

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: CARRIE JAFFEE, SPECIAL ADMINISTRATOR FOR  
RICKY ALLEN, SR., DECEASED Petitioner  
v. MARYLU REDMOND, ET AL.

CASE NO: 95-266

PLACE: Washington, D.C.

DATE: Monday, February 26, 1996

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   CARRIE JAFFEE, SPECIAL                   :

4       ADMINISTRATOR FOR RICKY                   :

5       ALLEN, SR., DECEASED                   :

6                   Petitioner                   :

7           v.                                   :   No. 95-266

8   MARYLU REDMOND, ET AL.                   :

9   - - - - -X

10   Washington, D.C.

11   Monday, February 26, 1996

12                   The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 10:02 a.m.

15   APPEARANCES:

16   KENNETH N. FLAXMAN ESQ., Chicago, Illinois; on behalf of  
17       the Petitioner.

18   GREGORY E. ROGUS, ESQ., Chicago, Illinois; on behalf of  
19       the Respondents.

20   JAMES A. FELDMAN, ESQ., Assistant to the Solicitor  
21       General, Department of Justice, Washington, D.C.; on  
22       behalf of the United States, as amicus curiae,  
23       supporting the Respondents.

24

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 95-266, Carrie Jaffee v.  
5 Marylu Redmond.

6 Mr. Flaxman.

7 ORAL ARGUMENT OF KENNETH N. FLAXMAN

8 ON BEHALF OF THE PETITIONER

9 MR. FLAXMAN: Mr. Chief Justice, and may it  
10 please the Court:

11 In Rule 501 of the Federal Rules of Evidence  
12 Congress delegated to this Court the power to recognize  
13 new evidentiary privileges consistent with the principles  
14 of the common law as interpreted in the light of reason  
15 and experience.

16 Even before Rule 501, when this Court had full  
17 common law power to recognize privileges, the Court was  
18 very parsimonious in the privileges that it would  
19 recognize. The Court recognized a common law privilege  
20 for trade secrets, a common law privilege for informants,  
21 a common law privilege for military secrets. The Court  
22 rejected a news gatherer's privilege, and an accountant's  
23 privilege.

24 Following the adoption of the Federal Rules of  
25 Evidence, the Court has continued to be very reluctant to



1 establish new privileges. The Court rejected an  
2 editorialist privilege, a State legislator's privilege, an  
3 accountant's work product privilege, and an academic peer  
4 review privilege.

5 QUESTION: When were the Federal Rules of  
6 Evidence adopted, Mr. Flaxman?

7 MR. FLAXMAN: 1973, I believe.

8 QUESTION: Thank you.

9 MR. FLAXMAN: And the Court limited spousal  
10 privileges.

11 The respondents in this case ask the Court to  
12 fashion a new, broad privilege that would apply to any  
13 mental health professional engaged in psychotherapy or  
14 counseling. The number of persons engaged in these  
15 professions is countless, and the number of conversations  
16 that would be protected by this new privilege are  
17 countless.

18 QUESTION: Well, it's not countless if they're  
19 licensed and we confine the privilege to those who are  
20 licensed. I assume you could go to every State and count  
21 how many licenses there are.

22 MR. FLAXMAN: Well, except the States are each  
23 day creating new counselor status positions. I think  
24 California, there's now somebody who, after 2 years of an  
25 associate's degree, becomes a certified alcoholic

1 counselor.

2 QUESTION: But are they licensed, or they have  
3 some State certification, or is there some document?

4 MR. FLAXMAN: Yes. They receive a State  
5 license, and they're --

6 QUESTION: Well then, I assume they could be  
7 counted.

8 MR. FLAXMAN: They can be counted, but it would  
9 be -- it would be a very large number.

10 QUESTION: And Mr. Flaxman, they would be  
11 counted in a diversity case, is that not right?

12 MR. FLAXMAN: That's absolutely correct. In a  
13 diversity case, the Rules of Evidence require the Federal  
14 courts to apply State law in determining privileges. This  
15 was not a diversity case, this case. There was a Federal  
16 civil rights claim.

17 QUESTION: Wasn't there one State claim? In  
18 addition, there was a wrongful death claim under State  
19 law?

20 MR. FLAXMAN: There was a supplemental claim  
21 brought under State law. The principle that was applied  
22 by the district court that was not questioned by the  
23 district court is that when there is a State law claim and  
24 a Federal claim, that the Federal -- and there is no  
25 Federal privilege, the rule would be to admit the -- admit

1 evidence.

2 QUESTION: Is there precedent that holds that  
3 the State --

4 MR. FLAXMAN: There's precedent among -- that  
5 principle is recognized, I think uniformly within the  
6 circuits. It's consistent with the legislative history.  
7 I don't think it's been ruled on by this Court. It was  
8 not challenged by the respondents in the court of appeals,  
9 and I don't believe it's within the questions that are  
10 presented in the petition for certiorari.

11 I think the question here is that the agreed  
12 question is whether there should be a Federal privilege  
13 for this kind of evidence, and this kind of evidence that  
14 we're focusing on is not confidential communications about  
15 dreams or feelings.

16 QUESTION: Well, is it different in kind from  
17 the kind of evidence that would be privileged under the  
18 clinical -- under a privilege for clinical psychologists?  
19 Does the social worker here learn something different in  
20 sort of standard counseling --

21 MR. FLAXMAN: Well --

22 QUESTION: -- from what a clinical psychologist  
23 learns and hears?

24 MR. FLAXMAN: Well, we don't know, on this  
25 record, what kind of therapy was actually being

1 administered. As a general rule, I think a legislature  
2 could make a rational distinction between social workers  
3 and clinical psychologists and psychiatrists.

4 QUESTION: Because?

5 MR. FLAXMAN: Because they'd be different kinds  
6 of therapy.

7 QUESTION: Well, what is the difference?

8 MR. FLAXMAN: Well, I think as a rational  
9 distinction a legislature could say that a psychiatrist  
10 and a clinical psychologist are going to be more concerned  
11 with psychic reality, and a social worker would be more  
12 concerned with helping somebody deal with their -- the  
13 problems that they're facing.

14 We -- in the record --

15 QUESTION: I mean, that sounds very sensible  
16 just based on the language we're using. As a matter of  
17 positive knowledge, is that correct?

18 MR. FLAXMAN: It's --

19 QUESTION: It sounds like a reasonable answer,  
20 but is it true, I guess is what I'm saying.

21 (Laughter.)

22 MR. FLAXMAN: That's -- unlike the number of  
23 people who are licensed, that's an answer -- that's a  
24 question that can't really be ascertained. It can be  
25 debated by scholars. It can be debated by interest



1 groups.

2 QUESTION: Well --

3 QUESTION: Well --

4 QUESTION: -- can we say that there simply are  
5 no clear, standard cases on which we can answer that  
6 question? In other words, psychiatric social workers do  
7 all sorts of things. Who knows what they're doing, is  
8 that sort of what you're saying?

9 MR. FLAXMAN: That's correct. Our approach.

10 QUESTION: Well, Mr. Flaxman --

11 QUESTION: The brief of the American Psychiatric  
12 Association I take it, correct me if I'm wrong, supports  
13 the Respondent here, and they don't ask that we draw the  
14 line that you're suggesting in this colloquy with Justice  
15 Souter.

16 MR. FLAXMAN: That brief --

17 QUESTION: Or am I incorrect?

18 MR. FLAXMAN: No, I think you're absolutely  
19 correct, but I think they're incorrect in reading the  
20 record in this case. The record in this case doesn't  
21 support the claim that there was psychoanalytic counseling  
22 going on with the social worker and respondent Redmond.  
23 The record in this case doesn't reflect anything about the  
24 type of therapy --

25 QUESTION: Well, but I infer from their position

1 that formal psychiatric or psychoanalytic sessions are not  
2 necessarily different in their objectives than clinical  
3 counseling in the more ordinary sense, assuming there's an  
4 aura of confidentiality about it, where the  
5 confidentiality is expected on both sides.

6 MR. FLAXMAN: No, I think, and I -- perhaps I'm  
7 misreading their brief, but I think they make a  
8 distinction between psychoanalysis and counseling.  
9 Psychoanalysis is dealing with psychic truth. Not with  
10 what really happened, but with a person's feelings and  
11 emotions and dreams about what happened, and about  
12 someone's childhood.

13 QUESTION: Well, Mr. Flaxman, I take it you  
14 would not extend in a Federal case a privilege to a  
15 psychiatrist.

16 MR. FLAXMAN: That's correct. Our primary  
17 position is that there should not be any privilege.

18 QUESTION: Right.

19 MR. FLAXMAN: That when there are confidential  
20 interests, and we --

21 QUESTION: Regardless of what differences there  
22 might be --

23 MR. FLAXMAN: Right.

24 QUESTION: -- in the therapy or the nature of  
25 the questions.

1 MR. FLAXMAN: That's our primary position, is  
2 that the confidential interest -- and we concede that  
3 there are confidential interests in counseling and  
4 therapy.

5 QUESTION: And yet all 50 States recognize some  
6 form of privilege in this area.

7 MR. FLAXMAN: Well, some of the -- they  
8 recognize some form of privilege. Some of those  
9 privileges amount to nothing more than the balancing test,  
10 the district judge's, the trial judge's discretion that  
11 we're seeking in this case, and the States have made  
12 different exceptions, and many States --

13 QUESTION: Now, the court below didn't adopt a  
14 clear rule of, there is a privilege and that's that. It  
15 went on to balance the need for the evidence?

16 MR. FLAXMAN: Well, the court below adopted a  
17 very unconventional definition of cumulative. It said, I  
18 think, that because there were four witnesses who were  
19 family members of the deceased, and one police officer on  
20 the other side in the civil rights case, our learning what  
21 the police officer told the social worker, our learning  
22 that the police officer had had memory problems, would be  
23 cumulative.

24 QUESTION: In the area of privileged  
25 communications, do the Federal courts typically engage in

1 a balancing in determining whether to apply the privilege  
2 or not?

3 MR. FLAXMAN: The one circuit that has recog --  
4 the Second Circuit has expressly adopted a balancing test,  
5 and describes the privilege that it was adopting as  
6 nothing more than a requirement that the district judge  
7 balance the privacy interest with the opponent's need to  
8 know.

9 QUESTION: Well, that's really not much of a  
10 privilege, is it, because if everything is going to be  
11 balanced at the time the evidence is sought to be  
12 admitted -- the time the privilege is supposed to work is  
13 when the person either feels free or does not feel free to  
14 confide to the professional therapist.

15 MR. FLAXMAN: Well, we're not seeking  
16 disclosures about confidences about feelings or about  
17 dreams. We want to know what the client -- what the  
18 respondent told the social worker about the incident.  
19 That's -- the district judge said that's all we can get.

20 QUESTION: Well, but that may be a very  
21 difficult line to draw. You say you don't want the  
22 person's mental reflections and that sort of thing, but  
23 it's not always easy to separate those from an account of  
24 what happened.

25 MR. FLAXMAN: Well, it -- the district judge and



1 the magistrate judge who supervised the deposition of the  
2 respondent didn't have any trouble dealing with that. It  
3 was very clear that we could ask, what did you say about  
4 the incident, and when we tried --

5 QUESTION: Mr. Flaxman, correct me if I'm wrong  
6 about this, but I thought that part of what you were  
7 asking did involve mental impressions to the extent that  
8 you were asking for the notes of the social worker.

9 MR. FLAXMAN: The notes of the social worker  
10 only came up after the respondent testified that she could  
11 not recall any of her conversations with the social  
12 worker.

13 QUESTION: Are you now conceding that mental  
14 impressions of the social worker, mental impressions  
15 reflected in her notes, are things to which you do not  
16 have access?

17 MR. FLAXMAN: As a matter of relevancy, that's  
18 correct, and the district judge said that we could not get  
19 her notes when he was ruling on the relevancy question.  
20 The district judge said we could get notes that relate to  
21 conversations about the incident. It was after --

22 QUESTION: But the conversations, the notes, mix  
23 in, as lawyer's notes do, the social worker's own mental  
24 impressions with things that the patient or client said  
25 about what happened.

1 MR. FLAXMAN: Well, we were given three pages of  
2 heavily redacted notes which made clear the things that  
3 the client had said about the incident. One of those  
4 things is that in November of 199 --

5 QUESTION: But I -- please just straighten me  
6 out on what your position is. Do you say -- I thought you  
7 were objecting to the redactions.

8 MR. FLAXMAN: Well --

9 QUESTION: I thought you were saying, we want  
10 her notes, without the editing.

11 MR. FLAXMAN: We objected to that. The district  
12 judge ruled against us, and we agree with the -- we're not  
13 challenging the district judge's ruling on that, and we've  
14 never challenged the district judge's ruling on the  
15 redactions.

16 The district judge held a hearing to inquire  
17 about these I don't recall, these 15 I don't recalls that  
18 came from respondent Redmond when she was asked about the  
19 contents of conversations with the social worker.

20 After hearing and observing the character and  
21 demeanor of the witness, the district judge said, these  
22 denials, these I don't recalls are wholly incredible, and  
23 the only way to refresh her recollection is to review all  
24 of the notes, and the review just for counsel's eyes only.  
25 That order about production of the notes wasn't about a

1 privilege or about confidentiality, it was to help us  
2 cross-examine her. It was sanctioned for this meeting.

3 QUESTION: The propriety of that particular  
4 resolution I'm not sure is before us, or that the Court is  
5 interested in, but it seems to me very odd. It's standard  
6 for you to ask a witness, have you talked to your  
7 attorney, and the unprepared witnesses will say, oh, no.

8 Well, everybody knows that that's incredible,  
9 but if the witness responds in that incredible way, that  
10 isn't an open door to then inquire about all the  
11 conversations with the attorney.

12 MR. FLAXMAN: That's correct. The attorney-  
13 client --

14 QUESTION: And it seems to me that if this is  
15 any kind of a privilege, that the same rule should apply  
16 here. If she makes a statement that's incredible that she  
17 didn't go to a social worker or that she didn't discuss  
18 the event, I don't think that necessarily opens the door  
19 under the trial judge's ruling to explore everything that  
20 was said under any conventional privilege.

21 Now, if you want to have some different sort of  
22 privilege here, I suppose that's something altogether  
23 separate.

24 MR. FLAXMAN: Well, there's a vast difference  
25 between conferring with an attorney who is an officer of

1 the court, who is interested in following the law and not  
2 helping somebody change their recollections of an  
3 incident, to going into therapy.

4 QUESTION: Mr. Flaxman --

5 QUESTION: You say an attorney isn't always  
6 interested in changing someone's recollections of an  
7 incident?

8 (Laughter.)

9 MR. FLAXMAN: An attorney should not be helping  
10 somebody change their recollections and commit perjury,  
11 and if an attorney does that, then the attorney is subject  
12 to sanctions.

13 If a therapist does that, and helps somebody  
14 sleep at night after they did a horrible thing, then the  
15 therapist has succeeded.

16 The goals of therapy are quite different than  
17 the goals of an attorney. An attorney is ultimately  
18 answerable to the court as an officer --

19 QUESTION: Mr. Flaxman, you said earlier that  
20 the privilege recognized by some States, which amounts to  
21 a balancing of the importance of the information versus  
22 the -- I guess, what, the confidentiality of it, that that  
23 isn't much different from what would be applied anyway in  
24 the absence of a privilege.

25 MR. FLAXMAN: In some States there is a judicial



1       override.  There's a privilege, there are exceptions to  
2       the privilege, then there's a final exception that  
3       provided, however, the trial court may in the exercise of  
4       its discretion --

5                QUESTION:  Allow it in.

6                MR. FLAXMAN:  Or allow it to be disclosed.

7                QUESTION:  Yes, but that still is a privilege of  
8       sorts, isn't it?

9                MR. FLAXMAN:  It's a privilege --

10               QUESTION:  I mean, it's different from the rule  
11       which would be applied otherwise.

12               MR. FLAXMAN:  That's correct.  It's like the  
13       Second Circuit's privilege that they're -- just a  
14       balancing test.

15               QUESTION:  Now, any of these privileges that  
16       exist in other States, has any of them been adopted  
17       judicially, as a matter of common law?  Are they all  
18       legislated?

19               MR. FLAXMAN:  The Alaska supreme court adopted  
20       in State v. Allred, and the Arizona supreme court.  Other  
21       than that, all of the privileges have been adopted by  
22       legislative action.

23               QUESTION:  What is the nature of the Alaska and  
24       the Arizona privilege adopted --

25               MR. FLAXMAN:  The Alaska privilege applied to

1 psychologists and psychiatrists did not extend to social  
2 workers, and the Arizona --

3 QUESTION: Absolute?

4 MR. FLAXMAN: That's correct.

5 QUESTION: It's an absolute privilege.

6 MR. FLAXMAN: No. Well, I think all of the  
7 privileges have been limited with the duty to disclose  
8 that someone is dangerous, or that there's a child abuse  
9 admission. There are no absolute privileges in  
10 psychotherapy in any State in this --

11 QUESTION: And that includes Alaska and Arizona?

12 MR. FLAXMAN: That's correct. There are always  
13 instances where a therapist has to -- is required by law  
14 to make disclosures, and so there can't be this guarantee  
15 of absolute privilege which the American Psychiatric  
16 Association would urge and would seek.

17 QUESTION: You asked us to recognize a line  
18 between statements about fact and statements about  
19 feeling, and I confess that I'm skeptical that we could do  
20 that.

21 What if somebody says to the social worker or  
22 the psychologist, "I feel bad about killing somebody."  
23 Does that -- is that on one side of the line or the other?

24 MR. FLAXMAN: I think that's on the side that we  
25 don't get. I feel bad is --

1 QUESTION: Even though there's an admission in  
2 it, that implicit admission?

3 MR. FLAXMAN: That's right. I think that  
4 invades the --

5 QUESTION: Why isn't "I feel bad, feeling about  
6 killing somebody" fact? I mean, I --

7 MR. FLAXMAN: Because the district judge could  
8 say that kind of response is the response that anybody  
9 would feel, even if it was justifiable, and the probative  
10 value of that statement that I feel bad --

11 QUESTION: What if he says, "I didn't do it."?

12 MR. FLAXMAN: The statement, I didn't --

13 QUESTION: "I didn't kill anybody." That's his  
14 defense. "I did not kill anybody."

15 MR. FLAXMAN: "I didn't kill anybody" is a  
16 statement about the incident. That should be disclosed.

17 QUESTION: No, but that's -- no, I'm saying  
18 that's his legal position. "I did not kill the decedent  
19 that I am accused of killing." Go back to our statement.  
20 "I feel bad about killing somebody." Is it subject to the  
21 privilege? Would it be subject to a privilege or not?

22 MR. FLAXMAN: I would -- well, I would say that  
23 a district judge would require that that denial which --  
24 would have to be disclosed, that it wouldn't be  
25 privileged, but it would be -- that's a -- that should not

1 be hidden from the Government in a criminal case, or from  
2 a plaintiff in a civil case.

3 QUESTION: So you really can't -- there's no  
4 analytical distinction, then --

5 MR. FLAXMAN: Well --

6 QUESTION: -- between the fact and the feeling.

7 MR. FLAXMAN: That's why we believe this should  
8 be a question for the district judge, who can balance all  
9 of these factors. In your hypothetical --

10 QUESTION: Yes, but even on your balancing  
11 theory I thought the judge was supposed to draw -- maybe I  
12 misunderstood you. I thought the judge was supposed to  
13 draw a line between fact and feeling, and what he was  
14 supposed to be balancing --

15 MR. FLAXMAN: No, I --

16 QUESTION: -- was the appropriateness of  
17 admitting the fact as against other interests.

18 MR. FLAXMAN: I think that's one of the things  
19 that the trial judge could be balancing, whether it's fact  
20 or feeling, but also the need for the evidence. If we had  
21 a hypothetical where the --

22 QUESTION: I don't understand that, the need for  
23 the evidence? You -- you come here saying there is no  
24 privilege, but you're going to let the court balance the  
25 need for the evidence?



1 MR. FLAXMAN: With the confidentiality interests  
2 that are involved in therapy.

3 QUESTION: Oh, okay, so you're not denying there  
4 ought to be a privilege.

5 MR. FLAXMAN: I --

6 QUESTION: We're just arguing about what the  
7 scope of it ought to be.

8 MR. FLAXMAN: No, I am denying there should  
9 be -- if there's a privilege, then --

10 QUESTION: You see, I thought you were arguing  
11 on the basis of relevance before. I thought you were  
12 saying, the facts come in because they're relevant, the  
13 feelings don't come in because they're not, because they  
14 aren't relevant.

15 MR. FLAXMAN: That's --

16 QUESTION: There's no balancing there at all.  
17 There's a determination of what's fact and what's feeling.

18 MR. FLAXMAN: Well --

19 QUESTION: But now you say there is a balancing,  
20 so you're willing to acknowledge that some stuff doesn't  
21 get in because it's subject to --

22 MR. FLAXMAN: No, what I'm willing to say is  
23 that in an appropriate case the district judge could say  
24 that these feelings have so little probative value, even  
25 if they are relevant they should not come in.

1           If there was a case where there were five police  
2 officers who each say that the officer who shot, shot  
3 because the man had a knife and was about to plunge it  
4 into the back of another man. The therapy admissions or  
5 therapy statements of that fifth police officer who did  
6 the shooting would have so little probative value that the  
7 confidentiality should not be invaded.

8           QUESTION: That really isn't much of a privilege  
9 at all.

10          MR. FLAXMAN: We are saying that there should  
11 not be a privilege, that the district judge should  
12 determine -- should consider relevancy, should consider  
13 the confidential interests, should consider the impact of  
14 disclosure on the person who's in therapy --

15          QUESTION: Why?

16          QUESTION: Why -- yes.

17          MR. FLAXMAN: Because there are confidential  
18 interests involved in therapy.

19          QUESTION: Privilege.

20          MR. FLAXMAN: Not privilege, just --

21          QUESTION: No, not a privilege, just  
22 confidential interests. You want us just to call it a  
23 confidential interest instead of a privilege, is that it?

24          MR. FLAXMAN: If there is a privilege, then the  
25 burden shifts of who has to pierce the privilege.

1           In this case, what happened is that the  
2       respondent came forward and said, I don't have to  
3       demonstrate that it was -- we were having psychotherapy.  
4       I don't have to demonstrate that there was a promise of  
5       confidentiality. I don't have to demonstrate that  
6       disclosure would interfere with the counseling  
7       relationship. All I have to do is to say, I saw a social  
8       worker and discussed things with her.

9           QUESTION: If you wouldn't have to say that,  
10      why, in fact, are you saying that there should not be a  
11      privilege?

12           I'm not interested in the semantics. I'm  
13      interested in this. If a woman goes to a doctor and has a  
14      physical problem, there is a privilege for confidential  
15      communications between the patient and her doctor made for  
16      the purposes of diagnosis or treatment if the doctor is  
17      licensed by the State to perform that diagnosis or  
18      treatment.

19           Why should there not be precisely the same  
20      privilege where the doctor is engaged in diagnosis or  
21      treatment of a mental or emotional condition? Why should  
22      there be a distinction --

23           MR. FLAXMAN: Well --

24           QUESTION: -- between a doctor who diagnoses  
25      a -- or treats a mental or emotional condition and a

1 doctor who treats a physical condition, provided that the  
2 State licenses the individual to engage in that diagnostic  
3 or treatment profession?

4 MR. FLAXMAN: The lower Federal courts, and this  
5 Court has never reached the question, have --

6 QUESTION: I'm not saying what the lower --

7 MR. FLAXMAN: Have --

8 QUESTION: I'm saying what reason is there --

9 MR. FLAXMAN: Well --

10 QUESTION: -- in logic or policy that would make  
11 that distinction?

12 MR. FLAXMAN: There is no reason for a  
13 physician-patient privilege, and that privilege is not  
14 recognized in the Federal courts.

15 QUESTION: No, look, I'm asking why -- if a  
16 person goes to a doctor and the person has cancer, or the  
17 person has a skin disease, or the person has an itch,  
18 there is a privilege for statements made for purposes of  
19 diagnosis or treatment.

20 Why is it any different where, instead of seeing  
21 the doctor for purposes of diagnosis or treatment of your  
22 itch, or cancer, or worse, you see that doctor or  
23 psychologist or social worker licensed to engage in  
24 psychotherapy because you have a very serious, or less  
25 serious, mental or emotional problem? Why in reason or



1 logic or policy should one try to make such a distinction?

2 MR. FLAXMAN: Well, the distinction -- there are  
3 many distinctions that can be made, but the fundamental  
4 difference that -- the fundamental reason why there's no  
5 need to make that distinction is because there is no  
6 privilege for when you go to a doctor and say I've a  
7 broken foot.

8 QUESTION: I'll try once more. I'm not saying  
9 what there is. I'm asking what there should be.

10 MR. FLAXMAN: Well --

11 QUESTION: And what I'm asking is -- it's only  
12 me who's interested, perhaps, but I am interested. I'm  
13 interested in, is there any reason in logic, in policy, is  
14 there any reason, other than what ten courts have held?  
15 I'm not interested, for this question, what courts have  
16 held in the past. I'm interested in whether there is a  
17 reason in logic or policy for drawing the line that I just  
18 referred to.

19 MR. FLAXMAN: There's no reason for drawing the  
20 line. If the respondent had gone to a physician and in  
21 the course of getting treatment for a broken finger said,  
22 I can't remember pulling the trigger, that statement  
23 should be admissible in the Federal --

24 QUESTION: Am I not being clear? I'm saying,  
25 what is the difference whether you go to a physician to

1 diagnose your cancer, skin disease or whatever, or if you  
2 go to a licensed psychologist or psychotherapist or  
3 psychiatrist for diagnosis or treatment of a mental or  
4 emotional condition? That's why I -- that's the line I'm  
5 talking about. What's the reason for drawing that line?

6 MR. FLAXMAN: If the Court is willing to  
7 recognize a privilege for physician-patient discussions,  
8 then the Court should recognize a psychotherapist  
9 privilege. The Court has never recognized the doctor-  
10 patient privilege, and the Court should not recognize the  
11 psychotherapist-client privilege.

12 The -- in United States -- in Upjohn v. United  
13 States, the Chief Justice, then Justice, wrote that the  
14 Court doesn't lay down broad rules but decides only the  
15 cases before it.

16 QUESTION: I suppose if we did recognize a  
17 doctor's privilege, which we haven't, it would be a lot  
18 less expensive, wouldn't it? Very few people go to a  
19 doctor in order to get treatment and say, "I just killed  
20 somebody," whereas a lot of people go to psychiatrists and  
21 say, "I just killed somebody; I feel really bad about it."

22 MR. FLAXMAN: I don't think that --

23 QUESTION: I mean, don't you think the cost of  
24 the psychiatrist privilege would be a lot higher than the  
25 cost of the medical doctor's privilege?

1 Court has MR. FLAXMAN: Oh, it would be, especially in a  
2 case like this, where we've had the disclosures made in  
3 November of 1991, which is 5 or 6 months after the  
4 incident, that respondent Redmond was unable to recall  
5 pulling the trigger. That kind of information, which is relevant to  
6 her believability and her ability to come into court and  
7 recall and recount what happened, is the kind of information that would be shielded from us by the broad  
8 privilege that's sought in this case.

9 QUESTION: How many States have a physician's  
10 privilege, by the way?

11 MR. FLAXMAN: Virtually all States.

12 QUESTION: Virtually all of them, and yet we  
13 don't in Federal courts.

14 MR. FLAXMAN: That's correct.

15 QUESTION: Is it -- has this Court affirmatively  
16 disavowed a medical doctor's privilege, or has it just  
17 never passed on it?

18 MR. FLAXMAN: The Court has never passed on it,  
19 and

20 QUESTION: And how about the circuits?

21 MR. FLAXMAN: The circuits have uniformly  
22 rejected a physician privilege. The circuits have  
23 generally recognized a clergy person privilege, and this

1 Court has in dicta suggested that there should be such a  
2 privilege, and that privilege is quite different than the  
3 privilege with the therapist.

4 If somebody goes to a clergyperson and talks  
5 about having done a horrible thing, the clergyperson  
6 probably will not engage in 50 or 75 therapy sessions to  
7 help the memory.

8 QUESTION: Suppose the clergyperson is also a  
9 licensed social worker?

10 MR. FLAXMAN: The question then is whether the  
11 sessions were clerical in nature or counseling in nature.  
12 My understanding of clerical --

13 QUESTION: Suppose the answer is both?

14 MR. FLAXMAN: That would be a difficult question  
15 for the district judge to balance.

16 (Laughter..)

17 MR. FLAXMAN: If the clergyperson was doing  
18 therapy and was helping somebody recall memories, or get a  
19 sharper recollection of what happened, then it would not  
20 be what the organized religion probably would recognize as  
21 clerical -- clerical-penitent counseling, and I think that  
22 it's more likely that a clerical person who's confronted  
23 with someone who's confessing to a horrible thing would  
24 encourage that person to go turn him- or herself in,  
25 rather than helping them process it in their mind so they



1 remember it differently.

2 I'd like to reserve the rest of my time.

3 QUESTION: Very well, Mr. Flaxman.

4 Mr. Rogus.

5 ORAL ARGUMENT OF GREGORY E. ROGUS

6 ON BEHALF OF THE RESPONDENTS

7 MR. ROGUS: Mr. Chief Justice, and may it please  
8 the Court:

9 In enacting Rule 501, Congress declared that the  
10 Federal courts are to look to reason and experience in  
11 determining evidentiary privileges. The intent behind the  
12 rule as evidenced both in the legislative history and as  
13 acknowledged by this Court in the Trammel decision was not  
14 to freeze the law of privilege as it existed but to allow  
15 the courts flexibility to develop rules of privilege, once  
16 again in line with reason and experience.

17 Now, it is true, as Mr. Flaxman has mentioned,  
18 that decisions of this Court have counseled caution in  
19 terms of the recognition of privilege. However, this  
20 Court has also stated that when a privilege promotes  
21 sufficiently important interests to outweigh the need for  
22 probative evidence, recognition and implementation of a  
23 privilege is proper.

24 Now, in this case the Seventh Circuit acted  
25 consistent with its authority under Rule 501 and

1 consistent with this Court's directive in Trammel, and  
2 determined that reason and experience justified a  
3 recognition --

4 QUESTION: Mr. Rogus, did the court also balance  
5 the need for the evidence with its notion of the  
6 privilege?

7 MR. ROGUS: The court did engage in balancing.

8 QUESTION: Is that the way that Federal courts  
9 normally approach the exercise of a privilege?

10 MR. ROGUS: That is a technique and approach  
11 that is used, was mentioned by the Second Circuit in the  
12 Doe case. In actuality, what's at work here --

13 QUESTION: Do you defend that as an appropriate  
14 approach?

15 MR. ROGUS: The need for balancing is  
16 appropriate particularly with respect to determining when  
17 an exception to a privilege should come into play.

18 QUESTION: Well, would that be the approach in  
19 the case of an attorney-client privilege, for example?  
20 You balance the need?

21 MR. ROGUS: Well, I think that has been done in  
22 the sense of the recognition of the privilege, for  
23 example, in the crime fraud exception. While the  
24 attorney-client privilege is recognized, and there are no  
25 exceptions that come to mind immediately, the crime fraud

1 exception --

2 QUESTION: But that's not balancing. That's a  
3 boundary to the privilege. It prevents the abuse of the  
4 privilege. It has nothing to do with the requirements or  
5 the exigencies of, and the necessities of producing the  
6 information in a particular case, and I'm quite surprised  
7 that you support the balancing idea. I should have  
8 thought you would say the privilege either should be  
9 granted or it shouldn't.

10 MR. ROGUS: Well, the privilege, the underlying  
11 privilege should be granted. The balancing that we refer  
12 to is the balancing of the important interests that are  
13 served by recognition of the privilege against the need  
14 for probative --

15 QUESTION: Is that a case-by-case balancing?

16 MR. ROGUS: No, not a case-by-case balancing.  
17 It's a balancing at the policy level weighing the  
18 interests, the important interests against the need for  
19 probative evidence.

20 QUESTION: Well, is it possible --

21 QUESTION: You mean, it wouldn't matter if it's  
22 the only source of this evidence available in this  
23 particular case? That wouldn't be taken -- I had thought  
24 that some of the State courts that do balancing would  
25 consider that thing, that this thing couldn't be obtained

1 from any other source, it's crucial to the defense or the  
2 plaintiff's --

3 MR. ROGUS: If it were the only evidence  
4 available on a material element of the cause of action,  
5 that would certainly affect the balancing.

6 QUESTION: Well, I'd consider that case-by-  
7 case, myself.

8 QUESTION: If you subscribe to what Justice  
9 Scalia just said, the purpose of the privilege is to  
10 enable the attorney or the doctor, whoever, to tell a  
11 person, I suppose, that what you say here is confidential,  
12 and if instead he has to say, what you say here may be  
13 confidential, depending on how some future court may  
14 balance the need for your testimony, that's much less  
15 disposed to get people to confide.

16 MR. ROGUS: Well, in this instance,  
17 psychotherapists do need to tell their patients --  
18 patients do need to know that their communications are  
19 confidential.

20 QUESTION: So you're in effect starting with a  
21 presumption of confidentiality subject to case-by-case  
22 balancing on the issue of exception?

23 MR. ROGUS: A presumption of confidentiality,  
24 yes.

25 QUESTION: Okay.



1 MR. ROGUS: In this --

2 QUESTION: That's a much weaker sense of  
3 privilege, then, than the sort of classic privileges.

4 MR. ROGUS: We did not and we are not asking for  
5 recognition of an absolute privilege.

6 QUESTION: Okay.

7 QUESTION: Do --

8 QUESTION: Well, how does it stack up with the  
9 doctor? That's what I'm -- I'm thinking now about the  
10 other side. They're saying, well, it should be the same  
11 as the doctor who is diagnosing you for cancer and so  
12 forth.

13 MR. ROGUS: If --

14 QUESTION: Where I'm confused, and don't really  
15 understand it too well, is the status of the doctor and  
16 client. Suppose I have a physical injury in a court. Are  
17 you asking for a psychiatric privilege where the doctor  
18 with the physical injury wouldn't have one? Are you  
19 saying treat both alike? How -- what is the relationship?

20 MR. ROGUS: I'm saying if anything the  
21 psychotherapy -- the psychotherapist-patient privilege  
22 should be recognized more readily than the doctor-patient  
23 because of, once again, the nature of the privacy  
24 interests involved, the types of things that people go to  
25 see psychotherapists for, the types of things that people

1 discuss with psychotherapists that touch upon very -- not  
2 always, but very frequently very highly private personal  
3 concerns, so if anything there's more reason to recognize  
4 the psychotherapist --

5 QUESTION: And you think that the doctor doesn't  
6 receive communications of a very private nature from a  
7 patient?

8 MR. ROGUS: I am not saying that a doctor does  
9 not.

10 QUESTION: Do you concede that there is no  
11 doctor-patient privilege recognized in the Federal courts?

12 MR. ROGUS: I believe that it has not been  
13 recognized, but that is not --

14 QUESTION: And that that is the general rule in  
15 the courts, in the circuits?

16 MR. ROGUS: I believe that is correct.

17 QUESTION: So what are we supposed to do about  
18 that? That's what I mean. Are we supposed to say that  
19 just a psychiatrist and psychoanalyst have it, that  
20 doctors in general, what are we supposed to do about that?

21 MR. ROGUS: Psychotherapists should have the  
22 privilege. We are looking at a function, psychotherapy,  
23 which has not always coincided with medical practice.  
24 There is some overlap, but it does not always coincide.

25 We are zeroing in on the function of

1 psychotherapy, the treatment and diagnosis of mental and  
2 emotional conditions and disorders.

3 QUESTION: You keep speaking of the function,  
4 and if you speak in terms of the function, then there's  
5 never any question as to whether, if a privilege for  
6 psychotherapy is recognized, it would cover social  
7 workers, as in this case.

8 Let's assume that I agree that there ought to be  
9 a privilege so far as communications back and forth  
10 between the patient and a psychiatrist are concerned and  
11 the patient and a clinical psychologist are concerned. Is  
12 there a difference between what the clinical psychologist  
13 does in the kind of standard case and what the psychiatric  
14 social worker does?

15 MR. ROGUS: My understanding, based upon what  
16 was developed in the record, and the research, and the  
17 information provided by the amici, is that the training,  
18 the education, and the functioning of clinical social  
19 workers approaches if not equates to what clinical  
20 psychologists do in terms of performing the  
21 psychotherapeutic function, of doing psychotherapy.

22 QUESTION: But they don't have the advanced  
23 degree. That's the only clearly standardized difference.

24 MR. ROGUS: Well, there is -- I wouldn't say  
25 that one degree is more advanced than another. There are

1 a lot of Ph.Ds, for example, in the clinical social work  
2 field, just as there are Ph.D advanced degrees in  
3 psychology.

4 Much of the training, the clinical experience,  
5 as I believe was developed in the record with respect to  
6 Ms. Beyer, who -- the clinical social worker who was  
7 involved in this particular case, demonstrates the amount  
8 of experience, the quality, the type of experience she  
9 had, much of which overlapped with that which a clinical  
10 psychologist --

11 QUESTION: But I suppose --

12 QUESTION: The method -- I'm sorry.

13 QUESTION: I take it, in line with Justice  
14 Souter's questioning, that most States license clinical  
15 social workers and they pass some sort of an examination.

16 MR. ROGUS: It is our understanding that of the  
17 50 States that recognize privileges, 44 of them do, in  
18 fact, extend that privilege to clinical social workers.

19 QUESTION: And do those persons who hold that  
20 privilege have a duty of confidentiality under their own  
21 professional ethical standards?

22 MR. ROGUS: Yes, they do. That's set forth --

23 QUESTION: But you're saying that the courts  
24 should not recognize what is generally understood as a  
25 duty of confidentiality, even in the patient-client,



1 patient-doctor relation, much less this.

2 MR. ROGUS: If that is what my previous remarks  
3 sounded like, that is not what I meant to say. They  
4 should recognize privilege.

5 QUESTION: I suppose I have a duty of  
6 confidentiality. If somebody comes up to me and says,  
7 let's say my nephew comes up to me and says, you know,  
8 Unc, I want to tell you something in strictest confidence,  
9 and I say yes, you tell me that, I promise you I won't  
10 tell this to anybody.

11 I mean, is that enough that I've undertaken a  
12 duty of confidentiality to justify the creation of a  
13 privilege?

14 MR. ROGUS: But you are not engaging, under the  
15 facts as you've laid them out, in a psychotherapeutic --

16 QUESTION: No, I understand that, but I just  
17 don't see the relevance of the fact that there is a duty  
18 of confidentiality here.

19 There are duties of confidentiality in a lot of  
20 situations which we've simply, utterly ignored. Parent-  
21 child, there's no parent-child privilege, for Pete's sake.  
22 That's certainly a very confidential relationship.

23 MR. ROGUS: This arises in the setting of a  
24 professional approach to psychotherapy and the importance  
25 and value that society puts in --

1 QUESTION: Yes, but --

2 MR. ROGUS: -- having and maintaining such a  
3 profession for the purpose of aiding members of society,  
4 and in this particular --

5 QUESTION: That allows us --

6 QUESTION: The fact that a client expects that  
7 his communications to an attorney are going to be  
8 confidential is relevant in our creation of the privilege,  
9 is it not?

10 MR. ROGUS: It certainly is, an expectation of  
11 confidentiality, and there is an expectation of  
12 confidentiality and the protection of private  
13 communications when a patient engages in a  
14 psychotherapeutic --

15 QUESTION: Okay, so we can draw the line simply  
16 by saying the line's got to be drawn somewhere, and we're  
17 going to draw it at the point at which the person  
18 receiving the communication is licensed by the State.

19 But in principle, apart from that line-drawing  
20 methodology, there's no reason to draw it there, is there?

21 I have had law clerks tell me things in  
22 confidence, and I presume they felt better after telling  
23 me.

24 (Laughter.)

25 QUESTION: I assume there was some value to it,

1 but you would not recognize the privilege in that case,  
2 but there's no reason in principle why you shouldn't, is  
3 there?

4 MR. ROGUS: Once again, we are talking about a  
5 particular function here.

6 QUESTION: Well, the function is feeling better,  
7 and I don't denigrate that, by telling somebody something,  
8 and so the function is being performed -- talk about poor  
9 man's psychiatrist, but the function is being performed  
10 when they tell me, but -- and so it seems to me there's no  
11 reason in principle why I shouldn't be able to claim the  
12 privilege.

13 And your -- I think your answer is, well, we've  
14 got to draw the line somewhere, judge.

15 MR. ROGUS: And the difference would be, once  
16 again, not only what -- how the person feels when they  
17 have talked to you, brought to you whatever their --  
18 what's on their mind, what they're feeling, et cetera, but  
19 what you, in turn, can tell them and help them.

20 QUESTION: What can the psychiatrist tell --  
21 even the full-dress psychiatrist, if we grant the sort of  
22 privilege that you want us to grant? What can he tell the  
23 patient?

24 MR. ROGUS: Well, my --

25 QUESTION: What you tell me will, what,

1 probably, most likely, be held in confidence?

2 MR. ROGUS: What you will tell me will be held  
3 in confidence.

4 QUESTION: He can't say that. You  
5 acknowledge -- you acknowledge exceptions.

6 MR. ROGUS: There are some exceptions that have  
7 been noted by the courts based on --

8 QUESTION: Is there any State that has no  
9 exceptions?

10 MR. ROGUS: No. I believe they all have at  
11 least one exception.

12 QUESTION: And some have very broad exceptions.  
13 If it's important enough, you can get it in, right?

14 MR. ROGUS: That would be correct.

15 QUESTION: Well, what could a psychiatrist  
16 possibly comfort his patient with, what kind of assurance  
17 could he possibly comfort his patient with in that kind of  
18 a State?

19 MR. ROGUS: Because the exception should be --

20 QUESTION: Very little.

21 MR. ROGUS: -- very narrowly and -- there should  
22 be very few exceptions, and they should be very narrowly  
23 drawn to fit only certain categorical situations. For --

24 QUESTION: If --

25 MR. ROGUS: For example, I think one of the



1 instances that was referred to during Mr. Flaxman's  
2 argument was if something should be mentioned in terms of  
3 a definite threat of harm to a specifically identified  
4 individual, if a person goes in, talks to their therapist  
5 and says, I'm going to kill Joe Smith, and there is no  
6 reason for the clinician to doubt that that person is in  
7 fact capable of and will, and would carry out that  
8 specific threat to Joe Smith.

9 In that instance, most of the States I believe  
10 have recognized a very narrowly drawn privilege, once  
11 again, arising out of the fact that that very specific  
12 threat to that one very specific individual is there.

13 QUESTION: But I take it even on your scheme if  
14 Smith is dead, and an admission has been made to a  
15 psychiatric social worker and to no one else, and a case  
16 cannot be proven without that beyond a reasonable doubt,  
17 without that admission, you would let the admission in,  
18 wouldn't you?

19 MR. ROGUS: Under the -- if it were the only  
20 evidence --

21 QUESTION: Right. My hypo. My hypo.

22 MR. ROGUS: They I --

23 QUESTION: You'd let it in.

24 MR. ROGUS: There have been cases that allow  
25 that testimony in under --

1 QUESTION: So whatever the value of being able  
2 to assure the patient of confidentiality may be, on your  
3 theory that value would be absent, because the social  
4 worker, the psychiatrist, the psychologist could not say,  
5 what you tell me is in confidence. All he could say is,  
6 what you tell me will be kept confidential unless they  
7 need it badly enough.

8 MR. ROGUS: Yes, in a sense.

9 QUESTION: All right.

10 MR. ROGUS: Based on --

11 QUESTION: Now, what about a case like this, in  
12 which there is a claim that memory enhancement may be  
13 involved?

14 Memory enhancement is a lot like the -- given  
15 the possibility that the memory enhancement in fact is  
16 memory change, I would suppose that that kind of evidence  
17 could be just as crucial as the unique evidence of guilt.  
18 Why shouldn't the -- why shouldn't an exception be  
19 recognized for cases in which there is a colorable claim  
20 that memory enhancement went on?

21 MR. ROGUS: Several points in response to that.  
22 First of all, the record does not give any indication  
23 whatsoever that there was such enhancement. Secondly, as  
24 the Court --

25 QUESTION: But there are grounds for some

1 suspicion.

2 QUESTION: Would State law in this case have  
3 allowed an exception for this evidence to come in?

4 MR. ROGUS: Whether the law of the State of  
5 Illinois -- no, I believe it would have been privileged.

6 QUESTION: And you don't rely, apparently, in  
7 giving your responses, on what State law allows or doesn't  
8 allow? You're going to have us decide it on the basis of  
9 whether it would be needed or not?

10 MR. ROGUS: As the Court indicated in Trammel,  
11 we certainly, in terms of formulating the Federal rule,  
12 can look to State law for guidance, but inasmuch as there  
13 was a Federal question involved in this case, and under  
14 the language of 501, we can look to State law for  
15 guidance, but State law as State law would not control the  
16 question.

17 QUESTION: All right. Well, what does 501 tell  
18 us? It tells us that the privilege of a witness shall be  
19 governed by the principles of the common law as they may  
20 be interpreted by the courts of the United States in the  
21 light of reason and experience.

22 Now, what do you think the common law provides?

23 MR. ROGUS: At the common law prior to the early  
24 seventies there was no vast body of case law indicating  
25 one way or the other whether there was a psychotherapist

1 patient-privilege or not.

2           There were courts that were starting to  
3 entertain the notion of a psychotherapist patient-  
4 privilege. Based on the analysis provided by many of the  
5 commentators, it was at about that same time that many of  
6 the courts were getting involved in addressing that issue  
7 that many of the legislatures simultaneously also began to  
8 take action in terms of not only looking at, for example,  
9 the social work profession and stepping up the amount of  
10 State regulation of the profession itself, but also  
11 enacting provisions providing for privilege.

12           QUESTION: What do we look to for the --  
13 determining what the principles of the common law are  
14 here?

15           MR. ROGUS: The principles of the common law  
16 would -- basically we would look to the development of the  
17 law through cases and court decisions, that is correct,  
18 and as of the time 501 was enacted, once again, no, there  
19 was not a --

20           QUESTION: Mr. Rogus, do you know if there are  
21 any States that recognize a psychotherapist privilege and  
22 do not recognize a doctor-patient privilege?

23           MR. ROGUS: Off-hand I do not know the answer to  
24 that question.

25           QUESTION: Mr. Rogus, Mr. Flaxman said there



1 were two States that had this privilege by virtue of court  
2 decisions. You've just explained that the development  
3 was, courts were active, legislatures were responding with  
4 kind of a dialogue. Do you know how many -- in how many  
5 States the privilege notion began in the courts, that  
6 there was first a court declaration and then there was  
7 legislative codification?

8 MR. ROGUS: I do not know specifically how many.  
9 It was very few. Very few. My understanding is, just a  
10 handful of States where that is the case.

11 QUESTION: Why shouldn't we do the same? I  
12 mean, I have no doubt we have the power to pronounce a  
13 common law rule, but the variety of rules in the States is  
14 so diverse.

15 MR. ROGUS: And in that --

16 QUESTION: I wouldn't know which common law rule  
17 to adopt. Why shouldn't we say, you know, it looks like  
18 pretty much a policy call that different States have done  
19 different ways, and I don't know why we should pick one of  
20 these infinite varieties of laws and impose them on the  
21 Federal courts.

22 MR. ROGUS: But the basic thrust of what has  
23 been going on in the States is to recognize the privilege  
24 and, given once again that --

25 QUESTION: It doesn't get you anywhere. You

1 don't even know what privilege means. I mean, as you've  
2 described to us, in some States it means very little. It  
3 means only, we'll think about whether it's important  
4 enough, and if it is, you can't -- if it isn't important  
5 enough, you can't get it.

6 It -- I don't view this as a solid basis for  
7 saying yes, the common law has developed in a certain way.

8 MR. ROGUS: Thank you.

9 QUESTION: Thank you, Mr. Rogus.

10 Mr. Feldman.

11 ORAL ARGUMENT OF JAMES A. FELDMAN  
12 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
13 SUPPORTING THE RESPONDENTS

14 MR. FELDMAN: Mr. Chief Justice, and may it  
15 please the Court:

16 Rule 501 provides that the privilege of a  
17 witness shall be governed by the principles -- not the  
18 specific privileges, but the principles of the common law  
19 as interpreted by the courts of the United States in the  
20 light of reason and experience.

21 In our view, the most significant feature to  
22 look to in determining what reason and experience tells us  
23 here is the fact that all 50 States have recognized the  
24 privilege in one form or --

25 QUESTION: Well, they recognize something. I

1 mean, your brother was just saying that, I think, that  
2 what we should recognize is a presumption of  
3 confidentiality subject to exception by weighing.

4 If we go no further than to do that, is it even  
5 worth the trouble?

6 MR. FELDMAN: I --

7 QUESTION: Why bother?

8 MR. FELDMAN: Well, I -- actually, we -- it's  
9 not our position that that's what the Court ought to do.

10 QUESTION: Well, what's your position --

11 MR. FELDMAN: Our --

12 QUESTION: -- on the value of a -- of the kind  
13 of presumption that he was arguing for? Is that worth the  
14 trouble?

15 MR. FELDMAN: I think it would have some value  
16 in, some incremental value in increasing the confidence of  
17 patients that their communications would be confidential,  
18 but I don't think it would have the kind of value that the  
19 States generally have recognized when they've adopted --

20 QUESTION: If that's all we did, should we do it  
21 at all?

22 MR. FELDMAN: Yes. I think that that would be  
23 something useful to do. It's not our position that that's  
24 what the courts ought to do.

25 I think under Rule 501, the Federal courts ought

1 to take a cautious view towards the recognition of  
2 privileges. It ought to be sure to recognize the general  
3 policy of the Federal rules in favor of the admissibility  
4 of evidence, but where a privilege is justified, and  
5 especially where the 50 States have so -- have at least  
6 uniformly recognized the important interests that are at  
7 stake in a case like this, I think the Federal courts  
8 should do likewise.

9 The fact that all 50 States have recognized it I  
10 think shows that they recognize the importance of  
11 psychotherapy in the relief of mental and psychological  
12 distress for people. I think they've recognized the need  
13 for confidentiality, the very strong need for  
14 confidentiality.

15 QUESTION: Mr. Feldman, how could you justify a  
16 psychologist-social worker privilege without recognizing a  
17 medical doctor privilege?

18 MR. FELDMAN: There has been -- in our view the  
19 case for medical doctor privilege has not yet been  
20 compellingly enough made, and I'll tell you why. First,  
21 there are fewer States that recognize it. Second, if you  
22 look at the way the States recognize it, they generally --  
23 it generally has even more exceptions, and there's even --  
24 there's less of it than with respect to a psychotherapist-  
25 patient privilege.



1           As the advisory committee on the proposed rules  
2     in 1973, or around there, recognized, if you look at their  
3     commentary on the psychotherapist-patient privilege, which  
4     was in those proposed rules, and the doctor-patient  
5     privilege was not, they noted that confidential  
6     communications are even more important for the successful  
7     practice of psychotherapy than for the successful practice  
8     of medicine.

9           QUESTION: Well, that's just exactly -- what can  
10    I read to find out about this? I mean, I'm used to, as  
11    many of us, having diversity cases, where, of course,  
12    there is the privilege you're arguing for and also a  
13    medical doctor privilege. That's the normal case we find  
14    it in.

15           I've never had a case, I don't think, where it  
16    came out of the Federal system and a medical doctor, but  
17    Mr. Flaxman seems to agree -- I agree with him. I don't  
18    know how you distinguish between a patient who comes in  
19    with a gunshot wound, and the doctor's got to find out  
20    what happened, and a psychiatric social worker who says,  
21    I'd like you to tell me what your problem was in this  
22    case, or some other.

23           How can you do the one without the other, and  
24    what were the objections to the doctor privilege? Why  
25    wasn't a rule written on that? Where do I -- what do I

1 read to find out about this? It didn't seem to me very  
2 fully developed in the briefs.

3 MR. FELDMAN: In the advisory committee notes on  
4 Rule -- proposed Rule 504, they do specifically go into  
5 that question, and they cite a previous paper that was  
6 issued by the Group for the Advancement of Psychology -- I  
7 don't recall the exact name -- that explored the subject  
8 more fully. There's also been a number of other things  
9 that are cited throughout the amicus briefs about it.

10 But the general point, and the general reason  
11 why the States have seen fit to recognize one to a greater  
12 extent than the other is that, although confidentiality is  
13 no doubt important for the practice of medicine, it's  
14 important for the practice of many things. It's probably  
15 important for accountants. It's important -- it's  
16 generally an important value, but the extraordinary level  
17 of confidentiality that a privilege involves, that step  
18 should only be taken where it's clearly justified.

19 QUESTION: Mr. Feldman, why -- let's assume that  
20 the consultation occurs in a State that has the very  
21 negligible -- under State law, the very negligible  
22 privilege that you said it's worth adopting, but it won't  
23 do a whole lot of good, so all that that person can tell  
24 the client is, you know, under State law, you have very  
25 little assurance of confidentiality.

1           Why should a Federal court accord to that social  
2 worker or psychiatrist a greater degree of confidentiality  
3 than the State itself? Shouldn't the maximum Federal  
4 protection be where the consultation has occurred in State  
5 X, we will accord whatever confidentiality the courts of  
6 State X accord? I can't see any Federal justification for  
7 going further than that, or any use, for that matter.

8           MR. FELDMAN: It would certainly be a possible  
9 rule to set the Federal ceiling at the State floor.

10          QUESTION: Well, wonderful, but can we do that  
11 under the Federal rule? It seems to me the Federal rule  
12 has to be uniform, so isn't this eminently an area that we  
13 should leave to legislation?

14          MR. FELDMAN: I think that -- I've two answers.  
15 I think -- first of all, I think Congress has made it  
16 quite clear and the Court has said in its opinions that  
17 this is something that the courts have to grapple with one  
18 way or the other.

19          A decision one way or the other -- a decision  
20 not to recognize a privilege in a State that has a very  
21 strong privilege, for example, is going to do some damage  
22 to that State's policies, and what that State has  
23 recognized as necessary for the advancement of -- or  
24 for --

25          QUESTION: Well, it's not just that State's

1 policy. It's according to the licentiature system, the  
2 licensing system of the State, more dignity than the State  
3 itself gives --

4 MR. FELDMAN: But --

5 QUESTION: -- and I have the same trouble as  
6 Justice Scalia does. I'm not sure how to handle that.

7 MR. FELDMAN: I wanted to get to the second  
8 point, which was that in our brief we suggest that the key  
9 question is whether a confidential relationship is formed,  
10 and that question, since States are the primary level of  
11 government that governs the relationships of  
12 psychotherapists and patients, as with most other  
13 professions, the question of whether a confidential  
14 relationship, a highly confidential, an extraordinarily  
15 confidential relationship is formed, I think it's  
16 reasonable to look to State law for that.

17 QUESTION: So you look to licensing, plus the  
18 extent of privilege, State by State?

19 MR. FELDMAN: I think you'd look to the question  
20 of whether the privilege extends to this kind of a  
21 relationship.

22 As far as the specific narrow exceptions to the  
23 State --

24 QUESTION: Under the rubric of whether or not  
25 there's a reasonable justification to believe that the



1 communication is confidential?

2 MR. FELDMAN: Under the rubric of, if there's --  
3 the Federal privilege -- a necessity for the application  
4 of any privilege is that a confidential relationship is  
5 formed.

6 In attorney-client privilege, if you're not a  
7 member of the bar in a given State -- the State gets to  
8 determine who's a member of the bar. If you're not a  
9 member of the bar, there's no question that you don't have  
10 a privilege in Federal court, and similarly with the  
11 marital privilege and other kinds of privilege.

12 In the same way, it's up to the State to  
13 determine whether a confidential relationship has been  
14 formed, and that's a prerequisite for the application of  
15 the Federal privilege.

16 Once you have that, I think the exceptions in  
17 the States follow enough of a pattern that --

18 QUESTION: Mr. Feldman, in this case would  
19 Illinois have recognized a privilege for what's at issue  
20 here?

21 MR. FELDMAN: Yes. The Seventh Circuit so held,  
22 in fact.

23 QUESTION: I was unclear on your answer a moment  
24 ago. Are you still arguing for a uniform Federal rule on  
25 privilege?

1 MR. FELDMAN: Yes.

2 QUESTION: Or are you arguing -- so you're not  
3 arguing for a rule that would vary from State to State.

4 MR. FELDMAN: It would -- no more --

5 QUESTION: Okay. But the reason I -- let me  
6 tell you why I ask the question.

7 Part of the premise of your argument is, the  
8 value of recognizing the privilege depends upon the value  
9 of the confidentiality in the relationship.

10 Now, we can't tell what the value of the  
11 confidentiality in the relationship is unless we go State-  
12 by-State and find out which States have strong privileges,  
13 which States have just weak privileges.

14 And so I guess what we would have to do is to  
15 say, well, if a majority of the States have really strong  
16 privileges, that would probably justify our recognition of  
17 the strong privilege, but if a majority of the States have  
18 a weak privilege, it wouldn't do any good for us, at least  
19 in those States, to recognize a strong privilege because  
20 it would have no effect on the relationship. The social  
21 worker would have to say, I can't guarantee much.

22 Is that what we should do, is sort of do a nose  
23 count and find out whether we're going to get much for our  
24 privilege or a little for our privilege?

25 MR. FELDMAN: I think not quite. What the

1 Federal court should do is look to see whether the State  
2 recognizes, for instance, a relationship between a  
3 psychiatric social worker and a client as being one that's  
4 entitled to a very high confidentiality protection and  
5 accords it a privilege.

6 If in that State the State has said, social  
7 workers in this State -- you can go to see a social  
8 worker, but we're not going to accord it any privilege at  
9 all, it's just not that confidential a relationship, you  
10 don't have a reasonable expectation that a confid -- it  
11 would be like going to see somebody about a legal problem  
12 who's not a lawyer. You can do it, I suppose, but you  
13 can't -- it's not going to be privileged.

14 QUESTION: Yes, but on your understanding, if  
15 there were 45 States that recognized a social worker's  
16 privilege and 5 that didn't, you would say we ought to  
17 recognize it, right?

18 MR. FELDMAN: I think --

19 QUESTION: As a uniform Federal rule.

20 MR. FELDMAN: No. I think --

21 QUESTION: No.

22 MR. FELDMAN: The Federal rule should be that  
23 where the State recognizes a confidential relationship,  
24 recognizes a privilege with respect to a given category of  
25 provider, that in those cases I think there's enough

1 uniformity in the States to say that a Federal privilege  
2 is also warranted.

3 QUESTION: Thank you, Mr. Feldman.

4 Mr. Flaxman, you have 3 minutes remaining.

5 REBUTTAL ARGUMENT OF KENNETH N. FLAXMAN

6 ON BEHALF OF THE PETITIONER

7 MR. FLAXMAN: Thank you.

8 I have always been tantalized by the idea that  
9 if you tell someone, you tell this to me I'll keep it a  
10 secret, that that could be a privilege, that the court  
11 should enforce that kind of promise, and as a matter of  
12 fact, that used to be the law. It used to be called the  
13 gentleman's privilege.

14 I think in about the 18th Century to 17th  
15 Century, courts stopped enforcing that privilege. In  
16 Branzburg v. Hayes, this Court explicitly recognized that  
17 that used to be the law and it is no longer the law.

18 The question of whether the confidential  
19 communication should be recognized by -- protected by a  
20 privilege or protected by case-by-case balancing I think  
21 should be answered in favor of case-by-case balancing.

22 QUESTION: Could I ask a question about State  
23 law? I assume that even in Illinois, the Illinois  
24 psychiatrist or social worker could not give assurance  
25 that even a State law action would not require -- it would



1 depend upon where the action came up.

2 I assume that an Indiana court would apply  
3 Indiana's rules; isn't that right? So that if the lawsuit  
4 were in Indiana, the Illinois social worker, by reason of  
5 being an Illinois social worker, wouldn't have a special  
6 privilege in Indiana.

7 MR. FLAXMAN: That's what I believe the Court  
8 should do.

9 The question about --

10 QUESTION: No, I'm not saying what it should do,  
11 but isn't that the way things work? These are forum  
12 rules, so that Illinois can only assure that an Illinois  
13 social worker will not be compelled to testify in an  
14 Illinois forum.

15 MR. FLAXMAN: That's correct, but Illinois can't  
16 even make that assurance, because the common law trend of  
17 courts has not been to create privileges, it's been to  
18 create exceptions to broad statutory privileges. We've  
19 seen that in Illinois, where there aren't exceptions, or  
20 evidence that might be relevant in a criminal case, where  
21 courts have created an exception.

22 QUESTION: Do you agree that this communication  
23 would be privileged in the Illinois courts? You don't, do  
24 you?

25 MR. FLAXMAN: I agree that we don't know, and we

1 wouldn't know unless we litigated it in the Illinois  
2 courts.

3           There was just a recent amendment to the  
4 Illinois statute which says that the social worker could  
5 reveal confidential communications to her employer, and if  
6 this was in State court we would argue that this exception  
7 and all the other exceptions require the courts, when the  
8 evidence is crucial, as we would argue it is crucial in  
9 this case, should fashion yet another exception, and  
10 courts in other States --

11           QUESTION: And is it true that the rule they  
12 apply is governed -- in the State law cases is governed by  
13 the law in the State where the conversation occurred,  
14 rather than where the case is being tried?

15           MR. FLAXMAN: I think it's the conversation  
16 where the case is being tried, rather than where it  
17 occurred.

18           But these questions have not arisen --

19           QUESTION: Why has it never arisen, where  
20 someone in -- you've practiced a lot in 1983 cases. Has  
21 no one ever tried to subpoena medical records from a  
22 hospital or a doctor's private -- you know, medical  
23 doctor's private records? Why have we never had to face  
24 the problem of the gunshot wound or -- the medical doctor,  
25 who's dealing with physical problems?

1                   MR. FLAXMAN: We don't face that problem because  
2 the district judges uniformly say there's no privilege.  
3 If it's relevant --

4                   QUESTION: But wouldn't you think some doctor  
5 somewhere or a hospital somewhere would have faced a  
6 subpoena for some confidential patient records and would  
7 have asked us?

8                   MR. FLAXMAN: That hasn't happened, and I don't  
9 think it -- it's just routinely accepted.

10                  CHIEF JUSTICE REHNQUIST: Thank you,  
11 Mr. Flaxman.

12                  The case is submitted.

13                  (Whereupon, at 11:02 a.m., the case in the  
14 above-entitled matter was submitted.)

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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

*CARRIE JAFFEE, SPECIAL ADMINISTRATOR FOR RICKY ALLEN, SR., DECEASED* *Petitioner v. MARYLU REDMOND, ET AL.*

*CASE NO:*      *95-266*

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Ann Marie Federico*

(REPORTER)