

Analysis and Commentary

Jaffee v. Redmond: Making the Courts a Tool of Injustice?

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In July, 1996, the United States Supreme Court held in *Jaffee v. Redmond* that statements made to a psychotherapist are privileged communications in a federal action. Prior to *Jaffee*, the federal courts were not in agreement as to whether this privilege existed. The majority found strong public and private interests that were furthered by recognition of the privilege. The minority, however, reasoned that the “occasional injustices” due to the exclusion of evidence made the courts a tool of injustice. Although the privilege is now recognized in federal courts, its contours and exceptions remain to be decided on a case by case basis.

At the end of its 1995–1996 term, the U.S. Supreme Court decided *Jaffee v. Redmond*, holding that statements made to a psychotherapist during counseling sessions are privileged communications in a federal civil action.¹ The Court, broadly interpreting Rule 501 of the Federal Rules of Evidence, created a federal psychotherapist-patient privilege applicable in federal question* and diversity cases.[†] Prior to *Jaffee*, the federal courts of appeal were in disagreement as to whether such a privilege existed, and

even if one were found to exist, its contours and exceptions were unclear and likely varied from jurisdiction to jurisdiction. The Supreme Court heard *Jaffee* on *certiorari* to resolve the conflict among the lower federal courts.

Privileges in a Nutshell

In general, the psychotherapist-patient privilege is a rule of law giving a patient the right to exclude from evidence confidential communications made by him or her to the psychotherapist.² Privilege, derived from the Latin phrase *privata lex*, which literally translates into private law, was in 18th century England, a “judicially recognized point of honor among lawyers and other gentlemen” to maintain confidential communications.³ In modern times, Dean Wigmore has identified four conditions necessary to establish a privilege:

1. The communications must originate in a *confidence* that they will not be disclosed.

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* A federal question case arises under the Constitution, Acts of Congress, or treaties and involves their interpretation and application; see U.S. Constitution Art. III, § 2.

† Diversity refers to federal jurisdiction of cases between citizens of two different states or between a citizen and a foreign state or citizen, where the matter in question exceeds the sum or value of \$75,000. 28 U.S.C.A. § 1332 (West Supp. 1997).

2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

3. The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

4. The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of the litigation.⁴

Although most of the privileges recognized today developed as common law, several, including the psychotherapist-patient privilege, are statutory in origin. The Federal Rules of Evidence, applicable in federal courts and formally adopted on July 1, 1975 (Fed. R. Evid. 501), did not include any specific privileges; instead, it allowed the federal courts to look to the common law privileges and interpret them "in light of reason and experience."

The California code addressing the psychotherapist-patient privilege was among the first enacted and is typical of that enacted in other states.⁵ Typically, the holder of the psychotherapist-patient privilege is the patient himself, as it is the patient's privacy interest that is to be protected. A privileged communication will be excluded only if the communication has been made in confidence; in many instances, if the privileged relationship exists, confidentiality will be presumed. Additionally, the privilege may be waived by a failure to claim the privilege, voluntary disclosure of the communication by the holder, or by contractual provision. Where minors are concerned, the person rendering mental health treatment is the holder of the privilege. In California, as in many other states, the term

"psychotherapist" has been broadly defined to include psychiatrists, psychologists, clinical social workers, and other mental health professionals as designated by statute. It should be noted that in California and in several other jurisdictions, the psychotherapist-patient privilege applies to any litigation, civil or criminal, whereas the physician-patient privilege applies only in civil cases.

Exceptions to the psychotherapist-patient privilege are numerous. In California, under the patient litigant exception, no privilege exists against disclosures concerning the mental or emotional condition of the patient when the patient himself raises this issue. Further, there is no privilege if the therapist has been appointed by the court to examine the patient, except if appointed at the request of a defense lawyer in a civil proceeding. Under the crime or tort exception, no privilege exists if the services of the psychotherapist were sought or obtained to aid or commit a crime or tort, or to escape detection or apprehension.

Jaffee v. Redmond: The District Court Does Not Recognize the Psychotherapist-Patient Privilege

Jaffee, the petitioner, was the administrator for the estate of Allen; Mary Lu Redmond, the respondent, was a police officer for the Village of Hoffman Estates, Illinois. While on duty, Redmond responded to a call concerning a fight at the Grand Canyon Estates apartment complex. She was informed that a stabbing had occurred, and observed five men running out of the complex, one of whom was carrying a pipe. Officer Redmond

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drew her revolver when the men failed to get on the ground as she had directed. Then, she observed two additional men, one with a butcher knife chasing the other. Ricky Allen, the man with the knife, was shot and killed by Redmond because she believed he was going to stab the other man. After the shooting, Officer Redmond was confronted by an angry crowd that had gathered at the scene.

The petitioner, believing that excessive force had been used, sought damages alleging a violation of Allen's constitutional rights under 42 U.S.C. § 1983, and also under the Illinois Wrongful Death statute. Because a federal statute was involved, the case was initially heard in a federal district court. At trial, a question of fact existed as to when Redmond had drawn her gun and whether Allen was unarmed when he was shot. Another issue, which ultimately landed the case in the Supreme Court, concerned the fact that Redmond attended approximately 50 counseling sessions with Karen Beyer, a clinical social worker, for six months after the shooting. Jaffee attempted to obtain the social worker's notes for use in cross-examining Redmond, while Redmond vigorously resisted discovery claiming a psychotherapist privilege. Although the district court judge rejected the claimed privilege, the respondents refused to comply with the disclosure order. In his instructions to the jury, the judge said that refusal to turn over the notes was without legal justification and that the jury was permitted to presume the notes contained information adverse to the re-

spondent's case.[‡] The trial court awarded Allen's estate \$45,000 for violation of his constitutional rights and \$500,000 for his wrongful death at the hands of Redmond.

The Court of Appeal Recognizes the Psychotherapist-Patient Privilege

The appellate court, however, reversed and remanded. Instead of rejecting the privilege, the appellate court found that the "reason and experience" language of Rule 501 of the Federal Rules of Evidence, "compelled" recognition of a psychotherapist-patient privilege.⁶ Free communication between therapist and patient, without the threat of public disclosure, was, in the court's opinion, "the key to successful treatment." Further, an additional argument in favor of a federal privilege was the fact that all fifty states had adopted some form of psychotherapist-patient privilege. The Court of Appeals, however, added a caveat when it stated that the privilege would not be applicable when "in the interests of justice, the evidentiary need for the disclosure of the

[‡] Jury Instruction No. 8 reads in part: "... During the course of this lawsuit, the court ordered the village of Hoffman Estates to turn over all of Ms. Beyer's notes to the 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 the Plaintiff's attorneys. During Ms. Beyer's testimony she referred to herself as a 'therapist,' although she is not a psychiatrist or psychologist—she is a social worker. The 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."

patient's counseling session outweighs that patient's privacy interests." In essence, the appellate court added a balancing test to the calculus, disallowing the privilege in instances when justice would not be served by nondisclosure. When the appellate court balanced the competing interests in *Jaffee*, officer Redmond's privacy interest, in addition to the fact that there were several percipient witnesses to the shooting, outweighed the need to disclose the private communications between Redmond and her therapist. Since the federal courts were not in agreement as to the existence of a federal psychotherapist privilege, the Supreme Court agreed to hear *Jaffee*.

U.S. Supreme Court Affirms the Recognition of the Psychotherapist-Patient Privilege

In deciding to recognize a psychotherapist-patient privilege, the *Jaffee* court began by analyzing the plain language of Rule 501 of the Federal Rules of Evidence. The *Jaffee* court stated that under Rule 501, it was expressly authorized to announce new privileges based in part on the common law, tempered "in the light of reason and experience."¹ The Judicial Conference Advisory Committee, which developed the Federal Rules of Evidence, borrowed the "in the light of reason and experience" clause from a Supreme Court case dating back to 1934. The justices, not constrained by legal precedent, were of the opinion that Rule 501 "directed federal courts to 'continue the evolutionary development of testimonial privileges.'" Cognizant that, on the one hand "the public. . . has a right to every man's evi-

dence," but only "rational means" of⁷ "ascertaining the truth" were permissible, the high court framed the issue before it as follows: "[W]hether a privilege protecting confidential communications. . . 'promotes sufficiently important interests to outweigh the need for probative evidence.'"

First, the Court identified public and private interests that would be furthered by recognizing a psychotherapist-patient privilege. The Court stated that the cornerstone of privileges, such as the attorney-client privilege and priest-penitent privilege, is trust and confidence. "Effective psychotherapy, by contrast, depends upon an atmosphere. . . in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears. . . [D]isclosure of confidential communications. . . may cause embarrassment or disgrace. . . [T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."¹ As to the public interest served by recognition of a privilege, the court was of the opinion that treatment of mentally ill individuals improved the mental health of all citizens (i.e., recognition of a psychotherapist-patient privilege furthered public mental health).

Next, the Supreme Court looked to the states to see how they had addressed the question. It was found that all states recognized some form of privilege. Again, based on legal precedent in the Supreme Court, policy decisions of the states can be considered in deciding to recognize a new privilege. Because of the widespread agreement of the states in recognizing the

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psychotherapist-patient privilege, their collective "reason and experience" favored recognition of the privilege in federal courts. Additionally, the Court sought to avoid a potentially troublesome situation in which, in the same case, a state court recognized the privilege, but the federal court did not. In this respect, the justices believed that failure to recognize the privilege could frustrate the purpose of state legislation.

When the Court had determined that a psychotherapist-patient privilege should exist, it began to define its scope. The Court thought it obvious that the privilege should include both psychiatrists and psychologists. But the Court went further, stating that the privilege should apply with equal force to licensed clinical social workers, as was the case in *Jaffee*. The Court took judicial notice of the fact that social workers were also members of the mental health team and provide a significant amount of treatment. The Supreme Court agreed with the Court of Appeals when it stated that "Drawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose." Hence, the Supreme Court had no trouble in including clinical social workers under the umbrella of the psychotherapist-patient privilege.

In contrast to the Court of Appeals, however, the high court rejected the balancing test. The Supreme Court said that promising confidentiality on the one hand and balancing it with the interests of justice on the other would "eviscerate the effectiveness of the privilege." Instead of

a balancing test, which might allow for the disclosure of communications, certainty as to disclosure was deemed more important. If a witness were uncertain whether communications would remain confidential, the purpose of the privilege would be vitiated: "'An uncertain privilege. . . is little better than no privilege at all.'"⁸

At this point, the court was satisfied that all of the relevant considerations had been discussed. The court was content to delay further definition of the contours and exceptions to the psychotherapist-patient privilege until a later time, to be decided on a case by case basis.

Jaffee, however, was not a unanimous decision; two justices, Scalia and Chief Justice Rehnquist, filed dissenting opinions. The thrust of the dissenting judge's opinions focused on what they labeled the "occasional injustice" resulting from the exclusion of evidence when the privilege was invoked. The dissent noted that in other cases in which evidence is excluded, the "victim" is usually the state or the public. In contrast, the "victim" when the psychotherapist-patient privilege is invoked is likely to be an individual whose case may fail because evidence has been excluded. What was particularly distasteful to the dissent was the fact not only of allowing such a wrong, but of having the court become an instrument of the wrong.

The dissent reviewed the record of past attempts to create new privileges. It noted that "Testimonial privileges. . . are not lightly created nor expansively construed, for they are in derogation of the search for truth."⁹ In the past, the court had rejected

a privilege against disclosure of academic peer review materials as well as legislative acts. Rehnquist and Scalia believed the majority had overgeneralized the issue before the court into two questions: whether there should be a psychotherapist-patient privilege and then, when it had been determined there should be a privilege, whether there should be a social worker-client privilege.

The dissent openly pondered the role of the psychotherapist. They believed that people have told their problems to siblings, parents, friends, and even bartenders for years, and yet none of these persons who provided "counseling" has been given a privilege not to testify. Additionally, the dissent pointed out that assuming the officer in *Jaffee* had shot Allen, why should she be able to tell her social worker that fact, but be able to withhold that fact from a jury. To the dissent, it seemed entirely fair to say that for Redmond to receive the benefits of telling the truth (i.e., confessing), she must also accept the adverse consequences.

As to the majority's reliance on the fact that all states have recognized some form of privilege, the dissent thought this was a novel argument in reverse. The dissent felt that the majority had accommodated the truth-seeking functions of the federal courts so as not to conflict with the policies of the states. Further, since the policies of the states were so variable, the dissent argued that, taken to the extreme, the federal privilege should vary in accordance with the various state policies.

Regarding the inclusion of social workers in the psychotherapist-patient privilege, the dissenting justices thought that

the general rule of narrowly constraining privilege was turned on its head. According to the dissent, a psychiatrist or psychologist is an expert in psychotherapy. A social worker, on the other hand, "does not bring this heightened degree of skill to bear." To make its point, the dissent pointed to the fact that the Judicial Conference Advisory Committee recommended a privilege for treatment only "by a person admitted to practice medicine or a person certified or licensed as a psychologist."

Jaffee's Wake

The significance of the *Jaffee* decision is that, henceforth, a psychotherapist-patient privilege will be recognized in the federal courts. Furthermore, there is uniformity in the federal courts regarding this issue: additionally, potentially thorny issues involving state and federal issues in the same case may have been averted. Yet, much of the privilege remains to be delineated. As the Court itself noted, the contours and exceptions of the privilege will be decided on a case by case basis in the future.

Jaffee, then, represents an evolutionary rather than a revolutionary change in the law. Does *Jaffee*, as opined by Rehnquist and Scalia, work an injustice? To judicial purists, the answer is yes. Without a doubt, inculcating evidence will be shielded by the psychotherapist-patient privilege, and the guilty or liable may not be held responsible. However, this occasional injustice is deemed less important than fostering and encouraging the relationship between a psychotherapist and his or her patient. Indeed, this rationale also underlies the attorney-client, priest-

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penitent, and husband-wife privileges; and, at the core of these relationships is trust. Perhaps Bentham, in 1827, with regards to the attorney-client privilege, cogently summarized the situation:

The law advisor is neither to be compelled, nor so much as suffered, to betray the trust reposed in him. . . . Not suffered? Why not? Oh, because to betray a trust is treachery; and an act of treachery is an immoral act. . . . But if such confidence, when reposed, is permitted to be violated, and if this be known (which, if such be the law, it will be), the consequence will be, that no such confidence will be reposed.¹⁰

References

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3. Allred v. State, 554 P.2d 411 (Alaska 1976)
4. 8 John Henry Wigmore, Evidence § 2285 (McNaughton rev. 1961)
5. Cal. Evid. Code § 917 *et sec.* (West 1995)
6. Jaffee v. Redmond, F.3d 1346 (7th Cir. 1995)
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9. Jaffee v. Redmond, 116 S. Ct. 1923 (1996) (quoting United States v. Nixon, 100 S. Ct. 906 (1980))
10. Jeremy Bentham, 9 Rationale of Judicial Evidence, part 14, ch. 5, § 2 (1827)