EVIDENCE—PRIVILEGED COMMUNICATIONS—THE PSYCHOTHERAPIST-PATIENT PRIVILEGE AS ADOPTED IN THE FEDERAL COURTS INCLUDES NOT ONLY ALL COMMUNICATIONS TO LICENSED PSYCHIATRISTS AND PSYCHOLOGISTS, BUT ALSO ALL COMMUNICATIONS TO LICENSED SOCIAL WORKERS IN THE COURSE OF PSYCHOTHERAPY—*Jaffee v. Redmond*, 116 S. Ct. 1923 (1996).

Privilege law began as a judicially created doctrine recognizing honor between lawyers in England not to divulge confidential communications.[1] At common law, testimonial privileges were discouraged,[2] but

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[1] *See* Allred v. State, 554 P.2d 411, 413 (Alaska 1976). Privilege is defined as "[a] particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens. An exceptional or extraordinary power or exemption." BLACK'S LAW DICTIONARY 1197 (6th ed. 1990). "Privilege" is a derivative form of the Latin phrase "*privata lex*," which can be loosely translated as "a prerogative given to a person or group of persons." Brian Domb, *I Shot the Sheriff, But Only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege*, 5 J.L. & HEALTH 209, 211 (1991) (footnote omitted).

Two types of privileges exist: testimonial and viatorial. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2197, at 113-14 (McNaughton rev. 1961). Testimonial privileges prevent divulgence of evidence due to the topic or communication that it affects. *See* 8 *id.* at 114. If a communication is privileged, it will be regarded as a testimonial privilege based on the confidential relationship in which it transpired. *See* 8 *id.* Viatorial privileges, on the other hand, excuse evidence because they absolve a witness from being present at trial. *See* 8 *id.* at 113. A viatorial privilege will exclude a witness from traveling and being present at trial so long as that witness has not received notice from the court that his or her testimony was required, and the court did not compensate the witness, or previously excuse him or her for an inability to attend. *See* 8 *id.* at 113-14.

[2] *See* 8 WIGMORE, *supra* note 1, § 2190, at 67-68 (describing the common law "recognition of a definite testimonial compulsion and duty" for witnesses in common law courts). The common law standards underlying the identification of new testimonial privileges can be stated as:

> For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence . . . . [W]e start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.

United States v. Bryan, 339 U.S. 323, 331 (1950) (footnote omitted). The phrase "every man's evidence" is well known, and both courts and scholars have invoked the phrase since the mid-eighteenth century. *See* Jaffee v. Redmond, 116 S. Ct. 1923, 1928 n.8 (1996). For example, both Lord Chancellor Hardwicke and the Duke of Argyll cited the maxim during a May 25, 1742 debate in the House of Lords about a proposal to confer

were extended without controversy to protect communications between the husband and wife,[3] and the attorney and client.[4] This expansion of common law privileges ceased, however, more than a century ago.[5] Privileges were viewed as a hindrance to the primary responsibility of a court; namely, to find the truth.[6] Although the common law has not rec-

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immunity upon a witness for testifying against Sir Robert Walpole, the first Earl of Orford. *See id.*

[3] *See* Domb, *supra* note 1, at 214-15. *Black's Law Dictionary* attempts to define the husband-wife privilege as

> [a] privilege extended to confidential marital communications. While state statutes vary, in general such provide that a spouse has a privilege to refuse to disclose, and to prevent the other from disclosing, a confidential communication made while spouses were married. There are certain exceptions to this privilege, the major one being where one spouse is the victim of a crime by the other.

BLACK'S LAW DICTIONARY 741-42 (6th ed. 1990). Both scholars and courts have stated that a perceived justification for this privilege is that it is likely to advance harmony and sanctity in the marriage association. *See, e.g.*, Domb, *supra* note 1, at 215; Trammel v. United States, 445 U.S. 40, 44 (1980).

This testimonial privilege is broader than most in that it applies not only to confidential communications, but to any detrimental testimony. *See* Domb, *supra* note 1, at 215. The potential abuse of this broadness (for example, marrying someone during a trial so as to not have to testify against that person) is one possible reason for the recent narrowing of the privilege's scope. *See id.*

[4] *See* 8 WIGMORE, *supra* note 1, § 2290, at 542 (stating that the attorney-client privilege is the oldest privilege for confidential communications known to the common law). *Black's Law Dictionary* defines the privilege as the

> client's privilege to refuse to disclose and to prevent any other person from disclosing confidential communications between him and his attorney. Such privilege protects communications between attorney and client made for [the] purpose of furnishing or obtaining professional legal advice or assistance.

BLACK'S LAW DICTIONARY 129 (6th ed. 1990). Its aim is to promote complete and honest communication between clients and their attorneys, and thus encourage more wide-spread public interests in the awareness of law and facilitation of justice. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). It is widely acknowledged that for an attorney to function effectively, open communication is required. *See* Ellen S. Soffin, *The Case for a Federal Psychotherapist-Patient Privilege that Protects Patient Identity*, 1985 DUKE L.J. 1217, 1240 (1985). Once this premise is accepted, it logically flows that a client will come forward with more information if he or she is assured that the confidentiality of this information is protected through the attorney-client privilege. *See id.*

[5] *See* CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 75, at 107 (John William Strong ed., 4th ed. 1992). Although McCormick recognized the difficulty in imputing a specific reason for this termination, he nonetheless found that a contributing element was clearly the tendency of the judiciary to view privileges as an impediment to litigation. *See id.*

[6] *See* Baldridge v. Shapiro, 455 U.S. 345, 360 (1982) (finding that a statute recognizing a privilege should be strictly construed to avoid suppressing what would otherwise be competent evidence); United States v. Nixon, 418 U.S. 683, 710 (1974) (holding that testimonial privileges "are not lightly created nor expansively construed, for they are in derogation for the search for truth" (footnote omitted)); ACLU v. Finch, 638 F.2d 1336,

ognized the physician-patient privilege, legislatures in a number of states have adopted this privilege through statute.[7] Similarly, states have widely recognized the priest-penitent privilege.[8]

Today, state privilege law is largely a product of statutes for those privileges not recognized at common law.[9] The overwhelming majority

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1344 (5th Cir. 1981) (emphasizing that privileges are "strongly disfavored" among the federal courts).

Wigmore, in his treatise on evidence, outlined four conditions that must be present before any privilege can be established:

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

8 WIGMORE, *supra* note 1, § 2285, at 527 (footnote omitted). For an application of Wigmore's four conditions to the psychotherapist-patient privilege, see *infra* note 21.

[7] *See Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1532 (1985) [hereinafter *Developments*]. The physician-patient privilege is defined as "[t]he right of one who is a patient to refuse to divulge, or have divulged by his physician, the communications made between he and his physician." BLACK'S LAW DICTIONARY 1126 (6th ed. 1990). This privilege is statutorily recognized in most states and applies only to the patient. *See id.* at 1126-27. It may also be waived by the patient. *See id.* at 1127.

The privilege was created during the nineteenth century largely as a tool for encouraging citizens to seek medical treatment, thereby improving public health. *See Developments*, *supra*, at 1532. The idea was that citizens would not seek treatment for certain diseases if they thought it would become public information that they had a specific disease. *See id.* The privilege was further intended to invite patients to fully disclose necessary information, which would in turn aid in the adequacy of the treatment. *See id.* at 1532-33. The very first physician-patient privilege was enacted by the New York Legislature in 1828. *See* MCCORMICK, *supra* note 5, § 75, at 107.

The physician-patient privilege has yet to be recognized by the federal courts in cases dealing with a federal question. *See* United States v. University Hosp., 575 F. Supp. 607, 611 (E.D.N.Y. 1983) (finding that the physician-patient privilege does not exist in federal court proceedings except when it pertains to a claim or defense where state law applies).

[8] *See* Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 109, 113 (1983). The priest-penitent privilege is defined as "the recognition of the seal of confession which bars testimony as to the contents of a communication from one to his confessor." BLACK'S LAW DICTIONARY 1189 (6th ed. 1990). It is recognized in all states, and nearly all states have statutes specifically providing for the privilege. *See id.*; Yellin, *supra*, at 109.

The priest-penitent privilege is a product of our society's zeal to protect relationships founded on confidence and trust, as well as the perception that requiring a priest to testify is an ineffective method of producing testimony. *See id.* at 111. It is generally considered an offensive concept to jail a member of the clergy for his or her devotion to and compliance with an absolute religious duty that he or she is compelled to adhere to. *See id.*

of new privileges created at the state level since the early 1800s have been enacted legislatively.[10] This trend toward codification has even led to the preexisting common law privileges, such as the attorney-client and husband-wife privileges, being statutorily regulated in several states.[11]

Federal law dealing with privileges has evolved in a somewhat different fashion.[12] Today, the recognition of new privileges is governed by Federal Rule of Evidence 501, which directs courts to recognize privileges according to the principles of common law, limited only by experience and reason.[13] Congress established the Federal Rules of Evidence

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[9] *See* MCCORMICK, *supra* note 5, § 75, at 107; 8 WIGMORE, *supra* note 1, § 2286, at 532. A variety of different interest groups have attempted to influence the recognition of new privileges, all believing that a particular interest is essential and warranted. *See id.* As a result of the judicial attitude that privileges were a hindrance to litigation, the responsibility for the creation of new privileges shifted dramatically from the courts to legislatures during the nineteenth century. *See* MCCORMICK, *supra* note 5, § 75, at 107.

[10] *See* MCCORMICK, *supra* note 5, § 75, at 107. McCormick noted that while many of the statutory privileges are undoubtedly sound in their reasoning, legislatures are occasionally swayed by dominant groups who seek the prominence and convenience of a "professionally based privilege." *See id.* The result of this procedure is that states differ considerably in whether they recognize a particular privilege, as well as how that privilege is limited or defined. *See id.*

State legislatures have enacted a variety of different privileges. *See* 8 WIGMORE, *supra* note 1, § 2286, at 532-35. These include statutes that recognize a privilege for certain tips given to journalists by their sources; communications to accountants; and conversations with psychologists. *See* 8 *id.* at 532-33. Iowa has even recognized a privilege for statements made to "confidential clerks or stenographers." *See* 8 *id.* at 535 n.24 ("'No . . . stenographer or confidential clerk of any [attorney or physician], who obtains such information by reason of his employment . . . shall be allowed, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity.'"(alteration in original)).

[11] *See* MCCORMICK, *supra* note 5, § 75, at 107. According to Wigmore, state statutes that erect testimonial privileges should be clearly distinguished from those that do no more than punish for general violations of a confidential relationship. *See* 8 WIGMORE, *supra* note 1, § 2286, at 532. Those state statutes that only penalize for a breach of confidence, such as those dealing with disclosure by a detective or a trust company, expressly sanction disclosure in judicial proceedings. *See* 8 *id.* Testimonial privileges, however, do not. *See* 8 *id.*

[12] *See* MCCORMICK, *supra* note 5, § 75, at 107-08.

[13] *See* Jaffee v. Redmond, 116 S. Ct. 1923, 1927 (1996). Rule 501 states:

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

FED. R. EVID. 501. Under Rule 501, privileges in diversity actions will continue to derive from state privilege law. *See* MCCORMICK, *supra* note 5, § 76.1, at 108. Only in

with the intention that a broad national rule would bring clarification, simplification, and uniformity to an otherwise unstable area of the law.[14] This "broad national rule," however, applies only to claims based on a federal question.[15] In any case where the evidence relates to a claim or defense governed by state substantive law, the state law on privileges will be applied.[16]

Because Congress did not specifically delineate certain privileges when it enacted Rule 501,[17] any prospect of concrete national uniformity

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federal question cases and criminal actions will privileges be governed by the common law as defined in view of "reason and experience." *See id.*

[14] *See* Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781, 1783 (1994). Congress adopted the Federal Rules of Evidence in 1975. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS xxix (3d ed. 1996); *see also* MCCORMICK, *supra* note 5, § 76.1, at 108 (discussing the adoption of the Federal Rules of Evidence). This was after Congress rejected the Proposed Federal Rules of Evidence drafted by the Advisory Committee and approved by the Supreme Court in 1972. *See id.* § 75, at 107. The Proposed Federal Rules contained provisions explicitly recognizing nine privileges: (1) required reports; (2) attorney-client; (3) psychotherapist-patient; (4) husband-wife; (5) priest-penitent; (6) political vote; (7) trade secrets; (8) secrets of state and other official information; and (9) identity of informer. *See id.* When these rules were submitted to Congress, they created great controversy, and as a result, Congress adopted what is now Federal Rule of Evidence 501. *See id.*

The enactment of the Proposed Federal Rules would have constructed a unitary system of privilege applying to every case, "regardless of jurisdictional ground." *See id.* § 76.1, at 108. The act passed by Congress, however, instituted a bifurcated system for privilege law. *See id.*; FED. R. EVID. 501.

In enacting Rule 501, Congress did not intend that the law of privileges be frozen in time. *See* Trammel v. United States, 445 U.S. 40, 47 (1980). The rule provided the federal courts with a mandate to carry forward the natural development process of testimonial privileges. *See id.* The Proposed Rules would have completely abrogated preexisting law of privilege and would have recognized only nine distinct categories of privileged communications. *See* Proposed Rules 502-510, 56 F.R.D. 183, 234-58 (1973). Congress rejected this static approach, however, instead adopting Rule 501, which allowed courts the flexibility to adopt new privileges "on a case-by-case basis," regardless of whether the prospective privilege fit into a specifically delineated category. *See Trammel*, 445 U.S. at 47.

[15] *See* FED. R. EVID. 501; *see also* Dudley, *supra* note 14, at 1783 (noting that no provision allows for the utilization of state law in civil cases based on federal law, or in federal criminal cases).

[16] *See* FED. R. EVID. 501. The rule is a product of an awkward trade-off

> between the Advisory Committee on the Federal Rules of Evidence, which sought both to federalize and to codify all of the law of privilege to be applied in federal courts, and those who argued that most privileges were creatures of state law and that federal codification would freeze the development of a necessarily dynamic area of the law.

Dudley, *supra* note 14, at 1784 (footnotes omitted).

[17] *See* FED. R. EVID. 501. For a discussion on the adoption of Federal Rule of Evidence 501, see *supra* note 14.

for privilege law was effectively precluded.[18] Congress merely instructed the courts of the United States that privileges should be recognized "in the light of reason and experience."[19] As a result, the kaleidoscopic pattern of privilege in both the state and federal court systems will likely remain intact for the ascertainable future.[20]

The psychotherapist-patient privilege[21] provides a clear example of this kaleidoscopic pattern of privilege in both the state and federal court

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[18] *See* MCCORMICK, *supra* note 5, § 76, at 108. States deviate substantially in recognizing privileges. *See id.* § 76.2, at 109. All states have at least some form (although varied) of both the husband-wife and the attorney-client privilege. *See id.* In addition, most provide for the protection of at least some types of government information. *See id.* Most states also have one version or another of both a physician-patient and priest-penitent privilege. *See id.*

Federal privilege law, on the other hand, does not recognize the physician-patient privilege. *See* United States v. University Hosp., 575 F. Supp. 607, 611 (E.D.N.Y. 1983). Some states, and even some lower federal courts, have also recognized a limited journalist-source privilege. *See* MCCORMICK, *supra* note 5, § 76.2, at 110. Communications by a client to an accountant are also recognized in roughly a third of the states. *See id.* There is also even an occasional privilege recognized in states for disclosures to school counselors and teachers, nurses, private investigators, social workers, marriage counselors, group-psychotherapy participants, and confidential stenographers and clerks. *See id.*

[19] FED. R. EVID. 501. The Rule's authors borrowed this phrase from the opinion of the United States Supreme Court in *Wolfle v. United States*, which stated that:

> the rules governing the competence of witnesses in criminal trials in the federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience.

291 U.S. 7, 12 (1934) (citation omitted). The Supreme Court has also stated that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." Funk v. United States, 290 U.S. 371, 383 (1933).

[20] *See* MCCORMICK, *supra* note 5, § 76, at 108.

[21] *See* Domb, *supra* note 1, at 221 (noting that the foundation of the psychotherapist-patient privilege lies in the encouragement of complete communication between a therapist and patient, as well as the preservation of a relationship of assurance and confidence between the two). It has been said that the privilege was "derive[d] from the Freudian model of psychoanalysis" that required both complete disclosure and the confidence of the patient for adequate treatment. *See* Robert S. Catz & Jill J. Lange, *Judicial Privilege*, 22 GA. L. REV. 89, 106 (1987).

A frequently quoted statement regarding the policy behind the psychotherapist-patient privilege is:

> The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand.

systems.[22] Although all fifty states, as well as the District of Columbia, have recognized this privilege,[23] this recognition has come in many

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MANFRED S. GUTTMACHER & HENRY WEIHOFEN, PSYCHIATRY AND THE LAW 272 (1952). The central argument for the privilege is that unless the patient is certain that the psychotherapist will have no control over him, especially through means like testifying in a courtroom, a patient will not overcome the "built-in resistance to full disclosure." Domb, *supra* note 1, at 220 n.89.

The common law did not recognize the psychotherapist-patient privilege. *See Developments*, *supra* note 7, at 1539. Unlike the physician-patient privilege, however, courts and academics have consistently endorsed the psychotherapist-patient privilege. *See id.* The privilege itself solely protects confidential communications. *See id.* at 1540. These communications encompass any and all information procured by the psychotherapist during therapy, either orally or through observance of the patient. *See id.* The privilege, however, protects only those communications essential for treatment. *See id.* at 1540-41. Accordingly, disclosures that are not communicated for the purposes of treatment, such as those made in the course of a court-ordered examination to ascertain a criminal defendant's mental state, are not privileged. *See id.* at 1541.

The psychotherapist-patient privilege satisfies Wigmore's four criteria for establishing a privilege at common law. *See* Allred v. State, 554 P.2d 411, 417 (Alaska 1976). First, the communications between a psychotherapist and his patient are "inherently confidential." *See id.* Second, this confidential relationship is a necessary element to achieving the goal of psychotherapy. *See id.* Third, the psychotherapist-patient relationship is clearly one that the community believes should be fostered. *See id.* Lastly, "in balancing injury to the relation, by fear of disclosure, against the benefit to justice by compelling disclosure, the scales weigh heavily in favor of confidentiality." *Id.* at 418. For an outline of Wigmore's four criteria for establishing privileges, see *supra* note 6.

[22] *See* Jaffee v. Redmond, 116 S. Ct. 1923, 1939 (1996) (Scalia, J., dissenting). Justice Scalia referred to "the enormous degree of disagreement among the States as to the scope of the privilege." *Id.* The Justice further commented on the disparity between states in terms of applying the privilege to social workers:

> In adopting *any* sort of social worker privilege, then, the Court can at most claim that it is following the legislative "experience" of 40 States, and contradicting the "experience" of 10. But turning to those States that do have an appreciable privilege of some sort, the diversity is vast. In Illinois and Wisconsin, the social-worker privilege does not apply when the confidential information pertains to homicide, and in the District of Columbia when it pertains to any crime "inflicting injuries" upon persons. In Missouri, the privilege is suspended as to information that pertains to a criminal act, and in Texas when the information is sought in any criminal prosecution. In Kansas and Oklahoma, the privilege yields when the information pertains to "violations of any law" . . . . In Oregon, a state-employed social worker like Karen Beyer loses the privilege where her supervisor determines that her testimony "is necessary in the performance of the duty of the social worker as a public employee." In South Carolina, a social worker is forced to disclose confidences "when required by statutory law or by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding." The majority of social-worker-privilege States declare the privilege inapplicable to information relating to child abuse. And the States that do not fall into any of the above categories provide exceptions for commitment proceedings, for proceedings in which the patient relies on his mental or emotional condition as an element of his claim or defense, or for communications made in the

varying forms.[24] In addition, prior to 1996, the privilege was not uniformly recognized in the federal courts.[25]

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course of a court-ordered examination of the mental or emotional condition of the patient.

Id. at 1939-40 (Scalia, J., dissenting) (citations omitted) (footnotes omitted). For a discussion on Justice Scalia's dissent in *Jaffee*, see *infra* notes 142-65 and accompanying text.

[23] *See* ALA. CODE § 34-26-2 (1991); ALASKA STAT. §§ 08.86.180, 08.86.200 (Michie 1996); ARIZ. REV. STAT. ANN. § 32-2085 (West 1992 & Supp. 1996); ARK. RULE EVID. 503; CAL. EVID. CODE §§ 1010, 1012, 1014 (West 1995); COLO. REV. STAT. ANN. § 13-90-107(g) (West 1989 & Supp. 1996); CONN. GEN. STAT. ANN. § 52-146c (West 1991 & Supp. 1996); DEL. UNIF. RULE EVID. 503; D.C. CODE ANN. § 14-307 (1995); FLA. STAT. ANN. § 90.503 (West 1979 & Supp. 1997); GA. CODE ANN. § 24-9-21 (1995); HAW. RULES EVID. 504, 504.1; IDAHO RULE EVID. 503; 225 ILL. COMP. STAT. ANN. 15/5 (West 1993); IND. CODE ANN. § 25-33-1-17 (West 1993 & Supp. 1996); IOWA CODE ANN. § 622.10 (West 1950 & Supp. 1996); KAN. STAT. ANN. § 74-5323 (1992); KY. RULE EVID. 507; LA. CODE EVID. ANN. art. 510 (West 1995); ME. RULE EVID. 503; MD. CODE ANN., CTS. & JUD. PROC. §§ 9-109, 9-109.1 (1995 & Supp. 1996); MASS. GEN. LAWS ANN. ch. 233, § 20B (West 1986 & Supp. 1996); MICH. COMP. LAWS ANN. § 333.18237 (West 1992 & Supp. 1996); MINN. STAT. ANN. § 595.02 (West 1988 & Supp. 1997); MISS. RULE EVID. 503; MO. ANN. STAT. § 491.060 (West 1996); MONT. CODE ANN. § 26-1-807 (1995); NEB. REV. STAT. § 27-504 (1995); NEV. REV. STAT. ANN. § 49.209 (Michie 1996); N.H. RULE EVID. 503; N.J. STAT. ANN. § 45:14B-28 (West 1995); N.M. RULE EVID. 11-504; N.Y. C.P.L.R. § 4507 (McKinney 1992); N.C. GEN. STAT. § 8-53.3 (Supp. 1996); N.D. RULE EVID. 503; OHIO REV. CODE ANN. § 2317.02 (Anderson 1995); OKLA. STAT. ANN., tit. 12, § 2503 (West 1993); OR. RULES EVID. 504, 504-1; 42 PA. CONS. STAT. ANN. § 5944 (West 1982 & Supp. 1996); R.I. GEN. LAWS §§ 5-37.3-3, 5-37.3-4 (1995 & Supp. 1996); S.C. CODE ANN. § 19-11-95 (Law Co-op. Supp. 1996); S.D. CODIFIED LAWS §§ 19-13-6 to 19-13-11 (Michie 1995); TENN. CODE ANN. § 24-1-207 (1980 & Supp. 1996); TEX. RULES CIV. EVID. 509, 510; UTAH RULE EVID. 506; VT. RULE EVID. 503; VA. CODE ANN. § 8.01-400.2 (Michie 1992); WASH. REV. CODE ANN. § 18.83.110 (West 1989); W. VA. CODE § 27-3-1 (1992); WIS. STAT. ANN. § 905.04 (West 1993 & Supp. 1996); WYO. STAT. ANN. § 33-27-123 (Michie Supp. 1996).

[24] *See Jaffee*, 116 S. Ct. at 1940 (Scalia, J., dissenting). A limited number of states protect communications with only psychiatrists and psychologists, but most implement the protection on a broader scale. *See id.* at 1930 n.13. For example, the Hawaii Rules of Evidence and the North Dakota Rules of Evidence extend the privilege to both physicians and psychotherapists, whereas Arizona's Rules cover "behavioral health professionals." *See* HAW. RULES EVID. 504, 504.1; N.D. RULE EVID. 503; ARIZ. REV. STAT. ANN. § 32-3283 (WEST 1992). In Texas, the privilege has been extended to all people "licensed or certified by the State of Texas in the diagnosis, evaluation or treatment of any mental or emotional disorder" or "involved in the treatment or examination of drug abusers." TEX. RULES CIV. EVID. 510(a)(1). Utah law goes even further, extending the privilege to all confidential communications made to marriage and family therapists; professional counselors; "advanced practice registered nurse[s] designated as registered psychiatric mental health nurse specialist[s]"; and clinical or certified social workers. *See* UTAH RULE EVID. 506. The extent of the exceptions to the privilege adopted by the states is correspondingly varied. *See Jaffee*, 116 S. Ct. at 1930 n.13.

[25] *See Jaffee*, 116 S. Ct. at 1927. Prior to the Supreme Court's decision in *Jaffee*, the United States Courts of Appeals were in disagreement over whether a psychotherapist-patient privilege qualified for recognition under Federal Rule of Evidence 501. *See id.*; *see also* United States v. Burtrum, 17 F.3d 1299, 1302 (10th Cir. 1993) (not recognizing

In a recent case, *Jaffee v. Redmond*,[26] the United States Supreme Court addressed the issues of whether the federal courts should recognize the psychotherapist-patient privilege under Rule 501,[27] and whether that privilege should extend to all licensed social workers.[28] In finding a need to insulate communications conveyed to licensed psychologists and psychiatrists, the Court held that these communications are protected under Rule 501.[29] Furthermore, the Court held that the psychotherapist-patient privilege extends to communications made to "licensed social workers in the course of psychotherapy."[30]

On June 27, 1991, Police Officer Mary Lu Redmond responded to a call at an apartment complex where a fight was in progress.[31] Having exited her patrol car, Redmond witnessed several men rushing out of the apartment building.[32] One of these men, Ricky Allen, was chasing another man with a butcher's knife.[33] After Allen disregarded Redmond's repeated orders to drop the knife, Redmond was forced to shoot Allen, believing that Allen was about to wound the man he was pursuing.[34] Allen died as a result of this single gunshot.[35]

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privilege); *In re* Doe, 964 F.2d 1325, 1328 (2d Cir. 1992) (recognizing privilege); *In re* Grand Jury Proceedings, 867 F.2d 562, 565 (9th Cir. 1988) (not recognizing privilege); United States v. Corona, 849 F.2d 562, 567 (11th Cir. 1988) (same); *In re* Zuniga, 714 F.2d 632, 639 (6th Cir. 1983) (recognizing privilege); United States v. Meagher, 531 F.2d 752, 753 (5th Cir. 1975) (not recognizing privilege).

[26] 116 S. Ct. 1923 (1996).

[27] *See id.* at 1927. The Court acknowledged that there was a conflict among the courts of appeals on whether such a privilege should be recognized. *See id.* For the full delineation of the split between the courts, see *supra* note 25. For the full text of Federal Rule of Evidence 501, see *supra* note 13.

[28] *See Jaffee*, 116 S. Ct. at 1931.

[29] *See id.*

[30] *See id.* The Court agreed with the decision of the Seventh Circuit, which stated that "'[d]rawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose.'" *Id.* at 1931-32 (quoting Jaffee v. Redmond, 51 F.3d 1346, 1358 n.19 (7th Cir. 1995), *aff'd*, 116 S. Ct. 1923 (1996)).

[31] *See id.* at 1925. Redmond was the first police officer on the scene. *See id.* She was employed as a police officer by the Village of Hoffman Estates, a suburb of Chicago, Illinois. *See id.* After the events at issue in this lawsuit arose, Redmond left the Hoffman Estates Police Department. *See id.* n.1.

[32] *See id.* As Redmond initially arrived at the scene, two women ran toward the officer's squad car, screaming and waiving their arms, declaring that a stabbing had taken place in the building. *See id.* Redmond communicated this information to her dispatcher, and requested an ambulance to the scene. *See id.* Redmond next exited the patrol car and began walking toward the apartment building, when several men burst out, one of whom was brandishing a pipe. *See id.* These men ignored Redmond's orders to fall to the ground, so she drew her revolver. *See id.* It was at this point that Ricky Allen exited the apartment building, chasing another man with a butcher's knife. *See id.*

[33] *See Jaffee*, 116 S. Ct. at 1925.

[34] *See id.* at 1925-26. Redmond subsequently recalled the situation:

After the incident, Redmond received counseling services from Karen Beyer, a clinically licensed social worker.[36] Their sessions began three or four days after the shooting and continued at the rate of approximately two or three sessions per week for the next six months.[37]

The administrator of the estate of Ricky Allen subsequently brought suit against Redmond, alleging that she had violated the decedent's constitutional rights by imposing excessive force during the shooting incident.[38] During the pretrial discovery process, the plaintiff learned of the

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> I ordered the black male subject with the knife to drop the knife several times. I told him to drop the knife and get on the ground. . . . I was yelling at him to drop the knife and get on the ground. . . . [H]e did not drop the knife and he did not get on the ground. . . . [I yelled] at least three times. I just kept yelling the minute I saw him.

Jaffee, 51 F.3d at 1349 (alteration in original). Redmond further recalled the instant before the gunshot:

> As [Allen] was gaining speed on the first subject until they were directly—he was directly in front of him, like the first subject's back, and then the second subject, as he was gaining on him the second subject, the male black subject with the knife took the knife back, raised it above his head and I waited, and as he started to come down with the knife and made the downward motion, I fired one shot at him.

Id.

[35] *See Jaffee*, 116 S. Ct. at 1926. Redmond testified that after taking a lone shot at Allen, he collapsed directly to the ground. *See Jaffee*, 51 F.3d at 1349. With her service revolver at her side, Redmond immediately ran to him. *See id.* Redmond recalled observing the butcher knife laying about two or three feet away from Allen's body. *See id.*

Officer Joe Graham, who pulled in at the scene after the incident had already occurred, stated that when he arrived, Redmond was standing on the lawn behind Allen's body aiming her gun at the crowd. *See id.* at 1349-50. According to Graham, she appeared "'somewhat bewildered,'" later explaining that she was "'visibly shaken or upset or disoriented.'" *Id.* at 1350. Graham further recalled that the crowd was "'fluctuating back and forth . . . in a very chaotic movement,'" and the people were yelling that "'they were going to sue the white bitch for shooting Mr. Allen.'" *Id.*

[36] *See Jaffee*, 51 F.3d at 1350. According to Illinois law, a clinically licensed social worker is a provider of "mental health services for the evaluation, treatment, and prevention of mental and emotional disorders . . . based on knowledge and theory of psychosocial development, behavior, psychopathology, unconscious motivation, interpersonal relationships, and environmental stress." *Id.* n.3 (quoting 225 ILL. COMP. STAT. ANN. 20/3 (West 1994)). In Illinois, a licensed clinical social worker

> (1) has a master's or doctoral degree in social work from an accredited graduate school of social work and (2) has at least three years of supervised postmaster's clinical social work practice which shall include the provision of mental health services for the evaluation, treatment, and prevention of mental and emotional disorders.

Id. (quoting 405 ILL. COMP. STAT. ANN. 5/1-122.1 (West 1994)).

[37] *See id.* at 1350. The only conversations that took place between Redmond and Karen Beyer during this time period were during counseling sessions. *See id.* n.4.

[38] *See Jaffee*, 116 S. Ct. at 1926. The complaint sought damages under the Illinois Wrongful Death Act as well as under Title 42 of the United States Code. *See id.*; *see also* 740 ILL. COMP. STAT. ANN. 180/1-180/2.2 (West 1993) (allowing a private cause of

sessions between Redmond and Beyer,[39] and immediately attempted to discover Beyer's notes of the sessions for use in Redmond's cross-examination.[40] The plaintiff thereafter served Beyer with a subpoena to produce proof of being a professional counselor, to produce all of her records and notes concerning Redmond, and to testify at a deposition.[41]

Beyer appeared for the deposition, but specifically limited her answers to those statements made by Redmond about the facts leading up to the fatal incident on June 27, 1991.[42] Although at trial the judge allowed both Redmond and Beyer to testify,[43] he instructed the jury that it would be allowed to draw an adverse inference out of both Redmond's and Beyer's denial to produce Beyer's notes and testify about their communications.[44] Based on this instruction, the jury found for the plaintiff on both claims, awarding a total of $545,000 in damages.[45]

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action for damages for wrongful death); 42 U.S.C. § 1983 (1994) (allowing a federal civil action for deprivation of civil rights).

[39] *See Jaffee*, 116 S. Ct. at 1926. The administrator of Allen's estate learned specifically that Redmond had conducted approximately fifty counseling sessions with Beyer. *See id.*

[40] *See id.* At the deposition of Redmond, the plaintiffs asked about the subject of these sessions with Beyer. *See Jaffee*, 51 F.3d at 1350. Redmond refused to answer these questions, however, claiming that these communications were with a "licensed clinical social worker," and were therefore privileged. *See id.*

[41] *See Jaffee*, 51 F.3d at 1350.

[42] *See id.* at 1351. Beyer also adamantly refused to furnish her notes or reports dealing with her therapy sessions with Redmond. *See id.* Despite the trial judge's order to compel the requested evidence, Beyer continually refused to disclose her communications with Redmond, except to provide a specific factual description of the pattern of events as they led to the shooting. *See id.* Claiming privilege, Beyer also produced only three pages of notes—which were redacted. *See id.* In addition, Redmond, in her second and third deposition sessions, continually answered "I don't recall" to questions dealing with her counseling sessions with Beyer. *See id.*

[43] *See id.* On April 6, 1993, the trial judge ordered that Redmond would not be allowed to testify about her version of the incident, reasoning that attorneys for the plaintiff would be unable to cross-examine Redmond effectively. *See id.* The judge vacated this order just prior to trial, however, but made his intention clear that the jury would be permitted to draw an adverse presumption based on these actions of Beyer and Redmond. *See id.*

[44] *See Jaffee*, 116 S. Ct. at 1926. Jury Instruction Number Eight stated in its entirety:

> You have heard evidence in this case that Karen Beyer, while an employee of the Village of Hoffman Estates, had numerous conversations with Mary Lu Redmond and made notes of those conversations. You have also heard testimony that Ms. Beyer's notes were the property of the Village of Hoffman Estates. During the course of this lawsuit the Court ordered the Village of Hoffman Estates to turn over all of Ms. Beyer's notes to plaintiff's attorneys. The Village was provided with numerous opportunities to obey the Court's order and refused to do so. During the course of this lawsuit Mary Lu Redmond also testified that she would not authorize or direct Ms. Beyer to turn over those notes to plaintiff's attorneys. During Ms. Beyer's testimony she referred to herself as a "therapist," although she is not a

Redmond appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit.[46] The Seventh Circuit reversed the decision, and remanded for a new trial.[47] Recognizing a psychotherapist-patient privilege under the touchstones of "reason and experience,"[48] the court noted that all fifty states have adopted at least some form of the privilege.[49] In addition, the court was further influenced by the fact that Illinois law categorically extended its form of the privilege to social workers in the position of Karen Beyer.[50] The court of appeals qualified its recognition of this new privilege, however, declaring that the privilege could not be asserted when the subject matter of a patient's consultation outweighs the privacy interest of that patient.[51]

The United States Supreme Court granted certiorari[52] to settle the disputed issue among the circuits[53] of whether communications between a psychotherapist and a patient are protected under Rule 501.[54] The Supreme Court held that not only should the privilege be recognized, but it

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> psychiatrist or psychologist - she is a social worker. This Court has ruled that there is no legal justification in this lawsuit, based as it is on a federal constitutional claim, to refuse to produce Ms. Beyer's notes of her conversations with Mary Lu Redmond, and that such refusal was unjustified. Under these circumstances, you are entitled to presume that the contents of the notes would be unfavorable to Mary Lu Redmond and the Village of Hoffman Estates.

Jaffee, 51 F.3d at 1351-52 n.9 (emphasis removed).

[45] *See Jaffee*, 116 S. Ct. at 1926. The jury awarded plaintiff $45,000 in damages for the federal constitutional claim, as well as $500,000 for the wrongful death claim based on state law. *See id.*

[46] *See Jaffee*, 51 F.3d at 1352.

[47] *See id.* at 1348. Redmond also appealed the district court's use of a "deadly force" jury instruction. *See id.* The Seventh Circuit affirmed the district judge's decision concerning this issue and the Supreme Court did not review it. *See id.*; *Jaffee*, 116 S. Ct. at 1925.

[48] *Jaffee*, 51 F.3d at 1355-56. The court agreed with both the Second and the Sixth Circuits that acknowledgment of the psychotherapist-patient privilege was necessitated by both experience and reason. *See id.* The court further explained that a patient shares a unique relationship with his or her psychotherapist, and it stands to reason that the most important aspect of gaining successful treatment is the patient's capacity to interchange freely without concern of public dissemination. *See id.*

[49] *See id.* at 1356.

[50] *See id.* at 1357.

[51] *See id.*

[52] *See* Jaffee v. Redmond, 116 S. Ct. 334 (1995).

[53] *See* Jaffee v. Redmond, 116 S. Ct. 1923, 1927 (1996). For a list of those circuit courts recognizing the psychotherapist-patient privilege as well as those declining to recognize it, see *supra* note 25.

[54] *See Jaffee*, 116 S. Ct. at 1927. For the full text of Federal Rule of Evidence 501, see *supra* note 13.

should include communications to all "licensed social workers in the course of psychotherapy."[55]

A split in the courts of appeals over whether to recognize a federal psychotherapist-patient privilege provided the framework for the decision in *Jaffee*.[56] In 1992, the Second Circuit was faced with the issue in *In re Doe*.[57] In *Doe*, the court heard an appeal from a lower court order holding the appellant, John Doe, in contempt for refusing to disclose certain answers regarding his psychiatric history.[58] The district court refused to recognize a psychotherapist-patient privilege and compelled Doe to disclose his full psychiatric history to the defendant.[59]

On appeal in *Doe*, the Second Circuit reversed the district court's decision, recognizing that the intent of Congress in enacting Rule 501 was not to suspend the development of federal privilege law.[60] The court recognized the privilege, noting that there were several important interests at stake, including the appellant's personal privacy and the necessity

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[55] *See Jaffee*, 116 S. Ct. at 1931.

[56] *See id.* at 1927.

[57] 964 F.2d 1325, 1328 (2d Cir. 1992).

[58] *See id.* at 1326. A man named Steven Diamond was indicted in 1990 for attempted extortion, a violation of 18 U.S.C. § 1951 (1988). *See id.* The appellant, a key witness in *Doe*, had initiated a federal investigation of Diamond, alleging that Diamond attempted to extort roughly $50,000 from Doe for Diamond's services in obtaining a zoning variance for a theater owned by Doe. *See id.* The government's case against Diamond rested largely on the testimony of Doe, and Diamond therefore attempted to raise the issue of Doe's credibility in his own defense. *See id.*

Counsel for Diamond subsequently learned that Doe had suffered from periodic depression over the course of 30 years during which time he had consulted various psychiatrists. *See id.* The defendants sought to interview the psychiatrists, as well as obtain a release of Doe's files, to evaluate the information in preparation of trial. *See id.* at 1326-27. Doe refused to disclose this information, claiming that "'it would be unfair, confusing, and prejudicial to permit defense counsel to go into the content of these confidential records.'" *Id.* at 1327.

The trial judge initially issued a protective order for the restricted purpose of enabling defense counsel to distinguish the information it would use at trial. *See id.* Defense counsel retained a psychiatrist to review the records who stated to the court that: "'[Appellant's] long history of emotional illness is certainly relevant to his credibility as a witness and should be a subject permitted during cross-examination.'" *Id.* After an in camera review of the files, the judge directed the information to be released to the defendants. *See id.*

During a pre-trial hearing held by the judge to resolve the privilege issue, Doe refused to answer all questions relating to his psychiatric history, invoking the psychotherapist-patient privilege. *See id.* The judge therefore held him in contempt of court. *See id.* The district court judge stayed the execution of the order to allow Doe to appeal the ruling to the court of appeals. *See id.*

[59] *See id.*

[60] *See id.* at 1327-28 (noting the Supreme Court's affirmation that Rule 501 confirmed a positive intention not to paralyze privilege law, rather the purpose of the rule was to allow courts flexibility to expand the law through case-by-case inquiry).

of acquiring informed medical assistance.[61] The court subsequently held that the privilege was limited, however, to only those instances where the privacy interest of the witness outweighs the evidentiary need for the witness's psychiatric history.[62] After analyzing the facts of the case in the context of this test, the court held that the privilege should not apply to Doe, and he must therefore disclose his psychiatric files.[63]

The issue of whether to recognize the psychotherapist-patient privilege was also tackled by the Sixth Circuit in *In re Zuniga*.[64] In *Zuniga*, the Sixth Circuit consolidated for appeal two civil contempt orders issued by separate federal district courts.[65] The two lower courts held the appel-

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[61] *See id.* at 1328.

[62] *See Doe*, 964 F.2d at 1328-29. The court, after recognizing the privilege, stated: "we also recognize, as appellant concedes, that the privilege is highly qualified and requires a case-by-case assessment of whether the evidentiary need for the psychiatric history of a witness outweighs the privacy interests of that witness." *Id.* (citing *In re* Zuniga, 714 F.2d 632, 639 (6th Cir. 1983)).

[63] *See id.* at 1329. The court stated:

> Although appellant's psychiatric files do contain material that squarely implicates his privacy interests, the balance in this case weighs overwhelmingly in favor of allowing an inquiry into his history of mental illness. Appellant is not only the person who initiated the criminal investigation against Diamond but also a witness whose credibility will be the central issue at trial. He has a long history of emotional illness, and there is expert psychiatric opinion in the record that this history is relevant to his credibility. . . . We agree with Chief Judge Platt that a preclusion of any inquiry into appellant's psychiatric history would violate the Confrontation Clause and vitiate any resulting conviction of Diamond.

Id.

[64] 714 F.2d 632, 636 (6th Cir. 1983).

[65] *See id.* at 634. Two separate courts of the Eastern District of Michigan held the appellants, Jorge S. Zuniga and Gary S. Pierce, in contempt of court for not properly responding to a subpoena duces tecum issued by a grand jury. *See id.*

Pierce was a licensed psychiatrist, practicing medicine in Michigan. *See id.* When the Grand Jury for the Eastern District of Michigan served a subpoena duces tecum on Pierce, requiring him to appear and produce certain records, Pierce refused. *See id.* He filed a motion to quash the subpoena, which was denied by the district court judge. *See id.* After further efforts at resistance by Pierce, the district court found him in civil contempt, issuing a court order placing him in the custody of the United States Marshal until he agreed to comply with the subpoena. *See id.* at 634-35. The district court granted a stay in the execution of its order pending appeal. *See id.* at 635.

Zuniga was a licensed psychiatrist, practicing in the State of Michigan. *See id.* He was similarly served with a subpoena duces tecum, commanding him to produce certain records to the district court. *See id.* When he filed a motion to quash the subpoena, the district judge denied the motion, but limited the subpoena to the records pertaining to 75 individuals. *See id.* The judge also restricted the scope of the subpoena to apply only to the five years preceding the service of the subpoena. *See id.*

After this order limiting the scope of the subpoena, the government served a second subpoena on Zuniga. *See id.* Zuniga again filed a motion to quash, and persistently refused to comply with the second subpoena. *See id.* at 636. At this point, the district

lant psychiatrists in contempt of court for refusing to provide psychiatric records of their patients to a grand jury, which requested them through a subpoena duces tecum.[66]

The court of appeals affirmed the district court's ruling, while at the same time recognizing a psychotherapist-patient privilege.[67] Finding that the expressed interests in favor of the privilege[68] outweighed the want for evidence in the management of criminal justice, the court held that the psychotherapist-patient privilege was "mandated by reason and experience."[69] Mirroring *Doe*, however, the court did not find that the privilege applied to the facts of the case.[70] Because the information sought by the subpoena related only to the identity of certain patients, as well as the dates and times of their treatments, the court found that the information was not privileged, and forced disclosure.[71]

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court found Zuniga to be in contempt of court "and remanded him to the custody of the United States Marshal until such time as Zuniga purged himself of contempt by compliance." *Id.* The district court granted a stay in the execution of this order pending Zuniga's appeal. *See id.*

The two appeals were consolidated pursuant to Rule 3(b) of the Federal Rules of Appellate Procedure because the two issues, as well as the arguments presented, were identical. *See id.* Both parties contended that the documents sought by the government were protected by the psychotherapist-patient privilege. *See id.*

[66] *See id.* at 634. Subpoena duces tecum is defined as:

> A court process, initiated by a party in litigation, compelling production of certain specified documents and other items, material and relevant to facts in issue in a pending judicial proceeding, which documents and items are in custody and control of a person or body served with process.

BLACK'S LAW DICTIONARY 1426 (6th ed. 1990) (citing FED. R. CIV. P. 45; FED. R. CRIM. P. 17; People v. Grosunor, 439 N.Y.S.2d 243, 249 (Crim. Ct. 1981)).

[67] *See Zuniga*, 714 F.2d at 639, 642.

[68] *See id.* at 640. The court noted that the interests behind a psychotherapist-patient privilege were extensive. *See id.* at 639. Among these interests is that confidentiality is a necessity for acquiring successful treatment. *See id.* "The inability to obtain effective psychiatric treatment may preclude the enjoyment and exercise of many fundamental freedoms, particularly those protected by the First Amendment." *Id.*

[69] *See id.* (quoting FED. R. EVID. 501). Although recognizing the privilege, the court expressly declined to define the boundaries of the privilege. *See id.* As the court stated:

> Just as the recognition of privileges must be undertaken on a case-by-case basis, so too must the scope of the privilege be considered. This is necessarily so because the appropriate scope of a privilege, like the propriety of the privilege itself, is determined by balancing the interests protected by shielding the evidence sought with those advanced by disclosure.

Id. at 639-40 (citations omitted).

[70] *See id.* at 640.

[71] *See id.* The court stated that

> [t]he essential element of the psychotherapist-patient privilege is its assurance to the patient that his innermost thoughts may be revealed without fear of disclosure. Mere disclosure of the patient's identity does not negate this element. Thus, the Court concludes that, as a general rule, the identity of a patient or the fact and time of his treatment does not fall within the scope

Other circuit courts have declined to recognize the psychotherapist-patient privilege.[72] In *United States v. Burtrum*,[73] the Tenth Circuit was faced with the question of whether the psychotherapist-patient privilege should exist in criminal child sexual abuse cases.[74] At the district court level, the defendant was charged with sexual child abuse.[75] Burtrum had undergone therapy shortly after the incidents, at which time he admitted to the crimes and was further diagnosed as a pedophile.[76] The defendant attempted to exclude this evidence based on the psychotherapist-patient privilege, but the district court denied his request.[77] The district court did recognize a qualified psychotherapist-patient privilege based on the reasoning in *Doe*,[78] but found that the public interest in safeguarding children from sexual abuse substantially outweighed the defendant's privacy interest as well as the desire for informed medical assistance.[79] As a result, the district court held that Burtrum's admission of guilt to his psychotherapist was admissible.[80]

The Tenth Circuit affirmed the district court's decision but refused to recognize even a qualified psychotherapist-patient privilege.[81] The court reasoned that privileges are generally disfavored because they cause

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> of the psychotherapist-patient privilege. Accordingly, the information sought by the grand jury subpoenas is not privileged.

Id. (footnote omitted).

[72] *See* United States v. Burtrum, 17 F.3d 1299, 1302 (10th Cir. 1994); *In re* Grand Jury Proceedings, 867 F.2d 562, 565 (9th Cir. 1989); United States v. Corona, 849 F.2d 562, 567 (11th Cir. 1988); United States v. Meagher, 531 F.2d 752, 753 (5th Cir. 1976).

[73] 17 F.3d 1299 (10th Cir. 1994).

[74] *See id.* at 1300. Appellant Wilkie Bill Burtrum, Jr., was convicted of sexually abusing children, a violation of federal criminal law. *See id.*; *see also* 18 U.S.C. §§ 2241(c), 2244(a)(1) (Supp. 1996) (making sexual abuse a federal crime if done within the special maritime and territorial jurisdiction of the United States, or in federal prison). Burtrum appealed his conviction, contending that the district court erred by admitting testimony, which he believed was privileged, from his psychotherapist. *See Burtrum*, 17 F.3d at 1300. The court of appeals, in determining whether to recognize the psychotherapist-patient privilege, expressly limited its holding solely to those cases "in a criminal child sexual abuse context." *Id.* at 1301-02.

[75] *See id.* at 1300. Burtrum was actually convicted of two counts of "oral sodomy with a child under the age of twelve." *Id.* The offenses in question occurred within Indian territory, which conferred jurisdiction upon the federal court to hear the case. *See id.*; *see also* 18 U.S.C. §§ 1151, 1153 (1984 & Supp. 1996) (making offenses committed within "Indian Country" subject to the exclusive jurisdiction of the United States).

[76] *See Burtrum*, 17 F.3d at 1300.

[77] *See id.* at 1300-01.

[78] 964 F.2d 1325 (2d Cir. 1992). See *supra* notes 57-63 and accompanying text for a discussion of *Doe*.

[79] *See Burtrum*, 17 F.3d at 1301.

[80] *See id.*

[81] *See id.* at 1302 (finding that "significant evidentiary need compels the admission of this type of relevant evidence in child sexual abuse prosecutions," and therefore refusing to recognize the privilege in these limited circumstances).

the repression of otherwise competent evidence.[82] In addition, the court opined that Congress specifically declined to recognize a psychotherapist-patient privilege by adopting Rule 501.[83] The court did, however, expressly limit its decision to the context of child sexual abuse prosecutions.[84]

The Ninth Circuit similarly declined to recognize the privilege in *In re Grand Jury Proceedings*.[85] In that case, a federal grand jury was investigating the death of an infant child by targeting the child's mother, Jane Doe.[86] As a part of its investigation, the grand jury served subpoenas to compel production of Doe's psychiatric and hospital records.[87] Doe filed a motion to quash the subpoenas, claiming that the information sought was subject to the psychotherapist-patient privilege.[88] After a hearing on the issue, the district court denied Doe's motion and compelled production of the information.[89]

On appeal, the Ninth Circuit affirmed the holding of the district court and did not recognize the privilege.[90] The court held that Rule 501 encompassed only those privileges in existence at common law, and the

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[82] *See id.* (quoting *In re* Grand Jury Proceedings, 842 F.2d 244, 246 (10th Cir. 1987)) (stating that there is "a strong presumption against testimonial privileges because they result in the suppression of competent evidence").

[83] *See id.* (finding that the psychotherapist-patient privilege was nonexistent at common law, and Congress has also chosen not to recognize the privilege). The court further found that Congress, in adopting Rule 501, preserved the federal law of privilege as it existed, rather than delineating specific privileges, like the psychotherapist-patient privilege. *See id.*

[84] *See Burtrum*, 17 F.3d at 1302.

[85] 867 F.2d 562 (9th Cir. 1989).

[86] *See id.* at 563. Jane Doe's child died on a federal reservation "located within the Special Federal Maritime and Territorial Jurisdiction of the United States." *Id.* Doe was the subject of the grand jury investigation, but contended that the cause of death of her child was Sudden Infant Death Syndrome. *See id.* Because murder was suspected, the Federal Bureau of Investigation began an investigation, and a federal grand jury was also convened to investigate. *See id.* at 563-64.

[87] *See id.* at 564. The government directed these subpoenas to Doe's treating psychiatrist, Dr. John Roe, along with two hospitals where Doe had earlier received treatment. *See id.* Dr. Roe stated in an affidavit to the grand jury that Doe possessed a "fragile" mental condition, and that "based upon her past history, he felt release of her confidential medical information could 'seriously threaten her mental health.'" *Id.* Both Dr. Roe and the two hospitals, however, agreed to provide the information requested in the subpoenas if the court so ordered. *See id.*

[88] *See id.*

[89] *See id.* The district judge conducted a telephone hearing, at which time he consolidated all Doe's motions and denied them—granting the government's motion to compel production. *See id.* Doe filed a timely appeal, and the Ninth Circuit granted a stay of the execution of the order pending appeal. *See id.*

[90] *See In re Grand Jury Proceedings*, 867 F.2d at 565.

psychotherapist-patient privilege was not.[91] The court specifically declined to reach the merits of whether the privilege was justified, holding that it was up to Congress to define new privileges in the context of federal criminal proceedings.[92] As a result, the court ordered Doe to produce her psychiatric records to the grand jury.[93]

In *United States v. Corona*,[94] the Eleventh Circuit also faced the issue of whether to recognize the psychotherapist-patient privilege.[95] In *Corona*, the defendant was charged with the crime of purchasing firearms while addicted to a controlled substance.[96] To prove that Corona was addicted to a controlled substance, the government offered evidence of his treatment at a drug rehabilitation center, including testimony from his psychiatrist.[97] The district court rejected Corona's motion to exclude the

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[91] *See id.* The court further noted that the psychotherapist-patient privilege has developed strictly through state statutes. *See id.*

[92] *See id.* The court stated specifically:

> We note that the Hippocratic tradition of physician non-disclosure of patient secrets is ancient; we decline to reach the merits of the efficacy of the psychotherapist-patient privilege by this holding, but we do opine 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.

[93] *See id.*

[94] 849 F.2d 562 (11th Cir. 1988).

[95] *See id.* at 566-67.

[96] *See id.* at 562-63. Ray L. Corona was charged with 18 violations of 18 U.S.C. sections 922(a)(6) and 922(h)(3), otherwise known as the Drug Control Act of 1968. *See id.* These provisions essentially make it unlawful for a person to "make any false or fictitious oral or written statement . . . intended or likely to deceive" any importer, collector, manufacturer, or dealer of firearms when purchasing a firearm. *See* 18 U.S.C. § 922(a)(6) (1976 & Supp. 1996). In addition, the statute forbids any "unlawful user of or [person] addicted to" any controlled substance to receive firearms. *See id.* § 922(h)(3).

On several occasions between October 1981 and October 1984, Corona purchased nine firearms from the Tamiami Gun Shop of Miami. *See Corona*, 849 F.2d at 563. During each purchase, the defendant completed a form published by the Bureau of Alcohol, Tobacco and Firearms, that was designed to detect statutorily-prohibited purchasers of firearms. *See id.* Corona continually answered "no" to the question on the form asking "'[a]re you an unlawful user of, or addicted to marijuana, or a depressant, stimulant, or narcotic drug?'" *Id.* The government contended that these negative responses resulted in a violation of 18 U.S.C. § 922(a)(6), and that his use of cocaine during the three-year period in which he bought the guns resulted in a violation of 18 U.S.C. § 922(h)(3). *See id.*

[97] *See Corona*, 849 F.2d at 563. The government offered as evidence testimony of Corona's private psychiatrist, Dr. Roberto Ruiz, who treated Corona weekly between August 1980 and January 1981. *See id.* During these sessions Corona confided to Dr. Ruiz that he had become an extensive cocaine user, after initially starting as a social user. *See id.* Dr. Ruiz also learned from Corona that he often spent up to $10,000 per month to satisfy his habit. *See id.* at 564. Although Dr. Ruiz did not come to the conclusion that Corona was actually an addict, he did officially classify him as a "chronic cocaine user." *See id.*

testimony and held that there was no psychotherapist-patient privilege in criminal actions in the Eleventh Circuit.[98] As a result, Corona was convicted in the district court.[99]

On appeal, the Eleventh Circuit affirmed Corona's conviction.[100] In declining to recognize the psychotherapist-patient privilege, the court reasoned that the privilege was a derivative form of the physician-patient privilege, which was not recognized either at common law or at the federal level by statute.[101] In addition, the court reiterated the findings of the Supreme Court in emphasizing that privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth."[102] Accordingly, the court declined to recognize the privilege in federal criminal trials.[103]

The Fifth Circuit also faced this issue in *United States v. Meagher*.[104] In *Meagher*, the defendant was convicted in the district court for bank robbery.[105] In response to Meagher's defense of insanity the government offered testimony of medical witnesses, one of whom was Meagher's psychiatrist.[106] Meagher claimed that the psychiatrist's rec-

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The government further offered as evidence testimony from a former acquaintance of Corona, Shelley Phillips. *See id.* at 563. Phillips testified that she socialized with Corona several times between 1981 and 1983, and that each time they consumed cocaine roughly twelve times each night. *See id.*

The government finally introduced as evidence records of Corona's treatment at the Palm Beach Institute (PBI). *See id.* at 564. Corona entered the institute on two separate occasions between 1981 and 1983, for treatment of a chemical substance abuse problem. *See id.* Corona's therapist and other workers at PBI were under the impression that Corona was addicted to cocaine. *See id.*

[98] *See id.* The court also denied the motion made by Corona to exclude the PBI records. *See id.* The PBI file itself contained 130 pages of information about Corona. *See id.* In its ruling, the court limited the amount of records allowed into evidence to 13 pages. *See id.*

[99] *See id.* The jury convicted Corona on all 18 counts. *See id.* The court sentenced him to one year in prison and five years of probation. *See id.*

[100] *See id.* at 568.

[101] *See id.* at 567.

[102] *Corona*, 949 F.2d at 567 (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).

[103] *See id.*

[104] 531 F.2d 752 (5th Cir. 1976).

[105] *See id.* at 752. William Joseph Meagher was found guilty of robbing the Florida Northside Bank in Jacksonville, Florida. *See id.* His only defense to the charge was insanity, and he offered testimony from nine medical witnesses in support of that defense. *See id.*

[106] *See id.* The government offered into evidence the testimony and records of Dr. Samuel Yochelson, a psychiatrist employed by the National Institute of Mental Health, located in Washington, D.C. *See id.* at 752-53. Meagher had been a member of Dr. Yochelson's program of researching criminal behavior between 1971 and 1973. *See id.* at 753. The two maintained a somewhat routine correspondence level during the time period, and the psychiatrist testified that "in his professional opinion and as a result of his

ords were protected under the physician-patient privilege, but the court disagreed, and Meagher was found guilty.[107]

On appeal in *Meagher* the Fifth Circuit declined to recognize a privilege for this information.[108] The court first noted that Rule 501 governed its recognition of new privileges, limiting the court to those common law principles as defined by federal courts in view of "experience and reason."[109] The court further held that because no physician-patient privilege existed at common law, it would not now recognize such a privilege in federal criminal trials.[110] Additionally, the court buttressed its position in finding that Congress expressly declined to adopt Proposed Rule 504, which would have created a specific psychotherapist-patient privilege in federal courts.[111] The court found that even if Congress had adopted the rule, this privilege would not have applied to situations where a patient was relying on his mental condition as a part of his defense.[112] As a result, the court concluded that this information

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long personal contact with defendant, he did not believe the defendant to have been insane at the time of the bank robbery." *Id.*

[107] *See id.* at 752.

[108] *See id.* at 753.

[109] *See Meagher*, 531 F.2d at 753. (citing FED. R. EVID. 501).

[110] *See id.* (citing United States v. Harper, 450 F.2d 1032, 1035 (5th Cir. 1971)).

[111] *See id.*; *see also* 51 F.R.D. 315, 366 (1971). Proposed Rule 504(b) states:

> 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, 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.

Id. In addition, Proposed Rule 504(c) states that "[t]he 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." *Id.*

Congress did not enact Proposed Rule 504, but instead enacted current Rule 501 in its place. *See* MCCORMICK, *supra* note 5, § 76.1, at 108. For a discussion of the Proposed Rules of Evidence, see *supra* note 14.

[112] *See Meagher*, 531 F.2d at 753. The court stated:

> [I]n its Proposed Rules of Evidence, Rule 504, the Supreme Court recommended a psychotherapist-patient privilege, but expressly excepted from the privilege those situations in which the patient relies upon his mental condition as an element of his defense; i.e., whenever the defendant raises an insanity defense. This proposed psychotherapist-patient privilege was not accepted by Congress in its final enactment of the Federal Rules of Evidence; yet, even if such a privilege had been adopted via the Supreme Court's proposed rules, it could not be utilized when the defendant in a criminal trial claims insanity as a defense.

Id. (citations omitted).

would not have been protected even had the court decided to recognize the privilege.[113]

With this split in the circuit courts as a background, the Supreme Court granted certiorari[114] in *Jaffee v. Redmond* to definitively answer the question of whether the federal courts should adopt the psychotherapist-patient privilege under Rule 501.[115] In *Jaffee*, the Court not only held that recognition of a psychotherapist-patient privilege in the federal courts was mandated by Rule 501, but also that it should extend to all licensed social workers providing psychotherapy.[116]

Justice Stevens, writing for the Court,[117] began by analyzing Rule 501 of the Federal Rules of Evidence, which mandates the Court to circumscribe new privileges by defining the principles of the common law with a view toward "reason and experience."[118] The Justice found that Congress's intention was not to hinder the development of privileges by adopting Rule 501, but rather that such new privileges are more appropriately defined through a case-by-case analysis.[119] In defining exactly what the common law principles are that underlie the recognition of new testimonial privileges, and would guide the court in its analysis, Justice Stevens referred to the fundamental adage that the public is entitled to "every man's evidence."[120] The Justice defined the general common law disposition as unsympathetic to testimonial privileges.[121]

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[113] *See id.*

[114] *See* Jaffee v. Redmond, 116 S. Ct. 334 (1995).

[115] *See* Jaffee v. Redmond, 116 S. Ct. 1923, 1927 (1996).

[116] *See id.* at 1931.

[117] *See id.* at 1925. Justice Stevens was joined in the majority opinion by Justices O'Connor, Kennedy, Souter, Thomas, Ginsburg, and Breyer. *See id.*

[118] *See id.* at 1927; *see also* Hawkins v. United States, 358 U.S. 74, 79 (1958) (stating that changes in privileges should be directed by "reason and experience"); Funk v. United States, 290 U.S. 371, 383 (1933) (finding that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions").

[119] *See Jaffee*, 116 S. Ct. at 1927-28. (citing University of Pa. v. EEOC, 493 U.S. 182, 189 (1990); Trammel v. United States, 445 U.S. 40, 47 (1980)). The Justice stated:

> The Senate Report accompanying the 1975 adoption of the Rules indicates that 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." The Rule thus did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to "continue the evolutionary development of testimonial privileges."

Id. (citations omitted).

[120] *See id.* at 1928. The Justice qualified this fundamental common law principle, however, by stating that exceptions to the rule would be justified if there was a "'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *See id.* (quoting *Trammel*, 445 U.S. at 50).

[121] *See id.*

Guided by these standards, the Court turned to the issue of whether the psychotherapist-patient privilege is mandated under common law principles.[122] Justice Stevens began by equating the psychotherapist-patient privilege with both the husband-wife and the attorney-client privileges, positing that all three require confidence and trust for a successful relationship.[123] The Court further observed that the Judicial Conference Advisory Committee recommended to Congress in 1972 that it adopt a federal psychotherapist-patient privilege for inclusion in the Federal Rules of Evidence.[124] Based on this reasoning, Justice Stevens concluded that the proposed privilege served important private interests.[125]

The Court made it clear, however, that the proposed privilege must also advance public ends.[126] Justice Stevens declared that the psychotherapist-patient privilege does serve the public ends by promoting the appropriate treatment for those people suffering from a mental or emo-

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[122] *See id.* Justice Stevens stated:

> Guided by these principles, the question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patient "promotes sufficiently important interests to outweigh the need for probative evidence . . . ." Both "reason and experience" persuade us that it does.

Id. (citation omitted).

[123] *See id.* Justice Stevens noted that physician treatment for physical ailments can be successful without these elements of "confidence and trust." *See id.* "Effective psychotherapy, by contrast, 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." *Id.* Public disclosure of confidential information necessary for successful treatment would likely cause embarrassment. *See id.* As a result, the mere prospect of exposure of these communications could very well serve to hinder the growth of the confidential relationship needed for successful treatment. *See id.*

[124] *See Jaffee*, 116 S. Ct. at 1928-29. The Justice quoted the Judicial Conference Advisory Committee in part, saying that the ability of a psychiatrist to assist a patient

> is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . ., there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment.

Id. at 1928.

[125] *See id.* at 1929.

[126] *See id.* (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)). Justice Stevens also outlined the public interests in both the attorney-client and husband-wife privileges. *See id.* According to the Justice, the goal of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* (quoting *Upjohn*, 449 U.S. at 389). In addition, justification for the husband-wife privilege is that it advances the public's special interest in harmonious marital relations. *See id.* (quoting *Trammel*, 445 U.S. at 53).

tional disturbance.[127] The Justice held that the mental health of citizens of the United States is a public goal that is of predominant concern.[128]

The Court next contrasted these public and private interests with the potential evidentiary benefit that would result if the Court refused to recognize the privilege.[129] Justice Stevens held this benefit to be a modest one.[130] The Justice found that the absence of such a privilege would effectively chill conversations with psychotherapists, and patients would never convey to a therapist the evidence sought by most litigants in the first place.[131] As a result, the Court noted that this would not aid in the truth-seeking function because if there was no privilege, a psychotherapist would receive little or no information.[132] Based on this reasoning, Justice Stevens found it appropriate to recognize the psychotherapist-patient privilege in federal court under Rule 501.[133]

The Court buttressed its decision to recognize the privilege by noting that all fifty states have enacted at least some type of psychotherapist-patient privilege.[134] Justice Stevens found that a patient's promise of

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[127] *See id.*

[128] *See id.*

[129] *See Jaffee*, 116 S. Ct. at 1929.

[130] *See id.* (finding that "the likely evidentiary benefit that would result from the denial of the privilege is modest").

[131] *See id.* "If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation." *Id.*

[132] *See id.* Justice Stevens further proffered:

> Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

Id.

[133] *See id.* at 1930. The Court stated that

> [b]ecause we agree with the judgment of the state legislatures and the Advisory Committee that a psychotherapist-patient privilege will serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth," we hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.

Id. at 1931 (citation omitted) (footnote omitted).

[134] *See Jaffee*, 116 S. Ct. at 1929-30. Justice Stevens observed that the Court has previously considered the policy decisions behind the recognition of privileges in the States, and that these considerations are relevant to a situation where federal courts may either recognize a new privilege or alter the scope of an already existing one. *See id.* (citing Trammel v. United States, 445 U.S. 40, 48-50 (1980)). For a citation to statutes in the 50 states and the District of Columbia that recognize the psychotherapist-patient privilege, see *supra* note 23.

confidentiality, if made by the states, would have little or no value if the Supreme Court declined to recognize the privilege in the federal courts.[135] Patients would realize that the confidentiality extended only to state courts, the Justice proffered, and denying the privilege in the federal courts would only serve to frustrate the purposes of the legislation in all the states.[136]

After recognizing the psychotherapist-patient privilege, the Court next faced the issue of whether to extend the privilege to include social workers.[137] Justice Stevens found, without hesitation, that the privilege should be extended.[138] According to the Justice, counseling sessions with social workers serve the same public goals as do those with psychotherapists or psychiatrists.[139] Furthermore, the Justice concluded that in today's society, social workers provide a significant amount of mental health treatment, usually to those who cannot afford to see a psychiatrist or psychotherapist.[140] As a result, the Court concluded that not only

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[135] *See id.* at 1930.

[136] *See id.* The Court stated that

> [b]ecause state legislatures are fully aware of the need to protect the integrity of the factfinding functions of their courts, the existence of a consensus among the States indicates that "reason and experience" support recognition of the privilege. In addition, given the importance of the patient's understanding that her communications with her therapist will not be publicly disclosed, 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. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.

Id. (footnote omitted). The Court further found it inconsequential that the vast majority of states enacted the privilege legislatively, rather than by judicial decision. *See id.* Justice Stevens found that the current unanimous legislative acceptance of the privilege demonstrates that state lawmakers acted quickly. *See id.* The Justice commented that this fast legislative development, as opposed to judicial development, simply demonstrated the fact that legislators quickly realized the necessity of the rule during the evolution of the field of psychotherapy. *See id.*

[137] *See id.* at 1931.

[138] *See id.*

[139] *See Jaffee*, 116 S. Ct. at 1931. The Court stated that if the petitioner had filed her claim in the state court in Illinois, the privilege issue would have been upheld without question, at least on the state wrongful death claim. *See id.* n.15. Rule 501 would have extended any state-law privilege to that proceeding, according to Justice Stevens. *See id.*

The Court also noted the disagreement over what rule should be applied where both federal and state claims are asserted in federal court, and the relevant evidence would not be privileged under federal law, yet would be privileged under state law. *See id.* (citing CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., 23 FEDERAL PRACTICE AND PROCEDURE § 5435 (1980)). Because neither side raised the issue the Court declined to express an opinion on the matter. *See id.*

[140] *See id.* at 1931. The Court found that social workers often provide therapy to those underprivileged people who could not afford to be treated by an expensive psychia-

should it adopt the psychotherapist-patient privilege in federal courts, but the privilege should extend to those social workers providing psychotherapy.[141]

Justice Scalia began the dissent[142] by stating that the majority neglected to discuss one of the negative impacts that would result from a recognition of the privilege, namely occasional injustice.[143] In addition, the Justice stated that the Court's decision directly contradicted the principle that testimonial privileges are disfavored, for they impede the search for truth.[144] Justice Scalia also found that the privilege created by the Court was unlimited and undefined.[145]

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trist or psychologist. *See id.* In recognition of this, the Court also found that nearly all states expressly extend the testimonial privilege to licensed social workers. *See id.* The Justice concluded by agreeing with the circuit court that there is no discernible public purpose for distinguishing between the counseling rendered by expensive psychotherapists and the counseling furnished by more easily accessible social workers. *See id.* at 1931-32.

The Court did, however, "part company" with the court of appeals on a separate issue. *See id.* at 1932. The Justice rejected the balancing element of the privilege that was adopted by the circuit court and a small contingent of the states. *See id.* The Court disagreed with the principle of having a trial judge compare the importance of a patient's privacy interest with the evidentiary demand for disclosure in court long after the conversation had taken place. *See id.* This, the Court felt, would eviscerate the efficacy of the privilege. *See id.* As a result, the Court stated that:

> if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one 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)).

[141] *See id.* at 1931.

[142] *See id.* at 1932 (Scalia, J., dissenting). Justice Scalia was joined by Chief Justice Rhenquist, but only in Part III of the opinion. *See id.* The Chief Justice agreed with Justice Scalia only on the point that the psychotherapist-patient privilege should not be extended to social workers. *See id.* at 1936 (Scalia, J., dissenting).

[143] *See id.* at 1932 (Scalia, J., dissenting). Justice Scalia stated that there is a cost that must be paid for every rule that excludes probative and reliable evidence. *See id.* The Justice equated the psychotherapist-patient privilege to the rule that excludes confessions taken when the defendant has not received Miranda warnings. *See id.* (citing Miranda v. Arizona, 384 U.S. 436, 471 (1966)). The Justice further commented that "the victim of the injustice is always the impersonal State or the faceless 'public at large.'" *Id.*

In the present type of situation, the Justice noted that the victim will very likely be someone who will be obstructed (by the privilege) from establishing a valid cause of action, or worse still, a person who would be obstructed from proving a warranted defense. *See id.* at 1932-33 (Scalia, J., dissenting). The latter situation was found by the Justice to be particularly distasteful because not only does it cause the courts of law to uphold a wrong, but it results in the courts themselves becoming the instruments of that wrong. *See id.* at 1933 (Scalia, J., dissenting).

[144] *See Jaffee*, 116 S. Ct. at 1933 (Scalia, J., dissenting). The dissent proffered that the Supreme Court has recognized in the past that courts have been specifically given the mandate of preserving justice, and that this mandate would be severely impeded by con-

The dissent next tackled the analysis used by the majority in recognizing a psychotherapist-patient privilege.[146] Justice Scalia characterized the Court's analysis as a misdirection, alleging that more emphasis should have been given to the question of whether the privilege should apply to social workers than merely whether to recognize the psychotherapist-patient privilege.[147] In addition, the Justice commented that the Court's reliance on the recommendation of the Advisory Committee in its Proposed Rules[148] was faulty, because the Advisory Committee's privilege would not have extended to social workers.[149] Justice Scalia con-

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travening the general canon that "the public . . . has a right to every man's evidence." *See id.* (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)) (internal quotation marks omitted). Justice Scalia further noted that the Court has adhered to the aforementioned principle to such an extent in the past that it has rejected attempts at recognizing new privileges under Rule 501. *See id.* In addition, the Justice posited, even when the Court did recognize a privilege, it adhered to the principle of construing the scope of that privilege narrowly. *See id.* (citing United States v. Zolin, 491 U.S. 554, 568-70 (1989) (permitting in camera review of documents alleged to come within the crime-fraud exception to the attorney-client privilege); *Trammel*, 445 U.S. at 53 (holding that voluntary testimony by a spouse is not covered by the husband-wife privilege)).

[145] *See id.* Justice Scalia commented that the majority opinion effectively abandoned the established judicial inclination for the truth, and in the process created a privilege that was "vast[ ] and ill-defined." *See id.*

[146] *See id.*

[147] *See id.* at 1933-34 (Scalia, J., dissenting). Justice Scalia observed that the majority simplified its job remarkably by its procedure in analyzing the issues. *See id.* The Justice noted that the majority began

> by characterizing the issue as "whether it is appropriate for federal courts to recognize a 'psychotherapist privilege,'" and devotes almost all of its opinion to that question. Having answered that question (to its satisfaction) in the affirmative, it then devotes *less than a page of text* to answering in the affirmative the small remaining question whether "the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy."

Id. at 1933 (citations omitted). Justice Scalia finally commented that by relegating the major question actually propounded by the case to nothing more than a postscript, the majority "makes the impossible possible in a number of wonderful ways." *See id.*

[148] *See* Proposed Rule of Evidence 504, 56 F.R.D. 183, 240 (1973). For further information regarding the Proposed Rules of Evidence, see *supra* note 14.

[149] *See Jaffee*, 116 S. Ct. at 1933-34 (Scalia, J., dissenting). The Justice conceded that the Advisory Committee on the Proposed Rule of Evidence did in fact recommend a type of psychotherapist-patient privilege. *See id.* at 1934 (Scalia, J., dissenting). Justice Scalia, however, noted that the Advisory Committee advocated a privilege for psychotherapy provided by authorized medical doctors, including psychiatrists, or licensed or certified psychologists. *See id.* (citing *Proposed Rule of Evidence 504*, 56 F.R.D. at 240). As a result, the dissent concluded that the Advisory Committee would not have recommended the privilege at issue in *Jaffee*. *See id.* Justice Scalia finally concluded:

> [t]hat condemnation is obscured, and even converted into an endorsement, by pushing a "psychotherapist privilege" into the center ring. The Proposed Rule figures prominently in the Court's explanation of why that privilege deserves recognition, and is ignored in the single page devoted to the sideshow which happens to be the issue presented for decision.

cluded on this point by stating that the actions of the majority were in clear contravention of the Court's duty to advance tentatively when creating barriers between itself and the truth.[150]

The dissent next questioned whether the majority should have recognized the psychotherapist-patient privilege at all.[151] Justice Scalia opined that the alleged benefits of the privilege were insufficient to outweigh the detriment of affording occasional injustice.[152] In addition, the Justice discounted the majority's argument that not recognizing the privilege would result in less information being conveyed to providers of

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Id. (citations omitted).

[150] *See id.* Justice Scalia stated that the Court's methodology itself was violative of its duty to proceed cautiously when creating privileges because it gave more serious consideration to the much more general, easier question of whether to recognize the privilege for psychotherapists, than to the much harder question of whether it should extend to social workers. *See id.*

[151] *See id.* The Justice phrased the central question as: "are [the benefits of the privilege] of such importance, and is the contribution of psychotherapy to them so distinctive, and is the application of normal evidentiary rules so destructive to psychotherapy, as to justify making our federal courts occasional instruments of injustice?" *Id.*

[152] *See id.* Justice Scalia also questioned when exactly it was that psychiatrists and psychotherapists came to be so indispensable to the maintenance of the mental health of our nation. *See id.* The Justice commented that throughout the history of society, people solved their problems by talking to friends, siblings, bartenders, parents, and spouses. *See id.* Justice Scalia subsequently posited that the average person's mental health would be more significantly impaired if they were unable to receive advice from their mother than if they were not allowed to visit a psychotherapist. *See id.* Yet, the Justice concluded, there is no "mother-child privilege." *See id.*

psychotherapy.[153] The dissent also found unappealing the Court's argument that not recognizing the privilege would frustrate state law.[154]

Justice Scalia further argued that the actuality of all fifty states having adopted at least some form of the privilege is an argument against, rather than for, adoption of the privilege.[155] According to the dissent, the statutory enactment in a majority of the states suggested that this type

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[153] *See id.* at 1935 (Scalia, J., dissenting). In commenting upon the majority's argument that disclosure to psychotherapists would be effectively chilled by a nonrecognition of the privilege, the dissent asked the following questions: "[i]f that is so, how come psychotherapy got to be a thriving practice before the 'psychotherapist privilege' was invented? Were the patients paying money to lie to their analysts all those years?" *Id.*

Justice Scalia further posited that even were it certain that not recognizing the privilege would result in the inhibition of disclosure to psychotherapists, this is not necessarily a bad thing. *See id.* The Justice disagreed with the idea that a guilty person would be able to obtain the benefits of admitting his or her crime to a psychotherapist (thus benefiting mentally), while at the same time benefiting by not having to admit that fact in criminal court. *See id.* The Justice further stated that:

> [i]t seems to me entirely fair to say that if she wishes the benefits of telling the truth she must also accept the adverse consequences. To be sure, in most cases the statements to the psychotherapist will be only marginally relevant, and one of the purposes of the privilege (though not one relied upon by the Court) may be simply to spare patients needless intrusion upon their privacy, and to spare psychotherapists needless expenditure of their time in deposition and trial. But surely this can be achieved by means short of excluding even evidence that is of the most direct and conclusive effect.

Id.

[154] *See Jaffee*, 116 S. Ct. at 1935 (Scalia, J., dissenting). The dissent responded to the majority's argument that not recognizing the privilege would frustrate state laws enacted to foster confidential communications by referring to it as a novel argument, and a type of inverse preemption. *See id.* Justice Scalia declared that the Court's reasoning did not square with that of the Supreme Court in *United States v. Gillock*, where the Court declined to adopt a privilege for Tennessee legislators in federal court, even though the privilege was guaranteed in state proceedings under the Tennessee Constitution. *See id.* (citing 445 U.S. 360, 368 (1980)). Furthermore, according to the dissent, state policies regarding the privilege vary to such an extent that it would be impossible for a uniform federal policy to honor a majority of them. *See id.* As Justice Scalia stated: "[i]f 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.*

[155] *See id.* at 1936 (Scalia, J., dissenting). Justice Scalia proffered that perhaps the privilege has not been enacted judicially because the uses for psychotherapy are so rapidly evolving that only legislation can provide the flexibility that is demanded by the privilege. *See id.* The Justice also noted that only four state court decisions have ever even considered adopting, in common law form, a psychotherapist-patient privilege. *See id.* n.1 (citing Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469, 473-74 (Alaska 1977); Allred v. State, 554 P.2d 411, 416-17 (Alaska 1976); State v. Evans, 454 P.2d 976, 978 (Ariz. 1969); *In re* "B", 394 A.2d 419, 425 (Pa. 1978)). As a result, Justice Scalia suggested that the Court's declaration should be revised to state that "the common law had indicated *scant* disposition to recognize a psychotherapist-patient privilege when (*or even after*) legislatures began moving into the field." *Id.*

of privilege is better left to the state legislatures.[156] Lastly, the Justice concluded that to rest such a federal privilege on the unanimous judgment of the states is faulty because the various states all differ in their recognition of the privilege.[157]

The dissent next analyzed the question of whether the privilege should extend to social workers.[158] Justice Scalia initially concluded that to do so would violate the rule that states that privileges must be interpreted narrowly.[159] The Justice also explained that psychiatrists and psychologists differ in many ways from licensed social workers who provide psychotherapy.[160] Furthermore, the dissent posited that social workers

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[156] *See id.* at 1936 (Scalia, J., dissenting). The Justice noted that this overwhelmingly legislative adoption of the privilege in the states suggests that adoption of the privilege is better left to such decision-making bodies where reason can be tempered by certain political pressures such as organized interest groups. *See id.* In addition, Justice Scalia commented that these decision-making bodies are often not as concerned with justice as are the courts. *See id.* The dissent noted that psychologists and social workers would therefore have a significant impact in this respect through efforts such as lobbying. *See id.*

[157] *See id.* Justice Scalia equated resting this newly recognized privilege on the unanimous judgment of the states to a situation where a federal court would recognize "a new, immediately applicable, federal common law of torts, based upon the States' 'unanimous judgment' that *some* form of tort law is appropriate." *Id.* The Justice commented that in both situations, state laws are so varied that both the lower federal judges as well as the parties to the lawsuit would have "barely a clue" of what this new common law would entail. *See id.*

[158] *See id.*

[159] *See Jaffee*, 116 S. Ct. at 1937 (Scalia, J., dissenting).

[160] *See id.* The dissent referred to the fact that the majority expressed not a single word in reference to how the services provided by a psychiatrist or psychologist, and that of a social worker, are different. *See id.* Justice Scalia declared that a licensed psychologist or psychiatrist "is an expert in psychotherapy," which he thought might be sufficient for the recognition of a new privilege based on that relationship between psychotherapist and patient. *See id.* According to the Justice, however, "[o]ne must presume that a social worker does *not* bring this greatly heightened degree of skill to bear, which is alone a reason for not encouraging that consultation as generously." *Id.*

In further defining how the two professions are different, Justice Scalia referred to the Illinois Code's definition of "social worker." *See id.* (citing 225 ILL. COMP. STAT. ANN. 20/9 (West 1993)). Illinois differentiates between "licensed clinical social workers" and "licensed social workers," although the Court's decision recognizing the privilege would apparently apply to both classes, according to Justice Scalia. *See id.* To become a "licensed clinical social worker" in Illinois, one must have a "master's degree in social work from an approved program," as well as "3,000 hours of satisfactory, supervised, clinical professional experience." *Id.* (citing 225 ILL. COMP. STAT. ANN. 20/9 (West 1993)). In terms of "licensed social workers," however, the requirements are less demanding. *See id.* One must have either: "(a) 'a degree from a graduate program of social work' approved by the State, or (b) 'a degree in social work from an undergraduate program' approved by the state, plus '3 years of supervised professional experience.'" *Id.* at 1937-38 (Scalia, J., dissenting) (citing 225 ILL. COMP. STAT. ANN. 20/9A (West 1993)). The Justice further stated that:

> these are only *Illinois'* requirements for "social workers." Those of other States, for all we know, may be even less demanding. Indeed, I am not

perform a variety of functions, including psychotherapy, and such an extension might create considerable confusion over the capacity in which the information was provided to the social worker, thus creating administrative problems for the privilege.[161]

The dissent also argued that the majority's reliance on state privilege law extending the privilege to social workers was unfounded.[162] States, according to Justice Scalia, disagree tremendously on the scope of the privilege.[163] In addition, the Justice proffered that many of the states which do recognize a privilege for communications to licensed social workers do so in a separate statute from the one recognizing the psychotherapist-patient privilege.[164] Consequently, Justice Scalia concluded that, because of the tremendous division on the issues of the psycho-

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> even sure there is a nationally accepted definition of "social worker," as there is of psychiatrist and psychologist. It seems to me quite irresponsible to extend the so-called "psychotherapist privilege" to all licensed social workers, nationwide, without exploring these issues.

Id. at 1938 (Scalia, J., dissenting). Justice Scalia finally noted that another important distinction between the two professions is that psychiatrists and psychologists only perform psychotherapy. *See id.* Social workers, however, interview people for a variety of reasons and in a variety of fashions. *See id.*

[161] *See id.* The dissent noted that "in applying the 'social worker' variant of the 'psychotherapist' privilege," it will become essential to conclude whether the evidence conveyed to the social worker "was provided to him *in his capacity as a psychotherapist*, or in his capacity as an administrator of social welfare, a community organizer, etc." *Id.* The Justice further noted that it will become essential for the social worker to advise the patient, prior to his or her conversations with them, which portions of their conversations will be privileged as opposed to which portions will have to be disclosed. *See id.*

[162] *See id.* Justice Scalia considered the Court's reasoning flawed because the majority of states that did recognize the privilege for social workers did so by statute, not through judicial decision. *See id.* As a result, the Justice considered this "experience of the States" irrelevant to the ultimate issue of judicial recognition of the privilege. *See id.* According to the Justice, therefore, state social-worker privilege statutes provide no support whatsoever to the theory relied upon by the majority. *See id.* at 1939 (Scalia, J., dissenting).

[163] *See id.* at 1939-40 (Scalia, J., dissenting). The dissent noted that at least four states have privileges with such gaping exemptions that even the majority recognized that they amount to little more than no privilege. *See id.* at 1940 (Scalia, J., dissenting). Furthermore, the Justice noted, five states have specifically refused to adopt a privilege for social workers, thus contradicting the majority's decision. *See id.* In addition to these nine states, Justice Scalia added one state whose "privilege is illusory." *See id.* (citing WASH. REV. CODE ANN. § 18.19.180 (West 1989 & Supp. 1997) (mandating disclosure of information "in response to a subpoena from a court of law")). The Justice concluded that "in adopting *any* sort of social worker privilege, then, the Court can at most claim that it is following the legislative 'experience' of 40 States, and contradicting the 'experience' of 10." *Id.* at 1939 (Scalia, J., dissenting). For another quote by Justice Scalia regarding the degree of disagreement between the states, see *supra* note 22.

[164] *See Jaffee*, 116 S. Ct. at 1938 (Scalia, J., dissenting).

therapist-patient privilege and its scope, any adoption and definition of the privilege should be left to Congress.[165]

The Court's recognition of the psychotherapist-patient privilege was well-founded.[166] Thousands of conversations take place every day during which very personal information is conveyed to both psychiatrists[167] and psychologists.[168] A confidential relationship between the counselor and

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[165] *See id.* at 1940 (Scalia, J., dissenting). Justice Scalia concluded that:

> although the Court is technically correct that "the vast majority of States explicitly extend a testimonial privilege to licensed social workers," that uniformity exists only at the most superficial level. No State has adopted the privilege without restriction; the nature of the restrictions varies enormously from jurisdiction to jurisdiction; and 10 States, I reiterate, effectively reject the privilege entirely. It is fair to say that there is scant national consensus even as to the propriety of a social-worker psychotherapist privilege, and none whatever as to its appropriate scope. In other words, the state laws to which the Court appeals for support demonstrate most convincingly that adoption of a social-worker psychotherapist privilege is a job for Congress.

Id. (citation omitted).

[166] *But see* Abigail Trafford, *Health Tab, Second Opinion: Confidence and Confidentiality*, WASH. POST, June 18, 1996, at Z06 (referring to an opinion of some psychiatrists that the Supreme Court went "further than it had to" in its decision in *Jaffee*).

[167] *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 950 (1983). "Psychiatry" is defined by *Webster*'s as "a branch of medicine that deals with mental, emotional, or behavioral disorders." *Id.*

"Psychiatrists are medical doctors." Matthew Mariani, *Beyond Psychobabble: Careers in Psychotherapy*, OCCUPATIONAL OUTLOOK Q., Spring 1995, at 17, also *available in* 1995 WL 9161995. Although psychiatrists do "talk therapy," they also have the ability to prescribe drugs for the treatment of mental illnesses. *See id.* In today's society, psychiatrists are beginning to specialize in certain areas to a greater extent than they used to. *See id.* Most are specializing in managed health care settings, performing as medication experts. *See id.*

Psychiatrists, unlike psychologists or social workers, possess the ability to hospitalize a patient if necessary. *See id.* According to a noted psychiatrist, Dr. Jurand, the main "advantage" of psychiatrists over other professions "is their access to doing inpatient work, which also means they may get the chance to treat the most severe cases. Now, that's a mixed blessing. More and more, we're relegated to those cases. Many psychiatrists like some hospital work, but fairly few want to do exclusively that." *Id.* at 17-18. As of 1992, according to the American Medical Association, approximately 37,000 psychiatrists in the United States were involved with patient care. *See id.* at 18. Approximately 4000 of those concentrate on the area of child psychiatry. *See id.*

To become a psychiatrist, one must first obtain a bachelor's degree, which includes courses in organic and inorganic chemistry, math, biology, and physics. *See id.* A medical degree is also required, which usually takes approximately four more years. *See id.* While in medical school, an aspiring psychiatrist will take classes in endocrinology, microbiology, biochemistry, anatomy, genetics, pharmacology, human physiology, the behavioral sciences, and other subjects. *See id.* After completing a medical degree, a residency is required, usually lasting at least four years. *See id.*

[168] *See* Mariani, *supra* note 167, at 18. *Webster*'s defines psychology as "the study of mind and behavior in relation to a particular field of knowledge or activity." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 951 (1983). There are two types of psychologists:

patient is required for successful treatment.[169] If a patient were to walk in to his or her therapist's office knowing that what was spoken to the therapist would not be confidential, any type of communication to that therapist surely would be chilled, and the most effective treatment would not result. This confidential nature of communications between the doctor and patient has long been respected and recognized, most prominently in the Hippocratic Oath.[170]

In addition, recent decades have shown a tremendous growth in the number of people who are willing to take that first step toward getting

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clinical and counseling. *See* Mariani, *supra* note 167, at 18. The occupations of these two types of psychologists are very common. *See id.* Typically, both call for a doctoral degree. *See id.* "Compared to the other therapy-providing occupations, clinical and counseling psychologists have the most extensive training on how to assess mental disorders and do psychotherapy." *Id.* Recently, the differences between clinical and counseling psychologists have markedly decreased. *See id.*

According to a 1993 estimate established by the American Psychological Association, approximately 40,000 psychologists, both clinical and counseling, are actively practicing in the United States. *See id.* at 19. To become a psychologist, one must initially earn a bachelor's degree. *See id.* No particular background in college is required—graduate students in psychology derive from various backgrounds. *See id.* Counseling psychologists are required to obtain a Ph.D. *See id.* Normally, clinical psychologists are a product of Ph.D programs as well. *See id.* Many schools today also offer what is referred to as a Psy.D. (Doctor of Psychology), instead of the traditional Ph.D. in psychology. *See id.* at 20. This degree requires a minimum of four years to complete. *See id.*

[169] *See* Trafford, *supra* note 166, at Z06 (quoting Washington psychiatrist Stephen Hersch: "[t]he less confidential things are, the less likely people are to seek some support"). It has been stated that:

> [d]iscussing personal issues with someone who can keep secrets fosters trust. This might help clients form more trusting relationships with others over time. In a sense, therapists may help clients simply by not abusing them. This could be a new experience for someone who has grown up in an abusive family. Those who have suffered emotional, physical, or sexual abuse benefit from seeing that not everyone will try to hurt them.

Mariani, *supra* note 167, at 15.

[170] *See* Trafford, *supra* note 166, at Z06. The "doctor-patient confidentiality rule" has been a principle of medicine for a very long time. *See id.* It is embodied in the Hippocratic Oath, which "requires physicians not to 'voice about' what they learn in the course of caring for patients and to treat such information as 'sacred secrets.'" *Id.*

Psychotherapists must provide confidentiality to maintain professional ethics and keep the trust of the client. *See* Mariani, *supra* note 167, at 14. It is essential that a patient feel as though he or she can speak freely. *See id.* Ordinarily, during the patient's first session, the therapist will describe this confidence, telling the patient that what he or she says during therapy will not be disclosed to anyone else. *See id.*; *see also* AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, Standard 5.01 (Dec. 1992). In addition, some therapists will even suggest that a patient should interview many different therapists before choosing one, so that the patient will be comfortable enough with that therapist to receive effective treatment. *See* Mariani, *supra* note 167, at 14.

well by entering a therapist's office.[171] Therapy has also proven to be incredibly successful.[172] There are, however, many more people out there who have not yet sought help.[173] There is already a stigma attached to the idea of seeing a therapist; making those communications available for trial purposes would not aid in the growth of psychotherapy, nor would it aid in the mental health of our nation's citizenry.

The Court's decision to extend the psychotherapist-patient privilege to include communications made to licensed social workers "in the course of psychotherapy" was also appropriate.[174] Today, there are over 155,000 employed social workers in the United States, approximately half of whom are engaging in some type of psychotherapy.[175] The success of these social workers depends no less on the confidentiality and

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[171] *See Therapy and Privacy: High Court Was Wise to Shield Sessions*, STAR TRIB. (Minneapolis-St. Paul) June 23, 1996, at 22A [hereinafter *Therapy and Privacy*].

[172] *See* Martin E.P. Seligman, *Insights: Long-Term Psychotherapy Is Highly Effective: The Consumer Reports Study*, HARV. MENTAL HEALTH LETTER, July 1, 1996, at 5. The results of a Consumer Reports study on the effectiveness of psychotherapy and psychiatric drugs were published by the magazine in its November 1995 issue. *See id.* The statistical findings and analysis in the study indicated that therapy by mental health professionals on average worked very well. *See id.* Most individuals responding to these questions were the beneficiaries of a better mental health state after receiving treatment. *See id.* The Consumer Reports study was "the most extensive study of psychotherapeutic effectiveness on record." *Id.* at 6.

[173] *See Therapy and Privacy*, *supra* note 171, at 22A.

[174] *See* Mariani, *supra* note 167, at 20. Clinical social workers are considered "psychotherapists," and as such, they "stress the way social situations affect a person's behavior." *Id.* *Webster's* defines "social work" as "any of various professional services, activities, or methods concretely concerned with the investigation, treatment, and material aid of the economically underprivileged and socially maladjusted." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1119 (1983). During the course of treatment, a clinical social worker will note how social systems, such as a person's family, work, government, or neighborhood, play a role in a patient's emotional disorders. *See* Mariani, *supra* note 167, at 20. A clinical social worker may employ several different methods of treatment, including the involvement of a patient's family, or other therapists if the social worker deems appropriate. *See id.* "Social work has traditionally stressed the importance of understanding cultural and other differences." *Id.*

To become a clinical social worker, one must initially obtain a bachelor's degree. *See id.* An aspiring clinical social worker then must obtain a master's degree in social work (M.S.W.). *See id.* One requirement for the M.S.W. is a certain amount of clinical training. *See id.* A M.S.W. usually takes two to three years to consummate. *See id.* Many social workers hold a doctorate degree as well, in the form of either a Ph.D or a D.S.W. (Doctor of Social Work). *See id.* Today, the total number of clinical social workers in the United States exceeds 80,000. *See id.*

[175] *See* Frank J. Murray, *Court Allows Confidentiality Privilege for Psychotherapists, Social Workers*, WASH. TIMES (D.C.), June 14, 1996, at A12; *see also* Mariani, *supra* note 167, at 20. This is in comparison to only 37,000 practicing psychiatrists, and 40,000 practicing psychologists in the United States. *See* Mariani, *supra* note 167, at 18, 19.

trust of their patients than does that of psychiatrists or psychologists.[176] Social workers, due to their extraordinary numbers and accessibility, have claimed a prominent role in the mental health of the country.[177] They are also generally much more affordable for the common person.[178] As a result, a privilege extending only to psychiatrists and psychologists would have the practical effect of restricting the benefits of the privilege to only those who are able to pay for it.[179]

Psychotherapists as a group, including psychiatrists, psychologists, and social workers, have much in common.[180] They all perform similar functions when providing therapy, even though they may use different terms to describe what they do.[181] In addition, their goal is always similar—to relieve their patient from mental suffering.[182] Furthermore, the patient's need for such psychotherapy, as well as his or her disclosures during treatment, will be identical regardless of the discipline of the therapist. Consequently, a distinction allowing the privilege only to those who can afford the more expensive therapist is clearly unwarranted.

The Court in *Jaffee*, however, neglected to properly define the scope of the privilege. Clinical social workers—as well as clinical and counseling psychologists, psychiatrists, marriage and family therapists, and clinical mental health counselors—provide their services in a wide variety of settings.[183] This naturally raises a number of questions: to

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[176] *See* Murray, *supra* note 175, at A12. Bob Cohen, a lawyer, clinical social worker, and the executive director of the National Association of Social Workers, stated that: "[s]uccessful intervention and treatment requires that the client have the utmost confidence in the confidentiality of what is confided to the professional." *Id.*

[177] *See* Meg McKeon, *Social Workers Have Confidentiality Privilege*, BALT. SUN, Apr. 6, 1996, at 9A. According to the National Institute of Mental Health, clinical social work is recognized as one of the "core mental health professions," along with psychiatric nursing, psychology, and psychiatry. *See id.* The majority of mental health services in the United States are provided by clinical social workers. *See id.*

[178] *See Vote of Confidence in Confidentiality; Supreme Court: Ruling Could Prove a Boost for Effective and Affordable Therapy*, BALT. SUN, June 21, 1996, at 20A (stating that "social workers are generally more affordable and more accessible for many people").

[179] *See id.*

[180] *See* Mariani, *supra* note 167, at 13.

[181] *See id.*

[182] *See id.*

[183] *See id.* at 15. Psychotherapy is provided in many different ways and settings. *See id.* Sometimes, work is done at "residential or inpatient facilities," which include: residential treatment centers, psychiatric hospitals, and psychiatric wards of general hospitals. *See id.* Some other therapists provide treatment for clients who are not hospitalized, sometimes referred to as "outpatients." *See id.* Some of the different organizations that provide outpatient therapy are college and university counseling centers, social service agencies, day-treatment hospitals, health maintenance organizations, other managed care providers, community mental health clinics, employee assistance programs, and other

which of these settings and to which of these different therapists will the privilege be applied? Will the privilege be extended only to clinical social workers? Or will all licensed social workers warrant the status of the privilege?[184]

Furthermore, in today's society the biggest threat to confidential information conveyed between a patient and therapist may not even be from the courts. It may in fact come from the "medical marketplace," where in many instances managed care plans and insurance companies demand information to warrant payment for this therapy.[185] Although some information may be warranted to avoid unnecessary spending, in many instances these companies are requiring therapists' notes.[186] Will such information be subject to the privilege in these instances?

The Court also failed to identify whether any of the traditional exceptions to the confidentiality rule will stand in light of its ruling.[187] These exceptions are necessary, yet the Court failed to address them. Although the adoption of the privilege by the Court was warranted, and may have been necessary, the lack of definition creates uncertainty as to exactly what information may be privileged. And, as Justice Stevens stated in the last line of the Court's opinion: "[a]n uncertain privilege, or

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human service agencies. *See id.* In addition, many therapists are private practitioners. *See id.* Some psychotherapists even treat patients in multiple settings. *See id.* For example, some hold jobs within a mental health organization, while simultaneously conducting a private practice. *See id.*

[184] *See* Jaffee v. Redmond, 116 S. Ct. 1923, 1931 (1996). The *Jaffee* Court extended the privilege to "confidential communications made to licensed social workers in the course of psychotherapy." *Id.* The social worker in question, Karen Beyer, was a licensed clinical social worker of the State of Illinois. *See id.* at 1926. The Court failed to address the question of whether there was a difference between all "licensed social workers" or "licensed clinical social workers," nor did the Court address the question of whether that difference would be relevant. *See id.* at 1931.

[185] *See* Trafford, *supra* note 166, at Z06.

[186] *See id.* Many psychotherapy counselors believe that these demands are "out of bounds." *See id.*

[187] *See id.* There are many well-known exceptions to a therapist's confidentiality. *See id.* For example, therapists are mandated under certain state laws to report evidence of the abuse of a child, and in other states therapists must also report to the authorities their knowledge of instances of elder abuse. *See id.*; *see also* Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 441 (1976) (finding that "[t]here is no privilege . . . if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger"). The American Psychiatric Association's guidelines state that "[a]t times, psychiatrists' duties regarding confidentiality come into conflict with their other professional responsibilities. In cases involving imminent danger to others, psychiatrists must balance their duty to protect these patients' confidences against their responsibility to the members of the public at risk." Trafford, *supra* note 166, at Z06.

one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[188]

W. Joseph Nielsen

[188] *Jaffee*, 116 S. Ct. at 1932 (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).