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# The Social Worker's Privilege, Victim's Rights, and Contextualized Truth

*by*
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Rather than critique Professor Mueller's paper, with which I generally agree, I intend to use it as a jumping off point to raise some issues that have not yet been articulated about the connection between politics and privilege. I too was unsurprised about *Jaffee*'s[1] recognition of a psychotherapist privilege, but am, like the other speakers, concerned about how the Supreme Court reached this result, why it expanded the privilege to encompass social workers, and what this portends.

The first question that struck me about *Jaffee* was, "How can the common law tradition work in creating new privileges as instructed by Federal Rule of Evidence 501, when we no longer really have any common law of privilege?" Accretion is at best illusory in a world where states enact statutory privileges by responding to political pressure with no thought to Wigmore's classic formulation,[2] and where the federal system has cut off its best avenue for experimentation by making the common law of privileges irrelevant in diversity cases.[3] The Eighth Circuit is the most likely source for evolving standards concerning the psychotherapist privilege. Due to its Indian Country jurisdiction, it sees most of the federal child abuse, battered women, and rape cases. Yet even here, there have not been many

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

2. 8 JOHN HENRY WIGMORE, EVIDENCE § 2285 (3d ed. 1940). Wigmore suggested that privileges should only be recognized when: (1) The communication 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; (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of the litigation. *Id.*

3. *See* FED. R. EVID. 501.

decisions discussing this issue.[4] Before *Jaffee*, relatively few federal cases addressed the existence of the privilege, though predictably some of the decisions that did involved alleged civil rights violations.[5]

Take a hard look at the parties in these cases who are likely to seek psychological help: "victims." It is not an exaggeration to suggest that one of the major political forces of our era, the Victims' Rights Movement, is ultimately responsible for defining the scope of the federal privilege, just as it had been in the states. How can I advance this iconoclastic claim? Professor Mueller aptly observed that privilege is the one place we do not pretend our rules are value-free. Instead, we admit that privileges are really substantive because they regulate out-of-court conduct.[6] Thus, if the Court relies on state privilege law to inform the federal common law principles, it is obvious that the pressure to expand victim oriented privileges will be great, because the Victims' Rights Movement has been incredibly successful in obtaining all manner of favorable state legislation, including privileges. Yet, in *Jaffee*, the Supreme Court said with no hint of irony that "[b]ecause state legislatures are fully aware of the need to protect the integrity of the fact-finding functions of their courts, the existence of a consensus among the States indicates that 'reason and experience' support recognition of the [psychotherapist] privilege."[7]

Now that this broad federal privilege has been blessed by the Supreme Court, Professor Mueller would let state law define its contours,[8] a proposition with which I disagree. This is a federal function that Congress explicitly left to the courts in Rule 501. States vary too much in their privilege definitions for it to be wise to rely on naked political power to prescribe its boundaries. Courts are at least one step removed from the rough and tumble world of legislative politics, and federal judges with lifetime tenure are less susceptible to pres-

4. *See, e.g.*, United States v. Bercier, 848 F.2d 917, 920 (8th Cir. 1988) (finding that statements made by defendant to his treating physician were properly admitted, as the physician-patient privilege was not recognized in federal criminal proceedings).

5. *See, e.g.*, Mines v. City of Philadelphia, 158 F.R.D. 337 (E.D. Pa. 1994) (finding in a civil rights action that a protective order was appropriate where plaintiffs sought discovery of psychotherapist's records concerning officer who allegedly used excessive force).

6. Christopher B. Mueller, *The Federal Psychotherapist-Patient Privilege After Jaffee: Truth and Other Values in a Therapeutic Age*, 49 HASTINGS L.J. 945 (1998).

7. 116 S. Ct. at 1930.

8. *See* Mueller, *supra* note 6, at 947.

sure than state judges who stand for re-election. On the other hand, I agree with Professor Mueller that expectations of confidentiality are typically grounded in state privilege law, since local law is relied upon by members of the community in regulating their out of court conduct, not the fortuity that a later action will be filed in federal, rather than state, court and address federal issues.

One solution might be to create a hybrid privilege that would rely on state law if it exists, and if not, fall back on federal common law.[9] Yet even here, as the Supreme Court noted, if both state and federal claims are joined, the trial court would have to decide which law to apply when they are not identical, an issue on which there is not full agreement.[10] Most judges apply the federal privilege law when there is a conflict.[11] It is unclear, however, whether this is really a matter of the Supremacy Clause, or rather simply a byproduct of the fact that federal court has been more hostile to expansive privileges than the states have been. Thus, federal judges may pick federal law because it provides no privilege, thereby resulting in the admissibility of the evidence. Ironically, *Jaffee*'s social worker privilege is likely to be much more expansive than state law. As such, lower courts may be more comfortable applying the state privilege, directly or as part of a hybrid approach, when the two conflict, in order to restrict the application of this amorphous privilege. But to completely abandon what little is left of the common law tradition of privilege to definition by the states appears to be in derogation of the federal court's role of ensuring integrity of federal trials. Nor is there any indication that Congress would approve such abrogation of the federal rule.

The deeper challenge posed by *Jaffee* is predicting its significance. The expansion of the privilege to a social worker acting as a psychotherapist was ultimately surprising because it was so swift and signaled a true paradigm shift: the common law is now truly common—the law of the people. Those who look at privilege from a power perspective as preserving the prerogative of the elite have to

9. This type of formulation was proposed by the American Bar Association's Criminal Justice Section's Committee on Federal Rules of Evidence and Procedure for civil cases. American Bar Association Criminal Justice Section's Committee on Rules for Criminal Procedure and Evidence, *Proposed Privilege Rules*, at 4 (Final Draft 1994) (on file with author).

10. *See Jaffee*, 116 S. Ct. at 1931 n.15.

11. *See* 23 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5434 (1980).

be taken aback (or possibly elated) by the potentially vast undefined social worker privilege. Twenty years ago, Representative Hungate derided the quest for privilege by social workers by mentioning them in the same breadth as piano tuners.[12] Yet, the Supreme Court now tells us that common law principles justify granting them a privilege. Times have changed, and as *Funk v. United States* so aptly foresaw, "[t]he public policy of one generation may not, under changed conditions, be the public policy of another."[13]

What has changed in that twenty years, a blink of the eye in common law terms? May I suggest Princess Diana could inform us on this topic as well.[14] Society from top to bottom is in a fit of self discovery, betterment and realization. Twelve step programs abound, and the mental health mode appears to follow one of two extremes. Either people tell the world their most intimate problems *a la* Princess Diana or they tell the mental health provider and depend on their secrets being kept because of the perceived stigma, shame, embarrassment or disgrace associated with seeing a psychologist or with the revelations themselves. Public approval of this search for self understanding and solace permeates throughout our culture, with even the Supreme Court assuming that "[t]he mental health of our citizenry, no less than its physical health, is a public good of *transcendent* importance."[15]

In a society that encourages working out problems with the help of professionals, why should the victims among us be denied their right to obtain help? Society also recognizes that the victims are not only the rich who patronize psychiatrists, or the middle class who visit psychotherapists, but the masses who can barely afford any help or are sent with public funds to public as well as private social workers. The People's Princess would understand this people's privilege. And in its haste to be egalitarian, the Supreme Court gave nary a thought

12. Representative Hungate told the Senate Committee that "when you open this up, the social workers and the piano tuners want a privilege." Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511, 534 (1994) (citing *Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong. 6 (1974)).

13. 290 U.S. 371, 381 (1933).

14. References to the Princess' recent tragic death had been previously made by a few speakers, in the context of how the media shaped public opinion and thereby had an effect on expectations of "truth" at trial. *See, e.g.*, Johannes F. Nijboer, *Vision, Abstraction, and Socio-Economic Reality*, 49 HASTINGS L.J. 387 (1998).

15. *Jaffee*, 116 S. Ct. at 1929 (emphasis added).

to the significant difference in qualifications required for licensing social workers as compared to psychotherapists and psychiatrists. Indeed, the Court did not even limit the privilege to the approximately 21,500 clinical social workers certified by the American Board of Examiners.[16]

But one did not need to read the content of the many amicus briefs filed in *Jaffee* to predict this result. It was obvious from a quick reading of their statements of interest. The psychiatrists weighed in with 42,000 members,[17] the psychologists with 135,000 members and affiliates,[18] but the social workers had 155,000 members.[19] Moreover, the National Association of Social Workers' ("NASW") brief indicated that in 1990 the number of social workers in mental health organizations and general hospital psychiatric services was more than the combined number of psychiatrists and psychotherapists.[20] The practical reality is that because insurance may only pay the lower rates for social workers, the middle class, as well as the poor, might only have access to treatment with social workers.

Yet, I don't view *Jaffee* as simply an equal access issue. Personally, I think this was a victims' rights issue. It may be instructive to look at who the victim was in *Jaffee.* It was not the person shot, but the female police officer who shot him as he wielded his butcher knife. It is noteworthy that the National Association of Police Organizations ("NAPO"), representing 185,000 law enforcement officers, also weighed in with an amicus brief[21] that articulated the great trauma that officers encounter when they are faced with shooting someone. Moreover, the Supreme Court recognized that "[p]olice officers engaged in the dangerous and difficult tasks associated with protecting the safety of our communities not only confront the risk of physical harm but also face stressful circumstances that may give rise to anxiety, depression, fear, or anger."[22]

16. *See* Brief for the National Association of Social Workers et. al. as Amici Curiae, Jaffee v. Redmond, 116 S. Ct. 1923 (1996) (No. 95-266) [hereinafter NASW Brief].

17. *See* Brief of the American Psychiatric Association and the American Academy of Psychiatry and the Law as Amici Curiae, Jaffee v. Redmond, 113 S. Ct. 1923 (1996) (No. 95-266).

18. *See* Brief Amicus Curiae of the American Psychological Association, Jaffee v. Redmond, 116 S. Ct. 1923 (1996) (No. 95-266).

19. *See* NASW Brief, *supra* note 16.

20. *See id.*

21. *See* Brief of Amicus Curiae National Association of Police Organizations, Inc., Jaffee v. Redmond, 116 S. Ct. 1923 (1996) (No. 95-266).

22. *Jaffee*, 116 S. Ct. at 1929 n.10.

Thus, what I see happening is that the victim, be it adult or child, who seeks help to deal with physically or sexually or mentally abusive conduct caused by another, is perceived as an innocent whose privacy and confidentiality should be protected. This is so not because we presume the perpetrator committed a criminal offense, but because that person's conduct caused the need for the mental health consultation. In other words, the communication is privileged because the perpetrator's conduct requires a forfeiture of any right to the confidential communication.[23] To those who would argue that this rationale cannot be employed in (typically criminal) cases in which the identity of the perpetrator is in dispute without assuming the defendant is the assailant, the response is that this is no different than the numerous other evidentiary rulings on preliminary facts which are based on a lower standard of proof than that required to convict the defendant.[24]

But I detect that something more significant is happening, something that goes to the essence of this conference—the question of truth versus its rivals. I see privilege being viewed in this context as an ally of the truth, not as an adversary. Why? Because the public at large, like victims, does not believe that privilege hides the truth regarding the victim's credibility. Rather, privilege is regarded as enhancing the truth-finding ability of the jury. Why? Because they think that the lawyer's role is to find and exploit minor inconsistencies, embarrass the victim, and cloud or even distort the truth by unfairly attacking the witness' credibility. Moreover, many believe the context in which the privileged statements are made color their meaning. NAPO's brief echoes Kim Scheppele's findings about victims:[25] police officers who kill may blame themselves as well as the people they kill, and may go through a number of phases before they

23. *Cf.* FED. R. EVID. 804(b)(6) (forfeiture by wrongdoing).

24. *See, e.g.*, Dowling v. United States, 493 U.S. 342 (1990) (affirming introduction of prior act which resulted in acquittal).

25. Kim Lane Scheppele, *Just the Facts Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 126-27 (1992).

> The very fact of delay or change is used as evidence that the delayed or changed stories cannot possibly be true. But abused women frequently have exactly this response: they repress what happened; they cannot speak; they hesitate, waver, and procrastinate; they hope the abuse will go away; they cover up for their abusers; they try harder to be "good girls"; and they take the blame for the abuse upon themselves. Such actions produce delayed or altered stories over time, which are then disbelieved for the very reason that they have been revised.

*Id.* (footnotes omitted).

can assimilate what truly happened. The fact that Redmond could not recall pulling the trigger until the completion of fifty therapy sessions, and her belief that she had a better recollection of the incident after therapy than a few hours after the shooting,[26] is consistent with the view that therapy permitted a redefinition of truth—a contextualized truth. Such a truth would no doubt fit well in the holistic storytelling approach to trial practice, aided by syndrome and social science evidence to teach the jury about the reality of the victim's life. Why is such context needed? Because the victim's reality may not be the same as that of the jurors, nor may their values be shared or even understood by the jurors without such information. In a world where the powerful speak in a common language, victims and those who in the past were (or even now are) outsiders currently demand that their stories be told in their own voices. Thus, the relationship between truth and privilege appears to be in the eyes of the beholder, and telling the jury secrets from a tormented heart may not be perceived as assisting the search for truth. As Spinoza once said, "He who would distinguish the true from the false must have an adequate idea of what is true and what is false."[27]

Yet, with this said, I am uncomfortable with the lack of definition given this social worker privilege and the undoubted pressure to extend it even further down the line to minimally trained rape and battered women's counselors who volunteer their time on hot lines and front line shelters.[28] And in criminal cases, what becomes of the defendant's right to confront witnesses? Professor Mueller suggests that *Ritchie*[29] is honored in the breach.[30] At a minimum, courts should be more forthright in acknowledging, like the hearsay rules now do, that withholding such information is based on a forfeiture by misconduct,[31] rather than creating untenable justifications based on privilege theory.

But what happens when the defendant wants to claim the benefits of the therapeutic model? Professor Mueller posits that we should want all people to attain mental health, not simply good peo-

26. Petitioner's Brief at 36, Jaffee v. Redmond, 116 S. Ct. 1923 (1996) (No. 95-266).

27. II SPINOZA, THEOLOGICAL-POLITICAL TREATISE 42 (1670).

28. *See, e.g.,* CAL. EVID. CODE §§ 1035.8 (sexual assault victim-counselor privilege), 1037.5 (domestic violence victim-counselor privilege) (West 1997); *see also* United States v. Lowe, 948 F. Supp. 97 (D. Mass. 1996) (finding federal rape counselor privilege).

29. *See* Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

30. *See* Mueller, *supra* note 6, at 964-65.

31. *See* FED. R. EVID. 804(b)(6) (forfeiture by wrongdoing).

ple. However, the common law is inevitably shaped by culture, and today, society is driven by concern with victims' rights. Child abuse reporting statutes clearly override the psychotherapist privilege in a number of states on the theory that we must protect those who cannot protect themselves. If the states now control the evolution of common law privileges, we will see the continuation of the trend that favors victims' rights at the expense of defendant's rights until the day may arrive when the "evolving common law" protects only "good" people. Is this the ultimate utilitarian victory: truth being served by a lopsided interpretation of privilege that protect victims, while exempting alleged perpetrators? Whether this result actually serves truth or its rivals may depend on one's views about the relative roles of context and doctrine at trial. Reaching a balance that ensures that context supplements, but does not supplant or distort, the truth finding function at trial is not an easy task,[32] regardless of the evidentiary issue in question. Courts, however, must take care not to confuse evidentiary policy with political power when reaching those determinations.

32. *See* Marianne Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 WASH. L. REV. 331 (1985) (discussing how psychiatrists shape the truth when they testify, and stating that they are not equipped to detect what really happened in the world (historical truth)).