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# ***Jaffee v. Redmond*: The Supreme Court Adopts a Federal Psychotherapist-Patient Privilege and Extends the Scope to Encompass Licensed Social Workers**

Acknowledging conflict among the courts of appeals, and recognizing the importance of the issue, the United States Supreme Court granted certiorari in *Jaffee v. Redmond*<sup>1</sup> to decide whether federal courts should recognize a privilege for communications between psychotherapist and patient under Rule 501 of the Federal Rules of Evidence.<sup>2</sup>

## I. FACTUAL BACKGROUND

In *Jaffee*, police officer Mary Lu Redmond responded to a fight-in-progress call on June 27, 1991.<sup>3</sup> According to Redmond, Ricky Allen burst from an apartment building chasing another man with a butcher knife.<sup>4</sup> Allen disregarded her repeated commands to drop the knife.<sup>5</sup> Believing Allen was going to stab the man he was chasing, Redmond fatally shot him.<sup>6</sup> Petitioner, the administrator of the estate of Ricky Allen, filed suit in the United States District Court for the Northern District of Illinois alleging that Redmond violated Allen's constitutional rights through the use of excessive force.<sup>7</sup> Testimony from family members of Allen conflicted with that of Redmond on crucial issues, such as whether Allen was armed when Redmond shot him.<sup>8</sup>

Petitioner learned during pretrial discovery that subsequent to the shooting incident, Redmond had obtained counseling from Karen Beyer,

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1. 116 S. Ct. 1923, 1927 (1996). Certiorari was granted at 116 S. Ct. 334 (1995).

2. 116 S. Ct. at 1925.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 1925-26.

7. *Id.* at 1926.

8. *Id.* Also at issue was whether Redmond drew her gun before exiting her squad car. *Id.*

a licensed clinical social worker.<sup>9</sup> Petitioner sought access to notes from the counseling sessions, but met with vigorous resistance from respondents, who argued the conversations between Redmond and Beyer were protected under a psychotherapist-patient privilege.<sup>10</sup> The district judge rejected respondents' argument and ordered disclosure of Beyer's notes.<sup>11</sup> However, neither Redmond nor Beyer complied with the order, and when called to testify, both "either refused to answer certain questions or professed an inability to recall details of their conversations."<sup>12</sup> The judge instructed the jury that no legal justification existed for refusing to turn over the notes and that the jury could therefore presume that the notes would have been unfavorable to Redmond.<sup>13</sup> The jury verdict was in favor of the petitioner.<sup>14</sup> The Court of Appeals for the Seventh Circuit reversed and remanded for a new trial, concluding that "'reason and experience' . . . compelled recognition of a psychotherapist-patient privilege."<sup>15</sup> The Supreme Court affirmed, holding that a psychotherapist-patient privilege exists under Rule 501.<sup>16</sup>

## II. LEGAL BACKGROUND

Article Five of the Proposed Rules of Evidence set forth nine specific privileges, including a psychotherapist-patient privilege.<sup>17</sup> Congress rejected the Proposed Rules and instead adopted the more general mandate of Rule 501 instructing the courts to interpret the common law "in the light of reason and experience."<sup>18</sup> The Senate Committee

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9. *Id.* Redmond participated in approximately fifty counseling sessions with Beyer. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* This refusal was demonstrated both during depositions and on the witness stand during trial. *Id.*

13. *Id.*

14. *Id.* The jury awarded \$45,000 on the federal claim and \$500,000 on the state claim. *Id.*

15. *Id.* (quoting *Jaffee v. Redmond*, 51 F.3d 1346, 1355 (7th Cir. 1995)). "The Court of Appeals qualified its recognition of the privilege by stating that it would not apply if 'in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interest.'" *Id.* at 1926 (quoting 51 F.3d at 1357).

16. *Id.* at 1931.

17. *Id.* at 1928 n.7. The Federal Rules of Evidence were drafted by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and the Supreme Court in 1972 to be presented to Congress. *Id.*

18. *Id.* The rule as enacted provides as follows:

emphasized that Congress, in approving the general rule of privileges, was not disapproving the recognition of a psychotherapist-patient privilege.<sup>19</sup>

The Fifth Circuit had the first opportunity to interpret the rule in *United States v. Meagher*,<sup>20</sup> decided in 1976. There, defendant was convicted of bank robbery, and the only defense raised was insanity at the time of the offense.<sup>21</sup> Prior to the robbery, defendant had voluntarily participated in a research program concerning criminal behavior conducted by Dr. Samuel Yochelson, a noted psychiatrist.<sup>22</sup> Dr. Yochelson testified that in his professional opinion, defendant was not insane at the time of the robbery.<sup>23</sup> Defendant argued that admission of this testimony violated his privilege against compelled disclosure of confidential information between physician and patient.<sup>24</sup> Because no such privilege existed at common law, the court held that no such privilege would be recognized, and even if such a privilege were to be recognized, defendant could not utilize the privilege and rely upon his mental condition as his defense.<sup>25</sup>

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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.

19. S. REP. NO. 1277, 93d Cong., 2d Sess. 13 (1974), reprinted in 1974 U.S.C.A.N. 7051, 7059. The Judicial Committee received a considerable volume of correspondence from the psychiatric profession demonstrating a general concern over the deletion of the specific privilege. *Id.* The Senate Committee responded:

It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient . . . privilege[] . . . [but] should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

*Id.*

20. 531 F.2d 752 (5th Cir.), cert. denied, 429 U.S. 853 (1976).

21. 531 F.2d at 752.

22. *Id.* at 753. Defendant participated in the research program between December and July 1971, and between May and September 1973. The bank robbery occurred in October 1973. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* The court conceded that the Proposed Rules were not accepted by Congress. However, had they been adopted in original form, the defendant in a criminal trial claiming

In 1983, three circuits were faced with this issue: the Sixth Circuit decided *In re Zuniga*,<sup>26</sup> the Seventh Circuit decided *In re Pebsworth*,<sup>27</sup> and the Eleventh Circuit decided *United States v. Lindstrom*.<sup>28</sup> In *Zuniga*, two psychiatrists were served with subpoenas duces tecum seeking patient files to ascertain the fact and time of treatment.<sup>29</sup> Both doctors refused to comply with the subpoenas, contending such information was protected from disclosure by psychiatrist-patient privilege.<sup>30</sup> The court relied on Proposed Rule 504 which articulated the psychotherapist-patient privilege,<sup>31</sup> language from the accompanying Senate Report,<sup>32</sup> and a Supreme Court decision which stated that "[t]he Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privilege[s]."<sup>33</sup> Concluding that it clearly had authority to recognize a psychiatrist-patient privilege,<sup>34</sup> the court then employed a balancing test to determine if such a privilege should be recognized in the case at bar.<sup>35</sup> The court determined that the patient's interest in maintaining confidentiality, coupled with the interests of society in successfully treating mental illness, outweighed the evidentiary need.<sup>36</sup> Consequently, the court held that a psychotherapist-patient privilege was mandated.<sup>37</sup>

In *Pebsworth*, the Seventh Circuit avoided the ultimate issue of whether a psychotherapist-patient privilege exists by holding that a

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insanity as a defense could not avail himself of such a privilege. *Id.*

26. 714 F.2d 632 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983).

27. 705 F.2d 261 (7th Cir. 1983).

28. 698 F.2d 1154 (11th Cir. 1983).

29. 714 F.2d at 634-35.

30. *Id.* at 636.

31. *Id.* at 636-37.

32. S. REP. NO. 1277, *supra* note 19.

33. 714 F.2d at 637 (quoting *Trammel v. United States*, 445 U.S. 40, 48 (1980)).

*Trammel* is a landmark Supreme Court case wherein the Court modified the spousal privilege to apply only to the witness-spouse and not to the accused. 445 U.S. at 53. The rule, as modified, provides that "the witness may be neither compelled to testify nor foreclosed from testifying." *Id.*

34. 714 F.2d at 637.

35. *Id.* at 639. The court determined that a balancing of interests was required based on language from *Trammel* in which the Supreme Court determined the proper analysis was "whether the privilege . . . promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice." *Id.* (quoting *Trammel*, 445 U.S. at 52).

36. *Id.*

37. *Id.* However, because the particular information sought would reveal only the fact and time of treatment, it was not within the scope of the privilege and therefore, the psychiatrists' noncompliance was unjustified. *Id.* at 642.

patient waives any arguable privilege as to medical records when he explicitly authorizes disclosure of such information to a medical insurance carrier for reimbursement.<sup>38</sup> In *Lindstrom*, the Eleventh Circuit determined that the privacy interests of a patient in maintaining confidentiality of medical records "are not absolute and, in the context of [a] criminal trial, must 'yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case.'"<sup>39</sup>

In 1988, the Eleventh Circuit had occasion to re-examine this issue in *United States v. Corona*.<sup>40</sup> Corona argued that any confidences he conveyed to his psychiatrist during the course of treatment were privileged and protected from disclosure at trial.<sup>41</sup> The court emphasized that its earlier decisions in *Lindstrom* and *Meagher* also involved psychiatrists, and the Eleventh Circuit had in each instance declined to recognize a psychotherapist-patient privilege.<sup>42</sup> In reaffirming that no physician (including psychotherapist)-patient privilege exists in federal criminal trials, the court relied on the rationale from those cases and Supreme Court language stating that "privileges 'are not lightly created nor expansively construed, for they are in derogation of the search for the truth.'"<sup>43</sup> In 1989, the Ninth Circuit followed suit in *In re Grand Jury Proceedings*,<sup>44</sup> holding that notwithstanding the discretion contained in Rule 501, courts are limited to the development of common law and no such privilege exists at common law.<sup>45</sup>

In 1992, this matter surfaced in the Second Circuit case of *Doe v. Diamond*.<sup>46</sup> There, appellant was scheduled as a key witness for the government in an extortion case.<sup>47</sup> Because of the importance of appellant's testimony in prosecuting the alleged extortionist, appellant's

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38. 705 F.2d at 262.

39. 698 F.2d at 1167 (quoting *United States v. Society of Indep. Gasoline Marketers of Am.*, 624 F.2d 461, 469 (4th Cir. 1979), cert. denied sub nom., *Kayo Oil Co. v. United States*, 449 U.S. 1078 (1981)).

40. 849 F.2d 562 (11th Cir. 1988), cert. denied, 489 U.S. 1084 (1989).

41. 849 F.2d at 566. Even though Corona acknowledged that no physician-patient privilege existed in that circuit, he urged the court to distinguish between a psychotherapist-patient relationship and the more general physician-patient relationship, and to follow the Sixth Circuit's reasoning enunciated in *In re Zuniga* in adopting the privilege. *Id.* at 566-67.

42. *Id.* at 567.

43. *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

44. 867 F.2d 562 (9th Cir.), cert. denied, 493 U.S. 906 (1989).

45. 867 F.2d at 565. The court reiterated that "if such a privilege is to be recognized in federal criminal proceedings, it is up to Congress to define it, not this court." *Id.*

46. 964 F.2d 1325 (2d Cir. 1992).

47. *Id.* at 1326.

own credibility was expected to be a central issue during trial.<sup>48</sup> In the course of discovery, the government learned that appellant had suffered from depression periodically over the previous thirty years and had therefore obtained psychiatric treatment.<sup>49</sup> In deciding this issue of first impression in that circuit, the court analyzed the following: the decision of the Sixth Circuit in *In re Zuniga*,<sup>50</sup> the district court cases recognizing the privilege within the circuit,<sup>51</sup> the courts of appeals that declined to recognize the privilege,<sup>52</sup> and the fact that forty-nine states had adopted some form of psychotherapist-patient privilege.<sup>53</sup> The court found the cases rejecting the privilege unpersuasive because of the underlying rationale that Rule 501 limits the development of the common law, viewing that rationale as "contrary to the teaching of *Trammel [v. United States]* 'not to freeze the law of privilege.'"<sup>54</sup> The court concluded that communications between a psychotherapist and patient are intensely personal, disclosure of such communications would be embarrassing to the patient, and unrestrained disclosure might discourage individuals from seeking needed psychiatric help.<sup>55</sup> The court held that a psychotherapist-patient privilege should be recognized under Rule 501.<sup>56</sup>

More recently, the Tenth Circuit chose to decide the narrower question of whether such a privilege exists in the context of criminal child sexual abuse cases.<sup>57</sup> Based on the significant evidentiary need to further

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48. *Id.*

49. *Id.*

50. *Id.* at 1328-29 (citing *In re Zuniga*, 714 F.2d 632 (1983)).

51. *Id.* at 1328 (citing *Lora v. Board of Educ. of New York*, 74 F.R.D. 565, 575 (E.D.N.Y. 1977); *United States v. Friedman*, 636 F. Supp. 462, 463 (S.D.N.Y. 1986)).

52. *Id.* (citing *In re Grand Jury Proceedings*, 867 F.2d at 562; *United States v. Corona*, 849 F.2d at 562; *United States v. Lindstrom*, 698 F.2d at 1154; *United States v. Meagher*, 531 F.2d at 752).

53. *Id.*

54. *Id.* (quoting *Trammel*, 445 U.S. at 47).

55. *Id.* The court determined that because 49 states recognize such a privilege, experience has been favorable. *Id.*

56. *Id.* The court narrowed this holding by emphasizing that the privilege only requires that a court consider the privacy interests of a witness as an important factor in the determination of admissibility. *Id.* at 1329. The court concluded that because appellant was not only the person who initiated the extortion investigation, but also a key witness whose credibility would be a deciding factor in the trial, "the balance . . . weigh[ed] overwhelmingly in favor of allowing an inquiry into his history of mental illness." *Id.*

57. *United States v. Burtrum*, 17 F.3d 1299, 1301-02 (10th Cir.), *cert. denied*, 115 S. Ct. 176 (1994).

child sexual abuse prosecutions, the court declined to recognize a psychotherapist-patient privilege in that context.<sup>58</sup>

Following this turmoil in the courts of appeals which spanned almost twenty years, the Supreme Court granted certiorari in *Jaffee v. Redmond*<sup>59</sup> to decide this important question.

### III. RATIONALE OF THE COURT

In *Jaffee v. Redmond*,<sup>60</sup> the Supreme Court, in a seven-to-two decision, held "that confidential communications between a licensed psychotherapist [or licensed social worker in the course of psychotherapy] and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence."<sup>61</sup> In reaching this decision, the Court employed much of the same reasoning and rationale as did the circuit courts that recognize the privilege.

The Court first interpreted the language of Rule 501, which "authorizes federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience.'"<sup>62</sup> In interpreting this language, the Court relied on the Senate Report accompanying the adoption of the Rules,<sup>63</sup> and the language from *Trammel v. United States* which "directed federal courts to 'continue the evolutionary development of testimonial privileges.'"<sup>64</sup>

The Court then examined "[t]he common-law principles underlying the recognition of testimonial privileges."<sup>65</sup> The general rule is that witnesses have a duty to provide any testimony they are capable of giving, and testimonial privileges are highly disfavored.<sup>66</sup> Exceptions

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58. 17 F.3d at 1302. The court found that "[c]riminal child sexual abuse cases illustrate well the policy reasons behind the presumption against testimonial privileges in criminal cases." *Id.* Because this crime victimizes a vulnerable segment of society often intimidated by the legal system, the detection and prosecution of such a crime is difficult even absent a testimonial privilege. *Id.*

59. 116 S. Ct. 334 (1995).

60. 116 S. Ct. 1923 (1996).

61. *Id.* at 1925, 1931.

62. *Id.* at 1927 (quoting FED. R. EVID. 501).

63. *Id.* "Rules" refers to the Federal Rules of Evidence. "Rule 501 'should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis.'" *Id.* (quoting S. REP. NO. 1277, *supra* note 19).

64. *Id.* at 1928 (quoting *Trammel*, 445 U.S. at 47).

65. *Id.*

66. *Id.* The "fundamental maxim [is] that the public . . . has a right to every man's evidence." *Id.* (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950) (citations omitted)).



to this general rule may be justified only where a societal "good transcend[s] the normally predominant principle of utilizing all rational means for ascertaining the truth."<sup>67</sup>

The Court compared the psychotherapist-patient privilege to the spousal and attorney-client privileges because all three are "rooted in the imperative need for confidence and trust."<sup>68</sup> However, the Court contrasted psychotherapy from general physical treatment because the latter may proceed successfully based on objective criteria, while the former "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears."<sup>69</sup>

Having determined that the protection of communications between psychotherapist and patient serves important private interests, the Court turned to the question of whether such a protection would also further public goals.<sup>70</sup> After analyzing the public interests served through the spousal and attorney-client privileges, the Court found that "[t]he psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."<sup>71</sup> The Court noted that the *Jaffee* case, because it involved a police officer who encountered stressful circumstances in the fulfillment of her duties, amply demonstrates the importance of offering confidential counseling.<sup>72</sup> If police officers are not able to obtain treatment following a traumatic incident, the entire community may suffer.<sup>73</sup> The Court emphasized that any evidentiary benefit that would result from refusal to recognize the privilege is modest when compared with the significant public and private interests favoring recognition.<sup>74</sup>

Turning to a discussion of the status of psychotherapist privilege in the states, the Court noted that some form of privilege exists in all fifty states and the District of Columbia.<sup>75</sup> This fact led the Court to conclude that "'reason and experience' support recognition of the

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67. *Id.* (citing *Trammel*, 445 U.S. at 50) (citations omitted).

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

69. *Id.* at 1928. As a result, even a possibility of disclosure by the therapist may impede development of the trust-based relationship vital for successful treatment of the patient. *Id.*

70. *Id.* at 1929.

71. *Id.*

72. *Id.* at 1929 n.10.

73. *Id.*

74. *Id.* at 1929.

75. *Id.*

privilege.<sup>76</sup> The Court further noted that “any State’s promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court,” and as a result, “[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.”<sup>77</sup> The Court found it of no consequence that the vast majority of states recognize the privilege as a result of legislative rather than judicial action.<sup>78</sup> However, it found significant that the psychotherapist privilege was among the nine specific privileges set forth in the Proposed Rules.<sup>79</sup> The Court thus recognized a psychotherapist-patient privilege, but noted that the protection could be waived by the patient.<sup>80</sup>

The Court then discussed to whom the psychotherapist privilege will apply. In addition to licensed psychiatrists and psychologists, the privilege extends to “licensed social workers in the course of psychotherapy.”<sup>81</sup> The reasoning employed for recognizing such a privilege for psychiatrists and psychologists applies with equal force to a clinical social worker.<sup>82</sup> The Court recognized that “social workers provide a significant amount of mental health treatment” and often treat citizens “who [can]not afford the [more expensive] assistance of a psychiatrist or psychologist.”<sup>83</sup> Because counseling obtained through either source serves the same public goals, the Court concluded that it would serve no discernible purpose to draw a distinction between the two.<sup>84</sup>

The Court explicitly rejected the balancing component which was implemented by the court of appeals, concluding that if the determination of admissibility is left to a trial judge’s later evaluation of the relative weight of patient privacy interests as opposed to the need for evidentiary disclosure, the effectiveness of the privilege would be nullified.<sup>85</sup> Concluding that conversations between Karen Beyer and

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76. *Id.* at 1930.

77. *Id.*

78. *Id.*

79. *Id.* This was deemed important because the Court previously refused to recognize a state legislative privilege, reasoning that no such privilege was included in the Advisory Committee’s draft. *Id.* (citing *United States v. Gillock*, 445 U.S. 360, 367-68 (1980)).

80. *Id.* at 1931 n.14.

81. *Id.* at 1931.

82. *Id.*

83. *Id.*

84. *Id.* at 1931-32 (citing *Jaffee*, 51 F.3d at 1358 n.19). The Court noted that while only 12 states regulated social workers at the time the Advisory Committee prepared the Proposed Rules in 1972, all 50 states so regulate today. *Id.* at 1932 n.16.

85. *Id.* at 1932. If the policy underlying the privilege is to be furthered, the patient, and more importantly, the therapist, “must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one

Officer Redmond, along with the notes taken during their counseling sessions, were protected under Rule 501, the Court found it "neither necessary nor feasible to delineate [the] full contours [of the privilege] in a way that would 'govern all conceivable future questions in this area.'"<sup>86</sup> The Court did, however, note that there would be situations in which the privilege would have to give way, such as when serious harm would come to the patient or to others absent disclosure by the therapist.<sup>87</sup>

#### IV. IMPLICATIONS

The Supreme Court's decision in *Jaffee* is of great importance in the development of testimonial privileges under Rule 501. This case illustrates that a clear majority of the Court is willing to further expand the law of privileges. The decision to recognize a psychotherapist-patient privilege will have far-reaching effects throughout the federal courts as more evidence is protected from disclosure and the continued quest for the truth becomes ever more challenging.

Though the Court explicitly rejected a test balancing the patient's privacy interests against the evidentiary need,<sup>88</sup> the Court itself performed a balancing of interests in reaching its holding.<sup>89</sup> The Court concluded that privacy interests of the patient along with the societal interest in sound mental health outweigh any evidentiary benefit that might result from denial of the privilege.<sup>90</sup> According to Justice Scalia, the Court failed to mention the true purchase price of the privilege: "occasional injustice"<sup>91</sup> resulting from the courts' refusal to admit highly probative evidence.

As a result of this decision, the primary problem that will be encountered by practitioners is choosing a strategy when the trial court rejects a claim that communications are privileged under *Jaffee*.<sup>92</sup> One

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which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

86. *Id.* (quoting *Upjohn*, 449 U.S. at 386).

87. *Id.* at 1932 n.19.

88. *Id.* at 1932.

89. *Id.* at 1928-29.

90. *Id.* at 1929.

91. *Id.* at 1932 (Scalia, J., dissenting). "That is the cost of every rule which excludes reliable and probative evidence—or at least every one categorical enough to achieve its announced policy objective." *Id.*

92. For example, what would happen if the social worker was in fact licensed, but failed to pay dues for a specific period and the license lapsed? Is the social worker "licensed" for purposes of the privilege? Or, what if the communications took place in Georgia, the social worker was licensed only in Florida, and Georgia's licensing standards were far more

option is to proceed as respondents did in *Jaffee*: refuse to comply with court-ordered disclosure, receive an unfavorable jury instruction placing the presumption against the party claiming the privilege, and then appeal the instruction.<sup>93</sup> The other alternative is to comply with the court order by revealing patient confidences, and then appeal the compelled disclosure. This second alternative undermines the purpose of the privilege and nullifies any protection that otherwise would be afforded.

Lower courts will confront at least four additional problems in applying this privilege. First, the Court extended the scope of the privilege to include confidential communications made to "licensed social workers in the course of psychotherapy."<sup>94</sup> The question will arise as to whether the information disclosed to the social worker was revealed "in the course of psychotherapy," or while the social worker was acting in another capacity, for example, as a community organizer.<sup>95</sup>

Second, the Court failed to set forth any federal standard defining a "licensed" social worker.<sup>96</sup> The Court relied on the Proposed Rules, yet went beyond the scope of Proposed Rule 504, which set forth the psychotherapist-patient privilege.<sup>97</sup> The Proposed Rule recommended a "privilege for psychotherapy conducted by 'a person authorized to practice medicine' or 'a person licensed or certified as a psychologist.'"<sup>98</sup> Absent a federal guideline, the only viable option is to defer to the definition set forth in state statutes, which vary widely with regard to licensing standards.<sup>99</sup> Deference to state licensing standards will therefore produce inconsistent results, meaning that the scope of a federal privilege will vary from one federal jurisdiction to another.<sup>100</sup>

Third, as enunciated by the United States District Court for the Western District of Michigan, "the Supreme Court refused to define the contours of the privilege with any precision."<sup>101</sup> The Court noted that

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stringent than those of Florida? Is this social worker "licensed" for purposes of the privilege? Situations such as these remain unresolved.

93. 116 S. Ct. at 1926.

94. *Id.* at 1931.

95. *Id.* at 1938 (Scalia, J., dissenting).

96. *Id.* at 1937-38.

97. *Id.* at 1933-34.

98. *Id.* at 1934 (quoting Proposed Rule of Evidence 504).

99. *Id.* at 1930 n.13, 1939-40.

100. *Id.* at 1935 (Scalia, J., dissenting). Justice Scalia noted that if deference to states and "furtherance of state policies is the name of the game, rules of privilege in federal courts should vary from State to State, a la Erie." *Id.*

101. *Van Domelen v. Menominee County*, No. 2:95-CV-064, 1996 WL 495574, at \*2 (W.D. Mich. June 25, 1996).

"there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist."<sup>102</sup> However, the Court refused to address possible exceptions in any detail. This refusal to provide a definitive scope setting forth the exceptions to the privilege will certainly pose application problems for the courts. Discussion regarding possible or proposed exceptions to such a privilege began prior to *Jaffee*<sup>103</sup> and will surely continue in its aftermath.

The fourth problem is whether this decision will impact the continued refusal by the federal courts to recognize a general physician-patient privilege.<sup>104</sup> Cases arise where a general physician treating a patient for physical illness may be called upon, or may feel compelled, to render psychotherapeutic advice.<sup>105</sup> Because the Court failed to establish a definition of psychotherapy for purposes of this privilege, this question will be answered only as the federal courts address these issues in light of *Jaffee*.

Despite the difficulties of defining and implementing the privilege on a case-by-case basis, the perceived benefits that will inure as a result of recognizing this privilege are of utmost importance in our increasingly stressful society. "The need for full disclosure is critical in treating psychiatric patients."<sup>106</sup> This privilege allows the patient the freedom to disclose inner feelings and emotions without fear of embarrassment or public humiliation.<sup>107</sup> Through the psychotherapist-patient privilege, the hope is that more Americans who are in need of psychiatric services<sup>108</sup> will seek such professional assistance, thereby benefiting

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102. 116 S. Ct. at 1932 n.19. Does this mean that a future crimes exception exists under this privilege or only a future bodily harm exception?

103. See, e.g., *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1530 (1985); Jeffrey A. Klotz, *Limiting the Psychotherapist-Patient Privilege: The Therapeutic Potential*, 27 CRIM. L. BULL. 416 (1991); Catherine M. Baytion, Note & Comment, *Toward Uniform Application of a Federal Psychotherapist-Patient Privilege*, 70 WASH. L. REV. 153 (1995); Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U. MIAMI L. REV. 249 (1996).

104. Daniel J. Capra, *The Federal Law of Privileges*, 16 A.B.A. SEC. LITIGATION, Fall 1989, at 32, 36.

105. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 333 (3d ed. 1980). An example of such a situation is where a patient refuses to comply with medical treatment.

106. Anne D. Lamkin, *Evidentiary Privileges: Should Psychotherapist-Patient Privilege Be Recognized?*, 18 AM. J. TRIAL ADVOC. 721 (1995).

107. *Jaffee*, 116 S. Ct. at 1928.

108. A recent study indicates that "of the more than fifty-two million Americans who suffer from mental illness each year, only 28.5 percent get help." Winick, *supra* note 103, at 253 (citing Darrel A. Regier et al., *The De Facto U.S. Mental and Addictive Disorders Service System*, 50 ARCHIVES GEN. PSYCHIATRY 85, 90 (1993)).

not only the patient, but society as a whole.<sup>109</sup> But the privilege is not absolute, and as it continues to evolve through interpretation, only time will reveal the true extent of its protection.

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109. 116 S. Ct. at 1929.

