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ARTICLES

THE SUPREME COURT'S DECISION TO RECOGNIZE A PSYCHOTHERAPIST PRIVILEGE IN *JAFFEE v. REDMOND*, 116 S. CT. 1923 (1996): THE MEANING OF "EXPERIENCE" AND THE ROLE OF "REASON" UNDER FEDERAL RULE OF EVIDENCE 501

Diane Marie Amann and Edward J. Imwinkelried***

*Reason is the life of the law; nay, the common law itself is nothing else
but reason*

Sir Edward Coke¹

The life of the law has not been logic; it has been experience.

Justice Oliver Wendell Holmes²

The rationalist tradition is one of the foremost schools of common-law jurisprudence.³ Lord Coke, an early spokesperson for that school, argued that a court could formulate common-law doctrine relying on "nothing else but reason."⁴ Eventually, a competing school, the legal realist tradition, emerged.⁵ Justice Holmes was one of the seminal thinkers in that camp. He borrowed Coke's expression, "the life of the law," but used it to advance the radically different premise that the vital common-law principle is "experience," not "reason."⁶ On common-law doctrine, Holmes wrote that "a page of history is worth a volume of

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1. FIRST INSTITUTE, *in* THE SHORTER BARTLETT'S FAMILIAR QUOTATIONS 80 (1959).

2. THE COMMON LAW AND COLLECTED LEGAL PAPERS, *in* THE GREAT QUOTATIONS 330 (1993).

3. *See generally* WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE (1985).

4. *See supra* note 1 and accompanying text.

5. *See generally* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

6. *See supra* note 2 and accompanying text.

logic."⁷

A strict adherent to either jurisprudential school would be perplexed by Federal Rule of Evidence 501. In pertinent part, that statute reads:

Except as otherwise provided 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 . . . 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.⁸

The final three words, "reason *and* experience,"⁹ comprise the critical passage. The passage appears to confound both schools because it mandates that the courts developing federal privilege doctrine grant reason and experience equal weight.

In practice, reason has prevailed at the lower court level. The federal district courts and courts of appeals have exercised their power under Rule 501 quite cautiously.¹⁰ True to the rationalist tradition, these courts, for the most part, have attached the highest priority to "[r]ectitude of decision (i.e. the correct application of . . . substantive laws to facts established as true)."¹¹ When rectitude of decision has collided "with other values such as . . . the protection of [allegedly privileged] relationships,"¹² the courts ordinarily have resolved the conflict against the litigant who claimed a privilege that would block admission of logically relevant evidence. Several courts have erected "a strong presumption" against fashioning new privileges.¹³ Prior to 1996, some even went so far as to hold that Rule 501 precludes the courts from recognizing privileges that did not exist at common law before the enactment of the Federal Rules of Evidence.¹⁴

Until 1996, the United States Supreme Court exhibited the same resistance to arguments in favor of creating new privileges. The Court had declared that "[e]videntiary privileges in litiga-

7. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

8. FED. R. EVID. 501.

9. *Id.* (emphasis added).

10. *See, e.g., In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980).

11. WILLIAM TWINING, *supra* note 3, at 14.

12. *Id.*

13. *See, e.g., United States v. Burtrum*, 17 F.3d 1299, 1302 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 176 (1994). *See also* Daniel Capra, *The Federal Law of Privileges*, 16 LITIG. 32 (Fall 1989).

14. *See* Capra, *supra* note 13, at 35 (citing *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989), *cert. denied*, 493 U.S. 906 (1989)).

tion are not favored."¹⁵ Appreciating that privileges obstruct the search for truth, the Court opined that the recognition of a new privilege is warranted only when the privilege would serve a "public good" of such magnitude that it "transcend[s] the normally predominant principle of utilizing all rational means [for] ascertaining truth."¹⁶ In the famous *Nixon* case,¹⁷ the Court emphasized that testimonial privileges "are not lightly created nor expansively construed." In a long line of cases, the Court consistently rejected the invitation to announce the existence of new, uncodified privileges.¹⁸

Given that unbroken line of authority, the Supreme Court's 1996 decision in *Jaffee v. Redmond*¹⁹ came as a mild surprise. In that case, the majority not only held, despite scant case-law support,²⁰ that communications within the psychotherapist-patient relationship are privileged, but it also accorded the privilege broad scope. This breadth is evidenced by the majority's rulings that create an absolute rather than a conditional privilege²¹ and that extend the privilege to conversations with licensed clinical social workers.²²

The majority issued these decisions over a vigorous dissent by Justice Scalia.²³ Justice Scalia faulted both the majority's threshold recognition of a psychotherapist privilege and its extension of the privilege to licensed clinical social workers. Initially, Justice Scalia listed the leading cases in the line of authority that vindicated the "traditional judicial preference for the truth"²⁴ by rejecting novel privilege claims. Although he acknowledged that "psychotherapist privilege statutes exist in all the states,"²⁵ he did not consider that fact to be "experience" in favor of recognizing a psychotherapist privilege. In his judgment, those statutes were

15. *Herbert v. Lando*, 441 U.S. 153, 175 (1979).

16. *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

17. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

18. *See, e.g., University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182 (1990) (privilege for academic peer review); *United States v. Gillock*, 445 U.S. 360 (1980) (privilege against disclosure of legislative acts by state legislator); *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984) (accountant-client privilege).

19. 116 S. Ct. 1923 (1996).

20. *See id.* at 1927, 1935-36 n.1 (Scalia, J., dissenting).

21. *See id.* at 1932.

22. *See id.* at 1931-32.

23. *See id.* at 1932 (Scalia, J., dissenting).

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

25. *Id.* at 1935 (Scalia, J., dissenting).

beside the point because that body of law "consists entirely of legislation rather than common-law decision."²⁶

Likewise, Justice Scalia criticized the majority's decision to include social workers within the ambit of the privilege. He noted the differences between psychiatrists and psychologists, on the one hand, and social workers, on the other.²⁷ The former possess much more expertise in the treatment of mental illness²⁸ and, in Justice Scalia's opinion, consequently deserve the protection of an evidentiary privilege far more than the latter. Because the training of clinical social workers is not "comparable in its rigor,"²⁹ the majority's decision to treat social workers in the same fashion as psychiatrists and psychologists struck Justice Scalia as "irresponsible."³⁰

The thesis of this Article is that, notwithstanding the forceful character of Justice Scalia's dissent, the *Jaffee* majority came to the right result. Part I of this Article describes, in detail, both the lower court and the Supreme Court opinions in *Jaffee*. Part II of this Article evaluates Justice Scalia's argument that, under Rule 501, there should be a strong, general preference against recognizing new privileges. This Article concludes that Justice Scalia is right on this score as a matter of both policy and statutory construction. Part III of this Article turns to the specific question of whether federal courts applying Rule 501 should have recognized a psychotherapist privilege and extended it to clinical workers. This Article concludes that the *Jaffee* majority has the better of the argument. Properly interpreted, "experience" cuts in favor of fashioning a psychotherapist privilege. "Reason," meanwhile, justifies the majority's ruling that, in a democratic society committed to the principle of equality, the privilege should reach psychological counseling by social workers. As Part III explains, the *Jaffee* majority's holdings are not only defensible, but more importantly, the holdings shed light on the meaning of the expressions "experience" and "reason" in Rule 501.

26. *Id.* at 1938 (Scalia, J., dissenting).

27. *See id.* at 1937 (Scalia, J., dissenting).

28. *See id.* (Scalia, J., dissenting).

29. *Id.* at 1938 (Scalia, J., dissenting).

30. *See id.* (Scalia, J., dissenting).

I. A DESCRIPTION OF THE LOWER COURT DECISIONS AND SUPREME COURT OPINIONS IN THE JAFEE CASE

A. *The District Court Decision*

The catalyst for the *Jaffee* decision was a civil rights action filed under 42 U.S.C. § 1983.³¹ The plaintiffs were the survivors of Ricky Allen, Sr. Allen passed away after being shot by Mary Lu Redmond, a police officer employed by the Village of Hoffman Estates, Illinois. Redmond and the village were named as defendants in the plaintiffs' complaint, which alleged that in the encounter leading to the shooting, Redmond had used excessive force.

During pretrial discovery, the plaintiffs learned that Redmond had participated in approximately fifty counseling sessions with Karen Beyer, a licensed clinical social worker employed by the Village of Hoffman Estates.³² To prepare to cross-examine Redmond, the plaintiffs attempted to obtain Beyer's notes of the counseling sessions. Both defendants resisted discovery on the ground that a common-law psychotherapist-patient privilege protected the notes.³³

The district court judge rejected the defendants' argument. Nevertheless, both during depositions and on the witness stand at trial, the defendants invoked the privilege to refuse to answer certain questions.³⁴ In the final jury charge, the trial judge informed the jurors that they were permitted to draw an "adverse inference" from the defendants' refusal:³⁵ "[T]he judge advised the jury that the refusal to turn over Beyer's notes had no 'legal justification' and that the jury could therefore presume that the contents of the notes would have been unfavorable to" defendants.³⁶ The jury returned a verdict exceeding \$500,000 in favor of the plaintiffs.³⁷

B. *The Court of Appeals Decision*

The defendants appealed to the Court of Appeals for the Sev-

31. *See id.* at 1925-26.

32. *See id.* at 1926.

33. *See id.*

34. *See id.*

35. *Jaffee v. Redmond*, 51 F.3d 1346, 1354 (7th Cir. 1995), *aff'd*, 116 S. Ct. 1923 (1996).

36. *Jaffee*, 116 S. Ct. at 1926.

37. *See id.*

enth Circuit.³⁸ The court of appeals reversed the trial court judgment. At the outset of its opinion, the court decided to recognize a psychotherapist privilege. The court noted that the other circuits had split over the question of the wisdom of recognizing the privilege.³⁹ Indeed, the court frankly conceded that the majority of the relevant published opinions had answered the question in the negative.⁴⁰ Yet, the court chose to embrace the minority view and presented two very different arguments to justify its choice.

The first argument was humanistic in nature. Concerned with matters intrinsic to the litigants, humanistic rationales "treat privileges as corollaries to the rights to privacy and personal autonomy."⁴¹ The Seventh Circuit evoked this humanistic rationale in this quote from an earlier decision creating a psychotherapist privilege: "The psychiatric patient . . . exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame."⁴² The court proceeded to cite numerous precedents establishing privacy zones that reinforce "personal autonomy."⁴³ In "the American legal tradition," the court wrote, the protection of privacy is a legitimate "end in itself."⁴⁴

The second argument was instrumental. Focusing on extrinsic concerns, instrumental, or utilitarian, rationales "argue that privileges should be recognized as a means to the end of promoting certain types of out-of-court conduct."⁴⁵ The Seventh Circuit's end was to establish a privilege that would foster candid patient-psychotherapist consultation. The court observed that, during counseling, patients often divulge "highly personal matters," public revelation of which "would . . . be embarrassing to the point

38. See *Jaffee*, 51 F.3d at 1346.

39. See *id.* at 1354-55.

40. Although the Second and Sixth Circuits had opted for the privilege, the Fifth, Ninth, Tenth, and Eleventh Circuits were contra. See *id.* at 1354-55.

41. Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511, 543-44 (1994) (hereinafter cited as Imwinkelried, *An Hegelian Approach*).

42. *Jaffee*, 51 F.3d at 1356 (quoting *In re Zuniga*, 714 F.2d 632, 638 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983)).

43. See *id.* (quoting, *inter alia*, a passage from *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), that explains a constitutional basis for zones of privacy).

44. *Id.*

45. Imwinkelried, *An Hegelian Approach*, *supra* note 41, at 543.

of mortification."⁴⁶ The court reasoned that without an "assurance" of confidentiality, the patients may balk at disclosing their "innermost thoughts,"⁴⁷ and without such disclosures, the psychotherapist could not effectively diagnose and treat patients. The court drew support for its own reasoning from "the fact that all fifty states have recognized the need for and have adopted varying forms of the psychotherapist-patient privilege."⁴⁸

After deciding to recognize a privilege, the court turned to the issue of the privilege's scope. Although it acknowledged that Beyer was a clinical social worker rather than a psychiatrist or psychologist,⁴⁹ the court refused to draw the line between the two categories of counselors: "Drawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose. Indeed, social workers have been characterized as the 'poor person's psychiatrist.'"⁵⁰

Finally, the court addressed whether the new privilege would be absolute or conditional. Absolute privileges can be defeated only by establishing the holder's waiver or the applicability of a special exception⁵¹—not by a showing of compelling need for the information.⁵² A party seeking disclosure may surmount a conditional privilege, however, by demonstrating a compelling need.⁵³ Regarding this last issue, the Seventh Circuit, which had boldly recognized a psychotherapeutic privilege encompassing social workers, assumed a conservative stance. It fashioned a limited, conditional privilege, requiring the trial judge to assess "whether, 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."⁵⁴

The court held that the facts in *Jaffee* weighed in favor of sustaining the defendants' privilege claim. The court observed that the plaintiffs had little need for Beyer's notes because "[t]here

46. *Jaffee*, 51 F.3d at 1356 (citing *In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992)).

47. *See id.*

48. *Id.*

49. *See id.* at 1357-58.

50. *See id.* at 1358 n.19.

51. *See* RONALD L. CARLSON ET AL., EVIDENCE IN THE NINETIES 746-51 (3d ed. 1991).

52. *See* *Admiral Ins. Co. v. United States Dist. Ct. for the Dist. of Ariz.*, 881 F.2d 1486, 1494 (9th Cir. 1989).

53. *See* CARLSON, *supra* note 51, at 751.

54. *Jaffee*, 51 F.3d at 1357.

were numerous eyewitnesses to the shooting.”⁵⁵ In contrast, the privacy interests of Officer Redmond, who had “sought professional counseling after an unquestionably traumatic and tragic event she experienced in the line of duty,” were “substantial.”⁵⁶ Concluding that these privacy interests trumped the plaintiffs’ need, the court held that the trial judge had erred in permitting adverse comment on the defendants’ refusal to surrender Beyer’s notes.

C. *The Supreme Court Opinions*

1. The Majority Opinion

The majority opinion, written by Justice Stevens, affirmed the result and most of the rulings of the Seventh Circuit. On the threshold question of whether to recognize any psychotherapist privilege, the majority opinion concurred with the Seventh Circuit. Essentially ignoring the humanistic argument articulated by the Seventh Circuit, the majority instead adopted and elaborated on the circuit court’s instrumental rationale. “If the privilege were rejected,” the majority wrote, “confidential conversations between psychotherapists and their patients would surely be chilled.”⁵⁷ To underscore its own reasoning that such a chill would disserve societal goals, the majority, as did the Seventh Circuit, observed that “all 50 states and the District of Columbia have enacted into law some form of psychotherapist privilege.”⁵⁸

Although the majority asserted that both “reason” and “experience” favored its conclusion,⁵⁹ its argument relied primarily on the latter. The majority insisted that reliance upon legislative experience as a basis for exercising the judicial power codified in Rule 501 was entirely “appropriate.”⁶⁰ According to Justice Stevens, the legislative experience is pertinent “[b]ecause state legislatures are fully aware of the need to protect the integrity of the factfinding functions of their courts.”⁶¹ Consequently, “[i]t is of no consequence that recognition of the privilege in the vast majority of States is the product of legislative action rather than ju-

55. *Id.* at 1358.

56. *Id.*

57. *Jaffee*, 116 S. Ct. at 1929.

58. *Id.*

59. *See id.* at 1930.

60. *See id.*

61. *Id.*

dicial decision.”⁶² “The present unanimous acceptance of the privilege” by “state lawmakers” is persuasive proof of a solid social “consensus” that the psychotherapist-patient relationship merits the protection of an evidentiary privilege.⁶³

Next, the majority considered the nature of the privilege. Whereas its threshold ruling had rebuffed the trial judge’s refusal to recognize any privilege, its ruling on the nature of the privilege rejected the Seventh Circuit’s recognition of only a conditional privilege, superable by a showing of compelling need.⁶⁴ Justice Stevens declared for the majority:

We part company with the Court of Appeals on [this] point. We reject the balancing component of the privilege implemented by that court and a small number of States. Making the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. . . . [I]f the purpose of the privilege is to be served, the participants in the confidential conversation ‘must be able to predict with some degree of certainty whether particular discussions will be protected. An 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.’⁶⁵

Finally, the majority issued the ruling that drew the sharpest fire from Justice Scalia—its decision to affirm the Seventh Circuit’s extension of the privilege to conversations with licensed clinical social workers. The majority not only approved the result reached by the circuit court, but it also endorsed the circuit court’s reasoning. The majority observed that “[t]oday, social workers provide a significant amount of mental health treatment.”⁶⁶ The majority added that social workers’ “clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, . . . but whose counseling sessions serve the same . . . goals.”⁶⁷ The majority approvingly quoted the Seventh Circuit’s statement that to differentiate clinical social workers from psychiatrists would serve

62. *Id.*

63. *See id.*

64. *See Jaffee*, 51 F.3d at 1357.

65. *Jaffee*, 116 S. Ct. at 1932 (quoting *Upjohn v. United States*, 449 U.S. 383, 393 (1981)).

66. *Id.* at 1931.

67. *Id.*

no "discernible . . . purpose" or reason.⁶⁸

2. The Dissenting Opinion

Justice Scalia filed the only dissenting opinion in *Jaffee*,⁶⁹ although the Chief Justice joined in the part of the dissent that attacked the extension of the privilege to social workers.⁷⁰ In his dissent, Justice Scalia ignored the question of whether the privilege should be absolute or conditional. Instead, he directed his criticism to the majority's rulings that recognized any privilege at all and that expanded the scope of the privilege to apply to social workers.

Justice Scalia prefaced his criticism with a detailed review of Supreme Court precedents that expressed hostility to the creation or extension of evidentiary privileges.⁷¹ The common denominator of these "extensive"⁷² precedents, he wrote, was that they all vindicated the "traditional judicial preference for the truth."⁷³ With that preference in mind, Justice Scalia launched into his criticism of the majority rulings.

The key to Justice Scalia's critiques of both the threshold recognition of a psychotherapeutic privilege and its extension to social workers was his interpretation of the term "experience" in Federal Rule of Evidence 501. Construing the term to mean judicial experience, justice Scalia bluntly stated that he considered the " 'experience' of the States . . . irrelevant . . . because it consists entirely of legislation rather than common-law decision."⁷⁴ The statutes were irrelevant because their very existence "[a]t best . . . suggests that the matter has been found not to lend itself to judicial treatment."⁷⁵ On a more skeptical note, Justice Scalia contended that the statutory form of the state privileges "[a]t worst . . . suggests that the privilege commends itself only to decisionmaking bodies in which reason is tempered . . . by po-

68. *See id.* at 1932.

69. *Id.* (Scalia, J., dissenting).

70. *See id.* at 1932. The Chief Justice indicated that he joined "as to Part III" of the dissent. That part of the dissent deals with the question of whether the privilege should reach conversations with licensed clinical social workers. *See id.* at 1936 (Scalia, J., dissenting).

71. *See id.* at 1932-33 (Scalia, J., dissenting).

72. *Id.* at 1940 (Scalia, J., dissenting).

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

74. *Id.* at 1938 (Scalia, J., dissenting). The paragraph immediately following again refers to "the irrelevance" of the state statutes. *Id.* (Scalia, J., dissenting).

75. *Id.* at 1936 (Scalia, J., dissenting).

litical pressure from organized interest groups.”⁷⁶

Justice Scalia also challenged the wisdom of the majority’s decision to expand the scope of the privilege to protect licensed clinical social workers. Citing the pertinent Illinois statutes,⁷⁷ Justice Scalia asserted that even licensed social workers lack the “significantly heightened degree of skill” that is the hallmark of psychiatrists and psychologists.⁷⁸ The social workers’ education and experience are not as precisely tailored to the treatment of mental illness.⁷⁹ The differences between social workers and full-fledged mental health experts are so pronounced that, in Justice Scalia’s view, the confidentiality of social workers’ counseling is not worth “purchas[ing] at the price of occasional injustice.”⁸⁰ At the very end of his dissent, Justice Scalia insisted that the minimal benefit “of encouraging psychotherapy by social workers” did not make it “tolerable” to convert the federal courts into “tools of injustice.”⁸¹

II. AN EVALUATION OF JUSTICE SCALIA’S CONTENTION THAT UNDER FEDERAL RULE OF EVIDENCE 501, THERE SHOULD BE A GENERAL BIAS AGAINST CREATING NEW PRIVILEGES OR EXPANDING EXISTING PRIVILEGES

Before setting out his critique of the *Jaffee* majority’s specific rulings, Justice Scalia developed his general position that there should be a strong bias against the enforcement of evidentiary rules that interfere with the rational “pursuit of the truth.”⁸² Given that bias, the courts should ordinarily “reject new privileges . . . and . . . construe narrowly the scope of existing privileges.”⁸³ Justice Scalia’s stance on this issue is sound. Indeed, his position is stronger than he makes it out to be. Although he seemed content to marshal the earlier Supreme Court precedents that support his policy-based position,⁸⁴ the position could have been strengthened by a powerful statutory construction argument.

76. *Id.* (Scalia, J., dissenting).

77. *See id.* at 1937 n.2 (Scalia, J., dissenting).

78. *Id.* at 1937 (Scalia, J., dissenting).

79. *See id.* at 1938 (Scalia, J., dissenting).

80. *Id.* at 1937 (Scalia, J., dissenting).

81. *Id.* at 1941 (Scalia, J., dissenting).

82. *Id.* at 1940 (Scalia, J., dissenting).

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

84. *See id.* at 1933 (Scalia, J., dissenting).

It certainly is hard to dispute Justice Scalia's thesis that as a matter of general policy, courts should hesitate to adopt "rule[s] which exclud[e] reliable and probative evidence."⁸⁵ Public judicial systems exist in large part to reduce the danger that aggrieved parties will resort to private, violent means of dispute resolution.⁸⁶ If the system consistently produces accurate outcomes—verdicts determined by the correct application of legal norms to the facts—the outcomes will tend to inspire public confidence in the system. The system will be accepted as legitimate,⁸⁷ and the general public will be inclined to respect and to obey judgments rendered by the system. If an evidentiary rule obstructs the system's search for truth, however, the outcome might represent a substantive injustice.⁸⁸ Even worse, as Justice Scalia argued in his dissent in *Jaffee*, the court decreeing the outcome might be perceived as an "instrumen[t] of wrong."⁸⁹ If such outcomes become more than "occasional"⁹⁰ aberrations, the system itself may eventually become "unpalatable for those who love justice."⁹¹

Although Justice Scalia presented a policy argument that is powerful as well as sound, he strangely overlooked a statutory construction argument that would have reinforced his position. Perhaps this is because although he recognized that the Court in *Jaffee* did not write "on a clean slate,"⁹² Justice Scalia failed to examine what was on the slate; namely, Federal Rule of Evidence 501.⁹³ In enacting Rule 501, Congress set forth the means for evolution of federal privilege law. Thus, the question was not whether, as a matter of general evidentiary policy, the Court thought it advisable to recognize a psychotherapist privilege. Rather, the precise question was one of statutory interpretation: Is recognition of a psychotherapist privilege a proper exercise of the power that Congress delegated to the federal courts in Rule

85. *Id.* at 1932 (Scalia, J., dissenting).

86. See Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985).

87. See Dolf Sternberger, *Legitimacy*, in 9 INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCES 244, 247 (David Sills ed., 1968) (discussing the contributions of Max Weber, Carl Schmitt, and Guglielmo Ferrero to the sociological concept of legitimacy).

88. See *Jaffee*, 116 S. Ct. at 1932 (Scalia, J., dissenting).

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

90. See *id.* at 1932.

91. *Id.* at 1933.

92. *Id.* at 1940.

93. See FED. R. EVID. 501.

501?⁹⁴

The text of Rule 501, standing alone, does not answer the question. The first sentence of Rule 501 directs federal courts to determine privilege questions by resorting to "the principles of the common law as they may be interpreted . . . in the light of reason and experience."⁹⁵ The word "principle" ordinarily denotes a broader proposition than a particularized rule.⁹⁶ Congress's use of the term "principles" in Rule 501 attains more significance because, in other provisions in the same statutory scheme, Congress employed the narrower term "rule."⁹⁷ When a legislature utilizes different words, it may be assumed that the legislature had different things in mind.⁹⁸

The expression in Rule 501, "principles of the common law as they may be interpreted . . . in the light of reason and experience," is usually attributed to 1930s Supreme Court decisions, *Funk v. United States*⁹⁹ and *Wolfe v. United States*.¹⁰⁰ In *Funk* in particular, the Court made it clear that the expression denoted no specific set of evidentiary propositions, but rather a common-law methodology by which courts balanced the need for evidence against the benefit of cloaking a relationship with a privilege.¹⁰¹ Within years, Congress itself "confirmed" the *Funk-Wolfe* methodology by enacting Federal Rule of Criminal Procedure 26, which directs courts "to determine admissibility of evidence under the 'principles of the common law as they may be interpreted . . . in the light of reason and experience.'"¹⁰² The legislative history of Rule 501 demonstrates an intent to maintain this reading of the statutory expression. In his testimony before Congress, the late Professor David Louisell, one of the leading American authorities

94. See 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE §§ 5422, 5425 (1980).

95. FED. R. EVID. 501.

96. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22 (1977).

97. See, e.g., FED. R. EVID. 402.

98. See Florida Public Telecommunications Ass'n v. FCC, 54 F.3d 857 (D.C. Cir. 1995); United States v. Barial, 31 F.3d 216, 218 (4th Cir. 1994); see also Taracorp, Inc. v. NL Indus., Inc., 73 F.3d 738, 744 (7th Cir. 1996) (applying the same maxim to the interpretation of a contract).

99. 290 U.S. 371 (1933).

100. 291 U.S. 7 (1934).

101. See Imwinkelried, *An Hegelian Approach*, *supra* note 41, at 541.

102. Hawkins v. United States, 358 U.S. 74, 76-77 (1958) (quoting rule); cf. JACK B. WEINSTEIN ET AL., 3 WEINSTEIN'S FEDERAL EVIDENCE ¶ 501.02[2][a], at 501-6 to -7 (Joseph M. McLaughlin, gen. ed., 1997) (noting that the language of Rule 501 also appears in FED. R. CRIM. P. 26); 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 201, at 646 (1985) (Rule 26 based on *Wolfe* and *Funk*).

on privilege law, entreated Congress to authorize the courts to employ "the common law evolutionary method."¹⁰³ Likewise, the Senate committee report stated that Rule 501 was intended to permit the development of "evolved" privilege rules.¹⁰⁴

The text of Rule 501 furnishes the basic methodology, but suggests no preference in the adjudication of privilege claims. The Supreme Court has often¹⁰⁵ remarked that "the meaning of statutory language, plain or not, depends on context"¹⁰⁶ The interpretation of a word in a statutory scheme is a "holistic endeavor,"¹⁰⁷ and the meaning of one provision in the scheme can shed valuable light on the interpretation of another provision. Examining Rule 501 in the context of its statutory scheme—the Federal Rules of Evidence—dictates the very preference Justice Scalia urged: a bias against creating new privileges or expanding old privileges.

Numerous provisions of the Federal Rules of Evidence manifest a bias in favor of the admission of logically relevant evidence. There are provisions in Articles IV,¹⁰⁸ VI,¹⁰⁹ VII,¹¹⁰ VIII,¹¹¹ IX,¹¹² and X¹¹³ that lower common-law barriers to the introduction of relevant evidence. The policy bias in favor of admitting relevant evidence is both evident and purposeful; indeed, on several occasions, the Supreme Court has acknowledged it. In 1988, in its decision in *Beech Aircraft Corp. v. Rainey*,¹¹⁴ the Court referred to the "liberal thrust of the Federal Rules."¹¹⁵ In the same opinion, the Court alluded to the Federal Rules of Evidence's "general approach of relaxing the traditional barriers" to the admission of evidence. In 1993, the Court repeated similar generalizations in its celebrated scientific evidence decision, *Daubert v.*

103. PROPOSED RULES OF EVIDENCE (SUPP.): HEARINGS BEFORE THE SUBCOMM. ON CRIMINAL JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 93d Cong. 242 (1973).

104. See S. Rep. No. 93-1277, reprinted in 1974 U.S.C.C.A.N. 7051.

105. See *United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("[o]ver and over").

106. *King v. Saint Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

107. *United Savings Ass'n v. Timbers of Inwood Forest Ass'ns, Ltd.*, 484 U.S. 365, 371 (1988).

108. Imwinkelried, *An Hegelian Approach*, supra note 41, at 537-38.

109. See *id.* at 538.

110. See *id.* at 538-39.

111. See *id.* at 539.

112. See *id.* at 539-40.

113. See *id.* at 540.

114. 488 U.S. 153 (1988).

115. *Id.* at 169.

*Merrell Dow Pharmaceuticals, Inc.*¹¹⁶ The Court in *Daubert* approvingly cited the quoted language in *Rainey*¹¹⁷ and added that the Rules have a “permissive”¹¹⁸ character.

As the Court commented in *Daubert*, these provisions form a general “backdrop” for resolving ambiguities in individual statutes in the Federal Rules of Evidence.¹¹⁹ Given that backdrop, Rule 501 should be construed as embodying the general preference that Justice Scalia championed:

Although Rule 501 furnishes the procedural methodology for adjudicating privilege claims, its context—the other articles of the Federal Rules—supplies a substantive policy bias favoring the admission of relevant, reliable evidence. The invocation of a privilege can bar the introduction of such evidence, and the loss of that evidence is the social cost of recognizing the privilege. The Federal Rules of Evidence have a built-in bias against that type of loss. . . . [T]hat bias does not derive from the legislative history of Rule 501 itself; rather, it emanates from Rule 501’s neighbors, Articles IV and VI through X. Rule 501 in effect requires the judge to weigh the competing interests on a scale; but Congress has placed a thumb on the relevance side of the scale and tipped it in favor of the admission of probative evidence.¹²⁰

When in genuine doubt, therefore, a federal court should refuse to create a new privilege or to expand an existing one.

III. AN ASSESSMENT OF JUSTICE SCALIA’S CONTENTION THAT UNDER RULE 501, THE FEDERAL COURTS SHOULD NOT RECOGNIZE A PSYCHOTHERAPIST-PATIENT PRIVILEGE EXTENDING TO CONSULTATIONS WITH LICENSED CLINICAL SOCIAL WORKERS

After establishing his apprehension toward new privileges, Justice Scalia concluded that the majority in *Jaffee* erred both in recognizing a psychotherapist privilege and in extending that privilege to consultations with licensed clinical social workers. Is this conclusion inevitable once the validity of the general preference is conceded? It is submitted that the answer to that question is “no.” The *Jaffee* majority correctly ruled that the term “experience,” as used in Rule 501, counsels in favor of recognizing a

116. 509 U.S. 579 (1993).

117. *See id.* at 588.

118. *Id.* at 589.

119. *See id.*

120. *See Imwinkelried, An Hegelian Approach, supra* note 41, at 541.

psychotherapist privilege. The majority also properly followed the lead of "reason" under Rule 501 when it extended the privilege to licensed clinical social workers. The majority's rulings were justifiable exercises of the courts' power under Rule 501, and illumine the meaning of the statutory terms "experience" and "reason."

A. *The Majority's Decision to Fashion a Psychotherapist Privilege*

The validity of Justice Scalia's attack on the majority's recognition of a psychotherapist privilege turns on the meaning of the term "experience" in Rule 501. The majority obviously attached great weight to the fact that legislative bodies in "all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege."¹²¹ For his part, Justice Scalia dismissed that fact as "irrelevant."¹²² Although the majority was impressed by "[t]he uniform judgment of the" state legislatures,¹²³ Justice Scalia regarded the uniform pattern of the state statutes as an "irrelevance."¹²⁴ In contrast, the majority twice asserted that it is wholly "appropriate"¹²⁵ to rely on state statutes as experience warranting the creation of an evidentiary privilege.

Determining the meaning of the term "experience" by looking to state statutes and other sources, as the majority did, reflects a sounder interpretation of Rule 501. Indeed, just as Justice Scalia understated the case for the general policy bias against recognizing new privileges, Justice Stevens understated the case for the conclusion that the term "experience" in Rule 501 specifically contemplates legislative experience. In his attempt to rebut the dissent's argument, Justice Stevens simply asserted, "Although common-law rulings may once have been the primary source of new developments in federal privilege law, that is no longer the case."¹²⁶ Closer scrutiny, which the issue surely deserves, reveals that both policy considerations and maxims of statutory construction bolster the majority's ruling.

Many exclusionary rules of evidence rest on institutional rationales; that is, on justifications that serve a policy of ensuring effi-

121. *Jaffee v. Redmond*, 116 S. Ct. 1923, 1929 (1996).

122. *Id.* at 1938 (Scalia, J., dissenting).

123. *Id.* at 1930.

124. *Id.* at 1932 (Scalia, J., dissenting).

125. *Id.* at 1929-30.

126. *Id.* at 1930.

cient functioning of the courts as mechanisms for accurate resolution of disputes.¹²⁷ Rule 403 is a case in point. That rule allows the trial judge to exclude relevant evidence when the judge concludes that the admission of the evidence would tempt the jury to decide the case on an emotional basis.¹²⁸ In this situation, the introduction of the evidence might trigger an inferential error,¹²⁹ which could result in an inaccurate verdict. Rule 403 empowers the judge to shield the court from that risk. The best evidence and hearsay rules, contained in Articles X and VIII of the Federal Rules of Evidence, fit the same pattern. As particular applications of a broader best evidence principle,¹³⁰ these doctrines give the litigants incentives to produce more trustworthy types of evidence; for instance, the document itself rather than a paraphrase, or the witness herself rather than a description of what she said outside of court. The hope is that the presentation of more reliable species of evidence will yield more accurate verdicts.

Privileges do not fit neatly in this pattern. As previously stated, the *Jaffee* majority largely ignored the humanistic rationale advanced by the Seventh Circuit and focused instead on the instrumental justification. If the stated rationale for recognizing a privilege is the instrumental rationale that the privilege will promote certain behavior outside of court,¹³¹ then the pivotal question is the impact of the evidentiary rule beyond the walls of the courthouse. On the one hand, the courts are in a superior position to gauge the impact of an evidentiary rule on courtroom behavior, including the conduct of the petit jurors during deliberations. Unlike most legislators, trial judges have extensive experience interacting with petit jurors. By virtue of presiding at jury trials, judges undeniably gain insights into the workings of the jury institution. On the other hand, little reason, if any, exists to suppose that judges are in a better position to assess the effect of an evidentiary rule beyond the courthouse. Judges have no inherent advantage in determining whether shaping a privilege rule in a particular fashion will significantly enhance the freedom of inter-

127. AN EVIDENCE ANTHOLOGY 132, 189 (Edward J. Imwinkelried & Glen Weisenberger eds., 1996) [hereinafter ANTHOLOGY].

128. See generally Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59 (1984).

129. See *id.* at 68.

130. See generally Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988).

131. See ANTHOLOGY, *supra* note 127, at 132, 155, 188-89.

action between a psychotherapist and a patient miles from the courthouse. Because the legislature has the plenary power to enact statutes regulating that interaction, it would appear that a legislative body is in at least as strong a position as a court to evaluate whether a proposed privilege rule is likely to achieve a certain, desired effect outside of court. Thus, the stated policy underlying Rule 501 is served by consideration not only of judicial, but also of legislative, experience.

In addition to this strong policy argument, potent statutory construction arguments also justify the weight the *Jaffee* majority placed on state statutes recognizing a psychotherapeutic privilege. Justice Scalia seemed to argue that, in applying Rule 501, the federal courts should assign great, if not dispositive, significance to the "judicial treatment" of a claimed privilege.¹³² He summarily dismissed the legislative experience as an "irrelevance."¹³³ In effect, he read Rule 501 as if the adjective "judicial" preceded the noun "experience." Proper construction of Rule 501, however, first by comparing it to other rules, and second, by examining the origins of its text, prohibits interpolation of that adjective.

When the drafters wanted to insert the adjective "judicial" to limit a concept in the Federal Rules of Evidence, they did so explicitly. Rule 201, governing judicial notice, is a perfect example. The title of Article II,¹³⁴ the title of Rule 201, and the rule's text all expressly incorporate the adjective "judicial."¹³⁵ The adjective appears a total of six times in five subdivisions of Rule 201,¹³⁶ and the adverbial form of the term surfaces three times in two subdivisions.¹³⁷ Significantly, the very first paragraph of the accompanying Advisory Committee Note distinguishes between judicial notice of adjudicative and "legislative" facts.¹³⁸ When the drafters wanted to signal their intent to restrict a concept to its judicial facets, they employed apt language to evince that intent.¹³⁹

132. *Jaffee*, 116 S. Ct. 1932, 1936, 1938 (1996) (Scalia, J., dissenting).

133. *Id.* at 1938 (Scalia, J., dissenting).

134. *See* FED. R. EVID. art. II.

135. *See* FED. R. EVID. 201.

136. *See id.* The word appears once in subsection (a), once in subsection (c), once in subsection (d), twice in subsection (e), and once in subsection (f). *See id.*

137. *See id.* The word appears as an adverb once in subsection (b), and twice in subsection (g). *See id.*

138. *See* FED. R. EVID. 201 advisory committee's note.

139. *Cf.* FED. R. EVID. 803(22)-(23) (hearsay exceptions for certain types of

No language exists in Rule 501 to suggest even faintly that the drafters intended to restrict courts that interpret the statute to the weighing of judicial experience. One of the most frequently invoked maxims of interpretation is *expressio unius*.¹⁴⁰ That canon presumes that, when a drafter includes language in one statutory provision but omits the language from another provision in the same statutory scheme, the omission is intentional.¹⁴¹ As one court has remarked, "Where Congress knows how to say something but chooses not to, its silence is controlling."¹⁴² Rule 201 demonstrates beyond cavil that Congress knew how to limit a concept to its judicial aspects. Because Congress did not limit Rule 501 in that way, one is compelled to conclude that the drafters used the term "experience" in the broad sense, including experience with legislation.

The genesis of the language of Rule 501 supports the same conclusion. As previously stated, the language often is traced to the Court's 1930s decisions in *Funk v. United States*¹⁴³ and *Wolfe v. United States*.¹⁴⁴ The *Funk* decision itself, however, tracks the language back further to the Court's 1892 decision in *Benson v. United States*.¹⁴⁵ In *Benson*, the government called as a witness a codefendant whose trial had been severed from that of another defendant. Precedent, grounded on the common law of 1789, appeared to require the court to declare the codefendant was incompetent.¹⁴⁶ The Court, however, did not consider itself "precluded by that [precedent] from examining this question in the light of . . . sound reason."¹⁴⁷ Traditional reasons for holding

judgments).

140. See *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 517 (2d Cir. 1996). See generally Clifton Williams, *Expressio Unius Est Exclusio Alterius*, 15 MARQ. L. REV. 191 (1931).

141. See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994); *Russello v. United States*, 464 U.S. 16, 23 (1983); *Oregon Natural Resources Council, Inc. v. Kantor*, 99 F.3d 334, 339 (9th Cir. 1996); *United States v. Azeem*, 946 F.2d 13, 17 (2d Cir. 1991); *United States v. Espinoza-Leon*, 873 F.2d 743, 746 (4th Cir.), *cert. denied*, 492 U.S. 924 (1989); *Timken Co. v. United States*, 858 F. Supp. 206, 212 (Ct. Int'l Trade 1994); *Donovan v. United States*, 807 F. Supp. 560, 566 (D.S.D. 1992), *aff'd sub nom. Donovan v. Farmer's Home Admin.*, 807 F. Supp. 560, 566 (D.S.D. 1992); *B.F. Goodrich Co. v. United States*, 794 F. Supp. 1148, 1153 (Ct. Int'l Trade 1992); *Miller v. Carlson*, 768 F. Supp. 1331, 1335-36 (N.D. Cal. 1991).

142. *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995).

143. 290 U.S. 371 (1933).

144. 291 U.S. 7 (1934).

145. 146 U.S. 325 (1892); see also *Funk*, 290 U.S. at 375-77.

146. See *United States v. Reid*, 53 U.S. (12 How.) 361 (1851).

147. *Benson v. United States*, 146 U.S. 325, 335 (1892).

such a witness incompetent were no longer deemed sound.¹⁴⁸ The Court supported this conclusion by citing a trend toward a rule against incompetency.¹⁴⁹ Legislative, as well as judicial, developments marked the trend; indeed, in the Court's view, state legislation had "controlled the decisions of the courts"¹⁵⁰

As it had in *Benson*, the *Funk* Court relied upon "general authority" and "sound reason"—"upon the trend of congressional opinion and of legislation (that is to say of legislation generally), and upon the great weight of judicial authority"¹⁵¹ Reviewing the early, common-law rule that a spouse was incompetent to testify for an accused spouse, the Court determined that contemporary uses of the terms "reason" and "experience" required abandonment.¹⁵² A current of modern state legislation, present in "most," but not all, states,¹⁵³ helped persuade the Court that the early view conflicted with contemporary "public policy."¹⁵⁴

Paraphrasing *Funk* one year later in *Wolffe*, the Court wrote that evidentiary rules are "governed by common-law principles as interpreted and applied by the federal courts in the light of reason and experience."¹⁵⁵ Thus, the examination of general authority had evolved into an assessment of "experience," including, in *Wolffe*, state court privilege rulings predicated on state statutes.¹⁵⁶ Congress endorsed inclusion of state legislation as part of "experience" when it enacted Rule 501, the text of which recites almost verbatim the passage in *Wolffe*. The *Jaffee* majority's look at state legislative trends in its assessment of experience fell squarely within its own, congressionally approved, precedent.

148. *See id.* at 335-36.

149. *See id.* at 337.

150. *Id.* A quarter-century later, in another case abrogating an ancient incompetency rule, the Court again followed *Benson's* inquiry into "sound reason" and "general authority." *See Rosen v. United States*, 245 U.S. 467 (1918). With regard to "sound reason," the Court balanced the old reasons against a modern concern, "the conviction of our time that the truth is more likely to be arrived at" by hearing all percipient witnesses and leaving to the jury the question of how much weight to give their testimony. *Id.* at 471. As to "general authority," the Court in *Rosen*, as it had in *Benson*, cited trends in both courts and legislatures. *See id.*

151. *Funk*, 290 U.S. at 380.

152. *See id.* at 381-85.

153. *See id.* at 376.

154. *See id.*

155. *Wolffe v. United States*, 291 U.S. 7, 12 (1934).

156. *See id.* (citing *Linnell v. Linnell*, 143 N.E. 813, 814 (Mass. 1924); *State v. Young*, 117 A. 713, 715 (N.J. 1922); *O'Toole v. Ohio German Fire Ins. Co.*, 123 N.W. 795, 797 (Mich. 1909); *Wickes v. Walden*, 81 N.E. 798, 804 (Ill. 1907)).

In sum, Justice Scalia erred in seeking to limit the concept of "experience" in Rule 501 to judicial experience. At least when the stated justification for a privilege is instrumental, the crucial issue is the likely impact of the evidentiary rule on behavior outside of the courtroom. A legislative body is at least as well poised to forecast that impact as the judiciary. Further, it is unsound to interpret Rule 501 as if the term "judicial" preceded the term "experience." Rule 501 omits that adjective, and the drafters' use of that very adjective in other provisions in the Rules indicates that the omission was purposeful. Broadly construing Rule 501, so that it encompasses legislative as well as other experience, also holds truer to *Funk* and other opinions from which the wording of Rule 501 derives.

B. The Majority's Decision to Extend the Psychotherapist Privilege to Patients' Consultations with Licensed Clinical Social Workers

If the therapist in *Jaffee* had been a psychiatrist or psychologist, the majority's landmark enunciation of the existence of an uncodified, absolute psychotherapist privilege would have disposed of the case. However, because Officer Redmond's therapist was a licensed clinical social worker, the majority confronted the task of sketching at least the "contours" of its creation.¹⁵⁷

As previously stated, the majority included clinical social workers within the parameters of the psychotherapist privilege; indeed, it professed "no hesitation" in so doing.¹⁵⁸ Citing a study by the United States Department of Health and Human Services, the majority stated that social workers now "provide a significant amount of mental health treatment."¹⁵⁹ The majority emphasized that social workers' mental health clientele "often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist."¹⁶⁰

Justice Scalia, joined by Chief Justice Rehnquist, assailed the majority's ruling that the privilege encompasses consultations with social workers.¹⁶¹ Justice Scalia criticized the majority opinion for focusing only on the similarities between social workers and other mental health professionals, while penning "not a

157. *Jaffee*, 116 S. Ct. 1932.

158. *Id.* at 1931.

159. *Id.*

160. *Id.*

161. *See id.* at 1932 (Scalia, J., dissenting).

word about the respects in which they are different."¹⁶² Justice Scalia, joined by the Chief Justice, proceeded to detail two differences. First, Justice Scalia highlighted the difference in education and training between the two groups.¹⁶³ Review of statutory licensing requirements for clinical social workers engaged in mental health counseling¹⁶⁴ convinced the dissenters that social workers lack the "greatly heightened degree of skill" psychiatrists and psychologists possess.¹⁶⁵ Even a licensed social worker's training was not deemed "comparable in its rigor . . . or precision."¹⁶⁶ Second, Justice Scalia underscored that, although psychiatrists and psychologists "do nothing but psychotherapy,"¹⁶⁷ social workers do not confine their practice to psychotherapy; rather, they "interview people for a multitude of reasons."¹⁶⁸ Given that difference, to apply the privilege fashioned by the majority, a trial judge will have "to determine whether the information provided to the social worker was provided to him in his capacity as a psychotherapist"¹⁶⁹—a determination unnecessary in the case of psychiatrists and psychologists. Consequently, Justice Scalia reasoned, it will be more difficult for trial judges to administer the majority's privilege than it would be to apply a privilege confined to psychiatrists and psychologists.

Justice Scalia correctly faulted the majority's analysis for being incomplete because it neglects the significant differences between the two groups of mental health therapists. Moreover, Justice Scalia argued persuasively that it would be constitutional to restrict any privilege to psychiatrists and psychologists. Assume that the Illinois legislature had enacted a statute with that narrow scope. Suppose further that a social worker rendering therapy or one of the social worker's clients challenged the statute as violative of the Equal Protection Clause. In most cases, when a court assesses the validity of legislation under the equal protection guarantee, the court applies the rational basis test.¹⁷⁰ The crucial question is whether the classification is rationally related

162. *Id.* at 1937 (Scalia, J., dissenting).

163. *See id.* at 1937-38 (Scalia, J., dissenting).

164. *See id.* (Scalia, J., dissenting).

165. *Id.* (Scalia, J., dissenting).

166. *Id.* at 1938 (Scalia, J., dissenting).

167. *Id.* (Scalia, J., dissenting).

168. *Id.* (Scalia, J., dissenting).

169. *Id.* (Scalia, J., dissenting).

170. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 14.1-3 (5th ed. 1995).

to a legitimate state policy. If there is such a relation, the statutory classification passes muster.

It is true that, in some instances, the Supreme Court scrutinizes the classification more closely,¹⁷¹ sometimes even subjecting the classification to strict scrutiny.¹⁷² Strict scrutiny is ordinarily reserved for cases in which the classification impinges upon a fundamental right,¹⁷³ such as the right to vote,¹⁷⁴ or in which the very basis of the classification is a suspect factor, such as race.¹⁷⁵ Our hypothetical Illinois statute would not trigger strict scrutiny. No fundamental right exists to medical services in general¹⁷⁶ or to mental health therapy in particular.¹⁷⁷ Further, although there is some contrary authority,¹⁷⁸ the clear "weight of authority"¹⁷⁹ is that poverty is not a suspect basis of classification.¹⁸⁰ Therefore, the rational basis test would control the constitutionality of the Illinois statute, and Justice Scalia's arguments would be telling. The differences with which Justice Scalia would justify differential treatment of the two groups of mental therapists also would suffice to validate the statute under the Equal Protection Clause.

If *Jaffee* had posed the question whether the United States Constitution permitted restricting the privilege to psychiatrists and psychologists, Justice Scalia's identification of significant differences between the two groups of therapists would have been dispositive. Constitutionality was not the question, however. Like

171. *Id.* § 14.3.

172. *See id.*

173. *See* McLain v. Meier, 496 F. Supp. 462, 466 (D.N.D.), *aff'd in part and rev'd in part on other grounds*, 637 F.2d 1159 (8th Cir. 1980).

174. *See* Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

175. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

176. *See* Hill v. Shobe, 93 F.3d 418, 422 (7th Cir. 1996).

177. *See* Noyes v. Moyer, 829 F. Supp. 9, 13 (D.N.H. 1993); *Woe v. Cuomo*, 559 F. Supp. 1158, 1165 (E.D.N.Y. 1983), *aff'd in part and rev'd in part*, 729 F.2d 96 (2d Cir. 1984).

178. *See* Nieves v. University of Puerto Rico, 7 F.3d 270, 275 (1st Cir. 1993) (finding poverty to be a suspect class under the Puerto Rican, but not the U.S. Constitution); *Serrano v. Priest*, 557 P.2d 929, 952 (Cal.), *cert. denied*, 432 U.S. 907 (1977); *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977); *Washakie Co. School Dist. No. One v. Herschler*, 606 P.2d 310, 374 (Wyo. 1980).

179. *See* Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 98 (Ark. 1983) (Adkisson, C.J., Dissenting).

180. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); *Hassan v. Wright*, 45 F.3d 1063, 1068 (7th Cir. 1995); *Dotson v. Shalala*, 1 F.3d 571, 580 (7th Cir. 1993); *Hogan v. Russ*, 890 F. Supp. 146, 148 (N.D.N.Y. 1995); *Johnson v. Dept. of Pub. Safety & Corr. Services*, 885 F. Supp. 817, 820 (D. Md. 1995); *Oaks v. District Court*, 631 F. Supp. 538, 545 (D.R.I. 1986); *Board of Educ. v. Nyquist*, 39 N.E.2d 359, 365 (1982); *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135, 1144 (Okla. 1987).

the question about the existence of a psychotherapist privilege, the question about the scope of the privilege is a question of interpretation of a statute, Rule 501. Once again, examination of Rule 501 in its statutory context and in light of its origins will aid interpretation.

Nothing in the text of Rule 501 either requires or invites courts fashioning a new privilege to limit its scope to the extent that the Constitution compels. Other statutes within the Federal Rules of Evidence—Rules 402 and 412 in particular—include such limitations. On its face, Rule 402 differentiates between various categories of exclusionary rules of evidence. Rule 402 distinguishes exclusionary rules “provided by the Constitution” from those “provided . . . by these rules,” including, of course, Rule 501.¹⁸¹ Rule 412, the rape shield statute, is even more instructive.¹⁸² Subdivision (a) states the general rule excluding evidence of a complainant’s sexual history.¹⁸³ Subdivision (b)(1) then enumerates three exceptions to the general rule in criminal cases.¹⁸⁴ Subdivision (b)(1)(C) codifies an exception for “evidence the exclusion of which would violate the constitutional rights of the defendant.”¹⁸⁵ Thus, under Rule 412, courts are required to limit the scope of the exclusionary rule to the extent constitutionally permissible. By omitting any similar directive in Rule 501, Congress permitted courts shaping a new privilege to extend their reach beyond constitutional minima. Courts are to be guided, according to the rule, by “reason and experience.”

Just as “experience,” both judicial and legislative, militates in favor of a psychotherapist privilege, “reason,” construed in light of that term’s origins, favors extension of that privilege to consultations with social workers. Since the *Benson* opinion in 1892, the Court has deemed itself free to change the law of privilege if contemporary reasons warranted change.¹⁸⁶ Likewise, in 1933, the *Funk* Court, using language reminiscent of Lord Coke, highlighted judicial latitude to follow the lead of “reason” in “adapt[ing]” evidentiary principles.¹⁸⁷ Lower courts, it instructed, should develop evidentiary doctrines “suited to . . . the genius,

181. See FED. R. EVID. 402.

182. See FED. R. EVID. 412.

183. See FED. R. EVID. 412(a).

184. See FED. R. EVID. 412(b)(1).

185. FED. R. EVID. 412(b)(1)(C).

186. See *Benson v. United States*, 146 U.S. 325, 335 (1892).

187. See *Funk*, 290 U.S. at 384.

spirit, and objects of American institutions”¹⁸⁸ This approach has also survived passage of the Federal Rules of Evidence. In *Trammel v. United States*, issued nearly a century after *Benson*, the Court found both ancient and recent reasons for a common-law privilege to be unsound and, following “reason and experience” as required by Rule 501, fashioned an evidentiary doctrine appropriate to the times.¹⁸⁹

In extending the psychotherapist privilege to clinical social workers, the *Jaffee* majority properly exercised its statutorily delegated power to design privilege rules compatible with the distinctive “spirit . . . of American institutions.”¹⁹⁰ Its extension serves a core characteristic of American institutions: a commitment to legal equality, one that predates and transcends the Equal Protection Clause. As early as the Declaration of Independence, Jefferson proclaimed equality a “self-evident” truth.¹⁹¹ The principle of equality, he wrote in a letter to Washington, is the “foundation” of the Constitution.¹⁹² Similarly, Alexander Hamilton declared in an address at the Constitutional Convention in 1787 that “[t]here can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government.”¹⁹³ Even the great French historian de Tocqueville identified “a passion for equality” as one of America’s

188. *Id.*

189. *See Trammel v. United States*, 445 U.S. 40 (1980). The Court first concluded that the original reasons barring one spouse from testifying against another—that a wife is her husband’s chattel, with no independent legal identity—no longer were valid. *See id.* at 52. The contemporary reason—preservation of the marital relationship—did not override the need for the witness’s testimony. *See id.* at 52-53. This latter conclusion directly contradicted a recent declaration that the contemporary reason “has never been unreasonable and is not now.” *Hawkins v. United States*, 358 U.S. 74, 77 (1958). Nonetheless, the Court in *Trammel* concluded that the dictates of reason and experience, as assessed in 1980, authorized a new privilege rule; accordingly, it overruled *Hawkins*. *See Trammel*, 445 U.S. at 53.

190. *See Funk*, 290 U.S. at 384. When the Federal Rules of Evidence were adopted, those institutions seemed unready to embrace the psychotherapeutic privilege that the majority adopted in *Jaffee*. *See Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 6 (1974) (comments of Rep. William Hungate, chairman of the Subcommittee on Criminal Justice of the House Judiciary Committee) (“It has been the effort of the committee to draw this bill so that the law of privileges is left where we found it. This meets the major complaint. People did not like the changes being made; when you open this up, the social workers and the piano tuners want a privilege. It is a very difficult matter, so we left that where it is for now.”).

191. HENRY DAVIDOFF, *THE POCKET BOOK OF QUOTATIONS* 80 (1959).

192. *POLITICAL QUOTATIONS: A COLLECTION OF NOTABLE SAYINGS ON POLITICS FROM ANTIQUITY THROUGH 1989* 46 (Daniel B. Baker, ed., 1990):

193. *Id.*

foremost institutional traits.¹⁹⁴

That passion surfaces in critiques of American evidence law. For years, one of the leading contemporary evidence commentators, Professor Kenneth Graham, Jr., has contended that the primary failing of the Federal Rules of Evidence is that they subvert the principle of legal equality. In his 1973 letter to the House subcommittee considering the draft evidence rules, Professor Graham charged that the draft was "shockingly unfair."¹⁹⁵ As an example of the unfairness, Professor Graham pointed to Rule 803(6), which sets out the business entry hearsay exception.¹⁹⁶ This rule, he wrote, represents "a special privilege" for wealthy "businessmen."¹⁹⁷ Its wording permits a bank to invoke the exception to justify introducing its computer printouts against an individual defendant. It did not appear broad enough, however, to allow the individual to introduce his or her check stubs against the bank.¹⁹⁸ Provisions such as draft Rule 803(6) led Professor Graham to conclude that the Rules were the handiwork of "an oligarchy of rich . . . lawyers who make rules to suit their powerful clients"¹⁹⁹

After the passage of the Federal Rules of Evidence, Professor Graham reiterated this theme in his oft-cited treatise on the evidence rules. He voiced the fear that the courts would slight the principle of legal equality as they evolved privilege doctrine pursuant to Rule 501.²⁰⁰ Professor Graham was concerned that courts would structure privilege rules to shield "professions that primarily serve a monied clientele . . .—doctors, lawyers, and psychiatrists"²⁰¹—while denying protection to "professions that serve analogous functions for working class people"²⁰² He specifically stated that, given the similarity of their professional functions, it would be inconsistent with the principle of legal equality to cover psychiatrists but to exclude social workers.²⁰³ Professor

194. POLITICAL QUOTATIONS: A WORLDWIDE DICTIONARY OF THOUGHTS AND PRO-
NOUNCEMENTS FROM POLITICIANS, LITERARY FIGURES, HUMORISTS AND OTHERS 51 (Michael C.
Thomsett & Jean F. Thomsett, eds., 1994).

195. See PROPOSED RULES OF EVIDENCE (SUPP.), HEARINGS BEFORE THE SUBCOMM. ON
CRIMINAL JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 93d Cong. 202 (1973).

196. See *id.* at 204.

197. *Id.*

198. See *id.*

199. *Id.* at 205.

200. See WRIGHT & GRAHAM, *supra* note 94, § 5422, at 675-76 (1980).

201. *Id.* at 676.

202. *Id.*

203. See *id.* at 676 n.52.

Graham complained that, to date, the courts had neglected the privilege needs of "the poor man."²⁰⁴

The *Jaffee* decision represents a belated response to Graham's complaint. Echoing Graham, Justice Stevens justified extending the privilege on the ground that social workers' "clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals."²⁰⁵

If the psychotherapy privilege had been limited to psychiatrists and psychologists, it would have offended the principle of legal equality. The poor and the members of the working class and middle class have at least as great a need for mental health therapy as the wealthy. A 1973 article, cited by the Seventh Circuit, states that the incidence of mental illness is highest in low-income groups.²⁰⁶ As early as the 1930s, researchers detected indications of a higher rate of schizophrenia among the poor.²⁰⁷ The most recent research, sponsored by the National Institute of Mental Health, confirms those indications. These data indicate that the odds of finding a schizophrenic disorder in the lowest socioeconomic status group are 8.1 times higher than that for the highest group. For severe cognitive impairment, the odds are 11.5 times greater.²⁰⁸ Observing that other studies had found that the incidence of hysterical neurosis²⁰⁹ and sociopathy²¹⁰ also is highest among the poor, these researchers stated that, overall, "the odds of individuals in the lowest socioeconomic status group having a disorder is about 2.5 times that of individuals in the highest group."²¹¹ They concluded that "there is no question that the burden of mental disorders . . . rests disproportionately on those with the least ability to meet their costs."²¹²

204. See *id.* at 676.

205. *Jaffee*, 116 S. Ct. at 1931 (citation omitted).

206. See Richard Delgado, Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 CAL. L. REV. 1050, 1051 (1973); see also *Jaffee v. Redmond*, 51 F.3d 1346, 1358 n.19 (7th Cir. 1995), *aff'd*, 116 S. Ct. 1923 (1996).

207. See D.A. Regier et al., *One-Month Prevalence of Mental Disorders in the United States and Sociodemographic Characteristics: The Epidemiologic Catchment Area Study*, 88 ACTA PSYCHIATRICA SCANDINAVICA 35, 44 (1993).

208. See *id.* at 44-45; see also DONALD W. GOODWIN & SAMUEL B. GUZE, *PSYCHIATRIC DIAGNOSIS* 46 (5th ed. 1996).

209. See *id.* at 111.

210. See *id.* at 258.

211. Regier et al., *supra* note 207, at 44.

212. *Id.* at 45. Accord 25 WRIGHT & GRAHAM, *supra* note 94, § 5525, at 177 (citing study finding that psychiatrists and psychologists "treated only 16% of those receiving

Despite their fragmentary nature, these data point to the same conclusion that common sense suggests. Mental illness can be a product of prolonged, intense psychological pressure; in some respects, the poor are more exposed to this pressure. Desperate financial need can be a source of pressure; as a class, the poor are more vulnerable to that pressure than other economic strata. Because they cannot afford better housing, many of the poor reside in "crime ridden" areas with high homicide rates²¹³—an existence that itself can be "stressful."²¹⁴

Although the need may be superior, both the quantity and quality of mental health counseling available to the poor is inferior to that available to the well-to-do. As the Seventh Circuit observed, the professional services of psychiatrists and psychologists can be "costly"²¹⁵ and, consequently, beyond the reach of the poor.²¹⁶ As a practical matter, the poor have effective access only to psychiatric social workers.²¹⁷ In addition, as the *Jaffee* dissenters stated, the social workers to whom the poor have access have less expertise in treating mental illness than psychiatrists and psychologists.²¹⁸ To make matters worse, members of the lower economic strata are often more distrustful of authority figures and may be less willing to divulge relevant information to the mental health therapist without an assurance of confidentiality.²¹⁹ Thus, the instrumental justification advanced by both the Seventh Circuit and the *Jaffee* majority—promotion of candid communications between patient and psychotherapist—arguably applies more to the clients of social workers than to those of private psychiatrists and psychologists.

These problems are largely a product of the market mechanisms for distributing mental health services. The simple truth is that many people cannot afford the services of well-trained psy-

treatment for mental illness, whereas social workers treated 18%, nurses 29%, and other unlicensed professionals took care of 26% of the patients. Moreover, nearly 50% of those suffering from mental illness have incomes below the poverty level and could hardly afford to patronize those who serve the country club crowd."); cf. Richard A. Shweder, *It's Called Poor Health for a Reason*, N.Y. TIMES, Mar. 9, 1997, at E5 (reciting British statistics showing that lower classes suffer more from mental illness than upper classes).

213. See *Jaffee*, 51 F.3d at 1355.

214. See *id.*

215. See *id.* at 1358 n.19.

216. See Delgado, *supra* note 206, at 1054-55.

217. See *id.* at 1050, 1054, 1063; see also *Jaffee*, 51 F.3d at 1358 n.19.

218. See *Jaffee*, 116 S. Ct. at 1937-38 (Scalia, J., dissenting).

219. See Delgado, *supra* note 206, at 1053, 1068.

chiatrists and psychologists. Quoting the 1973 article that revealed the high incidence of mental illness among the lower classes,²²⁰ the Seventh Circuit described clinical social workers as the "poor man's psychiatrist."²²¹ The facts of *Jaffee* demonstrate that even fully employed people, like police officers, consult social workers through work-sponsored programs.²²² Admittedly, society has no constitutional duty to make the services of psychiatrists and psychologists available to everyone at the government's expense.²²³ Nonetheless, the government does not need to add insult to injury. The market may dictate the type of mental health therapist a person can consult, but the law determines the kind of evidentiary privilege, if any, that covers the consultation. The courts should not compound inequalities by denying any evidentiary privilege to consultations with those mental health experts whom the poor can consult. The legislature may have no affirmative constitutional duty to ensure equal access to the most thoroughly trained mental health professionals; however, for their part, courts can grant the poor and middle class equal evidentiary protection for their mental health consultations. Rule 501, through its forbear, the *Funk* line of opinions, empowers courts to employ "reason" to contour evidentiary privileges "in harmony with the . . . spirit . . . of American institutions . . ."²²⁴ That spirit, which embraces a commitment to legal equality,²²⁵ inspires the *Jaffee* majority's decision to extend the privilege to clinical social workers.

IV. CONCLUSION

In one sense, *Jaffee* disappoints. The *Jaffee* majority chose to rely on a conventional, instrumental justification for evidentiary privileges. Grave reason exists to doubt whether, in the long term, the instrumental rationale will prove the firmest grounding for privilege doctrine. A few empirical studies show the impact of evidentiary privileges on interactions outside the courtroom. The studies are so few in number that their findings are necessarily

220. See *Jaffee*, 51 F.3d at 1358 n.19 (quoting Delgado, *supra* note 206, at 1050).

221. *Id.*

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

223. See generally *Hill*, 93 F.3d at 422 (stating that governments have no constitutional duty to provide emergency medical services); *Noyes v. Moyer*, 829 F. Supp. 9 (D.N.H. 1993); *Woe*, 559 F. Supp. at 1165.

224. *Funk v. United States*, 290 U.S. 371, 384 (1933).

225. See *supra* notes 190-225 and accompanying text.

tentative; however, those findings tend to suggest that the courts and commentators have overestimated the impact of privileges on the willingness to communicate with professionals such as attorneys and psychotherapists.²²⁶ If additional research yields the same finding, courts wishing to continue cloaking certain relationships in an evidentiary privilege may need to depreciate the instrumental justification and to consider the humanistic rationale more seriously. In its opinion in *Jaffee*, the Seventh Circuit articulated the latter rationale²²⁷ and gave the Supreme Court an opportunity to express its own view of the viability of a humanistic rationale for evidentiary privileges. Unfortunately, in the Supreme Court, neither the majority nor the dissenters seized that opportunity.

In another sense, however, *Jaffee* pleases. Although *Jaffee* focused on the instrumental rationale, it did so in a way that not only reached the right results, but also gave important insight into federal privilege doctrine. Although Rule 501 refers to "the common law," strictly speaking, courts do not exercise common-law power when developing privilege doctrine. Rather, they employ a statutory power delegated by Congress. In *Jaffee* the Court elucidated the proper means to construe Rule 501's central statutory terms: "reason" and "experience."

In addressing the term "experience," the *Jaffee* decision reaffirms that courts exercising their delegated power should look at "experience" in a broad sense, including legislative experience. The language of Rule 501 coalesced in the *Funk-Wolfle* line of cases, in which the Court treated state legislation as "experience" justifying reform of an evidentiary rule.²²⁸ Following that line of cases, the majority in *Jaffee* considered the "uniform"²²⁹ pattern of the state legislation impressive enough to warrant the decision to create a federal psychotherapist privilege. *Jaffee* thus attests that, if the question is, for example, whether there is a need for a psychotherapist privilege, it is perfectly proper for a court to consider state legislation on the subject.

In addressing the term "reason," the majority in *Jaffee* further endorsed the approach established in the earlier opinions. In

226. See generally Daniel W. Schuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893 (1982); Fred Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989).

227. See *Jaffee*, 51 F.3d at 1356.

228. See *supra* notes 143-56 and accompanying text.

229. See *Jaffee*, 116 S. Ct. at 1930.

Funk, the Court, elaborating on the role of "reason" in formulating evidentiary doctrine, made clear that judges are both permitted and encouraged to adapt evidentiary norms to "changed" social conditions to keep those norms consistent with the "spirit . . . of American institutions" ²³⁰ In *Jaffee*, the majority acknowledged a profound social change: "Today, social workers provide a significant amount of mental health treatment."²³¹ Its decision to extend the privilege to social workers adapted privilege doctrine to that change. Moreover, it did this in a manner wholly consistent with the commitment to legal equality that is characteristic of American institutions. Concededly, it would not have been unconstitutional to promulgate a psychotherapist privilege denying any protection to patients who consult clinical workers. Drawing the line there, however, would have been an illiberal affront to the principle of legal equality.

230. *Funk*, 290 U.S. at 381-85.

231. *Jaffee*, 116 S. Ct. at 1931. The Court seconded a conclusion of the appellate court. See *Jaffee*, 51 F.3d at 1355.

