

The U.S. Supreme Court Decision in *Jaffee v. Redmond*: Implications for Counselors

Theodore P. Remley, Jr., Barbara Herlihy, and Scott B. Herlihy

In 1996, the U.S. Supreme Court held that communications between licensed psychotherapists and their patients are privileged under the Federal Rules of Evidence. The nature of privileged communication, the history of this Supreme Court decision, and implications of the decision for counselors are discussed.

On June 13, 1996, the U.S. Supreme Court held in *Jaffee v. Redmond* (1996 WL 315841, 1996) that the communications between licensed psychotherapists and their patients are privileged and do not have to be disclosed in cases heard in federal court. The *Jaffee* case involved a licensed clinical social worker and her client, who was a policewoman. The Court, throughout its dicta, which explained the reasoning for the decision, referred to the social worker as a *therapist* or *psychotherapist*, to the policewoman as a *patient*, and to the activities that took place between them as *counseling sessions*, *counseling*, or *psychotherapy*. The Court appears to have used the terms *counseling* and *psychotherapy* interchangeably in its dicta. However, it should be noted that the holding itself, which is narrower and is the only part of the decision that establishes legal precedent, applied specifically to a case involving a licensed social worker and did not discuss licensed counselors. The Court declined to delineate the full contours of the privilege "in a way that would govern all future questions" in this area (*Jaffee*, at *8), leaving unanswered the question of whether the privilege will be extended to the clients of licensed counselors in future cases.

The *Jaffee* decision has created an interpretation and generalization problem because state statutes have established privilege for the clients of specified licensed mental health professionals, whereas the Supreme Court decision has created a privilege for the "patients" of "psychotherapists." Because there is no definition of "psychotherapist" in federal law, federal courts will probably review state statutes to determine whether licensed mental health professionals are psychotherapists when determining whether their clients have privilege. No state currently licenses psychotherapists; rather, licensure is accorded to counselors, psychia-

trists, psychologists, social workers, and others who may provide psychotherapy services. Whether the privilege will be extended to clients of licensed counselors in federal courts in the future may depend on whether licensed counselors are recognized by the courts as "psychotherapists." The *Jaffee* decision may force the counseling profession to formulate a clear answer to the currently debated questions of whether counseling and psychotherapy are synonymous or separate and distinct activities, and whether counselors are willing to call themselves psychotherapists.

Nonetheless, the *Jaffee* decision clearly is important because it has established an official federal court precedent that gives legal protection to relationships between licensed master's-level psychotherapists and their patients and because it has brought positive attention to mental health professionals. The purpose of this article is to help counselors understand the meaning of this Supreme Court decision, its limitations, and the possible implications for the future practice of counseling in the United States.

To provide a context for our discussion, we first review the rationale that underlies privileged communication in counseling and discuss the nature of privilege. We then describe the progress of *Jaffee v. Redmond* from the original trial in an Illinois district court through the Court of Appeals to the Supreme Court. We conclude with a legal analysis of the Supreme Court decision and its implications for counselors.

PRIVILEGED COMMUNICATION: RATIONALE AND NATURE

In order for genuine therapeutic work to occur in counseling, clients need to feel safe to explore intimate and personal aspects of their lives. Clients will be reluctant to share personal information freely unless they can trust that their

Theodore P. Remley, Jr., is a professor of counseling at the University of New Orleans in Louisiana. *Barbara Herlihy* is an associate professor of counseling at Loyola University in New Orleans, Louisiana. *Scott B. Herlihy* is a student at Saint Mary's University School of Law in San Antonio, Texas. Correspondence concerning this article should be addressed to Theodore P. Remley, Jr., Department of Educational Leadership, Counseling, and Foundations, University of New Orleans, New Orleans, LA 70148.

privacy will be respected (Fischer & Sorenson, 1996). The counselor's confidentiality pledge is the cornerstone on which that trust is built (Herlihy & Corey, 1996). Of course, confidentiality is not absolute, and counselors have an ethical obligation to inform clients about the limitations of confidentiality (American Counseling Association *Code of Ethics and Standards of Practice*, 1995, Standards A.3.a. & B.1.g.), including the fact that confidentiality requirements do not apply when legal requirements demand disclosure (Standard B.1.c.).

Without the protection offered by privileged communication, counselors may be forced to testify about or produce records of confidential communications in a court of law. Confidentiality is an ethical standard, whereas privileged communication is a legal concept that protects clients from having their confidences disclosed in court without their permission (Shah, 1969). Generally, privileged communication is statutory in nature, and state or federal legislatures must enact specific laws that grant privilege to the communications in professional relationships.

Privileged communication is a unique area of law. Most rules of evidence in court proceedings arise out of society's interest in seeking the truth and are intended to promote the discovery of all relevant information. It is an established tradition in law that the public has a right to all possible evidence to ensure that justice is done. Privileged communication rules, by contrast, do not have a truth-seeking rationale. Instead, these rules promote a conflicting social value, that of encouraging the free flow of communication in certain "special" relationships. A relationship must meet certain criteria to justify granting a privilege, including the following: (a) The communications must originate in the confidence that they will not be disclosed; (b) confidentiality must be essential to maintaining the relationship; (c) the relationship, in the opinion of the community and society, is important and should be sedulously fostered; and (d) the injury that disclosure would cause to the relationship is greater than the benefit to litigation that would be gained (Wigmore, 1961). Historically, the concept of privilege was first recognized in the attorney-client relationship. Over the years, legislatures have narrowly extended the privilege to other professional relationships (Ahia & Martin, 1993).

At the state level, mental health professionals generally have been successful in gaining statutory privilege for their clients. Although all 50 states have adopted some form of psychotherapist-patient privilege (Jaffee, at *6 & n.11), a "patchwork quilt" of statutes exists, in which the clients of some professional groups are accorded privilege in some states but not in others (Herlihy & Sheeley, 1987). Various mental health professionals provide psychotherapy services, including counselors, psychiatrists, psychologists, and social workers, and typically a state's privileged communications statute does not apply to all these groups. To further complicate matters, existing statutes vary widely with respect to the scope of privilege granted. Most statutes limit the privilege by specifying exceptions, some of the

most common of which are (a) when the client's condition poses a danger to self or others, (b) proceedings for involuntary hospitalization, (c) court-ordered examinations, (d) when the client raises mental issues in litigation, and (e) disputes between a therapist and client (Anderson, 1996; Fischer & Sorenson, 1996; Swenson, 1993). Some statutes impose a "balancing test," which makes privilege contingent on the trial judge's evaluation of whether the client's need for privacy outweighs the court's need for the counselor's evidence.

The status of privileged communication between professionals and their clients is similarly complicated at the federal court level. In 1974, the Judicial Conference Advisory Committee recommended that Congress enact nine Federal Rules on Privilege that would establish privileged communications in certain professional relationships. One of these proposed rules was Federal Rule 504, Psychotherapist-Patient Privilege, which defined a psychotherapist as "a person authorized to practice medicine or a person licensed or certified as a psychologist in any state" (Proposed Federal Rules of Evidence, 1974). Congress did not enact this proposed rule, however, choosing instead in 1975 to adopt the more general Rule 501 of the Federal Rules of Evidence, which authorizes federal courts to determine privileges on a case-by-case basis by interpreting principles of law "in the light of reason and experience." The 11 United States Circuit Courts of Appeal have been divided on their interpretations with respect to psychotherapist-patient privilege. The Second and Sixth Circuits have compelled recognition of the privilege, whereas the Fifth, Ninth, Tenth, and Eleventh Circuits have ruled against extending the privilege (Anderson, 1996). The Seventh Circuit did not rule on the issue until its decision in *Jaffee v. Redmond*.

THE CASE OF JAFFEE V. REDMOND

Mary Lu Redmond, a police officer in a village near Chicago, responded to a "fight in progress" call at an apartment complex on June 27, 1991. At the scene, she shot and killed a man she believed was about to stab another man he was chasing. The family of the man she had killed sued Redmond, the police department, and the village, alleging that Officer Redmond had used excessive force in violation of the deceased's civil rights. When the plaintiff's lawyers learned that Redmond had sought and received counseling from a licensed social worker employed by the village, they sought to compel the social worker to turn over her case notes and records and testify at the trial.

Redmond and the social worker claimed that their communications were privileged under an Illinois statute. They both refused to reveal the substance of their counseling sessions even though the trial judge rejected their argument that the communications were privileged. The judge then instructed jurors that they could assume that the information withheld would have been unfavorable to the policewoman, and the jury awarded the plaintiffs \$545,000.

The case was appealed to the Seventh Circuit Court of Appeals, which reversed the court on the issue of the jury instruction and held that the confidential communications between Redmond and the social worker were protected from disclosure (*Jaffee v. Redmond*, 51 F.3d 1346, 1358 (7th Cir. 1995)). The Court of Appeals concluded that under the Federal Rules of Evidence, "reason and experience" compelled recognition of a psychotherapist-patient privilege. The Court qualified its recognition, however, by applying a balancing test, stating that the privilege would not apply in cases in which the evidentiary need for the contents of a patient's counseling sessions outweighed that patient's privacy interests.

The case was appealed to the U.S. Supreme Court. During its October 1995 term, the Court agreed to hear the case "because of the conflict among the courts of appeals and the importance of the question" (*Jaffee* at *4). At this point, the case captured the attention of various professional groups that represent psychotherapists and police officers. The American Counseling Association and 13 other professional associations filed *amicus curiae* (friend of the court) briefs in support of the defendants. The American Counseling Association Brief (1996) advanced the following arguments: (a) Congress gave courts the power to recognize privileges beyond those already existing by statute; (b) the court should recognize a psychotherapist-patient privilege because the benefits of psychotherapy are widely accepted and the detriments to a court's need for a therapist's evidence are often minimal; and (c) privilege can be justified for therapists other than psychiatrists and psychologists.

On February 26, 1995, the Supreme Court heard oral arguments on the case, and the Justices then retired to deliberate and draft their findings. Their ruling was announced on June 13, 1996.

UNDERSTANDING THE COURT'S DECISION

The U.S. Supreme Court's decision in *Jaffee* was a response made specifically to an appeal of a decision made in a lower court. Thus, their holding, as is the case in any appellate court decision, is a very narrow answer to a question raised by a person or entity (the petitioner) who appeals the lower court's decision. The question is raised for an appellate court by a petitioner who hopes to have a lower court's decision modified or overturned, claiming that the lower court made an error in law or interpretation of law.

The petitioner in this particular case was Jaffee, who was the administrator of the estate of the person who was shot and killed by police officer Redmond. The United States Court of Appeals for the Seventh Circuit, holding that the trial judge had made a mistake in failing to recognize a privilege between police officer Redmond and her psychotherapist, had reversed and sent back for a new trial a jury's decision that Redmond had used excessive force. The petitioner, Jaffee, argued the reverse: that the Court of Appeals had made a mistake in overturning the trial judge's

decision that the Federal Rules of Evidence did not create a privilege between individuals and their mental health professionals.

As a result of this appeal, the Supreme Court had a very narrow question before it, which the Court stated as, "whether statements the officer made to her therapist during the counseling sessions are protected from compelled disclosure in a federal civil action brought by the family of the deceased. Stated otherwise, the question is whether it is appropriate for federal courts to recognize a 'psychotherapist privilege' under Rule 501 of the Federal Rules of Evidence" (*Jaffee* at *2). The exact language of the Supreme Court decision in response to this question is, "We hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis and treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence" (*Jaffee* at *7).

The Supreme Court's decision in *Jaffee* recognized for the first time that the federal courts cannot compel disclosure of confidential statements made by a patient during a counseling session with a licensed psychotherapist. Such recognition of new privileges is rare, because courts view privileges as an impediment to the truth-seeking purpose of the trial process. In affirming the Seventh Circuit Court of Appeals, the Supreme Court noted that Rule 501 of the Federal Rules of Evidence does not specifically define which relationships are privileged in federal lawsuits, but rather it authorizes federal courts to define new privileges by interpreting "common law principles . . . in the light of reason and experience" (*Jaffee* at *4).

In interpreting the Court's decision, it is important to remember the distinction between a court's *holding* and its *dicta*. A *holding* is the only part of a higher court's decision that establishes legal precedent that must be followed by the court itself and all lower courts under its jurisdiction. All of the other language in the Supreme Court's decision is what is known in law as *dicta*. *Dicta* is the language the justices have agreed upon to explain how they reached their holding. Such language is helpful in understanding the reasoning the justices used, but *dicta* does not establish legal precedent. Neither the Supreme Court nor any of the federal courts that report to it are required to abide by anything said in the *Jaffee* decision other than the precise holding.

PRACTICAL EFFECTS OF THE DECISION FOR COUNSELORS

If legal privilege exists between counselors and their clients, counselors cannot be compelled by judges to disclose confidential information that results from counseling relationships. Generally, the laws of the state in which individuals practice the profession of counseling govern whether legal privilege exists in the relationship between counselors and their clients. However, in some cases filed in federal courts, federal laws rather than state laws are applied. Until the *Jaffee* decision, it was unclear whether a legal privilege

protected the relationship between clients and their counselors in federal courts because the language in Section 501 of the Federal Rules of Evidence is so broad (Anderson, 1996; Fischer & Sorenson, 1996). The *Jaffee* decision has interpreted that broad language to mean that a privilege does exist between licensed psychotherapists and their patients in cases in federal courts.

When a counselor is providing services to a client, there is no way for the counselor to know whether a criminal or civil suit may someday be filed in which the contents of the counseling sessions might be relevant. Furthermore, it is impossible for the counselor to know whether such a case might be filed in a federal or a state court.

Federal court cases are by far a minority in the American legal system. Cases may be heard in federal court under very limited circumstances. In "federal question" cases such as the *Jaffee* case involving a federal law or statute, federal law will apply, including the new privilege. However, in "diversity cases," such as those involving citizens of different states, the federal court will be required to apply the appropriate state laws governing the parties to the case.

The *Jaffee* case was allowed to be filed in federal court because the family of the decedent argued that the police used excessive force, which violated the decedent's federal constitutional rights. The counselor and client in this situation had little reason to believe during the course of their relationship that the content of their counseling sessions might some day be relevant in a federal court case.

The *Jaffee* decision has established the legal precedent that interactions between patients and their licensed psychotherapists are privileged if a lawsuit is filed in federal court. Therefore, there is a substantial possibility that a licensed counselor who practices in a state that has a statute that grants privilege to counselor-client relationships and identifies the counselor as a psychotherapist or entitles the counselor to provide psychotherapy services can now be confident that privilege most likely exists whether a lawsuit is filed in the state court or the federal court.

The clients of counselors who practice in states that do not provide statutory privilege to counselor-client relationships, or the clients of counselors who are not licensed, now may have the protection of privilege in some cases filed in federal courts, even though such privilege would not exist if the same lawsuit were filed in a state court.

The Supreme Court in *Jaffee* concluded that it was "not necessary nor feasible to delineate its full contours in a way that would govern all conceivable questions in this area" (*Jaffee* at *8). This will leave it to federal courts in subsequent cases to decide the scope and range and the privilege's applicability on a case-by-case basis. Such decisions will be guided by the fact scenarios presented in each case.

One final note regarding the practical effects of the decision for counselors concerns an interesting procedure that the judge applied in the *Jaffee* case. In the original trial, the presiding judge ordered the licensed social worker and her police officer client to reveal information disclosed in their counseling sessions, and they both refused to comply

with the order. For unknown reasons, this particular judge took no official action against either of them. Instead, the judge instructed the jury at the end of the trial that they could assume that the contents of the counseling sessions would have been detrimental to the position taken by the police officer in the case. These instructions by the judge were the basis for the case being appealed, in that the police officer argued that the instructions were in error and prejudiced the jury's thinking to the degree that a new trial was required for justice to be served. The judge's actions in this case do not mean that counselors will not be held in contempt of court and fined or incarcerated for refusing to disclose privileged information at the order of a trial judge (Arthur & Swanson, 1993; Remley, 1991). Counselors who are ordered by a trial judge to disclose information they consider privileged should seek and follow the advice of an attorney who has been retained for the sole purpose of advising them regarding their own legal rights and obligations (Fischer & Sorenson, 1996).

SIGNIFICANCE OF THE DECISION

The holding in *Jaffee* has established a legal precedent that is favorable to the counseling profession in that a privilege has been recognized in a federal case between a client and her licensed master's-level mental health professional. Although the language in the decision that explains the court's reasoning (*dicta*) does not establish legal precedent, it too is favorable to counselors in that it supports positions taken by the counseling profession. It provides a foundation for making the argument that relationships between clients and their counselors should be privileged in all U.S. jurisdictions.

The first significant aspect of the Court's decision is that the Court, in its *dicta*, explicitly recognized that the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust" (*Jaffee* at *5-6) and that important public and private interests are served by protecting confidential communications between patients and their psychotherapists. The Court stated that the public interest is served by the improvement of the mental health of our citizenry, which is "of transcendent importance" (*Jaffee* at *6), and that the private interest is served by allowing effective and successful treatment of individuals. In making its decision, the Court was persuaded by the fact that all 50 states and the District of Columbia have enacted some sort of psychotherapist-patient privilege into law. This consensus among the states, the Court's deference to the states' ability and need to protect the integrity of the truth-finding process in their own courts, and the axiomatic result that would occur if a state were to offer promises of confidentiality in their own courts, only to have such protection stripped when in federal courts, all led the Court to determine that reason and experience demanded recognition of the new privilege. A denial of such protection would only frustrate the purpose of the state legislation that was designed to foster such confidential communications.

The second significant aspect is that the Court had "no hesitation" to extend the privilege not just to licensed psychiatrists and psychologists, but also to licensed clinical social workers such as the one involved in the *Jaffee* case (*Jaffee* at *8). The Court recognized that licensed social workers provide a significant amount of mental health services, and that their clients often include the poor and others who cannot afford the services of a doctoral-level practitioner. Regardless of whether the therapist is a psychologist, psychiatrist, or social worker, the same public goals are served by their services. This extension of the privilege to licensed social workers, based on the value of the treatment they provide, may indicate a willingness by the Court to extend it to all mental health professionals licensed by the state, including licensed counselors. Although it cannot be said with certainty that such an extension will be made by the Supreme Court or lower federal courts in subsequent decisions, the underlying rationale for such an extension is the same as that embraced by the Court in its decision to extend the privilege to licensed social workers. The largely unmet mental health needs of the citizens would be served by an extension of the privilege to all qualified providers of mental health services, including psychiatrists, psychologists, social workers, and counselors. Winick (1996) suggested that courts applying the new privilege should focus on the *function* of the counseling relationship instead of the type of therapy or title of the member of the helping profession. Decisions made on this basis would avoid social and legal inequality among citizens in need of therapy as well as enhance the professional status and public perception of licensed counselors.

The third significant aspect of the *Jaffee* decision is that the Supreme Court rejected the Seventh Circuit Court's balancing test, also implemented by a number of states in their own privilege statutes, that would make "the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure" (*Jaffee* at *8). The imposition of such a test would "eviscerate the effectiveness of the privilege" (*Jaffee* at *16) and create uncertainty as to its application. This rejection of the balancing test is of great importance. Such balancing would be left to the discretion of the trial judge. "Discretion" is a slippery concept in the law, and a trial judge will not be overturned on such a discretionary ruling absent a clear abuse of discretion. The "abuse of discretion" standard is a very high one, and the rejection of such a balancing test seems to imply that the privilege will be applied not only with greater clarity and certainty, but also in a greater number of circumstances.

The Supreme Court opinion stated that a privilege that allowed a trial judge to overturn it because of the need for evidence was worthless. According to the U.S. Supreme Court, individuals must have confidence that their secrets will not be revealed in the future if they are going to feel free to discuss matters that are sensitive or embarrassing.

POSSIBLE INFLUENCE ON STATE LEGISLATION

The U.S. Supreme Court, in explaining its reasoning for holding that the Federal Rules of Evidence include a licensed psychotherapist-patient privilege, made several points that will be helpful to counselors arguing for new or strengthened state privileged communication statutes that cover the counselor-client relationship. In addition, the language in this case could be helpful in seeking third-party insurance reimbursement for counseling services or the establishment or continuation of counseling programs. Important points made in the *Jaffee* decision include those listed below. First, the Supreme Court repeated from the decision of the Court of Appeals for the Seventh Circuit the following points:

1. The key to successful psychotherapeutic treatment is communications without fear of public disclosure;
2. All 50 states have adopted some form of psychotherapist-patient privilege, which means that society has acknowledged the need for protection of counseling relationships; and
3. The need and demand for counseling services have increased dramatically in the past several years, making outdated the previous federal court decisions rejecting the psychotherapist-patient privilege.

The Supreme Court, in the language of its decision, made the following additional points that are important to counselors:

4. Reason and experience lead to the conclusion that protecting confidential communications between psychotherapists and patients promote societal interests that outweigh the need for evidence in courts of law;
5. The mental health of U.S. citizens is no less important than their physical health;
6. If relationships between psychotherapists and patients were not privileged, they probably would not occur in the first place; therefore, no evidence is lost by granting privilege to those relationships;
7. If a psychotherapist-patient federal privilege did not exist, the wishes of a state legislature to grant privilege to such relationships would be compromised;
8. The reasons for a psychotherapist-patient privilege with respect to psychiatrists and psychologists apply equally to treatment by clinical social workers who provide treatment to the poor; and
9. A privilege must be certain to be effective. Leaving the determination of whether to grant a privilege to a trial judge makes the privilege uncertain and serves no useful purpose.

CONCLUSIONS

Whereas psychotherapist-patient privilege was previously unclear because of general language in the federal statutes, *Jaffee* has established that there is a licensed psychotherapist-patient privilege in some cases heard in federal courts.

Although in this particular case, a privilege was acknowledged between a licensed master's-level social worker and her client, it seems likely that a similar privilege may be acknowledged for licensed counselor-client relationships in future cases.

As a result of the *Jaffee* decision, counselors practicing in states in which strong counselor-client privilege statutes exist and in which the licensing statute includes the term *psychotherapy* can now be more confident that the privacy of their clients will be protected in both state and federal courts. On the other hand, counselors practicing in states in which no counselor-client privilege statutes exist (or weak ones have been enacted) now know that their clients' privacy may be protected in federal courts even though it would not be protected in a state court case.

The reasoning the U.S. Supreme Court used in reaching its holding in *Jaffee* is favorable to the counseling profession and can be used by counselors in seeking new or stronger counselor-client privilege laws in their states. The language in this case could even be used in seeking societal recognition of the importance and significance of counselors in such areas as third-party insurance reimbursement for counseling services or the establishment or continuation of public or private counseling programs.

REFERENCES

- Ahia, C. E., & Martin, D. (1993). *The danger-to-self-or-others exception to confidentiality*. Alexandria, VA: American Counseling Association.
- American Counseling Association. (1995). *Code of ethics and standards of practice*. Alexandria, VA: Author.
- American Counseling Association Brief of Amicus Curiae in Support of Respondent at 4-19, *Jaffee v. Redmond et al.*, 1996 WL 315841 (U.S. June 13 1996).
- Anderson, B. S. (1996). *The counselor and the law* (4th ed.). Alexandria, VA: American Counseling Association.
- Arthur, G. L., Jr., & Swanson, C. D. (1993). *Confidentiality and privileged communication*. Alexandria, VA: American Counseling Association.
- Fischer, L., & Sorenson, G. P. (1996). *School law for counselors, psychologists, and social workers* (3rd ed.). New York: Longman.
- Herlihy, B., & Corey, G. (1996). *ACA ethical standards casebook* (5th ed.). Alexandria, VA: American Counseling Association.
- Herlihy, B., & Sheeley, V. L. (1987). Privileged communication in selected helping professions: A comparison among statutes. *Journal of Counseling & Development*, 65, 479-483.
- Jaffee v. Redmond et al.*, 1996 WL 315841 (U.S. June 13 1996).
- Proposed Federal Rules of Evidence, S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7052-53.
- Remley, T. P., Jr. (1991). *Preparing for court appearances*. Alexandria, VA: American Counseling Association.
- Shah, S. A. (1969). Privileged communications, confidentiality, and privacy: Privileged communications. *Professional Psychology*, 1, 59-69.
- Swenson, L. C. (1993). *Psychology and the law*. Pacific Grove, CA: Brooks/Cole.
- Wigmore, J. H. (1961). *Evidence* (3rd ed.). Boston: Little, Brown.
- Winick, B. J. (1996). The psychotherapist-patient privilege: A therapeutic jurisprudence view. *University of Miami Law Review*, 50, 249-264.