate under other facts not presented to the court. This factor was present in the Sixth Circuit's rejection of a claim of parent-child privilege by a defendant whose emancipated adult son was subpoenaed to testify in grand jury proceedings.²¹⁵ The defendant argued that such a privilege was "analogous to the spousal privilege" as it "would serve the public interest in preserving the harmony and confidentiality of the parent-child relationship."²¹⁶ While acknowledging that it had the power to recognize new privileges under FRE 501, the court used a cautionary approach²¹⁷ to reject the privilege claim and noted that its "power must be used sparingly."²¹⁸ The court also specifically did not address situations involving unemancipated minors, noting that minors "generally require much greater parental guidance and support than do emancipated adults."²¹⁹

The Fourth Circuit also hinted that a parent-child privilege might be appropriate under different factual circumstances when the court rejected a twenty-nine-year-old son's claim of family privilege.²²⁰ The son maintained that he should not have to testify before a grand jury about his father's actions.²²¹ The

209. The decisions are *In re Grand Jury Proceedings (Agosto)*, 553 F. Supp. 1298 (D. Nev. 1983); *In re Grand Jury Proceedings (Greenburg)*, 11 Fed. R. Evid. Serv. (Callaghan) 579 (D. Conn. 1982).

210. *In re Grand Jury Proceedings of John Doe*, 842 F.2d at 248.

211. *In re Grand Jury Subpoena (Santarelli)*, 740 F.2d 816 (1984) (per curiam).

212. *Id.*

213. *Id.* at 817.

214. *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 709-10 (1974)).

215. *United States v. Ismail*, 756 F.2d 1253 (6th Cir. 1985)

216. *Id.* at 1258.

217. *See supra* notes 52-53 and accompanying text.

218. *Ismail*, 756 F.2d at 1258.

219. *Id.*

220. *United States v. Jones*, 683 F.2d 817 (4th Cir. 1982).

221. *Id.* at 818.

district court had committed the son for civil contempt after the son refused to answer questions before a federal grand jury.²²² Claiming a family privilege under FRE 501, the son turned to the Supreme Court's rationale in *United States v. Trammel*.²²³ In that case, the Court stated that "the intention of Rule 501 was 'not to freeze the law of privilege . . . [but] . . . rather was to provide the courts with the flexibility to develop rules of privilege on a case by case basis . . .'"²²⁴ The Fourth Circuit responded by focusing on the Supreme Court's ultimate decision in *Trammel* to narrow the scope of the marital testimonial privilege.²²⁵ This narrowing of an existing privilege seemed to convince the Fourth Circuit that the *Trammel* decision did not support the recognition of a new privilege.²²⁶ Even though the Fourth Circuit declined to recognize a family privilege under the specific facts of the case, the court qualified its decision by stating that "we do not endeavor to decide to what extent the age of the child and whether or not emancipation has occurred may or may not affect the decision as to whether any familial privilege exists."²²⁷

A third factor that has influenced federal courts' reluctance to create new privileges is state policy decisions regarding privilege law. Some courts have followed commentators' suggestions of turning to state decisions to help define the development of federal privilege law. As one commentator proposed:

Perhaps even more important than recognition of state-created privileges as a matter of comity in particular cases is the use of state privilege law as evidence of "reason and experience" in the formulation of federal privilege law under FRE 501. It is entirely appropriate for federal courts to evaluate state precedent for whatever light it might shed on sound principles.²²⁸

After noting that state courts or legislatures had declined to recognize a parent-child privilege, some federal courts have also declined to do so.²²⁹

Most state courts have also refused to recognize a parent-child privilege. While some courts have reasoned that privileges should be discouraged since they exclude relevant evidence from a judicial proceeding,²³⁰ other state courts have found that a policy decision that recognizes a new evidentiary privilege is

222. *Id.*

223. 445 U.S. 40 (1980).

224. *Jones*, 683 F.2d at 818 (quoting *Trammel*, 445 U.S. at 47.)

225. *Id.*

226. *Id.*

227. *Id.* at 819.

228. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 172 (2d. ed. 1994).

229. *See In re Grand Jury*, 103 F.3d 1140, 1147-48 (3d Cir. 1997); *Port v. Heard*, 764 F.2d 423, 430 (5th Cir. 1985).

230. *See, e.g., State v. Willoughby*, 532 A.2d 1020, 1022 (Me. 1987) *State v. Maxon*, 756 P. 2d 1297, 1298-99 (Wash. 1988).

better left to the legislature.²³¹ Additionally, some state courts have declined to recognize a parent-child privilege because they assert that the "Wigmore test"²³² has not been satisfied.²³³

D. Recent Developments in Reaction to the Jaffe Decision

Since the Supreme Court's decision in *Jaffe*, two federal courts addressing the issue have differed on whether *Jaffe* supports the recognition of a federal parent-child privilege. Six months after *Jaffe*, the District Court for the Eastern District of Washington held that as a matter of first impression, federal law recognizes a privilege protecting confidential communications between a parent and child.²³⁴ In *In re Grand Jury Proceedings (Unemancipated Minor Child)*,²³⁵ an unemancipated minor child filed a motion to quash a subpoena that required him to testify before a grand jury. The child, his mother and father, and others were targets of the grand jury investigation. The child claimed that a parent-child privilege protected him from having to testify against his parents.²³⁶

After concluding that there was an insufficient basis for recognizing a parent-child privilege based on the constitutional right of privacy,²³⁷ the court turned to the common law. The court examined prior federal court decisions and noted that only one federal court of appeals had specifically addressed the issue of "whether a minor, unemancipated child can be compelled to testify before a grand jury regarding communications made by a parent with whom the child resides."²³⁸ The court also noted that while other circuit courts may have ruled on this issue, they had not clearly revealed the specific factual circumstance under which the privilege was rejected.²³⁹ Because three federal courts had pointedly left open the question of whether a parent-child privilege might exist based on facts not presented,²⁴⁰ the court concluded, "there is no blanket

231. See, e.g., *People v. Dixon*, 411 N.W.2d 760, 763 (Mich. Ct. App. 1987); *State v. Bruce*, 655 S.W.2d 66, 68 (Mo. Ct. App. 1983).

232. See *supra* notes 57-64 and accompanying text.

233. See, e.g., *In re Inquest Proceedings*, 676 A.2d 790, 792-93 (Vt. 1996); *Maxon*, 756 P.2d at 1301-02.

234. *In re Grand Jury Proceedings (Unemancipated Minor Child)*, 949 F. Supp. 1487, 1494, 1497 (E.D. Wash. 1996).

235. *Id.* at 1488.

236. *Id.*

237. *Id.* at 1491.

238. *Id.* at 1491-92 (citing *In re Grand Jury Proceedings of John Doe*, 842 F.2d 244 (10th Cir. 1988) (holding that no parent-child privilege existed to allow a fifteen-year old boy to testify before a grand jury against his mother)).

239. *Id.* at 1492 (citing *In re Grand Jury Subpoena (Santarelli)*, 740 F.2d 816 (11th Cir. 1984) (per curiam)); *In re Matthews*, 714 F.2d 223 (2nd Cir. 1983); *In re Grand Jury (Starr)*, 647 F.2d 511 (5th Cir. 1981) (per curiam)).

240. *In re Grand Jury Proceedings (Unemancipated Minor Child)*, 949 F. Supp. 1487, 1492 (E.D. Wash. 1996).

prohibition against a parent-child privilege."²⁴¹ The court also suggested that "the reluctance of prosecutors to subpoena parents and minor children to testify against each other is, in reality, a reflection of the common law in action, whereby prosecutors presume that such testimony would be subject to some sort of parent-child privilege."²⁴²

The court next turned to the *Jaffe* decision. Using *Jaffe's* analytical framework, the court concluded it could recognize a parent-child privilege if "there is a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth,' and [if] the privilege serves public ends."²⁴³ After determining that "[b]oth reason and experience mandate the recognition of some form of a parent-child privilege,"²⁴⁴ the court explained that similar to other currently recognized privileges (attorney-client, priest-penitent, and physician-patient), the parent-child relationship is "rooted in the imperative need for confidence and trust."²⁴⁵ Asserting that there is "no meaningful distinction between the policy reasons behind the marital communications privilege and those behind a parent-child privilege,"²⁴⁶ the court decided that children and parents should not be dissuaded from communicating with each other.²⁴⁷ Rather, "in light of this society's increasing concern with the weakening of the family structure, such communication and parental guidance should be encouraged, not discouraged, by the judiciary."²⁴⁸ Despite the court's recognition of a parent-child privilege for confidential communications, the court declined to apply the privilege to the facts presented, holding that the minor child had failed to make a sufficient factual showing to justify application of the privilege.²⁴⁹

One month later, in another case of first impression, the Third Circuit relied on the *Jaffe* decision to uphold two district court rulings.²⁵⁰ In a split decision, the Third Circuit refused to become the first federal court of appeals to recognize a parent-child privilege.²⁵¹ This case involved the consolidation of appeals from two separate cases. The first was a Virgin Islands case in which a grand jury subpoenaed the father of an investigation target.²⁵² His son was under investigation for alleged transactions that had taken place when the son was

241. *Id.* at 1493.

242. *Id.* at 1491.

243. *Id.* at 1493 (quoting *Jaffe v. Redmond*, 518 U.S. 1, 11 (1996)).

244. *Id.* at 1494.

245. *Id.*

246. *Id.*

247. *Id.* at 1494-95.

248. *Id.* at 1495.

249. *Id.* at 1497.

250. *In re Grand Jury*, 103 F.3d 1140 (3rd Cir. 1997) (consolidating appeal docket Nos. 95-7354, 96-7529 and 96-7530, one from the District Court of the Virgin Islands, the other two a case involving the same person from the District Court of Delaware).

251. *Id.*

252. *Id.* at 1142.

eighteen-years-old. The father was a former FBI agent who moved to quash the subpoena because he believed he was going to be questioned about prior confidential conversations he had with his son. The father claimed that the conversations were privileged from disclosure under FRE 501.²⁵³ In asserting that testifying against his son would negatively impact their relationship, the father explained:

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.²⁵⁴

The district court denied the quashing of the father's subpoena and the father appealed.²⁵⁵

The second case involved a sixteen-year-old minor who was subpoenaed by a grand jury to testify regarding an investigation of her father.²⁵⁶ The grand jury was investigating her father's participation in the kidnapping of a woman. Counsel for the daughter and her mother, along with counsel for the father, filed a motion to quash the subpoena. The motion sought to protect confidential communications and to bar testimony of the daughter.²⁵⁷ The district court denied the motion, but the daughter refused to testify and was found in contempt.²⁵⁸ The district court then stayed the imposition of sanctions until after the hearing on the appeal.²⁵⁹ The appellants argued that:

recognition [of a parent-child privilege] is necessary in order to advance 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.²⁶⁰

Responding to these arguments, the Third Circuit declined to recognize a privilege for confidential communications because: (1) the overwhelming majority of both federal and state courts have rejected such a privilege; (2) no reasoned analysis of FRE 501 or of standards established by the Supreme Court supported recognition; (3) such a privilege did not meet Wigmore's four requirements and would have no impact on the parental relationship; and (4) while acknowledging its authority to recognize a new privilege, such recognition

253. *Id.* at 1143.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 1143-44.

259. *Id.* at 1144.

260. *Id.* at 1146 (citations omitted).

should be left to Congress.²⁶¹

The Third Circuit began its analysis by noting that eight federal courts of appeals²⁶² had specifically rejected a parent-child privilege and that the remaining federal courts of appeals that had considered the issue had chosen not to recognize the privilege under the particular facts presented.²⁶³ Similarly, the majority of state courts addressing the issue²⁶⁴ had also declined to recognize a common-law parent-child privilege.²⁶⁵ While noting that two federal district courts²⁶⁶ had recognized some form of parent-child privilege, the court asserted that the limited holdings of both cases were distinguishable and not authoritative.²⁶⁷

Turning to the language of FRE 501, the Third Circuit stated that the purpose behind the rule was "to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis,' and to leave the door open to change."²⁶⁸ The court also noted that in *Jaffe*, the Supreme Court had reaffirmed the maxim that "privileges are generally disfavored."²⁶⁹ Upholding this maxim, the Third Circuit explained how this generally disfavored status of privileges has influenced both its decisions and those of the Supreme Court, resulting in rare expansion of common-law testimonial privileges.²⁷⁰

The Third Circuit also focused on *Jaffe*'s reliance on the policies of the states. The court distinguished the parent-child privilege from the

261. *Id.* at 1146-47.

262. See *In re Erato*, 2 F.3d 11 (2d Cir. 1993); *In re Grand Jury Proceedings of John Doe*, 842 F.2d 244 (10th Cir. 1988); *United States v. Davies*, 768 F.2d 893 (7th Cir. 1985); *Port v. Heard*, 764 F.2d 423 (5th Cir. 1985); *United States v. Ismail*, 756 F.2d 1253 (6th Cir. 1985); *In re Grand Jury Subpoena (Santarelli)*, 740 F.2d 816 (11th Cir. 1984) (per curiam); *United States v. Jones*, 683 F.2d 817 (4th Cir. 1982); *In re Grand Jury Proceedings (Starr)*, 647 F.2d 511 (5th Cir. 1981) (per curiam); *United States v. Penn*, 647 F.2d 876 (9th Cir. 1980) (en banc).

263. *In re Grand Jury*, 103 F.3d 1140, 1147 (3rd Cir. 1997).

264. See, e.g., *In re Terry W.*, 130 Cal. Rptr. 913 (1976); *Marshall v. Anderson*, 459 So. 2d 384 (Fla. Dist. Ct. App. 1984); *People v. Sanders*, 457 N.E.2d 1241 (Ill. 1983); *Gibbs v. State*, 426 N.E.2d 1150 (Ind. Ct. App. 1981); *Cissna v. State*, 352 N.E.2d 793 (Ind. Ct. App. 1976); *In re Inquest Proceeding*, 676 A.2d 790 (Vt. 1996).

265. See *In re Grand Jury*, 103 F.3d at 1147.

266. See *In re Grand Jury Proceedings (Agosto)*, 553 F. Supp. 1298 (D. Nev. 1983); *In re Grand Jury Proceedings (Greenberg)*, 11 Fed. R. Evid. Serv. (Callaghan) 579 (D. Conn. 1982).

267. *In re Grand Jury*, 103 F.3d at 1148. The court explained how *In Re Grand Jury Proceedings (Agosto)*, 553 F. Supp. at 1298, "conflicts squarely with its own circuit's en banc precedent [rejecting privilege]" and how *In re Grand Jury Proceedings (Greenberg)*, 11 Fed. R. Evid. Serv. (Callaghan) at 579, only recognized a limited "privilege grounded in the First Amendment free exercise clause; however, the court declined to recognize a general common-law parent-child privilege." *In re Grand Jury*, 103 F.3d at 1148-49.

268. *In re Grand Jury*, 103 F.3d at 1149 (citing *Trammel v. United States*, 445 U.S. 40, 47 (1980)) (internal quotation omitted).

269. *Id.*

270. *Id.*

psychotherapist-patient privilege by noting that while all fifty states recognize a psychotherapist-patient privilege, only four states have any type of privilege for parents and children.²⁷¹ The Third Circuit further explained how *Jaffe* had placed significance on the inclusion of the psychotherapist-patient privilege among the nine privileges recommended to Congress in the Proposed Rules of Evidence.²⁷² The court distinguished this from the parent-child privilege, which was not among the recommended privileges.

The Third Circuit chose to evaluate the claims of parent-child privilege using Dean Wigmore's approach. Applying Wigmore's four criteria, the court concluded that two of the requirements for creation of a federal common law privilege were not met.²⁷³ The court determined that "confidentiality—in the form of a testimonial privilege—is not essential to a successful parent-child relationship, as required by the second factor."²⁷⁴ Essentially, the court was not convinced that the existence of a privilege influences a parent or child's decision to share confidences.²⁷⁵ In evaluating Wigmore's fourth factor,²⁷⁶ the court concluded, "any injury to the parent-child relationship resulting from non-recognition of such a privilege would be relatively insignificant" while the cost would be substantial.²⁷⁷ Additionally, the court seemed concerned that recognition of a parent-child privilege would require forcing a parent to remain silent, even if the parent wanted to testify.²⁷⁸ The court was unwilling to create such a privilege, and therefore believed that the only option would be to create a privilege that could be waived by a parent.²⁷⁹ This option was also rejected by the court because it concluded that if a parent could waive the privilege, then the goal of the privilege would be destroyed since the child would not be able to predict with certainty that her confidences would not be shared. The court ultimately determined that the creation of new privileges should be left to Congress, as it is better suited to evaluate public policy considerations.²⁸⁰

Dissenting in part from the Third Circuit majority opinion, Judge Mansmann noted how the consolidated appeals actually involved different parent-child

271. *Id.* at 1150 ("New York state courts have recognized a limited parent-child privilege, and Idaho and Minnesota have enacted limited statutory privileges protecting confidential communications by minors to their parents. In Massachusetts, . . . minor children are statutorily disqualified from testifying against their parents in criminal proceedings.") (citations omitted).

272. *Id.* at 1151.

273. *Id.* at 1152.

274. *Id.*

275. *Id.* at 1153.

276. See WIGMORE, *supra* note 57, § 2285. "The injury that would inure to the relation by the disclosure must be *greater than the benefit* thereby gained for the correct disposal of the litigation." *Id.* (emphasis in original).

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

278. *Id.*

279. *Id.* at 1153-54.

280. *Id.* at 1154-55.

privilege claims.²⁸¹ While the Virgin Islands appeal involved a privilege claim to protect "confidential communications made by a child in the course of seeking parental advice," the Delaware appeal concerned a teenaged daughter's claim of privilege to prevent her from being forced to testify adversely against her father.²⁸² Judge Mansmann concluded that the court should recognize a limited privilege protecting confidential communications made to a parent by a child seeking guidance.²⁸³

Asserting that it "is time to chart a new legal course,"²⁸⁴ Judge Mansmann turned to *Jaffe* and noted how the Supreme Court had reinforced the federal "courts' role in fostering evolution in the area of testimonial privilege."²⁸⁵ She maintained that the rationale of the spousal confidential communications privilege (preserving family harmony) also supports the recognition of an analogous parent-child privilege. After examining the crucial role that the parent-child relationship plays in a child's development, Judge Mansmann concluded, "the public good to be derived from a circumscribed parent-child privilege outweighs the judicial system's interest in compelled parental testimony."²⁸⁶

V. ASSERTION THAT FEDERAL COURTS SHOULD RECOGNIZE A PARENT-CHILD PRIVILEGE

Federal courts should recognize a qualified parent-child privilege. The Supreme Court's recent decision in *Jaffe* adds further support to the legal and social policy arguments that have previously been advanced regarding a parent-child privilege. The liberal approach to privileges used by the Supreme Court in *Jaffe* should assure federal courts of their authority to develop privilege law under FRE 501. The influence of this liberal approach is evident by the recent recognition of a parent-child privilege by the District Court for the Eastern District of Washington.²⁸⁷ That court used the *Jaffe* framework²⁸⁸ to correctly

281. *Id.* at 1157 (Mansmann, J., dissenting in part).

282. *Id.* at 1158 n.1.

283. *Id.* at 1158.

284. *Id.*

285. *Id.* at 1159.

286. *Id.* at 1165.

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

288. *Id.* at 1493. The court explains the *Jaffe* framework:

This framework begins with the "primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." Guided by "reason and experience," the Court may recognize exceptions to this general rule where there is a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth, and where the privilege serves public ends."

conclude that “reason and experience” mandate the recognition of a parent-child privilege. As the District Court for the Eastern District of Washington also noted, the rationales justifying the currently recognized marital privileges and the psychotherapist-patient privilege support recognition of a parent-child privilege.²⁸⁹ One commentator explained the similarity between the marital and parent-child privileges:

The child-parent relationship resembles the husband-wife relationship in that both involve a fundamental and private family bond. The child-parent relationship ideally encompasses aspects found in the marital relationship—mutual love, intimacy and trust. . . . The fact that the child-parent relationship is part of the institution of the family that it is hoped is promoted by a marital privilege makes the protection of children’s private conversations with parents even more appealing.²⁹⁰

Regarding the rationale underlying the psychotherapist-patient privilege (to foster mental health) it is illogical to require a child to bypass talking with her parents and seek professional help in order for her communications to be protected.²⁹¹ As Justice Scalia explained in his dissent in *Jaffe*: “Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother-child privilege.”²⁹²

The *Jaffe* decision should not only assure federal courts of their authority to recognize a parent-child privilege, but it should also encourage state legislatures to recognize the privilege. *Jaffe* specifically relied on the policy decisions of all the states (recognizing a psychotherapist privilege) to conclude that “reason and experience” required recognition of a federal psychotherapist-patient privilege.²⁹³ State legislatures should note the Supreme Court’s rationale and be proactive in developing parent-child privileges.²⁹⁴

The importance of the parent-child relationship in promoting the healthy emotional development of children and preventing juvenile delinquency is another reason why our judicial system should recognize a parent-child privilege.

Id. (citations omitted).

289. *Id.* at 1494. See also Ayala & Martyn, *supra* note 159, at 178-80; Watts, *supra* note 17, at 608-09.

290. Stanton, *supra* note 159, at 6-7; see also Comment, *The Child-Parent Privilege: A Proposal*, 47 FORDHAM L. REV. 771 (1979).

291. See Stanton, *supra* note 159, at 13. See also Steven P. Garmisa, *You and the Law*, CHI. SUN TIMES, Mar. 11, 1997. The author gives the following advice to parents in talking with their kids: “So hug your kids. Tell them you love them. And give them a Miranda warning before they say anything incriminating.” *Id.*

292. *Jaffe v. Redmond*, 518 U.S. 1, 22 (1996) (Scalia, J., dissenting).

293. *Id.* at 12.

294. See *Family Privilege, Opinion*, SALT LAKE TRIB., June 9, 1997, at A8. The author suggests that recognition of a family privilege is “another issue in which the states must show the federal government the way to better public policy.” *Id.*

Parent-child relationships are fundamentally different from other relationships. The distinguishing characteristic of a parent-child relationship is the idea of intimacy, or the "concept of caring which makes the sharing of personal information significant."²⁹⁵ Intimacy "involves a fundamental sharing of identity"²⁹⁶ that results in a "shared sense that 'we' exist as something beyond 'you' and 'me.'"²⁹⁷ It is intimacy that creates the unique bond between a parent and child that is lacking between a professional and a patient. Under the *Jaffe* framework, this intimacy helps to foster both private and public good. Not only is a child's development positively influenced, but by fostering a child's positive value system, society benefits as a whole.

The intimate relationship between a parent and child is also why a parent-child privilege is supported by the non-instrumental rationale for privileges. Critics are correct when they maintain that the existence of a parent-child privilege will not encourage parents and children to talk with each other. It is the intimacy between a parent and child that encourages such communication. This is the main reason why courts that have applied Wigmore's instrumental approach to a claim of parent-child privilege have declined to recognize the privilege. While a parent-child privilege would likely not encourage future communications, it should still be recognized because of its likely effect on the parent-child relationship *after* the privilege has been invoked. Critics of a parent-child privilege (and supporters of Wigmore's approach) mistakenly focus their inquiry on how a parent-child privilege impacts the relationship between a parent and child *before* invocation of the privilege.²⁹⁸ By permitting a parent or child to refuse to testify against the other, the privilege works to maintain and protect the existing relationship between a parent and child. "[W]ithout the privilege, the parent-child relationship will 'survive,' but will arguably not thrive to the degree necessary to perform its valued societal functions of teaching and child rearing, and maintaining a stable family situation."²⁹⁹ If a parent has been compelled to testify against her child, will that child feel secure enough to turn to the parent in a future time of need? In addition, even if a parent or child is unaware of the existence of a specific privilege, that parent or child may still believe and expect that communications will be kept confidential.³⁰⁰ "[T]he fact that the relationship does not arise in anticipation of confidentiality does not in itself preclude the importance of confidentiality. Once the family comes into

295. *Developments in the Law, supra* note 10, at 1589 (quoting Jeffrey H. Reiman, *Privacy, Intimacy and Personhood*, 6 PHIL. & PUB. AFF. 26, 33-34 (1976)).

296. *Id.*

297. *Id.* (quoting Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 629 (1980)).

298. The Third Circuit made the mistake of applying Wigmore's instrumental approach in its recent rejection of a parent-child privilege claim. See *In re Grand Jury*, 103 F.3d 1140 (3d Cir. 1997).

299. Patrick Koeppe, *A Parent-Child Testimonial Privilege: Its Present Existence, Whether it Should Exist, and To What Extent*, 13 CAP. U. L. REV. 555, 565 (1984).

300. See Booth, *supra* note 159, at 1180 (footnote omitted).

being, confidentiality becomes crucial."³⁰¹

The respect individuals have for the intimate relationship between a parent and child is also reflected in the natural repugnancy that many feel when a parent or child is forced to testify against this other. This natural repugnance supports the recognition of a parent-child privilege, especially because the intimate relationships between parents and children are increasingly at risk of being harmed by our judicial system. At one time the frequency at which parents were called to testify against their children was so low that one commentator called the practice "ingenious if not ingenuous."³⁰² Today, the erosion of the "unwritten rule" against calling a parent or child to testify against the other is evident in recent media reports of parents challenging subpoenas and even choosing to spend time in jail rather than testify against a child. In Burlington, Vermont, Arthur and Geneva Yandow chose to spend forty-one days in jail rather than comply with a district court order to answer certain questions about their son.³⁰³ Their twenty-five-year-old son, Craig, was under investigation for the rape and murder of a twenty-three-year-old young woman. The Yandows refused to answer questions about their son's appearance when he returned home on the night of the murder and about what he had shared with them concerning the night's events.³⁰⁴

The parents of a suspect in another high profile murder case also initially refused to testify against their child. In that case, Amy S. Grossberg and her high school sweetheart, Bran C. Peterson, Jr., were charged in Delaware for allegedly murdering their newborn son. Grossburg's parents filed a motion to quash subpoenas requiring them to testify against their daughter, but Delaware Superior Court Judge Henry duPont Ridgely denied the motion, rejecting their claim of parent-child privilege.³⁰⁵ After Judge Ridgely denied their motion, the Grossbergs reluctantly answered the prosecutor's questions about what their daughter confided in them regarding her newborn son's death.³⁰⁶

While these incidents of parents refusing to testify against their children have created some controversy, the situation that has sparked the most recent debate regarding the merits of a parent-child privilege involves some of the most shocking and disputed allegations of this decade.³⁰⁷ In late January of 1998,

301. Sandlow, *supra* note 42, at 828.

302. Kandoian, *supra* note 145, at 83 (quoting Comment, *From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?*, 1978 B.Y.U. L. REV. 1002, 1027-28.)

303. See Barry Siegel, *Choosing Between Their Son and the Law*, L.A. TIMES, June 13, 1996, at A1. See also *Couple Who Refused to Testify Released After Son Charged in Rape*, MILWAUKEE J. SENTINEL, May 9, 1996, at 14; Wilson Ring, *Couple Jailed for Refusing Order to Testify Against Son*, PEORIA J. STAR, April 6, 1996, at A10, available in 1996 WL 6959816.

304. See Siegel, *supra* note 303.

305. See Futterman, *supra* note 182.

306. See Doug Most, *Grossbergs Questioned in Baby-Death Case*, BERGEN RECORD, Feb. 21, 1998, at A3.

307. See *Pieces of the Puzzle*, CHI. SUN TIMES, Jan. 23, 1998, at 3.

allegations that President Bill Clinton had a sexual relationship with Monica Lewinsky, a former White House intern, resulted in a media frenzy that brought the merits of a parent-child privilege into the national spotlight. To investigate these allegations, Independent Counsel Kenneth Starr called Marcia Lewis, Monica Lewinsky's mother, to testify in front of a federal grand jury about any conversations that Monica had with her mother regarding the President. Ms. Lewis was forced to testify after Kenneth Starr granted her immunity from prosecution. After two days of testimony, a visibly shaken Ms. Lewis broke down and was unable to continue testifying. The grand jury hearings were continued and Ms. Lewis left the courtroom in a wheelchair. She later asked U.S. District Court Judge Norma Holloway to excuse her from having to return to continue her testimony before the grand jury, but Judge Holloway rejected Ms. Lewis' request.³⁰⁸

The sight of this distraught mother renewed the debate over a parent-child privilege.³⁰⁹ Numerous newspaper articles, editorials, and television talk shows examined the topic.³¹⁰ In addition, Ken Starr's tactics motivated United States Senator Patrick Leahy to introduce legislation that asks the U.S. Judicial Conference to examine the merits of a parent-child privilege.³¹¹ Similar legislation has been introduced in the United States House of Representatives.³¹² This legislation would amend FRE 501 and create a parent-child privilege to protect confidential communications. The National Association of Criminal Defense Lawyers (NACDL) is also calling for the adoption of a parent-child privilege. Recognizing that a parent-child privilege would "promote and protect the important family values of trust and open communication between parent and child," the NACDL is calling on Congress and state legislatures to enact a statutory parent-child communication privilege.³¹³ In advocating the propriety

308. See John M. Broder, *Monica Lewinsky's Mother Fails in Bid to End Testimony*, N.Y. TIMES, March 26, 1998, at A16.

309. See *id.* The author notes how Marcia Lewis' ordeal "provoked sympathy from millions of Americans and criticism of independent counsel Kenneth Starr's tactics." *Id.* See also Daniel J. Capra, *Laws of Evidentiary Privilege*, N.Y. LAW J., May 8, 1998, at 3, col. 1. The author explains how "[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." *Id.*

310. See, e.g., *Mother and Witness Painful or Not, Marcia Lewis' Testimony is Important*, Editorial, PITTSBURGH POST-GAZETTE, Feb. 18, 1998, at A14; Margaret Carlson, *Should a Mom Rat on Her Daughter?*, TIME, Feb. 23, 1998, at 25; Lance Gay, *Starr Seen as Threat to Families Calling Lewinsky's Mother to Violate Daughter's Privacy Leaves Sour Taste with Many*, ROCKY MOUNTAIN NEWS, Feb. 15, 1998, at 3A; Ruth Marcas, *Starr's Tactics Trouble Some Prosecutors*, SEATTLE TIMES, Feb. 14, 1998, at A2; Adrienne T. Washington, *Starr Out of Bounds with Monica's Mother*, WASHINGTON TIMES, Feb. 24, 1998, at C2; Eric Zorn, *With Ma On Stand, Lawyers Can Mine the Mother Lode*, CHI. TRIB., Feb. 12, 1998, at 1.

311. See S. 1721, 105th Cong. (1998).

312. See H.R. 3577, 105th Cong. (1998).

313. National Association of Criminal Defense Lawyers, *Need for Parent/Child Privilege*,

of a parent-child privilege, the NACDL has specifically mentioned the United States Supreme Court's decision in *Jaffe*.³¹⁴ The NACDL's proposed privilege would protect confidential communications between a parent and child and would prevent each from testifying over the other's objection.³¹⁵

Independent Counsel Kenneth Starr's decision to force Marcia Lewis to testify against her daughter has also prompted three state legislatures to consider legislation that would create some type of parent-child privilege. In California, State Representative Zoe Lofgren introduced a bill entitled the "Confidence in the Family Act."³¹⁶ This legislation provides "that a witness cannot be compelled to testify in federal civil or criminal proceedings against his or her parent or child."³¹⁷ In New Jersey, state Senator Richard Codey introduced legislation that would create a privilege prohibiting "prosecutors from forcing parents to testify against their children."³¹⁸ In Illinois, State Representative Daniel Burke is sponsoring legislation that would make it less likely in civil proceedings for a parent or child to be forced to testify about confidential statements made to one another.³¹⁹

Paralleling this backlash against the erosion of the unwritten rule against calling parents and children to testify against each other is the explosion of juvenile crime arrest rates over the past decade.³²⁰ Although the juvenile crime rate has fallen for the first time during the past two years, there is still concern that the number of juvenile crimes will continue to increase. "Census projections reflect a growth in the juvenile population in the United States of nearly 20 percent between 1990 and 2010. Even if juvenile arrest rates do not continue to grow, the overall number of juvenile crimes committed likely will be dramatically higher in the next 20 years."³²¹ Increasing juvenile crime rates

22-APR CHAMPION 10, 10-11, Feb. 1998.

314. *Id.* "[T]he United States Supreme Court has gone beyond traditional common law privileges and has recently recognized an evidentiary privilege for communications between a social worker psychotherapist and a patient." *Id.* at 11.

315. *See id.*

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

317. Robert W. Peterson and Gerald F. Uelmen, Commentary, *Starr's Legacy May Include a New Privilege Law: Compelling Monica Lewinsky's Mother to Testify Has Spawned Calls for Protecting Parent-Child Communications*, L.A. TIMES, Apr. 23, 1998, at B9.

318. Kathy Barrett Carter, *Democrats Seek Ban on Prosecutors Pitting Parents Against Kids, Family Communications Would Be Privileged*, STAR-LEDGER, Feb. 24, 1998, at 29.

319. *See* Dennis Conrad, *Bill is Reaction to Lewinsky's Mother's Testimony, Woman Forced to Testify About Allegations Daughter Had Affair with President*, PEORIA JOURNAL STAR, March 21, 1998, at B6, available in 1998 WL 5758410.

320. *See Rate of Crime Drops*, TIMES UNION, Aug. 21, 1996 at A12, available in 1996 WL 9554778. "In 1980 the arrest rate for juvenile crime was about 340 arrests for every 100,000 youths aged 10 through 17. By 1994 it had reached a high of about 525 arrests before falling off in 1995 to 510 arrests for each 100,000 juveniles." *Id.*

321. James C. Backstorm, *Housing Juveniles in Adult Facilities: A Common-Sense Approach*, CORRECTIONS TODAY, June 1, 1997 at 20, available in 1997 WL 10514028; *See also*

create more opportunities for prosecutors to call parents to testify against their children. This increased opportunity, combined with the erosion of the practice of not calling parents and children to testify against each other, shows how parents and children need a parent-child privilege now more than ever.

Our judicial system should recognize a limited parent-child privilege. The family member who is being asked to testify should hold the privilege. Both parent and child witnesses should be able to invoke the privilege, as “[c]ompelled parent-child testimony can be just as crushing to families when a child betrays a parent as when a parent betrays a child.”³²² The privilege should apply not only to confidential communications, but also to adverse testimony. Similar to the marital privileges, with one protecting confidential communications and the other prohibiting forced adverse spousal testimony, a parent-child privilege should also have two components. Additionally, the adverse testimony privilege should protect the conduct of a parent or child that has been observed by the other.

The privilege should apply to all children, including adult children, as the relationship between parents and children is one that should always be fostered. “Sociological research has debunked the commonly espoused notion that parents and adult children in America typically lose contact and become relatively unimportant to each other.”³²³ Compared to a marital relationship that may be legally ended or a professional relationship that ends when services are complete, a parent-child relationship usually endures for many years. “Although spouses may separate and friends may drift apart, parents and children characteristically remain available to each other in times of need.”³²⁴

The privilege should be limited by permitting voluntary testimony of a parent or child. Similar to the rationale behind the adverse spousal testimony privilege (permitting voluntary testimony) if a parent or child is willing to testify against the other, then the relationship is likely not one that needs to be fostered. A parent may believe it is in her child’s best interests for the parent to testify, and in that situation, the judicial system should respect the parent’s choice.

The use of a case-by-case balancing approach would also limit the application of the privilege. This would help calm fears that recognizing a parent-child privilege is the first step down the “slippery slope” of encouraging privilege claims based on various other close relationships. A balancing approach should weigh the potential evidentiary significance of the matter sought against the interests protected by the privilege. These interests include protecting

Teen Crime Rate Down Nationwide, NEWS & OBSERVER, Aug. 9, 1996, at A5, available in 1996 WL 2891879. United States Attorney General Janet Reno explained, “[t]he arrest rate for children aged 10 to 17 declined 2.9 percent in 1995 and the arrest rate for murders by juveniles dropped 15.2 percent in 1995 and was down 22.8 percent since 1993. . . . These rates are still far too high. The number of juveniles over the next 15 years will increase significantly.” *Id*

322. Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910, 925 (1987).

323. *Id.* at 918.

324. *Id.* at 919.

and maintaining the intimate parent-child relationship, preventing public repugnance at the judicial system, and preventing a witness from having to choose between loyalty to a parent or child and perjury.³²⁵ By abandoning Wigmore's traditional utilitarian justification, a more flexible approach to privileges could be used to permit a judge to take into consideration many different factors such as the need for protected evidence, the nature of the relationship between the parent and child, the possible disruption of the relationship in question, and the nature of the particular case.³²⁶ A judge should also consider whether the parent and child are opposing parties in legal proceedings and whether the communications involved planning a future fraud or crime. If either of these situations is present, the judge should not recognize the privilege. Additionally, an uncertain balancing approach may induce litigants to try to obtain the evidence elsewhere to avoid the cost of litigating the issue of a parent-child privilege.³²⁷ An *in camera* screening of the evidence is also a possibility.³²⁸ While such a screening may invade a litigant's privacy to some degree, litigants would likely still prefer this small invasion to the current system, which provides no protection for communications between a parent and child.

CONCLUSION

The Supreme Court's recent decision in *Jaffe* makes the arguments for a federal parent-child privilege stronger than ever. By using a liberal approach of privilege law in recognizing a psychotherapist-patient privilege, *Jaffe* affirms federal courts' authority to recognize new privileges under FRE 501 and lends support to numerous legal and social policy arguments that have been repeatedly advanced by litigants, courts and scholars during the last twenty years. The recent public outcry against Independent Counsel Kenneth Starr's decision to force Marcia Lewis to testify against her daughter lends even further support for the creation of a parent-child privilege. Federal courts should recognize a qualified parent-child privilege that uses a balancing approach to determine if the privilege should be applied in a particular judicial proceeding. Such a privilege would still recognize the maxim that all relevant evidence should be placed before the trier of fact, but it would also protect the intimate relationship between a parent and child and prevent our judicial system from making the mistake of pursuing the truth at too high a cost.

325. See *id.* at 926.

326. See Margaret A. Berger, Comment, *The Privileges Article in the New York Proposed Code of Evidence*, 47 BROOK. L. REV. 1405, 1410 (1981).

327. See *id.* at 1489-90.

328. See *Developments in the Law*, *supra* note 10, at 1489-91 (citing Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 483-84 (1977)).

