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by

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Our legal system recognizes a time-honored universal duty which compels every person to divulge all relevant evidence to litigants who appropriately seek such information through the use of legal process.[1] The fairness of our judicial system relies on this duty. Without it, the even playing field of our adversary system would be tipped in favor of litigants who, through good fortune or power, acquire factual information not readily available to their opponents. While our adversary system relies upon the premise that each litigant is entitled to what Wigmore has called "every [person's] evidence,"[2] specific testimonial privileges operate to insulate from discovery certain confidential information that arises within relationships society seeks to protect.[3] Evidence that might well directly affect the outcome of litigation is suppressed by such recognized privileges as the spousal privilege and the attorney-client privilege.[4] Consequently, it is of no small moment when an authentically new privilege is recog-

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1. *See* 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2192 (3d ed. 1940).

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

Id.

2. *Id.*

3. *See* GLEN WEISSENBERGER, FEDERAL RULES OF EVIDENCE § 501 (2d ed. 1995).

4. *See id.* §§ 501.5, 501.6.

nized as a matter of federal common law by the United States Supreme Court.[5]

Recognizing a conflict among the courts of appeals, and appreciating the gravity of the competing interests, the Supreme Court granted certiorari in *Jaffee v. Redmond* to determine whether federal courts should recognize a privilege for communications between a psychotherapist and his or her patient.[6] The majority of the Court affirmed the Seventh Circuit's decision to recognize such a privilege and to include licensed social workers within the scope of the psychotherapist-patient privilege.[7]

Professors Imwinkelreid[8] and Mueller[9] have each provided insightful analyses of the issues raised by the Supreme Court's recognition of the psychotherapist-patient privilege. They share an approach which looks at the underlying rationale supporting the privilege, and then analyzes the implications of the underlying rationale in predicting the future development of the privilege.[10] There is very little with which any evidence scholar would quarrel in their analyses of the justifications for insulating privileged information from revelation. While Professors Imwinkelreid[11] and Mueller[12] focus on the privacy and instrumental underpinnings of the privilege, this brief Essay will seek to illuminate just how remarkable a decision *Jaffee v. Redmond* really is.

In order to appreciate the extraordinary nature of the decision in *Jaffee v. Redmond*, it is first important to recognize that all fifty states have recognized a psychotherapist-patient privilege in one form or another.[13] Also, forty-five states (with some hedging) extend the privilege to licensed social workers.[14] Nevertheless, despite this overwhelming support among the states for the psychotherapist

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

6. *See* Jaffee v. Redmond, 51 F.3d 1346 (7th Cir. 1995), *aff'd* 116 S.Ct. 1923 (1996).

7. *See Jaffee*, 116 S.Ct. at 1927.

8. Edward J. Imwinkelreid, *The Rivalry Between Truth and Privilege: The Weakness of the Supreme Court's Instrumental Reasoning in* Jaffee v. Redmond, *518 U.S. 1 (1996)*, 49 HASTINGS L.J. 969 (1998).

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

10. *See id. See also* Imwinkelreid, *supra* note 8, at 972-74.

11. *See* Imwinkelreid, *supra* note 8.

12. *See* Mueller, *supra* note 9, at 950-58.

13. *See Jaffee*, 116 S.Ct. at 1929 n.11 (citing provisions from all fifty states and the District of Columbia).

14. *See id.* at 1931 n.17.

privilege, this privilege, as compared to all other widely recognized privileges, is in its historical infancy.[15] As a consequence, lower federal courts have been slow to recognize the psychotherapist-patient privilege.[16] In their reluctance to recognize a psychotherapist privilege, some lower courts have reasoned that Congress did not support the recognition of new privileges when it enacted the language of Rule 501[17] rather than adopt the constellation of privileges originally submitted by the Supreme Court in its version of Article V.[18] In denying the privilege, lower federal courts have also responded to clear signals from the United States Supreme Court. In its decisions addressing the issue, the Court has taken a conservative approach to privilege law.[19] Since the adoption of Rule 501, the Supreme Court has consistently refused to recognize novel privileges, and it has expansively interpreted long-recognized privileges on only a few occa-

15. *See generally* 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 210 (1994).

16. *See, e.g.*, United States v. Burtrum, 17 F.3d 1299 (10th Cir. 1994), *cert. denied*, 513 U.S. 863 (1994); *In re* Grand Jury Proceedings, 867 F.2d 562 (9th Cir. 1989), *cert. denied sub nom.* Doe v. United States, 493 U.S. 906 (1989); United States v. Corona, 849 F.2d 562 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989).

17. FED. R. EVID. 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 action and proceedings, with respect to an element of 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.

Id.

18. *See In re* Grand Jury Proceedings, 867 F.2d 562 (9th Cir. 1989), *cert. denied sub nom.* Doe v. United States, 493 U.S. 906 (1989).

19. *See, e.g.*, University of Pennsylvania v. E.E.O.C., 493 U.S. 182 (1990) (rejecting federal peer review privilege); United States v. Zolin, 491 U.S. 554 (1989) (allowing in camera review of documents claimed to fall within crime-fraud exception to attorney-client privilege); Upjohn Co. v. United States, 449 U.S. 383 (1981) (broadening corporate attorney-client privilege by rejecting restrictive control group standard in favor of privilege covering statements by corporate employees relevant to subject matter of their employment); United States v. Gillock, 445 U.S. 360 (1980) (finding that there is no federal legislator privilege, in spite of state privilege rule); Trammel v. United States, 445 U.S. 40 (1980) (reducing by half federal spousal testimonial privilege by allowing it only for witness-spouse not party spouse); Herbert v. Lando, 441 U.S. 153 (1979) (holding that there is no privilege for newspaper editorialist); United States v. Nixon, 418 U.S. 683 (1974) (allowing qualified presidential privilege).

sions.[20]

Lower federal courts which have actually recognized a psychotherapist-patient privilege have done so cautiously.[21] Most frequently, when lower federal courts have recognized such a privilege, they have applied a balancing test.[22] The Seventh Circuit, which decided to join the growing number of circuits adopting a psychotherapist-patient privilege in the *Jaffee* case, used such a balancing approach and weighed the interest protected by shielding the evidence against the interest advanced by disclosure.[23]

When viewed against this historical backdrop, the United States Supreme Court decision in *Jaffee v. Redmond* is indeed extraordinary, and not only because it is the first time the United States Supreme Court has recognized a novel testimonial privilege under Rule 501.[24] It is also remarkable because of the methodology which the Supreme Court employed in relying upon the experience in states where privilege law is predominantly created by legislation.[25] Finally, the decision is yet even more extraordinary because the majority in *Jaffee* rejected the wisdom of the lower federal courts and refused to adopt a balancing test which would most effectively operate as the predicate for the development of the federal common law privilege.[26]

The remarkable nature of the decision in *Jaffee v. Redmond* is emphasized by mapping out the common ground I share with Professors Imwinkelreid and Mueller. First, Professor Mueller agrees with the Court's extension of the psychotherapist-patient privilege to so-

20. *See* cases cited *supra* note 19.

21. *See* Doe v. Diamond, 964 F.2d 1325, 1328-29 (2d Cir. 1992) (applying balancing test to find privacy interest in privileged communications outweighs need for witness's psychiatric history); *In re* Zuniga, 714 F.2d 632, 639 (6th Cir. 1983) (applying balancing test to find psychotherapist-patient privilege more important than evidentiary interest in disclosure).

22. *See* cases cited *supra* note 21.

23. *See* Jaffee v. Redmond, 51 F.3d 1346 (7th Cir. 1995), *aff'd* 116 S.Ct. 1923 (1996).

24. *See* cases cited *supra* note 19.

25. In deciding to recognize the privilege, the Court stated:

> That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 states and the District of Columbia have enacted into law some form of psychotherapist privilege. We have previously observed that the policy decisions of the states bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one.

Jaffee, 116 S.Ct. at 1929-30 (footnotes omitted).

26. *Id.* at 1932.

cial workers,[27] and Professor Imwinkelreid registers no objection.[28] Including social workers within the scope of the privilege is supported by state law in the overwhelming majority of jurisdictions,[29] and if the amicus briefs are reflective of the broader psychotherapist community, it appears that psychiatrists and psychologists embrace social workers as co-equal colleagues, at least insofar as the testimonial privilege is concerned.[30] While Justice Scalia in his dissent, joined by the Chief Justice, raises some concerns as to whether social workers authentically enjoy equal status in the delivery of psychotherapy with psychologists and psychiatrists, his arguments tend more to indicate caution in evaluating the function of a social worker in a particular factual context, rather than a basis for denying the privilege to social workers altogether.[31] While extending the privilege to social workers is not without any grounds for controversy, this aspect of the decision is not what makes *Jaffee* remarkable.

Mapping out further common ground, Professor Mueller emphasizes that the state law of psychotherapist-patient privilege is mostly statutory and that the statutes address in detail critical issues of coverage, exceptions, and waiver.[32] As Professor Mueller points out, these statutes conflict on important points.[33] Based on this recognition, I share in Professor Mueller's question: How can federal courts constructively use state law to fashion a federal privilege?[34] Professor Mueller's solution is that courts applying Federal Rule 501 should defer to state privilege law in all federal litigation, subject to whatever action Congress might take to create specific enclaves of federal privilege law.[35] Professor Mueller goes on to argue that federal courts should simply apply state law in this context because privilege law is substantive and because it is part of the regulation of out-of-court relationships.[36] Ultimately, Professor Mueller advocates the

27. *See* Mueller, *supra* note 9, at 950.

28. *See* Imwinkelreid, *supra* note 8.

29. *See Jaffee,* 116 S.Ct. at 1931 n.17.

30. *See* Brief of the American Psychiatric Association and the American Academy of Psychiatry and the Law as Amici Curiae, Jaffee v. Redmond, 116 S. Ct. 1923 (1996) (No. 95-266). *See also* Brief Amicus Curiae of the American Psychological Association, Jaffee v. Redmond, 116 S. Ct. 1923 (1996) (No. 95-266).

31. *See Jaffee,* 116 S. Ct. at 1936-41 (Scalia, J., dissenting).

32. *See* Mueller, *supra* note 9, at 959.

33. *See id.*

34. *See id.*

35. *See id.* at 960.

36. *See id.*

amendment of Rule 501, at least as it applies to the psychotherapist-patient privilege.[37] Professor Mueller has identified a real problem, but I predict that his solution is unrealistic. Congress has deferred to the courts in Rule 501,[38] and it is unlikely that it will ever reclaim this abandoned territory. More realistically, the problem will be addressed by the resurrection of the balancing test of the Seventh Circuit and other circuits in the application of the psychotherapist-patient privilege.[39] This resurrection of the balancing test is likely to arise in the guise of creating exceptions to the privilege, a matter to which I will return later in this Paper.

I also find common ground with Professor Imwinkelreid's conclusion that the instrumental justification for the psychotherapist privilege is unimpressive.[40] As he carefully documents in his paper, the research data collected in the studies cited in the *Jaffee* amicus briefs lead to the conclusion that, in embracing the instrumental rationale for the psychotherapist privilege, the *Jaffee* majority overestimates the impact of the existence of the privilege on the behavior of a typical patient.[41] Unquestionably, the empirical evidence for the instrumental rationale is weak, but this should come as no surprise.[42] The common law has long developed by relying upon untested underlying "legislative facts,"[43] to use the terminology of the advisory committee note to Federal Rule of Evidence 201. Without question, the common law was developing long before social scientists ever considered empirically testing its underlying assumptions, and the absence of underlying hard facts has never halted the advancement of the common law. Frank realism informs Professor Imwinkelreid's analysis that the standard for determining the admissibility of purportedly scientific evidence articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[44] will never be embraced as the standard for the empirical assumptions ("legislative facts"[45]) which underlie the advancement of the common law.[46] Nevertheless, I believe that Profes-

37. *See id.* at 961.
38. *See* FED. R. EVID. 501.
39. *See* cases cited *supra* note 21, 23.
40. *See* Imwinkelreid, *supra* note 8, at 974.
41. *See id.*
42. *See id.* at 974-80.
43. *See* FED. R. EVID. 201 advisory committee's note (defining "legislative" facts).
44. 509 U.S. 579 (1993).
45. *See supra* note 43 and accompanying text.
46. *See* Imwinkelreid, *supra* note 8, at 989.

sor Mueller would agree with me that Professor Imwinkelreid is correct in concluding that autonomy is the most defensible underpinning for the psychotherapist privilege.[47] Moreover, if we are to take the majority seriously that the privilege created in *Jaffee* is an absolute privilege, and not a qualified one, autonomy is the only underlying value that supports the majority's position.[48] As good as encouraging therapy might be under an instrumental rationale, that good can hardly in every case outweigh the horrific harms that might be avoided by revealing otherwise privileged information. Intuitively, it takes a primal value like autonomy to justify the absolute privilege which the Court claims it created.

In looking to the future, I would draw upon Professor Mueller's analysis in projecting the hard choices that lie ahead in the application of the federal psychotherapist-patient privilege.[49] Simultaneously, I would rely upon Professor Imwinkelreid's emphasis on autonomy as having the greatest promise in guiding the development of the privilege.[50] As an example of the hard choices to be made in crafting the privilege, Professor Mueller identifies sexual assault in child abuse cases in which federal courts, although infrequently, must decide whether communications within post-event therapy should be insulated by privilege.[51] Likewise, one can posit any number of different factual situations in which a person's autonomy interest in therapy collides directly with the very same sort of interest of the person who would seek disclosure of the information. Consider, for example, the situation where a traumatic event leads to litigation (as many do in our current climate). In post-event therapy, the plaintiff or complaining witness tells his or her psychotherapist: "I plan to lie about all of this in court." In this situation, the defendant, or the accused, obviously has the very type of autonomy interests at stake which Professor Imwinkelreid identifies as most justifiably supporting the privilege.[52] Moreover, these autonomy interests of the defendant are in serious jeopardy if the otherwise privileged information is

47. *See id.* at 985.

48. *See Jaffee*, 116 S.Ct. at 1932.

49. *See* Mueller, *supra* note 9, at 967.

50. *See* Imwinkelreid, *supra* note 8, at 985. *See also* Edward J. Imwinkelreid, *A 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, 543-44 (1994).

51. *See* Mueller, *supra* note 9, at 964-66.

52. *See* Imwinkelreid, *supra* note 8, at 985.

not subject to revelation. Numerous types of communications borne in therapy, perhaps falling into patterns, might be identified where it is reasonable to conclude that the autonomy interests of the patient are rivaled by, or exceeded by, the autonomy interests of the litigant. In looking to the future, how will these competing autonomy interests be accommodated?

At the conclusion of its decision, the majority in *Jaffee* points out that because *Jaffee* is the first case in which the Court recognized a psychotherapist privilege, "it is neither necessary nor feasible to delineate its full contours."[53] In a proximate footnote, the majority states:

> Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of disclosure by the therapist.[54]

At the same time, the majority in *Jaffee* claims that it has rejected the balancing of harm and good endorsed by the Seventh Circuit below.[55] It is evident that the majority in *Jaffee* contemplates that the so-called "absolute" privilege which it has created must "give way" in certain situations based upon the *content* of the communication. The only imaginable structure that could accommodate this "giving way" of the so-called absolute privilege would be through the recognition of exceptions to the psychotherapist privilege. By analogy, the attorney-client privilege does have at least one content exception, that pertaining to communications in furtherance of a crime or fraud.[56] It is likely this exception was created in the early history of the attorney-client privilege by a process of balancing. Inevitably, if content-based exceptions are to evolve as part of the development of the psychotherapist privilege, they will originate as the result of judges, presumably during *in camera* proceedings, examining the contents of the communication and assessing the potential harm that would result from insulating the communication from disclosure. Functionally, these exceptions could only originate through a process of weighing the interests of the patient against the interest of the litigant—the very balancing test applied by the Seventh Circuit and other federal

53. *Jaffee*, 116 S.Ct. at 1932.
54. *Id.* at 1932 n.19.
55. *See id.* at 1932.
56. *See* WEISSENBERGER, *supra* note 3, § 501.5.

courts which have recognized the psychotherapist privilege.[57] There is little question, as the majority's footnote in *Jaffee* portends, that the privilege will "give way"[58] where the serious threat of harm can be averted only by means of disclosure by the therapist. Undoubtedly, over time, the cases in which the privilege does give way will fall into patterns that will harden into broadly recognized "exceptions." The competing values at play will undoubtedly implicate the very type of autonomy values which Professor Imwinkelreid identifies,[59] and most assuredly, these values pertain to the avoidance of physical harm as illustrated by the well-known *Tarasoff*[60] situation, as well as the avoidance of the very type of deprivation of liberties which can result from litigation.

In conclusion, the *Jaffee* decision is remarkable not only because it creates a novel federal privilege or because state law was influential in informing the determination of whether to recognize a psychotherapist privilege. Ultimately, the decision is most remarkable because the majority rejected the balancing test which lower federal courts fully recognized to be the most fertile grounding for the evolutionary development of a novel common law privilege. *Jaffee* is a case in which the majority of Court informed its decision by the work of state legislatures, rather than careful crafting of a common law privilege by lower federal courts. That is remarkable.

57. *See* cases cited *supra* notes 19, 21.
58. *Jaffee*, 116 S.Ct. at 1932 n.19.
59. *See* Imwinkelreid, *supra* note 8, at 895.
60. *See* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976).