Protecting Confidential Communications between a Psychotherapist and Patient: Jaffee v. Redmond

Molly Rebecca Bryson

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Evidentiary privileges obstruct a long-standing foundation of the United States judicial system that the public has a right to know the evidence in a case at trial.\textsuperscript{1} This right to know is limited to evidence that increases the likelihood that a relevant fact actually exists.\textsuperscript{2} When society determines that it will allow witnesses to withhold relevant evidence, it

\textbf{NOTES}

\textbf{PROTECTING CONFIDENTIAL COMMUNICATIONS BETWEEN A PSYCHOTHERAPIST AND PATIENT: JAFFEE V. REDMOND}

\textsuperscript{1} See 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 70 (3d ed. 1961). Dean Wigmore explains that a "general duty to give what testimony one is capable of giving exists and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." \textit{Id.} Accordingly, privileges have evoked much debate in the federal court system. See \textit{Note, Making Sense of Rules of Privilege Under the Structural (Il)logic of the Federal Rules of Evidence}, 105 \textsc{Harv. L. Rev.} 1339, 1339 (1992) (noting that the Supreme Court has decided more cases on privileges than any other non-constitutional evidence cases). Since the Federal Rules of Evidence became effective in 1975, the Supreme Court has decided seven cases on privileges. See Jaffee v. Redmond, 116 S. Ct. 1923, 1931 (1996) (recognizing a psychotherapist-patient privilege under Rule 501); University of Pa. v. EEOC, 493 U.S. 182, 201-02 (1990) (refusing to allow a university to require a particularized necessity of access for peer review materials under Rule 501); United States v. Zolin, 491 U.S. 554, 569 (1989) (finding that an \textit{in camera} review of alleged attorney-client communications may be appropriate under certain circumstances); Upjohn Co. v. United States, 449 U.S. 383, 396 (1981) (holding that employees' communications to counsel are protected under certain circumstances); United States v. Gillock, 445 U.S. 360, 373-74 (1980) (determining that, in a federal prosecution against a state legislator, there is no privilege for hearing evidence of legislative acts by that legislator); Trammel v. United States, 445 U.S. 40, 53 (1980) (rejecting a claim of privilege where the petitioner's spouse chose to testify against him); Fisher v. United States, 425 U.S. 391, 396 (1976) (finding that the compelled production of documents from attorneys does not implicate Fifth Amendment privileges clients might have enjoyed if they were compelled specifically to produce the documents).

\textsuperscript{2} See \textsc{Fed. R. Evid.} 401. Rule 401 defines relevant evidence as "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." \textit{Id.} Rule 402 of the Federal Rules of Evidence further states that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." \textsc{Fed. R. Evid.} 402.
voluntarily foregoes information that rightfully could be disclosed.\(^3\) While withholding information reduces the amount of evidence retrieved in the fact-finding process,\(^4\) it strengthens certain relationships that are partially based on the exchange of confidential communications.\(^5\) Relationships, such as those between an attorney and client, and husband and wife, have long enjoyed protection from forced disclosure of confidential communications.\(^6\) Regarding the attorney-client privilege, courts have

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\(^3\) See \textit{McCormick on Evidence} § 72, at 171 (Edward W. Cleary et al. eds., 3d ed. 1984) (noting that rules of privilege do not facilitate the search for truth). Unlike other rules of evidence whose purpose is to contribute to the fact-finding process, the rules of privilege frustrate this purpose by preventing the introduction of relevant evidence. \textit{See id.} The introduction of such relevant evidence can be particularly critical in a criminal case because of the greater stakes involved for both parties. \textit{See 2 Weinstein \& Berger, Weinstein’s Evidence} § 501[03], at 501-41 (1995) (describing the importance of relevant evidence in a criminal case).

Given the importance of privileged material to the ultimate outcome of a case, questions of privilege usually arise during pretrial discovery. \textit{See} Martin A. Schwartz, \textit{Supreme Court Recognizes Psychotherapist Privilege, N.Y. L.J.,} July 16, 1996, at 3 (reporting that the privilege question in \textit{Jaffee arose} during pretrial discovery). Rule 26(b) of the Federal Rules of Civil Procedure governs discovery on all information “not privileged, which is relevant to the subject matter involved in the pending action.” \textit{FED. R. CIV. P.} 26(b)(1).

\(^4\) See Earl C. Dudley, Jr., \textit{Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law,} 82 \textit{Geo. L.J.} 1781, 1819 (1994) (“One possible explanation for the courts’ reluctance to find a constitutional foundation for most privileges is that ‘every expansion of privilege is of necessity a diminution in the power of the judiciary.’”) (quoting 23 \textit{Wright \& Graham, Federal Practice and Procedure} § 5422, at 669 (1980)).

\(^5\) \textit{See} United States v. Bryan, 339 U.S. 323, 331 (1950) (justifying exemptions from giving testimony on the basis of a predominant “substantial individual interest” that must be protected); \textit{see also} Upjohn, 449 U.S. at 389 (discussing the critical nature of confidentiality in the administration of justice); McCormick, \textit{supra} note 3, § 73, at 173 (describing the rationale behind privileges as the protection of relationships that society has determined to be of greater social significance than the potential retrieval of evidence); Fred C. Zacharias, \textit{Rethinking Confidentiality II: Is Confidentiality Constitutional?}, 75 \textit{Iowa L. Rev.} 601, 614 (1990) (contending that a strict first amendment standard in attorney-client confidentiality would affect the court’s balancing test in other contexts, such as federal securities laws). Privileges are different from evidentiary rules that exclude unreliable evidence. \textit{See} Wendy Meredith Watts, \textit{The Parent-Child Privileges: Hardly a New or Revolutionary Concept,} 28 \textit{Wm. \& Mary L. Rev.} 583, 586 (1987); \textit{see also} Edward J. Imwinkelried, \textit{Evidentiary Distinctions: Understanding the Federal Rules of Evidence} 71-76 (1993) (describing the different kinds of exclusionary rules). Exclusionary rules that exclude unreliable evidence include: the hearsay rule (Rules 801 and 802), the opinion rule (Rule 701), the original document rule (Rule 1002), and the rule rejecting proof of bad character as evidence of crime (Rule 404). \textit{See} Watts, \textit{supra}, at 586 n.8. Unlike the foregoing rules, Rule 501 excludes evidence that is not only relevant, but also reliable. \textit{See Imwinkelried, supra}, at 72. The privilege excludes the communication, but allows the introduction of other evidence pertaining to the same facts. \textit{See id.} at 74.

\(^6\) \textit{See} Watts, \textit{supra} note 5, at 587 (asserting that society realizes the disadvantages of privileges, but has chosen to protect certain relationships). Traditionally-protected relationships include attorney-client, husband-wife, and priest-penitent. \textit{See id.} at 587-89 (presenting an overview of the development of privilege law).
protected such communications to strengthen loyalty and to enable the
attorney to represent the client effectively. Likewise, courts have pro-
tected communications between spouses to preserve marital confidences.

During the last twenty years, protection of confidential communi-
tcations between a psychotherapist and client has achieved wide acceptance

7. See Upjohn, 449 U.S. at 389 (acknowledging that the attorney-client privilege induces clients to fully reveal information about their case). In Upjohn, the Supreme Court defined the purpose of the attorney-client privilege as "encourag[ing] full and frank communication between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and administration of justice." Id. The Court acknowledged that the public has an interest in obtaining sound legal advice that can be achieved only when the client communicates fully with the attorney. See id.; see also Jacqueline A. Weiss, Note, Beyond Upjohn: Achieving Certainty by Expanding the Scope of the Corporate Attorney-Client Privilege, 50 Fordham L. Rev. 1182, 1202-05 (1982) (discussing the foundation of the attorney-client privilege and the judiciary's struggle to balance the interest in protecting the privilege with the interest of facilitating discovery). See generally Deborah Stavile Bartel, Drawing Negative Inferences Upon a Claim of the Attorney-Client Privilege, 60 Brook. L. Rev. 1355, 1364-65 (1995) (describing the attorney-client privilege as facilitating attorneys' advisory role by promoting clients' full disclosure).

8. See Watts, supra note 5, at 587. The Court's recognition of the husband-wife privilege forbids one spouse from testifying involuntarily against the other. See Hawkins v. United States, 358 U.S. 74, 79 (1958) (maintaining the applicability of the exclusionary rule until "reason and experience" dictate a change); Wolfe v. United States, 291 U.S. 7, 14 (1934) (holding that spouses who disclose their communications voluntarily to a third person, who is not a member of another privileged class, lose the protection of the husband-wife privilege); Funk v. United States, 290 U.S. 371, 381 (1933) (justifying the admission of a spouse's testimony on the grounds that "since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule"); see also infra note 64 (distiguishing between the adverse spousal testimony privilege and the spousal communications privilege). But cf. Trammel v. United States, 445 U.S. 40, 53 (1980) (modifying Hawkins and rejecting a claim of privilege where the petitioner's spouse voluntarily elected to testify against him).

at the state level. Though all fifty states and the District of Columbia have recognized some form of a psychotherapist-patient privilege, federal courts remained unconvinced regarding the importance of the privilege and their institutional competence to recognize it. This ambivalence has, in part, resulted from courts' differing interpretations of the law governing privileges—Rule 501 of the Federal Rules of Evi-


12. See infra note 21 and accompanying text (noting that the Fifth, Ninth, Tenth, and Eleventh circuits failed to recognize a psychotherapist-patient privilege).

13. See id. (describing the circuit court split on whether to recognize the psychotherapist-patient privilege).
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Psychotherapist-Patient Privilege

14. Congress enacted Rule 501 in 1975 to preserve the flexibility needed to respond to the changing conditions in society. Rule 501 allows courts to interpret common law "in the light of reason and experience." Courts that have recognized the psychotherapist-patient privilege have been influenced profoundly by the privacy interest in the therapeutic relationship that develops between a psychotherapist and patient. Courts that have refused to recognize the privilege have viewed the importance of retrieving evidence predominant particularly when the information is obtainable only through disclosure of communications made during psychotherapy. Often, nonrecognition of the privilege has occurred in a criminal context, such as a child sexual abuse case, as a result of the large stakes involved for both parties in the outcome of the suit.

15. See Jaffee, 116 S. Ct. at 1927 (describing the need for flexibility in the development of the common law); S. REP. NO. 93-1277, at 13 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7059 (demonstrating Congress's intent to permit federal courts to develop the common law on privileges); see also OLIVER W. HOLMES, JR., THE COMMON LAW 1 (1881) ("The life of the law has not been logic: it has been experience.").

16. FED. R. EVID. 501; see infra note 51 and accompanying text (stating explicitly the language of Rule 501); see also Jaffee, 116 S. Ct. at 1927 (listing courts of appeals that have interpreted Rule 501 and have decided either to recognize or not to recognize a psychotherapist-patient privilege). The Court traditionally has shown a hesitance to recognize privileges. See University of Pa. v. EEOC, 493 U.S. 182, 189 (1990) (explaining the Court's desire to exercise its authority to recognize privileges in a limited way because of Congress's role in recognizing privileges). In University of Pennsylvania, the Supreme Court held that a peer review privilege is not based in the common law. See id. The Court acknowledged that the disclosure of peer review materials is usually a necessary component of the EEOC's assessment of the presence or absence of illegal discrimination. See id. at 193-94. Noting that Congress had already considered the competing interests involved, but had opted against the privilege, the Court held against the University and did not find a peer review privilege. See id. at 189.

17. See Doe v. Diamond, 964 F.2d 1325, 1328-29 (2d Cir. 1992) (focusing on the dominating importance of the witness's privacy interest); In re Zuniga, 714 F.2d 632, 640 (6th Cir. 1983) (reasoning that the rationale driving the privilege is that a patient must be entitled to reveal "his innermost thoughts . . . without fear of disclosure"); see also Ellen S. Soffin, Note, The Case for a Federal Psychotherapist-Patient Privilege That Protects Patient Identity, 1985 DUKE L.J. 1217, 1224 (describing the importance of confidentiality to mental health treatment).

18. See Jaffee, 116 S. Ct. at 1927 (reporting that the Fifth, Ninth, Tenth, and Eleventh Circuits did not recognize the psychotherapist privilege); see also discussion infra Part I.B.1-3 (describing the rationales employed by the courts of appeals in deciding not to recognize the privilege).

19. See United States v. Burtrum, 17 F.3d 1299, 1302 (10th Cir. 1994) (offering policy reasons against recognizing the psychotherapist privilege); see also discussion infra Part I.B.1 (describing the Burtrum court's presumption against recognizing the privilege).
The Supreme Court granted certiorari in *Jaffee v. Redmond*\(^{20}\) to balance the competing interests and resolve the split in the circuit courts.\(^{21}\) *Jaffee* began as a wrongful death claim brought by the surviving family members of a man killed in the line of duty by Officer Mary Lu Redmond.\(^{22}\) Once the petitioner learned that Redmond had taken part in fifty post-incident counseling sessions with a licensed clinical social worker,\(^{23}\) the petitioner requested the social worker's notes from the sessions.\(^{24}\) The district court judge, interpreting the federal standard as controlling,\(^{25}\) ordered disclosure of the notes even though Illinois state law


\(^{21}\) See *id.* at 1927. *Compare Burtrum*, 17 F.3d at 1302 (refusing to recognize a psychotherapist-client privilege because of the significance of the evidentiary interest), and *In re Grand Jury Proceedings*, 867 F.2d 562, 564-65 (9th Cir. 1989) (choosing not to recognize a psychotherapist-client privilege in grand jury investigations because Congress should make the determination), and *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988) (declining to recognize a physician-patient or psychotherapist-patient privilege in the context of a federal criminal trial because the physician-patient privilege was not recognized), and *United States v. Meagher*, 531 F.2d 752, 753-54 (5th Cir. 1976) (refusing to recognize a psychotherapist-patient privilege because it did not recognize a physician-patient privilege), with *Diamond*, 964 F.2d at 1328 (recognizing a psychotherapist-client privilege in order to protect the strong privacy interest in effective counseling), and *Zuniga*, 714 F.2d at 639 (determining that promoting confidentiality in the psychotherapist-patient relationship was sufficiently compelling to justify recognition of the privilege).

\(^{22}\) See *Jaffee*, 116 S. Ct. at 1925-26. The petitioner alleged that Redmond had used excessive force in her confrontation with the deceased, and testified to facts conflicting with Redmond's testimony, such as when Redmond aimed her gun and whether the deceased was armed. *See id.* at 1926.

\(^{23}\) See *id.* (describing Karen Beyer as a clinical social worker licensed by the State of Illinois and employed by the Village of Hoffman Estates at the time of the counseling sessions); see also *Jaffee v. Redmond*, 51 F.3d 1346, 1350 (7th Cir. 1995), *aff'd*, 116 S. Ct. 1923 (1996) (stating that Karen Beyer counseled Redmond two or three times a week for six months).

\(^{24}\) See *Jaffee*, 116 S. Ct. at 1926 (stating that the petitioner wished to use the social worker's notes to cross-examine Redmond about the events leading up to the deceased's death).

\(^{25}\) With respect to choice of law questions, Congress's enactment of Rule 501 echoes the famous doctrine first posited in *Erie Railroad Co. v. Tompkins*. See 304 U.S. 817, 822 (1938) (holding that "the law to be applied in any case is the law of the state," with the exceptions of "matters governed by the Federal Constitution or by acts of Congress"); *see also* 1 *STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL* 403 (5th ed., 1990) (explaining that state rules of privilege will apply when state law governs the claim or defense). Saltzburg and Martin note that ambiguities arise between state and federal privilege laws, particularly when both state and federal claims are tried in one case. *See id.* at 404-05. The authors adopted a pragmatic stance by advocating the jury's use of the same privilege rule on similar issues. *See id.* at 405. Notwithstanding the potential for ambiguity, Rule 501's approach to choice of law generally has avoided negative criticism. *See FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS* app. II at 364 (West 1993).

Traditionally, laws of privilege were perceived as procedural and, thereby, governed by the laws of that particular forum. *See MCCORMICK, supra* note 3, § 73.2, at 174-75; *see also*
granted the privilege to licensed social workers. Redmond refused to comply and judgment regarding production was entered against her. The Court of Appeals for the Seventh Circuit reversed, holding that both reason and experience dictated recognition of a psychotherapist-patient privilege that included confidential communications with licensed social workers.

In *Jaffee*, the Supreme Court agreed with the Seventh Circuit and held that confidential communications between a psychotherapist and client are privileged and cannot be disclosed at trial. Using a balancing approach, the Court determined that the significant private and public interests at stake in recognizing the privilege outweighed the evidentiary benefit in forcing the disclosure of communications. Though the Supreme Court used a balancing approach to recognize the privilege, it refused to create an uncertain privilege that would apply only at the trial of the case.

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Restatement of Conflict of Laws § 597, at 714 (1934). In contrast, modern authorities posit that policy interests of jurisdictions should resolve choice of law questions. See *McCormick, supra* note 3, § 73.2, at 175; Restatement (Second) of Conflict of Laws § 139(1), at 385 (1971).

26. See *Jaffee*, 51 F.3d at 1350 n.5. The district judge refused to apply the privilege to licensed social workers because the Supreme Court's proposed version of the privilege did not apply to licensed social workers. See *id*. Instead, the court relied on the federal standard as controlling in situations where there were both federal and state claims. See *id*.

27. See *id*. at 1351. The district judge instructed the jury to assume that Redmond's refusal to disclose the notes from the counseling sessions indicated that they contained information adverse to her. See *id*.

28. See *id*. at 1355.

29. See *Jaffee*, 116 S. Ct. at 1927 (affirming the Seventh Circuit's decision to recognize a psychotherapist-patient privilege).

30. A psychotherapist-patient privilege serves private interests by creating a confidential atmosphere in which a patient feels free to disclose sensitive information necessary for effective treatment. See *id*. at 1928.

31. A psychotherapist-patient privilege serves public interests by facilitating the mental health of society, including police officers. See *id*. at 1929.


33. See *Jaffee*, 116 S. Ct. at 1929 (predicting that a rejection of the psychotherapist-patient privilege would result in fewer communications between psychotherapists and patients); see also *infra* text accompanying notes 133-35 (discussing the balancing approach utilized by the Court). The Court rejected the additional balancing component the Seventh Circuit employed that gave the trial judge discretion to balance the interests on a case-by-case basis. See *Jaffee*, 116 S. Ct. at 1932. The Seventh Circuit had determined that the scope of the psychotherapist privilege could be limited by conducting a process of balancing competing interests. See *Jaffee*, 51 F.3d at 1357. The petitioner's ability to gather the desired information from Redmond through other sources weighed heavily in the court's balancing in favor of maintaining the confidentiality of the social worker's notes. See *id*. at 1358.
judge's discretion on a case-by-case basis.\textsuperscript{34} Writing for the majority, Justice Stevens concluded that the threat of disclosure of confidential communications between a psychotherapist and patient would jeopardize the purpose and effectiveness of that relationship to such a degree that any value received from disclosing communications would be minimal.\textsuperscript{35} Therefore, by recognizing a psychotherapist-patient privilege, the Court served both private and public interests in facilitating the effectiveness of the therapeutic relationship.\textsuperscript{36} The majority also agreed with the Seventh Circuit's inclusion of licensed social workers in the psychotherapist-pa-

\begin{footnotesize}
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  \item See Jaffee, 116 S. Ct. at 1932 (expressing distaste for the creation of an uncertain privilege); see also infra Part III.B. (discussing whether the Court actually did create an uncertain privilege).
  \item See Jaffee, 116 S. Ct. at 1929; see also Winick, supra note 32, at 254 (noting the inconclusiveness of empirical literature regarding whether courts' recognition of a psychotherapist-patient privilege is a determinative factor in the decision to seek psychotherapeutic treatment). Winick hypothesizes that patients would not be willing to undergo therapy without reliance on a psychotherapist-patient privilege because of the "extremely unpleasant and embarrassing" nature of public disclosure. Id. at 257. Winick suggests that the continuing stigma, including "embarrassment and social disadvantages" associated with mental illness, increases the potential for negative ramifications from public disclosure. Id. at 259.
  \item Professors Daniel Shuman and Myron Weiner tested the assumption that therapy's effectiveness is dependent upon the certainty of confidentiality. See Daniel W. Shuman & Myron F. Weiner, The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege, 60 N.C. L. Rev. 893, 893 (1982) (concluding that "the existence of the [psychotherapist-patient] privilege is of consequence to few patients and in few cases"). Shuman and Weiner advanced the following premises: (1) the lack of a privilege is a deterrent to people considering mental therapy; (2) the lack of a privilege is a delay to those who consider needed treatment; (3) the lack of a privilege decreases the treatment's quality; (4) the lack of a privilege causes a premature end to treatment; and (5) the lack of a privilege harms patients when their communications are disclosed. See id. at 898. Based on their empirical study, Shuman and Weiner concluded that, even in the absence of a psychotherapist-patient privilege, patients would consult psychotherapists. See id. at 925-26. They alleged that most mental health patients are not aware of the privilege and, if they withhold information, they do so because of fear of their therapist's judgment of them. See id. at 926. The study also advanced the view that patients rely more heavily on the therapist's ethics concerning confidentiality than on a legal assurance of privilege. See id.; see also Ethical Principles of Psychologists and Code of Conduct Standard 5.01, in 47 Am. Psychol. 1597, 1606 (1992) (specifying that the psychologist discuss confidentiality upon commencement of the treatment); National Ass'n of Social Workers Code of Ethics § 1.07 (photo reprint 1997) (specifying that the social worker should inform clients about the limits of their confidential relationship).
  \item See Jaffee, 116 S. Ct. at 1928-29 (analyzing the private and public interests affected by the presence or absence of the psychotherapist privilege); see also id. at 1931 (valuing the public good derived from a psychotherapist-patient privilege above "'the normally pre-dominant principle of utilizing all rational means for ascertaining truth'" (quoting Trammel v. United States, 445 U.S. 40, 50 (1980))). The Court's recognition of the privilege resulted from its determination that both reason and experience suggest that a psychotherapist-patient privilege "'promotes sufficiently important interests to outweigh the need for probative evidence . . . .'' Id. at 1928 (quoting Trammel, 445 U.S. at 51).
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Psychotherapist-Patient Privilege

Dissenting, Justice Scalia sharply criticized the majority's views, maintaining that the "purchase price" for encouraging psychotherapy was "occasional justice." The dissent accused the Court of ignoring its traditional preference for the truth by creating a privilege whose scope was undefined. The dissent also questioned the consistency of the Court's decision to recognize a psychotherapist-patient privilege without recognizing a parent-child privilege. Noting differences in training and

37. See id. at 1931-32.
38. Id. at 1932 (Scalia, J., dissenting); see also MCCORMICK, supra note 3, § 72, at 170-71 (explaining that the majority of the Federal Rules of Evidence promote the truth-seeking process, while the rules of privilege frustrate that process).
39. See Jaffee, 116 S. Ct. at 1933 (Scalia, J., dissenting).
40. See id. at 1934. For information regarding the parent-child privilege, see Ann M. Stanton, Child-Parent Privilege for Confidential Communications: An Examination and Proposal, 16 Fam. L.Q. 1, 13 (1982) ("[I]t is illogical to require that a young person turn to outside professionals in order for his private communications to be protected."); Roy T. Stuckey, Guardians Ad Litem As Surrogate Parents: Implications for Role Definition and Confidentiality, 64 Fordham L. Rev. 1785, 1806 (1996) (arguing that a parent-child privilege would encourage intimacy and openness among family members and promote child development); Watts, supra note 5, at 586 (supporting recognition of the parent-child privilege in order to facilitate family harmony); Jeffrey Begens, Comment, Parent-Child Testimonial Privilege: An Absolute Right or an Absolute Privilege?, 11 U. Dayton L. Rev. 709, 728-29 (1986) (comparing the parent-child privilege to the accepted spousal privilege); Deborah A. Ausburn, Note, Circling the Wagons: Informational Privacy and Family Testimonial Privileges, 20 Ga. L. Rev. 173, 220 (1985) (contending that "informational privacy" protects family relationships without jeopardizing "just adjudication"); J. Tyson Covey, Note, Making Form Follow Function: Considerations in Creating andApplying a Statutory Parent-Child Privilege, 1990 U. Ill. L. Rev. 879, 888 (defining the goals of the parent-child privilege as "protect[ing] children's reasonable expectations of confidentiality when communicating with their parents . . . and . . . protect[ing] minor children from the traumatic and potentially destructive experience . . . [of] testify[ing] against their parents"); Gregory W. Franklin, Note, The Judicial Development of the Parent-Child Testimonial Privilege: Too Big For Its Britches?, 26 Wm. & Mary L. Rev. 145, 151-52 (1984) (analogizing the parent-child privilege to privileged professional relationships and the spousal privilege); Note, Parent-Child Loyalty and Testimonial Privilege, 100 Harv. L. Rev. 910, 916-20 (1987) (supporting recognition of a symmetrical parent-child privilege to promote loyalty between parent and child). But see In re Grand Jury Proceedings, Nos. 95-7354, 96-7529, 96-7530, 1997 W.L. 6328, at *5 (3d Cir. Jan. 9, 1997) (finding no basis to recognize a parent-child privilege). The Third Circuit acknowledged that although legal academicians favor the parent-child privilege, none of the courts of appeals or state supreme courts have adopted it. See id. The court interpreted the Supreme Court's reliance on the overwhelming state recognition of the psychotherapist privilege in Jaffee as an indicator that an absence of overwhelming state support would signal nonrecognition of a privilege. See id. at *9 (noting that only four states have recognized a form of the parent-child privilege). The Third Circuit further relied on the Supreme Court's 1973 list of proposed privileges that did not include a parent-child privilege as an indicator that the interest in protecting communications between a parent and child was not adequately significant. See id. at *10. Resolving to wait for Congress's determination, the court questioned the scope of the proposed privi-
function between licensed social workers and psychiatrists and psychologists, the dissent disparaged the majority's inclusion of licensed social workers in the psychotherapist-patient privilege.\(^4\)

This Note first examines the basis for the Court's authority to recognize new privileges, and the legislative history of Rule 501 of the Federal Rules of Evidence. This Note then explores the competing interests involved in the circuit court decisions that declined to find a psychotherapist-patient privilege, and those that recognized such a privilege. Next, this Note discusses the implications of the Court's decision in Jaffee, and the dissenting opinion. This Note asserts that the Court has created an uncertain privilege causing difficulty for lower courts because the Court provided insufficient direction regarding the point at which the need for evidence should override the privilege. This Note concludes that the inclusion of licensed social workers in the recognition of the psychotherapist-patient privilege is reasonable, but that the Court has left lower courts with an ambiguous standard that will likely yield inconsistent applications.

I. DEVELOPMENT OF TESTIMONIAL PRIVILEGES

A. The Creation of Rules Governing Privileges: The Battle of Competing Interests

Pursuant to 28 U.S.C. § 2072, Congress granted the Supreme Court the authority to prescribe rules of evidence for district courts and courts of appeals.\(^4\) The Supreme Court exercises this power by submitting to

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4. See Jaffee, 116 S. Ct. at 1936 (Scalia, J., dissenting); see also Winick, supra note 32, at 264 (discussing the therapeutic role that social workers play in the mental health field); Kerry L. Morse, Note, A Uniform Testimonial Privilege for Mental Health Professionals, 51 OHIO ST. L.J. 741, 754-55 (1990) (contending that including social workers in the psychotherapist-patient privilege is easier for patients to understand and applies to all socio-economic groups more equitably).

42. See 28 U.S.C. § 2072 (1994). Section 2072 endows the Supreme Court with power to create rules of evidence:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for purposes of appeal under section 1291 of this title.


The U.S. Constitution gives Congress the power to create lower courts. See U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme
Congress proposed rules that are drafted by the Court's Advisory Committee\textsuperscript{43} and reviewed by both the Court's Standing Committee and Judicial Conference.\textsuperscript{44} Pursuant to 28 U.S.C. § 2074, the Supreme Court must submit the proposed rules to Congress.\textsuperscript{45} Congress then has the discretion to reject the rules if it does not approve of their content; in addition, Congress may draft rules to amend or replace the Court's submissions.\textsuperscript{46}


\textsuperscript{44} See Moore, \textit{supra} note 42, at 1061-62 (explaining the Court's role in promulgating Federal Rules). Pursuant to 28 U.S.C. § 2073(a)(1), the Judicial Conference "prescribe[s] and publish[es] the procedures for the consideration of proposed rules under this section." 28 U.S.C. § 2073(a)(1). The Court spearheads an active review process of its proposed rules which allows opportunity for input by both the general public and the appointed advisory committees. \textit{See} Jack B. Weinstein, \textit{Reform of Federal Court Rulemaking Procedures}, 76 COLUM. L. REV. 905, 908 (1976) (comparing the Court's rulemaking to a legislative rather than judicial process). The Court has recognized and accepted Congress's ultimate rulemaking authority and role as a delegator. \textit{See} Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941) (acknowledging Congress's power to oversee the practice of federal courts and to delegate this authority to other federal courts).

\textsuperscript{45} See 28 U.S.C. § 2074(a). Section 2074(a) outlines the procedure the Supreme Court must follow in submitting rules of evidence to Congress:

\begin{quote}
The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.
\end{quote}

\textit{Id.}

\textsuperscript{46} See \textit{id.} § 2074(b); Weinstein, \textit{supra} note 44, at 908 (describing how Congress lately has taken a more active role in modifying national rules); \textit{see also} 28 U.S.C.A. § 2074(b)
Unlike other rules of evidence, however, Congress must affirmatively approve "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege."47

In 1973, the Supreme Court submitted a proposal to Congress advocating the recognition of nine privileges.48 One of these privileges was a psychotherapist-patient privilege.49 The Court advocated the recognition of a psychotherapist-patient privilege rather than a physician-patient privilege because it deemed confidentiality more important to the psychotherapist-patient relationship than to a physician-patient scenario.50

47. 28 U.S.C. § 2074(b). Rules, other than those dealing with evidentiary privileges, become effective if Congress does nothing from May 1 to December 1. See 28 U.S.C.A. § 2074 cmt. (Siegel 1988) (Submitting the Rules to Congress) (describing Congress's passive approval procedure). Because amendments to the Rules of Evidence affecting privileges require active congressional approval, either the House or Senate has the ability to reject the Supreme Court's proposals. See Cong. Rec. H40,890 (daily ed. Dec. 18, 1974) (statement by Rep. Hungate). Representative Hungate noted that rules of privilege are the result of a policy choice whose nature is legislative; therefore, Congress must take an affirmative role in choosing between competing interests. See id.; see also Weinstein & Berger, supra note 3, § 501[04], at 501-58 (noting the legislative nature of privilege rules).


49. See Fed. R. Evid. 504 (unenacted). The Supreme Court described the psychotherapist-patient privilege as the ability to maintain the confidentiality of communications between the patient and psychotherapist and any others involved in the patient's diagnosis or treatment. See id. The Court did not include licensed social workers in the proposed privilege:

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

Id.

50. See Fed. R. Evid. 504 (unenacted) advisory committee's note. The Supreme Court differentiated its proposed psychotherapist-patient privilege from a general physician-patient privilege on the basis of the psychotherapist's role in improving patients' mental health by maintaining confidentiality. See id. The Court described this confidentiality as a "sine qua non for successful psychiatric treatment." Id. The Supreme Court also indicated its acceptance of three exceptions to this general rule of confidentiality: (1) in a commitment proceeding, (2) in a court-ordered examination, and (3) in litigation where the patient introduces his or her condition. See id. at (d).

The Advisory Committee contended that assuring confidentiality to a client is an integral part of the psychotherapist's role. See id. Further, the Committee did not recommend the recognition of a general physician-patient privilege because the privilege had not been rec-
Instead of adopting the Supreme Court's proposal for recognized privileges, Congress drafted and adopted its own proposal, Rule 501. Courts recognized at common law and existed only as a state-created privilege by statute. See Kenneth R. Tucker, Note, Did Congress Err in Failing to Set Forth Codified Rules Governing Privileged Relationships and Resulting Communications?, 72 U. Det. Mercy L. Rev. 181, 207 (1994) (contrasting the Advisory Committee's treatment of a general physician-patient privilege with a psychotherapist privilege); see also Mueller & Kirkpatrick, supra note 10, § 209, at 455-56 (noting that there is no physician-patient privilege in federal common law partially because of its many exceptions). Exceptions to the physician-patient privilege stem from the nature and source of information the privilege blocks. See McCormick, supra note 3, § 104, at 258 (noting that some statutes that recognize a physician-patient privilege exempt malpractice actions, homicide prosecutions, and will contests). A physician's testimony on diagnosis and treatment may be the only available source of that information. See id.

The comparison between the psychotherapist-patient privilege and physician-patient privilege subsequently caused lower courts to hesitate to recognize either privilege without the other. See discussion infra Part I.B.3 (noting two cases that struggled to reconcile the two privileges, namely United States v. Corona, 849 F.2d 562 (11th Cir. 1988), and United States v. Meagher, 531 F.2d 752 (5th Cir. 1976)).

51. See Fed. R. Evid. 501. Rule 501's language allows an open-ended development of privileges:

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.

Id.

Congress's objection to the Supreme Court's draft of the Federal Rules of Evidence marked the first time Congress had made substantial revisions to a draft proposed by the Court. See Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary, 93d Cong. 74-77 (1974) (statement of Professor James William Moore) (describing the good relationship between Congress and the Court concerning the promulgation of rules and Congress's unedited adoption of the Court's draft of the Federal Rules of Civil and Criminal Procedure); see also 28 U.S.C.A. § 2074 cmt. (Siegel 1988) (Submitting Rules to Congress) (contending that the main reason Congress rejected the Court's proposed rules was that the Court previously had "trifled" with privileged communications); Imwinkelried, supra note 43, at 512 (explaining Congress's intervention as a result of the Watergate scandal's controversy over executive privilege). By not enumerating recognized privileges, Congress's changes to the Supreme Court's proposal were intended to allow the development of both statutory and common law privileges on an ongoing basis. See Cong. Rec. H40,891 (daily ed. Dec. 18, 1974) (indicating Congress intended "to leave the Federal law of privilege where we found it"); see also LouiseLL & Mueller, supra note 10, § 200, at 635 (characterizing Rule 501 as a "total rejection" of the Advisory Committee and Supreme Court's approach on privileges). Professors LouiseLL and Mueller assert that the Supreme Court committed three mistakes in drafting its proposed rule on privileges: (1) attempting to codify privileges when they are better suited to an evolutionary common law development based on specific factual scenarios; (2) attempting to eliminate the physician-patient and spousal communications privileges and to restrict the
have interpreted Rule 501 as creating a two-pronged inquiry that pro-
posed privileges must satisfy to achieve recognition.\textsuperscript{52} These prongs, rea-
son and experience, must demonstrate that the privilege justifies the
suppression of otherwise admissible evidence.\textsuperscript{53} Rule 501’s invitation to
federal courts to develop privileges “in the light of reason and experi-
ence” is a divergence from the Supreme Court’s proposal introducing
nine specifically named privileges.\textsuperscript{54}

Congress intentionally chose to exclude any specifically named privi-
leges from Rule 501 in order to provide courts with the opportunity to
recognize privileges on a case-by-case basis.\textsuperscript{55} Courts have given various
interpretations to the open-ended language of Rule 501. Some courts
viewed Rule 501 as a restriction on their capacity to recognize privileges
and a sign of disapproval of the specific privileges the Supreme Court

spousal testimonial privilege to apply only to the party spouse and not to the witness
spouse; and (3) attempting to apply federal privilege law in all cases in federal courts with-
out considering the application of state privilege law. See id. at 636 n.2, 637 nn.6-7.

\textsuperscript{52} See Jaffee, 116 S. Ct. 1923, 1928 (1996) (“reason and experience”); Trammel v.
United States, 445 U.S. 40, 47 (1980) (same); Doe v. Diamond, 964 F.2d 1325, 1328 (2d Cir.
1992) (same); In re Zuniga, 714 F.2d 632, 637 (6th Cir. 1983) (same).

\textsuperscript{53} See Jaffee, 116 S. Ct. at 1928 (“[T]he question we address today is whether a privi-
lege 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.” (citations omitted)); see also

\textsuperscript{54} Fed. R. Evid. 501 advisory committee’s note (indicating that Congress modelled
Rule 501’s interpretation of common law “in the light of reason and experience” from the
standard already in place in Rule 26 of the Federal Rules of Criminal Procedure). The
“reason and experience” language also stems from an early Supreme Court decision, Wol-
fle v. United States. See 291 U.S. 7, 12 (1934) (“Rules governing the competence of wit-
nesses [and the admissibility of testimony] in criminal trials in the federal courts . . . are
governed by common-law principles as interpreted and applied by the federal courts in the
light of reason and experience.”); see also Louisell & Mueller, supra note 10, § 201, at
645 (describing the derivation of the “reason and experience” language of Rule 501).

\textsuperscript{55} See 120 Cong. Rec. H40,891 (daily ed. Dec. 18, 1974) (depicting Congress’s intent
not to freeze privilege law but to provide flexibility in the law’s development on a case-by-
case basis); see also Tucker, supra note 50, at 204-06 (describing negative effects of Rule
501 resulting from its nonrecognition of specified privileges). Tucker contends that Con-
gress failed to change the status quo by adopting Rule 501. See id. at 205. In particular, he
maintains that Rule 501 did nothing to curb the misuses of privilege rules or to adjust to
the changes in society’s ideas on the importance of protecting certain relationships. See id.
recommendation; other courts viewed Rule 501 as empowering them to tailor the recognition of privileges to the needs of their jurisdiction.\footnote{See Herbert v. Lando, 441 U.S. 153, 175 (1979) ("Evidentiary privileges in litigation are not favored . . . ."); In re Grand Jury Proceedings, 867 F.2d 562, 565 (9th Cir. 1989) ("[I]f such a privilege is to be recognized in federal criminal proceedings, it is up to Congress to define it, not this court."); see also Imwinkelried, supra note 43, at 515-16 (citing some courts that have recognized more privileges than the Supreme Court's proposal and other courts that have developed a presumption against the recognition of any privileges); Tucker, supra note 50, at 206 (interpreting Rule 501 as causing "confusion and frustration," rather than deciding the issue of privileges).}

\section*{B. Judicial Balancing Against a Privilege: Erring on the Side of Caution}

Though Rule 501 does not preclude the recognition of a psychotherapist-patient privilege, it has caused lower courts to hesitate in recognizing even a narrowly-defined privilege. Lower courts' caution stems from the reasonable inference that Congress did not support the recognition of new privileges when it chose to adopt the current language of Rule 501, rather than ratifying the nine privileges the Supreme Court recommended. Lower courts' caution in recognizing the privilege also stems from the important value of evidence obtainable without the privilege and the courts' interpretation that a psychotherapist-patient privilege should not be recognized without acceptance of the more general physi-

\footnote{See Tucker, supra note 50, at 206 (asserting that Congress's action to narrow federal privilege law by adopting Rule 501 created ambiguity regarding whether it was rejecting the Supreme Court's proposed enumerated privileges).}

\footnote{See In re Grand Jury Proceedings, 867 F.2d at 565 (declining to recognize a psychotherapist-patient privilege in a criminal context because Congress had not yet defined such a privilege).}

\footnote{See Tucker, supra note 50, at 206 (presenting interpretations of Congress's actions regarding Rule 501); see also Daniel J. Capra, The Federal Law of Privileges, LITIGATION, Fall 1989, at 32, 32 (describing the disagreement among courts regarding whether the Supreme Court's proposed privileges are persuasive or controlling). Some courts have viewed the Court's proposed list of privileges as a "useful guide" in determining the scope of privileges. See United States v. McPartlin, 595 F.2d 1321, 1337 (7th Cir. 1979) (adopting the Supreme Court's recommended privilege protecting the sharing of information among defendants for common elements of their defense). Other courts have viewed the Supreme Court's proposals as irrelevant because Congress did not adopt them. See United States v. Bizzard, 674 F.2d 1382, 1387 (11th Cir. 1982) (dismissing the defendant's contention that one of the Supreme Court's proposed, but rejected, privileges should control the case). But see S. REP. No. 93-1277, at 13 (1974), reprinted in 1974 U.S.S.C.A.N. 7051, 7059 (stating that Congress's rejection of the Supreme Court's proposal did not constitute a disapproval of the enumerated privileges, but a desire to recognize privileges on a case-by-case basis).}

\footnote{See United States v. Burtrum, 17 F.3d 1299, 1302 (10th Cir. 1994) (declining to recognize a psychotherapist-patient privilege in a criminal child sexual abuse case in order to facilitate prosecutions).}
The Supreme Court in *Trammel v. United States* added to the lower courts' presumption against recognizing privileges when it limited the "sweeping" privilege of adverse spousal testimony because the foundations for the broad nature of the privilege no longer existed. The Court's restriction of the spousal privilege was an implicit signal to lower courts that it would not extend privileges broadly and would not advocate lower courts to do so either.

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61. See United States v. Corona, 849 F.2d 562, 567 (11th Cir. 1988) (declining to recognize a psychotherapist-patient privilege in a criminal context because "neither common law nor statutory law provides for any type of physician-patient privilege"); United States v. Meagher, 531 F.2d 752, 753 (5th Cir. 1976) (declining to recognize a psychotherapist-patient privilege in a criminal context because Congress had rejected the Supreme Court's proposed psychotherapist-patient privilege).

62. 445 U.S. 40 (1980). In *Trammel*, the petitioner's wife testified, as a Government witness, about her and her husband's roles in a heroin distribution conspiracy. See id. at 42-43. Invoking the adverse spousal testimony privilege, the husband claimed that his wife's testimony as an adverse witness was inadmissible. See id. at 43.

63. Id. at 52 ("The ancient foundations for so sweeping a[n] [adverse spousal] privilege have long since disappeared.").

64. See id. at 52. Adverse spousal testimony is a spouse's in-court testimony against the other spouse. See id. at 43-44; cf. Funk v. United States, 290 U.S. 371, 382 (1933) (allowing a defendant's spouse to testify on the defendant's behalf). The Court reasoned that the justification for an adverse spousal testimony privilege no longer existed because the willingness of one spouse to testify against the other was indicative of a lack of spousal harmony. See id. The *Trammel* Court's restriction on the adverse spousal testimony privilege does not affect the privileged nature of communications between spouses. See *Trammel*, 445 U.S. at 45 n.5 (noting the continued existence of the privilege protecting confidential marital communications); see also Wolfe v. United States, 291 U.S. 7, 14 (1934) (recognizing the privilege protecting confidential marital communications). See Michael W. Mullane, *Trammel v. United States: Bad History, Bad Policy, and Bad Law*, 47 Me. L. Rev. 105, 131-35 (1995) (discussing the differences between the two types of spousal privileges).

65. See *Trammel*, 445 U.S. at 53 (giving the witness spouse the choice to refuse or to accept the opportunity to testify adversely). The *Trammel* Court indicated that limiting the privilege by allowing one spouse to testify despite the objection of the other spouse was appropriate because the reasons for the adverse spousal testimony privilege no longer existed. See id. at 52 (noting that the view of a wife as chattel was no longer viable). The Court admitted that "the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggests the need for change." Id. at 48.

66. See id. at 53 (modifying the existing privilege to allow the admission of more testimony); see also United States v. Burtrum, 17 F.3d 1299, 1301 (10th Cir. 1994) (noting the Supreme Court's hesitance to expand testimonial privileges).
1. **Strictly Construing Privileges: The Significance of the Evidentiary Interest**

Prior to *Jaffee*, courts typically employed a balancing test to determine whether to recognize a psychotherapist-patient privilege. Some courts refused to recognize a psychotherapist-patient privilege because they found that the importance of the evidentiary interest outweighed the importance of preserving confidential communications between a psychotherapist and patient. Focusing on the evidentiary interest creates a presumption against recognizing privileges in order to uncover as much relevant evidence as possible.

In *United States v. Burtrum*, the United States Court of Appeals for the Tenth Circuit refused to recognize a psychotherapist-patient privilege, citing a strong need for evidence and a desire to minimize the difficulty in prosecuting offenses in child sexual abuse situations. Recognizing a privilege in this criminal context frustrated justice because children are particularly vulnerable and intimidated by the legal system, even without the additional obstacle of finding alternative sources of privileged information. To admit as much competent and relevant evidence as possible, the *Burtrum* court refused to recognize the privilege.

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67. See *Burtrum*, 17 F.3d at 1302 (discussing the strong need for evidence in a child sexual abuse context even at the expense of a psychotherapist-patient privilege); *Doe v. Diamond*, 964 F.2d 1325, 1328-29 (2d Cir. 1992) (discussing the importance of ensuring personal privacy in mental counseling even at the expense of losing evidence).

68. See cases cited *supra* note 21 (listing cases in which the courts have refused to recognize a psychotherapist-patient privilege because they determined the evidentiary interest to be more important than any other societal interest).

69. *In re Grand Jury Proceedings v. United States*, 842 F.2d 244, 246 (10th Cir. 1988) ("[W]hen the course of justice requires the investigation of truth, no man has any knowledge that is rightly private."). The court noted the importance of relevant evidence to a successful criminal prosecution and to the “fair adjudication” of the case. *Id.*

70. 17 F.3d 1299 (10th Cir. 1994). In *Burtrum*, the petitioner admitted to a psychotherapist that he had had sexual conduct and had committed oral sodomy with a child under twelve years old. *See id.* at 1300. The petitioner argued that without a psychotherapist-patient privilege, child molesters will not seek treatment, which will inhibit the prosecution of child sexual abuse. *See id.* at 1301.

71. *See id.* at 1302. A child sexual abuse case illustrates the policy reasons behind denying an evidentiary privilege because the crime is “difficult to detect and prosecute,” even without the exclusion of relevant evidence. *Id.* The difficulty lies in the secretive nature of the crime and the vulnerability of the child victim. *See id.*

72. *See id.*

2. The Role of Congress in Recognizing Privileges: Courts Question Their Institutional Competence

While some courts focused on the importance of the evidentiary interest in refusing to recognize a psychotherapist-patient privilege, other courts denied the privilege as a result of their interpretation of Rule 501's mandate that common law principles must govern the development of privileges. Based on their interpretation of this language, some courts failed to reason that Rule 501 gave them the authority to recognize privileges that had not been derived from the common law.

In In re Grand Jury Proceedings, the United States Court of Appeals for the Ninth Circuit declined to recognize a psychotherapist-patient privilege on the basis that recognition of such a privilege in the criminal context must come from Congress. The Ninth Circuit noted that federal law, not state law, must apply to criminal cases according to Supreme Court precedent. Accordingly, the court interpreted the language of Rule 501 as limiting federal courts' recognition of privileges to only those that existed at common law.

3. Comparison to the Unrecognized Physician-Patient Privilege

Typically, courts that have not recognized a physician-patient privilege have refused to recognize a psychotherapist-patient privilege. The ra-
tionale against a physician-patient privilege lies in the privilege's many exceptions that state statutes include in order to benefit the public interest.\textsuperscript{81} Furthermore, courts that have used the Supreme Court's proposed privileges as a guide in recognizing privileges have been hesitant to recognize a physician-patient privilege, because the Supreme Court did not propose its recognition in 1973.\textsuperscript{82}

In \textit{United States v. Corona},\textsuperscript{83} the United States Court of Appeals for the Eleventh Circuit used its nonrecognition of a general physician-pa-

Like the psychotherapist-patient privilege, the physician-patient privilege did not originate at common law. See Jonathan Baumoel, Comment, \textit{The Beginning of the End for the Psychotherapist-Patient Privilege}, 60 U. CIN. L. REV. 797, 804-06 (1992) (analyzing the statutory development of the psychotherapist-patient privilege in California); \textit{see also} SAMUEL KNAPP \& LEON VANDERCREEK, \textit{PRIVILEGED COMMUNICATIONS IN THE MENTAL HEALTH PROFESSIONS} 5-6 (1987) (suggesting that, in practice, the physician-patient privilege also covered communicable diseases); Slaughter, \textsuperscript{supra}, at 587 (noting that the rationale behind the development of the physician-patient privilege was to encourage patients to seek treatment for communicable diseases and that the existence of the privilege became important only when accident insurance, life insurance, and worker's compensation came into being).

\textsuperscript{81} See FED. R. EVID. 504 (unenacted) advisory committee's note. Exceptions to the state statutory physician-patient privilege include:

- Communications not made for purposes of diagnosis and treatment; commitment and restoration proceedings; issues as to wills or otherwise between parties claiming by succession from the patient; actions on insurance policies; required reports (venereal diseases, gunshot wounds, child abuse); communications in furtherance of crime or fraud; mental or physical condition put in issue by patient (personal injury cases); malpractice actions; and some or all criminal prosecutions. \textit{Id.}; \textit{see also} Slaughter, \textit{supra} note 80, at 587 n.120 (explaining the emerging unpopularity of the physician-patient privilege because its exclusion of relevant evidence facilitates fraudulent insurance recovery). \textit{But see} Baumoel, \textit{supra} note 80, at 801 (revealing that 42 state legislatures and the District of Columbia have adopted a physician-patient privilege despite the exceptions).

\textsuperscript{82} See FED. R. EVID. 504 (unenacted) advisory committee's note (explaining the difference between physicians' need for confidentiality with their patients and psychotherapists' need for confidentiality with their patients); \textit{see also} \textit{supra} note 48 (listing the Supreme Court's proposed privileges).

\textsuperscript{83} 849 F.2d 562 (11th Cir. 1988). In \textit{Corona}, the trial court admitted into evidence the records of the petitioners' psychiatrist in order to support the petitioners' conviction. \textit{See id.} at 563-64. The psychiatrist's records indicated that the petitioner was a chronic cocaine user. \textit{See id.}
tient privilege as justification for its nonrecognition of a psychotherapist-patient privilege. In the context of a criminal trial, the petitioner appealed the district court’s decision to admit his psychiatrist’s records into evidence on the grounds that a psychotherapist-patient relationship differs from a general physician-patient relationship. Not persuaded by this reasoning, the court refused to recognize a psychotherapist-patient privilege, which it viewed as a subset of the more general physician-patient privilege. The court’s refusal to recognize a psychotherapist-patient privilege indicated its unwillingness to construe privileges expansively.

Similar to the Eleventh Circuit’s reasoning, the United States Court of Appeals for the Fifth Circuit, in United States v. Meagher, did not recognize a psychotherapist-patient privilege on the grounds that it did not recognize a physician-patient privilege. The Fifth Circuit did not recognize a physician-patient privilege because it interpreted Rule 501 as giving courts the authority to recognize only those privileges recognized at common law.


84. See id. at 566-67.
85. See id. The petitioner cited the Sixth Circuit’s recognition of a psychotherapist-patient privilege as support for his proposition that the Eleventh Circuit should recognize such a privilege. See id.; see also In re Zuniga, 714 F.2d 632, 639 (6th Cir. 1983) (concluding that “a psychotherapist-patient privilege is mandated by ‘reason and experience’”) (citation omitted).
86. See Corona, 849 F.2d at 567 (reiterating that a physician-patient privilege is not recognized by the courts or by the legislatures); see also Catherine M. Baytion, Comment, Toward Uniform Application of a Federal Psychotherapist-Patient Privilege, 70 WASH. L. REV. 153, 163 (1995) (suggesting that physicians usually can treat their patients without the promise of nondisclosure).
87. See Corona, 849 F.2d at 567. The court stated the privileges “are not lightly created nor expansively construed, for they are in derogation of the search for the truth.” Id. (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)). In Nixon, the Court held that the “fundamental demands of due process of law in the fair administration of criminal justice” precluded the prominence of an interest in confidentiality when there was a “demonstrated, specific need for evidence.” Id. at 713.
88. 531 F.2d 752 (5th Cir. 1976). In Meagher, a psychiatrist testified that the defendant was not insane when he committed a bank robbery. See id. at 753. The defendant claimed that the court violated the physician-patient privilege when it allowed the submission of evidence from a psychiatrist in whose research program the defendant participated. See id.
89. See id. (emphasizing that Congress already had rejected the Supreme Court’s proposed psychotherapist-patient privilege when it enacted the Federal Rules of Evidence).
90. See id.
91. See id. (explaining that, under Rule 26 of the Federal Rules of Criminal Procedure, evidence is admitted in federal criminal trials according to common law standards, “except as modified by Congress”).
common law "in the light of experience and reason." Because no physician-patient privilege existed at common law, the court was unwilling to recognize the privilege.

C. Trumping the Search for Truth: Judicial Balancing in Favor of a Privilege

Courts that recognized a psychotherapist-patient privilege valued the interest of promoting confidential communications between a psychotherapist and patient more than the interest of facilitating full disclosure of evidence at trial. Historically, when the Supreme Court has recognized privileges, such as the attorney-client privilege, it has done so because an associated interest trumped the public's interest in the search for truth. Those courts that have recognized a psychotherapist-patient privilege

92. *Id.* Rule 26 of the Federal Rules of Criminal Procedure was based on two Supreme Court cases that held that federal courts, in the absence of a statute, may interpret common law principles "in the light of reason and experience." *Fed. R. Crim. P.* 26 cmt. (suggesting that courts may adjust the law as appropriate); see also *Wolffe v. United States*, 291 U.S. 7, 12 (1934) (requiring both experience and reason to justify the creation and continuance of law); *Funk v. United States*, 290 U.S. 371, 381, 385 (1933) (reflecting that when a law is no longer appropriate, reason dictates that the law be changed). The current Rule 26 of the Federal Rules of Criminal Procedure states: "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court." *Fed. R. Crim. P.* 26.

93. See *Meagher*, 531 F.2d at 753 (demonstrating the court's skepticism that recognizing a physician-patient privilege would help the defendant). The Supreme Court, in its proposed rules, specifically had excluded from the privilege confidential communications between psychotherapists and defendants when defendants relied on their mental state as one of the elements in their defense. See *id.*; see also *Fed. R. Evid.* 504 (unenacted) (allowing the admissibility of communications between a psychotherapist and patient when defendant patients try to use their mental state as a defense to criminal activity). When patients rely on their mental state to support a claim or defense, they waive their psychotherapist-patient privilege. See *Mueller & Kirkpatrick*, *supra* note 10, § 210, at 463-65 (describing civil and criminal cases in which patients waive their psychotherapist-patient privilege).

94. See *Doe v. Diamond*, 964 F.2d 1325, 1328-29 (2d Cir. 1992) (positing that the importance of the privacy interest in privileged communications outweighs the need for a witness's psychiatric history); *In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983) (valuing the importance of the psychotherapist-patient privilege over the evidentiary interest in disclosure).

95. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (describing the attorney-client privilege as "the oldest of the privileges for confidential communications known to the common law"); see also *Bartel*, *supra* note 7, at 1355-56 (revealing the negative inferences some courts allow juries to make when clients invoke the attorney-client privilege to preclude some discovery); *Weiss*, *supra* note 7, at 1185-88 (describing the development of the attorney-client privilege and its importance to promoting communications with attorneys).

96. See *United States v. Bryan*, 339 U.S. 323, 332 (1950) ("Every exemption from testifying or producing records thus presupposes a very real interest to be protected.").
privilege did so because the interest in cultivating confidential foundations of the relationship between a psychotherapist and a patient was deemed more important than the fact-finding interest.  

1. The Importance of the Witness's Privacy Interest

Protecting the privacy of an individual encourages professional treatment for mental health problems by eliminating the risk of disclosure of these communications during litigation. One may take part in counseling sessions with a reasonable expectation of privacy that the discussions will be protected as confidential.

In *Doe v. Diamond*, the United States Court of Appeals for the Second Circuit recognized a psychotherapist-patient privilege in light of "reason and experience." The court determined that the threat of disclosure of "intensely personal" information would discourage persons from attending counseling sessions. The court justified its position, in part, given that forty-nine states had adopted some form of a psychotherapist-patient privilege.

Though accepted overwhelmingly by state courts, the *Diamond* court noted that three circuits had rejected the psychotherapist-patient privilege. Dismissing these rejections, the court hypothesized that those

97. *See supra* note 94 (citing two courts whose balancing tests resulted in recognizing a psychotherapist-patient privilege).

98. *See Developments, supra* note 80, at 1544 (describing the justifications for recognizing a psychotherapist-patient privilege); *see also* Shuman & Weiner, *supra* note 35, at 893 (refuting the assertion that patients would alter their behavior in seeking mental health counseling in the absence of a psychotherapist-patient privilege).

99. *See Developments, supra* note 80, at 1547 (explaining that patients' reasonable expectation of privacy when they confide in psychotherapists is derived from the sensitive nature of information disclosed in a safe, trusting environment).

100. 964 F.2d 1325 (2d Cir. 1992).

101. *Id.* at 1328 (citation omitted) (focusing on the need to protect personal privacy and to promote informed medical assistance). In *Diamond*, the Second Circuit recognized the psychotherapist-patient privilege, but did not hold that the petitioner's privacy interests outweighed the need for evidence. *See id.* at 1326. The court was influenced by the fact that the petitioner initiated the investigation, in which his credibility would play a significant role at trial, and consented to interviews with psychiatrists to assess his credibility. *See id.* at 1326-27.

102. *Id.* at 1328 (distinguishing the kind of "intensely personal" information that a patient reveals to a psychotherapist from the kind of information that a patient reveals to a general physician); *see also* Winick, *supra* note 32, at 257 (emphasizing the effect of embarrassment resulting from public disclosure of mental health treatment).

103. *See Diamond*, 964 F.2d at 1328 (concluding that the widespread recognition of a psychotherapist-patient privilege indicates a favorable experience with the privilege); *see also supra* note 11 (listing state statutes governing the psychotherapist-patient privilege).

104. *See Diamond*, 964 F.2d at 1328; *see also* cases cited *supra* note 21 (naming those circuits that had rejected the privilege).
courts had not recognized the privilege because they inaccurately viewed Rule 501 as limiting the recognition of privileges to only those that had already been recognized at common law. By recognizing the privilege, the Second Circuit established its authority to recognize the privilege and held that the interests in privacy, and in effective counseling, were important considerations in the case-by-case balance against the evidentiary need for disclosure.

2. The Importance of Maintaining Confidentiality: Promoting An Effective Psychotherapist-Patient Relationship

Protecting the confidentiality of therapy promotes fuller disclosure from patients, which, consequently, enables psychotherapists to increase the effectiveness of their prescribed treatment. Without the assurance of confidentiality, a trusting relationship between the psychotherapist and patient cannot flourish, and the beneficial effect of the treatment will lessen due to the patient’s fear that communications may be disclosed during litigation. This utilitarian rationale suggests that society is improved by cultivating the psychotherapist-patient relationship to a greater degree than it is harmed by the loss of information that the privilege blocks.

105. See Diamond, 964 F.2d at 1328. The Second Circuit interpreted the Supreme Court’s intention in Trammel “‘not to freeze the law of privilege,’” as an indication that it could recognize privileges that had not been recognized by common law. Id. (quoting Trammel v. United States, 445 U.S. 40, 47 (1980)).

106. See id. The court eventually determined that the petitioner’s privacy interests did not outweigh the evidentiary interest in disclosing the psychiatrist’s records to allow an assessment of the petitioner’s credibility. See id. at 1329.

107. See Soffin, supra note 17, at 1224 (supporting the proposition that confidentiality is integral to successful mental health treatment). Soffin contends that, in the absence of confidentiality, patients may forego necessary treatment that would benefit not only themselves, but also society. See id. at 1225. She asserts that the public’s increased use of psychotherapy indicates the value that the public places on mental health treatment. See id. Soffin also suggests that even if the information protected by a psychotherapist-patient privilege was disclosed in order to supplement the fact-finding process, this information would be unreliable and inaccurate because it is only an “abstract expression of the patient’s inner feelings and emotions.” Id. at 1225-26.

108. See Winick, supra note 32, at 260-61. Winick states that “[i]nhibition by the patient thus can thus [sic] doom the therapeutic enterprise.” Id. at 260.

109. See Morse, supra note 41, at 742 (explaining justifications for enacting privileges). One of the more influential proponents of the utilitarian theory was Dean Wigmore. See McCormick, supra note 3, § 72, at 171 (attributing many commonly-held views of privilege to Wigmore). Wigmore established the following four conditions essential to the recognition of privileges:

(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.
In *In re Zuniga*, the United States Court of Appeals for the Sixth Circuit did not interpret Congress's rejection of the Supreme Court's proposed psychotherapist-patient privilege as a complete repudiation of the privilege. Instead, the court acknowledged that this kind of privilege may be appropriate "in the light of reason and experience." Admitting that evidentiary privileges are to be strictly construed, the court still viewed the importance of confidentiality in the relationship between a psychotherapist and a patient as too important to society to sacrifice simply for the sake of generating more evidence. The Sixth Circuit emphasized the critical role confidentiality plays in encouraging patients to disclose sensitive information necessary for treatment. The court dismissed any reservations in recognizing the privilege without similarly recognizing a physician-patient privilege due to the unique characteristics of communications between a psychotherapist and patient.

II. *Jaffee v. Redmond*: Including Licensed Social Workers in the Court's Recognition of the Psychotherapist-Patient Privilege

In *Jaffee v. Redmond*, the Supreme Court addressed the competing interests that courts of appeals had wrestled with in determining the suit-
ability of recognizing a psychotherapist-patient privilege. At trial, the family of the deceased sought access to notes that the clinical social worker had recorded during counseling sessions with Redmond after Redmond had shot and killed the deceased in the line of duty. Refusing to recognize the inclusion of a licensed social worker in the psychotherapist-patient privilege, the district court judge ordered Redmond to disclose the notes. Redmond ignored the order to disclose the notes and, subsequently, judgment was entered against her. The Court of Appeals for the Seventh Circuit reversed, recognizing a psychotherapist-patient privilege and concluding that Redmond’s privacy interest outweighed the evidentiary need for disclosure of the notes.

In affirming the Seventh Circuit’s decision, the Supreme Court held that the need to protect confidential communications between a psychotherapist and a patient outweighed the need for evidence. In reaching his conclusion, Justice Stevens, writing for the majority, found that “reason and experience” compelled the recognition of the psychotherapist-patient privilege. The majority also extended the privilege to licensed social workers because such professionals provide mental health counseling to those who cannot afford the services of psychiatrists and psychologists. The recognition of this privilege signaled the Court’s willingness

117. See id. at 1928 (describing the preference against privileges because they are exceptions to the general rule that witnesses must provide as much testimony as possible).
118. See id. at 1926; see also supra text accompanying notes 22-28 (discussing the facts of Jaffee).
119. See Jaffee v. Redmond, 51 F.3d 1346, 1351 (7th Cir. 1995) (relaying the district court judge’s instructions allowing members of the jury to infer unfavorable content in the counseling notes after Redmond refused to disclose them), aff’d, 116 S. Ct. 1923 (1996).
120. See Jaffee, 116 S. Ct. at 1926. The jury then returned a verdict for the petitioner of $45,000 on the federal claim and $500,000 on the state claim. See id.
121. See Jaffee, 51 F.3d at 1355-56 (concluding that it should recognize the privilege to protect confidential communications between a psychotherapist and patient and to promote a successful relationship between the two).
122. See Jaffee, 116 S. Ct. at 1929. The Court predicted that, in the absence of a privilege, communications between a psychotherapist and patient would be “chilled,” especially in situations where the precipitated treatment is likely to be relevant to imminent litigation. Id.
123. Id. at 1930. The Jaffee Court derived this two-prong inquiry from the language in Rule 501 that a privilege “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.” FED. R. EVID. 501; see also supra note 51 (stating Rule 501 in its entirety).
124. See Jaffee, 116 S. Ct. at 1931-32 (finding “no discernible public purpose” to make the distinction between counseling provided by psychiatrists and psychologists and counseling provided by licensed social workers); see also JAMES W. CALLICUTT & PEDRO J. LECCA, SOCIAL WORK AND MENTAL HEALTH 47-48 (1983) (noting empirical studies demonstrating that the particular psychotherapy profession involved with a patient did not achieve significantly different outcomes in the patient’s treatment); Seligman, supra note 9,
to preserve the confidentiality of communications between psychotherapists and patients at the cost of losing additional relevant evidence.\textsuperscript{125}

\textbf{A. The Majority Opinion: Extending Privileged Communications}

The \textit{Jaffee} Court began its analysis with Rule 501.\textsuperscript{126} The Court derived its authority to create a new privilege from the evolutionary nature of Rule 501, which allows courts to develop new privileges as "reason and experience" dictate.\textsuperscript{127} The Court recognized that this flexibility is an exception to the general rule that the public has a right to learn the evidence at trial.\textsuperscript{128} The Court justified the creation of the exception due to its benefit to the public, but found it necessary to construe the exception strictly to maintain the inherently fundamental, and usually predominant, importance of discovering the full truth at trial.\textsuperscript{129}

\begin{itemize}
\item \textsuperscript{125} See Daniel J. Capra, \textit{Communications With Psychotherapists and Social Workers}, N.Y. L.J., July 12, 1996, at 3 (analyzing the \textit{Jaffee} Court's cost-benefit analysis of recognizing a psychotherapist-patient privilege). Capra asserts that the Court's balancing of private and public interests is flawed because it does not support its assumption that, without a psychotherapist-patient privilege, confidential communications will cease. See id. at 38. Capra further contends that the Court does not support its assumption with empirical evidence that a patient who seeks psychotherapy is fearful that the psychotherapist will disclose the communications during later litigation. See id. He notes that patients sought psychotherapy even before the recognition of a federal psychotherapist-patient privilege. See \textit{id.}; see also Shuman & Weiner, supra note 35, at 925-26 (concluding from an empirical study that patients would seek psychotherapy even without the assurance of a psychotherapist-patient privilege).
\item \textsuperscript{126} See \textit{Jaffee}, 116 S. Ct. at 1927 (noting that Rule 501 affords courts flexibility to make changes in privileges according to the two-pronged inquiry of reason and experience).
\item \textsuperscript{127} See \textit{id.} at 1927-28 (relying, in part, on the Court's decision in \textit{Trammel v. United States}, 445 U.S. 40, 47 (1980), for the proposition that although there is a bias against expanding privileges, Rule 501 has not precluded the addition of new privileges). In \textit{Trammel}, the Court stated that Congress did not intend to freeze privileges, but found it appropriate to employ the flexibility of Rule 501 to restrict the witness's spousal privilege because there existed "legitimate law enforcement needs" for the testimony. \textit{Trammel}, 445 U.S. at 53.
\item The \textit{Jaffee} Court also relied, in part, on \textit{University of Pennsylvania v. EEOC}, 493 U.S. 182, 189 (1990), for the proposition that Congress intended federal courts to continue to develop privileges as circumstances dictated. See \textit{Jaffee}, 116 S. Ct. at 1928. In \textit{University of Pennsylvania}, the Court acknowledged its authority to recognize privileges, but cautioned against exercising the authority expansively. \textit{University of Pennsylvania}, 493 U.S. at 189.
\item \textit{Jaffee}, 116 S. Ct. at 1928 (describing the importance of including as much relevant evidence as possible in the fact-finding process); see also United States v. Bryan, 339 U.S. 323, 331 (1950) ("[T]here 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." (citation omitted)).
\item \textsuperscript{129} See \textit{Jaffee}, 116 S. Ct. at 1928 (balancing the important private and public interests with the need for relevant evidence); see also \textit{Trammel}, 445 U.S. at 50 (emphasizing that...
The Court did not accept the argument that recognition of a psychotherapist-patient privilege would deny a jury crucial evidence concerning a person's credibility, and would achieve only speculative benefits.\textsuperscript{130} The Court rejected this argument on the grounds that, without the privilege, there would be no evidence to uncover because patients would never reveal incriminating information to their psychotherapist.\textsuperscript{131} The \textit{Jaffee} Court also viewed the promotion of mental health treatment as a greater benefit to the public than the questionable advantage of additional relevant evidence at trial.\textsuperscript{132} To determine whether it should recognize a psychotherapist-patient privilege, the Court balanced the reason and experience prongs of Rule 501.\textsuperscript{133} First, Justice Stevens found that reason dictated the recognition of a psychotherapist-patient privilege because, similar to the spousal and attorney-client privileges, the psychotherapist-patient privilege was based on the "imperative need for confidence and trust."\textsuperscript{134} Specific to the facts of \textit{Jaffee}, the majority also found reasonable the cultivation of the psychotherapist-patient relationship in order to serve the public interest in maintaining a mentally sound police force by encouraging counseling sessions after traumatic job-related events.\textsuperscript{135}
Second, experience dictated the recognition of a psychotherapist-patient privilege: all fifty states and the District of Columbia recognize some form of the privilege.136 The Court viewed the states' legislative development of this privilege as fulfilling both the reason and experience prongs of Rule 501.137 Justice Stevens also suggested that if the Court did not recognize the privilege, the breadth of states' privileges would be minimized by the possibility of losing the privilege if the case reached federal court.138 Furthermore, the Court drew support from its Advisory Committee's previous recommendation to recognize a psychotherapist-patient privilege.139

136. See id. at 1929-30 (stating that the Court previously has looked to state law in determining whether to recognize a privilege); see also Trammel, 445 U.S. at 48-50 (referring to state law regarding a spousal privilege because marriage laws are typically governed by the state). But see United States v. Gillock, 445 U.S. 360, 368, nn.7-8 (1980) (refusing to grant an analogous privilege in federal law blocking evidence of a state legislator's acts). For a listing of the 50 state statutes that endorse some form of a psychotherapist privilege, see supra note 11. Commentators have acknowledged that although all states do have a form of the psychotherapist-patient privilege, the scope of the privilege varies from state-to-state. See Baumoel, supra note 80, at 802 (recognizing that these variations in state practice indicate that the states have made attempts to define the contours of the privilege, unlike Congress's statement on privileges in Rule 501 of the Federal Rules of Evidence); Samuel J. Knapp et al., Privileged Communications for Psychotherapists in Pennsylvania: A Time for Statutory Reform, 60 Temp. L.Q. 267, 275-76 (1987) (describing state variations in drafting statutes applying to psychotherapists as a whole or separately to psychiatrists, psychologists, and social workers); William Whitmore Hague, Comment, The Psychotherapist-Patient Privilege in Washington: Extending the Privilege to Community Mental Health Clinics, 58 Wash. L. Rev. 565, 575-576 (1983) (viewing state variations of the psychotherapist privilege as an indication of the complexity of achieving a balance between admitting relevant evidence and providing patients with effective mental health treatment); Anne D. Lamkin, Recent Development, Evidentiary Privileges: Should Psychotherapist-Patient Privilege Be Recognized?, 18 Am. J. Trial Advoc. 721, 723-25 (1995) (describing limitations on the psychotherapist privilege that various states have employed, such as in cases involving child abuse).

137. See Jaffee, 116 S. Ct. at 1930 (adding that once a legislature enacts a privilege, there is no longer an opportunity for the courts to create the privilege). The majority viewed the more expedient development of the privilege in the legislature than in the judicial system as an indication of the legislatures' attention to developments in the field of psychotherapy. See id.

138. See id. (noting that the consensus among the states in recognizing the privilege added greater concern to the Court's desire to avoid frustrating the goals of state legislation in promoting confidential communications).

139. See id. (using the Supreme Court's proposed recommendations in the early 1970s as a guide); see also Fed. R. Evid. 504 (unenacted) (specifically recognizing a psychotherapist-patient privilege). The Jaffee Court noted that its previous decision not to recognize a specific privilege was based partially on the Advisory Committee's exclusion of that privilege in its recommendations to the Court. See Jaffee, 116 S. Ct. at 1930; see also Gillock, 445 U.S. at 367-68 (refusing to recognize a state legislative privilege partially because the Advisory Committee had not recommended its recognition). By employing the same reasoning, the Court was persuaded that the recommendation of the Advisory Committee to
Having established that it should recognize a psychotherapist-patient privilege, the Court briefly discussed to whom the privilege should apply.\textsuperscript{140} The Court concluded that cost and accessibility were the only differences in counseling provided by social workers and counseling provided by psychiatrists and psychologists.\textsuperscript{141} According to the majority, these differences were insufficient to warrant recognition of the privilege as applied to psychiatrists and psychologists, but not to licensed social workers because the three professional groups provide similar services.\textsuperscript{142} Therefore, the Court included social workers within the protection of the psychotherapist-patient privilege.\textsuperscript{143}

B. The Dissent: Warning of the Potential for Occasional Injustice

Justice Scalia argued in dissent that the “purchase price” of “occasional injustice” was too high to justify recognizing a psychotherapist-patient privilege.\textsuperscript{144} He warned that courts would become “instruments of wrong” by excluding “reliable and probative evidence” that could prove a

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  \item \textsuperscript{140} See Jaffee, 116 S. Ct. at 1931.
  \item \textsuperscript{141} See id. (noting that the role of social workers in treating mental health problems had increased and affected lower income clients in particular).
  \item \textsuperscript{142} See id. at 1932 (finding that drawing a distinction between these professions served no public purpose).
  \item \textsuperscript{144} Jaffee, 116 S. Ct. at 1932 (Scalia, J., dissenting). Justice Scalia found the majority’s analysis of the benefit of privileged communications in psychotherapy “insufficiently convincing” to justify “making [the] federal courts occasional instruments of injustice.” Id. at 1934. He faulted the majority for failing to make a solid causal relationship between recognition of the privilege and an increase in the number of people who seek psychological counseling. See id.; see also Shuman & Weiner, supra note 35, at 893 (disputing the privilege’s effect on individuals’ decisions to seek counseling).
Justice Scalia asserted that the Court's role of preserving justice should advance the principle that "the public has a right to every man's evidence." Emphasizing the importance of this principle, Justice Scalia focused on the Court's traditional preference of refusing to recognize new privileges in order to discover the truth of a claim or defense to the fullest extent possible.

The dissent faulted the majority for framing the issue in an excessively broad way. Justice Scalia claimed that the majority's formulation of a psychotherapist privilege, rather than a more specific licensed social worker privilege, predetermined its holding that such a privilege be recognized. The dissent implied that the Court would be unwilling to

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145. See Jaffee, 116 S. Ct. at 1932-33 (Scalia, J., dissenting) (asserting that the preclusion of information that would establish a claim or defense is "particularly unpalatable for those who love justice"). Justice Scalia noted that the victim of the psychotherapist-patient privilege is not the state, but an individual who is unable to prove his or her claim or defense because relevant evidence was excluded. See id.

146. Id. at 1933 (citation omitted); see also Trammel v. United States, 445 U.S. 40, 50 (1980) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)). In Bryan, the Court cited approvingly to Dean Wigmore's depiction of the long-standing assumption that people have a right to hear all relevant evidence in a case. See 339 U.S. at 331.


148. See Jaffee, 116 S. Ct. at 1933 (Scalia, J., dissenting).

149. See id. at 1933-34 (charging that the Court's decision to analyze the suitability of the more general question of a psychotherapist privilege was reckless in light of its duty to facilitate the truth, rather than obscure it). In criticizing the majority's broad view of the counseling professions, Justice Scalia made an analogy to the limited scope of the attorney-client privilege. See id. at 1933. He noted that the attorney-client privilege is not identified broadly as a general advice-giving privilege. See id. Further, Justice Scalia asserted that the characterization of the attorney-client privilege "as a 'legal advisor' privilege" would allow the Court to recognize additional privileges for tax advisors and accountants. Id. Therefore, he reasoned that the majority could not include social workers in the psychotherapist-patient privilege if it had characterized the privilege as a psychiatrist or psychologist privilege. See id.

Defining the class of individuals covered by a privilege is not an uncommon problem. See Louisell & Mueller, supra note 10, § 214, at 835 (noting problems in determining the class of individuals and type of communications covered by a priest-penitent privilege). The Supreme Court's proposed, but unenacted, priest-penitent privilege included communications with a "minister, priest, rabbi, or other similar functionary of a religious organization." Fed. R. Evid. 506(a)(1) (unenacted). The Advisory Committee was concerned that the privilege did not extend to a "self-denominated 'minister,'" but rather confined itself. Id. (unenacted) advisory committee's note; see also Julie Ann Sippel, Comment, Priest-
jeopardize a patient's protection of communications with psychiatrists and psychologists so it could deny protection of confidential communications with licensed social workers. Finally, the dissent reminded the majority that the Court's proposed, but unenacted, recommendations of privileges in the 1970s did not support the majority's current formulation of the psychotherapist-patient privilege. As formulated by the Court in the 1970s, the proposed privilege applied only to psychotherapy provided by "a person authorized to practice medicine" or "a person licensed or certified as a psychologist," and did not apply to psychotherapy provided by a licensed social worker.

Chief Justice Rehnquist joined the dissent in criticizing the majority's inclusion of licensed social workers in the psychotherapist privilege. The dissent asserted that the fewer training requirements that licensed social workers have in comparison to psychiatrists or psychologists vary from state to state. Because the training requirements vary, the dissent argued that the majority's privilege would not apply uniformly.

While some courts, including the Jaffee majority, viewed state practice as relevant to the determination of federal privilege law, the dissent scoffed at this interpretation because the state psychotherapist-patient privilege was not uniform. Chief Justice Rehnquist and the dissent argued that the majority's privilege would not apply uniformly.

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Penitent Privilege Statutes: Dual Protection in the Confessional, 43 Cath. U. L. Rev. 1127, 1137 (1994) (noting the difficulties courts have in determining the individuals covered by the priest-penitent privilege when the statute does not specifically list them).

150. See Jaffee, 116 S. Ct. at 1933 (Scalia, J., dissenting).
151. See id. at 1933-34; see also Fed. R. Evid. 504 (unenacted) (stating the Supreme Court's proposal that Congress subsequently rejected).
152. Jaffee, 116 S. Ct. at 1934 (Scalia, J., dissenting) (quoting Fed. R. Evid. 504 (unenacted)).
153. See id. at 1936-41 (Rehnquist, C.J., dissenting in part).
154. See id. at 1937-38 (noting that typical training requirements for a social worker, such as Karen Beyer, are a master's degree in social work and three thousand hours of supervised clinical experience). Justice Scalia viewed these requirements as less rigorous than those for psychiatrists and psychologists. See id. at 1938.
155. See id. (questioning whether a "social worker" maintains a nationally accepted definition as do psychiatrists and psychologists). The dissent chided the majority for failing to investigate the national uniformity, or lack thereof, of standards for licensed social workers. See id. (contrasting the varying training of licensed social workers with the rigorous training that other professionals, such as attorneys, must undergo to benefit from the extension of a privilege); see also infra note 171 (listing state statutes governing the licensing requirements of social workers). See generally Diana M. DiNitto & C. Aaron McNeese, Social Work: Issues and Opportunities in a Challenging Profession 20-29 (1990) (discussing the educational and training aspects implicit in social work).
156. See Jaffee, 116 S. Ct. at 1929-30 (using state privilege law as a factor of Rule 501's experience prong). The dissent suggested that the majority's attention to the development of state privilege law was "inverse pre-emption." Id. at 1935 (Scalia, J., dissenting) (claiming that the majority's reasoning results in federal courts modifying their policies so that they are consistent with state policies, instead of the reverse). The dissent noted that the Court refused to modify federal law to fit state law in Gillock. See id. (citing the Gillock
privilege had developed through legislation, rather than through the court system.\textsuperscript{157} Moreover, the dissent contended that states recognizing a social worker privilege place specific restrictions on that privilege, such as the subject matter of the offense or the person victimized.\textsuperscript{158} Thus, the dissent concluded that the uniformity of experience that the majority used to substantiate its "experience" prong was "only at the most superficial level."\textsuperscript{159}

Expanding on the differences between licensed social workers and psychiatrists and psychologists, the dissent noted that social workers practice in many areas that do not involve psychotherapy.\textsuperscript{160} Aiding others in obtaining social and health services is one such area.\textsuperscript{161} Significantly, the privilege attaches to patient communications only when the social worker performs in a psychotherapist capacity.\textsuperscript{162}

The dissent strongly advised that the Court should leave the recognition of the privilege to Congress due to the legislative nature of the inquiry into distinctions between social workers and psychiatrists and psychologists, and the lack of uniformity in state recognition of a social worker privilege.\textsuperscript{163} The dissent implied that the Court's recognition of a psychotherapist-patient privilege would be appropriate only if the privilege clearly was needed and if the scope of the privilege was apparent.\textsuperscript{164}

\textsuperscript{157} See Jaffee, 116 S. Ct. at 1938 (Scalia, J., dissenting) (characterizing the states' experience as "irrelevant" and "counter-indicative" in the absence of decisions by the courts).

\textsuperscript{158} See id. at 1939-40 (strongly criticizing the majority's characterization of the uniformity of state privilege laws).

\textsuperscript{159} Jaffee, 116 S. Ct. at 1940 ("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.").

\textsuperscript{160} See id. at 1938 (describing the breadth of the state social worker privilege outside of a social worker's psychotherapy function).

\textsuperscript{161} See id. (distinguishing the roles of psychiatrists and psychologists by focusing on the sole role of psychotherapy that they perform); see also Note, The Social Worker-Client Relationship and Privileged Communications, 1965 WASH. U. L.Q. 362, 363 (noting that social workers specialize in casework, community organization, and welfare research and administration).

\textsuperscript{162} See Jaffee, 116 S. Ct. at 1938 (Scalia, J., dissenting) (distinguishing between the social worker acting as a psychotherapist and the social worker acting as an administrator of social welfare); see also infra notes 205-06 and accompanying text (noting the difficulty in making the determination of whether communications occurred during therapy).

\textsuperscript{163} See Jaffee, 116 S. Ct. at 1940 (Scalia, J., dissenting) (asserting that the lack of uniformity in state privilege law indicates that Congress should determine whether to recognize a social worker privilege).

\textsuperscript{164} See id. at 1940-41 (positing that the Court was not the appropriate forum in which to recognize the psychotherapist-patient privilege).
Consequently, the Court's recognition of the privilege conflicts with its broad precedent to refrain from "lighty creat[ing]" privileges.\textsuperscript{165}

III. \textbf{CONTINUING THE UNCERTAINTY: FORCING LOWER COURTS TO DEFINE THE PRIVILEGE'S SCOPE ON A CASE-BY-CASE BASIS}

In \textit{Jaffee v. Redmond}, the Supreme Court resolved the conflict among circuit courts regarding the recognition of a psychotherapist-patient privilege.\textsuperscript{166} The Court reached its conclusion by balancing the private and public interests in promoting mental health counseling against the general interest in searching for truth and considering all relevant evidence.\textsuperscript{167} Once the Court completed its balancing analysis in favor of recognizing a privilege, it maintained that the promise of confidentiality must be total in order for the privilege to be effective.\textsuperscript{168} This demand for total confidentiality will have a considerable impact on lower courts' application of the privilege.\textsuperscript{169} Because the Court failed to design the contours of the privilege, lower courts will have difficulty determining when the evidence must be admitted despite the privilege.\textsuperscript{170} In addition, the privilege will

\textsuperscript{165} \textit{Id.} (expressing a willingness to defer to Congress's estimation of the privilege).

\textsuperscript{166} \textit{See id.} at 1931 (holding that confidential communications between a licensed psychotherapist and patient during treatment are protected from disclosure under Rule 501).

\textsuperscript{167} \textit{See id.} ("[A] psychotherapist-patient privilege will serve a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" (quoting Trammel v. United States, 445 U.S. 40, 50 (1980))).

\textsuperscript{168} \textit{See id.} at 1932 ("[I]f 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.'" (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981))).

\textsuperscript{169} \textit{See id.} at 1931 n.15. The \textit{Jaffee} Court noted, but did not resolve, the disagreement regarding whether federal or state privilege law should apply when both claims are brought in federal court, and whether evidence would be privileged under state but not federal law. \textit{See id.; see also Schwartz, supra note 3, at 6 (discussing the role of lower courts in resolving the disagreement over choice of law).}

\textsuperscript{170} \textit{See Jaffee, 116 S. Ct. at 1932 (calling for the definition of new privileges to be determined on a case-by-case basis). The Jaffee Court suggested that serious threat of harm to a patient may be a situation in which the Court would override the privilege, but it gave no further direction for determining the characteristics of such a situation. See id. n.19; see also Baumol, supra note 80, at 804-05 (explaining a psychotherapist's duty to warn a potential victim of physical danger recognized in Tarasoff v. Regents of the Univ., 551 P.2d 334, 345 (Cal. 1976)).}

For criticism of the Court's intentional lack of guidance to lower courts, see Capra, \textit{supra} note 125, at 3. Capra questions to what extent courts must determine if the confidential communications were made in the context of therapy or in one of the other roles a social worker fills. \textit{See id.; see also 2 SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 2-3 (6th ed. Supp. Aug. 1996) (noting that the limitation to the context of therapy and the other parameters of the privilege are just two of the many questions the \textit{Jaffee} Court left unanswered). But see \textit{In re Zuniga}, 714 F.2d 632, 639 (6th Cir. 1983) ("Just as the recognition of privileges must be undertaken on a case-by-case basis, so too must the scope
be applied inconsistently to licensed social workers because the state licensing requirements vary widely.¹⁷¹

A. Protecting the Confidential Relationship Between Psychotherapist and Patient

The Court’s decision to value the public and private interests of fostering mental health above the usual priority of submitting all relevant evidence at trial illustrates the Court’s fundamental premise that the confidential nature of the relationship between the psychotherapist and patient is integral to the practice of psychotherapy.¹⁷² By recognizing the


¹⁷² See Jaffee, 116 S. Ct. at 1292 (describing the mental health benefits of ensuring the confidential nature of the psychotherapist-patient relationship); see also Soffin, supra note 17, at 1223-25 (discussing the importance of protecting the therapy relationship and the need to keep such evidence out of court). But see Shuman & Weiner, supra note 35, at 893 (challenging the view that the presence or absence of a psychotherapist-patient privilege significantly affects many decisions to seek mental health counseling).
privilege, the Court willingly sacrifices a source of potentially relevant evidence in order to protect the foundations of the psychotherapist-patient relationship.\textsuperscript{173} This utilitarian justification portrays the Court's value judgment that the foregone information is less important than the benefit society receives in fostering the psychotherapist-patient relationship.\textsuperscript{174}

While the Court's prioritization of interests is reasonable in a civil context, the psychotherapist privilege usually arises in criminal cases.\textsuperscript{175} In a criminal case, the Court scrutinizes evidence more thoroughly than in a civil case as a result of the higher stakes involved for both parties.\textsuperscript{176} Moreover, Justice Scalia suggested that by allowing a potential defendant to reveal the details of potential criminal activity to a psychotherapist without risking legal consequences, the Court gives the potential defendant an unjustified benefit without the corresponding potential for harsh repercussions.\textsuperscript{177}

Justice Scalia further noted that potential defendants typically had sought mental health counseling without the security of a psychotherapist-

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  \item See 2 SALTZBURG ET AL., supra note 170, at 3 (noting the willingness of the Jaffee Court to recognize a privilege nonexistent at common law). See generally Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE § 402.1, at 172-74 (3d ed., 1991) (describing situations, such as with Rule 501, when relevant evidence is not admissible).
  \item See Robert S. Catz & Jill J. Lange, JUDICIAL PRIVILEGE, 22 GA. L. REV. 89, 97 (1987) ("[T]he various privileges are merely attempts to define the situations in which, by experience, the exaction [of knowledge] would be unnecessary or disadvantageous.").
  \item See, e.g., Trammel v. United States, 445 U.S. 40, 42 (1980) (noting the criminal context of the case); United States v. Burtrum, 17 F.3d 1299, 1300 (10th Cir. 1994) (same); United States v. Corona, 849 F.2d 562, 562-63 (11th Cir. 1988) (same); United States v. Meagher, 531 F.2d 752, 752 (5th Cir. 1976) (same).
  \item See Earl C. Dudley, Jr., FEDERALISM AND FEDERAL RULE OF EVIDENCE 501: PRIVILEGE AND VERTICAL CHOICE OF LAW, 82 GEO. L.J. 1781, 1829 (1994) (discussing the importance of disclosure of privileged information in forming a defense); see also United States v. Gillock, 445 U.S. 360, 373 (1980) (noting that the need for extensive fact-finding is stronger in a criminal context rather than in a civil context); Branzburg v. Hayes, 408 U.S. 665, 685-91 (1972) (concluding that in a criminal context the duty to contribute information is most important).
  \item See JAFFEE, supra note 176, at 1935 (Scalia, J., dissenting) ("[I]f [respondent] wishes the benefits of telling the truth she must also accept the adverse consequences."). But see LOUISELL & MUELLER, supra note 10, § 208, at 732-33 (noting that, in an attorney-client context, the privilege counterbalances the unfairness of forcing one party to disclose information to the opposing party that it has told to its attorney). The attorney-client privilege facilitates the right to effective counsel in the U.S. adversary system. See id. According to the Jaffee majority, the psychotherapist-patient privilege facilitates effective psychotherapeutic treatment. See JAFFEE, supra note 16, at 1928 (asserting that even the possibility of disclosure can impede the formation of a confidential relationship and stunt successful treatment). Justice Scalia's criticism of the allowance of a patient's admission of guilt to a psychotherapist and subsequent denial of guilt in court does not differ appreciably from the allowance of a client's admission of guilt to an attorney and subsequent assertion of innocence in court. See id. at 1935 (Scalia, J., dissenting).
\end{itemize}
\end{footnotesize}
pist-patient privilege. This fact is relevant to the reason prong of the Court's analysis. If one of the motivations behind the Court's recognition of the privilege was to promote the effectiveness of psychotherapy, then statistics revealing that the privilege does not have an effect on the patient's behavior refute part of the basis for the Court's balancing analysis. Assuming that the statistics are correct casts skepticism on the Court's analysis.

B. Proclaiming an Absolute Privilege Without Defined Contours

The Jaffee majority strongly asserted that "[a]n 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." This strong as-

178. See Jaffee, 116 S. Ct. at 1935 ("[H]ow come psychotherapy got to be a thriving practice before the 'psychotherapist privilege' was invented?"). Justice Scalia criticized the majority for neglecting to provide evidence that those who seek counseling are concerned about potential litigation. See id.; see also Shuman & Weiner, supra note 35, at 893 (asserting that the majority of those who seek mental health counseling are not swayed by the presence or absence of a psychotherapist privilege).

179. See Jaffee, 116 S. Ct. at 1928-30 (outlining the Court's analysis of the privilege based on the reason prong of Rule 501).

180. See Shuman & Weiner, supra note 35, at 893 (refuting the view that the presence or absence of a psychotherapist privilege affects the patient's decision to seek mental health counseling). For a critique of Professors Shuman and Weiner's three studies, see Winick, supra note 32, at 256-57 (viewing the studies as inconclusive in resolving whether a Supreme Court rejection of the psychotherapist-patient privilege would deter patients from entering therapy). In criticizing these studies' methodologies, Winick asserts that it is reasonable that human behavior will be affected by the rejection of the privilege because of the potential disclosure of undesirable information. See id. at 257.

181. See Jaffee, 116 S. Ct. at 1940 (Scalia, J., dissenting) (noting the fourteen amicus briefs the Court received in support of recognizing a psychotherapist-patient privilege that included licensed social workers). Amicus briefs submitted to the Court include the National Association of Social Workers, the American Counseling Association, the American Psychological Association, the Employee Assistance Professionals Association, the American Association of State Social Work Boards, the American Psychoanalytic Association, and the American Psychiatric Association. See id. at 1925, 1940; see also Capra, supra note 125, at 3 (characterizing the recognition of privileges as a political decision). Capra contends that Congress is the more reliable branch to consider empirical evidence, such as the validity of statistics suggesting that the absence of a psychotherapist privilege will not deter communications. See id.

182. Jaffee, 116 S. Ct. at 1932 (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)). The majority disagreed with the Seventh Circuit's determination that the psychotherapist privilege be contingent on the outcome of balancing the interests in the case at bar. See id. (rejecting the Seventh Circuit's balancing test on a case-by-case analysis); see also Jaffee, 51 F.3d 1346, 1357 (7th Cir. 1995) (discussing the balancing component of the privilege). The Seventh Circuit viewed any purportedly privileged information submitted by the licensed social worker to be "cumulative at best" because of the many eyewitnesses that had testified about the events leading up to the shooting. Id. at 1358; see also Stephen A. Saltzburg, Privileges and Professionals: Lawyers and Psychiatrists, 66 Va. L. Rev. 597, 623 (1980) ("When a privilege claim tends to conceal important evidence that may not be
sention of the privilege is peculiar in light of the Court's traditional hesi-
tance to deplete the amount of relevant evidence considered at trial. Though the majority admitted in a footnote that there are times when the privilege must be sacrificed, it did not specify how lower courts would arrive at this decision. This resulting ambiguity over the undefined parameters of the privilege merely replaced the ambiguity federal courts easily duplicated, a court should consider both the loss of information and the claim of privacy before it decides to recognize the privilege.

183. See Herbert v. Lando, 441 U.S. 153, 175 (1979) ("Evidentiary privileges in litigation are not favored."); United States v. Bryan, 339 U.S. 323, 331 (1950) (asserting that the public has a duty to provide as much evidence as possible at trial); Doe v. Diamond, 964 F.2d 1325, 1328 (2d Cir. 1992) (denoting the psychotherapist-patient privilege as "highly qualified"); 2 Saltzburg et al., Federal Rules of Evidence Manual 592 (6th ed. 1994) (advocating a qualification on all privileges so that the otherwise privileged information could be introduced at trial in the event that there was no alternative source of proof for the claim or defense); Shuman & Weiner, supra note 35, at 899 (asserting that even those who are strong supporters of strengthening privacy interests do not advocate the recognition of an absolute privilege because these supporters acknowledge situations when evidence is undiscoverable through nonprivileged sources); see also Leading Cases, 110 Harv. L. Rev. 135, 292, 296-97 (1996) (criticizing the Jaffee Court's "unauthorized judicial legislation" in defining the psychotherapist-patient privilege so broadly and predicting that "Congress may have to tame this intractable federal privilege into a manageable monster").

184. See Jaffee, 116 S. Ct. at 1932 n.19 (suggesting that serious bodily harm to a patient or others would justify a therapist's disclosure despite the recognized privilege). Twenty years before Jaffee, the California Supreme Court held that a psychotherapist can be liable for failing to use reasonable care to warn the intended victim that a patient plans to inflict bodily harm. See Tarasoff v. Regents of Univ., 551 P.2d 334, 347-48 (Cal. 1976). In Tarasoff, the court weighed the safety interest against the confidentiality interest and concluded that the protection of the public was more important. See id. at 347; see also Mueller & Kirkpatrick, supra note 10, § 210, at 467-68 (discussing the psychotherapist's duty to warn). The more established attorney-client privilege also has similar exceptions, notably including present or future criminal and fraudulent activity. See Mueller & Kirkpatrick, supra note 10, § 195, at 367-68. The basis for the crime-fraud exception is derived from the principle that attorneys violate their professional responsibility when they assist clients in committing crimes and frauds. See id.; see also Model Rules of Professional Conduct Rule 1.6 (1992) (allowing the attorney to disclose information to prevent the client from committing a criminal act likely to result in bodily harm or death). Though the need for clearly delineated exceptions to the attorney-client privilege is recognized, the Jaffee Court's reticence in defining exceptions to the psychotherapist-patient privilege is unusual. See Capra, supra note 125, at 38. Post-Jaffee lower court cases have acknowledged the absence of defined parameters in the Court's newly created psychotherapist-patient privilege. See In re Grand Jury Proceedings, 1996 WL 739256, *7 (E.D. Wash. Dec. 17, 1996); United States v. Schwensow, 942 F. Supp. 402, 406 (E.D. Wis. 1996); Florida v. Finder, 678 So. 2d 410, 416-17 (Fla. Dist. Ct. App. 1996); Delaware v. Bright, 683 A.2d 1055, 1065 n.18 (Del. Super. Ct. 1996).

185. See Jaffee, 116 S. Ct. at 1932 n.19 (asserting that it is premature to develop the scope of the privilege); see also Capra, supra note 125, at 38 (criticizing the majority's recognition of an absolute privilege and refusal to delineate its contours).
have dealt with under Rule 501’s flexible mandate to develop privileges "in the light of reason and experience."  

That the Court purportedly would recognize an absolute psychotherapist-patient privilege, but fail to delineate its contours, is contrary to precedent. In Upjohn Co. v. United States, the Court acknowledged the difficulties inherent in failing to define the privilege. Because of these difficulties, the Jaffee Court chose to disagree with the Seventh Circuit's recognition of the psychotherapist-patient privilege contingent on a subsequent balancing analysis performed by the trial judge. Thus, it is inconsistent with the Court's reasoning that it would permit uncertainty in the privilege by failing to delineate the circumstances that may prevail over the execution of the privilege.

C. Should Licensed Social Workers Be Included in the Psychotherapist Privilege?

Perhaps the most controversial aspect of the Jaffee decision is its application of the psychotherapist-patient privilege to licensed social workers. The Court's justification for extending the privilege to licensed social workers rests on the premise that the counseling licensed social workers provide is basically the same as the counseling psychiatrists and psychologists provide. If this premise is true, the majority's inclusion

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186. FED. R. EVID. 501 (setting the standard for the recognition of privileges by federal courts).
187. See Upjohn, 449 U.S. at 393 (emphasizing the need for clients to predict with some certainty whether their communications with attorneys will be protected); see also Capra, supra note 125, at 38 (same); Confidentiality/Testing/Experts, 20 MENTAL & PHYSICAL DISABILITY L. REP. 543, 544 (1996) (same).
189. See id. at 393; see also Capra, supra note 125, at 38 (asserting that the Court's newly-recognized privilege is not as effective as it could be because of the possibility that the communications could be revealed at the trial judge's discretion).
190. See Jaffee, 116 S. Ct. at 1932 (distinguishing the Court's reasoning from that of the Seventh Circuit).
191. See Capra, supra note 125, at 38 (criticizing the Court's lack of clarity or detail in defining the psychotherapist privilege). Capra questions whether the Court's categorical claim to establish an absolute privilege rejects the idea of a qualified privilege. See id. If so, the implications for lower courts that must define the contours of the privilege remain uncertain. See id.
192. See Jaffee, 116 S. Ct. at 1931-32 (describing the majority's application of the psychotherapist-patient privilege to licensed social workers); see also id. at 1936-39 (Scalia, J., dissenting) (describing the dissent's criticism of the majority's inclusion of licensed social workers in the privilege).
193. See id. at 1931-32 (equating the public goals of counseling sessions by social workers with the public goals of counseling sessions by psychiatrists and psychologists).

The functional approach the Court advocates was used by the Alaska Supreme Court in 1976 in Allred v. Alaska, 554 P.2d 411 (Alaska 1976). In Allred, the court distinguished
of licensed social workers in the psychotherapist privilege counterbalances social inequity.\(^{194}\) Typically, those who seek the counseling services of psychiatrists and psychologists have more income than those who seek the counseling services of licensed social workers.\(^{195}\) Therefore, if the counseling services are, in fact, comparable, recognition of a privilege that affects people of varying socio-economic groups differently is cause for concern on equal protection grounds.\(^{196}\)

The dissent disputes the majority's assertion that counseling services provided by psychiatrists and psychologists are basically identical to those provided by licensed social workers.\(^{197}\) The differences in skills and training among the three professions lead the dissent to query whether the legislature, and not the Court, should decide whether to include social workers in the privilege.\(^{198}\) Unlike the Court, Congress has formal access

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\(^{194}\) See Morse, supra note 41, at 746-47 (advocating a uniform privilege for all mental health professionals so that people of different socio-economic backgrounds would be treated similarly). Social workers have even been referred to as the “poor person's psychiatrist.” Developments, supra note 80, at 1551 (quoting Comment, Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers, 61 CALIF. L. REV. 1050, 1050 (1973)).

\(^{195}\) See Morse, supra note 41, at 755 (indicating that money may be the determining factor in choosing a psychiatrist or psychologist over a licensed social worker).

\(^{196}\) See Winick, supra note 32, at 264-65 (asserting that equal protection concerns support an extensive privilege, inclusive of licensed social workers). Winick noted that psychiatrists and psychologists no longer can meet the nation's mental counseling needs and, consequently, require the additional services of licensed social workers to help meet the need. See id. (viewing the treatment that is provided by licensed social workers and that provided by psychiatrists and psychologists to be substantially similar).

\(^{197}\) See Jaffee, 116 S. Ct. at 1937-38 (Scalia, J., dissenting) (presuming that a licensed social worker does not have the same level of skill of a psychiatrist or psychologist).

\(^{198}\) See id. at 1937 (suggesting that the legislature should determine whether a licensed social worker employs “a significantly heightened degree of skill”). Though legislatures
to forums, such as committee hearings and constituent input, that can be used to determine whether the counseling services should be treated equally.\textsuperscript{199}

Though it may be true that the licensed social worker develops the same kind of trusting relationship with the client as does the psychiatrist or psychologist,\textsuperscript{200} it is not clear that, based on this relationship alone, the

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\textsuperscript{200} See Jaffee, 116 S. Ct. at 1931 (citing the increase in therapeutic services offered by social workers); \textit{see also} Winick, supra note 32, at 265 ("[A]ll forms of psychotherapy require trust and confidence by the patient in the clinician."). Winick supports his position
licensed social worker should share the same privilege when there is a wide variance of licensing requirements from state to state.\textsuperscript{201} The majority noted that in 1972, only twelve states had regulations covering social workers, whereas, in 1996, all fifty states regulate social workers.\textsuperscript{202} Attributing this increase in state regulations to developments in the field of social work, the Court noted that its own definition of psychotherapy in the 1970s effectively eliminated inclusion of the licensed social worker.\textsuperscript{203} Because the social worker has increasingly taken on the role of a psychotherapist, however, the Court changed its view to its current position that licensed social workers should be included with psychiatrists and psychologists in the psychotherapist-patient privilege.\textsuperscript{204}

by discussing the many mental health needs that licensed social workers address in order to supplement the services of the fewer practicing psychiatrists and psychologists. See \textit{id.} at 264.

\textsuperscript{201} See \textit{supra} note 171 (listing state statutes that govern the varying licensing requirements of social workers); Brief for the National Association of Social Workers et al. as Amici Curiae in Support of Respondents at 15-16 n.23, Jaffee (No. 95-266) (categorizing the coverage of the psychotherapist privilege in state statutes); see also Baytion, \textit{supra} note 86, at 153 n.3 (discussing the extension of a psychotherapist-patient privilege to psychiatric nurses, rape counselors, and battered women); Dubbelday, \textit{supra} note 193, at 812 (contending that many state statutes do not offer the same privilege to social workers as they do to psychiatrists or psychologists even though they perform similar functions).

Commentary is in agreement that state statutes governing the psychotherapist-patient privilege vary widely in their coverage and approach. See, e.g., 2 \textsc{Scott N. Stone} & \textsc{Robert K. Taylor}, \textsc{Testimonial Privileges}, \S\ 7.01, at 7-3 n.3 (2d ed. 1995) (listing the professionals each state includes in the psychotherapist-patient privilege); Knapp et al., \textit{supra} note 136, at 275-76 (noting a general tendency of courts to interpret strictly the professionals named in state privilege statutes); Baumoel, \textit{supra} note 80, at 802 (noting the variations in scope among the state statutes that recognize a psychotherapist-patient privilege); Hague, \textit{supra} note 136, at 575-76 (noting the variances among states in their protection of the psychotherapeutic relationship); Lamkin, \textit{supra} note 136, at 723-25 (categorizing the state statutes according to their coverage of the psychotherapist-patient privilege); see also Hague, \textit{supra} note 136, at 574-75 (noting that an extension of the privilege to additional professional groups increases the difficulty of excluding other professional groups that provide psychotherapy). Hague warns that creating an overbroad privilege excludes too much relevant evidence. See \textit{id.}

\textsuperscript{202} See Jaffee, 116 S. Ct. at 1931 n.16 (citing to American Association of State Social Work Boards, Social Work Laws and Board Regulations: A State Comparison Study 29, 31 (1996)).

\textsuperscript{203} See \textit{id.} (citing changes in the field of social work in dismissing the prejudicial effect of the Court's decision in the 1970s to exclude licensed social workers as irrelevant). During the twentieth century, social work grew increasingly influential in the administration of mental health counseling. See \textsc{Suppes} & \textsc{Wells}, \textit{supra} note 9, at 286-89 (predicting that the field of social work will be affected by cost-containment attempts in healthcare policies and increasing numbers of patients seeking services).

\textsuperscript{204} See Jaffee, 116 S. Ct. at 1931 n.16 (noting the advancements in the field of social work during the last twenty years); see also Jaffee v. Redmond, 51 F.3d 1346, 1355 n.15 (7th Cir. 1995) (depicting the increased level of professional legitimacy the fields of psychology and psychiatry have achieved since the 1950s); \textsc{Developments}, \textit{supra} note 80, at 1530 (asserting that the mental health counseling privilege has gained support during the last 40
Though the Court insisted that the psychotherapist-patient privilege should apply to licensed social workers, this position does not allow for the many different roles licensed social workers perform outside of mental counseling.\textsuperscript{205} In order to foster a consistent privilege, the Court should not protect the communications a licensed social worker has with her client that pertain to one of her other roles outside of mental counseling.\textsuperscript{206} Because the communications in \textit{Jaffee} were made in the context of therapy, lower courts may contend that the Supreme Court’s holding is limited to that context, thereby creating the potential for arbitrary distinctions in determining whether the communications in question were made in therapy or in another context.\textsuperscript{207}

IV. Conclusion

In \textit{Jaffee}, the Supreme Court held that confidential communications between a psychotherapist and patient cannot be disclosed at trial. The Court employed a balancing analysis that weighed the public interest and traditional preference for disclosure of all relevant evidence at trial against the private and public interest in cultivating mental health through the insurance of a confidential forum. Though the Court purported to create an absolute privilege, in actuality it recognized a privilege without defining its contours. Moreover, the inclusion of licensed social workers in the definition of “psychotherapist” applies differently from state-to-state corresponding to the states’ varying licensing requirements. Therefore, the privilege \textit{Jaffee} recognizes is anything but absolute and is left to the lower courts’ attempts to define it.

\textit{Molly Rebecca Bryson}

\textsuperscript{205}See Capra, supra note 125, at 38 (noting that the term “social worker” is defined broadly and encompasses many non-therapeutic roles). Capra notes that whether the communications were made during therapy is a difficult determination to make. \textit{See id.} (suggesting that a court must hold an in camera hearing to determine whether the communications were made during therapy). Inconsistencies in the privilege’s application may arise if the patient is not aware of the time at which communications are made during therapy and those made within one of the other contexts of social work. \textit{See id.} For a description of the many different roles a social worker performs, see 9 RACHELLE A. DORFMAN, CLINICAL SOCIAL WORK: DEFINITION, PRACTICE, AND VISION 41-47 (1996).

\textsuperscript{206}See Capra, supra note 125, at 38 (asserting that the Court must answer the question whether communications to licensed social workers made in contexts outside of the therapeutic role should be protected).

\textsuperscript{207}See \textit{id.} (warning of the potential for inconsistencies in rulings and uncertainties in practice).