
ALL ABOARD THE BANDWAGON!: THE
UNCERTAIN SCOPE OF THE FEDERAL
PSYCHOTHERAPIST-CLIENT PRIVILEGE IN
THE AFTERMATH OF *JAFFEE v. REDMOND*

INTRODUCTION

In *Jaffee v. Redmond*,¹ the Supreme Court may have raised more questions than it resolved. *Jaffee* involved a licensed clinical social worker's claim of privilege to avoid compelled disclosure of client confidences in a section 1983 federal civil rights violation claim and a pendent state wrongful death action.² Although the Court

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

2. *See id.* at 1925. In 1991, Hoffman Estates, Illinois police officer Mary Lu Redmond responded to a "fight in progress" call at an apartment complex. *See id.* As Redmond arrived at the scene, witnesses approached her, shouting that a stabbing had just occurred in one of the apartments. *See id.* She noticed two men running from the building. *See id.* According to Redmond, one of the men, Ricky Allen, brandished a butcher knife and ignored her repeated requests to stop. *See id.* To Redmond, it appeared that Allen was preparing to stab the man he was chasing. *See id.* at 1925-26. Redmond fired her weapon, killing Allen and igniting a hostile confrontation with the crowd that had gathered at the scene. *See id.* at 1926.

Following the shooting, two critical developments arose. First, Redmond participated in counseling sessions with a state-licensed clinical social worker, who worked for the Village of Hoffman Estates in an employee assistance program. *See id.* Second, Allen's relatives instituted state wrongful death and Section 1983 actions, alleging that Redmond violated Allen's constitutional rights by using excessive force. *See id.* During pretrial discovery, plaintiffs sought access to the licensed clinical social worker's notes. *See id.* The social worker strenuously refused disclosure, invoking the psychotherapist-patient privilege. *See id.* The district court judge denied the social worker's claim of privilege and ordered production. *See id.* Both Redmond and her social worker ignored the order. *See id.* At trial, the district judge instructed the jury that because no legal justification supported the social worker's refusal to

recognized a psychotherapist-patient privilege under Rule 501 of the Federal Rules of Evidence,³ its opinion offered little insight about the categories of mental health professionals to whom the privilege could apply.⁴ In dictum, the Court declared that confidential communications made to licensed psychiatrists and psychologists would clearly fall within the privilege.⁵ Acknowledging that the privilege's rationale could apply to other psychotherapeutic relationships, the Court extended the privilege to the licensed clinical social worker at issue in *Jaffee*.⁶

Based on the reasoning underlying this extension, however, other mental health practitioners now have grounds for advocating further enlargement of the privilege to cover their own professional affiliations. In fact, several professional associations advocated an extension of the psychotherapist privilege even before the *Jaffee* Court announced its existence. The National Association of Social

turn over her notes, the jury could infer that their contents were unfavorable to Redmond. *See id.* The jury awarded plaintiffs a total of \$545,000. *See id.*

On appeal, the Seventh Circuit reversed, holding that the trial court erred by failing to protect the confidential communications between Redmond and her social worker. *See Jaffee v. Redmond*, 51 F.3d 1346, 1357 (7th Cir. 1995). Although the Seventh Circuit articulated its recognition of a psychotherapist-patient privilege, it limited the privilege's application by creating a balancing test. *See id.* The privilege would not apply, the Seventh Circuit noted, if "the evidentiary need for the [information] . . . outweighs [the] patient's privacy interest." *Id.*

3. *See Jaffee*, 116 S. Ct. at 1930. Rule 501 of the Federal Rules of Evidence provides, in relevant part:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

FED. R. EVID. 501.

4. *See Jaffee*, 116 S. Ct. at 1932 (stating that "[b]ecause this is the first 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'" (citing *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981))).

5. *See id.* at 1931 (stating that "[a]ll agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists").

6. *See id.* The Court stated that it had "no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy." *Id.* (emphasis added).

Workers,⁷ the American Counseling Association,⁸ the Employee Assistance Professionals Association,⁹ the American Association of State Social Work Boards,¹⁰ the American Psychoanalytic Association,¹¹ and the National Network to End Domestic Violence¹² submitted amicus curiae briefs to the Court, urging recognition of a psychotherapist privilege that would cover their communications with their clients.¹³ Immediately following the *Jaffe* decision, the Employee Assistance Professionals Association stated publicly that the *Jaffe* decision will place Employee Assistance counselors in a good position to invoke the federal privilege on behalf of their clients.¹⁴

Further, although *Jaffe* involved a “licensed *clinical* social worker,” the Court stated that this privilege would apply to “confidential communications made to licensed social workers in the course of psychotherapy.”¹⁵ Many states which regulate social work practice distinguish between “licensed clinical social workers” and “licensed social workers,” frequently requiring a higher level of education and skill for the former.¹⁶ In addition, because state statutes

7. Available in Westlaw, 1996 WL 2012.

8. Available in Westlaw, 1996 WL 2014.

9. Available in Westlaw, 1996 WL 2015.

10. Available in Westlaw, 1996 WL 4042.

11. Available in Westlaw, 1996 WL 2017.

12. Available in Westlaw, 1996 WL 2013.

13. See, e.g., Amicus Curiae Brief of the American Counseling Association, available in Westlaw, 1996 WL 2014.

[The] definitions of psychotherapy do not depend on the identity or credentials of the therapist; rather, psychotherapy is defined by the nature of the treatment rendered, and so should be the privilege. Moreover, most states do not limit their psychotherapist-client privilege to psychiatrists and psychologists; the privileges extend to professional mental health counselors and social workers who also provide psychotherapy.

Id. (footnotes omitted).

14. See *EAPA Provides Training on the Impact of Recent U.S. Supreme Court Ruling Regarding Confidentiality*, NAT'L REP. ON SUBSTANCE ABUSE, July 29, 1996, at 1 (quoting Employee Assistance Professionals Association (EAPA) President George Cobbs, who stated that the *Jaffe* decision will put EAPA counselors in a good position “to obtain protection [in federal courts] for confidential communications related to mental and emotional disorders suffered by its [sic] clients”).

15. *Jaffe*, 116 S. Ct. at 1931. See *infra* notes 68-71 and accompanying text.

16. See *infra* notes 72-75 and accompanying text.

govern the licensure of social workers, educational and clinical practice requirements vary considerably.¹⁷ Thus, social workers in states which require only minimal education and training for licensure can arguably invoke the privilege. Yet, in light of the Court's discussion of the "strict standards for licensure" that the state demanded of the licensed clinical social worker in *Jaffee*, the Court may not have intended this outcome.¹⁸

Because the Court declined to specify the "full contours" of the psychotherapist privilege in *Jaffee*,¹⁹ lower courts may become entangled in peripheral evidentiary proceedings as various mental health professionals and leniently-licensed social workers clamor to claim the privilege. The central ambition of this Recent Development is to define *some contours* of the psychotherapist privilege. Part I analyzes the Court's rationale for extending the psychotherapist privilege to licensed social workers.²⁰ Part II demonstrates this rationale's unintended flexibility in cases involving the kinds of mental health professionals and social workers not addressed in *Jaffee*. Finally, Part III proposes guidelines for courts to consider when applying the psychotherapist privilege. Without strict, judicially-imposed standards regulating the application of the psychotherapist privilege, the inevitable efforts to broaden it will eviscerate the time-honored rule that "privileges are to be narrowly construed."²¹

17. See *infra* notes 68-71 and accompanying text.

18. See *Jaffee*, 116 S. Ct. at 1931 n.15 (noting that had the petitioner filed the complaint in an Illinois state court, Redmond's "claim of privilege would surely have been upheld, at least with respect to the state wrongful death action").

19. *Jaffee*, 116 S. Ct. at 1932. See *supra* note 4.

20. A discussion pertaining to the development of the psychotherapist-patient privilege is beyond the scope of this Recent Development. For a thoughtful discussion of these issues, see H. Carol Bernstein, Comment, *Psychotherapist-Patient Privilege Under Federal Rule of Evidence 501*, 75 J. CRIM. L. & CRIMINOLOGY 388 (1984); Lauren Messersmith, Comment, *Evidence: The Psychotherapist-Patient Privilege Under Federal Rule of Evidence 501*, 23 WASHBURN L.J. 706 (1984).

21. *Jaffee*, 116 S. Ct. at 1937, (Scalia, J., dissenting). See also *Trammel v. United States*, 445 U.S. 40, 50 (1980) (establishing the general rule that testimonial privileges are disfavored, due to the predominant preference for utilizing all means to ascertain truth).

I. EXTENSION OF THE PSYCHOTHERAPIST PRIVILEGE TO LICENSED SOCIAL WORKERS: THE COURT'S RATIONALE

Perhaps the most notable feature of the Court's discussion regarding the extension of the privilege to licensed social workers is its brevity. According to the Court, "[t]he reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker."²² Thus, the Court relied on the same, general policy objectives that the privilege advances to justify its extension to licensed social workers. Further, the Court briefly posited additional justifications, which specifically pertain to the social work profession. A discussion of those justifications follows.

A. The Necessity of an Atmosphere of Confidentiality

The Court acknowledged that effective psychotherapy requires a haven of confidentiality.²³ The possibility of a therapist's disclosure, the Court opined, would frustrate treatment because a client may withhold embarrassing or highly personal information that could be critical to treatment.²⁴ The possibility of disclosure may also prevent troubled individuals from seeking treatment altogether.²⁵ Therefore, the Court concluded that a psychotherapist privilege serves important private interests by protecting the sanctity of a confidential therapeutic relationship, and important public interests by promoting the use of mental health services.²⁶

22. *Jaffe*, 116 S. Ct. at 1931.

23. *See id.* at 1928-30.

24. *See id.* at 1928 (stating that "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment").

25. *See id.* at 1929 (stating that "[t]he psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem").

26. *See id.* The Court spoke in terms of the psychotherapist privilege serving private and public interest because new testimonial privileges "may be justified . . . by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Id.* at 1928 (citing *Trammel*, 445 U.S. at 50).

B. Lessons from State Law

The Court indicated that “the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one.”²⁷ Observing that fifty state legislatures have enacted some form of the psychotherapist privilege,²⁸ the Court reasoned that a refusal to honor the privilege in federal court would thwart the very purposes state law aimed to serve.²⁹ For example, the Court noted that had the *Jaffee* case proceeded in state court and alleged only state law claims, the state privilege statute would have protected the same client confidences which the plaintiff sought to compel in this federal cause of action.³⁰ Therefore, the Court’s analysis suggests that state privilege law and considerations of federal-state comity lend some shape to the analysis.³¹

C. “Strict Standards of Licensure”

The Court noted that the licensed clinical social worker at issue in *Jaffee* satisfied the strict standards for licensure, and thus qualified as a psychotherapist under state law.³² The Illinois statute to which the Court referred recognizes a general privilege for communications

27. *Jaffee*, 116 S. Ct. at 1929-30. See also *United States v. Gillock*, 445 U.S. 360, 368 n.8 (1980); *Trammel*, 445 U.S. at 48-50 (observing that “the trend in state law toward divesting the accused of the [spousal] privilege to bar adverse spousal testimony has special relevance because the laws of marriage and domestic relations are concerns traditionally reserved to the states”). Ironically, in *Gillock*, the Court determined that even though principles of comity command careful consideration, comity yields where important federal interests are at stake. See *Gillock*, 445 U.S. at 373.

28. See *Jaffee*, 116 S. Ct. at 1929 n.11. See also *infra* notes 45-65 and accompanying text for an analysis of the scope and coverage of state psychotherapist privileges.

29. See *Jaffee*, 116 S. Ct. at 1930 (stating that “any State’s promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications”).

30. See *id.* at 1931 n.15.

31. See *id.* at 1932.

32. See *id.* at 1931.

with psychotherapists,³³ which it defines to include licensed clinical social workers as well as a number of other mental health providers.³⁴ To qualify as a licensed clinical social worker in Illinois, a candidate for licensure must possess a master's or doctoral degree from an accredited institution and complete a specific number of hours of supervised clinical professional experience subsequent to the degree.³⁵ Because the licensed clinical social worker in *Jaffee* conformed to these state-established standards, the Court noted that she qualified as a psychotherapist to whom state law granted the privilege.³⁶ The Court's reasoning suggests that state law determines, by establishing licensure standards, the qualifications of those eligible to invoke the privilege.

D. Fulfilling the Psychotherapeutic Function

The Court observed that licensed clinical social workers, like psychiatrists and psychologists, perform psychotherapy.³⁷ As psychotherapists, they fulfill similar functions and serve similar public goals.³⁸ Consequently, the Court reasoned that a refusal to extend the privilege to social workers would deprive certain clients of the confidentiality that others enjoy.³⁹ In this sense, the Court's reasoning suggests that a "psychotherapist" privilege extends to those who perform psychotherapy, irrespective of professional affiliation. However, what constitutes "psychotherapy" remains unclear.⁴⁰

33. See 740 ILL. COMP. STAT. 110/10 (West 1994).

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

35. See 225 ILL. COMP. STAT. 20/9 (West 1994). Those who have a master's degree must complete 3000 hours while those who have a doctor's degree must complete 2000 hours. See *id.*

36. See *Jaffee*, 116 S. Ct. at 1931.

37. See *id.* at 1930.

38. See *id.* at 1931. The Court also noted that because social work services typically cost less, the clientele often includes poor people who cannot afford the services of psychiatrists or psychologists. See *id.* Thus, even if discernible qualitative differences exist between the psychotherapy offered by psychiatrists, psychologists, and social workers, the Court appeared unwilling to make a distinction that would disadvantage a poorer class of mental health clients.

39. See *id.* at 1931.

40. See *infra* notes 79-83 and accompanying text for a discussion of the term "psychotherapy."

Thus, the Court impliedly considered four factors: (1) the importance of confidentiality in the performance and acquisition of psychotherapy; (2) the class of professionals to whom state law grants a psychotherapist privilege; (3) the professional licensure requirements that state law demands; and finally, (4) the psychotherapeutic function performed. The Court stated that the four considerations alone were all that was necessary for their decision in *Jaffee*.⁴¹ When applying the privilege in new contexts, lower courts will need to look to the factors suggested in *Jaffee*. The application of these factors, however, may actually undermine decisional certainty about the scope of the privilege. Unfortunately, as the Court observed in *Upjohn Co. v. United States*, “[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”⁴²

II. ROOM TO GROW: THE APPLICATION OF *JAFFEE*

The Court’s reasoning for extending the psychotherapist privilege to licensed social workers may prove unintentionally elastic. Using the Court’s analysis, other mental health providers have reasonable grounds to invoke the psychotherapist privilege on behalf of their clients, perhaps stretching it beyond the narrow bounds that typically confine testimonial privileges. Yet, nothing in the Court’s analysis indicates that the privilege could not also extend to licensed family therapists, licensed professional counselors, employee assistance professionals, registered nurses, chemical dependency counselors, pastoral counselors, or even volunteer domestic violence and rape counselors. Thus, when applying *Jaffee* to novel claims of psychotherapist privilege, federal courts will confront inevitable difficulties.

A. The Incongruity and Breadth of State Privilege Statutes

The *Jaffee* Court emphasized that state law offers guidance on the

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

42. *Upjohn*, 449 U.S. at 393.

question of whether to amend the coverage of an existing privilege.⁴³ State statutes, however, vary considerably with respect to the classes of mental health providers covered by a testimonial privilege.⁴⁴ Despite these variations, state psychotherapist privilege statutes, particularly with regard to licensed social workers, fall into three general categories.

1. No State Law Privilege for Social Workers/Privilege for Other Mental Health Providers

In *Jaffee*, the Court mentioned a lack of federal-state comity as a factor underlying the privilege's extension to a licensed clinical social worker.⁴⁵ Yet, several states recognize a form of psychotherapist privilege that excludes licensed social workers, but expressly includes other mental health providers.⁴⁶ In these states, comity disappears. On the one hand, the *Jaffee* decision renders privileged certain communications that the state has not seen fit to protect—such as communications with licensed social workers.⁴⁷ On

43. See *supra* notes 27-31 and accompanying text.

44. See *infra* notes 45-65 and accompanying text. See generally Kerry L. Morse, Note, *A Uniform Testimonial Privilege for Mental Health Professionals*, 51 OHIO ST. L.J. 741 (1990) (discussing the "patchwork" of state privileges and calling for a uniform qualified privilege for all mental health professionals).

45. See *Jaffee*, 116 S. Ct. at 1931 n.15 (observing that if the plaintiff had filed the wrongful death complaint in state court, Illinois' privilege statute would have prevented the compelled disclosure of the client confidences).

46. See, e.g., ALA. CODE § 15-23-42 (1995) (victim counselors); ALA. CODE § 34-8A-21 (1991) ("licensed professional counselors or certified counselor associate"); ALA. CODE § 34-26-2 (1990) (providing for a testimonial privilege for licensed psychologists and licensed psychiatrists); ALASKA STAT. § 08.86.200 (Michie 1996) (psychologists and "psychological associates"); ALASKA STAT. § 09.25.400 (Michie 1996) (domestic violence and sexual assault counselors); HAW. REV. STAT. § 626-1, R. 504 (1985) (physicians); HAW. REV. STAT. § 626-1, R. 504.1 (1985) (psychologists); HAW. REV. STAT. § 626-1, R. 505.5 (Supp. 1996) (victim counselors); N.D. CENT. CODE § 31-01-06.3 (1996) (addiction counselors); N.D. CENT. CODE § 31-01-06.4 (1996) (any person providing diagnosis or treatment for physical, mental or emotional condition); 42 PA. CONS. STAT. ANN. § 5945 (1982 & Supp. 1996) (school counselors); 42 PA. CONS. STAT. ANN. § 5945.1 (West 1982 & Supp. 1996) (sexual assault counselors).

47. For example, under *Jaffee*, a licensed clinical social worker in the District of North Dakota could invoke the psychotherapist privilege in federal court to resist the compelled disclosure of client confidences, even though no similar protection would extend in a state

the other hand, the *Jaffee* decision may not apply to communications that state legislatures have deemed privileged—such as communications with licensed counselors or domestic violence counselors.⁴⁸ In this way, state privilege statutes that exclude licensed social workers, but not other professionals, provide strong justification for extending the federal privilege to such professional groups.

2. Statutory Privilege for Mental Health Providers, Including Social Workers and Other Professionals

The justification for extending the privilege gathers particular strength when considering those state privilege statutes that broadly cover the gamut of mental health practice.⁴⁹ Like the Illinois statute discussed in *Jaffee*,⁵⁰ these schemes recognize a privilege for

court. The Department of Justice, writing as *amicus curiae*, noted this potential anomaly in its brief, which states:

In a case arising in [a state that does not recognize a privilege for licensed social workers], there may . . . be no basis to claim a federal court privilege; there would be little reason for a federal court to attempt to protect the confidentiality of a relationship that the State itself has not attempted to protect.

Brief for the United States as *Amicus Curiae*, available in Westlaw, 1996 WL 32788.

48. For example, the Alabama statute grants a privilege to licensed counselors but not to licensed social workers. See ALA. CODE § 34-8A-21 (1991). Thus, in Alabama, a licensed counselor may invoke the psychotherapist privilege in *state* court; whereas, in *federal* court, client confidences remain vulnerable to disclosure because *Jaffee* does not expressly extend the privilege to licensed counselors.

49. See, e.g., ARIZ. REV. STAT. ANN. § 32-3283 (1992) (“behavioral health professional”); CAL. EVID. CODE § 1010 (West 1995) (“psychotherapists”); D.C. CODE ANN. § 14-307 (1995) (“mental health professionals”); FLA. STAT. ch. 90.503 (1979 & Supp. 1996) (“psychotherapist”); IOWA CODE ANN. § 622.10 (West 1950 & Supp. 1995) (“counselor” or “mental health professional”); NEB. REV. STAT. § 71-1, 335 (1995) (“mental health practitioners”); N.H. REV. STAT. ANN. § 330-A:19 (1995) (recognizing privilege between clients and all persons certified under Chapter 330A, including certified mental health practitioners); S.C. CODE ANN. § 19-11-95 (Law Co-op. Supp. 1996) (“person licensed . . . to provide diagnosis, counseling, or treatment of a mental illness or emotional condition”); UTAH CODE ANN. § 58-60-113 (“mental health therapists”) (1996); VT. R. EVID. 503 (“mental health professional”).

50. As discussed in *Jaffee*, Illinois provides for a general psychotherapist privilege, see 740 ILL. COMP. STAT. 110/10 (West 1994), which includes licensed clinical social workers. See 740 ILL. COMP. STAT. 110/2 (West 1994).

“psychotherapists,” a term that includes specific professional designations.⁵¹ Although these statutes include licensed social workers,⁵² they vary with respect to other mental health professionals. Some states define “psychotherapist” or “mental health professional” to encompass licensed marital and family therapists,⁵³ rape or domestic violence counselors,⁵⁴ licensed counselors,⁵⁵ substance abuse counselors,⁵⁶ psychiatric registered nurses,⁵⁷ and pastoral counselors.⁵⁸ In light of the *Jaffee* Court’s reference to federal-state comity, these other “psychotherapists,” who enjoy a statutory grant of privilege commensurate with that afforded licensed social workers, can reasonably argue that the federal privilege should also cover their professional relationships.

51. See *supra* note 49.

52. See, e.g., ARIZ. REV. STAT. ANN. § 32-3293 (1992) (certified social workers); CAL. EVID. CODE § 1010(c) (West 1995) (licensed clinical social worker); D.C. CODE ANN. § 6-2001(11)(C) (1995) (licensed social workers); FLA. STAT. ANN. § 90.503(1)(a)(3) (West 1979 & Supp. 1997) (licensed or certified clinical social workers); IOWA CODE ANN. § 622.10 (West Supp. 1996) (licensed social workers); NEB. REV. STAT. § 71-1-300 (1995) (person certified as a social worker pursuant to § 71-1-301); N.H. REV. STAT. ANN. § 330-A:16(d) (1995) (licensed clinical social workers); S.C. CODE ANN. § 19-11-95(A)(1)(c) (Law Co-op. Supp. 1996) (licensed master social worker or licensed independent social worker); UTAH R. EVID. 506(a)(3) (1996) (clinical of certified social workers); VT. R. EVID. 503(a)(5) (Michie Supp. 1996) (a social worker with demonstrated competence in the treatment of mental illness).

53. See, e.g., CAL. EVID. CODE § 1010(e) (West 1995); D.C. CODE ANN. § 6-2001(11)(D) (1995); FLA. STAT. ANN. § 90.503(1)(a)(3) (West Supp. 1997); IOWA CODE ANN. § 622.10 (West Supp. 1996); NEB. REV. STAT. § 71-1-299 (1995); N.H. REV. STAT. ANN. § 330-A:16(f) (1995); UTAH R. EVID. 506(a)(3).

54. See, e.g., D.C. CODE ANN. § 6-2001(11)(E) (1995) (rape counselors who have undergone at least 40 hours of training and serve under the direction of a licensed social worker, nurse, psychiatrist, psychologist, or psychotherapist).

55. See, e.g., NEB. REV. STAT. § 71-1-302 (1995).

56. See, e.g., FLA. STAT. ANN. § 90.503(1)(a)(4) (West Supp. 1997) (mental health counselors primarily engaged in the treatment of substance abuse); UTAH R. EVID. 506 (mental health therapist includes persons engaged in the treatment of alcohol and drug addictions).

57. See, e.g., D.C. CODE ANN. § 6-2001(11)(F) (1995) (licensed professional psychiatric nurses); S.C. CODE ANN. § 19-11-95(A)(1)(d) (Law Co-op. Supp. 1996) (clinical nurse specialist in the field of mental health); UTAH R. EVID. 506 (advanced practice registered nurse designated as a psychiatric specialist).

58. See, e.g., N.H. REV. STAT. ANN. § 330-A:16-C (1995) (religiously affiliated pastoral counselors).

3. Specific Grant of Privilege to Licensed Social Workers and Other Professionals

Many states recognize a specific social worker-client privilege.⁵⁹ The vast majority of states that recognize such a privilege also recognize a privilege for certain other mental health providers: licensed counselors,⁶⁰ employee assistance counselors,⁶¹ marital and family therapists,⁶² or psychiatric registered nurses.⁶³ Unlike the

59. *See, e.g.*, ARK. CODE ANN. § 17-46-107 (Michie 1995); CONN. GEN. STAT. ANN. § 52-146q (West Supp. 1996); DEL. CODE ANN. tit. 24, § 3913 (1987); GA. CODE ANN. § 24-9-21(7) (1995); IND. CODE ANN. § 25-23.6-6-1 (West 1993); KAN. STAT. ANN. § 65-6315 (1992) (creating a privilege, yet providing that privilege dissipates when information relates to a criminal act or violation of law); LA. REV. STAT. ANN. § 37:2714 (West 1988 & Supp. 1997); ME. REV. STAT. ANN. tit. 32, § 7005 (West 1988) (creating privilege, yet privilege dissipates if court deems that disclosure is "necessary to the proper administration of justice"); MD. CODE ANN., CTS. & JUD. PROC. § 9-121 (1995); MASS. GEN. LAWS ANN. ch. 112, § 135B (West 1996) (creating privilege, but providing for disclosure if judge determines that the interests of justice are more important than preserving the social worker-client relationship); MINN. STAT. ANN. § 595.02(1)(g) (West Supp. 1997); MISS. CODE ANN. § 73-53-29 (1995); MO. ANN. STAT. § 337.636 (West Supp. 1997); MONT. CODE ANN. § 37-22-401 (1995); N.J. STAT. ANN. § 45:15BB-13 (West 1991 & Supp. 1996); N.M. STAT. ANN. § 61-31-24 (Michie 1993); N.Y. C.P.L.R. 4508 (McKinney 1992); N.C. GEN. STAT. § 8-53.7 (1996) (creating privilege, but providing for disclosure if court compels in the interest of justice); OHIO REV. CODE ANN. § 2317.02(G) (Banks-Baldwin 1994 & Supp. 1996) (providing for waiver if a court determines in camera that the information is not germane to the social worker-client relationship); OR. REV. STAT. § 40.250 (1995); R.I. GEN. LAWS § 5-39.1-4 (1994); S.D. CODIFIED LAWS § 36-26-30 (Michie 1994); TENN. CODE ANN. § 63-23-107 (1990); VA. CODE ANN. § 8.01-400.2 (Michie 1992); WASH. REV. CODE ANN. § 18.19.180 (West 1989 & Supp. 1997) (providing elimination of privilege in response to a subpoena from a court of law); W. VA. CODE § 30-30-12 (1993 & Supp. 1996); WIS. STAT. ANN. § 905.05 (West 1997); WYO. STAT. ANN. § 33-38-109 (Michie 1996).

60. *See, e.g.*, ARK. CODE ANN. § 17-27-308 (Michie 1995); DEL. CODE ANN. tit. 24, § 3013 (1987); GA. CODE ANN. § 24-9-21(8) (1995); KAN. STAT. ANN. § 65-5810 (1992); LA. CODE EVID. ANN. art. 510(A)(4)(c) (West 1995); MISS. CODE ANN. § 73-30-17 (1995); MO. ANN. STAT. § 337.540 (West 1989); MONT. CODE ANN. § 37-23-301 (1995); N.M. STAT. ANN. § 61-9A-27 (Michie 1996); N.C. GEN. STAT. § 8-53.8 (1996) (providing for exception, if a court determines that disclosure is necessary to the proper administration of justice); OHIO REV. CODE ANN. § 2317.02(G)(1) (Banks-Baldwin 1994 & Supp. 1996) (providing for exception, if court determines in camera that information is not germane to counselor-client relationship); OR. REV. STAT. § 40.262 (1995); S.D. CODIFIED LAWS § 36-32-27 (Michie 1995); VA. CODE ANN. § 8.01-400.2 (Michie 1992); W. VA. CODE § 30-31-13 (1993); WIS. STAT. ANN. § 905.04 (West 1997); WYO. STAT. ANN. § 33-38-109 (Michie 1996).

61. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-146(n) (West 1991); TENN. CODE ANN. § 62-42-115 (Supp. 1996).

62. *See, e.g.*, GA. CODE ANN. § 24-9-21(8) (1995); IND. CODE ANN. § 25-23.6-9-1 (West

Illinois statute in *Jaffee*, the privilege is not derivative of a general psychotherapist privilege.⁶⁴ Rather, profession-specific privileges reflect a legislative judgment that the communications arising out of specific relationships merit particular protection. For this reason, the policy decisions of the states should, in the words of the *Jaffee* Court, “bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one.”⁶⁵

B. Not-So Strict Standards of State Licensure

The Court noted that the licensed clinical social worker qualified as a “psychotherapist” under Illinois law because she “satisfied the strict standards for licensure [as a licensed clinical social worker].”⁶⁶ The Court’s reference to licensure standards could suggest its adherence to the requirements of professional expertise typically associated with occupation-based testimonial privileges.⁶⁷ Yet, by stating that the privilege would apply to merely “*licensed social*

1993); KAN. STAT. ANN. § 65-6410 (1992); MO. ANN. STAT. § 337.736 (West Supp. 1996); NEV. REV. STAT. ANN. § 49.247 (Michie 1995); N.J. STAT. ANN. § 45:8B-29 (West 1991 & Supp. 1996); N.C. GEN. STAT. § 8-53.5 (1996); TENN. CODE ANN. § 63-22-114 (1990 & Supp. 1996).

63. See, e.g., GA. CODE ANN. § 24-9-21(7) (1995); MD. CODE ANN., CTS. & JUD. PROC. § 9-109.1 (1995 & Supp. 1996); MASS. GEN. LAWS ANN. ch. 233, § 20B (West 1986 & Supp. 1996); MISS. CODE ANN. § 13-1-21 (1972 & Supp. 1996); WIS. STAT. ANN. § 905.04(1)(f) (West 1997).

64. See *supra* note 52-59 and accompanying text.

65. 116 S. Ct. at 1929-30.

66. *Id.* at 1931 n.15. See *supra* text accompanying note 35 (discussing Illinois licensure requirements).

67. See *Jaffee*, 116 S. Ct. at 1938 (Scalia, J., dissenting). Justice Scalia expressed concern that the *Jaffee* majority strayed from the professional standards that accompany testimonial privileges. Noting that Illinois issues licenses to certain social workers who have only undergraduate degrees, Justice Scalia stated:

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 the Advisory Committee and this Court proposed extension of a privilege in 1972.

Id.

workers in the course of psychotherapy,"⁶⁸ the Court may have inadvertently defied the heightened expertise that the psychotherapist privilege warrants.

States differ regarding the minimum qualifications for licensure. Some states require only a bachelor's degree.⁶⁹ For example, Alabama will issue a license to any person who passes an examination and has a bachelor's degree in a human service field.⁷⁰ By contrast, other states require a master's or doctoral degree, passing marks on a written examination, and significant supervised experience.⁷¹

68. *Id.* at 1931 (emphasis added).

69. *See, e.g.*, ALA. CODE § 34-30-22(5)(a) (1991) ("bachelor social worker" license requires bachelor's degree in a human service field and passing a written examination); IND. CODE ANN. § 25-23.6-5-1 (West 1993) ("certificate in social work" requires bachelor's degree and two years experience in the practice of social work); MD. CODE ANN., HEALTH OCC. § 19-302 (1994) ("social work associate" license requires bachelor's degree from accredited school); MISS. CODE ANN. § 73-53-13 (1995) (license as a "social worker" requires bachelor's degree and passing a written examination); N.M. STAT. ANN. § 61-31-9 (Michie 1993) ("baccalaureate social worker" requires bachelor's degree and passing a written examination); N.D. CENT. CODE § 43-41-04 (1993) ("licensed social worker" requires bachelor's degree in social work or social welfare and passing a written examination); OHIO REV. CODE ANN. § 4757.28 (Banks-Baldwin Supp. 1997) ("licensed social worker" requires bachelor's degree in social work or, prior to 1992, an approved closely related program and passing a written examination); S.C. CODE ANN. § 40-63-70 (Law Co-op. Supp. 1996) ("licensed baccalaureate social worker" requires bachelor's degree in social work or human service field and passing an examination); S.D. CODIFIED LAWS § 36-26-15 (Michie 1994) ("licensed social worker" requires bachelor's degree and passing a written examination); WIS. STAT. ANN. § 457.08 (West 1995) ("social work certificate" requires bachelor's degree in social work program and passing a written examination).

70. *See* ALA. CODE § 34-30-22(5)(a) (1991) (establishing qualifications for a "licensed bachelor social worker"). To qualify as a "licensed graduate social worker" in Alabama, a candidate must pass an examination and possess a master's degree in social work. *See* § 34-30-22(5)(b). Finally, Alabama will issue a license as a "licensed certified social worker" to anyone who has a master's or doctoral degree, plus two years post-graduate experience. *See* § 34-30-22(5)(c).

71. *See, e.g.*, ALASKA STAT. § 08.95.110 (Michie 1996); COLO. REV. STAT. ANN. § 12-43-403 (West 1996); KY. REV. STAT. ANN. § 335.100 (Banks-Baldwin 1996); LA. REV. STAT. ANN. § 37:2706 (West 1988 & Supp. 1997); ME. REV. STAT. ANN. tit. 32, § 7053 (West 1988 & Supp. 1996); MASS. GEN. LAWS ANN. ch. 112, § 131 (West 1996); MO. ANN. STAT. § 337.615 (West Supp. 1997); MONT. CODE ANN. § 37-22-301 (1995); OR. REV. STAT. § 675.530 (1995); 63 PA. CONS. STAT. ANN. § 1907 (West 1982 & Supp. 1996); R.I. GEN. LAWS § 5-39.1-8 (1994); TENN. CODE ANN. § 63-23-102 (1990); TEX. HUM. RES. CODE ANN. § 50.015 (West 1990 & Supp. 1997); UTAH CODE ANN. § 58-60-205 (1996); VT. STAT. ANN. tit. 26, § 3205 (1989 & Supp. 1996); WASH. REV. CODE ANN. § 18.19.110 (West 1989 & Supp.

Further, states also differ with respect to designations of social workers. In *Jaffee*, the social worker earned Illinois licensure as a "clinical social worker." This designation not only requires heightened credentials,⁷² it also defines the kind of practice the social worker will have—in this case a clinical practice,⁷³ as opposed to community organization, lobbying, public policy, or social service administration.⁷⁴ Unlike Illinois, however, many states do not have a distinct label for "licensed clinical social workers," even though the credential requirements are similar.⁷⁵

These differences in state designation of social workers, as well as differences in minimum qualifications for licensure, raise questions about the application of *Jaffee*. Given the Court's reference to the "strict standards for licensure," could a social worker in Ohio, who is licensed under that state's relatively lenient standards,⁷⁶ invoke the federal psychotherapist privilege? Is a "certified master social worker" in Tennessee⁷⁷ comparable to a "licensed clinical social

1997); W. VA. CODE § 30-30-5 (1993 & Supp. 1996); WYO. STAT. ANN. § 33-38-106 (Michie 1996).

72. See *supra* note 66 and accompanying text.

73. Illinois law defines "clinical social work practice" as: "[P]roviding of mental health services for the evaluation, treatment, and prevention of mental and emotional disorders in individuals, families and groups based on knowledge and theory of psychosocial development, behavior, psychopathology, unconscious motivation, interpersonal relationships, and environmental stress." 225 ILL. COMP. STAT. 20/3 (West 1994).

74. Illinois law defines the functions of "licensed [non-clinical] social workers" as providing "social services to individuals, groups or communities in any one or more of the fields of social casework, social group work, community organization for the social welfare, social work research, social welfare administration, or social work education." 225 ILL. COMP. STAT. 20/3 (West 1994). See also FRANK GIBELMAN, WHAT SOCIAL WORKERS DO 42 (1995).

75. See, e.g., ALA. CODE § 34-30-22 (1991) ("licensed graduate social worker" or "licensed certified social worker"); LA. REV. STAT. ANN. tit. 32, § 2706 (West 1988) ("board certified social worker," requiring a master's or doctoral degree, significant experience, and passing an examination); MASS. GEN. LAWS ANN. ch. 112, § 131 (West 1996) ("certified social worker," requiring a master's or doctoral degree and two years experience); MONT. CODE ANN. § 37-22-301 (1995) ("licensed social worker"); TENN. CODE ANN. § 63-23-102 (1990) ("certified master social worker"); TEX. HUM. RES. CODE ANN. § 50.015 (West 1990 & Supp. 1997) ("licensed master social worker"); WASH. REV. CODE ANN. § 18.19.110 (West 1989 & Supp. 1997) ("certified social worker"); W. VA. CODE § 30-30-5 (1993 & Supp. 1996) ("graduate social worker" or "independent clinical social worker").

76. See *supra* note 69 and accompanying text.

77. See *supra* note 75 and accompanying text.

worker,” such that *Jaffee* would squarely apply to a claim of privilege? If qualifications imposed by state statute guide a court’s application of *Jaffee*, could not other mental health professionals, who have earned state licensure with qualifications equal to those required of master’s degree-level social workers, also claim the privilege?⁷⁸

C. The Fallacy of Functionality

In *Jaffee*, the Court observed that social workers, like psychiatrists and psychologists, perform psychotherapy.⁷⁹ As providers of psychotherapy services, the policies underlying the recognition of a psychotherapist privilege—encouraging the use of mental health services and promoting free and frank disclosures in treatment—apply with equal force to social workers.⁸⁰ In essence, the Court focused on the service provided by the person, rather than the credentials of the person performing the service.⁸¹ Yet, given the

78. See, e.g., IND. CODE ANN. § 25-23.6-8-1 (West 1993) (requiring a master’s or doctoral degree and two years supervised clinical experience for licensure as a “marriage and family therapist”); MO. ANN. STAT. § 337.510 (West Supp. 1997) (requiring a doctoral degree, master’s degree, or specialists degree for licensure as a “professional counselor”); MONT. CODE ANN. § 37-23-202 (1995) (requiring a graduate degree in counseling plus 3,000 hours of supervised clinical experience for licensure as a “professional counselor”); N.J. STAT. ANN. § 45:8B-18 (West 1991 & Supp. 1996) (requiring at least a master’s degree in counseling plus five years clinical experience for licensure as a “marriage counselor”); N.C. GEN. STAT. § 90-503 (1996) (requiring a master’s degree for licensure as an “employee assistance counselor”); N.C. GEN. STAT. § 90-336 (1996) (requiring a master’s degree plus 2,000 hours of clinical experience for licensure as a “professional counselor”); OHIO REV. CODE ANN. § 4757.07 (Banks-Baldwin 1994 & Supp. 1996) (requiring a master’s or doctoral degree in counseling for licensure as a “professional counselor”); OR. REV. STAT. § 675.715 (1995) (requiring a graduate degree for licensure as a “professional counselor” or “marriage and family therapist”); S.C. CODE ANN. § 40-75-100 (Law Co-op. Supp. 1996) (requiring a doctoral degree or master’s degree for licensure as a “professional counselor” or “marriage therapist”); TENN. CODE ANN. § 63-22-104 (1990) (requiring at least a master’s degree for licensure as a “professional counselor”); VT. STAT. ANN. tit. 26, § 3265 (1989 & supp. 1997) (requiring a master’s degree for licensure as a “mental health counselor”); WASH. REV. CODE ANN. § 18.19.120 (West 1989 & Supp. 1997) (requiring a master’s or doctoral degree for licensure as a “mental health counselor”).

79. See *Jaffee*, 116 S. Ct. at 1931-32.

80. See *id.* See also *supra* notes 23-26 and accompanying text.

81. In fact, the Court stated, “[d]rawing a distinction between the counseling provided by

breadth of the term “psychotherapy,” an entire cast of mental health practitioners can claim to provide it.

For example, the Dictionary of Mental Health characterizes “psychotherapy” as the “treatment of mental disorders and diseases by mental, usually verbal, techniques, rather than physical means.”⁸² Similarly, the Social Work Dictionary defines a “psychotherapist” as a “mental health professional who practices psychotherapy. The major disciplines . . . include social work, psychiatry, and clinical psychology. Some members of other professions are also psychotherapists, including nurse practitioners, physicians, family therapy specialists, clergy, guidance counselors, and educators.”⁸³ As these expansive definitions suggest, if the threshold inquiry for recognizing the psychotherapist privilege is whether the professional performs psychotherapy, then the privilege will swell among the ranks of virtually all “helping professions.”

III. THE CALL FOR STANDARDS

Against this backdrop of varying states’ privilege laws, differing state qualifications for licensure, and vague notions about the meaning and functions of psychotherapy, federal courts will have to construct the “full contours” of the psychotherapist privilege. Conceivably, certain courts will adopt a restrictive approach, limiting the privilege to the professionals discussed in *Jaffee*.⁸⁴ Other courts

costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose.” *Jaffee*, 116 S. Ct. at 1932 (citing *Jaffee v. Redmond*, 51 F.3d 1346, 1358 n.19 (7th Cir. 1995)).

82. RICHARD B. FISHER, *THE DICTIONARY OF MENTAL HEALTH* 204 (1980).

83. ROBERT L. BARKER, *THE SOCIAL WORK DICTIONARY* 304-05 (3d ed. 1995). The Social Work Dictionary defines “psychotherapy as “a specialized, formal interaction between a social worker or other mental health professional and client in which a psychotherapeutic relationship is established to help resolve symptoms of mental disorder, psychosocial stress, relationship problems, and difficulties coping in the social environment.” *Id.* at 305.

84. Historically, the United States Courts of Appeal have taken a restrictive approach to the psychotherapist privilege. At the time that the Court decided *Jaffee*, several circuits had fully rejected the psychotherapist privilege. *See, e.g.*, *United States v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994) (holding that the psychotherapist privilege does not apply in criminal child sexual abuse cases); *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989) (holding that the psychotherapist-privilege is not recognized in the context of grand jury investigations);

will likely interpret *Jaffee* expansively, allowing anyone who practices "psychotherapy" to claim the privilege. In the end, this diversity of application will foster uncertainty among the federal courts.

To promote the stability of the psychotherapist privilege, courts must look to the spirit, and not the letter, of *Jaffee*. First, in light of the Court's reference to strict licensure standards,⁸⁵ federal courts must impose standards that would qualify mental health professionals to claim the privilege.⁸⁶ For example, Congress has previously defined "clinical social worker" as someone who possesses a master's or doctor's degree, has performed two years of supervised clinical experience, and is licensed or certified by the State in which services are performed.⁸⁷ For other mental health providers, state licensure requirements exact similar standards—master's or doctoral degree plus clinical experience.⁸⁸ In this way, the standards correspond directly to the "strict standards for licensure" that the *Jaffee* Court

United States v. Corona, 849 F.2d 562 (11th Cir. 1988) (holding that no psychotherapist-patient privilege exists in federal criminal trials); United States v. Meagher, 531 F.2d 752 (5th Cir. 1976) (holding that no psychiatrist-patient privilege exists in federal criminal trials).

Even those circuits that did recognize a psychotherapist-privilege prior to *Jaffee* limited its application to psychiatrists and psychologists. *See, e.g.*, United States v. Diamond, 964 F.2d 1325 (2d Cir. 1992) (recognizing a psychotherapist privilege for communications made to a psychiatrist); *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983) (recognizing a psychotherapist privilege for psychiatrists).

85. *See supra* notes 32-36 and accompanying text.

86. The notion that qualification standards should guide the application of a psychotherapist privilege is hardly novel.

Extending a testimonial privilege to other professional counselors need not entail greater definitional uncertainty costs . . . Licensing and training requirements can clearly identify the professional counselors protected by the privilege. Courts and legislatures may use the possession of educational degrees, licenses, minimum number of hours of training or affiliation with a licensed institution, to determine whether the privilege protects communications with a counselor.

Developments in the Law: Privileged Communications, 98 HARV. L. REV. 1450, 1551 (1985) (footnotes omitted).

In addition, Congress considered a similar proposal when it added "qualified clinical social workers" to the list of mental health providers eligible for reimbursement under the Federal Employee Health Benefits Program. *See* 131 CONG. REC. 18094 (statement of Sen. Heinz).

87. *See* 42 U.S.C. § 1395x(hh)(1) (1994).

88. *See supra* note 78.

noted.⁸⁹

Second, despite the difficulties with a functionality approach, courts must consider the context in which the confidential communications arose. When considering context, courts must inquire about the proportion of practice that the mental health professional devotes to counseling or psychotherapy. For example, if the professional devotes a large part of her day to counseling clients, the communications at issue likely ensued in the confidential haven that the psychotherapist privilege protects.⁹⁰ Above all, courts must consider the underlying purpose of the privilege—to facilitate treatment by protecting free and frank communication.⁹¹ In light of this purpose, the context in which communications are made is the key consideration.

Finally, courts should refer to state privilege law in their decisions. Generally, reference to state law will cut in favor of extending the privilege, to ensure that it is coextensive with the state privilege.⁹² Compatible federal-state psychotherapist privileges will reinforce the client's expectation of confidentiality and thereby promote the purpose of the privilege.⁹³

89. Providers licensed pursuant to lenient state statutes would fall outside of the ambit of the privilege.

90. See *supra* notes 23-26 and accompanying text. By contrast, a licensed clinical social worker who performs exclusively administrative functions at a mental health agency, could hardly justify a claim of psychotherapist privilege because the communications could not likely have arisen in a confidential setting.

91. See *supra* notes 23-26 and accompanying text.

92. See *supra* notes 27-31, 45-66 and accompanying text.

93. By contrast, incompatible federal-state privileges undermine full and frank disclosures. See, e.g., Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U. MIAMI L. REV. 249, 263 (1996) (predicting that "[w]hen a patient first seeks therapy and the therapist is faced with the ethical duty of discussing confidentiality and its possible exceptions, it will be difficult to predict, if a lawsuit involving the patient should occur, whether it will be in state court or federal court"). Thus, in circumstances where a mental health professional can claim a privilege in state court but not federal court, or vice versa, a client will not reveal sensitive information unless he can anticipate, in advance, where he may be haled into court. Professor Winick suggests that this incongruity not only may promote forum shopping, it may also undermine the therapeutic relationship. See *id.*; see also Michele Smith-Bell & William J. Winslade, *Privacy, Confidentiality, and Privilege in Psychotherapeutic Relationships*, 64 AM. J. ORTHOPSYCHIATRY 180, 180 (1994) (stating that "[c]lients assume or seek assurances that sensitive information will be a confidential

CONCLUSION

In the aftermath of *Jaffee v. Redmond*, the state of the psychotherapist privilege remains uncertain. Although the Court embraced the privilege, its full contours have not yet taken shape. Case by case, lower courts will construct its framework. Yet without some blueprint to guide the courts the privilege is subject to widely varying applications, as mental health professionals begin to claim it in unprecedented numbers. Cryptic as the *Jaffee* opinion appears regarding the mental health professionals eligible to invoke the privilege, the factors that the Court considered offer some rudimentary analytic tools. Ultimately, those tools will likely fashion a broad mental health privilege, thereby eroding the narrow construction once afforded to this testimonial privilege.

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communication to their [mental health professional], and unless they can trust their therapist and rely on confidentiality, they are unlikely to cooperate fully in their therapy”).

* J.D. & M.S.W. 1997, Washington University.