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One Step Forward, Two Steps Back: The Recognized But Undefined Federal Psychotherapist-Patient Privilege

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One Step Forward, Two Steps Back: The Recognized But Undefined Federal Psychotherapist-Patient Privilege

*Jaffee v. Redmond*¹

I. INTRODUCTION

The judicial system does not function in a vacuum; decisions by the United States Supreme Court today affect each of us tomorrow. Citizens tailor their behavior and relationships to conform to the needs of the judiciary, and the judiciary in turn must sometimes tailor itself to meet the needs of citizens. Evidentiary privileges are such an effort by the judiciary. Instead of demanding every man's evidence, as is the general presumption,² courts recognize the need for some evidence to remain private.

Federal Rule of Evidence 501 governs federal evidentiary privileges without defining or identifying specific privileges.³ As a result, courts have developed privileges on a case-by-case basis, including the recognition of a psychotherapist-patient privilege.⁴ As different circuits pass judgment on the psychotherapist-patient privilege, conflict inevitably arises. Some circuits simply reject the privilege, while others recognize the privilege but apply it differently.⁵ The dispute in *Jaffee v. Redmond* was borne of this conflict, and the Supreme Court granted certiorari to resolve it.⁶ However, in recognizing the psychotherapist-patient privilege and disposing of the dispute in *Jaffee v. Redmond*, the Court did little to resolve the conflict among the circuits. The recognition of the psychotherapist-patient privilege was the necessary first step, but leaving the privilege undefined encourages litigation and undermines the privilege by making its application uncertain.⁷

II. FACTS AND HOLDING

Mary Lu Redmond, a police officer with the Village of Hoffman Estates, Illinois,⁸ shot and killed Ricky Allen on June 27, 1991.⁹ At trial, Redmond

1. *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996).

2. *Id.* at 1928.

3. *See infra* note 35.

4. *See infra* note 38 and accompanying text.

5. *See infra* Part III.B.

6. *Jaffee*, 116 S. Ct. at 1927.

7. *See infra* Part V.

8. *Jaffee*, 116 S. Ct. at 1925.

9. Redmond was the first officer to arrive at an apartment complex after responding

testified that Allen, armed with a butcher knife, prepared to stab a man Allen was chasing.¹⁰ Members of Allen's family who witnessed the shooting disputed Redmond's account of the event, specifically denying that Allen was armed with a weapon.¹¹ In the months following the shooting, Redmond attended approximately fifty counseling sessions with Karen Beyer, a licensed clinical social worker employed by the Village of Hoffman Estates.¹²

Carrie Jaffee, the administrator of Ricky Allen's estate, filed suit in the United States District Court for the Northern District of Illinois against Redmond, joining federal and state claims.¹³ During discovery, Jaffee sought access to the substance of the communications between Redmond and Beyer, including notes from their counseling sessions.¹⁴ Respondents objected to the discovery of the communications, claiming a psychotherapist-patient privilege.¹⁵ Acknowledging that the Federal Rules of Evidence do not contain a psychotherapist-patient privilege, the district court stated that the standard should be Proposed Rule of Evidence 504.¹⁶ The district court held the psychotherapist-patient privilege did not apply to communications with licensed clinical social workers.¹⁷ The district court ordered Beyer and Redmond to testify as to the substance of their communications and to disclose notes from the sessions.¹⁸ Beyer and Redmond, however, refused to do so.¹⁹ At the close of trial, the judge instructed the jury that the failure to disclose the notes had no "legal justification," and therefore, the jury could presume the notes were unfavorable

to a call describing a "fight in progress." *Id.*

10. *Id.* at 1925-26. After Allen ignored Redmond's commands to drop the knife, Redmond shot Allen, and he died shortly thereafter. *Id.*

11. *Id.*

12. *Id.* at 1926.

13. *Id.* Jaffee alleged Redmond used excessive force on Allen, violating his constitutional rights. In addition, Jaffee alleged Redmond caused Allen's wrongful death under 740 ILL. COMP. STAT. ANN. 180/1-180/2 (West 1994). *Jaffee*, 116 S. Ct. at 1926. It should be noted that Jaffee also named the Village of Hoffman Estates as a defendant, so further references to the arguments or positions of "Respondents" or "Redmond" include the Village of Hoffman Estates. *Id.* at 1925.

14. *Id.* at 1926. Jaffee subpoenaed Beyer to testify at a deposition and at trial. *Jaffee v. Redmond*, 51 F.3d 1346, 1350 (7th Cir. 1995).

15. *Jaffee*, 116 S. Ct. at 1926.

16. *Jaffee v. Redmond*, 51 F.3d 1346, 1351 n.5 (7th Cir. 1995); *see infra* note 41.

17. *Jaffee*, 51 F.3d at 1351 n.5.

18. *Id.* at 1350-51; *Jaffee*, 116 S. Ct. at 1926.

19. *Jaffee*, 116 S. Ct. at 1926. During depositions and trial, both Redmond and Beyer refused to answer questions regarding the notes and claimed a failure to recall the substance of the counseling sessions. *Id.*

to Redmond.²⁰ The jury found for Jaffee on both the federal and state claims.²¹ On appeal, the Seventh Circuit reversed and remanded the action for a new trial, holding that the psychotherapist-patient privilege protected the confidential communications between Redmond and Beyer, and assigning error to the trial court's jury instructions to the contrary.²² The court stated that "reason and experience," as called for by Federal Rule of Evidence 501,²³ compelled the recognition of a psychotherapist-patient privilege.²⁴ The court noted that the "privilege extends to other mental health care providers as well, including licensed clinical social workers."²⁵ The court restricted the privilege to cases where the patient's privacy interests outweigh the evidentiary needs provided for by disclosure of the confidential communications.²⁶ Balancing Redmond's privacy interests against the "evidentiary need for the disclosure" of the communications, the court characterized the evidentiary usefulness of the disclosure of the communications as "cumulative at best."²⁷

Acknowledging the inconsistency among United States Courts of Appeals regarding the psychotherapist privilege under Rule 501 of the Federal Rules of Evidence, the United States Supreme Court granted certiorari.²⁸ The Court framed the question before it as whether the private and public interests served by the recognition of a psychotherapist-patient privilege outweighed the need for probative evidence.²⁹ Concluding that protection of confidential communications would serve private and public interests, the Court characterized the evidentiary benefit of disclosure as modest.³⁰

A seven-member majority³¹ of the United States Supreme Court affirmed the Seventh Circuit, rejecting only the balancing component employed by the lower court. The Court stated that such a test would frustrate the effectiveness

20. *Id.*

21. *Id.* Allen's estate was awarded \$45,000 on the federal claim and \$500,000 on the state claim. *Id.*

22. *Id.* at 1926; *Jaffee*, 51 F.3d at 1357-58 n.18.

23. *See infra* note 35.

24. *Jaffee*, 116 S. Ct. at 1926-27; *Jaffee*, 51 F.3d at 1355. The court contrasted the inconsistent practices of several circuits in recognizing the psychotherapist-patient privilege. *Jaffee*, 51 F.3d at 1354-56.

25. *Id.* at 1358 n.19.

26. *Id.* at 1357.

27. *Jaffee*, 116 S. Ct. at 1927; *Jaffee*, 51 F.3d at 1358. There were numerous eyewitnesses to the shooting. *Jaffee*, 51 F.3d at 1349.

28. *Jaffee*, 116 S. Ct. at 1927.

29. *Id.* at 1928.

30. *Id.* at 1929.

31. Justice Stevens wrote the opinion for the majority. *Id.* at 1925. Justice Scalia wrote a dissent to which Chief Justice Rehnquist joined as to Part III. *Id.* at 1932.

of the privilege by making its application uncertain.³² The majority held a psychotherapist privilege precludes the compelled disclosure under Rule 501 of confidential communications between a patient and her licensed psychotherapist, and such privilege extends to licensed clinical social workers.³³ Therefore, the privilege protected the conversations and notes from Redmond's counseling sessions with Karen Beyer from compelled disclosure.³⁴

III. LEGAL BACKGROUND

A. Federal Rule of Evidence 501 and Proposed Rule 504

The Federal Rules of Evidence fail to endorse or describe which privileges federal courts should recognize. Federal Rule of Evidence 501 states "the privilege of a witness . . . shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience."³⁵ In *Trammel v. United States*,³⁶ the Supreme Court noted that Congress affirmatively intended not to freeze the law of privilege through the enactment of Rule 501.³⁷ The Court stated that Congress meant for Rule 501 to remain flexible, allowing for the development of the law of privilege on a case-by-case basis.³⁸

Before the enactment of Rule 501, Congress considered Proposed Rules of Evidence 503-510.³⁹ The Proposed Rules specifically identified nine

32. *Id.* at 1931-32.

33. *Id.* at 1931.

34. *Id.* at 1932. The Supreme Court affirmed the Seventh Circuit, which reversed the lower court and remanded for a new trial. *Id.* For Seventh Circuit's holding, see *Jaffee*, 51 F.3d at 1358.

35. Federal Rule of Evidence 501 reads in full:

Except as otherwise required by the Constitution of the United States or provided by Acts 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.

36. 445 U.S. 40 (1980).

37. *Id.* at 47.

38. *Id.* *United States v. Gillock*, 445 U.S. 360, 367 (1980).

39. See Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 235-58

privileges,⁴⁰ including a psychotherapist-patient privilege described in Proposed Rule 504.⁴¹ Proposed Rule 504 extended the psychotherapist-patient privilege

(1973).

40. *Id.* The Advisory Committee proposed a privilege for the following: required reports (Rule 502); lawyer-client (Rule 503); psychotherapist-patient (Rule 504); spousal (Rule 505); clergyman-penitent (Rule 506); political vote (Rule 507); trade secrets (Rule 508); state secrets (Rule 509); identity of informer (Rule 510). *Id.*

41. Proposed Rule 504 reads in full:

(a) Definitions.

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

(2) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Who may claim the privilege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by order of judge. If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the

to confidential communications made to psychiatrists and licensed or certified psychologists.⁴² Instead of adopting Proposed Rule 504 with its nine specific privileges, Congress adopted the more general approach of Rule 501, which provides for no specific privileges.⁴³

If Congress had accepted these Proposed Rules of Evidence, then federal courts could only recognize the nine privileges enumerated in the rules, except as otherwise permitted by the Constitution or Acts of Congress.⁴⁴ Though Congress rejected the Proposed Rules for the more general language of Rule 501, courts continue to consider the Proposed Rules when applying or developing federal privileges.⁴⁵ In *United States v. Gillock*, the Court noted the mere omission of a privilege from those proposed to Congress was not dispositive as to its future recognition, but added that its omission might suggest the privilege was not "indelibly ensconced" in our common law, and therefore not worthy of recognition.⁴⁶

examination is ordered unless the judge orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 240-41 (1973).

42. *Id.*

43. For a description of the legislative history of the proposed Rules of Evidence and Rule 501, see Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511, 512-23 (1994).

44. *United States v. Gillock*, 445 U.S. 360, 367 (1980).

45. In *Gillock*, the Supreme Court considered the Proposed Rules of Evidence in deciding whether to extend a privilege in criminal proceedings to the legislative acts of state senators. *Gillock*, 445 U.S. at 367. The Court again considered the Proposed Rules in *Trammel v. United States*, 445 U.S. 40, 47 (1980), where the privilege at issue was the husband-wife privilege and whether a spouse could testify against the other spouse without that spouse's consent. In *Lora v. Board of Education of the City of New York*, 74 F.R.D. 565, 575 (E.D.N.Y.1977), the district court considered the language of Proposed Rule 504 in determining the scope of the psychotherapist-patient privilege. See also *United States v. Meagher*, 531 F.2d 752 (5th Cir.), cert. denied, 429 U.S. 853 (1976); *In re Zuniga*, 714 F.2d 632 (6th Cir.), cert. denied, 464 U.S. 483 (1983).

46. *Gillock*, 445 U.S. at 367-68.

B. Application of the Psychotherapist-Patient Privilege

Circuits considering application of a psychotherapist-patient privilege have generally decided in one of three ways: (1) rejected the privilege for lack of common law foundation;⁴⁷ (2) rejected the privilege in the particular context or circumstances of the case at bar;⁴⁸ or (3) recognized the privilege.⁴⁹

1. Rejection for Lack of Common Law Foundation

Several circuits rejected the existence of the psychotherapist-patient privilege. The Fifth Circuit, in *United States v. Meagher*,⁵⁰ refused to protect communications between a defendant and his psychiatrist through recognition of a physician-patient privilege.⁵¹ After citing the portion of Rule 501 stating that the principles of common law govern federal privileges, the court concluded that no physician-patient privilege existed at common law and refused to recognize the privilege in federal criminal trials.⁵²

47. See *In re Grand Jury Proceedings*, 867 F.2d 562, 564 (9th Cir.), *cert. denied*, Doe v. United States, 493 U.S. 906 (1989); *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989); *Slaken v. Porter*, 737 F.2d 368 (4th Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985); *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976).

48. See *United States v. Burtrum*, 17 F.3d 1299, 1301-02 (10th Cir. 1984) (refusing to apply the privilege in a child sexual abuse context); *Hancock v. Hobbs*, 967 F.2d 462, 467 (11th Cir. 1992); *Dixon v. City of Lawton*, 898 F.2d 1443, 1451 (10th Cir. 1990); *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir. 1976).

49. See *Jaffee v. Redmond*, 51 F.3d 1346 (7th Cir. 1995); *United States v. Diamond (In re Doe)*, 964 F.2d 1325, 1328 (2d Cir. 1992); *In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983).

50. 531 F.2d 752 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976).

51. *Id.* at 753. The court analyzed the psychotherapist-patient privilege in terms of a physician-patient privilege.

52. *Meagher*, 531 F.2d at 753. However, the court stated that even if it recognized the privilege, the defendant patient could not avail himself of the privilege based on the particular facts of the case. The court cited an exception to the Proposed Rule of Evidence 504, which disallows the privilege in trials where the patient's mental condition is an element of his defense. *Id.*

The Fifth Circuit again considered the issue of a doctor-patient or psychotherapist privilege in *United States v. Moore*, 970 F.2d 48 (5th Cir. 1992). The court followed *Meagher*, holding that a federal doctor-patient privilege did not exist under common law. The defendant psychiatrist argued the names of his patients and their insurance indemnifiers should be protected by a doctor-patient privilege. After citing to *Meagher*, the Fifth Circuit panel acknowledged its inability to overrule the decision of another panel. *Moore*, 970 F.2d at 50.

The Fourth Circuit, in *Slakan v. Porter*,⁵³ held the trial court's recognition of a psychotherapist-patient privilege to be harmless error.⁵⁴ The court noted Federal Rule of Evidence 501 required that common law govern privileges.⁵⁵ After citing to *Meagher*, the court then stated that "the well-settled federal rule" is that communications with a psychotherapist are not privileged.⁵⁶

The Eleventh Circuit also followed *Meagher* in *United States v. Corona*, concluding that no physician-patient privilege existed at common law for criminal trials.⁵⁷ As in *Meagher*, the defendant sought the privilege to protect communications with his psychiatrist.⁵⁸ A previous Eleventh Circuit decision had held that no such privilege existed at common law to protect the psychiatric records of a prosecution witness.⁵⁹

The Ninth Circuit, in *In re Grand Jury Proceedings*,⁶⁰ also refused to recognize a psychotherapist-patient privilege at common law.⁶¹ The court concluded that the psychotherapist privilege developed through state statutory enactment without common law foundations.⁶² The court declined to reach the merits of the psychotherapist privilege, stating Congress must first adopt such a privilege.⁶³

2. Rejection of Privilege Because of Context of Case or Waiver

The Tenth Circuit refused to recognize the psychotherapist-patient privilege because of the context in which it arose.⁶⁴ The court considered the recognition of the psychotherapist-patient privilege in the context of a criminal child sexual

53. 737 F.2d 368 (4th Cir. 1984), *cert. denied sub nom.*, Reed v. Slaken, 470 U.S. 1035 (1985).

54. *Id.* at 377. The criminal defendant sought protection of the privilege for communications with his psychologist. *Id.*

55. *Id.*

56. *Id.*

57. *United States v. Corona*, 849 F.2d 562, 566-67 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989).

58. *Id.* at 563-64.

59. *Unites States v. Lindstrom*, 698 F.2d 1154, 1167 (11th Cir. 1983). The Eleventh Circuit again held that no doctor-patient privilege existed at federal common law in *Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992). The court also noted the plaintiff's mental condition was at issue in the case. *Id.* at 467.

60. 867 F.2d 562, 565 (9th Cir. 1989).

61. *Id.* The defendant claimed the psychotherapist-patient privilege for communications with her psychiatrist. *Id.*

62. *Id.*

63. *Id.*

64. *United States v. Burtrum*, 17 F.3d 1299, 1301-02 (10th Cir. 1994).

abuse case.⁶⁵ The court of appeals affirmed the district court, which recognized a qualified psychotherapist-patient privilege but refused to apply it after employing the Second Circuit's balancing test.⁶⁶ The district court concluded that the public interest of protecting children from sexual abuse outweighed the defendant's privacy interests and his need for medical assistance, therefore, the court did not apply the privilege in that context.⁶⁷ The Tenth Circuit performed a similar analysis, reviewing the case *de novo*.⁶⁸ With the absence of a common law psychotherapist-patient privilege and Congress' decision to exclude the psychotherapist privilege in the Federal Rules of Evidence as a backdrop,⁶⁹ the court noted the heightened evidentiary need presented in child sexual abuse cases.⁷⁰ After endorsing the policy of preventing and prosecuting child abuse, the court concluded that evidentiary need compelled the nonrecognition of the psychotherapist-privilege in criminal child sexual abuse cases.⁷¹

In an earlier criminal case, the Tenth Circuit avoided deciding the issue of whether to recognize the psychotherapist-patient privilege.⁷² The defendant claimed the privilege for communications made to a nurse in a psychiatric hospital.⁷³ The court apparently presumed the statements to the nurse would be protected by the psychotherapist privilege, subject to waiver, if such a privilege were recognized.⁷⁴ In a *per curiam* opinion, the court concluded that even if it

65. *Id.* The opinion does not identify the psychotherapist by professional title but referred to him only as "Mr. Joe Miller, a psychotherapist." *Id.* at 1300. The court stated it was only considering the privilege within the narrow context of criminal child sexual abuse cases. *Id.* at 1301-02.

66. *Id.* at 1301. For the balancing test, see *infra* note 100 and accompanying text.

67. *Burtrum*, 17 F.3d at 1301.

68. *Id.*

69. *Id.* at 1302.

70. *Id.* The court referred to the "clandestine manner" in which sexual abuse occurs and noted that sexually abused children may have difficulty testifying. In addition, the court acknowledged the difficulty of detecting this type of crime. *Id.*

71. *Id.*

72. *United States v. Crews*, 781 F.2d 826, 831 (10th Cir. 1986). The court also avoided deciding the existence of the privilege in *Dixon v. City of Lawton*, 898 F.2d 1443, 1450 (10th Cir. 1990). Citing exception (3) to the Proposed Rule of Evidence 504, see *supra* note 41, the court concluded that even if the privilege existed in federal court, the privilege would not apply since the defendant's mental state was at issue in the case. *Dixon*, 898 F.2d at 1450.

73. *Crews*, 781 F.2d at 829-30. While a patient in the psychiatric ward of a Veteran's Hospital in Sheridan, Wyoming, the defendant told a nurse he would shoot President Reagan if he came to Sheridan. *Id.* at 829.

74. *Id.* at 831.

recognized a psychotherapist-patient privilege, the defendant waived his right to the privilege by making the statements to a third party.⁷⁵

3. Recognition of Privilege

Two circuits recognized the existence of a psychotherapist-patient privilege at common law prior to the Seventh Circuit's recognition in the instant case.⁷⁶ The Sixth Circuit held that "reason and experience"⁷⁷ mandate the recognition of a psychotherapist-patient privilege.⁷⁸ The court considered the Eleventh and Fifth Circuits' refusal to recognize such a privilege unpersuasive in light of their failure to distinguish between the psychotherapist-patient privilege and a physician-patient privilege.⁷⁹ Contrasting the need for a psychotherapist-patient privilege with that of a physician-patient privilege, the Sixth Circuit quoted the D.C. Circuit which stated that "[m]any physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him."⁸⁰ After citing commentators advocating the recognition of a psychotherapist-patient privilege,⁸¹ the court concluded that effective psychotherapy was necessary to promote "extensive" individual and societal interests and, in turn, effective psychotherapy required confidentiality.⁸² The court considered an individual's mental illness a potential barrier to his enjoyment and exercise of fundamental freedoms, and thus, an important individual interest.⁸³ The court also recognized a societal interest in preventing the potential danger posed to a community by a mentally ill patient, which effective psychotherapy would counter.⁸⁴

After articulating the need and legal justification for the psychotherapist privilege, the court held the privilege should not extend to the information at

75. *Id.* During the Secret Service's investigation of the defendant's threat against the President, the defendant mentioned his desire to shoot President Reagan to a Secret Service agent. *Id.*

76. *Jaffee v. Redmond*, 51 F.3d 1346, 1357-58 (7th Cir. 1995).

77. *FED. R. EVID.* 501.

78. *In re Zuniga*, 714 F.2d 632, 636-37, 639 (6th Cir. 1983). The court considered the legislative history of the Federal Rules of Evidence as evidence of federal courts' authority to recognize such a privilege. *Id.* at 637.

79. *Id.* at 638. The *Zuniga* court characterized the psychotherapist-patient privilege as having "unique aspects." *Id.*

80. *Id.* (citing *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955)).

81. *Id.* (citing JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* § 504 *et seq.* (1975); Ralph Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175 (1960)).

82. *In re Zuniga*, 714 F.2d at 637-39.

83. *Id.* at 639.

84. *Id.*

issue before the court.⁸⁵ In the lower court, trial judge held two psychiatrists in civil contempt for their failure to respond to subpoenas which were the product of a federal grand jury investigation.⁸⁶ The court of appeals noted federal law supplies the privilege since the case arose because of alleged violations of federal criminal law.⁸⁷ The two psychiatrists claimed the psychotherapist-patient privilege protected the identity of patients, dates of treatment, and length of treatment.⁸⁸ After endorsing and conducting a balancing-of-interests test, the court concluded the disclosure of a patient's identity and date and length of treatment is not comparable to the disclosure of his innermost thoughts, and therefore, the privilege should not protect such information.⁸⁹ The court made no mention of the criminal backdrop in its analysis of whether the psychotherapist-patient privilege should apply.⁹⁰

The Second Circuit also recognized a psychotherapist-patient privilege and endorsed a balancing-of-interests test in *In re Doe*.⁹¹ After acknowledging the conflict among circuits regarding a federal psychotherapist privilege, the court rejected the view of the Fifth, Ninth, and Eleventh Circuits,⁹² which refused to

85. *Id.* at 640-41.

86. *Id.* at 634.

87. *Id.* at 636.

88. *Id.* at 640.

89. *Id.* The psychiatrists argued the identity of a patient should be privileged to maintain an effective psychotherapist-patient relationship. The court acknowledged that disclosure of the fact that a person is in treatment is not insubstantial and might cause some persons to be hesitant to seek treatment, but concluded that the need for the evidence outweighs this concern. However, the court stated that even if the information were protected by the privilege, the patients themselves had already waived the privilege through disclosing their identities to a third party, their insurance carriers. *Id.*

90. *Id.* at 641. The psychiatrists also argued the disclosure invaded their patients' right to privacy. The court disposed of this argument by balancing the "slight intrusion" on the patients' privacy interests against the grand jury's ability to conduct an effective and comprehensive investigation into possible violations of law. *Id.* at 642.

The Sixth Circuit again recognized the existence of a psychotherapist-patient privilege in *United States v. Snellenberger*, 24 F.3d 799, 802 (6th Cir. 1994). However, the court again concluded the privilege had been waived because of disclosure to third parties. The court also concluded the defendant violated an exception to the privilege since the information consisted of threats against the life of a United States judge. Finally, the court stated that the privilege must be asserted at the time of the communications in order for the communications to be protected, which in this case, it had not been. *Id.*

91. 964 F.2d 1325 (2d Cir. 1992). A witness for the government in a federal criminal trial claimed a psychotherapist-patient privilege protected his psychiatric records and history from disclosure. After withdrawing his consent to an *in camera* examination of his psychiatric files, the district judge held Doe in civil contempt. *Id.* at 1327.

92. See *supra* notes 47 and Part III.B.

recognize the privilege because of its lack of common law foundation.⁹³ Citing *Trammel*,⁹⁴ the Second Circuit characterized the Fifth, Ninth, and Eleventh Circuits' view as contrary to *Trammel's* holding that Rule 501 failed to freeze the law of privilege.⁹⁵

The Second Circuit framed its analysis in terms of "reason and experience."⁹⁶ The court reasoned that the highly personal and potentially embarrassing information shared with a psychotherapist make confidentiality in a psychotherapist-patient relationship more important than in a physician-patient relationship.⁹⁷ The court stated that people can not dispute that unrestrained disclosure of information shared with a psychotherapist might discourage people from seeking psychiatric treatment.⁹⁸ The court of appeals stated the adoption of a psychotherapist-patient privilege by a majority of states suggested that experience with the privilege has been favorable.⁹⁹

After recognizing the privilege, the court stated the privilege was qualified and required balancing the evidentiary value of the information against the

93. *United States v. Diamond*, (In re Doe), 964 F.2d 1325, 1328 (2d Cir. 1992).

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

95. *In re Doe*, 964 F.2d at 1328.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* States vary greatly in their recognition and application of a psychotherapist-patient privilege. The dissent describes the various limitations of the psychotherapist-patient privilege as applied to social workers. See *infra* note 147.

States also differ as to whom they extend the psychotherapist privilege. The following is a list of some professionals to whom states extend some form of psychotherapist privilege: psychiatrists (see, e.g., TENN. CODE ANN. § 24-1-207 (Supp. 1994)); psychologists (see, e.g., NEB. REV. STAT. § 27-504 (1994)); professional counselors (see, e.g., MO. REV. STAT. § 337.540 (1994)); licensed clinical social workers (see, e.g., FLA. STAT. ch. 90.503 (1995)); licensed social worker (see, e.g., COLO. REV. STAT. § 13-90-107(g) (1995)); counselor associates (see, e.g., ALA. R. EVID., Rule 503A (1995)); victim counselors (see, e.g., IOWA CODE ANN. § 236A.1 (West 1994); see also ALA. R. EVID. 503A (1995) (extending privilege to volunteer victim counselors); marriage and family therapists (see, e.g., WIS. STAT. ANN. § 905.04 (West 1995)); psychological associates (see, e.g., ALASKA STAT. § 08.86.200 (Michie 1995)); licensed associate counselors (see, e.g., DEL. CODE ANN. tit. 24, § 3013 (1995)); clinical nurse specialists (see, e.g., GA. CODE ANN. § 24-9-21 (1995)); sexual assault counselors (see, e.g., 42 PA. CONS. STAT. ANN. § 5945.1 (West 1990)); mental health professionals and nurses (see, e.g., S.C. CODE ANN. § 44-22-90 (Law Co-op 1991)); mental health counselors (see, e.g., FLA. STAT. ch. 90.503 (1995)); trainees under supervision (see, e.g., CAL. EVID. CODE § 1010 (West 1995)); college counselors (see, e.g., S.D. CODIFIED LAWS § 19-13-21.2 (Michie 1995)). See also Anne D. Lamkin, *Should Psychotherapist-Patient Privilege Be Recognized?*, 18 AM. J. TRIAL ADVOC. 721, 723-25 (1995).

party's privacy interests.¹⁰⁰ Since the patient/witness initiated the criminal investigation against the defendant and the patient/witness' credibility would be a central issue within the trial, the court concluded that the evidentiary need outweighed the patient's privacy interests.¹⁰¹ The court stated that an *in camera* review and a protective order preventing public revelation of the information sufficiently avoided the "public disclosure of confidential matters."¹⁰²

Of the circuits considering the psychotherapist-patient privilege, the dispositive factor varied among them. Several courts rejected the privilege for a lack of common law foundation,¹⁰³ but some also suggested any such privilege would not apply in criminal trials.¹⁰⁴ Others rejected the privilege because of the context in which it arose, such as in a child abuse case,¹⁰⁵ or held that the defendant/witness waived any such privilege by triggering one of the proposed exceptions to Rule 504.¹⁰⁶ Some courts also chose not to apply the privilege to the particular information or communications at issue after weighing the evidentiary value of the information.¹⁰⁷ From this conflict, the instant case arose.

IV. INSTANT DECISION

A. Majority Opinion

In *Jaffee v. Redmond*, the Supreme Court considered whether federal courts should recognize a psychotherapist-patient privilege, and whether such a privilege, if recognized, should extend to licensed clinical social workers.¹⁰⁸ The majority concluded sufficiently important interests exist to justify the protection

100. *In re Doe*, 964 F.2d at 1328.

101. *Id.* at 1329.

102. *Id.*

103. See *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976); *Slakan v. Porter*, 737 F.2d 368, 377 (4th Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985); *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989); *United States v. Lindstrom*, 698 F.2d 1154, 1167 (11th Cir. 1983); *Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992); and *In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir. 1989).

104. See *United States v. Meagher*, 531 F.2d 752 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976); *United States v. Corona*, 849 F.2d 562 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989).

105. See *United States v. Burtrum*, 17 F.3d 1299, 1301-02 (10th Cir. 1994).

106. See *Meagher*, 531 F.2d at 753; *Hancock*, 565 F.2d at 467; *United States v. Crews*, 781 F.2d 826, 831 (10th Cir. 1986); *Dixon v. City of Lawton*, 898 F.2d 1443, 1450 (10th Cir. 1990); *United States v. Snellenberger*, 24 F.3d 799, 802 (6th Cir. 1994); *United States v. Diamond*, (*In re Doe*), 964 F.2d 1325, 1331 (2d Cir. 1992).

107. See *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983); *In re Doe*, 964 F.2d at 1329.

108. *Jaffee v. Redmond*, 116 S. Ct. 1923, 1928, 1931 (1996).

of confidential communications between a psychotherapist and her patient through the recognition of a federal psychotherapist-patient privilege.¹⁰⁹ Furthermore, the majority concluded the privilege protected confidential communications with licensed clinical social workers.¹¹⁰

In its initial analysis, the majority considered the language of Federal Rule of Evidence 501.¹¹¹ The Court particularly noted that Rule 501 calls for privileges to be interpreted according to common law principles in light of reason and experience.¹¹² Citing *Trammel*, the Court again stated Rule 501 failed to freeze the law of privilege as it existed at that time, and the "evolutionary development" of privileges should continue.¹¹³ However, the Court noted the general presumption that all available testimony should be admissible, subject to exceptional exemptions serving a public good.¹¹⁴

The majority then framed the question before the Court as "whether a privilege protecting confidential communications between a psychotherapist and her patient 'promotes sufficiently important interests to outweigh the need for probative evidence'"¹¹⁵ Referencing the Judicial Conference Advisory Committee's Notes to the Proposed Rules¹¹⁶ and *amici curiae* briefs, the Court noted effective psychotherapy depends upon an atmosphere of confidence and trust.¹¹⁷ The Court concluded that the protection of confidential communications served important private interests through preventing the disclosure of embarrassing or disgraceful communications, and therefore, encouraging individuals to seek treatment for mental or emotional disorders.¹¹⁸ The Court characterized the public interest served by the privilege as the facilitation of an atmosphere conducive to the treatment of mental or emotional disorders, resulting in the improved mental health of this country's citizenry.¹¹⁹

109. *Id.* at 1928-29.

110. *Id.* at 1931.

111. *Id.* at 1927. For the text of Federal Rule of Evidence 501, see *supra* note 35.

112. *Jaffee*, 116 S. Ct. at 1927. For the text of Federal Rule of Evidence 501, see *supra* note 35.

113. *Jaffee*, 116 S. Ct. at 1927-28. For the text of Federal Rule of Evidence 501, see *supra* note 35.

114. *Jaffee*, 116 S. Ct. at 1928 (citing *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

115. *Id.* at 1928 (quoting *Trammel*, 445 U.S. at 51).

116. Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972).

117. *Jaffee*, 116 S. Ct. at 1928-29 (citing *Amici Curiae Briefs for American Psychiatric Association et al.* 14-17, and *American Psychological Association* 12-17.)

118. *Id.* at 1929 (citing *Amici Curiae Briefs for American Psychiatric Association et al.* 14-17, and *American Psychological Association* 12-17.)

119. *Id.* at 1929.

The majority then weighed the interests served by a psychotherapist privilege against the probative value of the communications.¹²⁰ The Court suggested the evidentiary benefit of having no privilege was modest since it is unlikely the evidence would have come into being but for the privilege.¹²¹ The majority speculated that the absence of a privilege would chill confidential communications between patient and psychotherapist, thus precluding the very existence of the information sought as evidence.¹²²

Calling it an indication of "reason and experience,"¹²³ the Court noted the existence of some form of the psychotherapist privilege in all fifty states and the District of Columbia.¹²⁴ The Court stated that once a state legislature enacts a privilege, common law can no longer create it, therefore, the Court considered it insignificant that the privilege had been the product of legislation instead of common law.¹²⁵ The majority also considered the psychotherapist privilege proposed in Rule 504 an indication of "reason and experience," and therefore, support for the recognition of the privilege by the Court.¹²⁶ The Court noted that the Senate Judiciary Committee, in declining to adopt the proposed privileges, explicitly stated it did not disapprove of recognition of a psychotherapist privilege.¹²⁷

After justifying the recognition of a federal psychotherapist privilege, the majority extended the privilege to licensed clinical social workers.¹²⁸ The Court noted that the reasons which support the recognition of a privilege for communications with psychiatrists and psychologists, also support the recognition of the privilege for licensed clinical social workers.¹²⁹

120. *Id.*

121. *Id.*

122. *Id.* For a discussion of the therapeutic value of the psychotherapist privilege, see Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U. MIAMI L. REV. 249 (1996).

123. *Jaffee*, 116 S. Ct. at 1930 (citing *Funk v. United States*, 290 U.S. 371, 376-81 (1933) (holding that a "consistent body of policy determinations by state legislators" reflected both reason and experience)).

124. *Jaffee*, 116 S. Ct. at 1930. The Court cited statutes from all fifty states and the District of Columbia. *Id.* at 1930 n.11. The Court stated the absence of a federal privilege would frustrate the purpose of the state legislation. *Id.* at 1930.

125. *Id.* For a discussion of the Court's authority to recognize novel privileges under Federal Rule of Evidence 501, see Imwinkelried, *supra* note 43, at 524-42.

126. *Jaffee*, 116 S. Ct. at 1930-31.

127. *Id.* at 1931 (citing S. REP. NO. 93-1277, at 13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059).

128. *Jaffee*, 116 S. Ct. at 1931-32.

129. *Id.* Another factor identified by the Court as favoring the extension of the privilege was that a social worker's clientele are typically people of lesser means who cannot afford a psychiatrist or psychologist. *Id.* at 1931 (citing *Amicus Curiae Brief for*

The Court affirmed the Seventh Circuit, but rejected the Seventh Circuit's balancing component, which weighed the evidentiary need for the information against the patient's privacy interests.¹³⁰ The Court characterized a privilege based on such a balancing test as uncertain, stating that it would frustrate the purpose of the privilege.¹³¹ The majority endorsed a privilege which would allow patients to predict with a degree of certainty whether the communications would be subject to disclosure.¹³² Acknowledging that courts develop privileges on a case-by-case basis, the Court stated "it is neither necessary nor feasible to delineate its full contours in a way that would 'govern all conceivable future questions in this area.'"¹³³

B. Dissenting Opinion

The dissent criticized the majority's justifications for extending a psychotherapist privilege to licensed clinical social workers. Justice Scalia stated it is unknown whether the privilege will encourage people to seek treatment as the majority suggested, especially since the majority failed to delineate the scope of the privilege, making its application uncertain.¹³⁴ In addition, Justice Scalia disagreed that the recognition of "some form of psychotherapist privilege"¹³⁵ by a majority of state legislatures supports the Supreme Court's recognition of the privilege for two reasons.¹³⁶ First, he argued a privilege created by state legislatures as opposed to one created by state courts suggests the privilege does "not lend itself to judicial treatment."¹³⁷ Second, if the federal privilege is based upon the privilege recognized by the states, courts will not know how to apply the privilege.¹³⁸ He stated lower courts will "barely

National Association of Social Workers et al. at 5-7).

130. *Jaffee*, 116 S. Ct. at 1932.

131. *Id.*

132. *Id.*

133. *Id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981)). The court suggested the privilege would not apply if harm to the patient or another person could be avoided through disclosure. *Jaffee*, 116 S. Ct. at 1932 n.19. This limitation is consistent with the well-known holding of *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976).

134. *Jaffee*, 116 S. Ct. at 1934.

135. *Id.* at 1929.

136. *Id.* at 1935-36.

137. *Id.* at 1936.

138. *Id.*

have a clue as to what its content might be¹³⁹ since the states vary greatly in their application of a psychotherapist privilege.¹⁴⁰

Chief Justice Rehnquist joined Justice Scalia in criticizing the majority for equating licensed clinical social workers with psychiatrists and psychologists.¹⁴¹ The dissent stated psychiatrists and psychologists are experts in psychotherapy, which might justify the use of a privilege to encourage individuals to seek treatment from these professionals as opposed to less qualified individuals.¹⁴² The dissenting justices stated neither they nor the majority knew whether licensed clinical social workers possess sufficient skill in psychotherapy to be the grouped with psychiatrists and psychologists.¹⁴³ The dissent also noted that Proposed Rule of Evidence 504 did not include licensed clinical social workers.¹⁴⁴ In addition, the dissent considered important that social workers interview people for reasons other than psychotherapy,¹⁴⁵ stating that it will be necessary to distinguish between psychotherapeutic communications and administrative or organizational communications in determining whether the privilege applies.¹⁴⁶ The dissent also noted states vary in their recognition of a

139. *Id.*

140. *Id.* See *supra* note 99; see also *infra* note 147.

141. *Jaffee*, 116 S. Ct. at 1936-37.

142. *Id.* at 1937.

143. *Id.* Requirements for Missouri licensure as a licensed clinical social worker are found in MO. REV. STAT. § 337.615 (1994):

1. Each applicant for licensure as a clinical social worker shall furnish evidence to the division that:

(1) The applicant has a master's degree from a college or university program of social work accredited by the council of social work education or a doctorate degree from a school of social work acceptable to the committee;

(2) The applicant has twenty-four months of supervised clinical experience acceptable to the committee, as defined by rule;

(3) The applicant is at least eighteen years of age, is of good moral character, is a United States citizen or has status as a legal resident alien, and has not been convicted of a felony during the ten years immediately prior to application for licensure.

2. Any person not a resident of this state holding a valid unrevoked and unexpired license, certificate or registration from another state or territory of the United States having substantially the same requirements as this state for clinical social workers may be granted a license to engage in his occupation in this state upon application to the division accompanied by the appropriate fee as established by the committee pursuant to section 337.612.

144. *Jaffee*, 116 S. Ct. at 1936-37.

145. *Id.* at 1938 (citing 225 ILL. COMP. STAT. ANN. 20/3(9) (West 1995)).

146. *Jaffee*, 116 S. Ct. at 1938.

privilege for licensed clinical social workers.¹⁴⁷ In summation, the dissent stated that a need for a privilege extending to licensed clinical social workers might exist, but the need was not so clear, nor the contours of the privilege so evident, that the Supreme Court should "craft" it in common law under Rule 501.¹⁴⁸

V. COMMENT

The Court granted certiorari to the instant case because of the conflict among the circuits regarding the psychotherapist privilege. Presumably, then, the Court should tailor its decision to resolve as much conflict among circuits as possible; however, the Court authored a limited opinion, which will resolve little conflict. The Court addressed only the two narrowest questions before it: whether the federal courts should recognize a psychotherapist privilege, and if so, whether that privilege should apply to licensed clinical social workers.¹⁴⁹ The

147. *Id.* at 1939-40. Citing various state statutes, the dissent concluded that forty states extend some form of privilege to licensed clinical social workers, while ten states do not extend a privilege. Of the forty states which do extend a privilege, the scope of the privilege varies depending upon the content or context of the communication. Examples of limitations on the privilege include when the communications pertain to homicide, crimes inflicting injuries, any criminal act, any violations of law, a serious harmful act, child abuse or when the communications are sought in criminal prosecutions, or when good cause is shown. *Id.*

Missouri privileges communications made to licensed clinical social workers except:

- (1) With the written consent of the client, or in the case of the client's death or disability, the client's personal representative or other person authorized to sue, or the beneficiary of an insurance policy on the client's life, health or physical condition;
- (2) When such information pertains to a criminal act;
- (3) When the person is a child under the age of eighteen years and the information acquired by the licensee indicated that the child was the victim of a crime;
- (4) When the person waives the privilege by bringing charges against the licensee;
- (5) When the licensee is called upon to testify in any court or administrative hearings concerning matters of adoption, adult abuse, child abuse, child neglect, or other matters pertaining to the welfare of clients of the licensee; or
- (6) When the licensee is collaborating or consulting with professional colleagues or an administrative superior on behalf of the client.

MO. REV. STAT. § 337.606 (1994).

148. *Jaffee*, 116 S. Ct. at 1940.

149. Perhaps any statements by the Court outside these two narrow questions would have been only dictum, but dictum would nevertheless guide lower courts in their application of the undefined federal psychotherapist privilege.

Court admitted the instant decision was not meant to "govern all conceivable future questions in this area," however, the Court's decision would probably fail to change the previous holdings of the circuits identified as in conflict.¹⁵⁰ The Court failed to address the issues which the circuits appear to have considered determinative. As circuits develop the privilege on a case-by-case basis, conflict will continue. Conflict among the circuits undermines the very justifications and objectives for the privilege given by the Court. By endorsing or addressing the decisions of the circuits, the Court could have avoided a portion of what is now inevitable litigation.

The Court remained silent on issues which significantly impact the application of the privilege recognized by the Court. First, it is unknown whether the psychotherapist privilege established in *Jaffee v. Redmond* will apply in criminal cases generally or in specific criminal contexts, such as child sexual abuse. The Fifth Circuit, in *United States v. Meagher*, rejected the physician-patient privilege in criminal trials because the privilege did not exist at common law.¹⁵¹ *Jaffee* clearly requires each circuit to recognize the psychotherapist privilege,¹⁵² but fails to indicate in which contexts the privilege should apply. While it is unclear whether the *Meagher* court would still refuse to apply the privilege in the criminal context, the Eleventh Circuit, in *United States v. Corona*, cited *Meagher* as if it stood for the proposition that federal courts should not recognize a psychotherapist privilege in criminal trials.¹⁵³ While the Fifth Circuit would recognize the psychotherapist privilege if deciding *Meagher* today, it might still refuse to apply the privilege because of the criminal context.¹⁵⁴

In *United States v. Burtum*, which concerned child abuse, the Tenth Circuit failed to recognize the psychotherapist privilege, but stated any such privilege,

150. *Jaffee*, 116 S. Ct. at 1927. The Court cited several decisions after stating that the circuits were in conflict. *Id.*

151. *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976). The court also suggests that the privilege, if recognized, would not have applied in this case because of a possible waiver. However, the court did not decide the waiver issue because of its failure to recognize the privilege. *Id.*

152. For a discussion of the Court's authority to recognize novel privileges under Rule 501, see Imwinkelried, *supra* note 43, at 524-42.

153. *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989).

154. The Fifth Circuit might hold as it did in *United States v. Lindstrom*, 698 F.2d 1154, 1167 (11th Cir. 1983), that a criminal defendant's right to effectively cross-examine witnesses outweigh the witness' privacy interests in her psychiatric records.

In contrast to this holding, see *United States v. Haworth*, 168 F.R.D. 660 (D.N.M. 1996). The district court, applying *Jaffee* in a criminal context, held a defendant's right to cross-examine was not violated by the nondisclosure of treatment records protected by the psychotherapist privilege. *Id.* at 661.

if it existed, would not apply to such cases.¹⁵⁵ Therefore, *Jaffee* adds little to *Burtrum* since *Burtrum* depended not upon the mere recognition of the privilege, but upon the application of the privilege to the circumstances before the Court. The dictum of *Jaffee* would probably cause the Tenth Circuit to hold just as it did, since the Supreme Court suggested that the privilege would not apply if disclosure could avoid harm to the patient or others.¹⁵⁶ The defendant in *Burtrum* disclosed the child abuse to his psychotherapist shortly after it occurred, so the psychotherapist could have considered the children at risk for further abuse, therefore warranting the disclosure of the information.¹⁵⁷

The Supreme Court's holding protects confidential communications in the course of psychotherapy, but it does not identify what information is included in "confidential communications."¹⁵⁸ For example, the Sixth Circuit, after recognizing the psychotherapist privilege, held it did not apply to the identity of patients, their dates of treatment, or their length of treatment.¹⁵⁹ *Jaffee* held that notes from and substance of counseling sessions are confidential communications, and therefore protected by the privilege.¹⁶⁰ The holding remains silent as to information such as the identity of patients or their dates of treatment.¹⁶¹ Although the Supreme Court rejected a balancing test in the administration of the privilege, inevitably, courts will weigh the privacy interests of such information and decide if it is worthy of protection.¹⁶² As *In re Zuniga*

155. *United States v. Burtrum*, 17 F.3d 1299, 1301-02 (10th Cir. 1994). The Court did not distinguish between on-going child abuse or past child abuse.

156. *Jaffee v. Redmond*, 116 S. Ct. 1923, 1932 n.19 (1996). The Court did not explicitly identify child abuse as one of the situations in which the privilege might not apply.

157. *Burtrum*, 17 F.3d at 1300. Based on the policy of protecting the "vulnerable segment of society" as articulated by the Tenth Circuit, *id.* at 1302, the Tenth Circuit may be prone to withhold the privilege in any child abuse context, whether the child abuse is on-going or has ceased. Disclosing on-going child abuse appears consistent with *Jaffee*, as harm might be avoided through disclosure. However, *Jaffee* does not foreshadow how courts should treat past child abuse, since the disclosure of past child abuse would not seem to divert potential harm.

158. *Jaffee*, 116 S. Ct. at 1931.

159. *In re Zuniga*, 714 F.2d 632, 640-41 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983).

160. *Jaffee*, 116 S. Ct. at 1931.

161. *Id.*

162. For example, see *United States v. Armstrong Hansen*, No. CR-96-35-GF-DWM, 1997 WL 104130, (D. Mont. Feb. 28, 1997). Stating that the Supreme Court in *Jaffee* "preferred" that the psychotherapist privilege be developed on a case-by-case basis, the district court held that the murder defendant's need for disclosure of the deceased victim's psychiatric records outweighed other interests, and therefore, the federal psychotherapist-patient privilege did not protect the records. *Id.* at *1.

demonstrates, reasonable argument can be made for both the protection of patient identity and for its disclosure.¹⁶³ Until the Supreme Court offers guidance as to what information the privilege should protect, courts will decide the issue on a case-by-case basis, resulting in conflict and an uncertain, inconsistent privilege.

The *Jaffee* holding also leaves undecided which exceptions apply to the privilege. Courts will probably apply the exceptions from Proposed Rule 504.¹⁶⁴ Courts relied on the Proposed Rule for guidance in applying the privilege prior to the Supreme Court's similar reliance in the instant decision.¹⁶⁵ The Court suggested the privilege would not apply if disclosure could avoid harm, which is one of the exceptions proposed in connection with Proposed Rule 504.¹⁶⁶ Several circuits cited the exceptions accompanying Proposed Rule 504 as justification for not applying the privilege to the facts before them.¹⁶⁷

Surprisingly, the conflict among the circuits did not include the question of which professionals the psychotherapist privilege covers. Most of the cases cited by the Court as those in conflict involved communications with psychiatrists or psychologists, although the Tenth Circuit seemed prepared to extend a psychotherapist privilege to a psychiatric nurse, if the court had recognized such a privilege.¹⁶⁸ The most difficult task faced by the federal courts and ultimately the Supreme Court may be deciding to whom the new psychotherapist privilege will apply. Several mental health professionals protected by a psychotherapist privilege in their respective states are not explicitly protected by the federal privilege.¹⁶⁹

The Court should extend the privilege to all those professionals practicing psychotherapy so long as courts can apply the privilege with certainty. The justifications given for the recognition of a psychotherapist privilege would seem

163. *In re Zuniga*, 714 F.2d at 637-39.

164. *See supra* note 41.

165. *Jaffee*, 116 S. Ct. at 1927-28, 1930-32.

166. *See supra* note 41.

167. *See supra* notes 45, 52, and 72; *see also* *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 129-30 (E.D. Pa. 1997). The court noted the *Jaffee* decision explicitly left the contours of the privilege undefined so that courts could define the contours on a case-by-case basis. The court held the plaintiff waived the psychotherapist privilege by placing her mental condition at issue in her cause of action. *Id.*

168. *United States v. Crews*, 781 F.2d 826, 830-31 (10th Cir. 1986).

169. *See supra* note 99. These professionals may presume communications made to them will be protected from disclosure in federal court, but they cannot assure their clients of such a fact until the privilege has been extended to them. If state statutes are evidence of the need and appropriateness of a privilege and the Court seeks to further the purposes of the state legislatures, as the Court suggests in *Jaffee*, many of these professionals would seem to be protected by the new federal privilege since several states extend a privilege to them. *Jaffee*, 116 S. Ct. at 1930-31.

to apply to all professionals practicing psychotherapy, regardless of their particular professional designation or title. However, certainty may require the Court to draw a bright line as to whom the privilege applies. For example, the Court should apply the privilege to only those therapists licensed by their respective states. Situations may arise in which a therapist practices psychotherapy but is not licensed, such as trainee therapists¹⁷⁰ or therapists who have yet to meet all of the qualifications for licensure.¹⁷¹ A bright line rule requiring licensure before confidentiality is triggered would enable unlicensed therapists to explain the limits of confidentiality to the patient. This example demonstrates the uncertainty an undefined privilege creates and the increased likelihood of litigation.¹⁷²

In *Jaffee*, the Court emphasized the need for a predictable privilege, however, the psychotherapist privilege will not be predictable until more of its contours (especially to whom it applies) are defined. District courts have little to guide them in their application of the privilege, and as a result, may look to the law of the states in which they sit. For example, a court in the Eastern District of Wisconsin considered whether the federal psychotherapist privilege established by *Jaffee* applied to Alcoholics Anonymous volunteers.¹⁷³ Finding no definition of psychotherapist in *Jaffee*, the District Court looked to Wisconsin law.¹⁷⁴ The Court found that the two volunteers were not psychotherapists under

170. California, for example, extends a privilege to trainees under the supervision of licensed therapists. See *supra* note 99.

171. For example, a Missouri appellate court refused to apply its professional counselor privilege to a psychologist who had not received his licensure at the time of treatment. *State v. Edwards*, 918 S.W.2d 841 (Mo. Ct. App. 1996). In addition, some states apply a psychotherapist privilege if the patient reasonably believes the professional is a therapist to whom the privilege applies. See, e.g., WIS. STAT. ANN. § 905.04 (West 1995).

172. See *United States v. Schwensow*, 942 F. Supp. 402 (E.D. Wis. 1996). Defendant claimed the psychotherapist privilege recognized in *Jaffee* protected statements made to Alcoholics Anonymous volunteers. *Id.* at 405. The government argued the volunteers were not licensed counselors nor was the relationship justifying confidentiality present. *Id.* at 406. The district court noted that the Supreme Court failed to designate who was considered a "psychotherapist" for purposes of the privilege. *Id.* It then stated that lower courts would determine such details on a case-by-case basis. Ultimately, the district court held the two volunteers were not "psychotherapists." *Id.* at 406-08. See also *United States v. Lowe*, 948 F. Supp. 97, 98-100 (D. Mass. 1996). The district court stated, "*Jaffee* does not control a determination of whether the federal privilege extends to communications with a rape crisis center employee or volunteer who is not a licensed social worker or psychotherapist." The court concluded that the policies of *Jaffee* call for some form of the psychotherapist privilege to be applied to communications with a rape crisis counselor. *Id.*

173. *Schwensow*, 942 F. Supp. at 408.

174. *Id.* at 406.

Wisconsin law and concluded that the two volunteers were not psychotherapists as required for *Jaffee*'s psychotherapist privilege.¹⁷⁵ Finally, the court concluded the psychotherapist privilege did not protect the communications with the volunteers.¹⁷⁶ If other federal district and appellate courts look to state law in applying the privilege, as opposed to a standard federal rule of law, inevitably, more conflict will develop.

The Supreme Court justified the recognition of a psychotherapist privilege because it promotes two important interests: the privilege encourages individuals to seek treatment by assuring them that their private and embarrassing communications will not be disclosed, and it facilitates the overall mental health of the country's citizenry by providing a trusting, confidential atmosphere conducive to psychotherapy.¹⁷⁷ If "the mere possibility of disclosure will impede development of the confidential relationship,"¹⁷⁸ such that patients will not seek treatment without the assurance of confidentiality, and if psychotherapy, in turn, cannot be effective without such assurance,¹⁷⁹ then the privilege must be well-defined to realize the Court's objectives. The Court acknowledged that an uncertain privilege was essentially no privilege at all.¹⁸⁰ Without established contours, courts will apply the privilege inconsistently across circuits; therefore, information protected in one circuit may be disclosed in another.¹⁸¹ This results in leaving the public with an unpredictable privilege.

An unpredictable privilege without contours is worse than no privilege at all. First, an unpredictable privilege frustrates the Court's objectives. If the Court's suggestion is true, the unpredictable privilege will not encourage patients to seek treatment since they do not have the assurance that their communications will remain undisclosed. Therefore, one of the Court's objectives—encouraging individuals to seek treatment—will remain unrealized since the possibility of disclosure exists under an unpredictable privilege. In addition, an unpredictable privilege, or one in which patients have little assurance of confidentiality, will

175. *Id.* at 408.

176. *Id.* Even if the district court deemed the volunteer counselors to be psychotherapists, the court would not have applied the psychotherapist privilege to the facts before it. The court held the defendant did not reasonably believe the volunteers were counselors and the statements at issue were not made for the purpose of treatment. *Id.*

177. *Jaffee*, 116 S. Ct. at 1929. *See supra* Part IV.A.

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

179. *See* Mark B. DeKraai & Bruce D. Sales, *Privileged Communications of Psychologists*, 13 PROF. PSYCHOL. 372 (1982).

180. *Jaffee*, 116 S. Ct. at 1932.

181. For example, circuits may inconsistently apply the privilege in criminal trials or in particular criminal contexts (*i.e.* past child abuse); to particular communications (*i.e.* identity of patients); or to particular psychotherapists (*i.e.* professional counselors or psychiatric nurses).

not facilitate the confidential relationship needed for effective psychotherapy. Therefore, another objective of the Court will also remain unrealized since the mental health of the country's citizenry will not improve through ineffective psychotherapy.

Second, the judicial system loses evidence which might effectuate justice since courts will continue to apply the privilege, albeit ineffectively. Testimonial privileges are "in derogation of the search for truth,"¹⁸² so if the Court chooses to make an exception to the general rule of disfavoring testimonial privileges, it should tailor the privilege so that the objectives or justifications are realized. Otherwise, neither the judicial system, nor the witnesses, nor the parties benefit from such an exception.

VI. CONCLUSION

In *Jaffee v. Redmond*, the Supreme Court recognized a federal psychotherapist-patient privilege for the first time. In addition, the Court extended the privilege to licensed clinical social workers, specifically protecting notes from counseling sessions and the substance of the sessions. However, the Court chose not to establish the contours of the privilege. Recognition of the federal psychotherapist-patient privilege is a step in the right direction, but an undefined privilege will frustrate the Court's justifications or objectives for the privilege. The many questions left unanswered by the Court will cause the privilege to be inconsistently applied. As the majority stated, a privilege which is inconsistently applied is "little better than no privilege at all."¹⁸³

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182. *Id.* at 1933 (Scalia, J., dissenting) (citing *United States v. Nixon*, 445 U.S. 683, 710 (1974)).

183. *Jaffee*, 116 S. Ct. at 1932.