SUPREME COURT OF THE UNITED STATES

No. 95-266

CARRIE JAFFEE, SPECIAL ADMINISTRATOR FOR RICKY ALLEN, SR., DECEASED, PETITIONER v. MARY LU REDMOND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[June 13, 1996]

Justice Scalia, with whom The Chief Justice joins as to Part III, dissenting.

The Court has discussed at some length the benefit that will be purchased by creation of the evidentiary privilege in this case: the encouragement of psychoanalytic counseling. It has not mentioned the purchase price: occasional injustice. That is the cost of every rule which excludes reliable and probative evidence or at least every one categorical enough to achieve its announced policy objective. In the case of some of these rules, such as the one excluding confessions that have not been properly Mirandized," see *Miranda* v. *Arizona,* 384 U. S. 436 (1966), the victim of the injustice is always the impersonal State or the faceless public at large." For the rule proposed here, the victim is more likely to be some individual who is prevented from proving a valid claim or (worse still) prevented from establishing a valid defense. The latter is particularly unpalatable for those who love justice, because it causes the courts of law not merely to let stand a wrong, but to become themselves the instruments of wrong.

In the past, this Court has well understood that the particular value the courts are distinctively charged with preserving justice is severely harmed by contravention

of the fundamental principle that ` the public . . . has a right to every man's evi dence.'"" *Trammel* v. *United States,* 445 U. S. 40, 50 (1980) (citation omitted). Testimonial privileges, it has said, *are not lightly created nor expansively construed,* for they are in derogation of the search for truth." *United States* v. *Nixon,* 418 U. S. 683, 710 (1974) (emphasis added). Adherence to that principle has caused us, in the Rule 501 cases we have considered to date, to reject new privileges, see *University of Pennsylvania* v. *EEOC,* 493 U. S. 182 (1990) (privilege against disclosure of academic peer review materials); *United States* v. *Gillock,* 445 U. S. 360 (1980) (privilege against disclosure of legislative acts" by member of state legislature), and even to construe narrowly the scope of existing privileges, see, *e.g., United States* v. *Zolin,* 491 U. S. 554, 568 570 (1989) (permitting *in camera* review of documents alleged to come within crime-fraud exception to attorney-client privilege); *Trammel, supra* (holding that voluntary testimony by spouse is not covered by husband-wife privilege). The Court today ignores this traditional judicial preference for the truth, and ends up creating a privilege that is new, vast, and ill-defined. I respectfully dissent.

I

The case before us involves confidential communications made by a police officer to a state-licensed clinical social worker in the course of psychotherapeutic counseling. Before proceeding to a legal analysis of the case, I must observe that the Court makes its task deceptively simple by the manner in which it proceeds. It begins by characterizing the issue as whether it is appropriate for federal courts to recognize a `psychotherapist privilege,'" *ante,* at 1, and devotes almost all of its opinion to that question. Having answered that question (to its satisfaction) in the affirmative, it then devotes *less than a page of text* to answering in the affirmative the small remaining question whether the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy," *ante,* at 13.

Of course the prototypical evidentiary privilege analogous to the one asserted here the lawyer-client privilege is not identified by the broad area of advice-giving practiced by the person to whom the privileged communication is given, but rather by the *professional status* of that person. Hence, it seems a long step from

a lawyer-client privilege to a tax advisor-client or accountant-client privilege. But if one re-characterizes it as a legal advisor" privilege, the extension seems like the most natural thing in the world. That is the illusion the Court has produced here: It first frames an overly general question (Should there be a psychotherapist privilege?") that can be answered in the negative only by excluding from protection office consultations with professional psychiatrists (*i.e.,* doctors) and clinical psychologists. And then, having answered that in the affirmative, it comes to the *only* question that the facts of this case present (Should there be a social worker-client privilege with regard to psychotherapeutic counseling?") with the answer seemingly a foregone conclusion. At that point, to conclude against the privilege one must subscribe to the difficult proposition, Yes, there is a psychotherapist privilege, but not if the psychotherapist is a social worker."

Relegating the question actually posed by this case to an afterthought makes the impossible possible in a number of wonderful ways. For example, it enables the Court to treat the Proposed Federal Rules of Evidence developed in 1972 by the Judicial Conference Advisory Committee as strong support for its holding, whereas they in fact counsel clearly and directly against it. The Committee did indeed recommend a psychotherapist privilege" of sorts; but more precisely, and more relevantly, it recommended a privilege for psychother apy conducted by a person authorized to practice medicine" or a person licensed or certified as a psychologist," Proposed Rule of Evidence 504, 56 F. R. D. 183, 240 (1972), which is to say that *it recommended against the privilege at issue here*. That condemnation is obscured, and even converted into an endorsement, by pushing a psycho therapist privilege" into the center ring. The Proposed Rule figures prominently in the Court's explanation of why that privilege deserves recognition, *ante,* at 12 13, and is ignored in the single page devoted to the sideshow which happens to be the issue presented for decision, *ante*, at 13 14.

This is the most egregious and readily explainable example of how the Court's misdirection of its analysis makes the difficult seem easy; others will become

apparent when I give the social-worker question the fuller consideration it deserves. My initial point, however, is that the Court's very methodology giving serious consideration only to the more general, and much easier, question is in violation of our duty to proceed cautiously when erecting barriers between us and the truth.

II

To say that the Court devotes the bulk of its opinion to the much easier question of psychotherapist-patient privilege is not to say that its answer to that question is convincing. At bottom, the Court's decision to recognize such a privilege is based on its view that successful [psychotherapeutic] treatment" serves important private interests" (namely those of patients undergoing psychotherapy) as well as the public good" of [t]he mental health of our citizenry." *Ante,* at 7 9. I have no quarrel with these premises. Effective psychotherapy undoubtedly is beneficial to individuals with mental problems, and surely serves some larger social interest in maintaining a mentally stable society. But merely mention ing these values does not answer the critical question: are they of such importance, and is the contribution of psychotherapy to them so distinctive, and is the application of normal evidentiary rules so destructive to psychotherapy, as to justify making our federal courts occasional instruments of injustice? On that central question I find the Court's analysis insufficiently convincing to satisfy the high standard we have set for rules that are in derogation of the search for truth." *Nixon,* 418 U. S., at 710.

When is it, one must wonder, that *the psychotherapist* came to play such an indispensable role in the maintenance of the citizenry's mental health? For most of history, men and women have worked out their difficulties by talking to, *inter alios,* parents, siblings, best friends and bartenders none of whom was awarded a privilege against testifying in court. Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother- child privilege.

How likely is it that a person will be deterred from seeking psychological counseling, or from being completely truthful in the course of such counseling, because of fear of later disclosure in litigation? And even more pertinent to today's decision, to what extent will the evidentiary privilege reduce that

deterrent? The Court does not try to answer the first of these questions; and it *cannot possibly have any notion* of what the answer is to the second, since that depends entirely upon the scope of the privilege, which the Court amazingly finds it neither necessary nor feasible to delineate," *ante,* at 16. If, for example, the psychotherapist can give the patient no more assurance than A court will not be able to make me disclose what you tell me, unless you tell me about a harmful act," I doubt whether there would be much benefit from the privilege at all. That is not a fanciful example, at least with respect to extension of the psychotherapist privilege to social workers. See Del. Code Ann., Tit. 24, §3913(2) (1987); Idaho Code §54 3213(2) (1994).

Even where it is certain that absence of the psychotherapist privilege will inhibit disclosure of the information, it is not clear to me that that is an unacceptable state of affairs. Let us assume the very worst in the circumstances of the present case: that to be truthful about what was troubling her, the police officer who sought counseling would have to confess that she shot without reason, and wounded an innocent man. If (again to assume the worst) such an act constituted the crime of negligent wounding under Illinois law, the officer would of course have the absolute right not to admit that she shot without reason in criminal court. But I see no reason why she should be enabled *both* not to admit it in criminal court (as a good citizen should), *and* to get the benefits of psychotherapy by admitting it to a therapist who cannot tell anyone else. And even less reason why she should be enabled to *deny* her guilt in the criminal trial or in a civil trial for negligence while yet obtaining the benefits of psychotherapy by confessing guilt to a social worker who cannot testify. It seems to me entirely fair to say that if she wishes the benefits of telling the truth she must also accept the adverse consequences. To be sure, in most cases the statements to the psychotherapist will be only marginally relevant, and one of the purposes of the privilege (though not one relied upon by the Court) may be simply to spare patients needless intrusion upon their privacy, and to spare psychotherapists needless expenditure

of their time in deposition and trial. But surely this can be achieved by means short of excluding even evidence that is of the most direct and conclusive effect.

The Court confidently asserts that not much truth- finding capacity would be destroyed by the privilege anyway, since [w]ithout a privilege, much of the desirable evidence to which litigants such as petitioner seek access . . . is unlikely to come into be ing." *Ante,* at 10. If that is so, how come psychotherapy got to be a thriving practice before the psychotherapist privilege" was invented? Were the patients paying money to lie to their analysts all those years? Of course the evidence-generating effect of the privilege (if any) depends entirely upon its scope, which the Court steadfastly declines to consider. And even if one assumes that scope to be the broadest possible, is it really true that most, or even many, of those who seek psychological counseling have the worry of litigation in the back of their minds? I doubt that, and the Court provides no evidence to support it.

The Court suggests one last policy justification: since psychotherapist privilege statutes exist in all the States, the failure to recognize a privilege in federal courts would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Ante,* at 11. This is a novel argument indeed. A sort of inverse pre-emption: the truth-seeking functions of *federal* courts must be adjusted so as not to conflict with the policies *of the States*. This reasoning cannot be squared with *Gillock,* which declined to recognize an evidentiary privilege for Tennessee legislators in federal prosecutions, even though the Tennessee Constitution guaranteed it in state criminal proceedings. *Gillock,* 445 U. S., at 368. Moreover, since, as I shall discuss, state policies regarding the psycho therapist privilege vary considerably from State to State, *no* uniform federal policy can possibly honor most of them. If furtherance of state policies is the name of the game, rules of privilege in federal courts should vary from State to State, *à la Erie*.

The Court's failure to put forward a convincing justification of its own could perhaps be excused if it were relying upon the unanimous conclusion of state courts in the reasoned development of their common law. It cannot do that, since *no* State has such a privilege apart from legislation.**1** What it relies upon, instead, is the fact that all 50 States and the District of Columbia have [1] *enacted into law* [2] *some form* of psychotherapist privilege." *Ante,* at 10 (emphasis added). Let us consider both the verb and its object: The fact [1] that all 50 States have *enacted* this privilege argues not *for*, but *against*, our adopting the privilege judicially. At best it suggests that the matter has been found not to lend itself to judicial treatment perhaps because the pros and cons of adopting the privilege, or of giving it one or another shape, are not that clear; or perhaps because the rapidly evolving uses of psychotherapy demand a flexibility that only legislation can provide. At worst it suggests that the privilege commends itself only to decision-making bodies in which reason is tempered, so to speak, by political pressure from organized interest groups (such as psychologists and social workers), and decision-making bodies that are not overwhelmingly concerned (as courts of law are and should be) with justice.

And the phrase [2] some form of psychotherapist privilege" covers a multitude of difficulties. The Court concedes that there is divergence among the States concerning the types of therapy relationships protected and the exceptions recognized." *Ante,* at 12, n. 13. To rest a newly announced federal common-law psychotherapist privilege, assertable from this day forward in all federal courts, upon the States' *unanimous judgment* that some form of psychotherapist privilege is appropriate," *ibid.* (emphasis added), is rather like announcing a new, immediately applicable, federal common law of torts, based upon the States' unanimous judgment" that *some* form of tort law is appropriate. In the one case as in the other, the state laws vary to such a degree that the parties and lower federal judges confronted by the new common law" have barely a clue as to what its content might be.

III

Turning from the general question that was not involved in this case to the specific one that is: The Court's conclusion that a social-worker psychotherapeu tic privilege deserves recognition is even less persua sive. In approaching this question, the fact that five of the state legislatures that have seen fit to enact some form" of psychotherapist privilege have elected not to extend *any form* of privilege to social work ers, see *ante,* at 15, n. 17, ought to give one pause. So should the fact that the Judicial Conference Advisory Committee was similarly discrimi nating in its conferral of the proposed Rule 504 privilege, see *supra*. The Court, however, has no hesitation in concluding . . . that the federal privilege should also extend" to social workers, *ante*, at 13 and goes on to prove that by polishing off the reasoned analysis with a topic sentence and two sentences of discussion, as follows (omitting citations and non-germane footnote):

The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker such as Karen Beyer. Today, social workers provide a significant amount of mental health treatment. Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals." *Ante,* at 13 14.

So much for the rule that privileges are to be narrowly construed.

Of course this brief analysis like the earlier, more extensive, discussion of the general psychotherapist privilege contains no explanation of why the psychotherapy provided by social workers is a public good of such transcendent importance as to be purchased at the price of occasional injustice. Moreover, it considers only the respects in which social workers providing therapeutic services are *similar* to licensed psychiatrists and psychologists; not a word about the respects in which they are different. A licensed psychiatrist or psychologist is an expert in psychotherapy and that may suffice (though I think it not so clear that this Court should make the judgment) to justify the use of extraordinary means to encourage counseling with him, as opposed to counseling with one's rabbi, minister, family or friends. One must presume that a social worker does *not* bring this greatly heightened degree of skill to bear, which is alone a reason for not encouraging that consultation as generously. Does a social worker bring to bear at least a significantly heightened degree of skill more than a minister or

rabbi, for example? I have no idea, and neither does the Court. The social worker in the present case, Karen Beyer, was a licensed clinical social worker" in Illinois, App. 18, a job title whose training requirements consist of master's degree in social work from an approved program," and 3,000 hours of satisfactory, supervised clinical professional experience." Ill. Comp. Stat., ch. 225, §20/9 (1994). It is not clear that the degree in social work requires *any* training in psychotherapy. The clinical professional experience" apparently will impart some such training, but only of the vaguest sort, judging from the Illinois Code's definition of [c]linical social work practice," viz., the providing of mental health services for the evaluation, treatment, and prevention of mental and emotional disorders in individuals, families and groups based on knowledge and theory of psychosocial development, behavior, psychopathology, unconscious motivation, interpersonal relationships, and environmental stress." Ch. 225, §20/3(5). But the rule the Court announces today like the Illinois evidentiary privilege which that rule purports to respect, Ch. 225, §20/16.**2** is not limited to "licensed clinical social workers," but includes all licensed social workers." Licensed social workers" may also provide mental health services" as described in §20/3(5), so long as it is done under supervision of a licensed clinical social worker. And the training requirement for a licensed social worker" consists of either (a) a degree from a graduate program of social work" approved by the State, or (b) a degree in social work from an undergraduate pro gram" approved by the State, plus 3 years of supervised professional experience." Ch. 225, §20/9A. With due respect, it does not seem to me that any of this training is comparable in its rigor (or indeed in the precision of its subject) to the training of the other experts (lawyers) to whom this Court has accorded a privilege, or even of the experts (psychia trists and psychologists) to whom the Advisory Commit tee and this Court proposed extension of a privilege in 1972. Of course these are only *Illinois'* require ments for social workers." Those of other States, for all we know, may be even less demanding. Indeed, I am not even sure there is a nationally accepted definition of social worker," as there is of psychiatrist and psychologist. It seems

to me quite irresponsible to extend the so-called psychotherapist privilege" to all licensed social workers, nationwide, without exploring these issues.

Another critical distinction between psychiatrists and psychologists, on the one hand, and social workers, on the other, is that the former professionals, in their consultations with patients, *do nothing but psychotherapy*. Social workers, on the other hand, interview people for a multitude of reasons. The Illinois definition of [l]icensed social worker," for example, is as follows:

> Licensed social worker" means a person who holds a license authorizing the practice of social work, which includes social services to individuals, groups or communities in any one or more of the fields of social casework, social group work, community organization for social welfare, social work research, social welfare administration or social work education." Ch. 225, §20/3(9).

> Thus, in applying the social worker" variant of the psychotherapist" privilege, it will be necessary to determine whether the information provided to the social worker was provided to him *in his capacity as a psychotherapist,* or in his capacity as an administrator of social welfare, a community organizer, etc. Worse still, if the privilege is to have its desired effect (and is not to mislead the client), it will presumably be necessary for the social caseworker to advise, as the conversation with his welfare client proceeds, which portions are privileged and which are not.

Having concluded its three sentences of reasoned analysis, the Court then invokes, as it did when considering the psychotherapist privilege, the experience" of the States once again an experience I consider irrelevant (if not counter-indicative) because it consists entirely of legislation rather than common-law decision. It says that the vast majority of States explicitly extend a testimonial privilege to licensed social workers." *Ante,* at 15. There are two elements of this impressive statistic, however, that the Court does not reveal.

First and utterly conclusive of the irrelevance of this supposed consensus to the question before us the majority of the States that accord a privilege to social workers do *not* do so as a subpart of a psychotherapist" privilege. The privilege applies to *all* confidences imparted to social workers, and not just those provided in the course of psychotherapy.**3** In Oklahoma, for example, the social-worker-

privilege statute prohibits a licensed social worker from disclos ing, or being compelled to disclose, *any informa tion* acquired from persons consulting the licensed social worker in his or her professional capacity" (with certain exceptions to be discussed *infra*). Okla. Stat., Tit. 59, §1261.6 (1991) (emphasis added). The social worker's professional capacity" is expansive, for the practice of social work" in Oklahoma is defined as:

> [T]he professional activity of helping indi viduals, groups, or communities enhance or restore their capacity for physical, social and economic functioning and the professional application of social work values, principles and techniques in areas such as clinical social work, social service administration, social planning, social work consul tation and social work research to one or more of the following ends: Helping people obtain tangible services; counseling with individuals families and groups; helping communities or groups provide or improve social and health services; and participat ing in relevant social action. The practice of social work requires knowledge of human development and behavior; of social economic and cultural institutions and forces; and of the interaction of all of these factors. Social work practice includes the teaching of relevant subject matter and of conduct ing research into problems of human behavior and conflict." Tit. 59, §1250.1(2) (1991).

Thus, in Oklahoma, as in most other States having a social-worker privilege, it is not a subpart or even a derivative of the psychotherapist privilege, but rather a piece of special legislation similar to that achieved by many other groups, from accountants, see, *e.g.*, Miss. Code Ann. §73 33 16(2) (1995) (certified public accountant shall not be required by any court of this state to disclose, and shall not voluntarily disclose" client information), to private detectives, see, *e.g.*, Mich. Comp. Laws §338.840 (1979) (Any communications . . . furnished by a professional man or client to a [licensed private detective], or any information secured in connection with an assignment for a client, shall be deemed privileged with the same authority and dignity as are other privileged communications recog nized by the courts of this state").**4** These social- worker statutes give no support, therefore, to the theory (importance of psychotherapy) upon which the Court rests its disposition.

Second, the Court does not reveal the enormous degree of disagreement among the States as to the scope of the privilege. It concedes that the laws of four States are subject to such gaping exceptions that they are `little better than no privilege at all,'" *ante,* at 16 and n. 18, so that they should more appropriately be categorized with the five States whose laws contradict the action taken today. I would add another State to those whose privilege is illusory. See Wash. Rev. Code §18.19.180 (1994) (disclo sure of information required [i]n response to a

sub poena from a court of law"). In adopting *any* sort of a social worker privilege, then, the Court can at most claim that it is following the legislative experience" of 40 States, and contradicting the experience" of 10.

But turning to those States that do have an appreciable privilege of some sort, the diversity is vast. In Illinois and Wisconsin, the social-worker privilege does not apply when the confidential information pertains to homicide, see Ill. Comp. Stat., ch. 740, §110/10(a)(9) (1994); Wis. Stat. §905.04(4)(d) (1993 1994), and in the District of Columbia when it pertains to any crime inflicting injuries" upon persons, see D. C. Code §14 307(a)(1) (1995). In Missouri, the privilege is suspended as to informa tion that pertains to a criminal act, see Mo. Rev. Stat. §337.636(2) (1994), and in Texas when the information is sought in any criminal prosecution, compare Tex. Rule Civ. Evid. 510(d) with Tex. Rule Crim. Evid. 501 *et seq*. In Kansas and Okla homa, the privilege yields when the information pertains to violations of any law," see Kan. Stat. Ann. §65 6315(a)(2) (Supp. 1990); Okla. Stat., Tit. 59, §1261.6(2) (1991); in Indiana, when it reveals a serious harmful act," see Ind. Code Ann. §25 23.6 6 1(2) (1995); and in Delaware and Idaho, when it pertains to any harmful act," see Del. Code Ann., Tit. 24, §3913(2) (1987); Idaho Code §54 3213(2) (1994). In Oregon, a state- employed social worker like Karen Beyer loses the privilege where her supervisor determines that her testimony is necessary in the performance of the duty of the social worker as a public employee." See Ore. Rev. Stat. §40.250(5) (1991). In South Carolina, a social worker is forced to disclose confi dences when required by statutory law or by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reason ably at issue in a proceeding." See S. C. Code Ann. §19 11 95(D)(1) (Supp. 1995). The majority of social-worker-privilege States declare the privilege inapplicable to information relating to child abuse.**5** And the States that do not fall into any of the above categories provide exceptions for commitment proceedings, for proceedings in which the patient relies on his mental or emotional condition as an element of his claim or defense, or for communications made in the course

of a court-ordered examination of the mental or emotional condition of the patient.6

Thus, although the Court is technically correct that the vast majority of States explicitly extend a testimonial privilege to licensed social workers," *ante,* at 15, that uniformity exists only at the most superficial level. No State has adopted the privilege without restriction; the nature of the restric tions varies enormously from jurisdiction to jurisdiction; and 10 States, I reiterate, effectively reject the privi lege entirely. It is fair to say that there is scant national consensus even as to the propriety of a social- worker psychotherapist privilege, and none whatever as to its appropriate scope. In other words, the state laws to which the Court appeals for support demonstrate most convincingly that adoption of a social-worker psychotherapist privilege is a job for Congress.

* * *

The question before us today is not whether there should be an evidentiary privilege for social workers providing therapeutic services. Perhaps there should. But the question before us is whether (1) the need for that privilege is so clear, and (2) the desirable contours of that privilege are so evident, that it is appropriate for this Court to craft it in common-law fashion, under Rule 501. Even if we were writing on a clean slate, I think the answer to that question would be clear. But given our extensive precedent to the effect that new privileges in derogation of the search for truth" are not lightly created," *United States* v. *Nixon,* 418 U. S., at 710, the answer the Court gives today is inexplicable.

In its consideration of this case, the Court was the beneficiary of no fewer than 14 *amicus* briefs supporting respondents, most of which came from such organizations as the American Psychiatric Association, the American Psychoanalytic Association, the American Association of State Social Work Boards, the Employee Assistance Professionals Association, Inc., the American Counseling Association, and the National Association of Social Workers. Not a single *amicus* brief was filed in support of petitioner. That is no surprise. There is no self-interested organization out there devoted to pursuit of the truth in the

federal courts. The expectation is, however, that *this Court* will have that interest prominently indeed, primarily in mind. Today we have failed that expectation, and that responsibility. It is no small matter to say that, in some cases, our federal courts will be the tools of injustice rather than unearth the truth where it is available to be found. The common law has identified a few instances where that is tolerable. Perhaps Congress may conclude that it is also tolerable for the purpose of encouraging psychotherapy by social work ers. But that conclusion assuredly does not burst upon the mind with such clarity that a judgment in favor of suppressing the truth ought to be pronounced by this honorable Court. I respectfully dissent.

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1. The Court observes: In 1972 the members of the Judicial Conference Advisory Committee noted that the common law `had indicated a disposition to recognize a psychotherapist-patient privilege when legislatures began moving into the field.' Proposed Rules, 56 F. R. D., at 242 (citation omitted). *Ante*, at 12. The sole support the Committee invoked was a student Note entitled Confidential Communications to a Psychotherapist: A New Testimonial Privilege, 47 Nw. U. L. Rev. 384 (1952). That source, in turn, cites (and discusses) a single case recognizing a common-law psychotherapist privilege: the unpublished opinion of a judge of the Circuit Court of Cook County, Illinois, Binder v. Ruvell, No. 52-C-2535 (June 24, 1952) which, in turn, cites no other cases. I doubt whether the Court's failure to provide more substantial support for its assertion stems from want of trying. Respondents and all of their amici pointed us to only four other state-court decisions supposedly adopting a common-law psychotherapist privi- lege. See Brief for the American Psychiatric Association et al. as Amici Curiae 8, n. 5; Brief for the American Psychoanalytic Association et al. as *Amici Curiae* 15-16; Brief for the American Psychological Association as *Amicus Curiae* 8. It is not surpris- ing that the Court thinks it not worth the trouble to cite them: (1) In In re "B", 482 Pa. 471, 394 A. 2d 419 (1978), the opinions of four of the seven Justices explicitly rejected a nonstatutory privilege; and the two Justices who did recognize one recognized, not a common-law privilege, but rather (mirabile dictu) a privi- lege "constitutionally based," "emanat[ing] from the penumbras of the various guarantees of the Bill of Rights, . . . as well as from the guarantees of the Constitution of this Commonwealth." *Id.*, at 484, 394 A. 2d, at 425. (2) Allred v. State, 554 P. 2d 411 (Alaska 1976), held that no privilege was available in the case before the court, so what it says about the existence of a common-law privilege is the purest dictum. (3) Falcon v. Alaska Pub. Offices Comm'n, 570 P. 2d 469 (1977), a later Alaska Supreme Court case, proves the last statement. It rejected the claim by a physician that he did not have to disclose the names of his patients, even though some of the physician's prac- tice consisted of psychotherapy; it made no mention of Allred's dictum that there was a common-law psychiatrist-patient privilege (though if that existed it would seem relevant), and cited Allred only for the proposition that there was no statutory privilege, *Id.*, at 473, n. 12. And finally, (4) State v. Evans, 104 Ariz. 434, 454 P. 2d 976 (1969), created a limited privilege, applica- ble to court-ordered examinations to determine competency to stand trial, which tracked a privilege that had been legisla- tively created after the defendant's examination. In light of this dearth of case support--from all the courts of 50 States, down to the county-court level--it seems to me the Court's assertion should be revised to read: "The common law had indicated scant disposition to recognize a psychotherapist-pa- tient privilege when (or even after) legislatures began moving into the field."

2. Section 20/16 is the provision of the Illinois Statutes cited by the Court to show that Illinois has "explicitly extend[ed] a testimonial privilege to licensed social workers." Ante, at 15, and n. 17. The Court elsewhere observes that respondent's commu- nications to Beyer would have been privileged in state court under another provision of the Illinois Statutes, the Mental Health and Developmental Disabilities Confidentiality Act, Ill. Comp. Stat., ch. 740, 110/10 (1994). Ante, at 14, n. 15. But the privilege conferred by 110/10 extends to an even more ill- defined class: not only to licensed social workers, but to all social workers, to nurses, and indeed to "any other person not prohibited by law from providing [mental health or developmental disabilities] services or from holding himself out as a therapist if the recipient reasonably believes that such person is permit- ted to do so." Ch. 740, 110/2.

3. See Ariz. Rev. Stat. Ann. 32-3283 (1992); Ark. Code Ann. 17-46-107 (1995); Del. Code Ann., Tit. 24, 3913 (1987); Idaho Code 54-3213 (1994); Ind. Code 25-23.6-6-1 (1993); Iowa Code 154C.5 and 622.10 (1987); Kan. Stat. Ann. 65-6315 (Supp. 1990); Me. Rev. Stat. Ann., Tit. 32, 7005 (1988); Mass. Gen. Laws 112:135A (1994); Mich. Comp. Laws Ann. 339.1610 (1992); Miss. Code Ann. 73-53-29 (1995); Mo. Rev. Stat. 337.636 (1994); Mont. Code Ann. 37-22-401 (1995); Neb. Rev. Stat. 71-1,335 (Supp. 1994); N. J. Stat. Ann. 45:15BB-13 (1995); N. M. Stat. Ann. 61-31-24 (1993); N. Y. Civ. Prac. 4508 (McKinney 1992); N. C. Gen. Stat. 8-53.7 (1986); Ohio Rev. Code Ann. 2317.02(G)(1) (1995); Okla. Stat., Tit. 59 1261.6 (1991); Ore. Rev. Stat. 40.250 (1991); S. D. Codified Laws 36-26-30 (1994); Tenn. Code Ann. 63-23-107 (1990); Wash. Rev. Code 18.19.180 (1994); W. Va. Code 30-30-12 (1993); Wyo. Stat. 33-38-109 (Supp. 1995).

4. These ever-multiplying evidentiary-privilege statutes, which the Court today emulates, recall us to the original meaning of the word "privilege." It is a composite derived from the Latin words "privus" and "lex": private law.

5. See, e.g., Ariz. Rev. Stat. Ann. 32-3283 (1992); Ark. Code Ann. 17-46-107(3) (1995); Cal. Evid. Code Ann. 1027 (West 1995); Colo. Rev. Stat. 19-3-304 (Supp. 1995); Del. Rule Evid. 503(d)(4); Ga. Code Ann. 19-7-5(c)(1)(G) (1991); Idaho Code 54-3213(3) (1994); La. Code Evid. Ann., Art. 510(B)(2)(k) (West 1995); Md. Cts. & Jud. Proc. Code Ann. 9-121(e)(4) (1995); Mass. Gen. Laws, 119:51A (1994); Mich. Comp. Laws Ann. 722.623 (1992 Supp. Pamph.); Minn. Stat. 595.02.2(a) (1988); Miss. Code Ann. 73-53-29(e) (1995); Mont. Code Ann. 37-22-401(3) (1995); Neb. Rev. Stat. 28-711 (1995); N. M. Stat. Ann. 61-31-24(C) (Supp. 1995); N. Y. Civ. Prac. 4508(a)(3) (McKinney 1992); Ohio Rev. Code Ann. 2317.02(G)(1)(a) (1995); Ore. Rev. Stat. 40.250(4) (1991); R. I. Gen. Laws 5-37.3-4(b)(4) (1995); S. D. Codified Laws 36-26-30(3) (1994); Tenn. Code Ann. 63-23-107(b) (1990); Vt. Rule Evid. 503(d)(5); W. Va. Code 30-30-12(a)(4) (1993); Wyo. Stat. 14-3-205 (1994).

6. See, e.g., Fla. Stat. 90.503(4) (Supp. 1992) (all three exceptions); Ky. Rule Evid. 507(c) (all three); Nev. Rev. Stat. 49.245 (1993) (all three); Utah Rule Evid.¬ 506(d) (all three); Conn. Gen. Stat. 52-146q(c)(1) (1995) (commitment proceedings and proceedings in which patient's mental condition at issue); Iowa Code 622.10 (1987) (proceedings in which patient's mental condition at issue).