



**NEWEST FEDERAL PRIVILEGE:
JAFFEE v. REDMOND AND THE PROTECTION OF
PSYCHOTHERAPEUTIC CONFIDENTIALITY**

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“The public has a right to every man’s evidence.” This axiom has been repeated for at least 250 years as a dominant principle of the law of evidence, where the legal compulsion to testify during trials operates to favor full disclosure as a means to ascertain the truth.¹ The notion of “privilege” stands as an exception to the expectation of disclosure. It insulates the content of some communications from public scrutiny, even when the substance of those communications might be critical to a just outcome at trial.

The rules of evidence for courts of the U.S. federal system reflect this traditional reluctance to create barriers to the truth, and judges are hesitant to identify new privileges. Recently, however, the U.S. Supreme Court chose to honor the ethic of psychotherapeutic confidentiality by creating a new federal privilege to protect the content of mental health therapy from courtroom disclosure. The result in the case of *Jaffee v. Redmond* places the psychotherapist’s office alongside the confessional and the family home as a precinct where communication is protected from the intrusive view of litigants. It is a tribute to the acceptance of mental health therapies that confidentiality is now legally recognized in a relatively modern setting.

ANCIENT PRIVILEGES: CLERGY, SPOUSES, AND GENTLEMEN

In contrast to the novelty of the psychotherapeutic privilege, other privileges have existed as part of the common law for centuries. The clergy-penitent privilege, a relic of medieval Christianity dating from at least the fifth century, was recognized in English law for over a thousand years. It was abandoned by the Anglican Church and English courts² following the Protestant Reformation.

Of similar ancient pedigree are the spousal privileges, protecting confidential disclosures between husband and wife. The common law protected private marital communications from compelled disclosure and also prohibited spouses from testifying against one another.³

Lesser known privileges were also part of the common law tradition. The code of honor in seventeenth-century England counted a gentleman's word as good as a vow, and promises to keep secrets were considered so sacred among the gentry that the common law explicitly recognized them with a legal privilege. Gentlemen could and did invoke the privilege—the right to refuse to testify in court—concerning confidences revealed in exchange for such promises.⁴

A related policy argument was voiced in favor of all these privileges: confidential communications arising out of relationships of trust should not be the subject of coerced testimony in court.⁵ The rule of privilege is meant to protect trusting relationships from destructive invasions, thereby fostering certain socially valued intimacies that are often defined by the exchange of secrets.

COMMON LAW PRIVILEGES IN AMERICAN COURTS

Many vestiges of the common law were left behind in England when America won its independence. Codes of honor reminiscent of the aristocratic did not survive, nor did the "gentleman's privilege" they recognized. The clergy-penitent privilege was discarded in England before 1776 and was therefore not available for incorporation into American law. Nevertheless, from the early years of the republic, American courts within both the state and federal systems have recognized this privilege, in some cases explicitly endorsing it.

An American state court recognized the clergy-penitent privilege as early as 1813.⁶ The first explicit endorsement in a federal court occurred in *Mullen v. United States*,⁷ when a conviction for child abuse was overturned, partially because evidence of the abuse was obtained from a Lutheran minister to whom the defendant had confessed.

The Supreme Court implicitly acknowledged the existence of a clergy-penitent privilege (and several others) in an 1875 decision. *Totten v. United States*⁸ involved an action in the U.S. Court of Claims brought by a man who had been hired by Abraham Lincoln to spy on military operations in the South during the Civil War. When payment was not forthcoming, he sued for his fee. In an opinion by Justice Field, the Court disallowed the claim, stating that

public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose.⁹

The privilege to refuse to testify concerning the communications of a spouse, once described as "essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life,"¹⁰ also remains intact under federal law.¹¹ A related but distinct privilege, the ability of one spouse to prohibit the other from giving testimony adverse to the partner's interest also survives. This privilege was modified in the 1980 case of *Trammel v. United States*.¹² *Trammel* changed the existing rule by clarifying that only the witness spouse may

invoke the privilege. A witness spouse who does not wish to testify may invoke the privilege, but testimony may not be barred by the protestations of the accused spouse.¹³

Trammel also clarified the reach of Rule 501 of the Federal Rules of Evidence, enacted by Congress as part of the 1972 revision of the federal evidence statute. As part of the revision process, the Judicial Conference of the United States defined specific privileges protecting confidential communications including those between attorneys and clients, husbands and wives, psychotherapists and patients, and members of the clergy and their congregations.¹⁴ Despite Supreme Court endorsement of this proposed rule, Congress instead adopted the current Rule 501, which enumerates no particular privilege but allows federal courts to recognize testimonial privileges on a case-by-case basis guided "by the principles of the common law as they may be interpreted...in the light of reason and experience."¹⁵ Extension of Rule 501 coverage to communications made within the context of psychotherapy was the issue presented to the Court in the Illinois case of *Jaffee v. Redmond*.

JAFFEE V. REDMOND AND PSYCHOTHERAPEUTIC PRIVILEGE

In June 1991, Mary Lu Redmond was a police officer employed by the village of Hoffman Estates, a Chicago, Illinois, suburb. As she approached an apartment complex in response to a reported "fight in progress," Redmond encountered two women who shouted that someone had been stabbed. According to her later testimony, Redmond called an ambulance, then advanced to the apartment building. Several men ran out, one brandishing a pipe. She ordered the men to get on the ground, but they ignored her. As she drew her revolver, two other men ran out of the building. One of the men was Ricky Allen who, according to Redmond, was waving a butcher knife and chasing the second man. Allen disregarded her demands that he drop the weapon, and as he was about to stab the other man, Redmond shot him. Allen died at the scene.

Allen's family subsequently filed a wrongful death suit in federal district court, alleging that Redmond had used excessive force in violation of Allen's constitutional rights. The family claimed damages under federal and state law. The two women Redmond had encountered when responding to the police report were Allen's sisters, and their recollections of the shooting contradicted Redmond's testimony. The sisters testified that Allen was unarmed when he emerged from the apartment building, and that Redmond had drawn her pistol before she left the patrol car.

Prior to trial, the plaintiffs discovered that Redmond had received counseling following the incident, completing approximately fifty sessions with Karen Beyer, a clinical social worker. The Allen family filed a subpoena for the social worker's notes to be used at trial to challenge Redmond's testimony. During depositions and the trial that followed, Redmond and her counselor refused to produce notes or testify concerning the therapeutic sessions. They asserted a psychotherapist-patient privilege that shielded the contents of those conversations from disclosure.

The district court judge ruled that the refusal had no legal basis and ended the trial with an instruction allowing the jury to presume the notes would have been unfavorable to Redmond's defense. The jury responded by awarding Allen's estate \$45,000 on the federal claim and \$500,000 on the state wrongful death claim.

The U.S. Court of Appeals for the Seventh Circuit reversed the trial ruling.¹⁶ In its order for a new trial, the appellate court noted the "unique relationship" existing between patients and psychotherapists; the existence of an Illinois law that makes communications in psychotherapy privileged; and the need to recognize such a privilege in the federal courts. The court proposed a balancing test to be used when, "in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests."¹⁷

In this case, the need for compelled testimony about confidential conversations was decreased because of the numerous eyewitnesses who could testify with firsthand knowledge of the shooting. Redmond's privacy interests were, in contrast, substantial. The court of appeals showed particular empathy for Redmond's need for counseling:

Her ability, through counseling, to work out the pain and anguish undoubtedly caused by Allen's death in all probability depended to a great deal upon her trust and confidence in her counselor, Karen Beyer. Officer Redmond, and all those placed in her most unfortunate circumstances, are entitled to be protected in their desire to seek counseling after mortally wounding another human being in the line of duty. An individual who is troubled as the result of her participation in a violent and tragic event, such as this, displays a most commendable respect for human life and is a person well-suited "to protect and to serve."¹⁸

Although the seventh circuit upheld the privilege, other federal courts had reached contrary conclusions, and there was no uniform rule to guide all federal proceedings. When the Allen family filed a petition to reverse the seventh circuit decision, the issue was ready for Supreme Court review and the petition was granted to explore the status of psychotherapeutic privilege.

The Court began its analysis with an explanation of Rule 501 of the Federal Rules of Evidence. Justice Stevens noted that the adoption of Rule 501 "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges.'"¹⁹

The question facing the court, then, was whether the interests asserted in favor of a testimonial privilege for psychotherapy outweighed the need to produce evidence. Like the court of appeals, the Supreme Court was convinced of the need for confidential exchanges in the therapeutic setting. Comparing the psychotherapist-patient privilege to the spousal and attorney-client privileges, the Court noted that all are founded on the "imperative need for confidence and trust." In such settings, patients must be

willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.²⁰

Clearly, there were adequate private interests at stake to justify the privilege in this case. But the Court held that exceptions to the rule of full disclosure must also

be related to important public interests. Facilitating treatment of the mental health needs of the public is such an interest, according to the Court. "The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."²¹

The Court found not only that policy arguments support the privilege, but that without it "confidential conversations between psychotherapists and their patients would surely be chilled," particularly when the events that led to the need for treatment—as in this case—are likely to result in litigation. Without the privilege, patients would not speak as freely and the therapeutic benefits would be lessened. There would be no corresponding benefits to the courts, because the confidential information sought would never be communicated to the therapist in the first place.

The Court emphasized how the endorsement of a psychotherapeutic privilege would place the federal courts in agreement with the states, all fifty of which have some similar type of privilege. But the state laws do differ in many particulars, including what kind of therapists are covered by the privilege. Officer Redmond was in therapy with a social worker. Should the privilege, which all states extend to licensed psychiatrists or psychologists, also apply to social workers?

The Court had "no hesitation" in finding that it should. Several reasons were cited: "social workers provide a significant amount of mental health treatment;...their clients often include the poor and those of modest means" who might not have access to providers with other credentials; and their counseling sessions "serve the same public goals" as those services provided by psychiatrists and psychologists.

The final issue the Court addressed was the "balancing test" announced by the court of appeals. The Supreme Court rejected the type of privilege that would make confidentiality contingent on a judge's after-the-fact evaluation of the importance of a patient's privacy as compared to the need for evidence. Such a rule would "eviscerate the effectiveness of the privilege." Therapists should be able to promise confidentiality, and people who enter therapy should be able to predict whether their conversations will remain confidential. "An uncertain privilege, or one that purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."²²

Though the Court was characteristically unwilling to speculate what shape the privilege would take in future cases, it ended its opinion confirming the psychotherapeutic privilege by suggesting that there may well be exceptions. The Court cited the classic *Tarasoff*²³ example, where disclosure by the therapist is allowed only to prevent "a serious threat of harm to the patient or others."²⁴

SCALIA IN DISSENT

The *Jaffee* decision recognizing a federal psychotherapeutic privilege was written by Justice Stevens and joined by six other Justices, but Justice Scalia issued a stinging dissent, joined in part by Chief Justice Rehnquist. Scalia's attack on the majority rule emphasized the injustices that may occur when evidence is excluded from trials. Not only may the public at large suffer from such a rule, Scalia asserted, but also, as in this

case, a victim may be prevented from proving a potentially valid claim. Worse yet, he noted, some defendants (civil or criminal) may be prevented from establishing a defense to their actions.

Justice Scalia saved his most severe rhetoric for his critique of the “vast and ill-defined” privilege created by the majority and the professional roles to which it would apply. Though he accepted the majority’s assertions concerning the value of therapy, Scalia nevertheless challenged the relative importance of

psychotherapy as compared to other social institutions. When is it, one must wonder, that the psychotherapist came to play such an indispensable role in the maintenance of the citizenry’s mental health? For most of history, men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, best friends and bartenders—none of whom was awarded a privilege against testifying in court. Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother-child privilege.²⁵

Addressing the majority’s claim that little useful evidence would be created absent the privilege, because patients would be unwilling to talk to therapists, Scalia asked: “If that is so, how 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?” Regarding the extension of the psychotherapeutic privilege to social workers, Scalia retorted:

It is not clear that the degree in social work requires any training in psychotherapy.... With due respect, it does not seem to me that any of this training is comparable in its rigor (or indeed in the precision of its subject) to the training of the other experts (lawyers) to whom this Court has accorded a privilege, or even of the experts (psychiatrists and psychologists) to whom...this Court proposed extension of a privilege in 1972.... I am not even sure there is a nationally accepted definition of “social worker,” as there is of psychiatrist and psychologist. It seems to me quite irresponsible to extend the so-called “psychotherapist privilege” to all licensed social workers, nationwide, without exploring these issues.²⁶

Justice Scalia noted that fourteen amicus briefs were filed in favor of the creation of a psychotherapeutic privilege,²⁷ and that none were filed in opposition. This is hardly surprising, he remarked, as “[t]here is no self-interested organization out there devoted to the pursuit of truth in the federal courts.” As a result of the Court’s decision, he concluded,

our federal courts will be the tools of injustice rather than unearth the truth where it is available to be found. The common law has identified a few instances where that is tolerable. Perhaps Congress may conclude that it is also tolerable for the purpose of encouraging psychotherapy by social workers. But that conclusion assuredly does not burst upon the mind with such clarity that a judgment in favor of suppressing the truth ought to be pronounced by this honorable Court.²⁸

CONCLUSION

The vast majority of trials do not occur in federal courts. They take place in state courts applying state law to determine the admissibility of evidence, the procedures for compelling testimony, and the definition of applicable privileges.²⁹ In federal courts, the *Jaffee* rule will be applied in only a fraction of all cases heard. Nevertheless, the creation of a new federal privilege by the Supreme Court signals a major victory by those who consider the right to confidentiality in the context of mental health therapy as important as the public's right to evidence.

Notes

1. According to the Supreme Court, [t]he familiar expression "every man's evidence" was a well-known phrase as early as the mid-18th century. Both the Duke of Argyll and Lord Chancellor Hardwicke invoked the maxim during the May 25, 1742, debate in the House of Lords concerning a bill to grant immunity to witnesses who would give evidence against Sir Robert Walpole, first Earl of Orford. [Notes omitted.] The bill was defeated soundly.
Jaffee v. Redmond, 116 S. Ct. 1923, 1996 WL 315841 (U.S. Ill.), n.8.
2. See Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and the Free Exercise of Religion*, 71 Minn. L. Rev. 723 (1987).
3. See Milton Regan, *Spousal Privilege and the Meanings of Marriage*, 81 Va. L. Rev. 2045 (1995). Regan (in notes 43-44) cites numerous examples of the adverse testimony privilege from English decisions in the years between 1579 and 1684. The privilege precludes compelled testimony by one spouse that would adversely affect the interests of the other. The 1957 MGM film classic *Witness for the Prosecution*, starring Tyrone Power as an accused murderer, Marlene Dietrich as his wife, and Charles Laughton as the defense attorney, turns on the application of the spousal privilege against compelled testimony.
4. This now abandoned common law rule (from English cases such as *Bulstrode v. Letchmere*, 2 Freem. 6, 22 Eng. Rep. 1019 (1676), and *Lord Grey's Trial*, 9 How. St. Tr. 127 (1682)) was discussed by the Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972), a case that explored the duty of journalists to disclose their confidential informants.
5. The rule against adverse spousal testimony originally found much of its rationale in the notion that women had no separate legal identity from their husbands and thus were not legally competent to testify without the husband's consent. See *Trammel v. United States*, 445 U.S. 40 (1980).
6. See *People v. Phillips*, N.Y. Court of Gen. Sess., where a Catholic priest's refusal to testify concerning matter divulged under "the Seal of Confession" was upheld (cited in Annotation, *Matters to Which the Privilege Covering Communication to Clergymen on Spiritual Matters Extends*, 71 A.L.R.3d 794 (1976)).
7. 263 F.2d 275 (1958).
8. 92 U.S. 105 (1875).
9. *Id.* at 107.
10. *Stein v. Bowman*, 38 U.S. 209 (1839).
11. See *Blau v. United States*, 240 U.S. 332 (1951). Irving Blau was jailed for refusing to testify before a grand jury concerning his own affiliation with the Communist Party as well as his wife's whereabouts. The Supreme Court overturned the contempt citation, citing the rule that "marital communications are presumptively confidential." *Id.* at 333.
12. 445 U.S. 40 (1980).

13. In its review of the policy reasons supporting the marital privileges, the *Trammel* Court assumed that when one spouse was willing to testify against the other, "their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve." *Trammel* at 913.
14. In addition to constitutional privileges (such as the privilege against self-incrimination contained in the Fifth Amendment), the proposed rule would have protected information such as secrets of state, trade secrets, and identities of informants. See Advisory Committee Notes, Federal Rules of Evidence, Rule 501, 28 U.S.C.A.
15. *Id.* Rule 501 reads as follows:

Except as otherwise required by the Constitution of the United States or provided by an Act of Congress or in the 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.
16. *Jaffee v. Redmond*, 51 F.3d 1346 (1995).
17. *Id.* at 1357.
18. *Id.* at 1358.
19. *Jaffee v. Redmond*, 1996 WL 315841 at 4 (citing *Trammel*, *supra* note 12).
20. *Id.* at 5.
21. *Id.* at 6. The Court went on to say,

This case amply demonstrates the importance of allowing individuals to receive confidential counseling. Police officers engaged in the dangerous and difficult tasks associated with protecting the safety of our communities not only confront the risk of physical harm but also face stressful circumstances that may give rise to anxiety, depression, fear, or anger. The entire community may suffer if police officers are not able to receive effective counseling and treatment after traumatic incidents, either because trained officers leave the profession prematurely or because those in need of treatment remain on the job.

Id. at n.10.
22. *Id.* at 8.
23. *Tarasoff v. Regents of the Univ. of California*, 17 Cal. 3d 425, 551 P.2d 334 (1976) (therapist has a duty to make warnings or otherwise take steps to protect identifiable victim who is the object of threats by a patient).
24. *Jaffee* at 8.
25. *Id.* at 11 (Scalia, J., dissenting). This comment echoed part of a colloquy on the importance of confidentiality that Scalia had during oral arguments with Gregory Rogus, Redmond's attorney.

Scalia: ...I just don't see the relevance of the fact that there is a duty of confidentiality here. There are duties of confidentiality in a lot of situations which we've simply utterly ignored. Parent-child, there's no parent-child privilege, for Pete's sake. That's certainly a very confidential relationship....

Rogus: This arises in the context of a professional approach to psychotherapy....

Scalia: But in principle, apart from that line drawing methodology, there's no reason to draw it there is there? I have had law clerks tell me things in confidence, and I presume they felt better after telling me.

1996 WL 88548 (U.S. Oral Arg.).
26. *Id.* at 14.

27. In addition to the brief filed by the solicitor general for the Clinton administration, briefs were filed by the National Association for Social Workers, the National Association of Police Organizations, the National Network to End Domestic Violence, the Employee Assistance Professionals Association, the American Psychoanalytic Association, the American Psychiatric Association, and the Menninger Foundation, with a score of related organizations filing separate briefs or joining others as cosignatories.
28. *Id.* at 17.
29. As Rule 501 itself makes clear (*see supra* note 15), many actions that arrive in federal court—such as diversity matters—may look to state law for the rule of privilege.