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The Federal Psychotherapist-Patient Privilege After *Jaffee*: Truth and Other Values in a Therapeutic Age

by
CHRISTOPHER B. MUELLER*

Introduction

There were some surprises in the decision in *Jaffee v. Redmond*,¹ but the fact that the Supreme Court recognized a psychotherapist-patient privilege as a matter of federal common law is not one of them. Nor is it surprising that the Court extended the privilege to sessions with a clinical social worker. It is true that the modern Court has been skeptical of privilege law,² absorbing the twentieth century version of Enlightenment rationalism found in the work of two prominent commentators who stressed the obligation to testify and the right of courts to have everyone's help unless some overriding social purpose could be clearly advanced by a privilege rule.³ The

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1. 116 S. Ct. 1923 (1996).

2. The Court has addressed various aspects of federal privilege law in seven post-Rules decisions. With the notable exception of attorney-client privilege, most of the Court's decisions reject privilege claims or provide only modest support. See *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 188 (1990) (rejecting federal peer review privilege); *United States v. Zolin*, 491 U.S. 554, 565 (1989) (permitting *in camera* review of documents claimed to fit crime-fraud exception to attorney-client privilege); *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (expanding corporate attorney-client privilege by rejecting restrictive control group standard in favor of privilege covering statements by corporate employees on points relating to the subject matter of their employment); *Trammel v. United States*, 445 U.S. 40, 53 (1980) (slicing federal spousal testimonial privilege in half by holding that it belongs only to witness-spouse, not to party spouse); *United States v. Gillock*, 445 U.S. 360, 374 (1980) (finding no federal legislator privilege, despite state privilege rules); *Herbert v. Lando*, 441 U.S. 153, 169 (1979) (rejecting newspaper editorialist's privilege); *United States v. Nixon*, 418 U.S. 683, 707-13 (1974) (approving qualified presidential privilege).

3. Wigmore and McCormick argued that privileges cost more than they deliver,

Court moved the other way in *Jaffee* because it could not reject, in federal question cases, a doctrine that all states recognize.⁴ Nor could it turn its back on the therapeutic enterprise that is so important in modern life, in both the private and public sectors, and specifically in the area of social work in which state governments are so heavily involved.

Nor is it surprising that the Court relied on an instrumental rationale (encouraging therapy), or that it looked to state law as the wellspring of the federal privilege. In adopting the instrumentalist view, the opinion in *Jaffee* reflects the continuing influence of the same commentators. In deferring so much to state law, the Court in *Jaffee*, commendably, seems to have understood what nearly everyone else understands—that privileges are substantive, that state privilege law is a feature in the federal landscape in diversity cases, and that in the absence of any developed federal rule or congressional guidance it is eminently sensible to look to state law in federal question cases.

But there are some surprises in *Jaffee*, one of which connects with the theme of this conference (tensions in the quest for truth and the implementation of other policies). It is surprising in *Jaffee* that the Court ignored the argument that sustaining a privilege claim

contributing to the general skepticism about privilege law, which leads to tedious judicial comments that privileges are to be narrowly construed. See 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2291 (McNaughton rev. 1961) (stating that benefits of attorney-client privilege are “indirect and speculative” while its “obstruction” is “plain and concrete”); CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 72 (1954) (explaining that privileges “shut out the light” to protect relationships; doubtful that they “really need this sort of protection bought at such a price”). See also CHARLES TILFORD MCCORMICK ON EVIDENCE § 72 (John Strong ed., 4th ed. 1992) (keeping the original language). At least one commentator has argued that this anti-privilege bias is part of the fabric of Federal Rule of Evidence 501. See Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511, 541 (1994) (noting that Rule 501 “supplies a substantive policy bias in favor of the admission of relevant, reliable evidence,” that privilege law can block such proof, and that the Rules “have a built-in bias against that type of loss”).

4. In a footnote, the Court cites provisions from the fifty states and the District of Columbia creating psychotherapist-patient privileges. See *Jaffee*, 116 S. Ct. at 1929 n.11. *Jaffee* ignored the foundational federal authority for this privilege. *Taylor v. United States*, 222 F.2d 398 (D.C. Cir. 1955). *Jaffee* cited two post-Rules federal cases recognizing the privilege, and four others refusing to recognize it. See *Jaffee*, 116 S. Ct. at 1927. For a more complete listing of federal cases on point, see CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 210 nn.1-2 (2d ed. 1995) (noting that ten cases support the privilege; nine go the other way).

would enable the defendant to avoid direct challenges to her credibility by shielding from view the sessions in which she spoke about legally relevant events. It is also surprising that *Jaffee* gives so little thought or guidance to federal courts in developing federal privilege law from state statutory law. This Essay examines these surprises in *Jaffee*, while addressing three main questions raised by the decision.

First, should we have such a psychotherapist-patient privilege, and if so, should it extend to sessions with clinical social workers? I argue that we should. The main objection, which is that the privilege costs too much in lost evidence, pales in comparison to our best estimate of benefits, which are both tangible and intangible. They include an increase in psychotherapy, which we view as socially important, and protection of privacy, which we value as an end in itself.

Second, does it make sense to rest a federal privilege on state law, and how can we sensibly do that? I argue that it does make sense to draw heavily on state privilege law because it is better developed than federal law, and rests on considerable experience. The distinctly federal interests that arise in litigation based on federal substantive law do not require federal courts to fashion a separate body of privilege law, and there is no reason to fear that following the lead of states will thwart or undermine federal concerns. But the practical problems of fashioning a single body of federal law out of the disparate and detailed state statutes suggests that federal courts would be better off simply applying state psychotherapist-patient privilege law, even at the cost of nonuniformity across the federal system, rather than trying to fashion distinctly federal law.

Third, how should federal courts address certain hard cases? Difficulties arise in the common situation in which the privilege claimant is a party to the suit who testifies at trial, as happened in *Jaffee* itself. Also, we can expect major challenges in sexual assault and child abuse trials. On the former point, both the Seventh Circuit and Supreme Court opinions ignore the plaintiff's provocative argument that therapy sessions may have shaped the defendant's memory and testimony. The privilege should apply even here, however, because making an exception would sap its vitality, and the wiser course is to make an exception in the narrower class of cases where the privilege claimant puts mental condition in issue. On the latter point (what to do in abuse and sexual assault cases), each federal court should certainly look to the law of the state where it sits.

I. The *Jaffee* Case

Jaffee was a federal suit against police officer Mary Lu Redmond and the city that employed her, seeking damages for the death of Ricky Allen, whom Redmond fatally shot during a disturbance at an apartment house.⁵ The complaint was filed only a week after the event, claiming wrongful death under state law and a violation of federal civil rights.⁶ At the same time, Officer Redmond attended the first of more than fifty counseling sessions with Karen Beyer, a licensed clinical social worker, where the two discussed the shooting.⁷ Learning of these sessions, the plaintiff asked for notes that Beyer had made and sought to depose Beyer and Redmond on what was said.⁸ In the belief that the psychotherapist-patient privilege reaches only sessions with psychologists or psychiatrists, the trial court overruled Redmond's objection.⁹ The court ordered disclosure of the notes and told Beyer and Redmond to answer questions put by the plaintiff, but the two were uncooperative, and the judge ultimately told the jury it could draw a negative inference about the refusal to testify about the therapy sessions.¹⁰

The plaintiff won a verdict, but defendants appealed and the Seventh Circuit reversed.¹¹ It found that there is a federal psychotherapist-patient privilege, that it applies to sessions with a licensed clinical social worker, and that the judge, therefore, should not have invited the negative inference.¹² Further, the Seventh Circuit found that the privilege is subject to a balancing test: disclosure may be or-

5. See *Jaffee*, 116 S. Ct. at 1925.

6. See *id.* at 1926.

7. See Amicus Brief of American Psychiatric Association and the American Academy of Psychiatry of the Law in Support of Respondents at 19 n.15, *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996) (No. 95-266) (stating that suit was filed "one week after the shooting," and counseling commenced "approximately a week or so after the shooting") (quoting Joint Appendix).

8. See *Jaffee*, 116 S. Ct. at 1926.

9. See *id.*

10. See *id.*

11. See *Jaffee v. Redmond*, 51 F.3d 1346, 1350-52 (7th Cir. 1994) (describing efforts of the trial judge to force disclosure, then to find a middle ground when the therapist was uncooperative; after telling Redmond she could not testify if disclosure were not made, the court paved the way for an appeal to test the privilege point, and ultimately let Redmond testify but told the jury there was "no legal justification" to refuse to produce the notes, and that the jury could "presume that the contents" would be "unfavorable"), *aff'd* 116 S. Ct. 1923 (1996).

12. See *id.* at 1358.

dered if the need for the proof outweighs the need for protection.¹³ The court explained that the privilege rests on both instrumental and humanistic foundations, meaning that it serves the practical purpose of encouraging psychotherapy and protects privacy as an end in itself.¹⁴ The Supreme Court mostly agreed¹⁵ and approved a federal privilege in a 7-2 opinion, holding that it covers sessions with "licensed psychiatrists and psychologists" and with licensed clinical social workers "in the course of psychotherapy."¹⁶ The Court stressed the instrumental basis more than the privacy rationale, and declined to go along with the balancing test favored by the Seventh Circuit.¹⁷

The opinion in *Jaffee* ignores the claim, advanced by the plaintiff,¹⁸ that Karen Beyer provided counseling that did not constitute psychotherapy. This argument sought to distinguish between a "reality interventionist" technique dealing with "situational distress" and true psychotherapy in which the focus is upon "personality reorganization."¹⁹ Apparently Karen Beyer had listened to police tapes, and the plaintiff argued that Beyer's focus on what actually happened was inconsistent with psychotherapy, where the focus is on "psychic reality" of the patient.²⁰ In ignoring this point, the Court in *Jaffee* seems to have endorsed the view that almost any form of counseling conducted by psychiatrists, psychologists, and clinical social workers constitutes psychotherapy protected by the privilege. The privilege approved in *Jaffee* is defined more by the professional qualifications of the therapist than by the style or type of therapy being practiced.²¹

13. See *id.* at 1357.

14. See *id.* at 1356.

15. See *Jaffee*, 116 S. Ct. 1929 (Justice Stevens wrote the majority opinion. Justice Scalia dissented, and was joined in part by Chief Justice Rehnquist).

16. *Id.* at 1931.

17. See *id.* at 1932.

18. See Reply Brief for Petitioner at 5, *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996) (No. 95-266).

19. See *id.* at 7.

20. Plaintiff argued that Beyer may have changed Redmond's perceptions through a process of "behavioral confirmation," where the patient conforms to the therapist's impressions about what actually happened. See *id.* at 7-9.

21. See also *United States v. Schwensow*, 942 F. Supp. 402, 406-07 (E.D. Wis. 1996) (declining to recognize privilege covering counselors working for Alcoholics Anonymous, who were not psychologists and did not fit the *Jaffee* criteria).

II. Should We Have a Privilege? Should It Reach Clinical Social Workers?

We need a psychotherapist-patient privilege for two broad reasons, usually labeled instrumental and humanistic. The instrumental reason is that psychotherapy serves a useful social purpose, and the privilege supports and encourages it. The sheer number and percentage of the general population who reportedly need and seek help for psychological problems,²² along with the extraordinary growth in clinical social work, attest to the scope of the problem and indicate a social consensus that therapy helps alleviate it.²³ And *Jaffee* itself presents an important modern paradigm, which is the situation of an employee in a stressful job dealing with a traumatic incident in a constructive way.²⁴ The importance of therapy in this setting, and of confidentiality to encourage workers to seek help without risking disclosure and loss of employment, has achieved increasing recognition.

The existence of exceptions might prompt the objection that no sensible patient could rely on protection, hence that the privilege does not encourage people to seek therapy or to be honest with a therapist. But this objection makes sense only if the exceptions devour the rule, which does not seem to be the case. The patient himself controls one common exception (no privilege when he puts his mental condition in issue),²⁵ and he is not likely to expect confidenti-

22. See Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U. MIAMI L. REV. 249, 253 & nn.24-29 (1996) (observing that studies estimate more than fifty-two million Americans suffer from a "specific diagnosable mental disorder each year" and that only 28.5% get help).

23. See generally Michael J. Lambert & Allen E. Bergin, *The Effectiveness of Psychotherapy*, in HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE 143 (Allen E. Bergin & Sol L. Garfield eds., 4th ed. 1992) (asserting that "psychotherapies, in general, have positive effects").

24. See Mary P. Koss & Julia Shiang, *Research on Brief Psychotherapy*, in HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE, *supra* note 23, at 681 (reporting that brief psychotherapy, as opposed to long term treatment, has been shown to be effective in dealing with a range of problems, including "job-related stress, anxiety disorders, mild depression, and grief reactions," as well as problems associated with "unusual stress" coming from experiences such as rape and earthquake, or other experiences leading to post-traumatic stress disorder).

25. See, e.g., UNIF. R. EVID. 503(d)(4) (amended 1986), 13A U.L.A. 585 (1994) (creating exception for cases where patient "relies upon" mental condition "as an element" of a claim or defense). See also UNIF. R. EVID. 503(d)(4), Action in Adopting Jurisdiction, 13A U.L.A. 585-93 (1994) (describing numerous state adoptions and variations of this provision); *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130 (E.D. Pa. 1997) (holding plaintiff waived psychotherapist-patient privilege in suit alleging that employer failed to

ality if he indicates an intent to attack another person (another common exception).²⁶ To be sure, some exceptions are so broad that they might threaten the utility of the privilege, such as exceptions that apply to the defendant in some or all criminal cases or to any communication indicating harmful conduct.²⁷ But even jurisdictions that recognize these broad exceptions still provide significant protection.

We know patients desire confidentiality.²⁸ We know as well that therapy requires a relationship in which the patient trusts the therapist and that a trusting relationship between patient and therapist is crucial not only to classical psychotherapy (patient on the couch in regular sessions lasting months or even years) but to modern therapy as well,²⁹ because therapy requires the willing cooperation of the pa-

accommodate clinical depression, which led plaintiff to take medication that made it hard for her to get up in the morning; letting her hide behind privilege when she placed that condition at issue is contrary to basic sense of fairness and justice).

26. See, e.g., MASS. GEN. LAWS ANN. ch. 112, § 129A(2) (West 1996) (denying privilege where patient communicates "explicit threat to kill or inflict serious bodily injury upon a reasonably identified person"); *State v. Bright*, 683 A.2d 1055, 1064-65 (Del. 1996) (noting that well-established exception applies where mental health professional has "affirmative duty" to others to warn of patient's dangerous propensities); *United States v. Snellenberger*, 24 F.3d 799, 802 (6th Cir. 1994) (recognizing state exception to privilege in situation of threats to harm others).

27. See MO. ANN. STAT. § 337.636 (West 1989 & Supp. 1997) (rejecting privilege for information that "pertains to a criminal act"); 740 ILL. COMP. STAT. ANN. 110/10(a)(9) (West 1993 & Supp. 1997) (denying privilege for disclosures that relate "directly to the fact or immediate circumstances" of a homicide). See also discussion *infra* notes 67-73 and accompanying text.

28. See generally Daniel W. Shuman et al., *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 INT'L J.L. & PSYCHIATRY 393, 410 (1986) (observing that in Canadian study, confidentiality was "an initial consideration" for 62% of patients, and 59% "knew or guessed correctly that a professional secret exists"; among lay people, willingness to discuss a range of issues "dropped substantially" when respondents were told that no privilege applied); Daniel W. Shuman & Myron F. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 919-20 (1982) (finding that when asked whether they would discuss sensitive subjects relating to masturbation, sexual thoughts and sexual activities without privilege protection, rate of positive response "dropped markedly"); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1255 (1962) (noting that in survey, lay people said they would be less likely to make complete disclosure if psychiatrist, psychologist, marriage counselor, or social worker had legal obligation to disclose).

29. See T. Byram Karasu, *Psychoanalysis and Psychoanalytic Psychotherapy*, in 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1775 (Harold I. Kaplan & Benjamin J. Sadock eds., 6th ed. 1995) (stating that "[n]o analysis can proceed without the formation of a rational, trusting therapeutic alliance; its establishment is the first task of treatment before a deeper transference neurosis can be facilitated."); Lambert & Bergin, *supra* note

tient in unearthing memories that the patient prefers not to call into his conscious mind.³⁰ We also know that therapy turns on the willingness of the patient to speak openly of personal thoughts and feelings on relationships, acts and events, capabilities, outlooks, fears, and fantasies, and indeed that simply talking may be therapeutic in raising to conscious expression feelings previously inaccessible to conscious thought.³¹ Finally, we know therapists inform patients about the limits of confidentiality in private sessions.³² Given this much knowledge (which includes some empirical data), it is a fair, if not inescapable, conclusion that the privilege positively contributes to the willingness to seek therapy and to the efficacy of treatment.

Admittedly the instrumentalist argument is weakened by the absence of empirical verification relating to the privilege itself.³³ We must at least pause to consider the claim that the cost of the privilege

23, at 181 (observing that most modern therapists are "eclectic" in their orientation, employing "mixtures" of psychoanalytic techniques; "[i]nterpersonal, social, and affective factors common across therapies still loom large as stimulators of patient improvement"; whether therapist is dealing with depression, inadequacy, anxiety or inner conflicts, treatment is facilitated by a relationship between patient and therapist that includes "trust, warmth, acceptance, and human wisdom").

30. See Mark B. DeKraai & Bruce D. Sales, *Privileged Communications of Psychologists*, 13 PROF. PSYCHOLOGIST 372, 372 (1982) (noting that trust toward therapist is so important that some say therapy is "rendered worthless in its absence"); R. HORACIO ETCHEGOYEN, *THE FUNDAMENTALS OF PSYCHOANALYTIC TECHNIQUE* 9 (1991) (stating "things are forgotten if one does not wish to remember them, because they are painful, ugly and disagreeable, contrary to ethics and/or aesthetics").

31. See SIGMUND FREUD, *The Interpretation of Dreams*, in 4 THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 100 (1958) (finding that if symptom can be traced to "elements in the patient's mental life from which it originated, it simultaneously crumbles away and the patient is freed from it"). See also David Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731, 746-47 (1957) (concluding that the art of therapy "seems to consist in helping the patient learn for himself the causes of his conduct and the methods of correction"); CHARLES BRENNER, *AN ELEMENTARY TEXTBOOK OF PSYCHOANALYSIS* 7 (Rev. ed., Int'l Universities Press 1973) (1955) (observing that the essence of Freud's psychoanalytic technique is that "the patient undertakes to report to the analyst without exception whatever thoughts come into his mind and to refrain from exercising over them either conscious direction or censorship").

32. See AMERICAN PSYCHOLOGICAL ASSOCIATION, *ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT* Standard 5.01 (1992) (stating that therapist must advise patients of "the relevant limits on confidentiality").

33. See generally Shuman et al., *supra* note 28, at 416-17 (explaining that treatment occurs "without regard to the existence of a privilege," and privilege is better supported by humanistic than instrumental arguments); Shuman & Weiner, *supra* note 28, at 928 (noting that survey of lay persons, patients, therapists, and judges shows that privilege may affect "efficacy" of therapy for only a "small percentage" of people).

is manifest while the benefit is a matter of guesswork³⁴ and the related objection that we have no concrete comparison between the value of therapeutic gains and the cost of lost proof.³⁵ But these objections are less than definitive, and the instrumentalist rationale remains persuasive for several reasons.

First, it counts that patients want and expect confidentiality, and it counts that doing away with the privilege would require therapists, as a matter of human decency and professional duty, to advise patients fairly about disclosure risks.³⁶ Taking even a mild version of the rationalist perspective on which law depends, it is likely that the privilege aids the process even if we cannot find measurable results.³⁷ This appraisal does not depend on a supposition that patients think about privilege law. In fields as disparate as contracts, torts, and employment discrimination, we seek to affect outcomes not only by the

34. See MCCORMICK, *supra* note 3, at § 72; WIGMORE, *supra* note 3, at § 2291.

35. In *Jaffee*, Justice Scalia protests that merely "mentioning" competing values of therapy and the search for truth "does not answer the critical question," which is whether the contribution of therapy to mental health is sufficiently great to justify "making our federal courts occasional instruments of injustice." See *Jaffee*, 116 S. Ct. 1923, 1934 (1996) (Scalia, J., dissenting). This objection applies to privileges in general.

36. Professor Winick argues that a decision rejecting a federal privilege would become known. Hence, even if patients generally know nothing about privilege law, they would hear of such a decision, particularly in the setting of *Jaffee* itself, in which an officer involved in a shooting anticipates a civil rights suit. Professor Winnick may be right, and certainly it is predictable that therapists would feel compelled to bring up the matter even if patients have not heard of it. See Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U. MIAMI L. REV. 249, 257 (1996) (assuming a decision rejecting the privilege, asking whether police officer involved in a shooting and lawsuit would "seek out counseling" in the knowledge that details revealed in therapy "could be the subject of an evidentiary fishing expedition" and whether a sexual assault victim would "seek counseling" if she knew the assailant's attorney "could seek discovery of what she said in therapy").

37. The indicated conclusion is as strong as in the setting of the attorney-client privilege, where few people doubt the need for a privilege. In his dissent in *Jaffee*, Justice Scalia asks, "[H]ow come psychotherapy got to be a thriving practice before the 'psychotherapist privilege' was invented? Were the patients paying money to lie to their analysts all those years?" *Jaffee*, 116 S. Ct. at 1935 (Scalia, J., dissenting). But this rhetorical argument is filled with assumptions: that psychotherapy was not a "thriving practice" in the distant past, that the privilege is a new invention, and that the privilege therefore did not contribute to the development of psychotherapy. Psychotherapy certainly *is* a major feature of the social landscape today, but it is hardly a new invention and has been a significant and visible element of American life for generations, and in any event the psychotherapist-patient privilege has itself been a feature of the legal landscape for quite some time, having been recognized in federal court some 43 years ago. See *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955).

direct impact of doctrine applied with precision in litigation, but also by the indirect and more diffuse effect of doctrine in supporting social understandings and expectations. It is those understandings and expectations that affect behavior on an everyday basis.³⁸ It is probable too that a privilege assists the therapist in her work, since any conscientious person would be reluctant to encourage another to make disclosures (or to keep records of such disclosures) in the knowledge that the information thus gleaned could be forced from the therapist in the form of testimony against the patient.³⁹

Second, the point about comparative costs is not compelling. It is unsurprising that nobody attempts an apples-and-oranges comparison, which would convince few people. And the premise that would likely go with such a comparison, which is that doing away with the privilege would produce for the future all the evidence that successful claims of privilege now suppress, assumes that patients would say as much (and psychotherapists could be forced to disclose as much) in a nonprivileged environment. But we have reason to suppose there would be less therapy, less disclosure, and less in the way of record-keeping by therapists in that environment.

The humanistic basis for the psychotherapist-patient privilege rests on the right of privacy.⁴⁰ This value finds expression in the Con-

38. Shuman and Weiner, who support the privilege on humanistic grounds but argue that the instrumentalist justification has not been made, give too much weight to knowledge of the privilege itself. See Shuman & Weiner, *supra* note 28, at 920-21 (concluding most patients "relied more heavily on the therapist's ethics for confidentiality" than a privilege of which they were unaware, so enactment of a privilege has "no effect" on success or failure of therapy). But confidentiality is exactly the point, and a legal doctrine that creates an environment in which confidentiality can be assumed is important to the behavior that depends on confidentiality. See Thomas Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 92 (1973) (explaining that the fact that people communicate without being aware of a privilege "proves little without the further assumption that subconscious, unarticulated knowledge never can influence human conduct").

39. See generally Note, *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1476 (1985) (suggesting that professional people "often must press reluctant or confused people to speak, especially when embarrassing secrets are involved," and the absence of a privilege would subject the professional person to "conflicting duties" to obtain complete information, maintain client confidences, and testify in court).

40. See RAYMOND L. SPRING ET AL., *PATIENTS, PSYCHIATRISTS AND LAWYERS: LAW AND THE MENTAL HEALTH SYSTEM* 215 (2d ed. 1997) (contrasting historic justifications for privilege law stressing the protection of specific relationships with modern justifications for the psychotherapist privilege which "tend to rely more on privacy as a basis") (2d ed. 1997).

stitution and in doctrines developed by the Supreme Court to protect citizens from prying by police and from legislative regulation of areas like marriage, contraception and abortion. This value also finds expression in rules relating to proof and practice in the courtroom, such as rape shield laws and the rule authorizing judges to shield witnesses from abuse and embarrassment.⁴¹ In the setting of psychotherapy, privacy is rightly elevated as important because trust and expressive freedom are vital to the process. And more broadly still, privacy is a critical aspect of a free society for reasons relating to personal autonomy, emotional development, self-appraisal and general happiness, all of which have obvious connections with therapy.⁴²

It is true that there is no general right of privacy enabling litigants or witnesses to block proof of private behaviors that may be embarrassing or mortifying. There is no general right to block inquiry into confidential communications with family or friends, where surely all of us seek and obtain help and support in adjusting to the world and working through the problems of living.⁴³ And *Jaffee* does not cover sessions with people who provide therapy (or purport to provide it) without a license. Hence the privilege approved in *Jaffee* is arguably flawed because it is too narrow to satisfy either the humanistic or the instrumental purpose. Even worse, this objection prompts the suggestion that the privilege is really a dignitary doctrine that serves the interest of the profession that it covers rather than broader social needs. This critique has some force, but in the end it is not convincing.

To begin with, other aspects of privacy *are* protected. The privilege for spousal confidences covers the most critical realm of

41. See, e.g., FED. R. EVID. 412 (creating a rape shield statute blocking inquiry into past sexual behavior by complaining witnesses); *United States v. Lopez*, 611 F.2d 44, 45 (4th Cir. 1979) (concluding that psychological history is an area of "great personal privacy" that generally has but minimal probative value on matters of general credibility); *United States v. Jackson*, 155 F.R.D. 664, 669 (D. Kan. 1994) (holding with reasoning similar to *Lopez*); *State v. Zuck*, 658 P.2d 162, 166 (Ariz. 1983) (explaining that courts may "protect witnesses against cross-examination that does little to impair credibility, but that may be invasive of their privacy").

42. See WESTIN, *PRIVACY AND FREEDOM* 32-37 (1973) (suggesting that privacy protects personal autonomy, provides for emotional release, and allows self-appraisal which are necessary to self-realization and psychological balance).

43. Justice Scalia argues that people work out their problems by talking to "parents, siblings, best friends and bartenders," and that the average citizen would gain more by getting advice from his "mom" than from licensed therapists. See *Jaffee v. Redmond*, 116 S. Ct. 1923, 1934 (1996) (Scalia, J., dissenting).

private communications (the area that seems most important to the greatest number) and a privilege covers religious consultations (including the confessional).⁴⁴ A broader familial privilege reaching conversations between parent and child and among siblings is not out of the question and may be warranted.⁴⁵

It is true that other private conversations are not privileged, even if private, intimate and "therapeutic." People sometimes have such talks in the belief that what they say cannot come back to haunt them, like conversations with trusted friends, bartenders or running partners. And people sometimes "bare their souls" or "unload" on passing acquaintances in the belief that the conversation is safe because neither expects to see the other again or to have overlapping contacts. But lack of privilege here does not mean the psychotherapist-patient privilege is fatally narrow, nor undercut the theory that it provides important protection for privacy as a value in itself. The area covered by the privileges mentioned above is, after all, very substantial. And what is not covered is often undiscoverable and unusable anyhow, meaning privacy is preserved even without a privilege—familial communications are hard to get at if the witness is reluctant to cooperate,⁴⁶ and conversations with bartenders and passing acquaintances are beyond reach in all but high-profile criminal prosecu-

44. See generally GLEN WEISSENBERGER, FEDERAL RULES OF EVIDENCE §§ 501.6, 501.7 (1995) (describing spousal privileges and stating that both state and federal courts recognize clergyman-parishioner privilege); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE §§ 5.33-5.34, 5.38 (1995) (describing spousal and religious privileges).

45. Compare *In re Grand Jury Proceedings, Unemancipated Minor Child*, 949 F. Supp. 1487, 1497 (E.D. Wash. 1996) (recognizing federal common law familial privilege allowing children to refuse to testify against parents, partly on basis of *Jaffee*; leaving open possibility of constitutionally-based privilege) with *In re Grand Jury Proceedings*, 103 F.3d 1140, 1146 (3d Cir. 1997) (refusing to quash grand jury subpoena that would require parent to testify against child; rejecting claim of federal parent-child privilege; noting under *Jaffee*, federal court should look to state law for guidance, but only Idaho, Minnesota, Massachusetts, and common law tradition in New York allow for such a privilege).

46. Lawyers and courts are reluctant to push too hard to get information from intact families. And in this setting perjury and evasion are likely, and predictably hard to detect, overcome, or punish. See generally *Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of the Fed. Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 2, at 240, 241-42 (1973) (letter by Charles L. Black, Jr. to the Honorable William Hungate) (criticizing proposed abolition of spousal confidences privilege by commenting: "It ought to be enough to say of such a rule that it could easily—even often—force any decent person—anybody any of us would want to associate with—either to lie or to go to jail. No rule can be good that has that consequence—that compels the decent and honorable to evade or to disobey it.").

tions or civil litigation (O.J. Simpson, JonBenet Ramsey, the tobacco litigation).

It is also notable that other therapeutic privileges are sometimes recognized. The most prominent example is the widely-recognized rape counselor privilege,⁴⁷ and there are others.⁴⁸ In the end, it is less plausible to look at these as professional dignitary privileges, born of lobbying efforts by professional groups, than as legislative responses to felt needs to encourage and secure assistance for people and to recognize a social interest in privacy.

Finally, there is such a thing as being too embarrassed about crafting an imperfect rule. We often face choices between a failsafe rule that is too general and uncertain for ready application and a clear rule that is too broad or too narrow. As a compromise between functionality and precision, the *Jaffee* rule merits respect (along with the state law on which it depends). In covering sessions with licensed psychotherapists, *Jaffee* reaches a critical category of cases in which therapy is the purpose and privacy is both needed and expected. Yet the *Jaffee* rule can be applied in the press of trial, since it reaches only counseling sessions with licensed therapists.

In the late twentieth century the privilege should extend to counseling performed by clinical social workers. The main reason is that training and experience justify the view that they provide professional therapy: they receive extended training, perform an apprenticeship, and provide mental health services.⁴⁹ Hence, the objection

47. See CAL. EVID. CODE §§ 1035-1036 (West 1995) (providing elaborate privilege covering communications between sexual assault victim and counselor); FLA. STAT. ANN. § 90.5035 (West 1979 & Supp. 1998) (creating sexual assault counselor-victim privilege); *United States v. Lowe*, 948 F. Supp. 97, 99 (D. Mass. 1996) (recognizing federal rape counselor privilege under *Jaffee* in federal trial on crimes including sexual offenses, citing Justice Department Report that twenty-seven states protect confidentiality in this setting); *Commonwealth v. Fuller*, 667 N.E.2d 847, 853 (Mass. 1996) (reversing order by trial judge requiring rape counseling center to turn over records; balancing need for disclosure against need for privacy of rape victim dictates that the latter prevails; statutory privilege contains no exception, except providing that defense right to cross-examine counselor is not limited if counselor testifies with victim's written consent); *Commonwealth v. Askew*, 666 A.2d 1062, 1064-65 (Pa. Super. Ct. 1995) (denying new trial motion after conviction on various sexual abuse charges; statutory privilege denies defendant the right to records of rape counseling center relating to victim).

48. See, e.g., CAL. EVID. CODE § 1037.5 (West 1995) (codifying domestic violence counseling privilege).

49. The applicable Illinois statute requires a licensed clinical social worker to have a master's or doctoral degree in social work, three years of supervised clinical practice, and requires in addition that she pass an exam and either complete 3,000 hours of supervised

that they lack the kind of professional qualifications possessed by psychologists and psychiatrists is not serious enough to justify rejecting privilege protection.⁵⁰ And the increasing importance of their role in late twentieth century America goes far to explain why forty-five of the fifty state legislatures extend privilege protection to communications with social workers.⁵¹

III. State Law As Source of Federal Privilege

Jaffee is a federal question case, and its mandate applies only in this setting.⁵² However, the Court was wise to look to state law for guidance. The main reason is that states, more than federal courts, have addressed the subject in detail, while Congress has been silent and federal appellate precedent is sparse. States have statutory and appellate law that is far "thicker" (more plentiful and detailed) than federal law. States deal routinely with child abuse and sexual assaults, where, not surprisingly, claims of psychotherapist-patient privilege are commonly tested. In these and other settings, such as criminal prosecutions where the defense claims insanity, state courts deal regularly with waiver and coverage issues.

Yet a huge methodological difficulty lies ahead. The Court in *Jaffee* stressed that state "policy decisions" bear on the question of whether federal courts should "recognize a new privilege" or "amend the coverage" of an old one.⁵³ The implication is that state law does

clinical experience or get a doctoral degree and complete 2,000 hours of supervised clinical work. See 225 ILL. COMP. STAT. §§ 20/3, 20/9 (West 1993).

50. In his dissent, Justice Scalia argues that there is no assurance that licensed social workers are shown to have the "greatly heightened degree of skill" that justifies extending a privilege to psychiatrists or psychologists. See *Jaffee v. Redmond*, 116 S. Ct. at 1937 (Scalia, J., dissenting).

51. Only Alabama, Alaska, Hawaii, North Dakota, and Pennsylvania are missing from the list of states with a privilege for communications with social workers. See *Jaffee*, 116 S. Ct. at 1931 n.17.

52. *Jaffee* has no direct application in the state court system, although state judges may well give weight to the decision as a matter of comity. Nor does *Jaffee* apply in diversity cases litigated in federal court, where Federal Rule of Evidence 501 requires federal courts simply to apply state privilege law. Technically, Federal Rule of Evidence 501 requires federal courts to apply state privilege law "with respect to an element of a claim or defense" where state law "supplies the rule of decision," which describes a category of cases that differs slightly from "diversity cases." In all other cases, federal courts are to apply federal law. See generally 2 MUELLER & KIRKPATRICK, FEDERAL EVIDENCE § 174 (2d ed. 1994).

53. *Jaffee*, 116 S. Ct. at 1929-30 (stressing further that a state "consensus" in recognizing the privilege provides a basis in "reason and experience" to recognize a federal

not merely point out a direction to consider, but plays a larger role and bears importantly on the content of federal law. This reading is strengthened by the comment in *Jaffee* that state privilege law would "have little value" if the patient knew federal courts would not honor it, and that denying a federal privilege would "frustrate the purposes" of state law.⁵⁴ The problem is that state law of psychotherapist-patient privilege is mostly statutory, and the statutes address critical issues of coverage, exceptions, and waiver in detail. Needless to say, however, they conflict on important points.⁵⁵ Here is the question that remains: How can federal courts constructively use state law to fashion a federal privilege? On this point, *Jaffee* offers little guidance.

Under one possible approach to this problem, federal courts would follow state law on psychotherapist-patient privilege. But this approach seemingly violates Federal Rule of Evidence (FRE) 501. For one thing, it would lead to a nonuniform body of law, which is at odds with the mandate of FRE 501 to fashion federal law in this area. This approach would not involve choices based on "reason" exercised by federal courts on the basis of "experience." State law, after all, is largely statutory, comprised of abstract commands that were crafted in a political process of bargaining and compromise. It is policy-based and value-laden, and it did not grow out of the common law process. That process is one in which courts come over time to favor a particular solution by making incremental moves, drawing from social values and traditions and testing outcomes over an extended period of time. Emphatically, the rules and statutes on point are not the product of this kind of organic growth and refinement.

Under what seems to be the only alternative, a federal court following *Jaffee* would look to the statute or rule in the state where it sits as one of many reference points in deciding the content of the federal rule.⁵⁶ (Other reference points include the rules or statutes in

privilege, and that it makes "no difference" that state law on point is statutory).

54. See *id.* at 1930.

55. It does not follow that they do not count in fashioning federal law: just as the unanimity of states in recognizing the privilege should inform the exercise of "reason" in light of "experience" on the question whether to recognize a federal privilege, so the details of statutory treatment should inform the exercise of reason in light of experience in deciding particular privilege issues.

56. Since privilege law is substantive, a court should not invariably apply forum law. Sometimes the court should look to the law of some other state, especially if the relationship or communications covered by the privilege were centered there. Practically speaking, however, such "horizontal choice of law problems" seldom arise. See generally 2

force in other states.) Under this approach, the court may sometimes depart from the result required by local statute. Holding a matter privileged as a matter of federal law where the state rule or statute requires disclosure seems wrong, and would surely be a peculiar outcome. As *Jaffee* itself indicates, the fact that the underlying substantive issues are federal does not justify such a departure. Further, holding a matter nonprivileged under federal law where a state statute provides protection also seems wrong. It would frustrate the purpose of state law, to which the Court in *Jaffee* so carefully deferred.

Departing in either of these ways from the mandate of state law might be justified if the privilege claim dealt with therapy sessions conducted by a federal officer or as part of a federal program, but only if something in the federal statutory framework points the way toward such a conclusion. In other cases, departing in such ways from local law would likely involve following some other state statute on the ground that it is wiser in its policy or provisions. Simply selecting one statute or another involves a naked political choice that is similar in nature to the ones made by state legislatures, and it seems incompatible with FRE 501's directive to fashion federal common law on the basis of reason and experience.⁵⁷ A more elaborate process could satisfy FRE 501, but it would require federal courts to evaluate the content, policies, and suitability of competing statutory choices, and the process would not produce a coherent body of law soon.

This game is not worth the candle. The first approach described above is superior to the second. At least in the area of the psychotherapist-patient privilege, FRE 501 should defer to state privilege law in all federal litigation. This deference would properly be subject to whatever action Congress might take to create specific enclaves of federal privilege law relating to specific federal programs or federal agents, in which case presumably state courts would recognize these federal privileges too. Beyond the methodological difficulties sketched above, there is another good reason for federal courts simply to apply state law in this area. Privilege law is substantive because it is part of the regulation of out-of-court relationships (spouses, lawyer-client, therapist-patient). Neither Congress nor federal rulemakers have stepped into this field, nor is it likely that they

MUELLER & KIRKPATRICK, FEDERAL EVIDENCE § 176 (2d ed. 1994).

57. FED. R. EVID. 501.

will do so, even assuming that the Constitution allows it. The federal interests at stake in a civil rights action against a local police officer do not justify legislation regulating the relationship between patients and psychotherapists, or a narrower rule addressing counseling obtained by police officers. The Court in *Jaffee* appears to recognize this fact, even though its solution was a mandate to create what is theoretically federal law in this area.

The reality is that while *Jaffee* puts federal courts in a difficult position, the problem is in the broader legal environment rather than *Jaffee* itself. The solution is to amend FRE 501, at least as it applies to the psychotherapist-patient privilege, or to adopt a new rule requiring federal courts to apply state psychotherapist-patient privileges unless Congress directs otherwise.

IV. Problems of Coverage and Exceptions

In two broad areas, sound application of the privilege will be particularly challenging. One involves cases where the privilege claimant testifies, particularly where she is also a party whose testimony is crucial. The other is the setting of abuse or sexual assault prosecutions, where the privilege might or might not apply to counseling or therapy obtained by the defendant or the victim.

Jaffee exemplifies the first problem. In *Jaffee*, defendant Mary Lu Redmond was the privilege claimant, and she testified that she fired the fatal shot when she saw the decedent Ricky Allen carrying a butcher knife poised to stab a man he was chasing out of an apartment complex. But Redmond testified that her memory at trial was better than it was after the event, and her therapist testified that in an early interview Redmond could not remember pulling the trigger.⁵⁸ Arguing that extensive counseling had affected Redmond's memory and testimony, the plaintiff asked the court to treat the situation with the elevated concern it had shown ten years earlier when it faced the issue of hypnotically-refreshed testimony.⁵⁹ There the Court spoke of confabulation, memory hardening, and suggestibility, and approved safeguards against such risks, including the use of tapes of hypnotic sessions to guard against inaccuracy.⁶⁰ By analogy, plaintiffs might also have invoked the situation in which a client reviews documents

58. See Reply Brief for Petitioner at 3 n.1, *Jaffee v. Redmond*, 116 S. Ct. 1923 (No. 95-266).

59. See Brief for Petitioner at 23, *Jaffee v. Redmond*, 116 S. Ct. 1923 (No. 95-266).

60. See *Rock v. Arkansas*, 483 U.S. 44, 59-60 (1987).

in preparation for testifying at trial, where some courts conclude that this strategy removes the protection of the attorney-client privilege that might otherwise apply.⁶¹ In *Jaffee*, Redmond began what was to stretch into 50-odd therapy sessions at the time suit was filed,⁶² and she and her therapist must have known they were going over the ground that Redmond would cover in her testimony at trial.⁶³

Here the stakes on both sides are high. On the one hand, it is here that the privilege poses a stark threat to the truth-seeking enterprise, since it operates not merely to deny access to evidence, but to hide from view a process that may shape critical trial testimony by a party. Hence, it is here that the claim, which any competent cross-examining lawyer would quickly make, carries some weight: "I need access to her pretrial statements and to the interviews and other material that may have shaped her testimony." Yet the value of the privilege depends heavily on allowing protection in this setting. Indeed, there would be almost nothing left if protection were lost whenever the underlying subject matter of the conversations were useful in impeachment. In the similar situation in which the complainant testifies in a sexual assault trial, significant modern authority denies defense access to records of rape counseling sessions (which are covered by a separate privilege).⁶⁴ Arguably, the cases requiring disclosure of materials covered by the attorney-client privilege, where these are reviewed prior to testifying, differ because they presumably involve an active effort to coach the witness. At least some modern cases seek to preserve privilege protection even in this setting, and at most they endorse the practice of *in camera* review to de-

61. See *Lowe v. White and Spicer*, 1990 WL 251387 (Del. Super. Ct. 1990) (showing document to witness to refresh memory before giving deposition waives work product protection); *Samaritan Health Servs., Inc. v. Superior Court*, 690 P.2d 154, 157 (Ariz. 1984) (stating that while pretrial review waives attorney-client privilege, court should conduct *in camera* inspection rather than order blanket disclosure).

62. See *Jaffee*, 116 S. Ct. at 1926.

63. Psychotherapy might bring to light entirely new thoughts, even about something as prosaic as an accidental shooting. See BRENNER, *supra* note 31, at 137, for a description of a patient who "struck an elderly man with his left, front fender and knocked him to the ground," and who believed afterwards that he "had not seen the man at all" when he slowed to a speed of five miles per hour in preparation for making a lefthand turn at a busy intersection. Later during therapy, the man recalled that "he was not surprised when he felt his car hit something," and suggesting that the driver's "unconscious motive for the mishap was" to "destroy his own father," even though he had been dead for a number of years; these motives were the sources of the patient's "subsequent guilt and fear."

64. See *supra* note 47.

termine whether privileged materials apparently affected trial testimony.⁶⁵

State psychotherapist-patient privilege law does not recognize an exception for cases where the privilege claimant testifies as a party at trial. Instead, most state law deals with the issue by sacrificing protection in a narrower class of cases where the privilege claimant is a party who puts her mental condition in issue. Here, sustaining a privilege would deny access to evidence that is relevant and useful for impeachment, and also crucial to a central issue injected by the privilege claimant. Yet even here, some modern courts indicate that privilege protection is not to be lightly sacrificed, guarding against manipulation by the side challenging a privilege claim.⁶⁶

The silence of the Court in *Jaffee* speaks volumes. The indicated conclusion is that the patient who testifies as a party does not lose the protection of the psychotherapist-patient privilege on that account.

The situation of victims or complaining witnesses in sexual assault and child abuse trials is even more difficult. Here, credibility issues loom large and proof is hard to come by, so shielding the sub-

65. See *Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co.*, 92 F.R.D. 779, 781 (S.D.N.Y. 1982) (refusing to order disclosure of abstracts of prior depositions prepared by lawyer and reviewed by witness in preparing for subsequent deposition, where abstracts contained mental impressions of attorney); *Thomas v. State*, 1997 WL 235504 (Alaska Ct. App. 1997) (denying waiver of work product protection in prosecutor's use of list of proposed questions in preparing witness, as judge found witness had not refreshed recollection by looking at questions; however, disclosure ordered of notes witness prepared on anticipated answers); *Northern Montana Hospital v. Knight*, 811 P.2d 1276, 1281-82 (Mont. 1991) (finding that documents reviewed by architect prior to testifying in deposition were not related to his testimony and were in any event protected by attorney-client privilege; disclosure unnecessary under Montana Rule 612); *Farm Credit Bank v. Huether*, 454 N.W.2d 710, 718 (N.D. 1990) (stating that under Rule 612, documents "specifically referred to in testimony" were subject to disclosure "even if previously privileged," but not other documents); *Girrens v. Farm Bureau Mut. Ins. Co.*, 715 P.2d 389, 396-97 (Kan. 1986) (finding that in reviewing transcript of his own oral statement to his attorney while preparing for deposition, plaintiff did not waive attorney-client privilege; state has no counterpart to Federal Rule of Evidence 612). See also *Commonwealth v. O'Brien*, 645 N.E.2d 1170, 1175-76 (Mass. 1994) (showing notes to witness on stand waives work product protection for notes, leaving open the question whether the same result obtains when notes are shown to witness before she testifies).

66. See *Kinsella v. Kinsella*, 696 A.2d 556, 571 (N.J. 1997) (denying access to husband's psychiatric records in custody battle despite husband's allegations of extreme cruelty by wife); *Clark v. District Court*, 668 P.2d 3, 8-10 (Colo. 1983) (finding that in wrongful death suit, where plaintiff claimed that defendant's employee had history of mental illness, denial of liability did not waive privilege, nor did testimony by employee admitting that he had obtained counseling and treatment).

stance of post-event therapy appears costly. Yet most cases hold that the privilege has some application in these settings.⁶⁷ Courts continue to reach this outcome despite the Supreme Court's 1986 decision in *Ritchie* indicating that disclosure of state therapy records is constitutionally required as a defense right, at least if *in camera* inspection discloses information useful to the defense.⁶⁸ But *Ritchie* dealt with official records in the possession of the state where the disclosure duty is well established,⁶⁹ not records of a therapist in private practice, and the decision is carefully circumscribed. Also, while the opinion is sympathetic to the state's nondisclosure policy, *Ritchie* stresses that the statute allows disclosure in some situations and leaves room for speculation that the result might have been different if the files were not even accessible to the police.⁷⁰ Hence, *Ritchie* allows protection of such material.

Privacy has meaning and weight in this setting, and encouraging therapy is an obvious social priority. Here patients talk to therapists on sensitive matters, bringing great potential for embarrassment. Hence, the decision to accord the protection of the privilege is clearly defensible and arguably correct. Accordingly, state legislative decisions should count heavily in federal cases, unless federal elements (such as federal policies respecting military personnel or Native

67. In the area of child abuse prosecutions, see *United States v. Haworth*, 168 F.R.D. 660, 661-62 (D.N.M. 1996) (denying defense motion to discover records of psychotherapist who examined witness; this material was privileged under *Jaffee*; disclosure was not warranted, but defendants may cross-examine witness "fully" regarding his treatment); *Farrell L. v. Superior Court*, 250 Cal. Rptr. 25 (Cal. App. 1988) (applying psychotherapist-patient privilege to group therapy sessions attended by sexual assault victim after assault). In the area of sexual assault prosecutions, see *People v. District Court*, 719 P.2d 722, 724-26 (Colo. 1986) (vacating order requiring pretrial disclosure of victim's treatment records covered by psychotherapist-patient privilege; ensuing developments might waive privilege).

68. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 58-60 (1987) (finding that in child sexual abuse trial, defense was entitled to *in camera* review of records of state Children and Youth Services file to determine whether they contained information relevant to the defense claim of innocence; full disclosure, however, would unnecessarily sacrifice state's "compelling interest in protecting its child-abuse information"). See also *People v. Hammon*, 938 P.2d 986, 993 (Cal. 1997) (concluding that in trial for molestation of defendant's foster child, no Sixth Amendment confrontation right to require *in camera* review of child's psychiatric records, to which defendant sought pretrial access for purposes of cross-examination at trial; records fit psychotherapist-patient privilege); *Dill v. State*, 927 P.2d 1315, 1322-24 (Colo. 1996) (rejecting defense argument in child abuse prosecution concerning defense right to notes of psychiatric sessions).

69. See *Ritchie*, 480 U.S. at 57-58.

70. See *id.* at 58 n.4.

Americans) justify formal creation of distinctly separate and context-specific federal privilege law. Here particularly, second-guessing state legislative solutions by choosing the "best law" seems inappropriate.

When it comes to therapy sessions involving defendants in child abuse trials, the prevailing attitude is quite different. Some states deny privilege protection to those charged with child abuse,⁷¹ although others come out the other way⁷² and some distinguish between child abuse and sexual offenses (denying the privilege only in the former setting).⁷³

Here too, privacy has meaning and weight, and encouraging therapy should be a social priority. And here too patients speak of sensitive matters. Denying the privilege to defendants means they are in effect both presumed guilty and deemed less worthy of protection. In *Jaffee*, Justice Scalia built on this proposition by arguing that one ought not to have confidential therapy while falsely denying misdeeds in court.⁷⁴ In an attempt to confer doctrinal legitimacy upon this view, plaintiffs in *Jaffee* suggested that the privilege issue could

71. See *Dill v. State*, 927 P.2d 1315, 1319 (Colo. 1996) (finding state statute abrogates privilege when therapist prepares report about abuse, but later sessions with patient/victim are still covered by privilege; no violation of defense rights in not turning over notes of later sessions); *State v. Smith* 933 S.W.2d 450, 457 (Tenn. 1996) (admitting statements by defendant to counselor in private mental health center in sexual battery trial; no common law privilege, and statutory privilege is expressly abrogated in sexual offense cases); *State v. Jett*, 626 S.2d 691, 692-93 (Fla. 1993) (observing that psychotherapist-patient privilege is abrogated by statute in any trial involving offense defined as child abuse or neglect).

72. See CAL. EVID. CODE §§ 1010-1027 (West 1995 & Supp. 1998) (creating psychotherapist-patient privilege and specifying exceptions, but making no exception for consultations involving sexual offenders or child abusers); *People v. Stritzinger*, 668 P.2d 738, 744-45 (Cal. 1983) (recognizing that exception for statements by victim of child abuse does not remove privilege covering communications with defendant). See also *In re Matthew R.*, 688 A.2d 955, 963-65 (Md. Ct. Spec. App. 1997) (applying privilege in child neglect proceedings against mother to her treatment records; where state put her condition in issue, her denials did not waive protection of privilege).

73. See IDAHO R. EVID. 503(d)(4) (creating exception to psychotherapist-patient privilege for communications "relevant to an issue concerning the physical, mental, or emotional condition of or injury to a child, or concerning the welfare of a child," including abuse, abandonment or neglect).

74. Justice Scalia can "see no reason" why officer Redmond "should be enabled both not to admit" that she shot an "innocent man" (if that is what happened) "and to get the benefits of psychotherapy by admitting it to a therapist who cannot tell anyone else." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1935 (1996) (Scalia, J., dissenting).

be usefully compared to *Miranda*⁷⁵ issues when the defendant testifies as a witness (when *Miranda*-barred statements are admissible to impeach the defendant).⁷⁶

Suffice it to say that the Court did not go in that direction in *Jaffee*, and rightly so: the twin policies underlying the privilege are to encourage therapy and protect privacy, and they seem to apply as much to people who misbehave or commit crimes as they apply to others. The attorney-client privilege is a closer analogy than the *Miranda* doctrine, and of course both the guilty and the innocent can claim the attorney-client privilege. The *Miranda* doctrine has nothing to do with privacy or encouraging professional services, and the wrinkle that permits the impeaching use of *Miranda*-barred statements reflects a considered judgment that the prophylactic purpose, which is to control police interrogations, is adequately served by blocking only the substantive use of statements obtained in violation of *Miranda* rights.⁷⁷

In the end, however, the differing judgments reflected in state rules on this point deserve respect. Those states that deny the privilege to the defendant in an abuse or sexual assault case have decided that the difficulties of proof and the importance of successful prosecution weigh heavily enough to justify an exception to the privilege. Unless federal elements appear, it is thus inappropriate to second guess state legislative solutions by choosing the "best law."

Conclusion

The Court in *Jaffee* did the right thing in recognizing a federal psychotherapist-patient privilege, applying it to therapeutic sessions with a licensed clinical social worker, and looking to state law as a source. But the task of making federal doctrine with appropriate deference to state privilege law is one that cannot be successfully pursued, and a better solution is to recognize state psychotherapist-privilege law in all federal litigation.

75. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

76. Reply Brief for Petitioner at 11 n.27, *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996) (No. 95-266).

77. The exception was carved out in *Harris v. New York*, 401 U.S. 222, 226 (1971) (admitting *Miranda*-barred statements to impeach defendants who testify), and later followed in related areas. See *United States v. Havens*, 446 U.S. 620, 627-28 (1980) (fashioning similar result for evidence seized in violation of Fourth Amendment); *Michigan v. Harvey*, 494 U.S. 344, 345-46 (1990) (establishing similar result for evidence seized in violation of the Sixth Amendment).

Difficult choices lie ahead. It seems right to apply the privilege to conversations involving a witness who testifies at trial, but even harder choices must be made in sexual assault and child abuse cases. These are not common in federal court, but they do arise, and each federal court should follow the law of the state where it sits. Accordingly, while long term difficulties will arise if the theory is that federal courts are making federal privilege law, this practice will nonetheless achieve the best possible result.

