

1997

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## Recommended Citation

Michael Bressman, *Jaffee v. Redmond: Towards Recognition of a Federal Counselor-Battered Woman Privilege*, 30 Creighton Law Review. 319 (1997)

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This work was originally published as Michael Bressman and Fernando R. Laguarda, Jaffee v. Redmond: Towards Recognition of a Federal Counselor-Battered Woman Privilege in 30 Creighton Law Review 319 1997.

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# **JAFFEE v. REDMOND: TOWARDS RECOGNITION OF A FEDERAL COUNSELOR-BATTERED WOMAN PRIVILEGE**

MICHAEL B. BRESSMAN & FERNANDO R. LAGUARDA†

## INTRODUCTION

In theory if not in fact, the purpose of a trial in the American legal tradition is to discern the truth related to a particular dispute.<sup>1</sup> Although scholars have debated how well the adversary system actually promotes fair and accurate outcomes, this truth-seeking paradigm remains generally well-accepted.<sup>2</sup> To ascertain the truth, information must be presented to the triers of fact for their consideration. The law of evidence thus provides the rules for introducing and considering such information in the adversary system.<sup>3</sup>

The fundamental evidentiary principle guiding the introduction of evidence is that "the public has a right to every man's evidence."<sup>4</sup> This principle is embodied in Federal Rule of Evidence 402, which declares that "[a]ll relevant evidence is admissible."<sup>5</sup> Relevant evidence allows for reliable fact-finding, furthering the truth-seeking mission of the courts. By contrast, the Federal Rules of Evidence exclude other evidence that would detrimentally affect the truth-seeking process.

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1. See FED. R. EVID. 102 (providing that "[t]hese rules shall be construed to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.").

2. See Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 56 (1991).

3. See generally FED. R. EVID. 101-1103.

4. *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961)). The phrase "every man's evidence" dates back to at least as early as the mid-18th century when it was invoked during a debate in the House of Lords. *Kastigar v. United States*, 406 U.S. 441, 443 n.5 (1972) (citing 12 T. HANSARD, PARLIAMENTARY HISTORY OF ENGLAND 675, 693 (remarks of the Duke of Argyll and of Lord Chancellor Harwicke)).

5. FED. R. EVID. 402.

For example, irrelevant evidence is inadmissible.<sup>6</sup> Likewise, unreliable or prejudicial evidence, which would have the tendency to derogate this process, is excluded.<sup>7</sup>

The development of evidentiary privileges represents a different concern. Unlike the other rules barring evidence, evidentiary privileges exclude evidence that may well be relevant, reliable, and not prejudicial.<sup>8</sup> Privileges, however, elevate other important societal interests and policies, such as privacy interests, above truth seeking.<sup>9</sup> Because privileges prevent normally admissible evidence from being revealed to the triers of fact, courts generally disfavor them.<sup>10</sup>

Nevertheless, some privileges, such as the attorney-client and spousal privileges, have gained clear acceptance.<sup>11</sup> The question is whether other privileges should join their ranks. In answering this question, courts typically consider the four criteria formulated by Dean Wigmore.<sup>12</sup> These criteria balance the individual's and society's interests against the need for the evidence.

In Federal Rule of Evidence 501, Congress gave the federal courts additional guidance in developing new privileges.<sup>13</sup> Congress instructed the federal courts to consider "the principles of common law

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6. *Id.*

7. See, e.g., FED. R. EVID. 802 (generally prohibiting hearsay statements from admission into evidence). See also FED. R. EVID. 404 (generally prohibiting character evidence from admission into evidence); FED. R. EVID. 403 (balancing probative value of evidence against harm likely to result from its admission).

8. *Developments in the Law — Privileged Communications*, 98 HARV. L. REV. 1450, 1454 (1985).

9. *Privileged Communications*, 98 HARV. L. REV. at 1454.

10. *Trammel v. United States*, 445 U.S. 40, 50-51 (1980) (citing *Elkins v. United States*, 364 U.S. 202, 234 (1960) (Frankfurter, J., dissenting); *United States v. Nixon*, 418 U.S. 683, 709-10 (1974)).

11. See 8 JOHN H. WIGMORE, EVIDENCE § 2285 (McNaughten rev. 1961).

12. *Id.* These criteria are:

- 1) The communications must originate in a confidence that they will not be disclosed.
- 2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relationship between the parties.
- 3) The *relation* must be one which in the opinion of the community ought to be sedulously fostered.
- 4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

*Id.*

13. See FED. R. EVID. 501.

. . . in the light of reason and experience.”<sup>14</sup> *Jaffee v. Redmond*<sup>15</sup> represents the United States Supreme Court’s most recent effort to grapple with this mandate. In *Jaffee*, the Supreme Court held that “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.”<sup>16</sup> The Court then extended this new privilege to protect communications between a licensed social worker and her patients.<sup>17</sup> The *Jaffee* decision demonstrates the Court’s willingness to consider personal and community interests in crafting new evidentiary privileges.

Part I of this Article reviews the *Jaffee* decision.<sup>18</sup> Part II discusses the meaning of the Supreme Court’s opinion, focusing on the Court’s analysis of the important interests at stake in recognizing the asserted testimonial privilege.<sup>19</sup> In Part II, this Article argues that the Court followed the intent of Congress in crafting a psychotherapist-patient privilege.<sup>20</sup> Furthermore, the extension of the privilege to cover confidential communications made to social workers indicates that there is room for further development of the privilege.<sup>21</sup> In Part III, the Article argues that *Jaffee* provides the foundation for recognition of a counselor-battered woman privilege in federal court.<sup>22</sup>

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14. *Id.* Federal Rule of Evidence 501 states:

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. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

*Id.*

15. 116 S. Ct. 1923 (1996).

16. *Jaffee v. Redmond*, 116 S. Ct. 1923, 1931 (1996) (footnote omitted).

17. *Jaffee*, 116 S. Ct. at 1931.

18. See *infra* notes 23-106 and accompanying text.

19. See *infra* notes 107-57 and accompanying text.

20. See *infra* notes 107-31 and accompanying text.

21. See *infra* notes 132-57 and accompanying text.

22. See *infra* notes 158-237 and accompanying text. Cases brought under the recently enacted Violence Against Women Act of 1994 (“VAWA”) may provide a forum for the recognition of this privilege. See generally Violence Against Women Act, Pub. L. No. 103-322, §§ 40001-703, 108 Stat. 1796, 1902-55 (1994) (codified in scattered sections of 42 U.S.C.). At the core of the VAWA is a civil rights remedy, which guarantees citizens the right to be free from gender-based violence. *Id.* (to be codified at 42 U.S.C. § 13981).

I. *JAFFEE V. REDMOND*

## A. THE FACTS

On June 27, 1991, Mary Lu Redmond, a police officer employed by the Village of Hoffman Estates, answered a dispatcher's call regarding a reported fight at an apartment complex.<sup>23</sup> Officer Redmond, who was on patrol duty alone, was the first officer to arrive at the scene.<sup>24</sup> As she drove into the apartment complex, two women ran toward her waving their arms above their heads.<sup>25</sup> One of the women told Redmond that there had been a stabbing in the building.<sup>26</sup> Redmond notified her dispatcher, requesting assistance and an ambulance.<sup>27</sup> Redmond got out of her squad car and approached the building.<sup>28</sup>

Before Redmond reached the building, however, five men ran out screaming — one of them waving a pipe.<sup>29</sup> Redmond ordered the man to drop the pipe and told everyone else to get on the ground.<sup>30</sup> The men ignored her, so Redmond drew her service revolver.<sup>31</sup> At almost the same moment, two more men emerged from the building; one of the men, Ricky Allen, Sr., was chasing the other.<sup>32</sup> According to Redmond, Allen was brandishing a butcher's knife and gaining on the second man.<sup>33</sup> Three times Redmond commanded Allen to drop the knife and get on the ground.<sup>34</sup> When he ignored her and raised his arm to stab the second man, Redmond shot Allen once.<sup>35</sup> Only three or four seconds had passed since she had drawn her revolver.<sup>36</sup>

After shooting Allen, Redmond ran toward him and noticed the butcher knife lying near his body.<sup>37</sup> She again radioed her dispatcher for assistance and an ambulance.<sup>38</sup> The scene became increasingly heated as a number of people "pour[ed] out of the buildings."<sup>39</sup> Some moved toward her, and when one came within arm's length, she raised

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

24. *Jaffee v. Redmond*, 51 F.3d 1346, 1348 (7th Cir. 1995), *aff'd*, 116 S. Ct. 1923 (1996).

25. *Jaffee*, 116 S. Ct. at 1925.

26. *Jaffee*, 51 F.3d at 1348. The women turned out to be the sisters of Ricky Allen, Sr. *Jaffee*, 116 S. Ct. at 1925.

27. *Jaffee*, 116 S. Ct. at 1925.

28. *Id.*

29. *Jaffee*, 51 F.3d at 1348.

30. *Id.* at 1349.

31. *Id.*

32. *Jaffee*, 116 S. Ct. at 1925.

33. *Jaffee*, 51 F.3d at 1349.

34. *Id.*

35. *Id.*

36. *Id.* Four of Allen's brothers and sisters witnessed the shooting and testified that Allen was unarmed when Officer Redmond shot him. *Id.*

37. *Jaffee*, 51 F.3d at 1349.

38. *Id.*

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

her gun and ordered everyone back.<sup>40</sup> Redmond testified that no one in the crowd came to her assistance.<sup>41</sup> She also stated that no one moved the knife from where it had landed until it was recovered by an investigating officer.<sup>42</sup>

When Officer Joe Graham arrived at the scene, he saw Redmond standing behind Allen's body with her gun aimed at the crowd.<sup>43</sup> According to Graham, Redmond seemed "visibly shaken."<sup>44</sup> Graham testified that people in the crowd were shouting that "she didn't have to shoot him in the head."<sup>45</sup> Graham also stated that he saw a butcher's knife near Allen's body.<sup>46</sup>

After the incident, Redmond received counseling from Karen Beyer, a clinical social worker licensed by the State of Illinois and employed by the Village of Hoffman Estates.<sup>47</sup> They first met a few days after the shooting, and eventually participated in approximately fifty counseling sessions during the next six months.<sup>48</sup> The only conversations Redmond had with Beyer occurred during these sessions.<sup>49</sup>

#### B. DISCOVERY AND THE TRIAL

Allen's family sued Redmond and the Village of Hoffman Estates, alleging violations of the decedent's constitutional rights and seeking damages under Title 42 of the United States Code section 1983 and the Illinois Wrongful Death Act.<sup>50</sup> Before trial, the plaintiffs attempted to obtain information concerning the contents of Redmond's conversations with Beyer.<sup>51</sup> Both Redmond and Beyer either refused to answer or gave evasive and incomplete answers to deposition questions about the counseling sessions.<sup>52</sup> Beyer also refused to produce any notes or reports from these meetings.<sup>53</sup> Each asserted that com-

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40. *Jaffee*, 51 F.3d at 1349.

41. *Id.*

42. *Id.*

43. *Id.* at 1349-50.

44. *Id.*

45. *Id.*

46. *Id.*

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

48. *Id.*; *Jaffee*, 51 F.3d at 1350.

49. *Jaffee*, 51 F.3d at 1350 n.4.

50. *Jaffee*, 116 S. Ct. at 1926 (citing 740 ILL. COMP. STAT. ANN. 180/0.01-2.2 (West 1993)). Had the plaintiffs sued in an Illinois state court, Redmond's claim of privilege "would surely have been upheld," since Illinois law provides that conversations between a therapist and her patients are privileged from compelled disclosure in any civil or criminal proceeding. See *Jaffee*, 116 S. Ct. at 1931 n.15.

51. *Jaffee*, 51 F.3d at 1350-51.

52. *Id.*

53. *Id.* at 1351. Beyer eventually provided three pages of redacted notes. *Id.*

munications with a clinical social worker in Illinois are privileged.<sup>54</sup> The district court, however, ruled that no social worker-patient privilege is recognized under Federal Rule of Evidence 501, which governed the case.<sup>55</sup>

After Redmond and Beyer refused to produce evidence concerning their counseling sessions, the district court ruled that Redmond would not be permitted to testify at trial about the shooting.<sup>56</sup> Although the district court reconsidered, it instructed the jury, over defendants' objections, that:

there is no legal justification in this lawsuit, based as it is on a federal constitutional claim, to refuse to produce Ms. Beyer's notes of her conversations with Mary Lu Redmond, and that such refusal was unjustified. Under these circumstances, you are entitled to presume that the contents of the notes would be unfavorable to Mary Lu Redmond and the Village of Hoffman Estates.<sup>57</sup>

The jury awarded plaintiffs \$45,000 on the federal constitutional law claim and \$500,000 on the state wrongful death claim.<sup>58</sup>

### C. THE APPEAL

Defendants appealed the jury verdict to the United States Court of Appeals for the Seventh Circuit.<sup>59</sup> They argued that the jury's verdict should be vacated because the district court's instruction allowed the jury to reach adverse conclusions from the defendants' refusal to disclose the information that they contended was protected by the psychotherapist-patient privilege.<sup>60</sup>

The Seventh Circuit overturned the verdict and remanded the case to the district court for a new trial.<sup>61</sup> The court reasoned that Rule 501 provided more flexibility to recognize new evidentiary privileges than the district court's orders and jury instruction suggested.<sup>62</sup> Under Rule 501, the court observed, evidentiary privileges are "gov-

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54. *Jaffee*, 51 F.3d at 1350-51. *Accord* 740 ILL. COMP. STAT. ANN. 110/1-110/15 (West 1993).

55. *Jaffee*, 116 S. Ct. at 1926. Interestingly, the district court appeared to accept that Rule 501 would allow recognition of a psychotherapist-patient privilege, but that it did not extend to social worker-patient confidential communications. *See Jaffee*, 51 F.3d at 1350-51 n.5.

56. *Jaffee*, 51 F.3d at 1351.

57. *Id.* at 1351-52 n.9 (quoting Jury Instruction No. 8).

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

59. *Jaffee*, 51 F.3d at 1348.

60. *Id.* at 1352-53. The defendants also argued that the district court's Fourth Amendment deadly force jury instruction was improper. *Id.* at 1352. The Seventh Circuit concluded that this instruction was adequate. *Id.* at 1354.

61. *Jaffee*, 51 F.3d at 1358.

62. *Id.* at 1354-58.



erned by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience."<sup>63</sup> Furthermore, the Seventh Circuit recognized that the Supreme Court had stated that Rule 501 "manifested an affirmative intention not to freeze the law of privilege," but instead to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis."<sup>64</sup>

The court noted that six federal circuit courts had considered the issue of whether a psychotherapist-patient privilege should be recognized, with two, the Second and the Sixth Circuits, concluding that "reason and experience" require the recognition of the privilege.<sup>65</sup> By contrast, the remaining four, the Fifth, Ninth, Tenth, and Eleventh Circuits, construed Rule 501 as limiting privileges to those recognized at common law.<sup>66</sup>

The Seventh Circuit sided with the minority.<sup>67</sup> It reasoned that the need for counseling had increased dramatically because of the rise of violence and crime throughout the country.<sup>68</sup> Furthermore, the court found that a patient must be able "to communicate freely without the fear of public disclosure" to receive successful treatment.<sup>69</sup> Without a psychotherapist-patient privilege, the court observed, those who need treatment simply will not seek it.<sup>70</sup>

The Seventh Circuit further noted that all fifty states have adopted some version of a psychotherapist-patient privilege,<sup>71</sup> and

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63. *Id.* at 1354.

64. *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980) (citations omitted)).

65. *In re Doe*, 964 F.2d 1325 (2d Cir. 1992); *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983).

66. *United States v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994) (rejecting a psychotherapist-patient privilege for admissions by a pedophile of criminal sexual assault); *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989) (declining the assertion of a psychotherapist-patient privilege by a grand jury murder investigation target); *United States v. Corona*, 849 F.2d 562 (11th Cir. 1988) (rejecting a psychotherapist-patient privilege in a criminal firearms case); *United States v. Meagher*, 531 F.2d 752 (5th Cir. 1976) (refusing claim of privilege in a bank robbery trial).

67. See *Jaffee*, 51 F.3d at 1355-56.

68. *Id.* at 1355.

69. *Id.* at 1355-56.

70. *Id.*

71. *Id.* at 1356 n.17; ALA. CODE § 34-26-2 (1991); ALASKA R. EVID. 504; ARIZ. REV. STAT. ANN. § 32-2085 (Supp. 1996); ARK. R. EVID. 503; CAL. EVID. CODE §§ 1010, 1012, 1014 (West 1995); COLO. REV. STAT. ANN. § 13-90-107(1)(g) (Supp. 1996); CONN. GEN. STAT. ANN. § 52-146c (West 1991 & Supp. 1996); DEL. UNIFORM RULE EVID. tit. 503; D.C. CODE ANN. § 14-307 (1995); FLA. STAT. ANN. 90.503 (West 1979 & Supp. 1997); GA. CODE ANN. § 24-9-21 (1995); HAW. R. EVID. 504, 504.1; IDAHO R. EVID. 503; 225 ILL. COMP. STAT. ANN. 15/5 (West 1993); IND. CODE § 25-33-1-17 (1995); IOWA CODE § 622.10 (1995); KAN. STAT. ANN. § 74-5323 (1992); KY. R. EVID. 507; LA. CODE EVID. ANN., art. 510 (West 1995); ME. R. EVID. 503; MD. CODE ANN., CTS. & JUD. PROC. § 9-109 (1995); MASS. GEN. LAWS ANN. ch. 233, § 20B (West 1986 & Supp. 1996); MICH. COMP. LAWS ANN.

many had expressly extended the privilege to communications between patients and licensed clinical social workers. The court concluded that support by all fifty states for a psychotherapist-patient privilege was strong evidence that "experience with the privilege has been favorable."<sup>72</sup>

The Seventh Circuit therefore recognized a psychotherapist-patient privilege under Rule 501 and extended it to communications between clinical social workers and their patients.<sup>73</sup> The court did not stop there, however, as it proceeded to balance the evidentiary need for the information contained in Redmond's counseling records against her privacy interests.<sup>74</sup> The court struck the balance in favor of the privilege to encourage Redmond to use counseling to resolve the feelings associated with her traumatic experience.<sup>75</sup> It concluded that the need for testimony about her thoughts recalled in counseling was less pressing in this case because there were numerous witnesses, including Redmond herself, who testified about the actual details of the shooting.<sup>76</sup>

#### D. THE SUPREME COURT OPINION

The United States Supreme Court, per Justice John Paul Stevens, affirmed the judgment of the Seventh Circuit in a seven-to-two decision.<sup>77</sup> The Supreme Court began its analysis in much the same way as the Seventh Circuit had, observing that Rule 501 authorizes federal courts to define new privileges by interpreting "common law principles . . . in the light of reason and experience."<sup>78</sup> The Court reasoned that Congress "did not freeze the law governing the privileges of witnesses

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§ 333.18237 (West Supp. 1996); MINN. STAT. ANN. § 595.02 (1988 & Supp. 1997); MISS. R. EVID. 503; MO. REV. STAT. § 491.060 (1994); MONT. CODE ANN. § 26-1-807 (1995); NEB. REV. STAT. § 27-504 (1995); NEV. REV. STAT. ANN. § 49.209 (Michie 1996); N.H. R. EVID. 503; N.J. STAT. ANN. § 45:14B-28 (West 1995); N.M. R. EVID. 11-504; N.Y. CIV. PRAC. L. & R. LAW § 4507 (McKinney 1992); N.C. GEN. STAT. § 8-53.3 (Supp. 1995); N.D. R. EVID. § 503; OHIO REV. CODE ANN. § 2317.02 (Banks-Baldwin Supp. 1996); OKLA. STAT. ANN. tit. 12, § 2503 (1993); OR. R. EVID. 504, 504.1; 42 PA. CONS. STAT. § 5944 (1989); R.I. GEN. LAWS §§ 5-37.3-3, 3-37.3-4 (1995); S.C. CODE ANN. § 19-11-95 (Law. Co-op. Supp. 1995); S.D. CODIFIED LAWS §§ 19-13-6 to -11 (1995); TENN. CODE ANN. § 24-1-207 (Supp. 1995); TEX. R. CIV. EVID. 509, 510; UTAH R. EVID. 506; VT. R. EVID. 503; VA. CODE ANN. § 8.01-400.2 (Michie 1992); WASH. REV. CODE ANN. § 18.83.110 (West Supp. 1997); W. VA. CODE § 27-3-1 (1992); WIS. STAT. ANN. § 905.04 (West 1993 & Supp. 1995); WYO. STAT. ANN. § 33-27-123 (Michie Supp. 1996).

72. *Jaffee*, 51 F.3d at 1357 (quoting *In re Doe*, 964 F.2d at 1328).

73. *Id.* at 1357.

74. *Id.* at 1357-58.

75. *Id.*

76. *Id.* at 1358.

77. *Jaffee*, 116 S. Ct. at 1932.

78. *Id.* at 1924. This phrase comes from Rule 501, which in turn was borrowed from the Supreme Court's opinion in *Wolfe v. United States*, 291 U.S. 7, 12 (1934) (citing *Funk v. United States*, 290 U.S. 371 (1933)).

in federal trials," but instead directed the courts to "continue the evolutionary development of testimonial privileges." 79

To determine whether to recognize a psychotherapist-patient privilege under Rule 501, the Court examined whether such a privilege "promotes sufficiently important interests to outweigh the need for probative evidence. . . ." 80 The Court began by analyzing the "private" interests the privilege serves.<sup>81</sup> Like the spousal and attorney-client privileges, the Court observed, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust."<sup>82</sup> There is "wide agreement," the Court continued, that effective psychotherapy depends upon "an atmosphere of confidence and trust" in which the patient discloses sensitive and personal information to her counselor.<sup>83</sup>

The Court then turned to the "public" interests served by the privilege.<sup>84</sup> It noted that the psychotherapist-patient privilege "facilitat[es] the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem" and that "[t]he mental health of our citizenry, . . . is a public good of transcendent importance."<sup>85</sup> For example, the Court observed, in cases such as *Redmond's*, serious social consequences would flow from denying police officers "effective counseling and treatment after traumatic incidents."<sup>86</sup>

Finally, the Court relied on the experience of the states to confirm the importance of the privilege, noting that all fifty states had enacted some form of psychotherapist-patient privilege.<sup>87</sup> The Court reasoned that this consensus was "reason and experience" enough to support recognition of the privilege.<sup>88</sup> Indeed, denial of a federal privilege would frustrate the purposes of the states in enacting a psychotherapist-patient privilege for their own courts.<sup>89</sup> The Court therefore held

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79. *Jaffee*, 116 S. Ct. at 1927-28 (quoting *Trammel*, 445 U.S. at 47).

80. *Id.* at 1928 (quoting *Trammel*, 445 U.S. at 51).

81. *Id.* at 1928.

82. *Id.*

83. *Id.* (citing Advisory Committee's Notes to Proposed Rule 504, 56 F.R.D. 183, 242 (1972)).

84. *Jaffee*, 116 S. Ct. at 1929. "Our cases make clear," noted the Court, "that an asserted privilege must also 'serv[e] public ends.'" *Id.* (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

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

86. *Id.* at 1929 n.10.

87. *Id.* at 1929 n.11; *supra* note 71. The Court noted 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." *Jaffee*, 116 S. Ct. at 1929-30.

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

89. *Id.* Justice Scalia's dissenting opinion took the majority to task for this line of reasoning. *Jaffee*, 116 S. Ct. at 1935-36 (Scalia, J., dissenting). Noting that most states had adopted the privilege through legislative means, Justice Scalia excoriated the ma-

that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501. . . ." <sup>90</sup>

In the remainder of the majority's opinion, the Court extended the psychotherapist-patient privilege to treatment by a clinical social worker.<sup>91</sup> The Court reasoned that social workers provide a significant amount of mental health treatment, often serving clients whose modest means prohibit them from seeking more expensive psychotherapy.<sup>92</sup> Furthermore, the Court noted that most states extend a testimonial privilege to licensed social workers.<sup>93</sup> Finally, the Court could find no "discernible public purpose" that would be served by distinguishing between counseling provided by social workers and psychotherapists.<sup>94</sup>

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jority for developing federal privilege rules in reliance on sources other than the common law. *Id.* at 1936 (Scalia, J., dissenting). The majority responded that this fact was "of no consequence" because policy determinations by state legislatures may reflect both "reason" and "experience." *Id.* at 1930 (citing *Funk*, 290 U.S. at 376-81). For one thing, "once a state legislature has enacted a privilege[,] there is no longer an opportunity for common-law creation of the protection." *Id.*; EDWARD W. CLEARY ET. AL, MCCORMICK ON EVIDENCE § 75, at 180 (3d ed. 1984) (noting that "[t]he development of judge-made privileges, however, virtually halted over a century ago."). For another, "[t]hat the privilege may have developed faster legislatively than it would have in the courts demonstrates only that the States rapidly recognized the wisdom of the rule as the field of psychotherapy developed." *Jaffee*, 116 S. Ct. at 1930. Justice Scalia's criticism fails to fully appreciate that Rule 501 directs federal courts to consider the "principles" of common law "in light of reason and experience."

90. *Jaffee*, 116 S. Ct. at 1931.

91. *Id.* at 1931-32.

92. *Id.* at 1931.

93. *Id.* at 1931 n.17 (citing ARIZ. REV. STAT. ANN. § 23-3283 (1992); ARK. CODE ANN. § 17-46-107 (1995); CAL. EVID. CODE §§ 1010, 1012, 1014 (West 1995); COLO. REV. STAT. § 13-90-107 (1987); CONN. GEN. STAT. § 52-146q (1991); DEL. CODE ANN., Tit. 24 § 3913 (1987); D.C. CODE § 14-307 (1995); FLA. STAT. § 90.503 (1991); GA. CODE ANN. § 24-9-21 (1995); IDAHO CODE § 54-3213 (1994); ILL. COMP. STAT., ch. 225, § 20/16 (1994); IND. CODE § 25-23.6-6-1 (1993); IOWA CODE § 622.10 (1987); KAN. STAT. ANN. § 65-6315 (Supp. 1990); KY. R. EVID. 507; LA. CODE EVID. ANN., Art. 510 (West 1995); ME. REV. STAT. ANN., Tit. 32, § 7005 (1988); MD. CODE ANN., CTS. & JUD. PROC. § 9-121 (1995); MASS. GEN. LAWS § 112:135A (1994); MICH. COMP. STAT. ANN. 339.1610 (1992); MINN. STAT. § 595.02(g) (1994); MISS. CODE ANN. § 73-53-29 (1972); MO. ANN. STAT. § 337.636 (Supp. 1996); MONT. CODE ANN. § 37-22-401 (1995); NEB. REV. STAT. ANN. § 71-1,335 (1995); NEV. REV. STAT. ANN. §§ 49.215, 49.225, 49.235 (Supp. 1995); N.H. REV. STAT. ANN. § 330-A:19 (1995); N.J. STAT. ANN. § 45:15BB-13 (1995); N.M. STAT. ANN. § 61-31-24 (Supp. 1995); N.Y. CIV. PRAC. LAW § 4508 (1992); N.C. GEN. STAT. § 8-53.7 (1986); OHIO REV. CODE ANN. § 2317.02 (1995); OKLA. STAT., Tit. 59, § 1261.6 (1991); R.I. GEN. LAWS §§ 5-37.3-3, 5-37.3-4 (1995); S.C. CODE ANN. § 19-11-95 (Supp. 1995); S.D. CODIFIED LAWS § 36-26-30 (1994); TENN. CODE ANN. § 63-23-107 (1990); TEX. RULE CIV. EVID. 510; UTAH R. EVID. 506; VT. R. EVID. 503; VA. CODE ANN. § 8.01-400.2 (1992); WASH. REV. CODE § 18.19.180 (1994); W. VA. CODE § 30-30-12 (1993); WIS. STAT. § 905.04 (1993-1994); WYO. STAT. § 33-38-109 (Supp. 1995)).

94. *Jaffee*, 116 S. Ct. at 1932 (quoting *Jaffee*, 51 F.3d at 1358 n.9).

Justice Antonin Scalia, joined by Chief Justice William Rehnquist in part, filed a dissenting opinion.<sup>95</sup> The dissent began by criticizing the majority for relegating the question in the case — whether Rule 501 supports a social worker-patient privilege — to an “afterthought” worthy of “*less than a page of text*.”<sup>96</sup> Rather, the dissent stated, the majority chose to answer “the more general, and much easier question” of whether Rule 501 encompasses a psychotherapist-patient privilege.<sup>97</sup> Only after finding such a privilege, the dissent continued, did the majority recklessly extend it to social workers and their clients, without due regard for the professional status that qualifies the psychotherapist-patient relationship for a privilege.<sup>98</sup>

With respect to the “easier” question of whether to recognize a psychotherapist-patient privilege, the dissent accused the majority of concocting a new privilege without any respect for the impact the denial of such evidence would have on the truth-seeking function of trials.<sup>99</sup> The dissent described as a “novel argument” the majority’s position that a federal psychotherapist-patient privilege should be recognized so as not to undermine state legislation protecting such confidential communications.<sup>100</sup> Furthermore, the dissent posited, the majority created “[a] sort of inverse pre-emption” that requires the “truth-seeking functions of *federal courts* . . . to be adjusted so as not to conflict with the policies of *the States*.”<sup>101</sup>

The dissent then found “even less persuasive” the majority’s reasoning for extending the privilege to social workers.<sup>102</sup> In the dissent’s view, because social workers presumably do not possess the same level of skill as psychotherapists, their counseling should not necessarily receive the same degree of protection.<sup>103</sup> Moreover, unlike psychiatrists and psychologists who only perform psychotherapy, social workers consult with people for many reasons unrelated to psychotherapy.<sup>104</sup> Indeed, the dissent noted that the majority of states recognizing a social worker privilege “do not do so as a subpart of a ‘psychotherapist’ privilege.”<sup>105</sup> Finally, although the majority of states have a social worker privilege, the great disparity as to its

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

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

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

98. *Id.* at 1934 (Scalia, J., dissenting).

99. *Id.* at 1932-33 (Scalia, J., dissenting).

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

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

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

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

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

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

scope, according to the dissent, undermines the recognition of such a privilege by the Court.<sup>106</sup>

## II. ANALYZING *JAFFEE V. REDMOND*

In *Jaffee*, the Court recognized a new privilege that did not exist at common law and then extended it the social worker-patient relationship.<sup>107</sup> But it did not do so in the lawless fashion suggested by the dissent. Rather, it did so pursuant to the authority granted to it by Congress in Rule 501. In enacting Federal Rule of Evidence 501, Congress committed the courts to consider "reason and experience" in developing the law of privilege without prescribing (or proscribing) any source of that wisdom.<sup>108</sup> The views of the states represent but one body of "reason and experience" for purposes of Rule 501. Indeed, the Court's opinion should not be read to convert Rule 501 into a tool of "inverse preemption," limiting the recognition of new privileges in federal courts to instances in which all, or almost all, of the states through their collective "reason and experience" have adopted a particular privilege.<sup>109</sup> Nor should the decision be interpreted as requiring state legislatures to take the lead in developing new privileges. The Federal Government may provide the "reason and experience" necessary to support the development of new privileges. And, of course, common law may continue to form the basis for new privileges. When viewed in this manner, *Jaffee* represents an opportunity to develop new privileges with input from state and federal authorities in addition to the teachings of common law.<sup>110</sup>

*Jaffee* makes clear that the development of new privileges also requires analysis under traditional principles of evidence law.<sup>111</sup> In reaching its conclusion to adopt a psychotherapist-patient privilege under Rule 501, the *Jaffee* Court evaluated the privilege under the Wigmore test.<sup>112</sup> The Court did not, however, plod through a step-by-step analysis of each of Wigmore's elements, and thus opened itself to the dissent's charge that it was creating a new privilege from whole cloth.<sup>113</sup> But the dissent failed to appreciate that the majority actually incorporated the Wigmore elements under the broader framework of determining whether the psychotherapist-patient privilege "pro-

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106. See *id.* at 1939-40 (Scalia, J., dissenting).

107. *Id.* at 1923, 1931-32.

108. See FED. R. EVID. 501.

109. See *Jaffee*, 116 S. Ct. at 1935 (Scalia, J., dissenting) (asserting that the majority's holding created a new rule of "inverse preemption").

110. See generally *Jaffee*, 116 S. Ct. at 1923-32.

111. See *id.*

112. *Id.* at 1927-31. See *supra* note 12.

113. *Jaffee*, 116 S. Ct. at 1927-31. See *id.* at 1933-41 (Scalia, J., dissenting).

motes sufficiently important interests to outweigh the need for probative evidence.”<sup>114</sup>

The “private interests” prong of the Court’s analysis encompassed the first two elements of Wigmore’s test — disclosures made with the expectation of confidence and the essentialness of the confidentiality.<sup>115</sup> First, the Court found that there was little question that a patient divulges personal information to a psychotherapist with the full expectation that any disclosures will be kept confidential.<sup>116</sup> The Court’s conclusion in this regard is supported by extensive studies and standards.<sup>117</sup> Indeed, it is the policy of those administering psychoanalytic therapy to ensure the confidential treatment of communications made by patients to them.<sup>118</sup> Second, the Court determined that confidentiality is essential to maintain the psychotherapist-patient relationship.<sup>119</sup> Again, research and reports bear out this determination.<sup>120</sup> Effective treatment requires a patient to reveal her innermost thoughts, feelings, fears, and concerns, many of which, if revealed to third parties, could cause the patient to suffer severe and possibly damaging embarrassment. As one Advisory Committee to the Rules stated:

Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there

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114. See *id.* at 1927-31.

115. *Id.* at 1928-29.

116. *Id.* at 1928.

117. See, e.g., Paul S. Appelbaum *et al.*, *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 BULL. OF THE AMER. ACAD. OF PSYCHIATRY AND THE LAW 109, 110 (1984) (reviewing studies); John M. McGuire *et al.*, *The Adult Client's Conception of Confidentiality in the Therapeutic Relationship*, 16 PROF. PSYCHOL.: RES. & PRAC. 375, 380 (1985) (noting survey results indicating that mental health patients expect confidentiality).

118. See Brief of the American Psychoanalytic Association Division of Psychoanalysis (39) of the American Psychological Association *et al.* as Amicus Curiae, at 17-18, *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996) (No. 95-266) (citing American Psychoanalytic Ass’n, *Principles of Ethics for Psychoanalysts and Provisions for Implementation of the Principles of Ethics for Psychoanalysts* § 6 (1983)). The ethical canons of the professional associations for mental health providers require the confidentiality of therapist-patient communications. *Id.* Accord American Psychological Ass’n, *Ethical Principles of Psychologists and Code of Conduct* § 5 (1992); AMERICAN PSYCHIATRIC ASS’N, *PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY* § 4 (1995); National Federation of Societies for Clinical Social Work, *Code of Ethics* § 5 (1988).

119. *Jaffee*, 116 S. Ct. 1928-29.

120. See, e.g., Dep’t of Justice, Report to Congress on the Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors, Findings and Model Legislation 14-15 (1995).

may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. . . . A threat to secrecy blocks successful treatment.<sup>121</sup>

Thus, the Court correctly concluded that the possibility of disclosure likely would prevent a patient from entrusting her psychotherapist with this sensitive and private information, disrupting their relationship and depriving her of the full benefits of therapeutic treatment.<sup>122</sup>

Having determined that the "private" interests justified the recognition of a psychotherapist-patient privilege, the Court turned to the more noteworthy part of its opinion, its consideration of the "public ends" served by the privilege.<sup>123</sup> This inquiry echoes Wigmore's third criterion — whether the privilege at issue is one that society believes ought to be "sedulously fostered."<sup>124</sup> With respect to the psychotherapist-patient privilege, the *Jaffee* Court concluded that society has a significant interest in promoting the mental health of its citizenry, especially in cases such as Redmond's.<sup>125</sup> Indeed, the Petitioners did not challenge this point in their briefs.<sup>126</sup>

Although the Court effectively applied Wigmore's principles, it still had to address its ambiguous mandate from Congress to interpret a privilege "in light of reason and experience."<sup>127</sup> Congress had adopted the general privilege standard embodied in Rule 501 after much debate. Under the original proposal, nine specific rules — in-

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121. Advisory Committee's Notes to Proposed Rule 504, 56 F.R.D. 183, 242 (1972) (quoting Group for Advancement of Psychiatry, Report No. 45, Confidentiality and Privileged Communication in the Practice of Psychiatry 92 (June 1960)).

122. See *Jaffee*, 116 S. Ct. at 1928. Justice Scalia questioned whether a privilege is necessary to encourage confidential communications. *Id.* at 1935 (Scalia, J., dissenting). As he pointed out, many people use psychotherapists even though it is unclear to them whether their communications will be kept legally confidential. *Id.* Though Justice Scalia's observation has some merit, it ignores the fact that most patients, rightly or wrongly, expect their communications to be protected from disclosure, including in a court. See Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 898 (1982).

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

124. See 8 JOHN H. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961).

125. *Jaffee*, 116 S. Ct. at 1929 & n.10. The use of psychotherapy has increased dramatically in this country as a way to treat mental illness, as evidenced, for example, by the inclusion of mental health care provisions in many health and disability insurance policies.

126. See generally Brief for Petitioner, *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996) (No. 95-266).

127. *Jaffee*, 116 S. Ct. at 1929, 1932. The Court also conducted a perfunctory weighing of the evidentiary benefit from disclosure versus the interest in maintaining the privilege. *Id.* Accord 8 JOHN H. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961). It adopted an absolute privilege because "[a]n uncertain privilege, . . . is little better than no privilege at all." *Jaffee*, 116 S. Ct. at 1932 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).



cluding a psychiatrist-patient privilege — “purported to define the privileges to be recognized in the federal courts in all actions, cases, and proceedings; any alleged privilege not enumerated . . . was deemed not to exist and could not be given effect unless of constitutional dimension.”<sup>128</sup> As the Senate Report accompanying the adopted Federal Rules of Evidence explained:

in approving the general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis.<sup>129</sup>

Representative William L. Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, reinforced this view when he introduced the Rules for final consideration in the House:

Rule 501 is not intended to freeze the law of privilege as it now exists. The phrase “governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience,” is intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis. For example, the Supreme Court’s rules of evidence contained no rule of privilege for a newspaperperson. The language of Rule 501 permits the courts to develop a privilege for newspaperpeople on a case-by-case basis. The language cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to newspeople any protection they may have from State newspaperperson’s privilege laws.<sup>130</sup>

Thus, the Court correctly concluded that Rule 501 instructed the federal courts to continue the development of privileges, including the creation of new ones, based on modern reason and experience.<sup>131</sup> Congress, however, provided little guidance as to what factors a federal court should consider or to where it should look in evaluating “reason and experience.”

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128. S. REP. NO. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7053.

129. *Id.* at 7059.

130. *Id.* at 7110 (statement of Representative Hungate, Dec. 18, 1974).

131. *See Jaffee*, 116 S. Ct. at 1927-28 (citing *Trammel*, 445 U.S. at 47).

## A. THE STATES

One possible source for evaluating "reason and experience" is state law. Even the dissent in *Jaffee* conceded that it would be appropriate to consult state common law in fashioning new federal privileges under Rule 501.<sup>132</sup> As the majority aptly recognized, however, some social issues are too urgent to await percolation in the court system and compel legislative development.<sup>133</sup> There is nothing surprising in relying on such legislative action for "reason and experience," particularly where it supplants the need for common law evolution. States frequently serve as laboratories for experimentation with different solutions to social problems.<sup>134</sup> In this case, for example, the states comprehensively addressed the need for and the methods of ensuring the mental health of their citizens, including the adoption of psychotherapist-patient and social worker-patient privileges. As a result, all fifty states and the District of Columbia have chosen to adopt some form of a psychotherapist-patient privilege.<sup>135</sup> Moreover, forty-five states and the District of Columbia have enacted a social worker-patient privilege.<sup>136</sup>

Contrary to the dissent's assertion, nothing in the Court's opinion creates a rule of "inverse preemption."<sup>137</sup> The Court was free to rely on other sources of "reason and experience" — for example, studies assembled by the Advisory Committee to the Rules that pointed in the other direction. Of course, the Advisory Committee cited no such studies.<sup>138</sup> Under these circumstances, it would have defied "reason and experience" for the Court to ignore the considered judgments of the states simply because those judgments found their way into legislation rather than the common law. Similarly, it had latitude in determining the expanse of the federal privilege. Indeed, the Court adopted an absolute privilege, which is broader than the privilege recognized in many of the states.<sup>139</sup> Nor did any particular state supply

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132. *Jaffee*, 116 S. Ct. at 1935 (Scalia, J., dissenting).

133. *Id.* at 1930.

134. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (stating "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

135. *See supra* note 71.

136. *See supra* note 93. *But see Jaffee*, 116 S. Ct. at 1936, 1939 (Scalia, J., dissenting) (noting that five states do not recognize a social worker-patient privilege and arguing that five other states effectively do not recognize the privilege).

137. *See generally Jaffee*, 116 S. Ct. at 1923-32.

138. *See id.* at 1928-29.

139. *Id.* at 1931-32.

the rule of decision in determining the outcome of the case.<sup>140</sup> State law merely served to counsel the development of federal common law for psychotherapist-patient and social worker-patient privileges and it is that federal law that resolved the given case.<sup>141</sup> This outcome is not unprecedented; on previous occasions, federal courts have looked to state law in adopting a federal common law standard to be used in federal courts.<sup>142</sup> If state law can supply the standards for federal common law, it certainly can supply the basis for extrapolation in the development of federal common law.

Two issues bear note concerning the Court's reliance on state legislatures as sources of "reason and experience." First, the Court did not establish a clear rule as to the number of states necessary to demonstrate "reason and experience" for purposes of Rule 501.<sup>143</sup> In some sense, *Jaffee* was an easy case because all the states had recognized some form of a psychotherapist-patient privilege and nearly as many had recognized a social worker-patient privilege.<sup>144</sup>

Second is the question of legal trends. The *Jaffee* Court noted that "state lawmakers moved quickly" in adopting the psychotherapist privilege and that the speed "demonstrates only that the states rapidly recognized the wisdom of the rule. . . ."<sup>145</sup> Similarly, the Court observed that while twelve states regulated social workers in 1972, all regulate them today.<sup>146</sup> During this time, social workers have provided a significantly increasing percentage of therapeutic services.<sup>147</sup> The Court thus indicated that legal trends among the states are relevant, but provided no clear guidance on how many states must participate before a trend emerges. For example, if forty states possessed a psychotherapist-patient privilege, but ten states had repealed such a

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140. Thus, Illinois' privilege statute did not govern the outcome nor did it matter that psychotherapist-patient and social worker-patient privilege laws vary from state to state.

141. As Professor Martha Field has pointed out, Rule 501 is one of the rare instances in which Congress has explicitly directed the federal courts to make federal common law. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 935 n.227 (1994). See Social Security Act, 42 U.S.C. § 416(h)(1)(A) (1982) (adopting state standards). See also Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674 (1994) (adopting state standards).

142. See, e.g., *Enmund v. Florida*, 458 U.S. 782 (1982) (examining state death penalty law, including statutes, in adopting an Eighth Amendment cruel and unusual punishment principle).

143. *Jaffee*, 1116 S. Ct. at 1929-32.

144. See *id.*

145. *Id.* at 1930; *Jaffee*, 51 F.3d at 1355 (noting that the need for psychiatric counseling "has skyrocketed during the past several years.").

146. *Jaffee*, 116 S. Ct. at 1931 n.16.

147. *Id.* (citing NATIONAL INST. OF MENTAL HEALTH & CTR. FOR MENTAL HEALTH SERVS., U.S. DEPT. OF HEALTH & HUMAN SERVS., MENTAL HEALTH UNITED STATES, 1994, at 85-87, 107-14).

privilege in the past few years, should a federal court interpret this state of affairs as support for or against recognizing such a privilege? Likewise, should a federal court recognize a privilege if only ten states adopted a particular privilege, but all of them had done so within the past few years? Even small legal trends — that is, trends among only a small number of states — are relevant in determining “reason and experience” under Rule 501. Thus, both numbers and trends should be germane to a federal court’s analysis of reason and experience.

#### B. CONGRESS AND THE FEDERAL GOVERNMENT

While states may take the lead in some instances in demonstrating “reason and experience” for purposes of Rule 501, Congress and the Federal Government may also serve as the source for measuring the propriety of a privilege. Congress may legislate in ways that evidence an interest in protecting a particular relationship or class of individuals. The Violence Against Women Act (“VAWA”), discussed in detail below, is one such example.<sup>148</sup> In enacting VAWA, Congress expressed a considered judgment that, among other things, victims of domestic abuse require assistance to recover their physical and mental well-being. It would be appropriate for federal courts to consider this judgment in determining whether to create a privilege that effectively encourages battered women to seek counseling by protecting their therapy sessions from disclosure in the courtroom.<sup>149</sup>

The Executive Branch might also contribute to the “reason and experience” supporting a particular privilege. For example, the Department of Justice might undertake a study on the incidence and effects of domestic violence on the national level.<sup>150</sup> It might even report to Congress on issues of confidentiality between domestic violence victims and their counselors.<sup>151</sup> Similarly, the President might commission a task force on such issues.<sup>152</sup>

Although these actions contribute “reason and experience” to the analysis, they do not reflect practical experience with a particular privilege, as do state privilege laws. Thus, in some sense, they are less on point than state privilege law. Federal Rule of Evidence 501, however, is not restricted to the “best evidence” of reason and experience.

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148. Violence Against Women Act, Pub. L. No. 103-322, §§ 40001-703, 108 Stat. 1796, 1902-55 (1994) (codified in scattered sections of 42 U.S.C.).

149. Congress, of course, could pass a new federal evidentiary rule recognizing a particular privilege. Failure to do so, however, does not necessarily indicate that Congress has rejected the privilege. Congress simply may not have focused on the issue or it may have deliberately left it to the federal courts to formulate the privilege under Rule 501.

150. See *supra* note 120 and accompanying text.

151. *Id.*

152. See PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982).

Rather, it directs federal courts to develop the principles of common law "in the light of reason and experience" utilizing any and all circumstances that they deem relevant. Furthermore, many federal initiatives do address the precise issues of confidentiality and thus provide concrete "reason and experience" related to the development of privileges.<sup>153</sup>

### C. FEDERAL COURTS

Congress did not instruct federal courts to freeze the law of privileges; instead Congress instructed them to "continue the evolutionary development of testimonial privileges."<sup>154</sup> While federal courts should consider the experiences of other institutions in determining whether a new privilege is justified, federal courts also have their own experiences that are important in evaluating the propriety of a new privilege. Courts are frequently asked to consider whether certain communications should be protected from disclosure, regardless of whether such communications fall within formally-recognized privileges.

The parent-child privilege serves as a good example. Both state and federal courts have been asked to recognize a parent-child privilege but generally have chosen not to do so to date.<sup>155</sup> Nevertheless, federal courts may come to the opinion, based on their own "reason and experience," that such a privilege should be recognized. This conclusion could result from considering the impact of the privilege in a number of cases, or it could be from evaluating the totality of the circumstances in a particular case that finally demonstrates the wisdom of the privilege. In either scenario, the court would need to conclude that the privilege would support important private and public interests as the Supreme Court did in *Jaffee* or that it satisfies Wigmore's criteria.<sup>156</sup>

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153. See *infra* note 217 and accompanying text.

154. *Jaffee*, 116 S. Ct. at 1928 (quoting *Trammel*, 445 U.S. at 47).

155. See, e.g., *In re Erato*, 2 F.3d 11, 12 (2d Cir. 1993); *In re Inquest Proceedings*, 676 A.2d 790, 794 (Vt. 1996); *United States v. Davies*, 768 F.2d 893, 900 (7th Cir. 1985); *United States v. Ismail*, 756 F.2d 1253, 1258 (6th Cir. 1985); *United States v. Smith*, 742 F.2d 398, 401 (8th Cir. 1984); *In re Grand Jury Subpoena of Santarelli*, 740 F.2d 816, 817 (11th Cir. 1984); *United States v. Jones*, 683 F.2d 817, 819 (4th Cir. 1982); *State v. Bruce*, 655 S.W.2d 66, 68 (Mo. Ct. App. 1983); *Hope v. State*, 449 So. 2d 1319, 1320 (Fla. Dist. Ct. App. 1984). But see *In re Grand Jury Proceedings*, 553 F. Supp. 1298, 1322-25 (D. Nev. 1983) (adopting a parent-child testimonial privilege). At least three states have statutorily recognized such a privilege. See IDAHO CODE § 9-203(7) (Supp. 1996); MASS. GEN. L. ANN. ch. 233 § 20 (Supp. 1996). MINN. STAT. § 595.02(j) (Supp. 1997).

156. See 8 JOHN H. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961) (setting out four prerequisites to the recognition of a privilege). See generally *Jaffee*, 116 S. Ct. at

#### D. SUMMARY

Although the *Jaffee* decision demonstrated the Supreme Court's willingness to recognize new evidentiary privileges under Rule 501, it did not provide a complete picture as to what information can be considered in evaluating "reason and experience."<sup>157</sup> Clearly, state privilege laws are a valuable source for this analysis — whether or not they evince unanimity or even a general consensus among the states. However, they are not the only source. A federal court should also consider federal activities related to the field of the prospective privilege. Moreover, federal courts must not forget their own experiences. There may be other sources to consider as well.

The important points to remember are that (1) Congress intended federal courts to use "reason and experience" to continue the development of new privileges, and (2) *Jaffee* did not limit (or quantify) the potential sources for determining "reason and experience." Part III of this Article will consider current "reason and experience" in the context of crafting a counselor-battered woman privilege.

#### III. RECOGNITION OF THE COUNSELOR-BATTERED WOMAN PRIVILEGE

Both federal and state governments recognize that domestic violence is a pressing national problem. Increased attention has focused on the need to address the causes of domestic violence and to provide assistance for its victims. One of the most basic and important aspects of assistance is counseling, which serves both the therapeutic and safety needs of victims. Because a growing number of batterers and rapists have attempted to gain access to the records of battered women's counseling sessions, the necessity of a counselor-battered woman privilege has become increasingly apparent.

While the Supreme Court in *Jaffee* chose not to delineate the "full contours" of the psychotherapist-patient privilege, a counselor-battered woman privilege falls squarely within such contours.<sup>158</sup> Society has clearly recognized the impact that domestic violence has on families and communities and has acted to combat this problem, including by encouraging counseling. Battered women, like all psychotherapy patients, expect their communications to be confidential. Indeed, confidentiality is essential to successful counseling. In addition, both the federal and state governments have passed numerous statutes, such as VAWA and anti-stalking laws, and supported many programs to as-

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1923-32. The authors use the parent-child privilege only for illustrative purposes. They do not advocate for or against the recognition of this privilege.

157. See generally *Jaffee*, 116 S. Ct. at 1923-32.

158. See *id.* at 1932.

sist battered women.<sup>159</sup> Moreover, during the past few years, many states have enacted specific counselor-battered woman and more general counselor-victim privileges to protect confidential communications.<sup>160</sup> With this collective "reason and experience," the holding in *Jaffee* supports the recognition by federal courts of a counselor-battered woman privilege under Rule 501.<sup>161</sup>

#### A. SOCIETAL INTEREST IN ENDING DOMESTIC VIOLENCE

Violence against women is an enormous problem throughout the United States.<sup>162</sup> The United States Department of Justice estimates that three out of every four women will be the victims of a violent crime at some point during their lives.<sup>163</sup> At least two million American women are severely assaulted by their partners every year; some experts put the number at closer to four million.<sup>164</sup> President Clinton recently noted that in 1992, nearly 30 percent of all female homicide victims were killed by husbands, former husbands, or boyfriends.<sup>165</sup> Furthermore, ongoing domestic abuse accounts for 22 percent to 35 percent of emergency room visits by women in the United States.<sup>166</sup>

159. See, e.g., Violence Against Women Act, Pub. L. No. 103-322, §§ 40001-703, 108 Stat. 1796, 1902-55 (1994); *infra* notes 205-37 and accompanying text.

160. See *infra* notes 231-32 and accompanying text.

161. The *Jaffee* Court confirms that Rule 501 of the Federal Rules of Evidence authorized "recognition of new privileges on a case-by-case basis." *Jaffee*, 116 S. Ct. at 1927 (quoting S. REP. NO. 93-1277 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7059). Thus, federal courts should be careful not to close the door on the development of a counselor-battered woman privilege.

162. This section focuses on violence against women because the victims of domestic violence and sexual assault are nearly always women. The United States Department of Justice estimates that 95 percent of reported assaults on spouses or ex-spouses are committed by men against women. Harriet Douglas, *Assessing Violent Couples*, 72(9) FAMILIES IN SOCIETY 525-535 (1991); SUSAN ESTRICH, REAL RAPE 81 (1987) (stating that "there is no evidence that many women in fact commit rapes").

163. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY (1995).

164. See H.R. REP. NO. 103-711, at 4 (1994), reprinted in 1995 U.S.C.C.A.N. 1839, 1851-52 (finding by Congress that four million women are battered by their partners each year); *Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. 117 (1990) (testimony of Angela Browne, Ph.D.) (noting that two million is a conservative estimate and that most experts would agree that four million women is a more accurate estimate). See also *id.* at 79 (noting from statistics that if every woman victimized by domestic violence in a given year were to join hands, the line would extend from New York to Los Angeles and back again); Antonia C. Novello, *From the Surgeon General, U.S. Public Health Service, A Medical Response to Domestic Violence*, 267 JAMA 3132, 3132 (1992).

165. See Proclamation No. 6829, 60 Fed. Reg. 51,879 (1995).

166. Teri Randall, *Domestic Violence Intervention Calls for More Than Treating Injuries*, 264 JAMA 939, 939 (1990). See *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1501 (1993) (noting Surgeon General's report that "abuse inflicted by intimates constitutes one of the leading causes of injury to women in the United States.").

Fatality statistics only begin to reveal the extent of the devastation to America's families. Shattered bones, scratches, bruises, and burns are the most visible consequences, but the emotional and psychological harm can be equally severe. Battered women often fear for their safety, expect violence to recur, lose their self-esteem, feel out-of-control and trapped, develop an increased tolerance for violence and abuse, and lose faith in others.<sup>167</sup> They commonly feel a sense of terror, depression, grief, anger, rage, hatred, and shame.<sup>168</sup> Battered women also are known to develop nightmares, sexual dysfunctions, concentration problems, and addictions.<sup>169</sup>

The children of abused women also suffer enormously. Nearly three million children witness their mothers being physically battered each year.<sup>170</sup> As noted by Chief Justice Workman of the West Virginia Supreme Court:

Children learn several lessons in witnessing the abuse of one of their parents. First, they learn that such behavior appears to be approved by their most important role models and that the violence toward a loved one is acceptable. Children also fail to grasp the full range of negative consequences for the violent behavior and observe, instead, the short term reinforcements, namely compliance by the victim. Thus, they learn the use of coercive power and violence as a way to influence loved ones without being exposed to other more constructive alternatives.

In addition to the effect of the destructive modeling, children who grow up in violent homes experience damaging psychological effects.<sup>171</sup>

These children may also suffer incidental injury from being present during assaults on their mothers, or they may be targets of abuse themselves.<sup>172</sup> In addition, there is an intergenerational aspect to domestic violence. It is well established that a male who witnesses family violence as a child will be predisposed to committing family violence as an adult.<sup>173</sup>

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167. See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1218-19 (1993).

168. Dutton, 21 HOFSTRA L. REV. at 1221.

169. *Id.* at 1221-22.

170. Alan J. Tomkins et al., *The Plight of Children who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 LAW & PSYCHOL. REV. 137, 139 (1994). See Dutton, 21 HOFSTRA L. REV. at 1211.

171. Patricia Ann. S. v. James Daniel S., 435 S.E.2d 6, 18 (W. Va. 1993) (Workman, C.J., dissenting).

172. Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 FAM. L.Q. 357, 357 (1995) (noting "strong substantive correlation between adult partner abuse and child abuse.").

173. Dutton, 21 HOFSTRA L. REV. at 1211-12.



B. PUBLIC AND PRIVATE INTERESTS SUPPORTING A COUNSELOR-BATTERED WOMAN PRIVILEGE

Confidential counseling for victims of domestic violence is a service of immense social value. To begin with, domestic violence programs are the most effective means for recovering physical and mental health. These programs "offer a combination of services that cannot be found in any other type of helping organization."<sup>174</sup> Shelter and counseling services are "havens where [a battered woman] can recuperate from her wounds, recover her sense of self, and re-evaluate her situation."<sup>175</sup> It is therefore not surprising that Congress recently appropriated at least \$182 million for fiscal years 1996 through 2000 to support shelters where women can recuperate and receive counseling.<sup>176</sup>

Counseling and shelter programs furnish a variety of services and provisions, including hotlines, individual and group counseling, housing, advocacy services, physical protection, emergency medical care, food, clothing, transportation, childcare, and outreach and education programs. The counseling function is an integral part of these programs in two ways. First, by encouraging battered women to confide in them, counselors are best able to evaluate the risks each batterer poses and to help identify the services and legal interventions that will enable a victim to escape the abuse.<sup>177</sup> Second, a counselor can provide psychological counseling appropriate to feelings of despair, depression, fear, and shame, which will enable the victim to regain self-confidence and leave the abusive relationship.<sup>178</sup>

Counselors are often former victims of domestic violence themselves. They are particularly qualified to assure the battered woman that her situation is not unique.<sup>179</sup> Counselors inform battered women that women of all ages, socio-economic classes, religions, races, and cultures are battered by the men who profess to love them. Such information may profoundly change the abused woman's understand-

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174. LEE H. BOWKER, *ENDING THE VIOLENCE* 86 (1986).

175. DEL MARTIN, *BATTERED WIVES* 196 (1976).

176. 42 U.S.C. §§ 10409(a), (b) (1994); *id.* at §§ 10402(a), (f). VAWA commits \$1.62 billion over six years to combat family violence and sexual assault. See Michelle W. Easterling, *For Better or Worse: The Federalization of Domestic Violence*, 98 W. VA. L. REV. 933, 942-43 (1996).

177. BARBARA J. HART ET AL., *PROTECTING CONFIDENTIALITY OF VICTIM-COUNSELOR COMMUNICATIONS* 46 (Susan H. Rauch ed. 1993) [hereinafter *PROTECTING CONFIDENTIALITY*].

178. See DEL MARTIN, *BATTERED WIVES* 196-97 (1976); *PROTECTING CONFIDENTIALITY*, *supra* note 177, at 45-47.

179. See ANN JONES, *NEXT TIME SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT* 230 (1994) (asserting that shelter counselors should consist primarily of women who have survived abuse).

ing of her experience, permitting her to reject the excuses the batterer advances as justification for his maltreatment. Thus, domestic violence services often provide critical counseling that helps the battered woman affirm her integrity and reclaim her ability to resist the violence and to act effectively to protect herself and her children.<sup>180</sup> Counselors function like psychotherapists, while also offering shared experience to reduce isolation and rebuild the self-esteem of battered women. Moreover, their counseling supplies the critical components of strategic planning with victims for physical safety and access to legal resources.

Counselors may be psychiatrists or psychotherapists, social workers, clergy, attorneys, or volunteers with significant life experience.<sup>181</sup> The last category includes the survivors of abuse who have chosen to help other battered women. As the Supreme Court recognized in *Jaffee*, when extending the psychotherapist privilege to social workers, social workers essentially serve the same function as psychotherapists.<sup>182</sup> The difference between the groups is that social workers often serve those who cannot afford psychotherapists.<sup>183</sup> Indeed, the Court agreed that differentiating between them would serve "no discernable public purpose."<sup>184</sup>

Recognizing substance over labels in the counselor-battered woman relationship is especially compelling because this relationship typically involves more sensitive and embarrassing personal disclosures than those considered in other privileged relationships.<sup>185</sup> To do otherwise would condition the privilege on the victim's ability to pay a formally licensed psychotherapist. Indeed, the counselor is often the poor person's psychotherapist.<sup>186</sup> As one commentator stated:

[M]any domestic violence victims are economically dependent on the men who abuse them[;] few victims have the resources necessary to begin a new life for themselves and their children. Batterers commonly isolate battered women from fi-

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180. See *supra* note 178 and accompanying text.

181. Catherine M. Baytion, *Toward Uniform Application of a Federal Psychotherapist-Patient Privilege*, 70 WASH. L. REV. 153, 153 n.3 (1995).

182. *Jaffee*, 116 S. Ct. at 1931-32.

183. *Id.* at 1931.

184. *Id.* at 1932 (quoting *Jaffee*, 51 F.3d at 1358 n.19).

185. *In re Pittsburgh Action Against Rape*, 428 A.2d 126, 146 (Pa. 1981) (Larsen, J., dissenting).

186. See 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5429, at 819 (1980) (noting that the number of social workers exceeds the combined number of psychiatrists, physicians and psychologists in low income areas). *Jaffee*, 51 F.3d at 1358 n.19 (citations omitted). The Supreme Court also acknowledged that "social workers provide a significant amount of mental health treatment." *Jaffee*, 116 S. Ct. at 1931.

nancial resources. For example, many battered women do not have ready access to cash, checking accounts, or charge accounts. One study showed that 27% of battered women had no access to cash, 34% had no access to a checking account, 51% had no access to charge accounts, and 22% had no access to a car.<sup>187</sup>

Recognizing a privilege for the psychotherapist and not the counselor who performs the same function would draw an arbitrary distinction.<sup>188</sup>

Moreover, confidential counseling is essential to protecting the safety of battered women and their children. Merely by seeking help, battered women often expose themselves to grievous harm:

Most victims of domestic violence have been threatened with further assault or even death if they ever reveal what their abusers have done to them. Almost all battered women are terrified of these threats. . . . Without assurances of confidentiality, few battered women would contact domestic violence programs or open up to battered women's counselors.<sup>189</sup>

Abused women have reason to believe the threats of their batterers: The risk of violent assaults actually increases once a woman has made an effort to leave or after she has left.<sup>190</sup> Not only does non-fatal violence escalate, but deadly violence also increases.<sup>191</sup> Women are most likely to be murdered when attempting to report abuse or to leave an abusive relationship.<sup>192</sup> Thus, confidentiality is not just helpful to de-

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187. Martha F. Davis et al., *Protecting Women's Welfare in the Face of Violence*, 22 FORDHAM URB. L.J. 1141, 1150-51 (1995).

188. Catharina J.H. Dubbelday, Comment, *The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved*, 34 EMORY L.J. 777, 821 (1985) (noting that "an approach that focuses only on the credentials of a professional seems arbitrary."). Cf. *Bernard v. Commonwealth*, SJC-07023 1996 Mass. Lexis 331 (Mass. Dec. 27, 1996) (extending statutory social worker privilege to unlicensed peer counselor employed by the state). Failing to recognize a counselor-battered woman privilege would also discriminate against women who wish to benefit from the specialized expertise of a domestic violence counselor, even if they could afford a psychotherapist.

189. Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 295 (1995).

190. Zorza, 29 FAM. L.Q. at 274. See MARY P. KOSS, ET AL., NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY 98-99 (1994); Dutton, 21 HOFSTRA L. REV. at 1212; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 6 (1991); J.M. Lawrence, *Fleeing Abuse Is Often Deadly For Women*, BOSTON HERALD, Oct. 15, 1995, at 26. The Bureau of Justice has found that divorced or separated persons had the highest rate of violent crimes committed against them by relatives. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1990, 152 (1992).

191. See David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, 13 RESPONSE 13, 13 (1990).

192. See Dutton, 21 HOFSTRA L. REV. at 1212; Lan Nguyen, *Police Say Man Stalked Wife Before Killing Husband in Va. Slaying Suicide Was Arrested the Previous Day*, WASH. POST, Dec. 28, 1995, at B1 (describing battered woman murdered by her husband

veloping the counseling relationship — it is often absolutely crucial to insuring the woman's survival.<sup>193</sup>

The first step in communications between a counselor and a battered woman is to ensure the physical safety of the battered woman whose life and whose children's lives continue to be at risk. Even if the record of those confidential communications does not reveal the victim's whereabouts, the very contents of the record may aggravate the abuser and thereby increase the risk and level of physical violence. Disclosure of a victim's fear, despair, and trauma resulting from the assault confirms for a perpetrator that his acts of violence, threats, and intimidation have been highly effective. Disclosure thus could encourage escalated coercion and sexual violence to maintain control over a battered woman or to impede a battered woman's departure from the relationship.

Since the inception of domestic violence counseling and shelter services in the mid-1970s, domestic violence programs have recognized that the safety of victims depends on their vigilance in protecting the confidentiality of communications between victims and counselors. Domestic violence programs take every precaution to ensure the confidentiality necessary to protect battered women from their abusers.<sup>194</sup> Most programs maintain confidentiality policies.<sup>195</sup> Most train their counselors to refuse to disclose any information about a battered woman without her consent.<sup>196</sup> Shelters and counseling programs have tailored telephone practices to prevent disclosure of counseling relationships and communications. Domestic violence programs rarely publish the addresses of shelters and safe home services, nor do they reveal the whereabouts of battered women once they leave home.

Unless afforded robust legal protections, all of the communications so vigilantly protected in the interest of victims' safety may be

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one day after he was arrested and released for stalking, and five months after separation).

193. Fearing future retaliation and violence, battered women often make great efforts to preserve the confidentiality of their location once they leave the batterer. Zorza, 29 FAM. L.Q. at 280. See CATHERINE KIRKWOOD, *LEAVING ABUSIVE PARTNERS: FROM THE SCARS OF SURVIVAL TO THE WISDOM FOR CHANGE* 103 (1993) (describing efforts such as paying utility bills under aliases to remove "any indication of existence.").

194. PROTECTING CONFIDENTIALITY, *supra* note 177, at 47.

195. *Id.*

196. See, e.g., Statement of Confidentiality for My Sister's Place, Washington, D.C. (providing that service volunteers "will never reveal the location of the shelter to anyone" and that any information relating to clients "is confidential and not to be shared or repeated to anyone."); PROTECTING CONFIDENTIALITY, *supra* note 177, at 47, Appendix V (noting that the Model Pennsylvania Confidentiality Policy provides that a women's center and its employees will "hold confidential all communications, observations and information made by, between, or about clients.").

compromised when abusers succeed in extracting confidential information under an exculpatory evidence argument. Giving batterers access to confidential communications — whatever the grounds — raises the prospect that the safety of battered women and their children will be compromised, along with the safety of the people and organizations who assist them.<sup>197</sup>

Battered women often feel humiliated by their inability to stop the violence of their abusers.<sup>198</sup> Few women would broach these most private subjects without express assurances of confidentiality.<sup>199</sup> Without a guarantee that her communications will be kept confidential, a woman who needs counseling may be afraid to seek assistance at all.<sup>200</sup> Few victims would divulge their private thoughts and feelings, even though such disclosures are necessary to make recovery possible.<sup>201</sup>

Similarly, once the counseling relationship has begun, any risk of disclosure necessarily inhibits the victim from freely revealing her fears, feelings, and anxieties, thereby limiting the effectiveness of the

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197. For example, domestic violence advocates are extremely concerned about the privacy implications of modern technology, such as "caller ID" services and access to private information over the internet. The Federal Communications Commission has adopted rules requiring carriers to inform their customers as to what information "caller ID" services reveal and how customers can activate and deactivate these services. See *In the Matter of Rules and Policies Regarding Calling Number Identification Service-Caller ID, Report and Order and Further Notice of Proposed Rulemaking*, 9 FCC Rcd 1764 (1994); *In the Matter of Rules and Policies Regarding Caller Number Identification—Caller ID, Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking*, 10 FCC Rcd 11700 (1995).

198. Zorza, 25 FAM. L.Q. at 295.

199. Roberta L. Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner*, 29 FAM. L.Q. 187, 187-88 (1995) (noting that "[V]ictims are not always comfortable admitting to the violence in their homes. They have good reason to be mistrustful because our society has not yet shown it is willing to offer consistent support to victims of domestic violence.").

200. See Ralph Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 188-89 (1960); Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 242 (1973) (quoting Report No. 45, Group for Advancement of Psychiatry 92 (1960)).

201. The devastating effects of sexual assault present in many violent relationships only magnifies the compelling need for a counseling relationship that enables the victim to cope with her trauma. Rape affects its victims like no other crime. See *Commonwealth v. Wilson*, 602 A.2d 1290, 1295 (Pa. 1992). "A rape victim suffers an invasion of her bodily privacy in an intensely personal and unsettling manner, triggering a number of emotional and psychological reactions running the gamut from shock, fear, distrust and anger to guilt, shame and disgust." *In re Pittsburgh Action Against Rape*, 428 A.2d at 138 (Larsen, J., dissenting). The traumatizing effects have been labeled "Rape Trauma Syndrome." *Id.* (Larsen, J., dissenting). "The benefits of counseling to a rape victim inure to the benefit of those in . . . relationships with her, and unless . . . victims are encouraged and provided with an opportunity for therapy, many women and their relationships will be mere 'shells.'" *Id.* at 140 (Larsen, J., dissenting).

counseling.<sup>202</sup> Any hesitation to disclose this sensitive information to a counselor impairs the counselor's ability to help the victim make a full recovery.<sup>203</sup>

Confidentiality also is necessary to reestablish and protect the dignity of women who have been abused or assaulted. Assuring confidentiality demonstrates to the victim that her concerns and feelings are significant and worthy of protection, thus helping to rebuild her dignity. The forced betrayal of a victim's confidences would further damage her dignity. Indeed, it would be a "great irony" that a batterer could safely confess to his attorney the details of the crime he has committed, with full confidence that this information is not available to others to be used against him during trial, but that the victim of such an assault has no such guarantee.<sup>204</sup>

### C. THE "REASON AND EXPERIENCE" OF STATE AND FEDERAL GOVERNMENTS

Congress and many state legislatures have responded to domestic violence by enacting legislation to aid its victims. For example, Congress enacted the Family Violence Prevention Services Act<sup>205</sup> and the Victims of Crime Act<sup>206</sup> to provide funds to assist battered women and other victims of domestic violence. These Acts earmark funds "for the purpose of providing immediate shelter and related assistance to victims of family violence."<sup>207</sup> Similarly, the recently enacted VAWA provides grants to combat violent crimes against women, to reduce sexual assaults against women, to encourage arrest policies, to support battered women's shelters, to gather stalking data, and to fund a national domestic violence hotline to facilitate access to information and assistance for battered women.<sup>208</sup> VAWA also created criminal penalties

202. See *In re Pittsburgh Action Against Rape*, 428 A.2d at 146-47 & n.2 (Larsen, J., dissenting).

203. See PROTECTING CONFIDENTIALITY, *supra* note 177, at 46 (describing need for complete and accurate details for counselor to be able to assess level of danger, design a safety plan, and consider legal options).

204. See *People v. Pena*, 487 N.Y.S.2d 935, 939 (N.Y. Sup. Ct. 1985).

205. See 42 U.S.C. §§ 10401-18 (1994).

206. See 42 U.S.C. §§ 10601-07 (1994).

207. 42 U.S.C. § 10402(f) (1994).

208. 42 U.S.C. § 40211 (1994). Violence Against Women Act, Pub. L. No. 103-322, §§ 40121, 40151, 40211, 40241, 40602, 108 Stat. 1910, 1920, 1925, 1934, 1951 (1994). Still, resources are scarce, and the demand for shelters far exceeds their capacity. As of 1994, there were 1,842 domestic violence programs in the United States, including 1,268 shelter programs. See National Coalition Against Domestic Violence, Available Services for Battered Women in the United States (1994) (calculations by S.B. Plichta & J.M. Lee, Mt. Sinai School of Medicine) (on file with the *Creighton Law Review*). In Massachusetts, 71 percent of the women seeking shelter and 80 percent of the children are turned away by women's shelters. In Philadelphia, one shelter rejects 75 percent of the women who seek shelter. Another shelter in New York City turns away one hun-

for incidents of interstate domestic violence, including stiff jail terms.<sup>209</sup>

All fifty states and the District of Columbia have enacted civil protection order statutes that afford broad relief to adult and child victims of domestic violence.<sup>210</sup> The relief provided by state codes includes injunctions against future violence, exclusion from the family domicile, support, custody, relinquishment of weapons, and payment of losses and attorneys' fees.<sup>211</sup> Some states now require police departments to respond to domestic violence incidents in the same manner as they would respond to offenses involving strangers.<sup>212</sup> States

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dred battered women and their children every week. ANN JONES, NEXT TIME, SHE'LL BE DEAD: BATTERING & HOW TO STOP IT 229-30 (1994). In 1995, 1,669 women and 2,209 children were housed in Massachusetts' battered women's shelters. The Woman Abuse Tracking in Clinics and Hospitals Project, Division of Prevention, Bureau of Family and Community Health, Massachusetts Department of Public Health, *Massachusetts Data on Intimate Partner Violence* (1996) (on file with the CREIGHTON LAW REVIEW).

209. Violence Against Women Act, Pub. L. No. 103-322 § 40221, 108 Stat. 19 (1994).

210. See, e.g., ALA. CODE § 30-5-1 to -5-11 (1995 & Supp. 1996); ALASKA STAT. §§ 25.35.010 to .050 (Michie 1995); ARIZ. REV. STAT. ANN. §§ 13-3601 to -3602 (West Supp. 1996); ARK. CODE ANN. §§ 9-15-101, -205, -206 (Michie 1995); CAL. FAM. CODE §§ 6300 - 6380 (West 1994 & Supp. 1996); COLO. REV. STAT. §§ 14-4-101 to -105 (1995 & Supp. 1996); CONN. GEN. STAT. ANN. § 46b-15 (West 1995); DEL. CODE ANN. tit. 10, §§ 1041 - 1048 (Supp. 1994); D.C. CODE ANN. §§ 16-1001 to -1005 (1995 & Supp. 1996); FLA. STAT. ANN. § 741.30(5) (West 1986 & Supp. 1997); GA. CODE ANN. §§ 19-13-1 to -22 (1991 & Supp. 1996); HAW. REV. STAT. §§ 586-1 to -11 (1996); IDAHO CODE § 39-6301 to -6317 (1993 & Supp. 1996); 750 ILL. COMP. STAT. ANN. 60/101 to 401, 60/102 (West 1993 Supp. 1996); IND. CODE §§ 34-4-5.1-1 to -5.1-9 (1986 & Supp. 1996); IOWA CODE § 236.1 to .18 (1995); KAN. STAT. ANN. §§ 60-3101 to -3111 (1994); KY. REV. STAT. ANN. §§ 403.710 to .785 (Banks-Baldwin 1990); LA. REV. STAT. ANN. § 2135 (West 1995); ME. REV. STAT. ANN. tit. 19, §§ 761-A to 770 (West Supp. 1996); MD. CODE ANN., FAM. LAW §§ 4-501 to -516 (1991 & Supp. 1995); MASS. GEN. LAWS ANN. ch. 209A, § 1 to 9 (West 1987 & Supp. 1996); MICH. COMP. LAWS ANN. § 600.2950 (West 1986 & Supp. 1996); MINN. STAT. § 518B.01 (1990 & Supp. 1997); MISS. CODE ANN. §§ 93-21-1 to -29 (1994 & Supp. 1996); MO. REV. STAT. §§ 455.010 to .538 (1994); MONT. CODE ANN. § 40-15-101 to -303 (1995); NEB. REV. STAT. § 42-905 (1993); NEV. REV. STAT. ANN. §§ 33.017 to .100 (Michie 1996); N.H. REV. STAT. ANN. §§ 173-B:1 to -B:11(b) (1994 & Supp. 1995); N.J. STAT. ANN. §§ 2C:25-17 to -33 (West 1995 & Supp. 1996); N.M. STAT. ANN. § 40-13-1 to -13-8 (Michie 1994); N.Y. FAMILY CT. ACT §§ 828, 842 (McKinney 1983 & Supp. 1997); N.C. GEN. STAT. §§ 50B-1 to -9 (McKinney 1994); N.D. CENT. CODE §§ 14-07.1-01 to -18 (Supp. 1995); OHIO REV. CODE ANN. §§ 2919.25 to .271 (Banks-Baldwin Supp. 1996); OKLA. STAT. tit. 22, §§ 40.2 to 40.3 (1992 & Supp. 1997); OR. REV. STAT. §§ 133.045, 192.445 (1995); PA. CONS. STAT. tit. 23, §§ 6101-17 (1991 & Supp. 1996); R.I. GEN. LAWS §§ 15-15-1 to -8 (1988 & Supp. 1995); S.C. CODE ANN. §§ 20-4-10 to -130 (Law. Co-op. 1985 & Supp. 1995); S.D. CODIFIED LAWS ANN. §§ 25-10-1 to -33 (Michie 1992 & Supp. 1996); TENN. CODE ANN. §§ 36-3-601 to -620 (1991 & Supp. 1995); TEX. FAM. CODE ANN. §§ 71.01 to .19 (West 1996); UTAH CODE ANN. §§ 30-6-1 to -14 (1995 & Supp. 1996); VT. STAT. ANN. tit. 15, §§ 1101 to -1115 (1989 & Supp. 1996); VA. CODE ANN. §§ 16.1-251 to 253.4 (Michie 1988 & Supp. 1995); WASH. REV. CODE ANN. §§ 26.50.060, to .070 (West 1986 & Supp. 1997); W. VA. CODE § 48-2A-1 to -14 (1995); WIS. STAT. ANN. §§ 813.12 - .122 (West 1994 & Supp. 1995); WYO. STAT. ANN. §§ 35-21-101 to -107 (Michie 1994).

211. See *supra* note 210.

212. See, e.g., MO. REV. STAT. § 455.080 (1994). Of course, implicit in this requirement is the unfortunate fact that in the absence of legislation, many police officers re-

likewise have passed mandatory arrest statutes that require police to arrest an abuser if they have probable cause to believe that an assault has occurred or that a protective order has been violated.<sup>213</sup> More recently, almost all states and the District of Columbia have enacted "anti-stalking" laws, criminalizing harassment that threatens death or serious injury.<sup>214</sup> In addition, an increasing number of states are adopting laws requiring consideration of evidence of domestic abuse when making child custody decisions.<sup>215</sup>

Both federal and state lawmakers have recognized the importance of protecting the privacy of battered women and the confidentiali-

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gard domestic violence as less serious than other violent crimes even though the statistics show that women are far more likely to be assaulted or killed by their partners than by strangers. See *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1501 (1993) (noting that as many as 40 percent of calls to police involve domestic disturbances).

213. See, e.g., CONN. GEN. STAT. ANN. § 46b-38b (West 1995); D.C. Code Ann. § 16-1031 (Supp. 1996); KAN. STAT. ANN. § 22-2307 (1995); NEV. REV. STAT. ANN. § 171.1225 (Michie 1992 & Supp. 1995); N.J. STAT. ANN. § 2C 25-21 (West 1995); OR. REV. STAT. § 133.055(2)(a) (1995).

214. See, e.g., ALA. CODE §§ 13A-6-90 to -94 (1994); ALASKA STAT. §§ 11.41.260 to .270 (Michie Supp. 1995); ARIZ. REV. STAT. ANN. § 13-2923 (West Supp. 1996); ARK. CODE ANN. § 5-71-229 (Michie Supp. 1995); CAL. CIVIL CODE § 1708.7 (West Supp. 1996); COLO. REV. STAT. § 18-9-111 (1986 & Supp. 1996); CONN. GEN. STAT. ANN. §§ 53a-181c to -181d (West 1994); DEL. CODE ANN. tit. 11, § 1312A (1995 & Supp. 1996); D.C. CODE ANN. § 22-504 (1996); FLA. STAT. ANN. § 784.048 (Supp. 1996); GA. CODE ANN. § 16-5-90 to 93 (1996); HAW. REV. STAT. §§ 711-1106.4 to -1106.5 (1993 & Supp. 1995); IDAHO CODE § 18-7905 (Supp. 1996); 720 ILL. COMP. STAT. ANN. 5/12-7.3 to -7.5 (West 1993 & Supp. 1996); IND. CODE §§ 35-45-10-1, -10-4, -10-5 (1994 & Supp. 1996); IOWA CODE § 708.11 (1995); KAN. STAT. ANN. § 21-3438 (1995); KY. REV. STAT. ANN. § 508.140 to .150 (Banks-Baldwin 1995); LA. REV. STAT. ANN. § 14:40.2 (West Supp. 1996); ME. REV. STAT. ANN. tit. 17-A, § 210-A (West Supp. 1996); MD. CODE ANN. art. 27 § 121B (1996); MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1996); MICH. COMP. LAWS ANN. §§ 750.411h to .411i (West Supp. 1996); MINN. STAT. § 609.749 (Supp. 1997); MISS. CODE ANN. § 97-3-107 (1994 & Supp. 1995); MO. REV. STAT. § 565.225 (1994); MONT. CODE ANN. § 45-5-220 (1995); NEB. REV. STAT. § 28-311.02 to .05 (1995); NEV. REV. STAT. ANN. § 200.575 (Michie Supp. 1995); N.H. REV. STAT. ANN. § 633:3-a (1996); N.J. STAT. ANN. § 2C:12-10 (West 1995); N.M. STAT. ANN. §§ 30-3A-1 to 3A-4 (Michie 1994); N.Y. PENAL LAW §§ 120.13 to .14, 240.25 to .31 (McKinney 1989 & Supp. 1997); N.C. GEN. STAT. § 14-277.3 (1993); N.D. CENT. CODE § 12.1-17-07.1 (Supp. 1993); OHIO REV. CODE ANN. § 2903.211 (Banks-Baldwin Supp. 1995); OKLA. STAT. tit. 21, § 1173 (Supp. 1997); OR. REV. STAT. § 163.730 to .755 (1995); PA. CONS. STAT. tit. 18, § 2709 (Supp. 1996); R.I. GEN. LAWS. § 11-59-1 to -59-3 (1994 & Supp. 1995); S.C. CODE ANN. § 16-3-1700 to 184 (Law Co-op. Supp. 1995); S.D. CODIFIED LAWS § 22-19A-1 to -19A-7 (Supp. 1996); TENN. CODE ANN. § 39-17-315 (West Supp. 1995); TEX. PENAL CODE ANN. § 42.071 (West Supp. 1997); UTAH CODE ANN. § 76-5-106.5 (1995 & Supp. 1996); VT. STAT. ANN. tit. 13, §§ 1061 to 1063 (Supp. 1996); VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1995); WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1997); W. VA. CODE § 61-2-9a (Supp. 1995); WIS. STAT. ANN. § 940.32 (West 1996); WYO. STAT. ANN. § 6-2-506 (Michie 1996).

215. See e.g., COLO. REV. STAT. § 14-10-124 (1987); FLA. STAT. ANN. § 61.13 (1985 & Supp. 1997); MINN. STAT. § 518.17 (1990 & Supp. 1997); N.J. STAT. ANN. § 9:2-4 (West 1993). See also *In re Custody of Vaughn*, 664 N.E.2d 434 (Mass. 1996) (creating a judicially crafted rule).



ality of their dealings with support services.<sup>216</sup> The Family Violence Prevention and Services Act, for example, forbids grants to any program without "documentation that procedures have been developed . . . to assure the confidentiality of records pertaining to any individual provided family violence prevention or treatment services. . . ."<sup>217</sup> Additionally, the United States Postal Service is required to implement new regulations "to secure the confidentiality of domestic violence shelters and abused persons' addresses."<sup>218</sup> Because many shelters and counseling programs receive federal funding, they must resist all attempts to divulge confidential information about the battered women they serve.

Moreover, in December 1995, the United States Department of Justice released a report to Congress concerning the issue of confidentiality of communications between sexual assault or domestic violence victims and their counselors.<sup>219</sup> The Department proposed model statutes to encourage victims of sexual abuse and domestic violence to seek counseling, make full disclosures to their counselors, and receive the maximum benefits from counseling.<sup>220</sup>

Similarly, state legislatures have acted specifically to protect the confidentiality of battered women by restricting access to information that would reveal their locations.<sup>221</sup> For example, some states require, or at least allow, courts to keep addresses of battered women confidential.<sup>222</sup> Others permit a victim to remove her driver's license and registration information from the public record.<sup>223</sup> Colorado allows a battered woman to make any public record confidential if she submits an affidavit stating that she believes she will be harassed or threatened with bodily harm.<sup>224</sup> New Jersey and Washington enable

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216. See *infra* notes 217-32 and accompanying text.

217. 42 U.S.C. § 10402(a)(2)(E) (1994). The Victims of Crime Act contains a similar provision. See 42 U.S.C. § 10604(a) (1994).

218. 42 U.S.C. § 13951 (1994).

219. Dep't of Justice, Report to Congress on the Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors, Findings and Model Legislation (1995).

220. *Id.* This effort builds on earlier work by the President's Task Force on Victims of Crime, which recommended that legislation be enacted "to ensure that designated victim counseling is legally privileged and not subject to defense discovery or subpoena." PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 17 (1982). The recommendation specifically included a privilege that would cover social workers, nurses, and victim counselors, not just psychiatrists and psychologists. *Id.*

221. See *infra* notes 222-32 and accompanying text.

222. See, e.g., MASS. GEN. LAWS ANN. ch. 209A, § 8 (West 1987); N.J. REV. STAT. ANN. § 2C:25-26 (West 1995); TEX. FAM. CODE ANN. § 71.111 (West 1996); WIS. STAT. ANN. § 813.125 (West 1994 & Supp. 1995), *id.* at § 5895.67 (West Supp. 1996).

223. See, e.g., ARK. CODE ANN. §§ 27-50-906 to -908 (Michie 1994 & Supp. 1995); CAL. VEH. CODE § 1808.21 (West Supp. 1997); MINN. STAT. § 171.12 (1986 & Supp. 1997).

224. See COLO. REV. STAT. § 24-72-204 (1988 & Supp. 1996).

a battered woman to register to vote without disclosing her street address.<sup>225</sup>

Washington also manages the most sweeping confidentiality system — the Address Confidentiality Program — that effectively assists battered women to disappear.<sup>226</sup> Under this program, a battered woman may list a post office box supplied by the Secretary of State's office as her address.<sup>227</sup> State employees then forward mail to her real address.<sup>228</sup> Moreover, she may seal her records to prevent anyone from locating her.<sup>229</sup> Shelters, in coordination with the State, relocate the battered woman.<sup>230</sup>

All of these programs and policies demonstrate "reason and experience" at the state and federal level to strengthen counseling and assistance for battered women, including protecting their confidentiality. The most telling evidence of "reason and experience," however, is that many states have also enacted statutory privileges to guard the confidentiality of communications between a counselor and a crime victim. A number of states have enacted a counselor-battered woman privilege.<sup>231</sup> Additionally, many states have enacted a more general counselor-victim privilege.<sup>232</sup> The enactment of these privilege statutes has been a recent trend with most statutes having been passed since 1980. Because of increasing societal awareness about the problem of domestic violence, it is highly likely that many more states will

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225. See N.J. REV. STAT. ANN. §§ 2C:25-26, 19:31-3.2 (West 1995 & Supp. 1996); WASH. REV. CODE ANN. §§ 40.24.010 to .070 (West Supp. 1997). The New Jersey legislature enacted its statute after a court held that a battered woman could register to vote without disclosing her street address. See *D.C. v. Superintendent of Elections*, 618 A.2d 931, 932 (N.J. Super. Ct. Law. Div. 1992).

226. See WASH. REV. CODE ANN. §§ 40.24.010 to .900 (West Supp. 1997); WASH. ADMIN. CODE §§ 434-840-001 to -370 (1996).

227. WASH. ADMIN. CODE § 434-840-020 (1996).

228. *Id.* at §§ 434-840-020 & -030.

229. *Id.*

230. During its first four years in operation, the program has served approximately 600 clients. Nancy Cleeland, *One State Helps Women Get Away*, SAN DIEGO UNION-TRIB., July 10, 1994, at A22.

231. See, e.g., ALASKA STAT. § 25.35.059, § 25.35.052(a) (1996). CAL. EVID. CODE § 1037.2 (West 1995); CONN. GEN. STAT. ANN. § 52-146k (West 1991 & Supp. 1996); 225 ILL. COMP. STAT. ANN. 107/75 (West 1996); LA. REV. STAT. ANN. § 46:2124.1 (West Supp. 1997); MASS. GEN. LAWS. ANN. ch. 233, § 20J (West 1986 & Supp. 1996); MICH. COMP. LAWS ANN. § 600.2157a (West 1986); N.D. CENT. CODE § 14-07.1-18 (1991 & Supp. 1995); N.H. REV. STAT. ANN. §§ 173-C:1, 173-C:2 (1994); PA. CONS. STAT. tit. 42, § 5945.1 (Supp. 1996); WYO. STAT. §§ 1-12-116 (1988) 14-3-210 (1994). More than half of the states have enacted statutes addressing the confidentiality of communications between counselors and sexual assault or domestic violence victims. Dep't of Justice, Report to Congress on the Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors, Findings and Model Legislation 3 (1995).

232. See, e.g., ALA. CODE §§ 15-23-40 to -45 (1995); IND. CODE §§ 35-37-6-1 to 11 (1994); IOWA CODE § 236A.1 (1995); N.J. STAT. ANN. §§ 2A:84A-22.13 to -22.15; 84A-29 (West 1996); N.M. STAT. ANN. §§ 31-25-1 to -6 (Michie 1994).

follow this trend and enact their own privilege statutes. However, even if they do not, there are sufficient grounds for a judicially crafted response in this area.

At least one federal district court has taken the first step. In *United States v. Lowe*,<sup>233</sup> the United States District Court for the District of Massachusetts confronted the question of whether to extend the federal privilege to rape counseling records.<sup>234</sup> The court reasoned that *Jaffee* was not technically on point because the communications were made to "a rape crisis center employee or volunteer" and not a "licensed social worker or psychotherapist."<sup>235</sup> Nevertheless, the court concluded that "the policies expressed in *Jaffee*" supported "some form of a federal privilege for communications with a rape crisis counselor . . . ."<sup>236</sup> The court reached this conclusion after noting that a majority of the states and the District of Columbia have enacted privileges for confidential communications between counselors and victims of sexual assault or domestic violence.<sup>237</sup>

## CONCLUSION

*Jaffee* confirmed that Rule 501 permits federal courts to use "reason and experience" to recognize new privileges. The facts of *Jaffee* provided the Court with the opportunity to recognize a psychotherapist privilege and then extend the privilege to the social worker context. The Court, however, did not foreclose broadening the privilege to other counseling relationships. As many states have recognized, the counselor-battered woman relationship is an appropriate further extension of the psychotherapist privilege. Not only does the counselor-battered woman relationship satisfy the traditional Wigmore elements, but "reason and experience" at the state and federal levels indicate that a counselor-battered woman privilege is necessary to assist victims of domestic violence in their healing process.

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233. No. Crim. 95-10404-PBS, 1996 WL 713070 (D. Mass. 1996) (Substitute Memorandum and Order).

234. *United States v. Lowe*, No. Crim. 95-10404-PBS, 1996 WL 713070, at \*1 (D. Mass. 1996) (Substitute Memorandum and Order).

235. *Lowe*, 1996 WL 713070, at \*2.

236. *Id.*

237. *Id.* The court, however, decided that the rape victim in *Lowe* had waived her privilege. *Id.* at \*2-3.

