Jaffee v. Redmond: The Supreme Court Recognizes the Psychotherapist-Patient Privilege in the Federal Courts and Expands the Privilege to Include Social Workers

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I. INTRODUCTION

In the recent landmark decision of Jaffee v. Redmond,1 the United States Supreme Court announced that confidential communications by a patient to a psychotherapist are absolutely privileged.2 Furthermore, the Court held that confidential communications by a party to a social worker are within the bounds of this psychotherapist-patient privilege.3 This comment examines the Court’s decision in Jaffee, focusing on the respective strengths and weaknesses of the reasoning employed by the majority and the dissent. Specifically, it is this author’s position that the majority’s decision in Jaffee is sound, well-reasoned, and based on the realities of our current social climate. On the other hand, Justice Scalia’s dissent is ill-conceived, illogical, dogmatic, and flies in the face of common sense and reason.

2. Id. at 1931.
3. Id.

Published by NSUWorks, 1997
The Supreme Court has consistently been reluctant to create new evidentiary privileges or to expand existing privileges. The general rationale the Court has used for refusing to recognize or expand privileges is that to do so is to exclude relevant evidence from the trier of fact. In other words, in a search for the truth, the public has a right to all relevant evidence. Only when the public need for an evidentiary privilege substantially outweighs the ordinary truth finding process will the Court deviate from this rationale.

In *Trammel v. United States*, the Supreme Court demonstrated its narrow view toward evidentiary privileges by cutting back the scope of the spousal immunity privilege, holding that only the testifying spouse could assert the privilege.

The federal courts' authority to recognize new privileges is derived from Rule 501 of the *Federal Rules of Evidence*. When the rules regarding privileges were proposed, the drafters incorporated several common law privileges, including a psychotherapist-patient privilege. However,

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8. 445 U.S. 40 (1980). Trammel was charged with conspiracy to import heroin into the United States. *Id.* at 42. Trammel’s wife was called to testify on behalf of the government in order to implicate her husband. *Id.* at 42–43. Trammel sought to invoke the spousal immunity privilege in an attempt to have his wife’s testimony excluded. *Id.* at 42.

9. *Id.* at 53.

10. FED. R. EVID. 501. This rule provides:

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.

*Id.*

Congress rejected a rigid adoption of privileges, and instead, adopted a
general rule giving the federal courts discretion to create new privileges.¹²

The cornerstone of the Supreme Court’s decision in Jaffee was rule
501.¹³ In Jaffee, two important issues were presented.¹⁴ One was whether
the Supreme Court should formally recognize the psychotherapist-patient
privilege under its powers granted by rule 501,¹⁵ and two, if such a privilege
were to be recognized, whether the privilege should extend to social workers
as well as to psychotherapists and clinical psychologists.¹⁶ Some federal
courts had previously recognized the psychotherapist-patient privilege at the
time Jaffee came before the Supreme Court for review.¹⁷ However, there
was still considerable disagreement among the circuits as to whether the
privilege should be recognized at all.¹⁸ Moreover, prior to Jaffee, even
where the psychotherapist-patient privilege did exist, various federal courts
held conflicting views regarding the scope of the privilege.¹⁹ Therefore,
when the Supreme Court granted certiorari in Jaffee,²⁰ the issue of the
psychotherapist-patient privilege in the federal courts cried out for resolu-
tion.

The issues presented in Jaffee are important ones to our society, given
that many people in our population need therapy in some context or another,
at some point in their lives. Complete and candid disclosure is at the heart of
the relationship between patient and psychotherapist.²¹ The Supreme
Court’s decision in Jaffee will have a significant impact on this relationship,
for it will foster open communication between patient and therapist.

dence, but excluding proposed rule 504 containing 10 specific common law privileges, among
which was the psychotherapist-patient privilege).
¹³ Jaffee, 116 S. Ct. at 1927; see also Fed. R. Evid. 501.
¹⁴ Id. at 1925.
¹⁵ Id.
¹⁶ Id.
¹⁷ See, e.g., In re Doe, 964 F.2d 1325, 1328 (2d Cir. 1992); In re Zuniga, 714 F.2d 632,
639 (6th Cir. 1983) (holding that the psychotherapist-patient privilege is recognized by the
federal courts).
¹⁸ See, e.g., United States v. Burtrum, 17 F.3d 1299, 1302 (10th Cir. 1994); In re Grand
Jury Proceedings, 867 F.2d 562, 565 (9th Cir. 1989) (refusing to recognize a psychotherapist-
patient privilege). See generally Bruce J. Winick, The Psychotherapist-Patient Privilege: A
Therapeutic Jurisprudence View, 50 U. MIAMI L. REV. 249 (1996) (discussing the general
disagreement in the federal system regarding the privilege).
¹⁹ Jaffee, 116 S. Ct. at 1939.
²⁰ Jaffee v. Redmond, 51 F.3d 1346 (7th Cir. 1995), cert. granted, 116 S. Ct. 334
²¹ Jaffee, 116 S. Ct. at 1928.
Without access to all of the "pieces to the puzzle," mental health professionals are impeded in their quest first to understand and then to help the patient.\textsuperscript{22} The logical end result of the Court's failure to recognize the psychotherapist-patient privilege, or to give it any significant breadth, can only be that the full and honest disclosure, so vital to a successful course of therapy, would be chilled.\textsuperscript{23} Thus, the \textit{Jaffee} decision is extremely significant because it will affect patients who see mental health professionals of all kinds, despite whether or not these patients go on to become litigants. It will bear upon the course of therapy indicated and provided by those professionals and it will surely influence the way lawyers try cases, as well as the nature and extent of evidence that juries get to see. Indeed, the \textit{Jaffee} decision will affect the very outcome of some cases.

\section*{II. THE HISTORY OF JAFFEE V. REDMOND}

\subsection*{A. Facts of the Case}

On June 27, 1991, Officer Mary Lu Redmond was dispatched to a "‘fight in progress’" taking place at an apartment complex in her jurisdiction.\textsuperscript{24} Upon arrival, Officer Redmond was greeted at her squad car by two frantic individuals shouting that there had been a stabbing.\textsuperscript{25} After calling for backup, Officer Redmond exited her squad car and proceeded to walk toward the apartment complex.\textsuperscript{26} As Redmond approached the structure, several men ran from the building, one of whom was waving a metal pipe.\textsuperscript{27} Officer Redmond ordered the men to the ground, and upon their refusal drew her weapon.\textsuperscript{28} A moment later, two additional men burst from the building.\textsuperscript{29} Although the facts are in dispute,\textsuperscript{30} according to Officer Redmond, one of

\begin{itemize}
  \item\textsuperscript{22} \textit{Id.} \textit{See also} Brief for American Psychiatric Association at *12–17, \textit{Jaffee v. Redmond}, No. 95-266, 1995 WL 767892 (U.S. Dec. 29, 1995) [hereinafter Amicus Brief].
  \item\textsuperscript{23} \textit{Id.} at *14.
  \item\textsuperscript{24} Brief for Petitioner at *3, \textit{Jaffee v. Redmond}, No. 95-266, 1995 WL 723662 (U.S. Nov. 30, 1995).
  \item\textsuperscript{25} \textit{Id.} at *4. The two individuals turned out to be relatives of the decedent Ricky Allen and would later testify against Officer Redmond at trial. \textit{Id.}
  \item\textsuperscript{26} \textit{Id.}
  \item\textsuperscript{27} \textit{Id.}
  \item\textsuperscript{28} Brief for Petitioner at *4.
  \item\textsuperscript{29} \textit{Id.}
  \item\textsuperscript{30} The siblings of the Ricky Allen related a story that conflicted with Officer Redmond's version of the events. \textit{Jaffee}, 51 F.3d at 1349. For example, there was conflicting testimony regarding what point in time Officer Redmond drew her weapon. \textit{Id.}
\end{itemize}
those men, Ricky Allen, was brandishing a butcher knife while in pursuit of another man.\textsuperscript{31} Despite Officer Redmond's repeated commands for Allen to drop the weapon and get to the ground, he continued in pursuit.\textsuperscript{32} Finally, when Officer Redmond believed Allen was about to stab the man he was chasing, Redmond fired her service revolver, striking Allen.\textsuperscript{33} Allen was pronounced dead at the scene by emergency personnel.\textsuperscript{34}

Ricky Allen's surviving family members sued Officer Redmond and her employer, the Village of Hoffman Estates, in federal court for civil rights violations and wrongful death.\textsuperscript{35} During discovery, the plaintiffs learned that Officer Redmond had attended numerous counseling sessions with a clinical social worker named Karen Beyer.\textsuperscript{36} The plaintiffs attempted to discover the content of the counseling sessions between Redmond and Beyer to use as substantive evidence during the trial.\textsuperscript{37} The defendants objected to discovery of the sessions between Redmond and Beyer, asserting that the communications were protected by the psychotherapist-patient privilege.\textsuperscript{38} The trial court rejected the defendants' argument that the conversations were privileged and ordered discovery of Beyer's notes of the conversations.\textsuperscript{39}

The trial court's order was never fully complied with by Officer Redmond or Karen Beyer.\textsuperscript{40} During depositions and at trial, Redmond and Beyer either refused to answer certain questions or were entirely evasive.\textsuperscript{41}

Ultimately, over the defendants' objection, the trial judge instructed the jury that the refusal to reveal the notes was not legally justified and that the jury could presume that the subject matter of the conversations would have been unfavorable to Officer Redmond and her employer, the Village of

\textsuperscript{31} Brief for Petitioner at *4.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at *5.
\textsuperscript{36} Brief for Petitioner at *5.
\textsuperscript{37} Id. at *5--6.
\textsuperscript{38} Id. at *6.
\textsuperscript{39} Jaffee, 51 F.3d at 1350--51. The district court judge determined that federal law rather than state law governed the privilege issue. Id. In doing so, the judge relied on proposed rule of evidence 504 and held that the rule did not extend to social workers. Id. at 1350 n.5.
\textsuperscript{40} Id. at 1351. See also Brief for Petitioner at *8.
\textsuperscript{41} Jaffee, 51 F.3d at 1351. Karen Beyer refused to hand over her notes of the counseling sessions and provided limited answers regarding Officer Redmond's version of the shooting. Id. Additionally, Officer Redmond, both at her deposition and during trial, responded "I don't recall" numerous times. Id.
Hoffman Estates. The jury returned a verdict for the plaintiffs and judgment was entered in favor of Allen's estate.

B. Procedural History

On appeal, the Seventh Circuit Court of Appeals reversed, holding that the trial court committed prejudicial error by compelling discovery of the notes and giving the adverse jury instruction. Specifically, the court held that the conversations between Redmond and Beyer were protected by the psychotherapist-patient privilege, and therefore, were inadmissible.

The court of appeals reasoned that the law of privileges could be expanded by the federal courts in accordance with the Federal Rules of Evidence. Furthermore, the rules call for recognition of a psychotherapist-patient privilege. The court stated that the privilege is not absolute but rather is a qualified privilege. In each case, the need for the privilege must be balanced against the need to ascertain the truth through the introduction of all relevant evidence at trial.

In the instant case, the need for private communications between a psychotherapist and her patient outweighed the plaintiffs need for the evidence. Hence, the court concluded that the jury instruction, which allowed the jury to draw an adverse inference against Officer Redmond and the Village of Hoffman Estates, constituted prejudicial error.

C. Analysis of the Seventh Circuit Decision

The majority used rule 501 as the foundation for its decision. First, the court stated that reason dictates the recognition of the psychotherapist-patient privilege in the federal courts. The court's rationale here was that public policy mandates the existence of the privilege. Mental health is of
great importance in our society and essential to mental health is open and
candid communication between a psychotherapist and her patient.\textsuperscript{54} Second,
experience dictates that the privilege should be recognized, since some form
of the psychotherapist-patient privilege is recognized in all fifty states.\textsuperscript{55}

However, as noted, the Seventh Circuit did not rule that the privilege
was absolute.\textsuperscript{56} Rather, the court held that the privilege is qualified and must
be balanced against the need to find the truth during the judicial process.\textsuperscript{57}
In balancing these two competing interests, the court reasoned that without
the privilege, communications between a psychotherapist and her patient
would be chilled.\textsuperscript{58} Most significantly, the court observed that the need for
open communications is essential for effective psychotherapy.\textsuperscript{59}

On the other hand, the court noted that although the conversations
between Officer Redmond and Karen Beyer were relevant to the substantive
issues of the plaintiffs' case, the plaintiffs had alternative evidence which
was just as effective.\textsuperscript{60}

\begin{flushright}
\textsuperscript{54} Id. at 1355–57.
\textsuperscript{55} Id. at 1356. See also ALA. CODE § 34-26-2 (1975); ALASKA R. EVID. 504; ARIZ.
REV. STAT. ANN. § 32-2085 (1992); ARK. R. EVID. 503; CAL. EVID. CODE ANN. § 1010
(1995); COLO. REV. STAT. § 13-90-107(g)(1) (1987); CONN. GEN. STAT. § 52-146c (1995);
DEL. UNIF. R. EVID. 503; D.C. CODE ANN. § 14-307 (1995); FLA. STAT. § 90.503 (West
1995); GA. CODE ANN. § 24-9-21 (1995); HAW. R. EVID. 504; IDAHO R. EVID. 503; ILL.
REV. STAT. ch. 225 § 15.5 (1994); IND. CODE § 25-33-1-17 (1993); IOWA CODE § 622.10
(1987); KAN. STAT. ANN. § 74-5323 (1985); KY. R. EVID. 507; LA. CODE EVID. ANN., art.
510 (West 1995); ME. R. EVID. 503; MD. CRS. & JUD. PROC. § 9-109 (1995); MASS. GEN.
L. § 233:20B (1995); MICH. COMP. LAWS ANN. § 333.18237 (West 1996); MINN. STAT.
ANN § 595.02 (West 1996); MISS. R. EVID. 503; MO. REV. STAT. § 491.060 (1994); MONT.
CODE ANN. § 26-1-807 (1995); NEB. REV. STAT. § 27-504 (1995); NEV. REV. STAT. ANN.
§ 49.209 (Michie 1996); N.H. R. EVID. 503; N.J. STAT. ANN. § 45:14B-28 (West 1995);
N.M. R. EVID. 504; N.Y. CIV. PRAC. L. & R. § 4507 (McKinney 1992); N.C. GEN. STAT. §
8-53.3 (1995); N.D. R. EVID. 503; OHIO REV. CODE ANN. § 2317.02 (1995); OKLA. STAT.
tit. 12 § 2503 (1991); OR. R. EVID. 504.1; 42 PA. CONS. STAT. § 5944 (1982); R.I. GEN.
LAWS § 5-37.3-3 (1995); S.C. CODE ANN. § 19-11-95 (Law. Co-op. 1995); S.D. CODIFIED
LAWS ANN. § 19-13-6 to 19-13-11 (1995); TENN. CODE ANN. § 24-1-207 (1980); TEX. R.
CIV. EVID. 509, 510; UTAH R. EVID. 506; VT. R. EVID. 503; VA. CODE ANN. § 8.01-400.2
(1992); WASH. REV. CODE § 18.83.110 (1994); W. VA. CODE §§ 27-3-1 (1992); WIS. STAT.
\textsuperscript{56} Jaffee, 51 F.3d at 1357.
\textsuperscript{57} Id. at 1357–58.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id. There were several eyewitnesses who testified on behalf of the plaintiff. Jaffee,
51 F.3d at 1357–58. The testimony of these eyewitness accounts could possibly be used to
test Officer Redmond's credibility just as effectively as Beyer's notes from the counseling
Accordingly, the court concluded that the need for the subject matter of the conversations as evidence was outweighed by the public's need for the psychotherapist-patient privilege.61

III. THE SUPREME COURT DECISION

A. Plaintiffs' Argument Before the Supreme Court

The plaintiffs argued that, in light of the Court's cautious approach to the creation of new privileges, the costs of the psychotherapist-patient privilege outweighed any benefits that might be received by recognizing the privilege.62

First, the plaintiffs contended that the cost of a psychotherapist-patient privilege would be substantial.63 The plaintiffs argued that since therapists, unlike lawyers, are not officers of the court, they have no real legitimate interest in the search for the truth.64 Accordingly, there is a real danger that a therapist may help to generate inconsistent recollections of a particular incident through therapy.65 Moreover, the plaintiffs contended that to allow such a broad privilege as was adopted by the appellate court would keep highly relevant evidence from the jury.66 This case turned on Officer Redmond's credibility, the plaintiffs argued, and to allow the privilege would significantly hinder the plaintiffs' attempt to impeach her credibility.67

Second, according to the plaintiffs, the benefits of the psychotherapist-patient privilege are unclear and speculative at best.68 The plaintiffs in Jaffee contended that there is no real science to prove that the absence of the psychotherapist-patient privilege would chill effective psychotherapy, as was urged by the appellate court and the defendants.69

Third, the plaintiffs further argued that there is no indication that the experience of the common law calls for an adoption of the psychotherapist-

61. Id.
62. Brief for Petitioner at *12.
63. Id.
64. Id.
65. Id.
66. Id. at *21–22.
67. Brief for Petitioner at *21. The plaintiffs alleged that Officer Redmond's memory of the events surrounding the incident became clearer and more self-serving as time passed. Id.
68. Id. at *26.
69. Id. at *26–27.
patient privilege in the federal courts.\textsuperscript{70} They observed that although all fifty states have adopted some form of the privilege,\textsuperscript{71} no state has adopted a privilege as broad as that urged by the appellate court.\textsuperscript{72}

Fourth, the plaintiffs pointed out that state laws which recognize a privilege between a psychotherapist and her patient are inconsistent as to the scope of the privilege.\textsuperscript{73} This is evidenced by the fact that the state laws are littered with exceptions.\textsuperscript{74} Furthermore, the plaintiffs pointed out that nine states do not recognize any evidentiary privilege between a social worker and her patient.\textsuperscript{75}

Finally, the plaintiffs contended that if the Court were to recognize an evidentiary privilege between a psychotherapist and patient, the Court should not expand that privilege of confidentiality to social workers.\textsuperscript{76} Here, the plaintiffs relied on the psychotherapist-patient privilege proposed by the \textit{Federal Rules of Evidence}.\textsuperscript{77} Proposed rule 504 speaks only of a "psychotherapist" and makes no mention of the term "social worker."\textsuperscript{78} Hence, plaintiffs argued, Congress did not intend that the privilege extend to social workers as well as psychotherapists.\textsuperscript{79}

\textbf{B. Defendants' Argument Before the Supreme Court}

The defendants argued that not only should there be a psychotherapist-patient privilege but that the privilege should extend to social workers as well.\textsuperscript{80} The defendants asserted that the decision by the Seventh Circuit was harmonious with rule 501, as well as with the congressional intent behind the rule.\textsuperscript{81} The defendants further contended that under rule 501 both reason and experience dictate the creation of the psychotherapist-patient privilege.\textsuperscript{82}

\begin{itemize}
\item \textsuperscript{70} Id. at *31.
\item \textsuperscript{71} See statutes cited supra note 55.
\item \textsuperscript{72} Brief for Petitioner at *31.
\item \textsuperscript{73} Id. at *37.
\item \textsuperscript{74} Id. at *31–33.
\item \textsuperscript{75} Id. at *35 n.66.
\item \textsuperscript{76} Id. at *39.
\item \textsuperscript{77} Brief for Petitioner at *39–40. \textit{See also Rules of Evidence for United States Courts and Magistrates}, \textit{supra} note 11, at 240–41 (proposing rule 504 of the \textit{Federal Rules of Evidence}).
\item \textsuperscript{78} Brief for Petitioner at *39.
\item \textsuperscript{79} Id.
\item \textsuperscript{80} Brief for Respondent at *11, Jaffee v. Redmond, 51 F.3d (7th Cir. 1995) (No. 95-266).
\item \textsuperscript{81} Id. at *9.
\item \textsuperscript{82} Id. at *9–10.
\end{itemize}
As for reason, the defendants relied heavily on the public policy underlying the privilege. Like the court of appeals, the defendants pointed out that psychotherapy serves a very important interest in our society. The premise here is that society encourages its citizens to seek mental health assistance freely and openly. Essential to these sessions is the confidentiality between the patient and therapist. Without confidentiality, citizens would be reluctant to candidly disclose crucial information needed to assure effective counseling. This is especially true with regard to police officers. Police officers such as Mary Lu Redmond are subjected to stressful situations in the line of duty on a daily basis. Many times, officers will need to seek counseling in regard to specific incidents that occur while on duty, as did Officer Redmond in this case. Critical to an officer’s mental health is the need for that officer to reveal the facts surrounding the incident without fear that his or her communications will be disclosed to third parties. Therefore, argued the defendants, in order for there to be effective therapy for a police officer or an ordinary citizen, the courts must assure the patient confidentiality at all cost.

The defendants also contended that experience requires the Court to adopt the psychotherapist-patient privilege, noting that all fifty states have adopted some form of the psychotherapist-patient privilege. The defendants responded to the plaintiffs by pointing out that although some states do have exceptions to the privilege, it is not logical to reject entirely the psychotherapist-patient privilege for this reason.

Moreover, the defendants urged that the privilege should apply to clinical social workers, such as Karen Beyer, as well as to psychothera-

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84. Brief for Respondent at *22.
85. Id. at *22–23.
88. Id.
89. Id. at *19–20.
90. Id. at *20.
91. Id. at *22.
93. See statutes cited supra note 55.
pists. In rebuttal to the plaintiffs' argument in regard to proposed rule 504, the defendants pointed out that at the time Congress drafted rule 504, the social work profession was in “early adolescence.” However, since that time, the social worker has become prevalent in the field of mental health. This is especially true since many people who cannot afford a psychologist or psychiatrist will often seek out the help of a social worker at a lesser expense. In light of the social worker's increased role in the field of mental health, it would be unfair to allow the privilege for psychotherapists and not social workers.

Finally, agreeing with the court of appeals, the defendants conceded that the privilege was not absolute. In every case, in order for the privilege to apply, the need for confidential communications between a psychotherapist and patient must be outweighed by the desire to include all relevant evidence at trial. In this case, the appellate court concluded, the plaintiffs had alternative evidence which would have served the same purpose as the notes of Karen Beyer. Specifically, numerous eyewitness accounts of the shooting were used to impeach Officer Redmond's testimony. Conversely, as indicated, Officer Redmond's need to have her conversations protected are essential to her work as a police officer. Hence, the defendants concluded that the Court should affirm the decision of the appellate court.

C. The Majority Opinion

As it had been for the appellate court, the framework for the Supreme Court's decision in Jaffee was the Federal Rules of Evidence. The Court reasoned that rule 501 was not intended to freeze the law of privileges but

95. Id.
96. Id. at *30–31.
97. Id. at *31.
98. Id.
100. Id. at *12.
101. Id.
102. Id. at *35–37.
103. Id. at *37.
105. Id.
rather to encourage the federal courts to continue to develop evidentiary privileges in light of reason and experience.\textsuperscript{107}

First, the majority conceded that past decisions indicated there should be a strong presumption against creating new evidentiary privileges.\textsuperscript{108} However, the Court noted that new privileges can be justified by ""public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.""\textsuperscript{109}

Like the appellate court, the majority relied heavily on public policy.\textsuperscript{110} The Court stated that like other privileges that have been adopted at common law, the psychotherapist-patient privilege is ""rooted in the imperative need for confidence and trust.""\textsuperscript{111} The majority concurred with the defendants’ proposition that like the attorney-client privilege, effective therapy depends on open and candid communications.\textsuperscript{112}

The Supreme Court also adopted the defendants’ view, and that of the court of appeals, that experience mandates the creation of the psychotherapist-patient privilege.\textsuperscript{113} The fact that the states have unanimously agreed that some form of the privilege should exist strongly suggests that experience with the privilege has been positive.\textsuperscript{114}

The majority also ruled the privilege should apply to clinical social workers as well as psychotherapists.\textsuperscript{115} Again, the rationale for extending the parameters of the privilege was that the privilege would not serve its purpose to society if not extended to social workers.\textsuperscript{116}

Up until this point, the majority was in agreement with the court of appeals ruling; however, the majority did not agree with the appellate court’s finding that the privilege should be a qualified one.\textsuperscript{117} The Court expressed that the privilege would be undermined if judges were to subject the privilege to a balancing test in each and every case as the appellate court had suggested.\textsuperscript{118} In order for the privilege to be effective, the parties to the

\textsuperscript{107} Id. at 1927.
\textsuperscript{108} Id. at 1928.
\textsuperscript{109} Id. (quoting Elkins v. United States, 364 U.S. 206, 234 (1960)).
\textsuperscript{110} Id. at 1929.
\textsuperscript{111} Jaffee, 116 S. Ct. at 1928 (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 1930.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 1931.
\textsuperscript{116} Jaffee, 116 S. Ct at 1931.
\textsuperscript{117} Id. at 1932.
\textsuperscript{118} Id.
conversation "must be able to predict with some degree of certainty whether particular discussions will be protected." The Court concluded, however, that there was no need to develop the full scope of the privilege nor would it be feasible to do so here and left that for future courts to decide.

D. The Dissenting Opinion

In a vigorous dissent, Justice Scalia accused the majority of having incorrectly framed the main issue. Most of the majority opinion was devoted to the question of whether the federal courts should, generally speaking, recognize a psychotherapist-patient privilege. Justice Scalia contended that the only proper question before the Court was whether there should be a social worker-patient privilege. Further, Justice Scalia argued that to frame the issue as the majority had was deceptive and countermanded the Court’s earlier decisions requiring it to proceed with caution when developing new evidentiary privileges.

The dissent contended that there is no real evidence to support the assertion that refusing to recognize the privilege would hinder effective psychotherapy, as the majority suggested. Justice Scalia thought it unlikely that an individual will be deterred from seeking counseling merely because he fears his conversations will be disclosed during litigation. Even if the privilege were to exist, the effect it would have on encouraging open communications is at best speculative, urged Justice Scalia. While Justice Scalia, with the majority, agreed that psychotherapy is indeed an essential part of our society, he contended that relevant evidence, in order to ascertain the truth at trial, outweighs that need.

In addition, Justice Scalia asserted that the disagreement among the states as to the nature and scope of the psychotherapist-patient privilege indicates that this is a job for Congress rather than the courts. He pointed to the fact that several states have expressed many exceptions to the privi-
lege and that at least ten states have refused to recognize an evidentiary privilege at all for a social worker.\textsuperscript{130} To the dissent, this lack of uniformity suggests that experience with the privilege varies widely among the states.\textsuperscript{131} Justice Scalia pointed out that no state has adopted the psychotherapist-patient privilege without restriction as the majority did here.\textsuperscript{132} Therefore, according to Justice Scalia’s dissent, the majority’s reliance on the experience of state legislatures in adopting the privilege was inadequate.\textsuperscript{133}

Justice Scalia conceded that, theoretically, perhaps there should be a privilege for social workers and their patients.\textsuperscript{134} However, considering the federal courts’ authority under rule 501, and the presumption against privileges in general, any need for an evidentiary privilege is outweighed by the need for accurate truth finding at trial.\textsuperscript{135} There were fourteen amicus briefs submitted on behalf of the defendants in this case.\textsuperscript{136} Most of those briefs came from mental health organizations in support of confidential communications between a mental health worker and her patient.\textsuperscript{137} On the other hand, there was not a single amicus in favor of the plaintiffs.\textsuperscript{138} According to Justice Scalia, perhaps this is because “[t]here is no self-interested organization out there devoted to pursuit of the truth in the federal courts.”\textsuperscript{139}

In closing, Justice Scalia expressed disenchantment with what he believed was the Court’s failure to live up to the expectation that it will pursue truth, and as a result, Justice Scalia believes, federal courts will become “tools of injustice.”\textsuperscript{140}

E. Analysis of Jaffee v. Redmond

One would be hard pressed to find fault with the majority’s view that full, open, and honest disclosure by patients to mental health professionals is crucial to effective therapy and recovery.\textsuperscript{141} Unlike doctors, psychiatrists,
psychologists, and social workers do not rely heavily upon physiological 
indicia to analyze a patient’s problem or to determine an appropriate course 
of therapy. While biological factors sometimes play a part in certain mental 
ilnesses like schizophrenia or depression, a tongue depressor in the mouth, a 
stethoscope to the heart or a computerized axial tomography are not methods 
of exploration primarily employed by mental health professionals. Rather, it 
is largely talk—what the patient says—that provides the mental health 
professional with the key that unlocks the door to the patient’s particular 
problems. When, out of fear of reprisal, the subject is highly motivated to 
suppress information that would otherwise help to give a clear and accurate 
picture to the therapist, the therapist is vastly impeded from providing 
effective therapy. 1 4 2 According to a report of the Group for the Advance-
ment of Psychiatry, “‘confidentiality is a sine qua non for successful 
successful psychiatric treatment.” 1 4 3 It would be like a tailor trying to make a suit for 
somebody without knowing all of the subject’s measurements. Counseling 
that is given in the wake of concealment of the facts or the provision of half 
truths by the subject renders that counseling a product of ignorance. It is 
axiomatic that a mentally sound populace is an absolute prerequisite to a 
stable and productive society. 1 4 4 Therefore, given the plethora of mental 
health problems, ranging from the serious to the extremely acute, that have 
plagued Americans in recent times, 1 4 5 rules of law that profoundly impair 
effective mental health treatment must be questioned and carefully scruti-
nized.

We probably will never know what Officer Redmond told her social 
worker in the aftermath of a terrible tragedy wherein Officer Redmond was 
the direct instrument of another human being’s demise. We do know, 
however, that most people in Officer Redmond’s shoes who harbored even 
the slightest degree of uncertainty as to whether some act or omission could 
result in significant penal or pecuniary repercussions to them, would remain 
silent as to those particulars. It may be that the act or omission in question 
was completely justifiable from an objective standpoint, yet as the Jaffee 
majority wisely noted, the fear of uncertainty that what patients say will

142. Id. See also Amicus Brief, Jaffee v. Redmond, No. 95-266, 1995 WL 767892 (U.S. 
Dec. 29, 1995).
143. Jaffee, 116 S. Ct. at 1928 (citations omitted).
144. See generally Jaffee v. Redmond, 116 S. Ct. 1923 (1996); Jaffee v. Redmond, 51 
F.3d 1346 (1995); Amicus Brief, Jaffee, (No. 95-266).
145. See GROUP FOR ADVANCEMENT OF PSYCHIATRY, REPORT 45, CONFIDENTIALITY AND 
PRIVILEGED COMMUNICATION IN THE PRACTICE OF PSYCHIATRY 92 (1960).
come back to haunt them will cause them to remain mute or distort the facts.\footnote{Jaffee, 116 S. Ct. at 1928.} Therapy sessions would then often be relegated to exercises in futility with the therapist flying blind and the subject deriving little or no benefit since the root of the problem never comes to light.\footnote{Id. (citations omitted).}

Zeroing in on the situation of police officers in particular, the \textit{Jaffee} majority’s line of reasoning is persuasive. Implicit in this reasoning is a premise that few would challenge. That is, society needs to have its police officers in a good state of mental health.\footnote{Id.} In order to maintain this state of mental health among these protectors of society, one must encourage them to divulge each and every aspect of the particular stressful situation which led to the need for counseling in the first place.\footnote{Id. at 1929.} Thus, one must not adhere to rules of jurisprudence which will have a chilling effect upon complete disclosure. From this point of departure, there is certainly no great leap in logic involved in applying this reasoning to our citizenry as a whole. For who would dispute that society is nothing more than a collective of individuals and that the mental health of these individuals determines, in turn, the degree of stability of that society? The majority’s logic in \textit{Jaffee} is unassailable if one accepts the premise that complete candor to the therapist is necessary to effective therapy.

However, there is at least one very vocal opponent to that premise, namely Justice Scalia, whose dissent will be discussed.\footnote{Id. at 1932 (Scalia, J., dissenting).} The central thesis of Justice Scalia’s dissent is weak on its face. His contention is that regardless of any benefit that may inure to society through recognition of a psychotherapist-patient privilege, the “purchase price” of that benefit is too high.\footnote{Jaffee, 116 S. Ct. at 1932.} What is this metaphorical “purchase price” to which Justice Scalia refers? According to him, it is that of “occasional injustice.”\footnote{Id.} Not rampant injustice, or even frequent injustice, but rather “occasional injustice.” What Justice Scalia must be referring to are those instances where the only proof that one engaged in culpable conduct is his or her admission to a therapist and where there is no separate and independent evidence of culpability. The flaw in the dissent’s approach, however, is that if no privilege is recognized, the whole truth will not be disclosed to therapists during counseling.

\begin{thebibliography}{99}
\bibitem{Jaffee} Jaffee, 116 S. Ct. at 1928.
\bibitem{Id} Id. (citations omitted).
\bibitem{Id} Id.
\bibitem{Id} Id. at 1929.
\bibitem{Id} Id. at 1932 (Scalia, J., dissenting).
\bibitem{Jaffee} Jaffee, 116 S. Ct. at 1932.
\bibitem{Id} Id.
\end{thebibliography}
Therefore, justice will not be served anyway because therapists cannot testify about that which they do not know. And certainly, if, in a given case, there were to exist some independent evidence, the mere fact that a defendant had made incriminating admissions to a therapist would not shield that defendant from the inculpatory effect of such independent evidence. Thus, with or without the privilege, in the vast majority of cases, the state or plaintiff will have to prove the case without resort to the testimony of the defendant's therapist. Moreover, "occasional injustice" is not an unduly high price to pay for the benefit of maintaining solid mental health among members of society. Only if one accepts the notion that professional therapy is not an effective means of dealing with mental health problems can he buy Justice Scalia's apparent assertion that the cost of recognizing a privilege here is too high. In fact, it is Justice Scalia's position that a talk with "mom" has more therapeutic value than professional counseling.\footnote{Id. at 1934.} No wonder that to him instances of injustice for the few cannot be tolerated for the sake of facilitating professional treatment for the many. Scalia contends that the "average citizen," if questioned, would say that his mental health would be more impaired if he were prevented from getting advice from his mother than by being prevented from talking to a psychotherapist.\footnote{Id.} The response to this is, so what? Justice Scalia's assertion completely begs the question. It is akin to saying: X is more valuable than Y; therefore, Y has little or no value. Furthermore, people do not have to choose between their mother and a therapist. Indeed, there may be a significant portion of the population which would admit that, notwithstanding filial love and devotion, they were actually driven into therapy by too much unsolicited advice from their mothers!

Justice Scalia goes on to compare the psychotherapist-patient privilege to the situation where evidence is excluded because a criminal defendant has not been properly "Mirandized."\footnote{Id. at 1932.} In the latter situation that pontificates Justice Scalia, "the victim of the injustice is always the impersonal State [sic] or the "faceless 'public at large.'"\footnote{Jaffee, 116 S. Ct. at 1932.} However, this is far from true. Certainly, it is an extremely bitter pill for the family and friends of the victim of a cold-blooded homicide to see the perpetrator "walk," simply because the

\footnotesize{\begin{itemize}
\item \textit{153.} Id. at 1934.
\item \textit{154.} Id.
\item \textit{155.} Id. at 1932. \textit{See generally} WAYNE R. LAFAVE \& JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.1 (2d ed. 1992) (discussing the effects of the exclusionary rule in criminal cases).
\item \textit{156.} \textit{Jaffee}, 116 S. Ct. at 1932.
\end{itemize}}
police made a procedural mistake. The loved ones of the decedent must go on each day haunted by the legacy of the private injustice which they have suffered. These loved ones are far more the victims of this injustice than an abstract "impersonal State" [sic] or "faceless public at large." These victims have faces and they certainly have feelings. This is not to suggest that Scalia is any great patron of the exclusionary rule and, true to his ultra-conservative judicial philosophy, both the psychotherapist-patient privilege and the Fifth Amendment privilege against self-incrimination would be unceremoniously dragged out to the chopping block if he had his druthers. In the end, the price of perfect justice, as it would be in Justice Scalia's grand design, could ultimately be nothing short of complete eradication of constitutional protections for all defendants. The "purchase price" (to use Justice Scalia's term) of this would be monumentally higher than the price of "occasional injustice" about which he struts and frets.

Another main contention by the dissent is that even assuming that the federal courts should somehow recognize a psychotherapist-patient privilege, communications to "social workers" should not be embraced within that privilege. Why does Justice Scalia feel that way? His answer is that through the annals of history, we have "worked out [our] difficulties by talking to, inter alios, parents, siblings, best friends and bartenders—none of whom was awarded a privilege against testifying in court." First of all, a privilege is not an "award," it is a rule of evidence based on reason and social policy reflecting the complex realities of contemporary society, not of some antiquated agrarian society. Second, even if a privilege were an award, it is not the recipient of the information that is awarded the privilege; rather, it is the communicator of the information who enjoys the benefit, and by proxy, all members of society, who could someday find themselves needing counseling just as Officer Redmond did in this case. Third, unlike licensed social workers, bartenders, parents, and siblings are not professionals trained to deal with mental problems which are often complicated, acute and deeply rooted. When one is thirsty and wants to relax, one does not go to a social worker to mix a drink, just as they would not seek out a bartender.

157. Id.
158. U.S. CONST. amend. V. ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . ").
160. Id. at 1936.
161. Id. at 1934.
162. See generally MCCORMICK, supra note 5, § 72 (discussing the purpose of evidentiary privileges).
to get their head on straight following some traumatic experience. Indeed, if one chose the mixologist as their psychological mentor in lieu of a trained, experienced professional, then one's judgment would be open to serious question. And regarding one's mother, one doubts that a bowl of chicken soup and a loving hug would provide more than a temporary fix to a problem.

Justice Scalia further contends that to broaden the psychotherapist-patient privilege to include a social worker is like broadening the lawyer-client privilege to include a “legal advisor.” While it is not clear what the Justice means when he uses the term “legal advisor,” he is implicitly drawing an analogy—to wit, social workers are to psychotherapists as legal advisors are to lawyers. This analogy cannot withstand even minimal, logical scrutiny. Social workers are trained, tested, and then authorized by the state through licensure to provide mental health therapy to people. Conversely, there is no such thing as a “legal advisor,” other than an attorney, in the eyes of the state. Only lawyers can give legal advice, and states have statutes making it a crime for anyone other than a lawyer to dispense legal advice. Social workers are in the trenches. They often work with children and the disadvantaged, those who cannot afford a high priced “shrink” who takes notes and nods empathetically as the patient on the couch spills his or her guts. Unlike Justice Scalia, one should not believe it is in the spirit of rule 501, to exclude social workers from the ambit of a psychotherapist-patient privilege merely because the drafters of the rules specifically included psychologists and psychiatrists. There is nothing in the committee’s recommendations excluding social workers. Splitting linguistic hairs serves no one. In substance, social workers are positive forces in fostering the mental health of our people, arguably as much, or even more so than psychiatrists and psychologists do. Moreover, the

164. Id. at 1931 n.16. See also AMERICAN ASSOCIATION OF STATE SOCIAL WORK BOARDS, SOCIAL WORK LAWS AND BOARD REGULATIONS: A COMPARISON STUDY 29 (1996).
167. Id. at 1932.
168. Fed. R. EVID. 501. See Senate and House committees’ notes following the rule, in which there is no express language indicating a desire to exclude social workers from any future adoption of the psychotherapist-patient privilege. Id.
Supreme Court was given the elasticity by Congress to recognize those privileges which “experience” and “reason” show should be recognized. The scientific evidence shows that in the last few decades the need for and usefulness of social workers has increased dramatically, way beyond what it was in 1972 when the committee drafted the proposals and recommendations. Therefore, in accordance with reason and experience, confidential communications to social workers should not be excluded from the protection of the privilege. Instead, given the deluge of mental health services provided by these, for the most part, dedicated professionals, experience has taught us that there is every reason to extend the privilege to include them.

IV. CONCLUSION

In the aftermath of Jaffee, there exists in the federal courts an evidentiary privilege between a psychotherapist and her patient. More expansively, Jaffee also means that the psychotherapist-patient privilege will extend to social workers as well. The privilege is not a qualified privilege but an absolute privilege protecting all confidential communications between a therapist and patient.

What does this mean to the future of evidentiary privileges in the federal court system? The Supreme Court made it clear that the contours of the psychotherapist-patient privilege were to be developed by future courts applying Jaffee to specific situations. This statement paves the way for future courts to chip away at the holding in Jaffee by creating exceptions and limiting its scope. Conversely, it opens the door to even further broadening of the privilege.

However, Justice Scalia seems to think that a “search for the truth” is such that everything must be uncovered and laid bare regardless of the cost to privacy or mental health. This type of absolutist thinking is dangerous. Where will this “search for the truth” end? If we speak of truth without counterbalancing important societal interests like mental health, we can

171. Jaffee, 116 S. Ct. at 1931 n.16.
172. Id. at 1932.
173. Id.
174. Id.
175. Id.
176. Jaffee, 116 S. Ct. at 1940 (citations omitted).
begin to justify more systematic incursions by our government. Ultimately, our rationale of "search for the truth" could become irrational and irreconcilable with democracy and reason. The direct result of this could be that at-will, warrantless searches of citizens' houses and persons would become the order of the day. The majority's view, vis-à-vis the dissent's here, is somewhat of a line drawing game. It boils down to values, which are of course, subjective. There may not be a "right" answer to the question of whether a psychotherapist-patient privilege is a benefit worth the cost of Scalia's "occasional injustice." Many different values have been represented by many different judicial compositions of the various Supreme Courts throughout our history. However, Justice Scalia (along with Justice Rehnquist who joined Justice Scalia's dissent in part) is distinctly in the minority among his colleagues, who have wisely allowed experience and reason to prevail in Jaffee.

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