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Evidence - Recognition of a Federal Psychotherapist-Patient Privilege - Jaffee v. Redmond

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EVIDENCE—Recognition of a Federal Psychotherapist-Patient Privilege. *Jaffee v. Redmond,* 116 S. Ct. 1923 (1996).

INTRODUCTION

On June 27, 1991, Mary Lu Redmond was the first police officer to respond to a "fight in progress" call at an apartment complex.[1] Redmond reported that she arrived on the scene just as two men ran out of the apartment complex. One of the men, Ricky Allen Sr., was chasing the other while brandishing a butcher knife.[2] As Allen gained on the other man, Redmond ordered him to "drop the knife and get on the ground."[3] When Allen did not comply, Redmond fired one shot, hitting Allen in the head and killing him.[4]

Carrie Jaffee, Allen's special administrator, sued Redmond,[5] alleging that she violated Ricky Allen's constitutional rights[6] and was liable for damages under Illinois's wrongful death statute.[7] Jaffee learned during discovery that after the shooting, Redmond had participated in over fifty counseling sessions with Karen Beyer, a licensed social worker.[8] Jaffee subpoenaed Beyer and sought access to the notes she took during the

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1. Jaffee v. Redmond, 116 S. Ct. 1923, 1925 (1996).

2. Jaffee v. Redmond, 51 F.3d 1346, 1349 (7th Cir. 1995). Redmond's story conflicted with the stories of several other witnesses. Four people, all of whom were relatives of Ricky Allen, testified that Allen was unarmed when Redmond shot him. *Id.*

3. *Id.*

4. *Id.*

5. *Jaffee*, 116 S. Ct. at 1925. Jaffee also filed suit against the Village of Hoffman Estates, Illinois, Redmond's employer at the time of Allen's death. *Id.*

6. *Jaffee*, 51 F.3d at 1348. Jaffee sought damages under 42 U.S.C. § 1983 (1996). *Id.*

7. 740 ILL. COMP. STAT. 180/0.01-2.2 (West 1994). The Illinois statute provides and actio for damages:

> §1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. No action may be brought under this Act if the decedent had brought a cause of action with respect to the same underlying incident or occurrence which was settled or on which judgement was rendered.

Id.

8. *Jaffee*, 116 S. Ct. at 1926. Beyer, like Redmond, was employed by the Village of Hoffman Estates at the time of the counseling sessions. *Id.*

counseling sessions, but Redmond vigorously resisted the discovery, asserting that the contents of the notes were protected from involuntary disclosure by a psychotherapist-patient privilege.[9]

The district court rejected Redmond's motion to quash the subpoena and ordered Beyer and Redmond to disclose the notes.[10] Neither Beyer nor Redmond complied with the order, and at depositions and on the witness stand both either refused to answer questions or claimed an inability to recall the details of their conversations.[11] The district court instructed the jury that Redmond's refusal to turn over the notes had no legal justification and that the jury was to presume the contents of the notes would have been unfavorable to the defense.[12] The jury returned a verdict in favor of the plaintiff.[13]

The Seventh Circuit Court of Appeals reversed the district court's decision and remanded the case for a new trial, holding that "reason and experience," the touchstones for acceptance of a privilege under Rule 501 of the Federal Rules of Evidence, compelled recognition of a psychotherapist-patient privilege.[14] The court noted that Illinois law expressly extends such a privilege to social workers like Karen Beyer,[15]

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9. *Id.*

10. *Jaffee*, 51 F.3d at 1350-51. The trial judge denied the defendants' motion to quash based on his belief that the federal psychotherapist-patient privilege recognized in other circuits did not apply to a licensed clinical social worker. *Id.*

11. *Id.* at 1351.

12. *Id.* at n.9. Jury instruction Number 8 provided in full:

> You have heard evidence in this case that Karen Beyer, while an employee of the Village of Hoffman Estates, had numerous conversations with Mary Lu Redmond and made notes of those conversations. You have also heard testimony that Ms. Beyer's notes were the property of the Village of Hoffman Estates. During the course of this lawsuit the Court ordered the Village of Hoffman Estates to turn over all of Ms. Beyer's notes to plaintiff's attorneys. The Village was provided with numerous opportunities to obey the Court's order and refused to do so. During the course of this lawsuit Mary Lu Redmond also testified that she would not authorize or direct Ms. Beyer to turn over those notes to plaintiff's attorneys. During Ms. Beyer's testimony she referred to herself as a "therapist," although she is not a psychiatrist or psychologist—she is a social worker. This Court has ruled that there is no legal justification in this lawsuit, based as it is on a federal constitutional claim, to refuse to produce Ms. Beyer's notes of her conversations with Mary Lu Redmond, and that such refusal was unjustified. Under these circumstances, you are entitled to presume that the contents of the notes would be unfavorable to Mary Lu Redmond and the Village of Hoffman Estates.

Id.

13. *Id.* at 1352. The jury awarded Ricky Allen's estate $45,000 on the federal claim and $500,000 on the state claim. *Id.*

14. *Jaffee*, 51 F.3d at 1355.

15. *Id.* at 1350. "Particularly significant to the case before the court is the Illinois Mental Health and Development Disabilities Confidentiality Act 740 ILCS 110/1-110/17(1994)." *Id.* The Illinois statute states:

> "Therapist" means a psychiatrist, physician, psychologist, social worker, or nurse provid-

and that federal decisions rejecting such a privilege were, with one exception, over five years old.[16] The court articulated a balancing test for determining when the federal privilege should apply, stating it would not apply if, "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]

The United States Supreme Court granted *certiorari* to resolve the conflict among the circuit courts of appeals[18] and affirmed the Seventh Circuit's recognition of a federal psychotherapist-patient privilege.[19] In recognizing a federal psychotherapist-patient privilege, the Court did not attempt to define the full scope of the privilege, preferring to do so on a case-by-case basis.[20]

Since, at this point, there are no recognized exceptions to the federal psychotherapist-client privilege, practitioners must try to anticipate which exceptions are likely to be recognized. This case note will use "reason and experience," as defined by the Court, to recommend some exceptions to the privilege.

BACKGROUND

A. The Federal Rule of Privilege

In 1972, the United States Supreme Court promulgated Proposed Federal Rule of Evidence 504[21] which would have recognized a federal psychother-

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ing mental health or developmental disabilities services or any other person not prohibited by law from providing such services or from holding himself out as a therapist if the recipient reasonably believes that such person is permitted to do so. Therapist includes any successor of the therapist.

740 ILL. COMP. STAT. 110/2 (West 1994).

16. *Jaffee*, 51 F.3d at 1355.

17. *Id.* at 1357.

18. *Id.* at 1354-55. The Fifth, Ninth, Tenth and Eleventh Circuits had refused to recognize a psychotherapist-patient privilege, while the Sixth and Second Circuits, in addition to the Seventh Circuit in *Jaffee*, had explicitly recognized such a privilege. *Id. See infra notes* 32-40 and accompanying text.

19. Jaffee v. Redmond, 116 S. Ct. 1923, 1927 (1996).

20. *Id.*

21. UNIF. R. EVID. commissioners' prefatory note, 13A U.L.A. 5 (1974). In 1961 the Judicial Conference of America established an Advisory Committee on Rules of Evidence which, in turn, conducted a "Feasibility Study" and concluded that the formulation of Uniform Rules of Evidence for Federal Courts was both "feasible and desirable." In due course rules were drafted and sent to the Supreme Court. Justice Douglas dissented. Several members of Congress objected to portions of the draft submitted by the Court. Accordingly, Congress suspended the effective date of the Rules and after extensive hearings in both houses, P.L. 93-595 was enacted. This contains, for the most part, the Supreme Court draft, but with

apist-patient privilege.[22] However, Congress rejected Proposed Rule 504 in

changes, the most significant of which was the deletion of the substantive provisions of Article V [dealing with privileges] from the Federal Rules.

Id. According to the legislative history,

Article V as submitted to Congress contained 13 rules. Nine of those rules defined specific nonconstitutional privileges which the Federal Courts must recognize (i.e. Required reports, lawyer-client, psychotherapist-patient [R.504], husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and the identity of informer). Many of these rules contained controversial modifications or restrictions upon common law privileges. The House amended article V to eliminate all of the Court's specific rules on privileges. Through a single rule, 501, the House provided that privileges shall be governed by the principles of the common law as interpreted by the Courts of the United States in the light of reason and experience (a standard derived from rule 26 of the Federal Rules of Criminal Procedure) except in the case of an element of a civil claim or defense as to which State law supplies the rule of decision in which event state privilege law was to govern.

S. REP. NO. 93-1277, at 11 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7058.

22. PROPOSED FED. R. EVID. 504 reads:

(a) Definitions

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

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

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the directions of the psychotherapist, including members of the patient's family.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by order of judge. If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of

favor of Federal Rule of Evidence 501,[23] which allows for flexible recognition of new federal common law testimonial privileges.[24] Congress seemed to be concerned that the strict codification[25] of privileges proposed by the Supreme Court would not allow the federal common law of privilege to develop over time.[26] The Advisory Committee notes to Rule 501 explicitly state that the rejection of Proposed Rule 504 was not to be construed as a rejection of the recognition of a psychotherapist-patient privilege.[27]

In light of Rule 501's language stating that privilege shall be governed by the common law,[28] it is significant that the Advisory Committee stated that rejection of Proposed Rule 504 was not a rejection of such a privilege. The psychotherapist-patient privilege did not exist at common law,[29] unlike the attorney-client privilege[30] or the husband-wife privilege,[31]

> the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

Id.

23. FED. R. EVID. 501. Rule 501 states that:

> Except as otherwise required by the Constitution of the United States or provided by an Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Id.

24. United States v. Gillock, 445 U.S. 360, 367 (1980).

25. *See* H.R. REP. NO. 93-650, at 8 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075,7082. ("Another rule provided that only those privileges set forth in Article V or some other Act of Congress could be recognized by the Federal Courts.").

26. The language of Rule 501 "privilege . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" is derived from Rule 26 of the Federal Rules of Criminal Procedure. H.R. REP. NO. 93-650 at 8 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075,7082. "This rule contemplates the development of a uniform body of rules of evidence. . . . The rule does not fetter the applicable law of evidence to that originally existing at common law. It is contemplated that the law may be modified and adjusted from time to time by judicial decisions." FED. R. CRIM. P. 26 advisory committee note 1.

27. S. Rep. No. 1277, at 11 (1974). Report of Senate Committee on the Judiciary states:

> It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

Id.

28. *See supra* note 23.

29. *See* JOHN WILLIAM STRONG ET AL., MCCORMICK ON EVIDENCE § 98, at 141-43 (4th ed. 1992) ("The common law knew no privilege for confidential information imparted to a physician.").

30. *Id.* at § 87, at 120-22. Traceing the origins of the attorney-client privilege, Strong et al.

and prior to *Jaffee*, differing interpretations of Rule 501's language, caused a split among the United States Circuit Courts of Appeals.

B. Split among the Circuit Courts

The Fifth,[32] Ninth,[33] and Eleventh[34] Circuits refused to recognize a federal psychotherapist-patient privilege prior to *Jaffee*.[35] They interpreted Federal Rule of Evidence 501[36] to mean that courts could not recognize privileges that did not exist at common law, and that if such a privilege were to be defined, it should be done by Congress and not the courts.[37]

The Sixth Circuit, however, interpreted Rule 501 to mean that "the Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of the testimonial privilege in

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explaing that,

> the notion that the loyalty owed by the lawyer to his client disables him from being a witness in his client's case is deep-rooted in Roman law. This Roman tradition may or may not have been influential in shaping the early English doctrine of which we find the first traces in Elizabeth's time, that the oath and honor of the barrister and the attorney protect them from being required to disclose upon examination in court, the secrets of the client.

Id.

31. *Id.* at § 78, at 112-13 ("In this country the courts have frequently said that the statutes protecting marital communications from disclosure are declaratory of the common law.").

32. *See* United States v. Meagher, 531 F.2d 752, 753 (5th Cir. 1976).

> Under Rule 26, Fed. R. Crim. P., the admissibility of evidence in federal criminal trials is governed by common law, except as modified by Congress. Rule 501, Fed. R. of Evid., states that unless otherwise provided, the privilege of a witness shall be governed by the principles of common law as interpreted by U.S. Courts in light of experience and reason. At common law, no physician-patient privilege existed and, therefore, we recognize no such privilege in federal criminal trials today.

Id.

33. *See* In Re Grand Jury Proceedings, 867 F.2d 562, 565 (9th Cir. 1989).

> The psychotherapist-patient privilege has developed by state statutory enactment. It does not exist at common law. Because our discretion under Rule 501 is limited to the development of privileges extant in the common law, we affirm the district court's denial of the motion to quash subpoenas of Doe's psychiatric records. When Congress chose not to enact the psychiatrist-patient privilege, it may have been unaware that the privilege did not have common law foundations. . . . [B]ut we do opine that if such a privilege is to be recognized in federal criminal proceedings, it is up to Congress to define it, not this court.

Id.

34. *See* United States v. Corona, 849 F.2d 562, 567 (11th Cir. 1988) ("Evidentiary privileges are governed by common law unless modified or expanded by an Act of Congress, the Constitution, or rules prescribed by the Supreme Court and that neither common law nor statutory law provides for any type of physician-patient privilege.") *Id.*

35. The Tenth Circuit had avoided the question of whether a psychotherapist-patient privilege existed at all, but had held specifically that because of strong policy reasons, there is no such privilege in cases of child sex abuse. United States v. Burtrum, 17 F.3d 1299, 1301 (10th Cir. 1994). *See infra* note 92.

36. FED. R. EVID. 501. *See supra* note 23.

37. *See supra* notes 32, 33, and 34.

federal criminal trials 'governed by the principles of the common law as they may be interpreted. . . in the light of reason and experience.'"[38] The court recognized a federal psychotherapist-patient privilege, declaring that "reason and experience" mandated recognition of the privilege.[39]

The Second Circuit also recognized such a privilege, stating: "Given the importance of the interests at stake, personal privacy and the need for informed medical assistance, and the widespread recognition of the privilege adopted in forty-nine states, we recognize the existence of a psychotherapist-patient privilege under Rule 501."[40]

C. Psychotherapist-Patient Privilege on the State Level

As the United States Supreme Court noted in *Jaffee*, all fifty states and the District of Columbia now recognize some form of psychotherapist-patient privilege.[41] The Uniform Rules of Evidence,[42] and the

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38. *In Re* Zuniga, 714 F.2d 632, 637 (6th Cir. 1983) (quoting Trammel v. United States, 100 S. Ct. 906, 911 (1980)).

39. *Id.* at 639. The Sixth Circuit cited the necessity of confidentiality in successful psychotherapy, and the willingness of the states to create a psychotherapist-patient privilege as evidence of reason and experience. *Id.*

40. *In Re* Doe, 964 F.2d 1325, 1328 (2d Cir. 1992).

41. *See* ALA. CODE § 34-26-2 (1975); ALASKA R. EVID. 504 (Michie 1995); ARIZ. REV. STAT. § 32-2085 (1992); ARK. R. EVID. 503 (Michie 1987); CAL. EVID. CODE §§ 1010, 1012, 1014 (West 1995); COLO. REV. STAT. § 13-90-107(g)(1) (1987); CONN. GEN. STAT. § 52-146c (1995); DEL. R. EVID. 503 (Michie 1997); D.C. CODE ANN. § 14-307 (1995); FLA. STAT. ch. 90.503 (1992); GA. CODE ANN. § 24-9-21 (1995); HAW. R. EVID. 504, 504.1 (Michie 1997); IDAHO R. EVID. 503 (Michie 1996); 225 ILL. COMP. STAT. 15/5 (West 1994); IND. CODE § 25-33-1-17 (1993); IOWA CODE § 622.10 (1987); KAN. STAT. ANN. § 74-5323 (1985); KY. R. EVID. 507 (Michie 1997); LA. CODE EVID. ANN. art. 510 (West 1995); ME. R. EVID. 503 (West 1996); MD. CODE ANN., CTS. & JUD. PROC. § 9-109 (1995); MASS. GEN. LAWS ANN. ch. 233, § 20B (West 1995); MICH. COMP. LAWS ANN. § 333.18237 (West 1996); MINN. STAT. ANN. § 595.02 (West 1988); MISS. R. EVID. 503 (West 1996); MO. REV. STAT. § 491.060 (1994); MONT. CODE ANN. § 26-1-807 (1995); NEB. REV. STAT. § 27-504 (1995); NEV. REV. STAT. ANN. § 49.209 (Michie 1995); N.H. R. EVID. 503 (Michie 1996); N.J. STAT. ANN. § 45:14B-28 (West 1995); N.M. R. EVID. 11-504 (Michie 1997); N.Y. C.P.L.R. § 4507 (McKinney 1992); N.C. GEN. STAT. § 8-53.3 (Supp. 1995); N.D. R. EVID. 503 (Michie 1996); OHIO REV. CODE ANN. § 2317.02 (Banks-Baldwin 1995); OKLA. STAT. tit. 12 § 2503 (1991); OR. R. EVID. 504, 504.1 (West 1997); 42 PA. CONS. STAT. § 5944 (1982); R.I. GEN. LAWS §§ 5-37.3-3, 5-37.3-4 (1995); S.C. CODE ANN. § 19-11-95 (Law Co-op. 1995); S.D. CODIFIED LAWS §§ 19-13-6 to -11 (Michie 1995); TENN. CODE ANN. § 24-1-207 (1980); TEX. R. CIV. EVID. 509, 510 (West 1996); UTAH R. EVID. 506 (Michie 1996); VT. R. EVID. 503 (1983); VA. CODE ANN. § 801-400.2 (Michie 1992); WASH. REV. CODE § 18.83.110 (1994); W. VA. CODE § 27-3-1 (1992); WIS. STAT. § 905.04 (1993-1994); WYO. STAT. ANN. § 33-27-123 (Michie 1995).

42. UNIF. R. EVID. 503, 13 U.L.A. 584-85 (1974).

Rule 503. [Physician and Psychotherapist—Patient Privilege].

(a) Definitions. As used in this rule:

(1) A "patient" is a person who consults or is examined or interviewed by a [physician or] psychotherapist.

[(2) A "physician' is a person authorized to practice medicine in any state or na-

California Evidence Code, both of which recognize a psychotherapist-patient privilege, have significantly influenced the development of both state and federal rules.[43]

All states recognize exceptions to the privilege. At least forty states recognize some form of the patient-litigant exception.[44] In twenty-five

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tion, or reasonably believed by the patient so to be.]

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

(4) A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the [physician or] psychotherapist; including members of the patient's family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communication made for the purpose of diagnosis or treatment of his [physical,] mental or emotional condition, including alcohol or drug addiction, among himself, his [physician or] psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the [physician or] psychotherapist, including members of the patient's family.

c) Who may claim the privilege. The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the [physician or] psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by order of court. If the court orders an examination of the [physical,] mental[,] or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) Condition as an element of claim or defense. There is no privilege under this rule as to a communication relevant to an issue of the [physical,] mental[,] or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense.

Id. (modifications in original).

43. The first version of the Uniform Rules was promulgated in 1953. California used these rules as a model for the California Evidence Code, which was used as a model for the development of the Federal Rules of Evidence enacted in 1975. In 1974 the Uniform Rules were modified to reflect as closely as possible P.L. 93-595 which later became the Federal Rules of Evidence. UNIF. R. EVID. commissioners' prefatory note, 13A U.L.A. 4-5 (1974).

44. *See supra* note 42, UNIF. R. EVID. 503(d)(3). State statutes recognizing this exception include: ALA. CODE § 34-26-2 (1975); ALASKA R. EVID. 504 (Michie 1995); ARIZ. REV. STAT. § 32-2085 (1992); CAL. EVID. CODE §§ 1010, 1012, 1014 (West 1995); CONN. GEN. STAT. § 52-146c (1995); DEL. R. EVID. 503 (Michie 1997); D.C. CODE ANN. § 14-307 (1995); FLA. STAT. ch.

states, the privilege does not apply to information relating to child abuse.[45] California enumerated twelve exceptions to its psychotherapist-patient privilege.[46] There are eight enumerated exceptions to Wyoming's psychotherapist-patient privilege.[47]

90.503 (1992); GA. CODE ANN. § 24-9-21 (1995); HAW. R. EVID. 504, 504.1 (Michie 1997); 225 ILL. COMP. STAT. 15/5 (West 1994); IND. CODE § 25-33-1-17 (1993); IOWA CODE § 622.10 (1987); KAN. STAT. ANN. § 74-5323 (1985); LA. CODE EVID. ANN. art. 510 (West 1995); ME. R. EVID. 503 (West 1996); MD. CODE ANN., CTS. & JUD. PROC. § 9-109 (1995); MASS. GEN. LAWS ANN. ch. 233, § 20B (West 1995); MINN. STAT. ANN. § 595.02 (West 1988); MISS. R. EVID. 503 (West 1996); MONT. CODE ANN. § 26-1-807 (1995); NEB. REV. STAT. § 27-504 (1995); N.H. R. EVID. 503 (Michie 1996); N.J. STAT. ANN. § 45:14B-28 (West 1995); N.M. R. EVID. 11-504 (Michie 1997); N.Y. C.P.L.R. § 4507 (McKinney 1992); N.D. R. EVID 503 (Michie 1997); OHIO REV. CODE ANN. § 2317.02 (Banks-Baldwin 1995); OKLA. STAT. tit. 12, § 2503 (1996); OR. R. EVID. 504, 504.1 (West 1997); 42 PA. CONS. STAT. § 5944 (1982); R.I. GEN. LAWS §§ 5-37.3-3, 5-37.3-4 (1995); S.C. CODE ANN. § 19-11-95 (Law Co-op 1995); S.D. CODIFIED LAWS §§ 19-13-6 to 19-13-11 (Michie 1995); TENN. CODE ANN. § 24-1-207 (1980); TEX. R. CIV. EVID. 509, 510 (West 1996); UTAH R. EVID. 506 (Michie 1996); VT. R. EVID. 503 (1983); VA. CODE ANN. § 801-400.2 (Michie 1992); WASH. REV. CODE § 18.83.110 (1994); WIS. STAT. § 905.04 (1993-1994); WYO. STAT. ANN. § 33-27-123 (Michie 1995).

45. ARIZ. REV. STAT. ANN. § 32-3283 (West 1992); ARK. CODE ANN. § 17-46-107(3) (1995); CAL. EVID. CODE § 1027 (WEST 1995); COLO. REV. STAT. § 19-3-304 (Supp. 1995); DEL. R. EVID. 503(d)(4) (MICHIE 1997); GA. CODE ANN. § 19-7-5(C)(10)(G) (1991); IDAHO CODE § 54-3213(3) (1994); LA. CODE EVID. ANN. art. 510(b)(2)(k) (WEST 1995); MD. CODE ANN., CTS. & JUD. PROC. § 9-121(e)(4) (1995); MASS. GEN. LAWS ANN. ch. 119, § 51A (West 1994); MICH. COMP. LAWS ANN. § 722.623 (West 1992); MINN. STAT. ANN. § 595.02.2(a) (West 1988); MISS. CODE ANN. § 73-53-29(e) (1995); MONT. CODE ANN. § 37-22-401(3) (1995); NEB. REV. STAT. § 28-711 (1995); N.M. STAT. ANN. § 61-31-24(C) (Supp. 1995); N.Y.C.P.R. § 4508 (a)(3) (McKinney 1993); OHIO REV. CODE ANN. § 2317.02(G)(1)(a) (Banks-Baldwin 1995); OR. REV. STAT. § 40.250(4) (1991); R.I. GEN. LAWS § 5-37.3-4(B)(4) (1995); S.D. CODIFIED LAWS § 36-26-30(3) (Michie 1994); TENN. CODE. ANN. § 63-23-107(b) (1990); VT. R. EVID. 503(d)(5); W. VA. CODE § 30-30-12(a)(4) (1993); WYO. STAT. ANN. § 14-3-205 (Michie 1994).

46. CAL. EVID. CODE §§ 1016-1027 (West 1995) (§ 1016 patient-litigant; § 1017 psychotherapist appointed by court or board of prison terms; § 1018 Crime or Tort; § 1019 parties claiming through deceased patient; § 1020 breach of duty arising out of psychotherapist-patient relationship; § 1021 intention of deceased patient concerning writing affecting property interest; § 1022 validity of writing affecting property interest; § 1023 proceeding to determine sanity of criminal defendant; § 1024 patient dangerous to himself or others; § 1025 proceeding to establish competence; § 1026 required report; § 1027 child under 16 victim of crime).

47. WYO. STAT. ANN. § 33-27-123 (Michie Supp. 1996) states:

> (a) In Judicial proceedings, whether civil, criminal, or juvenile, in legislative and administrative proceedings, and in proceedings preliminary and ancillary thereto, a patient or client, or his guardian or personal representative, may refuse to disclose or prevent the disclosure of confidential information, including information contained in administrative records, communicated to a person licensed or otherwise authorized to practice under this act, or to persons reasonably believed by the patient or client to be so licensed, and their agents, for the purpose of diagnosis, evaluation or treatment of any mental or emotional condition or disorder. The psychologist or school psychologist shall not disclose any information communicated as described above in the absence of an express waiver of the privilege except in the following circumstances:
>
> (i) Where abuse or harmful neglect of children, the elderly or disabled or incompetent individuals is known or reasonably suspected;
>
> (ii) Where the validity of a will of a former patient or client is contested;

PRINCIPAL CASE

In an opinion written by Justice Stevens,[48] the United States Supreme Court held that a federal psychotherapist-patient privilege extending to social workers, psychiatrists and psychologists, exists under Rule 501 of the Federal Rules of Evidence.[49] It also held that this privilege protected the conversations between officer Redmond and Karen Beyer, and the notes taken during their counseling sessions, from compelled disclosure.[50]

The Court framed the question for review as "whether a privilege protecting confidential communications between a psychotherapist and her patient 'promotes sufficiently important interests to outweigh the need for probative evidence.'"[51] According to the Court, the general rule is that justice demands access to "every man's evidence," and that testimonial privileges are disfavored because they are in derogation of the truth.[52] However, the Court explained, "exceptions from the general rule disfavoring testimonial privileges may be justified by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'"[53]

The Court noted that successful psychotherapy depends completely on the patient's willingness and ability to talk freely.[54] Thus, "the psychotherapist privilege serves the public interest by facilitating the provision of

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(iii) Where such information is necessary for the psychologist or school psychologist to defend against a malpractice action brought by the patient or client;
(iv) Where an immediate threat of physical violence against a readily identifiable victim is disclosed to the psychologist or school psychologist;
(v) In the context of civil commitment proceedings, where an immediate threat of self-inflicted damage is disclosed to the psychologist or school psychologist;
(vi) Where the patient or client, by alleging mental or emotional damages in litigation, puts his mental state in issue and production of these materials by the patient or client is required by law;
(vii) Where the patient or client is examined pursuant to court order; or
(viii) In the context of investigations and hearings brought by the patient or client and conducted by the board where violations of this act are at issue. Information that is deemed to be of sensitive nature shall be inspected by the board in camera and the board shall determine whether or not the information shall become a part of the record and subject to public disclosure.

Id.

48. Jaffee v. Redmond, 116 S. Ct. 1923 (1996). Justices Stevens, O'Connor, Kennedy, Souter, Thomas, Ginsburg and Breyer comprised the majority, with Justice Scalia dissenting and Chief Justice Rehnquist joining in Part III of Justice Scalia's dissent. *Id.*

49. *Id.* at 1932.

50. *Id.*

51. *Id.* at 1928.

52. *Id.*

53. *Id.* (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)).

54. *Jaffee*, 116 S. Ct. at 1928.

appropriate treatment for individuals suffering the effects of a mental or emotional problem, and the mental health of our citizenry . . . is a public good of transcendent importance."[55]

Noting that all fifty states and the District of Columbia recognize some sort of psychotherapist-patient privilege,[56] the Court stated that this confirmed the appropriateness of recognizing such a privilege under Rule 501. According to the Court, "this consensus among the states indicates that reason and experience support recognition of the privilege."[57]

The Court disposed of the petitioner's contention that language in Rule 501[58] requires that only those privileges extant at common law be recognized, reasoning that "it is of no consequence that the privilege in the vast majority of States is the product of legislative action rather than judicial decision. Although common-law rulings may once have been the primary source of new developments in federal privilege law, that is no longer the case."[59] The Court refused to adopt the Seventh Circuit's balancing test, stating that "an uncertain privilege . . . is little better than no privilege at all."[60]

The Court further stated that social workers were included in the privilege, explaining that the importance of the role of social workers in psychotherapy is much greater now than it was when Rule 504 was proposed in 1972. Noting that the vast majority of states extend a privilege to social workers, the Court held that the psychotherapist-patient privilege extends to licensed social workers.[61]

Finally, the Court declined to delineate the full scope of the federal privilege or any exceptions to it, deciding to define the details on a case-by-case basis.[62] The Court did, however, state: "[We] do not doubt that

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55. *Id.* at 1929.

56. *Id. See supra* note 41 and accompanying text.

57. *Jaffee*, 116 S. Ct. at 1930.

58. *See supra* notes 23, 31 and accompanying text.

59. *Jaffee*, 116 S. Ct. at 1930 ("In Funk v. United States, 54 S.Ct. 212 (1933), we recognized that it is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience.'"). The Court also rejected the petitioner's argument that differences in the scope of the state recognized privileges undermine the consensus by explaining: "These variations in the scope of the protection are too limited to undermine the force of the state's unanimous judgment that some form of psychotherapist privilege is appropriate." *Id.* at n.13.

60. *Id.* at 1932.

61. *Id.* at 1931-32. Forty-six states are listedby the court as explicitly extending a testimonial privilege to licensed social workers. *Id.* at n.17.

62. *See Id.* at 1932.

> These considerations are all that is necessary for the decision of this case. A rule that authorizes the recognition of new privileges on a case-by-case basis [R. 501] makes it appropriate to define the details of new privileges in a like manner. Because this is the first

there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist."[63]

In dissent, Justice Scalia criticized the psychotherapist-patient privilege as "new, vast, and ill-defined."[64] He stated that the privilege was at odds with the rule recognized by the Supreme Court in *United States v. Nixon*,[65] that testimonial privileges "are not lightly created nor expansively construed."[66]

Justice Scalia countered the argument that successful pyschotherapy depends on the privilege by asserting that "if this is so, why did psychotherapy thrive before the creation of this privilege?"[67] Justice Scalia also disagreed with the Court's judgment that little probative evidence will be made unavailable by the new privilege, claiming that this can only be determined by the scope of the privilege, which he said the Court "steadfastly" refused to define.[68]

Further, Justice Scalia attacked the Court's finding that the recognition of a federal privilege simply upholds the state determination that such a privilege is appropriate. He cited the varying state privileges and argued that no federal policy can honor most of the varying state privileges.[69] Justice Scalia noted that all of the state privileges were legislatively created and concluded that on the federal level, Congress should answer the question and not the Court.[70]

Finally, Justice Scalia, joined by Chief Justice Rehnquist, argued that even if a federal common law privilege is to be created, it should not extend to social workers.[71] He cited Proposed Rule 504 — used by the Court to support its recognition of a privilege extending to social workers — which specifically limits the proposed privilege to psychiatrists practicing medicine and licensed clinical psychologists.[72] He also argued that

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case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would "govern all conceivable future questions in this area."

Id. (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).

63. *Jaffee*, 116 S. Ct. at n.19.

64. *Id.* at 1933 (Scalia, J., dissenting).

65. 418 U.S. 683 (1974).

66. *Jaffee*, 116 S. Ct. at 1933 (Scalia, J., dissenting) (quoting U.S. v. Nixon, 418 U.S. at 683, 710 (1974)).

67. 116 S. Ct. at 1934 (Scalia, J., dissenting).

68. *Id.*

69. *Id.* at 1935.

70. *Id.* at 1936.

71. *Id.*

72. *Id. See supra* note 22.

the vastly differing state definitions of social worker will make uniform application of the privilege impossible,[73] and further observed that "[n]o State has adopted the [social worker] privilege without restriction."[74]

ANALYSIS

In accordance with the language of Federal Rule of Evidence 501,[75] the United States Supreme Court in *Jaffee* stated that the scope of the federal psychotherapist-patient privilege should be determined on a case-by-case basis.[76] The language of Rule 501 also demanded that the Court decide whether to recognize a new privilege "in the light of reason and experience." For "reason and experience," the Court relied heavily on two sources: the experience of state legislatures[77] and the suggestive authority of a Proposed Federal Rule of Evidence.[78] These two sources of "reason and experience" suggest at least three exceptions to the psychotherapist-patient privilege: a) where there is a serious threat of harm to the patient or others; b) cases involving child abuse; and c) cases in which the patient relies on his or her mental or emotional condition as an element of a claim or defense.

A. Serious Threat of Harm to the Patient or Others

In dictum, the *Jaffee* Court stated that "if a serious threat of harm to the patient or others can be averted only by means of a disclosure by the therapist," perhaps the privilege would have to give way.[79] In *Tarasoff v. Regents of University of California*,[80] the California Supreme Court stated: "We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins."

At least eleven states, including Wyoming and California, explicitly codify this exception to the psychotherapist-patient privilege.[81] According

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73. *Jaffee*, 116 S. Ct. at 1939 (Scalia, J., dissenting).

74. *Id.* at 1940.

75. *See supra* note 23.

76. *Jaffee*, 116 S. Ct. at 1932 n.19.

77. *See supra* note 59.

78. *Jaffee*, 116 S. Ct. at 1930 ("The uniform judgement of the States is reinforced by the fact that a psychotherapist privilege was among the nine specific privileges recommended by the Advisory Committee in its proposed privilege rules.").

79. *Id.* at 1932 n.19.

80. 551 P.2d 334 (Cal. 1976).

81. CAL. EVID. CODE §§ 1010, 1012, 1014 (West 1995); CONN. GEN. STAT. § 52-146c (1995); 225 ILL. COMP. STAT. 15/5 (West 1994); MASS. GEN. LAWS ANN. ch. 233, § 20B (West

to Wyoming law, an exception applies where "an immediate threat of physical violence against a readily identifiable victim is disclosed to the psychologist,"[82] or "in the context of civil commitment proceedings, where an immediate threat of self-inflicted damage is disclosed to the psychologist."[83] California's exception provides:

> there is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such a mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.[84]

Eighteen additional state privileges[85] include exceptions, modeled after Uniform Rules of Evidence 503's exception to the privilege for hospitalization proceedings,[86] which are broad enough to encompass the serious threat of harm exception. In Massachusetts, this exception reads:

> The privilege granted hereunder shall not apply to any of the following communications: (a) If a psychotherapist, in the course of his diagnosis or treatment of the patient, determines that the patient is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the patient against himself or another person, and on the basis of such determination discloses such communication either for the purpose of placing or retaining the patient in such hospital, provided however that the provisions of this section shall continue in effect after the patient is in said hospital, or placing the patient under arrest or under the supervision of law enforcement authorities.[87]

1995); MICH. COMP. LAWS ANN. § 333.18237 (West 1996); OHIO REV. CODE ANN. § 2317.02 (Banks-Baldwin 1995); R.I. GEN. LAWS §§ 5-37.3-3, 5-37.3-4 (1995); S.C. CODE ANN. § 19-11-95 (Law Co-op 1995); TENN. CODE ANN. § 24-1-207 (1980); VT. R. EVID. 503; W. VA. CODE § 27-3-1 (1992); WYO. STAT. ANN. § 33-27-123 (Michie supp. 1996).

82. WYO. STAT. ANN. § 33-27-123(a)(iv) (Michie Supp. 1996). *See supra* note 47.

83. WYO. STAT. ANN. § 33-27-123(a)(v) (Michie Supp. 1996). *See supra* note 47.

84. CAL. EVID. CODE § 1024 (West 1995). *See supra* note 46.

85. ALASKA R. EVID. 504 (Michie 1995); ARIZ. REV. STAT. § 32-2085 (1992); DEL. R. EVID. 503 (Michie 1997); FLA. STAT. ch. 90.503 (1992); HAW. R. EVID. 504, 504.1 (Michie 1997); KY. R. EVID. 507 (Michie 1997); ME. R. EVID. 503 (West 1996); MD. CODE ANN., CTS. & JUD. PROC. § 9-109 (1995); MASS. GEN. LAWS ANN. ch. 233, § 20 B (West 1995); MISS. R. EVID. 503 (West 1996); NEB. REV. STAT. § 27-504 (1995); N.M. R. EVID. 11-504 (Michie 1997); N.D. R. EVID 503 (Michie 1997); OKLA. STAT. tit. 12 § 2503 (1991); S.D. CODIFIED LAWS §§ 19-13-6 to 19-13-11 (Michie 1995); UTAH R. EVID. 506 (Michie 1996); VT. R. EVID. 503 (1983); WIS. STAT. § 905.04 (1993-1994).

86. UNIF. R. EVID. 503(d)(1); *See supra* note 42.

87. MASS. GEN. LAWS ANN. ch. 233, § 20B(a) (West 1996).

The Ohio Supreme Court explained that a psychiatrist does not give "testimony" when he transports a patient to the hospital on an emergency or involuntary basis if the psychiatrist has reason to believe that the patient is mentally ill subject to hospitalization and represents a substantial risk of harm to himself or others. "The physician-patient privilege places no curtailment on the freedom of action of a psychotherapist in a situation where he or she believes a patient presents a threat to society if not hospitalized."[88] According to these sources, the language of the hospitalization exception[89] seems to be broad enough to encompass situations where a serious threat of harm to the patient or others can be averted only by means of disclosure.

Thus, a total of twenty-nine states, including the eighteen states that model their privileges after Uniform Rule of Evidence 503, either explicitly or implicitly support an exception in cases involving a serious threat of harm. This state law evidence of "reason and experience," coupled with the Court's own intimation that this exception is perhaps necessary suggest that the Court should recognize a serious threat of harm exception to the federal psychotherapist-patient privilege.

B. Cases Involving Child Abuse

There is similar support in light of "reason and experience" for recognizing an exception in cases involving child abuse. At least one federal appeals court, twenty-five state legislatures,[90] and a recent congressional proposal of a new Federal Rule of Evidence suggest that the psychotherapist-patient privilege should yield in cases of child abuse.

In a 1994 decision, the Tenth Circuit aptly explained the policy reasons behind creating this type of exception:

> Criminal child sexual abuse cases illustrate well the policy reasons behind the presumption against testimonial privileges in criminal cases. These crimes occur in a clandestine manner and victimize a vulnerable segment of society. Moreover, minor victims often are intimidated by the legal system and may have difficulty testifying. Thus, these crimes may be difficult to detect and prosecute. We conclude that significant evidentiary need compels the admission of this type of relevant evidence in child sexual abuse prosecutions.[91]

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88. *In Re* Miller, 585 N.E.2d 396, 405 (Ohio 1992).
89. *See supra* note 42.
90. *See supra* note 45.
91. United States v. Burtrum, 17 F.3d. 1299, 1302 (10th Cir.1994).

Twenty-five states' laws agree with this assessment. Wyoming law, for example, states that "evidence . . . shall not be excluded on the ground that it constitutes a privileged communication in cases involving child abuse."[92] California law makes an exception to the privilege where the patient is a child under the age of sixteen, the psychotherapist has reasonable cause to believe that the patient has been the victim of a crime and disclosure of the communication is in the best interest of the child.[93]

The general acceptance of this policy, is further evidenced by the 1990 crime bill, which was ultimately rejected. In this bill Congress proposed a new Federal Rule of Evidence:

> Rule 502. In any criminal action or proceeding after a report of the abuse, neglect, or sexual exploitation of an individual who has not attained the age of 18 years, the privileged nature of any communications between physician and patient, psychotherapist and patient, psychologist and client, social worker and client, any other health care provider and patient, or husband and wife privileges shall not apply.[94]

The "reason and experience" of federal common law as articulated by the Tenth Circuit, the laws of at least twenty-five states, and the suggestive evidence of the 1990 crime legislation confirm that in child abuse situations, the psychotherapist-patient privilege must give way to the overriding public responsibility to promote the safety of children.

C. Patient's Mental or Emotional State in Issue

Almost all state sources and the original Proposed Federal Rule of Evidence 504 include an exception to the psychotherapist-patient privilege where a patient puts his or her mental or emotional state in issue.[95] Wyo-

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92. WYO. STAT. ANN. § 14-3-210(a)(i)-(iii) (Michie 1994). This statute was applied to Wyoming's privilege statute in C.P. v. Laramie County Dep't of Pub. Assistance & Soc. Servs., 648 P.2d 512 (Wyo. 1982) (holding that no evidentiary privileges apply in cases involving child abuse).

93. CAL. EVID. CODE § 1027 (West 1995). *See supra* note 46.

94. 136 CONG. REC. H8758-02 (1990).

95. ALASKA R. EVID. 504 (Michie 1995); ARK. R. EVID. 503 (Michie 1996); CAL. EVID. CODE § 1016 (West 1995); CONN. GEN. STAT. § 52-146c (1995); DEL. R. EVID. 503 (Michie 1997); D.C. CODE ANN. § 14-307 (1995); FLA. STAT. ch. 90.503 (1992); GA. CODE ANN. § 24-9-21 (1995); HAW. R. EVID. 504, 504.1 (Michie 1997); 225 ILL. COMP. STAT. 15/5 (West 1994); IOWA CODE § 622.10 (1987); KY. R. EVID. 507 (Michie 1997); LA. CODE EVID. ANN. art. 510 (West 1995); ME. R. EVID. 503 (West 1996); MD. CODE ANN., CTS. & JUD. PROC. § 9-109 (1995); MASS. GEN. LAWS ANN. ch. 233, § 20B (West 1995); MINN. STAT. ANN. § 595.02 (West 1988); MISS. R. EVID. 503 (West 1996); MONT. CODE ANN. § 26-1-807 (1995); NEB. REV. STAT. § 27-504 (1995); N.J. STAT. ANN. § 45:14B-28 (West 1995); N.M. R. EVID. 11-504 (Michie 1997); N.Y. C.P.L.R.

ming law states that there is no privilege "where the patient or client, by alleging mental or emotional damages in litigation, puts his mental state in issue."[96] According to California law:

> [T]here is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by: the patient, any party claiming through or under the patient; any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or the plaintiff in an action brought for damages for the injury or death of the patient.[97]

Further, Proposed Federal Rule of Evidence 504, which the Supreme Court relied on as suggestive evidence in *Jaffee*, has a "patient-litigant" exception:

> There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense. [98]

The language of Rule 503 of the current Uniform Rules of Evidence is almost identical.[99]

Some of the states which do not have statutory patient-litigant exceptions have created common-law exceptions. In many of these states, reliance upon an emotional or mental condition as an element of a claim or defense constitutes an implied waiver of the psychotherapist-privilege.[100]

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§ 4507 (McKinney 1992); N.D. R. EVID 503 (1997 Michie); OHIO REV. CODE ANN. § 2317.02 (Banks-Baldwin 1995); OKLA. STAT. tit. 12, § 2503 (1991); OR. R. EVID. 504, 504.1 (West 1997); R.I. GEN. LAWS §§ 5-37.3-3, 5-37.3-4 (1995); S.C. CODE ANN. § 19-11-95 (Law Co-op. 1995); S.D. CODIFIED LAWS §§ 19-13-6 to 19-13-11 (Michie 1995); TENN. CODE ANN. § 24-1-207 (1980); TEX. RULES. CIV. EVID. 509, 510 (West 1996); UTAH R. EVID. 506 (Michie 1996); VT. R. EVID. 503 (1983); WASH. REV. CODE § 18.83.110 (1994); W. VA. CODE § 27-3-1 (1992); WIS. STAT. § 905.04 (1993-1994); WYO. STAT. ANN. § 33-27-123 (Michie supp. 1996); *See also* Von Goyt v. State, Dep't of Pensions & Sec., 461 So.2d 821 (Ala. Civ. App. 1984).

96. WYO. STAT. ANN. § 33-27-123(a)(vi) (Michie Supp. 1996). *See supra* note 47.

97. CAL. EVID. CODE § 1016 (West 1995). *See supra* note 46.

98. PROPOSED FED. R. EVID. 504(3)(d). *See supra* note 22.

99. UNIF. R. EVID. 503, 13A U.L.A. 584 (1974). *See supra* note 42.

100. ALA. CODE § 34-26-2 (1975); ARIZ. REV. STAT. § 32-2085 (1992); IOWA CODE § 622.10 (1987); LA. CODE EVID. ANN. art. 510 (West 1995); N.Y. C.P.L.R. § 4507 (McKinney 1992); R.I. GEN. LAWS §§ 5-37.3-3, 5-37.3-4 (1995); WASH. REV. CODE § 18.83.110 (1994).

Thus, recognition of this exception is supported by the "reason and experience" of at least forty states and the suggestive authority of Proposed federal Rule 504 and Uniform Rule of Evidence 503.

While none of the exceptions discussed in this case note is supported by a consensus of all fifty states and the District of Colombia, each reflects the "reason and experience" of a majority of the states, bolstered by the suggestive authority of the Uniform Rules and the original Proposed Rules of Evidence, or Supreme Court dicta. Hence, by the *Jaffee* Court's own reasoning, each is likely to be recognized as an exception to the federal psychotherapist-patient privilege.

CONCLUSION

The Supreme Court's decision to define the scope of the psychotherapist-patient privilege on a case-by-case basis means that courts will once again be looking to "reason and experience"[101] to determine what exceptions to the privilege to recognize. The "reason and experience" evidenced by a survey of state law, suggestive authority, and selected federal law indicates that policy reasons strongly favor at least three exceptions:

A) In cases where there is an immediate danger of physical harm to the patient or others;

B) In cases involving child abuse; and

C) In cases in which the mental or emotional condition of the patient is in issue.

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101. FED. R. EVID. 501. *See supra* note 23.