

THE PSYCHOTHERAPIST PRIVILEGE:  
PRIVACY AND “GARDEN VARIETY”  
EMOTIONAL DISTRESS

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INTRODUCTION

When a new patient begins a session with a social worker, psychiatrist, or other psychotherapist, the patient is told about confidentiality. The patient learns that, with certain limited exceptions,<sup>1</sup> the content of their discussions will not be disclosed. If the psychotherapist is called to testify, he or she will assert the psychotherapist-patient privilege.

But what if the patient decides to bring a lawsuit and seeks damages for emotional distress? Is a request for such damages an implied waiver of the privilege? That is, does the plaintiff's claim for emotional distress damages entitle the defendant to examine the plaintiff's psychotherapy records in order to probe the veracity of the plaintiff's assertions and investigate other possible causes of the distress? In federal court, this issue arises primarily in the context of discrimination claims where the defendant's right to fairly challenge a plaintiff's evidence is pitted against the plaintiff's rights to privacy and vindication of civil rights. The issue is important because it can be a major factor in how far plaintiffs are willing to take a case, and how willing defendants are to settle.

Surprisingly, there is no clear authority on implied waiver of the psychotherapist-patient privilege in federal courts. There is binding authority from the Supreme Court establishing the privilege, but the bold outlines of that decision have been blurred in the confusion about implied waiver. This Article explores one aspect of that confusion: the popular “garden variety” approach, which favors plaintiffs with what the court deems garden variety, or “normal,” mental distress. Although a few other scholars have written on the confusion in the law of implied waiver,<sup>2</sup> this is the first article to look

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<sup>1</sup> See, e.g., Mass. Gen. Laws Ann. ch. 233, § 20B (West 2000) (carving out an exception to the psychotherapist-patient privilege where the psychotherapist determines there is a “threat of imminently dangerous activity by the patient”); S.C. Code Ann. § 40-75-190(A)(1) (2011) (imposing a duty to report suspected child abuse or abuse of a vulnerable adult).

<sup>2</sup> See Deirdre M. Smith, *An Uncertain Privilege: Implied Waiver and the Evisceration of the Psychotherapist-Patient Privilege in the Federal Courts*, 58 DEPAUL L. REV. 79, 102-06 (2008); Beth S.

closely at the garden variety approach, which is emerging as the dominant approach. It is also the first to survey the laws of the fifty states on implied waiver, as part of a “reason and experience” analysis under Evidence Rule 501.<sup>3</sup> That rule states that privilege “shall be governed by the principles of the common law” as interpreted by the federal courts “in the light of reason and experience.”

In 1996, the Court established the psychotherapist-patient privilege in *Jaffee v. Redmond*.<sup>4</sup> Using its authority under Evidence Rule 501, the Court determined that the privilege was necessary to promote mental health treatment, and that patients needed to know their conversations with their therapists would remain confidential.<sup>5</sup> The Court rejected a balancing approach to the privilege, noting that “[a]n uncertain privilege . . . is little better than no privilege at all.”<sup>6</sup> The privilege would keep out relevant evidence, but do so in the service of a greater public good: the “mental health of our citizenry.”<sup>7</sup> Since *Jaffee*, litigation has shifted from whether there is a privilege to whether it has been waived—mostly in civil rights suits.

There is no law, in the sense of binding authority from an appellate court, that tells lower courts how to evaluate implied waiver in most federal jurisdictions. In several circuits there are some useful dicta but no clear holding. In most circuits, litigants are faced with trying to predict likely rulings by looking at a wide array of district court decisions—none of which are binding, even on the judges or magistrates who issued them. The question of implied waiver is litigated frequently in the federal district courts, where the magistrates and judges have come to varying conclusions. Some take a narrow approach, finding waiver only when the plaintiff uses a portion of privileged material or puts the treating provider on the stand. Others take the broad approach, finding waiver whenever the plaintiff seeks emotional distress damages of any kind.

An approach gaining ground is the garden variety compromise. Under this approach, a plaintiff does not waive the privilege simply by asking for emotional distress damages, as long as the plaintiff claims no more than garden variety emotional distress and does not introduce expert testimony or any portion of the privileged records. This approach is a compromise because plaintiffs are allowed to retain the privilege as long as they do not seek extraordinary damages or use certain evidence.

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Frank, Note, *Protecting the Privacy of Sexual Harassment Plaintiffs: The Psychotherapist-Patient Privilege and Recovery of Emotional Distress Damages Under the Civil Rights Act of 1991*, 79 WASH. U. L.Q. 639, 649 (2001).

<sup>3</sup> FED. R. EVID. 501.

<sup>4</sup> 518 U.S. 1 (1996).

<sup>5</sup> *Id.* at 10.

<sup>6</sup> *Id.* at 18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)) (internal quotation marks omitted).

<sup>7</sup> *Id.* at 11.

But as this approach gains popularity, its problems become more apparent. It is based more on considerations of relevance and fairness than on the law of privilege and waiver. It depends on the individual judge's view of what is "ordinary," and therefore it is unpredictable. And with its unexamined focus on what is "ordinary" or "normal," the approach is biased and unrealistic. Who is the ordinary victim of a civil rights violation, and what is the normal response? Victims of discrimination or sexual harassment will often have prior experiences that may cause them to be particularly sensitive to emotional distress. Repeated discrimination can cause emotional health problems.<sup>8</sup> The garden variety analysis does not take these realities into account and is thus itself discriminatory. It tells plaintiffs that if they go beyond the judge's view of "normal" there is something wrong with them. Only those who are not too emotionally distressed, or who agree to fictionalize their emotional condition, retain the privilege.

The garden variety compromise also poses problems for defendants. If the judge finds a plaintiff's claims of emotional distress to be garden variety, the jury is not limited to a particular garden variety monetary award. In fact, the jury remains free to award up to the statutory limit.<sup>9</sup> The defendant is then vulnerable to a large award but unable to fully explore issues such as causation.

Yet the garden variety compromise remains popular. Most likely, this is because courts are sympathetic both to defendants who need to contest claims and to plaintiffs who want to retain some privacy in their counseling records. Psychotherapy is increasingly common for Americans.<sup>10</sup> While there is less stigma associated with seeking counseling than there was even fifteen years ago when *Jaffee* was decided, people are still concerned about privacy. Courts are sympathetic to these privacy concerns, but they are also sympathetic to defendants' arguments about fairness and causation. A plaintiff's psychotherapy can conjure up competing pictures. One image is that of an injured person earnestly seeking help with recovery; the other is of a truly mentally disturbed and troublesome person hiding his condition behind the therapist's office walls. Courts want to protect the former but not the latter. The garden variety approach does not square with the law of privilege. However, until a clear court rule, statute, or Supreme Court holding emerges, it is likely to continue attracting many district courts sympathetic to the competing fairness and privacy concerns it addresses.

This Article is the first to critique the garden variety approach in detail and its special problems in civil rights litigation. It is also the first to analyze waiver under the template of *Jaffee*. A close reading of *Jaffee* suggests that a proper approach to implied waiver of the psychotherapist-patient privilege should follow the Court's "reason and experience" analysis under Federal

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<sup>8</sup> See *infra* notes 168-69 and accompanying text.

<sup>9</sup> 42 U.S.C. §1981a(b)(3) (2006). See *infra* note 188 and accompanying text.

<sup>10</sup> See *infra* Part I.B.2.

Rule of Evidence 501. Such an analysis involves identifying the important public good served by the privilege, examining the Federal Rules of Evidence Advisory Committee's work<sup>11</sup> on the proposed and enacted Federal Rules of Evidence, and looking to the experience of the states. When this approach is followed for the question of implied waiver of the privilege, we can see that—in addition to the public good of the “mental health of our citizenry”<sup>12</sup>—waiver implicates the important federal policy of vindicating civil rights. But the lessons to be taken from the Advisory Committee's work and the laws of the states are mixed, illustrating the continuing tension between plaintiffs' privacy rights and defendants' rights to relevant evidence.

A better solution to the dilemma of analyzing implied waiver might be a statutory one, outside the current legal framework of privilege and waiver. A statutory amendment could allow federal civil rights plaintiffs a choice: receive moderate damages in a sum certain that is less than the current maximum, or waive the privilege and seek actual damages (up to the statutory cap<sup>13</sup>). In a sense, this would be the garden variety compromise, but in a statutory form and under the plaintiff's control. There is common law precedent for a choice of moderate damages when proof of actual damages is troublesome,<sup>14</sup> although such a fix to federal law would of course have to be accomplished by legislative amendment. It is useful to think about such an amendment because it would address the legitimate concerns that have led to the garden variety approach and would give control of the waiver back to the plaintiff-patient. At present, neither plaintiff nor defendant can predict when the court will find waiver. The judicial garden variety approach does nothing to reduce that uncertainty; a statutory version could do so by giving the plaintiff-patient a choice.

This Article traces the development of the garden variety approach to waiver of the psychotherapist-patient privilege in federal court, critiques that approach, and suggests an alternative. Part I begins with the history of the Supreme Court's adoption of the psychotherapist-patient privilege. It also looks at the context for the implied waiver issue—namely, the civil rights legislation under which the issue usually arises and the changing patterns of mental health treatment which make the issue so common. Part I concludes with a look at the federal court decisions on implied waiver, explaining the lack of clear authority and the three general approaches that have emerged, with emphasis on the dominant garden variety approach.

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<sup>11</sup> The Evidence Advisory Committee is one of five advisory committees to the Federal Judicial Conference. These committees assist in the Court's rulemaking process by evaluating and drafting proposed rules for the Judicial Conference to consider. See *How the Rulemaking Process Works*, USCOURTS.GOV, <http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.aspx> (last visited Sept. 11, 2013).

<sup>12</sup> *Jaffee*, 518 U.S. at 11.

<sup>13</sup> See 42 U.S.C. § 1981a(b)(3) (2006).

<sup>14</sup> See *infra* notes 256-58 and accompanying text.

Next, Part II presents an alternative analysis to what the courts have so far provided. This section discusses how the garden variety approach, despite its compromise appeal, undermines the goals of civil rights legislation, reinforces outmoded bias against mental health treatment, and does nothing to lessen uncertainty for litigants. Part II then follows the “reason and experience” template laid out in *Jaffee* to determine the best approach to implied waiver in civil rights cases. That template suggests that we first determine the important public good involved and then consult sources such as the Advisory Committee proposals and notes and the laws of the states. However, this Article concludes that such an analysis—although illuminating—leads to no clear answer, other than to suggest the propriety of legislation.

Finally, Part III suggests a possible legislative fix: allow civil rights plaintiffs to seek moderate damages in a sum certain, rather than actual damages, and maintain their psychotherapist-patient privilege. This proposal is limited to civil rights plaintiffs, whose cases implicate the additional public good of federal civil rights policy. Although a more general federal statute or court rule on waiver of the privilege may be desirable, this Article is concerned with the particular issues raised in civil rights litigation.<sup>15</sup>

## I. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE AND IMPLIED WAIVER

### A. *The Supreme Court Establishes the Privilege*

In 1996, the Supreme Court recognized the psychotherapist-patient privilege as a matter of federal common law in *Jaffee v. Redmond*. The Court did so under the authority of Federal Rule of Evidence 501, which authorizes the federal courts to define new privileges by interpreting common law principles “in the light of reason and experience.”<sup>16</sup>

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<sup>15</sup> As noted, the bulk of the federal decisions on the implied waiver issue are in civil rights cases.

<sup>16</sup> When *Jaffee* was decided, Federal Rule of Evidence 501 provided:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Federal Rule of Evidence 501, Pub. L. No. 93-595, 88 Stat. 1926, 1933 (1975) (amended 2011). Stylistic revisions to the evidence rules were enacted in 2011 but did not affect the substance.

At the time of *Jaffee*, the Court had already recognized an attorney-client privilege<sup>17</sup>—long-established in common law—and the spousal privilege.<sup>18</sup> As the Court had explained,

Testimonial exclusionary rules and privileges contravene the fundamental principle that “the public . . . has a right to every man’s evidence.” As such, they must be strictly construed and accepted “only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”<sup>19</sup>

Proponents of the privilege could not have asked for better facts than those presented in *Jaffee*. The party asserting the privilege was a police officer and defendant in a civil suit who had sought counseling after a traumatic event.<sup>20</sup> As the Court put it:

After a traumatic incident in which she shot and killed a man, a police officer received extensive counseling from a licensed clinical social worker. The question we address is 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.<sup>21</sup>

Under these facts, the Court reasoned that the privilege was necessary to promote the confidentiality necessary for effective mental health treatment.<sup>22</sup> The privilege promoted a social good by “facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.”<sup>23</sup> The Court asserted the importance of confidentiality to effective treatment and rejected a balancing approach to the privilege.<sup>24</sup> Patients and their therapists required certainty, the Court said, in order to engage in therapy without the inhibiting fear of future disclosure.<sup>25</sup> “[T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.”<sup>26</sup>

The Court recognized that privileges by their nature exclude relevant evidence but do so in favor of a competing public policy.<sup>27</sup> The Court relied

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<sup>17</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981).

<sup>18</sup> *Trammel v. United States*, 445 U.S. 40, 51-53 (1980) (recognizing marital communication privilege but limiting adverse spousal testimony privilege).

<sup>19</sup> *Id.* at 50 (citation omitted) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950); *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)) (internal quotation marks omitted).

<sup>20</sup> *Jaffee v. Redmond*, 518 U.S. 1, 3-4 (1996).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 10.

<sup>23</sup> *Id.* at 11.

<sup>24</sup> *Id.* at 17.

<sup>25</sup> *Id.* at 10.

<sup>26</sup> *Jaffee*, 518 U.S. at 10.

<sup>27</sup> *Id.* at 9.

on analogies to the attorney-client privilege, citing its decision in *Upjohn Co. v. United States*,<sup>28</sup> which said the purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."<sup>29</sup> The work of both attorneys and psychotherapists depends on confidentiality.<sup>30</sup> The Court also found support for its policy analysis in the Advisory Committee Notes to Proposed Federal Rule of Evidence 504, discussed below, and in the fact that all fifty states had adopted some form of the psychotherapist privilege.<sup>31</sup>

The Court rejected any balancing of competing interests in determining whether to apply the privilege. "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."<sup>32</sup> The Court did not further define the scope of the privilege, nor did it describe how the privilege might be waived. However, in two footnotes the Court acknowledged the possibility of limitations and waiver. In footnote 19, the Court said, "[W]e do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist."<sup>33</sup> In footnote 14, the Court merely stated, "Like [sic] other testimonial privileges, the patient may of course waive the protection."<sup>34</sup>

*Jaffee* was not the Court's first attempt to establish a psychotherapist privilege. Twenty-five years earlier, the Court had recommended to Congress that it enact a psychotherapist-patient privilege as part of the proposed Federal Rules of Evidence.<sup>35</sup> Congress rejected the enumeration of specific privileges, including Proposed Rule 504 (Psychotherapist-Patient Privilege), in favor of the common law authority in Rule 501. However, the *Jaffee* court quoted approvingly from the Advisory Committee Notes in support of Proposed Rule 504, noting that Congress had not actually disapproved of the privilege or the reasoning of the Advisory Committee.<sup>36</sup> The Court cited the

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<sup>28</sup> 449 U.S. 383 (1981).

<sup>29</sup> *Jaffee*, 518 U.S. at 11 (quoting *Upjohn*, 449 U.S. at 389) (internal quotation marks omitted).

<sup>30</sup> The public good served by the other privilege referenced in *Jaffee*, the marital privilege, is different. It is to preserve marital harmony, rather than to encourage full and frank communication between spouses. *Id.* See generally *Trammel v. United States*, 445 U.S. 40, 43-51 (1980) (discussing marital privilege and adverse spousal testimony privilege).

<sup>31</sup> *Jaffee*, 518 U.S. at 10, 12; see *infra* Part II.B.2.

<sup>32</sup> *Jaffee*, 518 U.S. at 17.

<sup>33</sup> *Id.* at 18 n.19.

<sup>34</sup> *Id.* at 15 n.14.

<sup>35</sup> *Id.* at 10.

<sup>36</sup> As justification for this reliance on the Advisory Committee Notes, the Court stated: "In rejecting the proposed draft that had specifically identified each privilege rule and substituting the present more

Advisory Committee's emphasis on the importance of confidentiality to psychotherapy: "[T]here is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment."<sup>37</sup>

Although the Court relied on the proposed rule, one part of that proposal went unmentioned. The Proposed Rule 504 contained an exception that goes to the issue of implied waiver:

There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.<sup>38</sup>

This is the so-called patient-litigant exception.<sup>39</sup> The *Jaffee* Court did not refer to this subsection, but subsequent courts have picked up on its language in addressing implied waiver.<sup>40</sup> The question for many courts has thus been framed as whether the plaintiff has put his or her "mental or emotional condition at issue."<sup>41</sup>

This patient-litigant exception can be at odds with analogies to the attorney-client privilege, and this conflict may have contributed to the analytical confusion about waiver. Asking whether the patient's *mental condition* is at issue is a very different question from that asked in the context of determining waiver of the attorney-client privilege: whether the client has put the *representation*—not the *topic* of representation—at issue.<sup>42</sup> The attorney-client privilege protects communications about topics that are very relevant to the litigation, and the client-litigant does not waive the privilege with respect to discussion of elements of his or her claim even though these elements are

open-ended Rule 501, the Senate Judiciary Committee explicitly stated that its action "should not be understood as disapproving any recognition of a psychiatrist-patient . . . privileg[e] contained in the [proposed] rules." *Id.* at 15 (alterations in original) (quoting S. REP. NO. 93-1277, at 7059 (1974)).

<sup>37</sup> *Id.* at 10 (quoting Proposed Federal Rules of Evidence 504 advisory committee's note, 56 F.R.D. 183, 242 (1973)) (internal quotation marks omitted).

<sup>38</sup> Proposed Federal Rule of Evidence 504, 56 F.R.D. 183, 241 (1973).

<sup>39</sup> "The patient-litigant exception included in Proposed Rule 504 represents the prevailing rule in the states and has been recognized as part of the federal common-law psychotherapist-patient privilege." Anne Bowen Poulin, *The Psychotherapist-Patient Privilege After Jaffee v. Redmond: Where Do We Go From Here?*, 76 WASH. U. L.Q. 1341, 1375 (1998) (footnote omitted). See *infra* Part II.B.3 for a discussion of the various state interpretations of this exception.

<sup>40</sup> See, e.g., *Doe v. City of Chula Vista*, 196 F.R.D. 562, 565 (S.D. Cal. 1999).

<sup>41</sup> See, e.g., *id.* at 563 (quoting *Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 631 (S.D. Cal.), *modified*, *Doe*, 196 F.R.D. 562 (1999)) (internal quotation marks omitted). See also *Doe v. Oberweis Dairy*, 456 F.3d 704, 718 (7th Cir. 2006) ("If a plaintiff by seeking damages for emotional distress places his or her psychological state in issue, the defendant is entitled to discover any records of that state."); *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) (finding plaintiff placed her "medical condition at issue").

<sup>42</sup> See FED. R. EVID. 502 advisory committee's note (discussing common-law waiver doctrines for attorney client privilege).



certainly at issue. The client does forfeit the privilege,<sup>43</sup> however, if the client seeks to rely on counsel’s advice as a defense, or if the client sues the attorney for malpractice, thereby putting the substance of the communications at issue.<sup>44</sup> By analogy, a patient would not waive the psychotherapist-patient privilege simply by putting his or her mental condition at issue, but rather only if she put the treatment itself at issue in some way. Disagreement about this analogy between the attorney-client and psychotherapist-patient privileges—especially in light of the patient-litigant exception—is one reason for the differences among the various approaches to waiver of the latter privilege in the federal courts.<sup>45</sup>

### B. *Context for Implied Waiver of the Privilege*

The issue of implied waiver of the psychotherapist-patient privilege arises most frequently in the context of civil rights litigation, and against a changing backdrop of mental health treatment. A brief look at this context is helpful for an understanding of the waiver issue.

#### 1. Federal Civil Rights Legislation

In federal court, the issue of waiver of the psychotherapist-patient privilege has arisen not so much in cases like *Jaffee*, where a civil defendant claimed the privilege, but most often in civil rights suits by plaintiffs making claims under federal laws such as Title VII,<sup>46</sup> 42 U.S.C. §§ 1981 and 1983, or the Americans with Disabilities Act (“ADA”).<sup>47</sup> In these cases, plaintiffs seeking emotional distress damages assert the psychotherapist-patient privilege in response to defense discovery requests. Most of the reported cases

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<sup>43</sup> Forfeiture may be the more appropriate term for what the courts have called waiver or implied waiver of the psychotherapist-patient privilege. See Smith, *supra* note 2, at 102-06 (discussing the difference between intentional, affirmative acts of waiver and the concepts of exceptions or limitations to the privilege). See also 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5543 (1989) (discussing distortion of the waiver concept with respect to patient-litigants).

<sup>44</sup> See FED. R. EVID. 502 advisory committee’s note.

<sup>45</sup> Although *Jaffee* analogized the psychotherapist-patient privilege to the attorney-client privilege, courts are clearly more protective of the latter. The attorney-client privilege is, after all, part of the legal framework, itself in service of the machinery of litigation. Judges were all lawyers at one time and therefore more understanding of the need for lawyer confidentiality. “The [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Special solicitude for the attorney-client privilege is also evidenced in the 2008 enactment of Federal Rule of Evidence 502, Attorney-Client Privilege and Work Product; Limitations on Waiver. Rule 502 tightens the requirements for waiver of the attorney-client privilege.

<sup>46</sup> 42 U.S.C. §§ 2000e to 2000e-17 (2006).

<sup>47</sup> 42 U.S.C. §§ 12101-12213 (2006).

involve claims of employment discrimination, but the implied waiver issue also arises in housing discrimination cases<sup>48</sup> and prisoners' lawsuits.<sup>49</sup> Federal civil rights legislation includes statutes relating to freedom of contract, housing, public accommodation, employment, and more.<sup>50</sup>

Compensatory damages for pain, suffering, and mental distress are often a major—if not the only—part of the damages sought.<sup>51</sup> The original Civil Rights Act of 1964 did not allow for compensatory damages.<sup>52</sup> In 1991, Congress amended the law to allow such damages.<sup>53</sup> As the House Report stated:

Victims of intentional sexual or religious discrimination in employment terms and conditions often endure terrible humiliation, pain and suffering. This distress often manifests itself in emotional disorders and medical problems. Victims of discrimination often suffer substantial out-of-pocket expenses as a result of the discrimination, none of which is compensable with equitable remedies. The limitation of relief under Title VII to equitable remedies often means that victims of intentional discrimination may not recover for the very real effects of the discrimination. Thus, victims of intentional discrimination are discouraged from seeking to vindicate their civil rights.<sup>54</sup>

Damages for emotional distress are particularly important in claims based on a “hostile work environment” or sexual harassment, where the plaintiff can bring suit regardless of whether she lost tangible job benefits.<sup>55</sup> In such cases, emotional distress damages may be the only damages available to a plaintiff.<sup>56</sup> Congress has limited such damages in employment discrimination actions to \$300,000 for the largest employers and \$50,000 for the

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<sup>48</sup> See, e.g., *Fitzgerald v. Cassil*, 216 F.R.D. 632, 632 (N.D. Cal. 2003).

<sup>49</sup> See, e.g., *In re Sims*, 534 F.3d 117, 120 (2d Cir. 2008); *Flowers v. Owens*, 274 F.R.D. 218, 220 (N.D. Ill. 2011).

<sup>50</sup> The civil rights laws include not only the Reconstruction-era civil rights statutes, now codified at 42 U.S.C. §§ 1981, 1982, and 1983, but also the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619, 3631 (2006); Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973bb-1 (2006); and Civil Rights Act of 1964, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6 (2006).

<sup>51</sup> Frank, *supra* note 2, at 647.

<sup>52</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 262 (1964).

<sup>53</sup> 42 U.S.C. § 1981a(b) (2006).

<sup>54</sup> H.R. REP. NO. 102-40, pt. 2, at 25 (1991).

<sup>55</sup> See generally Frank, *supra* note 2, at 644-48.

<sup>56</sup> See, e.g., *Equal Emp't Opportunity Comm'n v. Cal. Psychiatric Transitions*, 258 F.R.D. 391, 400 (E.D. Cal. 2009) (applying the broad rule in part because emotional distress damages are the only damages sought for sexual harassment).

smallest.<sup>57</sup> These provisions for compensatory damages also apply to claims of intentional discrimination under the ADA.<sup>58</sup>

## 2. Psychotherapy and Mental Health Treatment

At the time of the 1996 *Jaffee* decision, psychotherapy was becoming increasingly important to Americans. Legislatures in all fifty states had by then recognized a psychotherapist-patient privilege by statute.<sup>59</sup> The court of appeals in *Jaffee* had noted a rapid rise in counseling, stating, “[m]uch has changed with the mental health field in the past five years. The need, and demand, for counseling services has skyrocketed . . . .”<sup>60</sup>

Mental health treatment has continued to grow, and there is less stigma associated with such treatment than there used to be. “Psychotherapy has become mainstream.”<sup>61</sup> Many Americans seek counseling, although most seek it from licensed social workers, therapists, or pastoral counselors rather than more expensive psychologists or psychiatrists.<sup>62</sup> An increasing number of students seek mental health treatment at college, and many come to college already under treatment.<sup>63</sup> A trend begun by the time of *Jaffee* has continued—the increased use of medication to treat even mild mental health problems. During the past two decades, much outpatient mental health treatment

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<sup>57</sup> The law provides:

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

42 U.S.C. § 1981a(b)(3) (2006).

<sup>58</sup> 42 U.S.C. § 1981a(a)(2) (2006).

<sup>59</sup> *Jaffee v. Redmond*, 518 U.S. 1, 6 (1996).

<sup>60</sup> *Jaffee v. Redmond*, 51 F.3d 1346, 1355 (7th Cir. 1995) (footnote omitted), *aff'd*, 518 U.S. 1 (1996).

<sup>61</sup> JONATHAN ENGEL, *AMERICAN THERAPY: THE RISE OF PSYCHOTHERAPY IN THE UNITED STATES* 260 (2008).

<sup>62</sup> *Id.* at xi. See also Daniel Carlat, *Mind Over Meds*, N.Y. TIMES (Apr. 23, 2010), <http://www.nytimes.com/2010/04/25/magazine/25Memoir-t.html?pagewanted=all>; Gardiner Harris, *Talk Doesn't Pay, So Psychiatry Turns Instead to Drug Therapy*, N.Y. TIMES (Mar. 5, 2011), <http://www.nytimes.com/2011/03/06/health/policy/06doctors.html?pagewanted=all> (describing a trend toward pharmacological treatment in psychiatry, and the insurance coverage incentives to have lower paid professionals, rather than psychiatrists, provide talk therapy).

<sup>63</sup> Trip Gabriel, *Mental Health Needs Seen Growing at Colleges*, N.Y. TIMES (Dec. 19, 2010), <http://www.nytimes.com/2010/12/20/health/20campus.html?pagewanted=all>.

has been accomplished through psychotropic medication rather than talk therapy.<sup>64</sup> The increase in medication has, however, also pushed many people into psychotherapy who might not otherwise have sought it,<sup>65</sup> as emotional and mental problems are seen as treatable illness rather than character flaws or intractable traits. In addition, even patients who receive only medication will have some privileged communications with their providers to allow for a diagnosis and monitoring.

Insurance coverage for mental health treatment, including psychotherapy, is much more common now and likely to spread with the implementation of the Affordable Care Act (“ACA”).<sup>66</sup> It is stated federal policy to make mental health treatment available to those who need it, without stigma.<sup>67</sup> More Americans will have insurance coverage for mental health treatment, but insurance companies usually require a diagnosis before they will approve reimbursement. Thus, with increased mental health coverage will come an increase in diagnoses.<sup>68</sup> The American Psychiatric Association’s Diagnostic and Statistical Manual<sup>69</sup> provides hundreds of disorders for therapists to choose from. The Manual includes diagnoses for moderate transitory conditions, “adjustment disorders” and insomnia,<sup>70</sup> as well as more serious and long-lasting conditions.

### 3. Several Approaches to Implied Waiver

Against this backdrop of expanding mental health treatment, the courts have wrestled with the implied waiver issue. The *Jaffee* Court noted that the privilege could be waived but said no more on the subject.<sup>71</sup> The lower courts have been left to work it out, and have done so largely free of binding authority.

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<sup>64</sup> Mark Olfson & Steven C. Marcus, *National Trends in Outpatient Psychotherapy*, 167 AM. J. PSYCHIATRY 1456, 1456 (2010).

<sup>65</sup> ENGEL, *supra* note 61, at 260.

<sup>66</sup> The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). See Richard A. Friedman, *Good News for Mental Illness in Health Law*, N.Y. TIMES (July 9, 2012), <http://www.nytimes.com/2012/07/10/health/policy/health-care-law-offers-wider-benefits-for-treating-mental-illness.html> (pointing out that although the Mental Health Parity and Addiction Equity Act of 2008 had not led to more widespread mental health coverage, the Affordable Care Act of 2010 would eventually lead to “near-universal” mental health coverage).

<sup>67</sup> See *The Federal Mental Health Action Agenda*, U.S. DEPARTMENT OF HEALTH & HUM. SERVICES, [http://www.samhsa.gov/federalactionagenda/NFC\\_FMHAAspx](http://www.samhsa.gov/federalactionagenda/NFC_FMHAAspx) (last visited Sept. 11, 2013) (stating the goals for a “transformed mental health system” from the Substance Abuse and Mental Health Services Administration).

<sup>68</sup> See Smith, *supra* note 2, at 113.

<sup>69</sup> The fifth edition was released in May 2013.

<sup>70</sup> Smith, *supra* note 2, at 113 n.208.

<sup>71</sup> *Jaffee v. Redmond*, 518 U.S. 1, 15 n.14 (1996).

When plaintiffs seek emotional distress damages in civil rights litigation, defendants may argue that by seeking such damages, or by introducing certain evidence in support of such damages, plaintiffs have impliedly waived the privilege for their psychotherapy records. At least three approaches have emerged in response to these arguments: the so-called “broad,” “narrow,” and “middle”—or garden variety—approaches. Although the approaches can be neatly delineated in theory, the terms lose their clarity in court decisions. Broad rules are stated in cases involving garden variety damages; narrow rules are stated in cases where waiver could be denied under the broad rule; and there is no consensus as to the genus or species of the garden variety damages.<sup>72</sup>

The broad approach seemed to dominate the field shortly after *Jaffee*.<sup>73</sup> Under the broad view of waiver, the plaintiff impliedly waives the privilege if she seeks emotional distress damages of any kind or degree.<sup>74</sup> Under this view, plaintiffs can avoid waiver only by not asking for mental distress damages or asserting any psychological harm.

The narrow view is modeled after the law of attorney-client privilege. Under this view, implied waiver results only if the plaintiff attempts to rely on part of the communications with the psychotherapist or calls the treatment provider as a witness.<sup>75</sup> Some courts will widen this view slightly to find waiver if the plaintiff introduces any expert testimony in support of a claim of emotional distress damages.<sup>76</sup>

The garden variety, or middle-ground, approach strikes a balance between broad and narrow. Under this approach, the plaintiff does not waive the privilege so long as she does not seek damages for more than garden variety emotional distress and does not introduce expert testimony or a diagnosis in support of her claim.<sup>77</sup> There is great variation in what courts consider to be garden variety damages.<sup>78</sup> Generally, they are “the distress that any

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<sup>72</sup> See, e.g., *Ruhlmann v. Ulster Cnty. Dep’t of Soc. Servs.*, 194 F.R.D. 445, 449 (N.D.N.Y. 2000) (discussing “broad rule” cases that involve more than garden variety claims); *In re Consol. RNC Cases*, 2009 WL 130178, at \*7 (S.D.N.Y. Jan. 8, 2009) (applying the garden variety rule to find waiver in a wide range of mental distress damage claims).

<sup>73</sup> See, e.g., *Doe v. City of Chula Vista*, 196 F.R.D. 562, 569 (S.D. Cal. 1999); *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 131 (E.D. Pa. 1997).

<sup>74</sup> Although this is the broad rule formulation, many cases that state such a rule contain facts that would support waiver even under the other approaches—few cases find waiver merely on a prayer for ordinary mental distress damages attached to a civil rights claim. See *Ruhlmann*, 194 F.R.D. at 448-50 (discussing cases).

<sup>75</sup> See *Fitzgerald v. Cassil*, 216 F.R.D. 632, 639 (N.D. Cal. 2003) (adopting the narrow view).

<sup>76</sup> *Miles v. Century 21 Real Estate LLC*, No. 4:05-CV-1088 GTE, 2006 WL 2711534, at \*5 (E.D. Ark. Sept. 21, 2006) (characterizing this approach as the third of four approaches).

<sup>77</sup> See *Ruhlmann*, 194 F.R.D. at 449-50.

<sup>78</sup> See *Flowers v. Owens*, 274 F.R.D. 218, 225 (N.D. Ill. 2011) (discussing various formulations of garden variety emotional damages).

healthy, well-adjusted person would likely feel as a result of being so victimized.<sup>79</sup>

a. *Little Guidance from the Courts of Appeals*

The district courts, which routinely deal with discovery issues, have little guidance from the courts of appeals on the issue of implied waiver. Of the five federal appellate decisions addressing waiver of the psychotherapist privilege, three contain what can be characterized as language in favor of the broad rule, while two take a narrower approach.<sup>80</sup> But the facts of all of these cases can be distinguished in ways that have allowed the lower courts almost free rein in determining waiver. Most of what the appellate courts have said about implied waiver can be characterized as dicta.

It was not until 2000 that the first federal appellate decision citing *Jaffee* came down on the issue of waiver, and it seemed to favor the broad approach.<sup>81</sup> In *Schoffstall v. Henderson*,<sup>82</sup> the Eighth Circuit Court of Appeals upheld the trial court's finding of waiver where an employee sought emotional distress damages for sex discrimination, retaliation, and sexual harassment.<sup>83</sup> Citing several district court decisions espousing the broad rule, the court stated: "Numerous courts since *Jaffee* have concluded that, similar to attorney-client privilege that can be waived when the client places the attorney's representation at issue, a plaintiff waives the psychotherapist-patient privilege by placing his or her medical condition at issue."<sup>84</sup> The court concluded that the plaintiff had put her medical condition at issue,<sup>85</sup> although it did not explain exactly how she had done so. Presumably it was because of her allegations of extreme emotional distress: "Although her claims are difficult to decipher and interspersed with allegations of extreme emotional distress, they apparently boil down to sex discrimination, retaliation, and sexual harassment."<sup>86</sup> Despite the cursory analysis, and the seemingly broad language, district courts in the Eighth Circuit have read the decision to support a middle ground, garden variety approach.<sup>87</sup>

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<sup>79</sup> *Id.* (quoting *Kunstler v. City of New York*, No. 04CIV1145(RWS)(MHD), 2006 WL 2516625, at \*9 (S.D.N.Y. Aug. 29, 2006)) (internal quotation marks omitted).

<sup>80</sup> See *infra* notes 81-124 and accompanying text.

<sup>81</sup> *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000).

<sup>82</sup> 223 F.3d 818 (8th Cir. 2000).

<sup>83</sup> *Id.* at 823.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 822.

<sup>87</sup> See, e.g., *Miles v. Century 21 Real Estate LLC*, No. 4:05-CV-1088 GTE, 2006 WL 2711534, at \*5 (E.D. Ark. Sept. 21, 2006) (finding the plaintiffs did not waive the privilege when seeking damages for garden variety "humiliation, embarrassment, [and] emotional distress" (alteration in original) (internal quotation marks omitted)); *Walker v. Nw. Airlines Corp.*, No. Civ.00-2604 MJD/JGL, 2002 WL

In 2006, the Seventh Circuit issued a similarly cursory decision on waiver, also with very broad language. The plaintiff in *Doe v. Oberweis Dairy*<sup>88</sup> brought claims of employment discrimination, as well as battery and intentional infliction of emotional distress.<sup>89</sup> Referring to the “closely related doctor-patient privilege,”<sup>90</sup> the court stated:

If a plaintiff by seeking damages for emotional distress places his or her psychological state in issue, the defendant is entitled to discover any records of that state. Rule 35 of the Federal Rules of Civil Procedure would entitle the defendant to demand that the plaintiff submit to a psychiatric examination, the results of which would be available for use by the defendant in discovery and at trial; there is no greater invasion of privacy by making existing records available to the defendant.<sup>91</sup>

The court’s premises are faulty. *Jaffee* analogized to the attorney-client privilege,<sup>92</sup> and the Court has not recognized a doctor-patient privilege.<sup>93</sup> Moreover, it is questionable whether it is a greater invasion of privacy to undergo an exam than to have one’s past records combed through. And despite *Doe*’s broad language, district courts in the Seventh Circuit have felt free to endorse the garden variety approach.<sup>94</sup>

In fact, the outcomes in both *Schoffstall* and *Doe* can be squared with the garden variety—or even a narrow—approach to waiver. In *Schoffstall*, the plaintiff alleged “severe” rather than ordinary emotional distress.<sup>95</sup> In *Doe*, the plaintiff had a separate claim for intentional infliction of emotional

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32539635, at \*4 (D. Minn. Oct. 28, 2002) (“If, on the other hand, Plaintiff intends to seek anything more than nominal damages for any alleged emotional distress, then he is placing his mental condition at issue in this case, and Northwest is entitled to explore any evidence, including Plaintiff’s medical records, which may be relevant to such a claim.”).

<sup>88</sup> 456 F.3d 704 (7th Cir. 2006).

<sup>89</sup> *Id.* at 707.

<sup>90</sup> *Id.* at 718. The court provided no citation for this reference. There is no federal doctor-patient privilege, nor was a physician-patient privilege proposed as part of the Federal Rules of Evidence. See Proposed Federal Rule of Evidence 504 advisory committee’s note, 56 F.R.D. 183, 242 (1973) (explaining that “the common law recognized no general physician-patient privilege”). The proposed rules included an attorney-client privilege, psychotherapist-patient privilege, husband-wife privilege, and a privilege for “communications to clergymen.” Proposed Federal Rules of Evidence 503-06, 56 F.R.D. 183, 235-47 (1973).

<sup>91</sup> *Doe*, 456 F.3d at 718 (citations omitted).

<sup>92</sup> *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996).

<sup>93</sup> See *supra* note 90.

<sup>94</sup> See, e.g., *Flowers v. Owens*, 274 F.R.D. 218, 226 (N.D. Ill. 2011) (taking the garden variety approach to waiver). See also *Kronenberg v. Baker & McKenzie LLP*, 747 F. Supp. 2d 983, 994 (N.D. Ill. 2010) (applying the garden variety approach); *Loch v. Bd. of Educ. of Edwardsville Cmty. Sch. Dist. #7*, Civil No. 06-017-MJR, 2007 WL 3037285, at \*2 (S.D. Ill. Oct. 17, 2007) (stating in dicta, “This court doubts whether every plaintiff who seeks recovery for generalized emotional distress necessarily waives the psychotherapist/patient privilege as to his complete mental health history in every case”).

<sup>95</sup> *Schoffstall v. Henderson*, 223 F.3d 818, 826 (8th Cir. 2000).

distress.<sup>96</sup> These facts are among those considered by courts to put a claim of distress beyond the garden variety.<sup>97</sup> There is no denying that the language in both decisions seems to endorse a broad approach to waiver of the privilege, yet neither case established a binding rule for the lower courts.

In an age discrimination case, the Sixth Circuit also issued a decision with broad language.<sup>98</sup> In *Maday v. Public Libraries of Saginaw*,<sup>99</sup> the plaintiff appealed the admission of records of her sessions with a social worker.<sup>100</sup> The plaintiff herself had initially introduced some of these records—a potentially important fact, but one not relied upon by the court.<sup>101</sup> The court affirmed, noting, “To be sure, if [the plaintiff] were not seeking emotional-distress damages, then her conversations with a social worker about how she was feeling would likely be privileged. But when [the plaintiff] put her emotional state at issue in the case, she waived any such privilege . . . .”<sup>102</sup> The court’s language suggests that any request for emotional distress damages waives the privilege. A subsequent, unpublished Sixth Circuit decision reads *Maday* to endorse the broad rule,<sup>103</sup> as does a district court decision.<sup>104</sup> Thus, in the Sixth Circuit, the broad rule seems to prevail.<sup>105</sup>

In contrast, the D.C. Circuit favored the narrow approach when it addressed the waiver issue in 2007. Just as in *Doe* and *Schoffstall*, however, much of the court’s reasoning is dicta, as it goes beyond what was necessary to resolve the case. In *Koch v. Cox*,<sup>106</sup> the defendant employer argued that the plaintiff placed his mental state in issue, and thereby waived the privilege, when he admitted in deposition that he was depressed and referred to “stress” and “humiliation.”<sup>107</sup> The plaintiff had not sought emotional distress damages (or had abandoned any such claim).<sup>108</sup> Yet the defendant sought to use the plaintiff’s admissions as an implied waiver. Reviewing the narrow, broad, and middle-ground approaches that had grown up in the district courts, as well as the *Schoffstall* and *Doe* decisions, the court held:

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<sup>96</sup> *Doe*, 456 F.3d at 707.

<sup>97</sup> See *infra* Part I.B.3.c.

<sup>98</sup> *Maday v. Pub. Libraries of Saginaw*, 480 F.3d 815, 817 (6th Cir. 2007).

<sup>99</sup> 480 F.3d 815 (6th Cir. 2007).

<sup>100</sup> *Id.* at 820.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 821 (citations omitted).

<sup>103</sup> See *Simon v. Cook*, 261 F. App’x 873, 886 (6th Cir. 2008).

<sup>104</sup> *Dubose v. City of Morristown*, No. 2:07-CV-115, 2012 WL 876813, at \*1 (E.D. Tenn. Mar. 12, 2012).

<sup>105</sup> *But see Lamb v. Hazel*, No. 5:12-CV-00070-TBR, 2013 WL 1411239, at \*7 (W.D. Ky. Apr. 8, 2013) (concluding that the garden variety approach is the rule in the Sixth Circuit).

<sup>106</sup> 489 F.3d 384 (D.C. Cir. 2007).

<sup>107</sup> *Id.* at 387.

<sup>108</sup> *Id.* at 386.



[A] plaintiff does not put his mental state in issue merely by acknowledging he suffers from depression, for which he is not seeking recompense; nor may a defendant overcome the privilege by putting the plaintiff's mental state in issue. A plaintiff who makes no claim for recovery based upon injury to his mental or emotional state puts that state in issue and thereby waives the psychotherapist-patient privilege when, consistent with the Supreme Court's analogy in *Jaffee*, he does the sort of thing that would waive the attorney-client privilege, such as basing his claim upon the psychotherapist's communications with him; or, as with the marital privilege, “selectively disclos[ing] part of a privileged communication in order to gain an advantage in litigation.”<sup>109</sup>

The *Koch* court stated that the *Schoffstall* court had not properly analogized to the attorney-client privilege.<sup>110</sup> A client does not waive the attorney-client privilege simply by putting a matter at issue that was the subject of the representation.<sup>111</sup> A proper analogy would lead to finding waiver when the patient put the *communications* with the psychotherapist or the *treatment* in issue, not simply when the patient put his emotional state at issue.<sup>112</sup> Thus, the *Koch* court contains a strong argument for the narrow view. Yet a district court in its jurisdiction found that *Koch* had not held that one approach was best—only that waiver had not occurred in that case.<sup>113</sup> The district court then applied the garden variety test adopted by the Second Circuit.<sup>114</sup>

The Second Circuit is the most recent to weigh in, and like the D.C. Circuit, it rejected the broad view.<sup>115</sup> In *In re Sims*,<sup>116</sup> the court held that a prisoner suing for civil rights violations did not waive his psychotherapist privilege merely by stating in a deposition that he had anxiety and depression, especially when he had no attorney at the time.<sup>117</sup> The prisoner had since dropped his emotional distress damage claims and stipulated he would not call a treatment provider or expert.<sup>118</sup> Noting that implied waiver is best determined on a case-by-case basis under considerations of fairness, the court stated that a party might waive the privilege by disclosing or introducing some privileged material, but not simply by taking a position that the evidence might contradict.<sup>119</sup> The court also found that the presence or absence of counsel was relevant to the inquiry.<sup>120</sup> The *Sims* court soundly rejected the broad view that any claim for mental or emotional injury waives the privi-

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<sup>109</sup> *Id.* at 391 (citations omitted) (quoting *SEC v. Lavin*, 111 F.3d 921, 933 (D.C. Cir. 1997)).

<sup>110</sup> *Id.* at 389.

<sup>111</sup> *Id.*

<sup>112</sup> *Koch*, 489 F.3d at 389.

<sup>113</sup> *St. John v. Napolitano*, 274 F.R.D. 12, 18 (D.D.C. 2011).

<sup>114</sup> *Id.* at 20. Of course, since the court found no waiver under that test, its holding was not contrary to the *Koch* decision.

<sup>115</sup> *In re Sims*, 534 F.3d 117, 134 (2d Cir. 2008).

<sup>116</sup> 534 F.3d 117 (2d Cir. 2008).

<sup>117</sup> *Id.* at 134.

<sup>118</sup> *Id.* at 133.

<sup>119</sup> *Id.* at 132.

<sup>120</sup> *Id.* at 133.

lege, or that waiver results whenever psychotherapeutic records might be relevant to a plaintiff's claim.<sup>121</sup> Its multi-factored "fairness" approach seems most consistent with the middle-ground or garden variety view of waiver.<sup>122</sup>

Thus, with the possible exception of the Sixth Circuit in *Maday*, the courts of appeals that have touched on the waiver issue have not set binding rules for the district courts confronted with discovery motions. Despite the discussions of the three approaches, and language that seems to favor one or the other approach, there is little in the way of guidance—and certainly no predictability. Of course, district courts in the majority of circuits, which have not addressed the issue at the appellate level, are completely free to choose their rule for waiver. In the Ninth Circuit, for example, district courts have taken broad, narrow, and garden variety approaches.<sup>123</sup>

Further real guidance is unlikely. Although the issue of waiver arises frequently in the district courts, if one goes by the number of district court orders addressing it, the issue rarely appears in appellate decisions, let alone published decisions. This may be due to high settlement rates.<sup>124</sup> Thus the district courts are left to hash out the issue on their own. The result is a great deal of uncertainty, although the majority of the lower courts seem to be converging on the middle-ground, or garden variety, approach.

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<sup>121</sup> *Id.* at 141.

<sup>122</sup> District courts in New York appear to have read the case to approve the garden variety rule. *See, e.g.,* *Equal Emp't Opportunity Comm'n v. Nichols Gas & Oil, Inc.*, 256 F.R.D. 114, 121 (W.D.N.Y. 2009) (finding no waiver where claimed damages were only for "pain, suffering and humiliation" (internal quotation marks omitted)); *In re Consol. RNC Cases*, 2009 WL 130178, at \*7 (S.D.N.Y. Jan. 8, 2009) (finding waiver where plaintiffs had claimed negligent infliction of emotional distress, as well as "numerous and specific" emotional distress damages).

<sup>123</sup> Examples of courts adopting the broad view can be found in *Equal Employment Opportunity Commission v. California Psychiatric Transitions*, 258 F.R.D. 391, 400 (E.D. Cal. 2009), and *Doe v. City of Chula Vista*, 196 F.R.D. 562, 568 (S.D. Cal. 1999). By contrast, courts adopted the narrow view in *Equal Employment Opportunity Commission v. Wal-Mart Stores, Inc.*, 276 F.R.D. 637, 641 (E.D. Wash. 2011), and *Fitzgerald v. Cassil*, 216 F.R.D. 632, 639 (N.D. Cal. 2003). In another case, *Sims v. Lakeside School*, No. C06-1412RSM, 2007 WL 5417731, at \*1 (W.D. Wash. Mar. 15, 2007), the court took an ostensibly narrow approach, although applied to garden variety facts. In *Haught v. City of Anderson*, No. 2:11-CV-1653-JAM-CMK, 2013 WL 210066, at \*2 (E.D. Cal. Jan. 17, 2013), the court applied the garden variety rule.

<sup>124</sup> The rarity of the discovery issue's appearance in the appellate courts may also be due to the often deferential standard of review. The first appeal is often of the magistrate's order to the district court judge. In *Batts v. County of Santa Clara*, No. C 08-00286 JW, 2009 WL 3732003 (N.D. Cal. Nov. 5, 2009), the judge upheld the magistrate's order applying the narrow approach under the reasoning that since the Ninth Circuit had not addressed the issue of waiver, the magistrate's choice of rule could not be "contrary to law." Such reasoning, if widely adopted, could create a "Catch-22" where the issue could never get past the standard of review and thus never reach the Court of Appeals. Not all courts apply the standard of review in this way, however. *See, e.g., Doe*, 196 F.R.D. at 565-68 (reversing the magistrate's application of the narrow view and applying the broad view to waiver).

b. *District Court Decisions: Broad and Narrow*

District courts police discovery by ruling on motions. Civil rights plaintiffs generally assert the privilege in response to a defendant’s discovery request. The issue is then addressed by the court in a ruling on a motion to compel disclosure.<sup>125</sup> The issue may also arise through a plaintiff’s motion to quash the defendant’s subpoena of psychotherapeutic records,<sup>126</sup> or a plaintiff’s motion for a protective order. These rulings are written by magistrates and district court judges and are generally available whether officially published or not.

District courts began to grapple with the question of implied waiver of the psychotherapist-patient privilege shortly after the *Jaffee* decision. At first, the broad view of waiver seemed to prevail, so that the *Schoffstall* court in 2000 could state that “numerous cases” supported its broad view.<sup>127</sup> A contrary, narrow view emerged early on, however, as did the garden variety approach. Some courts, especially more recently, will state a preference for the narrow approach but use reasoning more consistent with a middle-ground or garden variety approach.<sup>128</sup> By 2011, an Illinois federal magistrate judge concluded that a “numerical minority” held the broad view,<sup>129</sup> and that “most courts have held that claims of ‘garden variety’ emotional damage do not result in a waiver of the psychotherapist/patient privilege.”<sup>130</sup> The arguments in favor and against each approach have been well articulated in a number of decisions.

Arguments for the broad approach rely mainly on the need for “fairness” to defendants, who should be allowed to challenge the causation of emotional distress. The seminal decision favoring the broad approach is *Sarko v. Penn-Del Directory Co.*<sup>131</sup> The *Sarko* court held that a plaintiff who claimed violation of the ADA when she was fired for tardiness had waived the privilege

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<sup>125</sup> See, e.g., *Miles v. Century 21 Real Estate LLC*, No. 4:05-CV-1088 GTE, 2006 WL 2711534, at \*5 (E.D. Ark. Sept. 21, 2006) (denying defendant’s motion to compel production of psychiatric records).

<sup>126</sup> See, e.g., *Fitzgerald*, 216 F.R.D. at 633 (granting plaintiff’s motion to quash a subpoena of psychiatric records).

<sup>127</sup> *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000). See also Ryan M. Gott, Note, *The Evolving Treatment of “Garden Variety” Claims Under the Psychotherapist-Patient Privilege*, 6 Suffolk J. TRIAL & APP. ADVOC. 91, 97 (2001) (“The majority of cases follow the *Sarko* [broad view] philosophy.”).

<sup>128</sup> See, e.g., *Wal-Mart Stores*, 276 F.R.D. at 641 (taking the narrow approach but stating that if defendant discovers evidence of “more particularized mental health or physical health issues, or that there were other potential causes or a long history of a relevant mental or physical illness, then Defendant may reapply to the Court for an order compelling production of medical records”). See also *Sims*, 2007 WL 5417731, at \*1 (applying the “narrow approach” but noting “garden variety” claims (internal quotation marks omitted)).

<sup>129</sup> *Flowers v. Owens*, 274 F.R.D. 218, 223 (N.D. Ill. 2011).

<sup>130</sup> *Id.* at 225.

<sup>131</sup> 170 F.R.D. 127 (E.D. Pa. 1997).

because she claimed to be disabled by depression.<sup>132</sup> The court analogized to the attorney-client privilege, citing *Jaffee*: “the Supreme Court specifically analogized the policy considerations supporting recognition of the privilege in *Jaffee* to those underlying the attorney-client privilege, which is waived when the advice of counsel is placed at issue in litigation.”<sup>133</sup> The court also found that it “would simply be contrary to the most basic sense of fairness and justice” to allow the plaintiff to claim privilege when her mental condition is directly at issue.<sup>134</sup> It is worth noting that the *Sarko* plaintiff had the burden not only to show emotional distress damages, but also a mental disability of depression.

Later decisions amplify the theme of fairness. In *Doe v. City of Chula Vista*,<sup>135</sup> the court concluded,

[T]o insure a fair trial, particularly on the element of causation . . . defendants should have access to evidence that [plaintiff's] emotional state was caused by something else. . . . Once [plaintiff] has elected to seek such damages, she cannot fairly prevent discovery into evidence relating to the element of her claim.<sup>136</sup>

The *Doe* court also relied on the Supreme Court's proposed, but rejected, evidence rule that would have codified the psychotherapist-patient privilege with an exception for when the patient had put his or her mental condition at issue.<sup>137</sup> The possibility of “multiple causation”<sup>138</sup> and fairness concerns<sup>139</sup> have been cited by other courts in favor of the broad view. “The parlance often employed in the cases is that one cannot use a privilege as both a sword and a shield.”<sup>140</sup>

Courts persuaded by the narrow view, on the other hand, find fairness to the defendant less compelling than the privacy interests protected by the privilege. In 1997, a Massachusetts federal judge took issue with the then dominant broad view, in particular the arguments set forth by the *Sarko* court.

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<sup>132</sup> *Id.* at 129-30.

<sup>133</sup> *Id.* at 130.

<sup>134</sup> *Id.* (quoting *Premack v. J.C.J. Ogar, Inc.*, 148 F.R.D. 140, 145 (E.D. Pa. 1993)) (internal quotation marks omitted).

<sup>135</sup> 196 F.R.D. 562 (S.D. Cal. 1999).

<sup>136</sup> *Id.* at 569. Although the court found implied waiver, it limited the scope of that waiver and ordered in camera review of the records by a magistrate to ensure only relevant material was released.

<sup>137</sup> *Id.* at 568.

<sup>138</sup> *Equal Emp't Opportunity Comm'n v. Cal. Psychiatric Transitions*, 258 F.R.D. 391, 400 (E.D. Cal. 2009).

<sup>139</sup> *Id.*; see also *In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008) (finding no waiver but noting fairness concerns).

<sup>140</sup> *Flowers v. Owens*, 274 F.R.D. 218, 225 (N.D. Ill. 2011) (citing *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000)); see also *In re Sims*, 534 F.3d at 132; *Santelli v. Electro-Motive*, 188 F.R.D. 306, 308 (N.D. Ill. 1999); 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5039 (2d ed. 2005).

In *Vanderbilt v. Town of Chilmark*,<sup>141</sup> the court criticized the way in which the *Sarko* court had analogized to the attorney-client privilege. It reasoned that the privilege is waived only if the communication itself is put in issue, not simply because the topic of the communication is at issue; “[t]he act of seeking damages for emotional distress is analogous to seeking attorney’s fees. The fact that a privileged communication has taken place may be relevant. But, the fact that a communication has taken place does not necessarily put [its] content at issue.”<sup>142</sup>

Narrow view courts also rebuffed arguments that fairness to the defense required the broad approach. A California federal court noted that a privilege is meant to exclude relevant evidence “in order to serve interests that are of over-arching importance.”<sup>143</sup> The *Jaffee* Court’s insistence that the privilege be clear, and not be dependent on after-the-fact judicial balancing, gave the court another reason to reject the broad or garden variety approaches.<sup>144</sup> This court also noted a substantial potential for abuse under the broad view of waiver because it would give defendants unfettered access to medical and psychiatric records.<sup>145</sup> Finally, the court emphasized that defendants were free to inquire about the “occurrence and dates of any psychotherapy,” topics that were not privileged.<sup>146</sup> Defendants were also free to find other evidence to support a theory that the plaintiff’s distress was exaggerated or pre-existing.<sup>147</sup>

### c. *The Garden Variety Compromise*

The garden variety<sup>148</sup> rule arose as a compromise between the concerns for fairness to defendants and concerns about plaintiffs’ privacy. Courts do not articulate the approach as a compromise, but there is an underlying sense that if plaintiffs do not overreach, they should be allowed to avoid waiver. The definition of “garden variety” is hard to pin down, but it seems guided by judges’ sense of what an “ordinary” or “normal” person might suffer as a result of the defendant’s alleged conduct.

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<sup>141</sup> 174 F.R.D. 225 (D. Mass. 1997).

<sup>142</sup> *Id.* at 229.

<sup>143</sup> *Fitzgerald v. Cassil*, 216 F.R.D. 632, 637 (N.D. Cal. 2003) (quoting *Hucko v. City of Oak Forest*, 185 F.R.D. 526, 530 (N.D. Ill. 1999)) (internal quotation marks omitted).

<sup>144</sup> *Id.* at 636-37.

<sup>145</sup> *Id.* at 638.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 636, 638.

<sup>148</sup> The term appeared in a waiver case before the *Jaffee* decision. *Sabree v. United Bhd. of Carpenters & Joiners of Am., Local No. 33*, 126 F.R.D. 422, 426 (D. Mass. 1989) (finding no implied waiver where plaintiff made a claim for only garden variety mental distress, “not a claim of psychic injury or psychiatric disorder resulting from the alleged discrimination”). See also *Smith*, *supra* note 2, at 112.

One of the first cases after *Jaffee* to take the middle ground was *Santelli v. Electro-Motive*.<sup>149</sup> There, a Title VII plaintiff sought damages for “humiliation, embarrassment, and other similar emotions.”<sup>150</sup> The court found that these allegations were limited to those emotions “she experienced essentially as the intrinsic result of the defendant’s alleged conduct,” and she was “barred from introducing evidence of any resulting symptoms or conditions that she might have suffered.”<sup>151</sup> She could not introduce evidence of, for example, “sleeplessness, nervousness, depression.”<sup>152</sup> As long as she stayed within the court’s parameters for her emotional distress damages claim, she could avoid waiver. The court found that these limitations made the privileged communications no longer relevant.<sup>153</sup>

A New York district court adopted the garden variety approach to balance the purpose of the privilege and the goals of the civil rights laws.<sup>154</sup> The court noted that in many of the so-called broad view cases, it was clear the plaintiff claimed more than garden variety emotional distress damages.<sup>155</sup> These decisions were therefore consistent with a garden variety approach. The court further noted that finding a waiver whenever the plaintiff sought incidental emotional distress damages would be inconsistent with the purpose of the privilege and contrary to the policy to allow redress for emotional distress caused by statutory and constitutional violations.<sup>156</sup> Similarly, another court adopting the garden variety approach stated that “[t]o hold otherwise would mean that privilege would be waived routinely in any case where a plaintiff sought recompense for the ordinary pain and suffering experienced in response to adverse employment actions that the plaintiff claims are illegal.”<sup>157</sup>

Concerns about routine findings of waiver even for “incidental” or “intrinsic” emotional distress damages seem to underlie the garden variety approach. But defining the garden has proven difficult. As one court recently noted:

The problem in these cases is definitional and stems from the imprecision and elasticity of the phrase “garden variety.” The courts’ formulations vary, but the thought they seek to convey is the same. Garden variety emotional damages are: “the distress that any healthy, well-adjusted person would likely feel as a result of being so victimized”; “the generalized insult, hurt feelings and lingering resentment which anyone could be expected to feel” given the defendant’s conduct; the “normal distress experienced as a result of the [claimed injury]”; “the negative

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<sup>149</sup> 188 F.R.D. 306 (N.D. Ill. 1999).

<sup>150</sup> *Id.* at 309.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Ruhlmann v. Ulster Cnty. Dep’t of Soc. Servs.*, 194 F.R.D. 445, 450 (N.D.N.Y. 2000).

<sup>155</sup> *Id.* at 449.

<sup>156</sup> *Id.* at 451.

<sup>157</sup> *St. John v. Napolitano*, 274 F.R.D. 12, 19 (D.D.C. 2011).

emotions that [plaintiff] experienced essentially as the intrinsic result of the defendant’s alleged conduct,” but not the “resulting symptoms or conditions that she might have suffered”; the “generalized insult, hurt feelings, and lingering resentment that does not involve a significant disruption of the plaintiff’s work life and rarely involves more than a temporary disruption of the claimant’s personal life”; the “ordinary or commonplace,” “simple or usual”; those that do not involve psychological treatment or adversely affect any “particular life activities”; those where the plaintiff describes his or her distress “in vague or conclusory terms,” but does not describe “the[ir] severity or consequences”; or those that involve the general pain and suffering and emotional distress one feels at the time of the complained-of conduct, but not any ongoing emotional distress.<sup>158</sup>

In 2011, a D.C. federal judge suggested a five-factor test borrowed from the case law on whether a plaintiff’s mental condition is “in controversy” for purposes of a court-ordered mental evaluation under Federal Rule of Civil Procedure 35.<sup>159</sup> These factors are:

(1) a cause of action for intentional or negligent infliction of emotional distress; (2) an allegation of a specific mental or psychiatric injury or disorder; (3) a claim of unusually severe emotional distress; (4) plaintiff’s offer of expert testimony to support a claim of emotional distress; and/or (5) plaintiff’s concession that his or her mental condition is “in controversy.”<sup>160</sup>

These factors—at least the first four—are similar to those noted by the D.C. Circuit in *Koch*,<sup>161</sup> and to those noted by the New York district court in *Ruhlman v. Ulster County Department of Social Services*<sup>162</sup> in its close reading of the “broad view” cases.<sup>163</sup>

Yet judicial opinion is hardly uniform, and even among those who adopt the garden variety approach, courts remain free to weed the garden as they will.<sup>164</sup>

## II. AN ALTERNATIVE ANALYSIS

### A. *A Critique of the Garden Variety Approach*

The garden variety approach may seem like a reasonable compromise that allows some recovery for emotional distress without a waiver of the privilege. but the approach has some insidious problems. It privileges plaintiffs

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<sup>158</sup> *Flowers v. Owens*, 274 F.R.D. 218, 225-26 (N.D. Ill. 2011) (alteration in original) (footnote omitted) (citations omitted).

<sup>159</sup> *St. John*, 274 F.R.D. at 19.

<sup>160</sup> *Id.* (quoting *Turner v. Imperial Stores*, 161 F.R.D. 89, 95 (S.D. Cal. 1995)) (internal quotation marks omitted).

<sup>161</sup> 489 F.3d 384, 390 (D.C. Cir. 2007).

<sup>162</sup> 194 F.R.D. 445 (N.D.N.Y. 2000).

<sup>163</sup> *Id.* at 449 (noting that courts find waiver when plaintiffs assert separate claims for negligent or intentional emotional distress, or when they claim specific or severe emotional disorders or diagnoses).

<sup>164</sup> *See, e.g., In re Consol. RNC Cases*, 2009 WL 130178, at \*7 (S.D.N.Y. Jan. 8, 2009) (finding a long list of emotional distress damages, involving multiple plaintiffs, to be beyond garden variety).

who have never sought psychotherapeutic counseling, those who were not particularly harmed emotionally by the alleged conduct, and also those whose allegations of mental suffering strike the district court as “normal.” The first group obviously does not need the psychotherapist-patient privilege, while membership in the second and third groups is hard to predict since it depends on the court’s view of normal and ordinary. As more and more Americans seek counseling, this approach is unrealistic and unworkable. Moreover, the idea of “ordinary” emotional distress in the context of civil rights litigation undermines the very goals of federal civil rights and mental health legislation.

The touchstone of “ordinary,” “intrinsic,” or “normal” emotional harm has no firm basis in reality. “‘Garden-variety emotional distress’ is a legal term, not a psychiatric term . . . .”<sup>165</sup> It is no more than judicial intuition about what seems to be the right amount of injury attributable to the defendant. Judges are thus imagining what an ordinary person would experience as a result of the statutory or constitutional violation. What basis is there for such imaginings? Who is the reasonably mentally distressed person? Does reasonableness take into account differences in perception and experience that might exist among genders and races?<sup>166</sup> What is the “intrinsic effect” of discriminatory behavior? It is likely much more severe than judges, especially those from privileged backgrounds, usually imagine.<sup>167</sup> Should the judge be imagining the effects on a reasonable member of the protected class who has experienced the typical amount of discrimination in the past?

What is “normal” will vary with life experiences, and the “ordinary” effect of discrimination may be greater than judges imagine precisely because of the very wrongs against which civil rights legislation was intended. Any concept of “normal emotional distress” needs to take into account the cumulative impact of discrimination over a lifetime. One study showed that day-to-day perceived discrimination was “related to the development of distress and diagnoses of generalized anxiety and depression.”<sup>168</sup> In a 2001 report, the surgeon general concluded, “the findings indicate that racism and discrimination are clearly stressful events. Racism and discrimination adversely affect health and mental health, and they place minorities *at risk for*

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<sup>165</sup> Smith, *supra* note 2, at 112. “Few courts make any effort to justify the vegetarian metaphor in terms of the policy of the privilege.” 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5543 (Supp. 2013).

<sup>166</sup> See Kim L. Kirn, *The “Reasonable Woman” Standard in Sexual Harassment Cases*, 81 ILL. B.J. 404, 404 (1993).

<sup>167</sup> U.S. Dep’t of Health & Human Servs., *Mental Health: Culture, Race, and Ethnicity—A Supplement to Mental Health: A Report of the Surgeon General*, NAT’L CTR. FOR BIOTECH. INFO., 25-39 (2001), <http://www.ncbi.nlm.nih.gov/books/NBK44243/pdf/TOC.pdf>.

<sup>168</sup> *Id.* at 38.



mental disorders such as depression and anxiety.”<sup>169</sup> It follows that the ordinary, normal victim of discrimination is a figment of judicial imaginations; it conjures up the image of a person who has never experienced discrimination but who is suddenly the victim of a discriminatory episode.

The potential conflict between the objective reasonable person standard and the plaintiff’s particular gender, race, or other circumstances has been long litigated when determining liability for sexual harassment or hostile workplace claims. In this context, many argue that the defendant’s conduct should be viewed from the standpoint of the reasonable woman.<sup>170</sup> The defendant’s conduct is to be viewed from both an objective and subjective perspective, considering the plaintiff’s circumstances.<sup>171</sup> The notion of garden variety emotional distress is in conflict with this approach toward liability—it amounts to a yardstick based on privilege, a kind of discrimination in itself that tells the plaintiff something is wrong with her if she claims to have suffered more than what is reasonable according to the dominant group.

The concept of a “normal” amount of distress also reflects a bias against those with emotional problems, perpetuating the stigma that still applies to mental health patients. Yet federal policy is to eliminate bias and discrimination against those with mental disabilities,<sup>172</sup> and to destigmatize mental health treatment.<sup>173</sup> According to the Substance Abuse and Mental Health Services Agency, one of the government’s goals is to reduce or eliminate “[t]he stigma that surrounds both mental illnesses and seeking care for mental illnesses.”<sup>174</sup> The garden variety approach to waiver undercuts this goal because it perpetuates the idea of what is normal or expected in a certain situation, but with no empirical basis. In many formulations of the approach, a diagnosis takes the claim for emotional distress beyond garden variety.<sup>175</sup> The garden variety approach tells plaintiffs who have a diagnosis that their emotional distress is beyond what is normal and reasonable, reinforcing bias and the stigma of mental health treatment.

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<sup>169</sup> *Id.* (citation omitted). In a related vein, victims of child sexual abuse may be more susceptible to later sexual abuse or harassment:

Recent research indicates that a number of psychosocial problems—including chronic depression and anxiety, isolation and poor social adjustment, substance abuse, suicidal behavior, and involvement in physically or sexually abusive relationships as either aggressor or victim—are more common among adults molested as children than among those with no such childhood experiences. Victims of sexual abuse can suffer an impaired ability to critically evaluate the motives and behavior of others, making them more vulnerable to revictimization.

*J.S. v. R.T.H.*, 714 A.2d 924, 932 (N.J. 1998).

<sup>170</sup> See generally Jane Goodman-Delahunty, *Pragmatic Support for the Reasonable Victim Standard in Hostile Workplace Sexual Harassment Cases*, 5 *Psychol. Pub. Pol’y & L.* 519, 531 (1999).

<sup>171</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (“[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’” (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993))).

<sup>172</sup> 42 U.S.C. § 12101 (2006).

<sup>173</sup> See, e.g., *The Federal Mental Health Action Agenda*, *supra* note 67.

<sup>174</sup> *Id.*

<sup>175</sup> See, e.g., *Santelli v. Electro-Motive*, 188 F.R.D. 306, 309 (N.D. Ill. 1999).

Not only does the garden variety approach perpetuate bias, but it reintroduces the uncertainty that the *Jaffe* Court sought to eliminate when it said that courts should not balance relevance and privacy. Measured by the judge or magistrate's personal yardstick of normal emotional distress, the garden variety standard is unknowable in advance. Predictability was exactly what the *Jaffe* Court sought to establish with the psychotherapist-patient privilege: "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."<sup>176</sup> The lack of binding authority on the proper standard for implied waiver has reintroduced uncertainty into the law of the psychotherapist-patient privilege. The garden variety approach does not reduce this uncertainty.

In part due to this uncertainty, a plaintiff who wishes to maintain the privilege will have to avoid mention of any particular diagnosis or symptoms, since diagnosis or particular symptoms are usually seen as indications of more than garden variety distress. Yet as insurance coverage for mental health treatment becomes more common, more people will receive diagnoses.<sup>177</sup> Plaintiffs who have received treatment and a diagnosis must decide whether to introduce that diagnosis or to leave it out so as to be sure to maintain confidentiality of their records.

In fact, the garden variety approach encourages plaintiffs to "white-wash" and fictionalize their mental condition by leaving out important and truthful information in order to preserve the privilege. Several cases show how awkward this can be. In *Flowers v. Owens*,<sup>178</sup> for example, the district court denied the plaintiff's motion for a protective order because the court was not satisfied that the plaintiff would limit his testimony to what it deemed garden variety emotional distress.<sup>179</sup> The plaintiff had testified in a deposition that he was afraid to leave his house because he was afraid he might encounter the police (defendants) who he said had beat him while he was in jail.<sup>180</sup> He had also said that whenever he saw any of the defendants it "[brought] back what happened."<sup>181</sup> The court stated that such testimony sounded like the symptoms of agoraphobia or post-traumatic stress disorder, and it also found other parts of his testimony to go beyond garden variety emotional distress.<sup>182</sup> The court concluded that the plaintiff could only maintain his privilege if he did not repeat such testimony at trial and confined himself to "the kind of simple, usual, and ordinary emotions approved by the [garden variety

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<sup>176</sup> *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)) (internal quotation marks omitted).

<sup>177</sup> See *supra* Part I.B.2.

<sup>178</sup> 274 F.R.D. 218 (N.D. Ill. 2011).

<sup>179</sup> *Id.* at 229.

<sup>180</sup> *Id.* at 220-21.

<sup>181</sup> *Id.* at 221.

<sup>182</sup> *Id.* at 227.

approach] cases.”<sup>183</sup> The court acknowledged that the limitation might prevent him from recovering the full amount of his damages but concluded the choice was the plaintiff’s whether to limit testimony or to waive the privilege and seek full recovery.<sup>184</sup>

The court in *Santelli v. Electro-Motive* ruled similarly. As in *Flowers*, the plaintiff had agreed to limit her testimony to garden variety distress in order to maintain her privilege.<sup>185</sup> The court stated that she could proceed as follows:

She will be precluded at trial from introducing the fact or details of her treatment; she may not offer evidence through any witness about symptoms or conditions that she suffered (*e.g.*, sleeplessness, nervousness, depression); and she will not be permitted to offer any evidence regarding a medical or psychological diagnosis. Rather, she will be permitted to testify only that she felt humiliated, embarrassed, angry or upset because of the alleged discrimination.<sup>186</sup>

One wonders how these limitations on testimony might affect a plaintiff’s credibility and demeanor as the witness struggles to stay within the garden boundaries. But these plaintiffs are in a bind—if they waive the privilege and allow the defendants to reveal the full extent of their mental health treatment, they may also have credibility problems with the jury. The plaintiffs in these, and other,<sup>187</sup> cases chose to maintain the privilege rather than seek full recovery for their emotional distress.

The garden variety approach allows those who were less harmed, and those who do not have serious psychological issues, to claim the privilege, while forcing those who most value the privilege—those with significant mental distress—to choose between claiming their actual damages and waiving the privilege or simply claiming an “ordinary” amount. The approach perpetuates the stigma associated with mental health treatment and reinforces a biased perspective, thereby undercutting important federal policies against discrimination and bias. It creates uncertainty about privacy rights and encourages plaintiffs to fictionalize their mental state.

The garden variety approach creates difficulties for defendants as well. The standard of “normal” damages is equally unknowable and unpredictable for defendants. Moreover, even when a plaintiff’s damage claims are deemed garden variety, the jury can award up to the statutory limits, although a court may reduce the award if it finds it excessive.<sup>188</sup> Defendants thus remain at

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<sup>183</sup> *Id.* at 229.

<sup>184</sup> *Flowers*, 274 F.R.D. at 229.

<sup>185</sup> *Santelli v. Electro-Motive*, 188 F.R.D. 306, 309 (N.D. Ill. 1999).

<sup>186</sup> *Id.*

<sup>187</sup> *See, e.g., In re Sims*, 534 F.3d 117, 136 (2d Cir. 2008); *Koch v. Cox*, 489 F.3d 384, 388 (D.C. Cir. 2007). In both cases, the plaintiffs abandoned claims for emotional distress in an effort to maintain their psychotherapist privilege.

<sup>188</sup> *See, e.g., Rainone v. Potter*, 388 F. Supp. 2d 120, 126 (E.D.N.Y. 2005) (reversing an award of \$150,000 for what the trial court deemed garden variety emotional distress).

risk for the full amount but are limited in what evidence they can discover—the court’s qualitative determination has no effect on the quantitative risk.

### B. “Reason and Experience” Analysis under Rule 501

The forgoing critique shows how the garden variety approach undermines key policy goals of the civil rights statutes. This policy critique is also an important consideration under a Rule 501 analysis of implied waiver under *Jaffee*. The courts have generally not engaged in such an analysis, in the apparent belief that implied waiver is a separate issue from that addressed in *Jaffee* (whether to recognize a privilege under Rule 501). But there is an argument for following the path laid down in *Jaffee*: the question of implied waiver is really about the scope of the privilege itself, and so it makes sense to recur to the *Jaffee* approach to determine the contours of waiver and privilege. Such an approach entails ascertaining the public good served by the privilege and looking to sources such as the Proposed Federal Rules of Evidence as well as the laws of the states.<sup>189</sup>

As the Court said, its job under Rule 501 is to “define new privileges by interpreting ‘common law principles . . . in the light of reason and experience.’”<sup>190</sup> “[T]he common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.”<sup>191</sup> The Court also referred to the notion of a “public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”<sup>192</sup>

#### 1. The Public Good: Not Just Mental Health, but Civil Rights

The Court first addressed the policy question of whether there was a public good sufficient to justify the privilege, and it found one in promoting mental health through confidential psychotherapy.<sup>193</sup> As some lower courts have noted, this same public good is implicated in the issue of implied waiver.<sup>194</sup> Potential plaintiffs may not seek the help they need if there is uncertainty about confidentiality.

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<sup>189</sup> The Court conducted a somewhat similar analysis in *Trammel v. United States*, 445 U.S. 40 (1980), ultimately limiting the privilege against adverse spousal testimony to the testifying spouse. There, the Court looked at the historical foundations of the privilege, its erosion in the states, and the policy reasons for limiting it.

<sup>190</sup> *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996) (quoting FED. R. EVID. 501).

<sup>191</sup> *Id.* (quoting *Funk v. United States*, 290 U.S. 371, 383 (1933)) (internal quotation marks omitted).

<sup>192</sup> *Id.* at 9 (quoting *Trammel*, 445 U.S. at 50) (internal quotation marks omitted).

<sup>193</sup> *Id.* at 2.

<sup>194</sup> *Fitzgerald v. Cassil*, 216 F.R.D. 632, 639 (N.D. Cal. 2003) (stating that broad or garden variety approaches would introduce uncertainty to the privilege and undermine the purpose of the privilege);

An additional public good is also implicated, however, in the context of federal civil rights lawsuits: the vindication of civil rights through citizens acting as "private attorneys general."<sup>195</sup> The civil rights laws<sup>196</sup> exist not only to create private rights of action but to encourage citizens to seek redress for acts of discrimination so that all of society might benefit. Since the 1960s, Congress has expanded civil rights protection to persons with disabilities<sup>197</sup> and defined sex discrimination to include discrimination on the basis of pregnancy.<sup>198</sup> Congress has repeatedly demonstrated the public importance of the statutory civil rights goals through various provisions, such as those allowing attorney fees to prevailing plaintiffs,<sup>199</sup> creating the Equal Employment Opportunity Commission with the authority to enforce employment civil rights,<sup>200</sup> and charging the Department of Housing and Urban Development with enforcement of the fair housing laws.<sup>201</sup> To further encourage victims to seek relief, Congress amended the law in 1991 to allow for compensatory damages, including emotional distress.<sup>202</sup> The law of implied waiver of the psychotherapist-patient privilege directly affects the enforcement mechanisms Congress has enacted.

As one district court judge put it, "To condition recovery for emotional distress incidental to the violation of federal constitutional and statutory rights upon the surrender of the protection of the psychotherapist privilege is also antithetical to the purpose of the laws that provide redress for such violations."<sup>203</sup> The need to further the public good of vindicating civil rights supports a narrow view of waiver.

## 2. The Work of the Advisory Committee

In support of its public good analysis, the *Jaffee* Court also looked to the Proposed Federal Rule of Evidence 504 and the Advisory Committee's

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Ruhlmann v. Ulster Cnty. Dep't of Soc. Servs., 194 F.R.D. 445, 451 (N.D.N.Y. 2000) (noting that the broad approach to waiver would undermine the goal of facilitating successful mental health treatment).

<sup>195</sup> A private attorney general is one who "vindicat[es] a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam). "A civil rights plaintiff who obtains meaningful relief has corrected a violation of federal law and, in so doing, has vindicated Congress's statutory purposes." *Fox v. Vice*, 131 S. Ct. 2205, 2214 (2011).

<sup>196</sup> See *supra* note 50.

<sup>197</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12101-12134 (2006).

<sup>198</sup> Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006).

<sup>199</sup> See 42 U.S.C. § 1988 (2006). "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

<sup>200</sup> See 42 U.S.C. § 2000e-5 (2006).

<sup>201</sup> See Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3616 (2006).

<sup>202</sup> 42 U.S.C. § 1981a(b)(3) (2006).

<sup>203</sup> *Ruhlmann v. Ulster Cnty. Dep't of Soc. Servs.*, 194 F.R.D. 445, 451 (N.D.N.Y. 2000).

notes on that rule.<sup>204</sup> As noted earlier, Proposed Rule 504, rejected by Congress, contained the following exception:

There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.<sup>205</sup>

This “patient-litigant exception” had already been established as part of federal law and was the prevailing rule in the states—although its exact parameters had not been established.<sup>206</sup> The *Jaffee* Court did not mention this exception. The Advisory Committee Notes say only that “[b]y injecting his condition into litigation, the patient must be said to waive the privilege, in fairness and to avoid abuses.”<sup>207</sup> Presumably, the Advisory Committee relied on the common law in including this exception.<sup>208</sup>

The exception in the proposed rules was presented by the Court in 1972. It contains no mention of civil rights litigation, and indeed, it was drafted before several important Civil Rights amendments and statutes, including the ADA, the Pregnancy Discrimination Act, and of course the 1991 Act that allowed litigants to seek compensatory damages. It is fair to say that the drafters of the rule did not consider how the patient-litigant exception would affect the policies of those statutes. Thus, the proposed rule should carry less weight with respect to implied waiver in civil rights cases than with respect to the existence of the privilege in the first place.

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<sup>204</sup> The Advisory Committee's role in the development of the Rules of Evidence is as follows: The rule-making path usually begins when the appropriate Advisory Committee prepares a draft rule or proposed change to a rule. The committee's reporter “prepares the initial drafts of rules changes and ‘Committee Notes’ explaining their purpose or intent.” The Advisory Committee as a whole reviews the draft, revises it, and sends it on to the Standing Committee on Rules of Practice and Procedure (Standing Committee).

The Standing Committee either accepts, rejects, or modifies the proposed rule submitted by the Advisory Committee. If the Standing Committee approves the draft, it transmits the proposed rule and the Advisory Committee Notes to the Judicial Conference. In turn, the Judicial Conference transmits its recommendations to the United States Supreme Court. The Court reviews the rule changes, modifies them if it wishes, and transmits them to Congress through an Order of the Court. Congress then has a period of time to review the rules and either modify or reject them. If Congress does not act on the rules, they go into effect as transmitted by the Court. This basic pattern has been followed since the passage of the Rules Enabling Act, but was amended in 1988 to open the Advisory Committee and Standing Committee meetings to the public, to provide for extended periods of public comment, and to provide for a longer period of congressional review.

Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283, 1288-90 (1995) (footnotes omitted) (quoting Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 329 (1991)).

<sup>205</sup> Proposed Federal Rule of Evidence 504, 56 F.R.D. 183, 241 (1973).

<sup>206</sup> See Poulin, *supra* note 39, at 1345-47.

<sup>207</sup> Proposed Federal Rule of Evidence 504, 56 F.R.D. 183, 244 (1973).

<sup>208</sup> “The Notes disclose a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary.” *Tome v. United States*, 513 U.S. 150, 160 (1995).

On the other hand, the Advisory Committee’s more recent efforts with the question of waiver of the attorney-client privilege should be considered part of the “reason and experience” analysis.<sup>209</sup> Federal Rule of Evidence 502 was proposed in 2007 to address confusion in the courts about the scope of waiver resulting from disclosure of some privileged materials.<sup>210</sup> Some courts held that any disclosure, whether intentional or inadvertent, waived the privilege with respect to the entire subject matter of the disclosed material. The rule makes clear that

a voluntary disclosure in a federal proceeding . . . if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver . . . is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.<sup>211</sup>

The rule also provides a route for a party to rectify an inadvertent disclosure.<sup>212</sup>

Rule 502 was prompted in part by complaints about the additional litigation costs to parties trying to maintain the attorney-client privilege, and by the need for certainty about the scope of the privilege and waiver.<sup>213</sup> The rule deals only with waiver through disclosure and does not affect other common law waiver doctrines—such as waiver by asserting an “advice of counsel” defense, or the waiver that accompanies an allegation of malpractice.<sup>214</sup> Nevertheless, the rule supports the idea that the scope of waiver can be a proper subject for a rule or statute, and that expense, confusion, and uncertainty are reasons for such codification.

### 3. The Experience of the States

After considering the proposed rule and Advisory Committee Notes, the *Jaffee* Court consulted the laws of the fifty states. The Court noted, “Because state legislatures are fully aware of the need to protect the integrity of the

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<sup>209</sup> *Jaffee v. Redmond*, 518 U.S. 1, 6 (1996) (internal quotation marks omitted).

<sup>210</sup> FED. R. EVID. 502 advisory committee’s note.

<sup>211</sup> *Id.*

<sup>212</sup> FED. R. EVID. 502(b).

<sup>213</sup> FED. R. EVID. 502 advisory committee’s note.

<sup>214</sup> “Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product.” *Id.* See also *Nguyen v. Excel Corp.*, 197 F.3d 200, 205 (5th Cir. 1999) (reliance on an advice-of-counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Byers v. Burleson*, 100 F.R.D. 436, 440 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). “The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.” FED. R. EVID. 502 advisory committee’s note.

factfinding functions of their courts, the existence of a consensus among the States indicates that ‘reason and experience’ support recognition of the privilege.”<sup>215</sup> All of the states had recognized the privilege by the time of *Jaffee*, although the laws varied in scope.<sup>216</sup>

Similarly, almost every state recognizes some kind of implied waiver. But, unfortunately, there is no clear state consensus on the approach to implied waiver, just as there is none among the federal courts. The great majority of states have a patient-litigant exception of some sort, usually statutory. While many model their statutory exception on Proposed Rule 504(d)(3), an equal number have their own variation.<sup>217</sup> A sizable minority have statutes that put the psychotherapist privilege on the same footing as the attorney-client privilege.<sup>218</sup>

Many states have no published judicial interpretation of their statutes. State trial courts, unlike federal trial courts, generally do not publish their decisions—thus we do not know whether the issue arises as frequently in state trial courts as it does in federal district courts. But it appears that, just as in the federal system, state implied waiver issues rarely reach the appellate level. Nevertheless, it is instructive to look at the various state approaches.<sup>219</sup>

Fifteen states have created statutory exceptions to the psychotherapist-patient privilege based on the language of Proposed Rule 504(d)(3).<sup>220</sup> Most of these states have no binding judicial interpretation of the exception, so litigants in those states cannot be sure what it means to “rel[y] upon a condition as an element of [a] claim or defense.” The Hawaii Intermediate Court of Appeals has made it clear, however, that more than relevance is required, and that the condition must be significant: “In this context, ‘mental or emotional condition’ means something that requires ‘diagnosis or treatment.’”<sup>221</sup>

A similar number of states have patient-litigant exceptions that differ somewhat from the proposed rule. For example, the Rhode Island statute defines “mental condition” as “including, but not limited to, any allegation of mental anguish, mental suffering or similar condition . . . provided . . . that a claim for damages or other relief for ‘pain and suffering’ [is] based solely on

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<sup>215</sup> *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996).

<sup>216</sup> Justice Scalia pointed out in dissent that of those states that have some sort of privilege, “the diversity is vast.” *Id.* at 33 (Scalia, J., dissenting).

<sup>217</sup> See Smith, *supra* note 2, at 97 n.98.

<sup>218</sup> *Id.* at 108.

<sup>219</sup> I’ve confined this analysis to exceptions relevant to the issue of implied waiver in torts and civil rights cases. Many states have codified additional exceptions for family, criminal, and civil commitment cases. Those exceptions are beyond the scope of this Article.

<sup>220</sup> ALASKA R. EVID. 504; ARK. R. EVID. 503; DEL. R. EVID. 503; FLA. STAT. ANN. § 90.503(4)(c) (West 2006); IDAHO R. EVID. 503; ME. R. EVID. 503; MICH. COMP. LAWS SERV. § 330.1750 (LexisNexis 2005); NEB. REV. STAT. ANN. § 27-504 (2007); N.M. R. EVID. 11-504; N.D. R. EVID. 503; OR. REV. STAT. § 40.230 (1999); UTAH R. EVID. 506; VT. R. EVID. 503; WIS. STAT. ANN. § 905.04 (West 2010).

<sup>221</sup> *Sussman v. Sussman*, 146 P.3d 597, 603 (Haw. Ct. App. 2006) (holding that a wife did not waive the privilege simply by seeking custody so that her mental condition became relevant).



one's physical condition."<sup>222</sup> Oklahoma's statute modifies the proposed federal exception by providing that the privilege is "qualified," rather than eliminated, when the patient relies on his mental condition as an element of a claim or defense.<sup>223</sup>

A handful of state statutes refer explicitly to findings by the judge. The relevant Connecticut statute says that communications are not privileged if the patient "introduces his psychological condition as an element of his claim or defense" and "the judge finds that it is more important to the interests of justice that the communications be disclosed than that the relationship between the person and psychologist be protected."<sup>224</sup> Massachusetts' statute is similar.<sup>225</sup> On the other hand, Virginia, West Virginia, and North Carolina statutes appear to give the judge discretion to order disclosure even where the client's mental condition is not an element of a claim or defense.<sup>226</sup>

Some states seem to take a broad approach to the question of implied waiver. The Kentucky Supreme Court, for example, held that a claim for "mental pain" was sufficient to waive the privilege.<sup>227</sup> Similarly, Louisiana plaintiffs in a wrongful death case were deemed to have waived the privilege simply by seeking "mental anguish damages."<sup>228</sup> A Washington appellate court recently held that a plaintiff seeking damages for emotional harm arising from an employment discrimination claim had waived the privilege even though he did not plan to offer a specific diagnosis or expert testimony.<sup>229</sup>

Some states have indicated that the issue of implied waiver should be approached narrowly. The New Jersey Supreme Court, noting that the statute equated the psychotherapist-patient privilege with the attorney-client privilege, has adopted a three-part test to determine the scope of implied waiver

<sup>222</sup> R.I. GEN. LAWS ANN. § 5-37.3-6(B)(1) (WEST 2013).

<sup>223</sup> OKLA. STAT. ANN. tit. 12, § 2503 (West 2013).

<sup>224</sup> CONN. GEN. STAT. ANN. § 52-146c(c)(2) (West 2013).

<sup>225</sup> MASS. GEN. LAWS ANN. ch. 233, § 20B(d) (West 2000).

<sup>226</sup> Virginia law states,

[W]hen the physical or mental condition of the client is at issue in such action, or when a court, in the exercise of sound discretion, deems such disclosure necessary to the proper administration of justice, no fact communicated to, or otherwise learned by, such practitioner in connection with such counseling, treatment or advice shall be privileged, and disclosure may be required.

VA. CODE ANN. § 8.01-400.2 (West 2001). In West Virginia, disclosure of privileged material may be required "[p]ursuant to an order of any court based upon a finding that the information is sufficiently relevant to a proceeding before the court to outweigh the importance of maintaining the confidentiality established by this section." W. VA. CODE ANN. § 27-3-1(b)(3) (LexisNexis 2008). In North Carolina, the law provides that "[a]ny resident or presiding judge in the district in which the action is pending may, subject to G.S. 8-53.6, compel disclosure, either at the trial or prior thereto, if in his or her opinion disclosure is necessary to a proper administration of justice." N.C. GEN. STAT. ANN. § 8-53.3 (West 2013).

<sup>227</sup> Dudley v. Stevens, 338 S.W.3d 774, 777 (Ky. 2011).

<sup>228</sup> Prine v. Bailey, 964 So. 2d 435, 443 (La. Ct. App. 2007).

<sup>229</sup> Lodis v. Corbis Holdings, Inc., 292 P.3d 779, 790-91 (Wash. Ct. App. 2013). The court cited *Oberweis* and *Fitzgerald* and analogized the psychotherapist-patient privilege to the doctor-patient privilege, which under state law is waived by filing suit for physical injury.

and requires in camera review before the material is released.<sup>230</sup> In Arizona, where the statute also analogizes to the attorney-client privilege, a court of appeals similarly has emphasized the limited scope of an implied waiver and the propriety of in camera review.<sup>231</sup> The Supreme Court of Alabama was unwilling to adopt a patient-litigant exception where the statute contained none: “[w]e hold that by merely alleging mental anguish and emotional distress the plaintiffs in these cases have not waived the psychotherapist-patient privilege . . . .”<sup>232</sup> And California’s Supreme Court has interpreted broad statutory language<sup>233</sup> quite narrowly:

In light of these considerations, the “automatic” waiver of privilege contemplated by section 1016 must be construed not as a complete waiver of the privilege but only as a limited waiver concomitant with the purposes of the exception. Under section 1016 disclosure can be compelled only with respect to *those mental conditions* the patient-litigant has “disclose[d] \* \* \* by bringing an action in which *they* are in issue”; communications which are not directly relevant to those specific conditions do not fall within the terms of section 1016’s exception and therefore remain privileged. Disclosure cannot be compelled with respect to other aspects of the patient-litigant’s personality even though they may, in some sense, be “relevant” to the substantive issues of litigation. The patient thus is not obligated to sacrifice all privacy to seek redress for a specific mental or emotional injury; the scope of the inquiry permitted depends upon the nature of the injuries which the patient-litigant himself has brought before the court.<sup>234</sup>

Finally, there are states that seem to take the middle-ground, or garden variety, approach. The reasoning of a Colorado court is similar to that seen in the federal cases:

[The plaintiff] has not made any independent tort claims for either intentional or negligent infliction of emotional distress, in which the question of liability would turn on her mental condition and the cause of it. She did not seek counseling for any emotional issues related to the accident. She does not seek compensation for the expenses incurred in obtaining either psychiatric counseling or marriage counseling. And finally, she does not plan to call any expert witnesses to testify about her mental suffering. Under these circumstances, we hold that bare allegations of mental anguish, emotional distress, pain and suffering, and loss of enjoyment of life are insufficient to inject a plaintiff’s mental condition into a case as the basis for a claim where the mental suffering alleged is incident to the plaintiff’s physical injuries and does not exceed the suffering and loss an ordinary person would likely experience in similar circumstances. Here, the mental suffering for which [plaintiff] claims damages is incident to her physical injuries and does not exceed the suffering and loss an ordinary person would likely expe-

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<sup>230</sup> *Kinsella v. Kinsella*, 696 A.2d 556, 569-70 (N.J. 1997).

<sup>231</sup> *Blazek v. Superior Court*, 869 P.2d 509, 515-16 (Ariz. Ct. App. 1994).

<sup>232</sup> *Ex parte W. Mental Health Ctr.*, 884 So. 2d 835, 841 (Ala. 2003).

<sup>233</sup> “There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by: (a) The patient; [or] (b) Any party claiming through or under the patient . . . .” CAL. EVID. CODE § 1016 (West 2009).

<sup>234</sup> *In re Lifschutz*, 467 P.2d 557, 570 (Cal. 1970) (alterations in original) (footnote omitted) (citation omitted).

rience in similar circumstances. Thus, the trial court may not find an implied waiver of [plaintiff's] physician-patient or psychotherapist-client privileges based on the fact that she has made these claims for mental suffering damages.<sup>235</sup>

Missouri has taken a similar approach, holding that “[a] person claiming emotional distress damages for sex discrimination and sexual harassment” retains the privilege where “her claim is only for such emotional distress and humiliation that an ordinary person would experience under the circumstances or that may be inferred from the circumstances, and . . . is not to be supported by any evidence of medical or psychological treatment for a diagnosable condition.”<sup>236</sup> Massachusetts, New Hampshire, and Texas have also applied what appears to be the garden variety approach.<sup>237</sup> These courts, like their federal counterparts, rely on concepts of “generic,” normal, or ordinary mental distress.

The lack of state consensus on the approach to implied waiver illustrates how strong the arguments are on every side of the debate between fairness to defendants, privacy, and vindication of civil rights. Although almost all states recognize some kind of implied waiver, they do not speak with one voice on its definition or scope. Unlike in the federal system, we cannot know what the trends are in the state trial courts, and not all states have appellate decisions in this area.

Thus, a “reason and experience” analysis suggested by *Jaffee* gives us no conclusive answer on the question of implied waiver of the privilege. Although such an analysis helps identify an additional public good in the context of civil rights litigation, the Advisory Committee’s experience, and that of the states, is mixed—reflecting the continuing conflict between privacy rights and fairness.

Perhaps one lesson from this analysis, however, is that waiver is a proper subject for statute or court rule. Only a few states leave it entirely up to a judge to balance competing interests.<sup>238</sup> Thus, with a statute, and perhaps a controlling court decision interpreting the statute, some state litigants have a measure of certainty about the waiver question—a certainty that federal litigants lack. The experience with Rule 502 governing waiver of the attorney-client privilege also supports a legislative solution where the federal courts are in disagreement.

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<sup>235</sup> *Johnson v. Trujillo*, 977 P.2d 152, 157 (Colo. 1999) (en banc).

<sup>236</sup> *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 569 (Mo. 2006) (en banc).

<sup>237</sup> See *Sorenson v. H & R Block, Inc.*, 197 F.R.D. 199, 204 (D. Mass. 2000) (applying Massachusetts law); *Desclos v. S. N.H. Med. Ctr.*, 903 A.2d 952, 959 (N.H. 2006) (finding no implied waiver with a claim for “‘generic’ mental suffering that is incident to physical injury”); *In re Whipple*, 373 S.W.3d 119, 124 (Tex. Ct. App. 2012) (“A routine allegation of mental anguish does not place a party’s mental condition in controversy. ‘The plaintiff must assert a mental injury that exceeds the common emotional reaction to an injury or loss.’” (citation omitted) (quoting *Coates v. Whittington*, 758 S.W.2d 749, 753 (Tex. 1988))).

<sup>238</sup> See *supra* note 226.

### III. A LEGISLATIVE OPTION

But what form should a legislative solution take? The most practical solution is to codify the garden variety compromise, without the uncertainty and bias of the judicial version.

A defense advocate might respond to the criticisms of a judicial garden variety approach by saying that if a plaintiff is unhappy with the compromise that conditions the privilege on forgoing more extensive damages, the plaintiff should be prepared to waive the privilege and reveal all; waiver is simply the price for seeking extensive damages. But by linking the privilege to the extent of the damages claimed, this argument incorporates a balancing of interests that the *Jaffe* Court rejected when it established the privilege.

Yet although the garden variety compromise appears inconsistent with *Jaffe's* approach to the privilege, there is something to the related concerns about fairness to defendants, and to tying that concern to the level of damages sought. Civil rights statutes require proof of actual damages,<sup>239</sup> and how is a defendant to rebut a plaintiff's claims—especially claims of extreme emotional distress—without access to relevant evidence? Are not treatment records also relevant to causation? For these reasons, some commentators have embraced a balancing approach to the question of waiver, albeit with stricter adherence to the law of privilege and discovery than what many courts have shown.<sup>240</sup>

For example, Beth Frank, focusing on sexual harassment lawsuits under Title VII, notes that Congress has asserted a strong federal policy of protecting sexual harassment victims' privacy interests.<sup>241</sup> She also emphasizes that Title VII was not intended to provide a tort remedy, but rather to vindicate civil rights by private attorneys general.<sup>242</sup> She therefore advocates a balancing approach much like many courts' formulations of the garden variety theory of waiver.<sup>243</sup> She suggests that courts only find waiver of the psychotherapist privilege by sexual harassment plaintiffs if the plaintiff introduces a portion of her mental health records or the testimony of her treating psychotherapist, or brings additional tort claims such as negligent or intentional infliction of emotional distress.<sup>244</sup>

Professor Deirdre Smith persuasively advocates an exacting application of privilege and waiver law under which the judge steers a careful course through Rule 26's discovery limitations, the definition of privileged communication, and waiver as determined by the plaintiff's affirmative acts.<sup>245</sup> She

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<sup>239</sup> 42 U.S.C. § 1981 (2006).

<sup>240</sup> Smith, *supra* note 2, at 100; Frank, *supra* note 2, at 649 nn.70-71 and accompanying text.

<sup>241</sup> Frank, *supra* note 2, at 641.

<sup>242</sup> *Id.* at 662-64.

<sup>243</sup> *Id.* at 666-68.

<sup>244</sup> *Id.* at 662-64.

<sup>245</sup> Smith, *supra* note 2, at 140-50.

notes that many courts oversimplify the inquiry; they find an implied waiver makes all of the plaintiff's psychotherapeutic records fair game for discovery.<sup>246</sup> She emphasizes that Rule 26 allows courts to limit discovery on grounds of relevance, privacy, embarrassment, and burden.<sup>247</sup> She also argues that courts should pay careful attention to the scope of the privilege;<sup>248</sup> a waiver as to some communications does not necessarily open all of the therapist's files and notes to inspection. Finally, she reminds us that while the burden to show the privilege may be on the party asserting it, the burden to show waiver should rest on the defendant.<sup>249</sup> Waiver should be determined by the plaintiff's affirmative acts rather than changing concerns of relevance or fairness.<sup>250</sup> Thus, she would find waiver where the plaintiff seeks to recover payment for mental health treatment or lists a mental health care provider as a witness—but such waiver would be limited to communication directly related to the waiver.<sup>251</sup> The plaintiff seeking to recover costs of treatment, for example, would waive the privilege as to communications about that cost such as “billing, treatment plan, diagnostic impression, and similar documents,” but not treatment notes.<sup>252</sup>

Smith's proposal is sound and, if followed, would go far to protect plaintiffs' privacy and defendants' interests in fairness. It also has the benefit of being entirely consistent with the existing law of privilege and discovery, and in some senses it provides the compromise between privacy and fairness that underlies the garden variety approach. But because of its nuance, her proposal does not necessarily provide litigants with the certainty they need to avoid endless litigation of the waiver question.<sup>253</sup>

A legislative solution could eliminate much of this uncertainty: allow plaintiffs to select a lower limit on emotional distress damages in exchange for maintaining the privilege. Plaintiffs could then choose between seeking significant, actual damages—which would probably require a waiver of the privilege—and asking for only a modest amount, with no waiver. Such a solution would have to be accomplished by Congress through an amendment to the civil rights laws. In effect, it would be the garden variety compromise, but with predictability for both plaintiffs and defendants. Plaintiffs would regain control over the question of waiver, and defendants would know that if there was no waiver, they had less to risk.

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<sup>246</sup> *Id.* at 82.

<sup>247</sup> *Id.* at 140.

<sup>248</sup> *Id.* at 114-16.

<sup>249</sup> *Id.* at 145.

<sup>250</sup> *Id.* at 146.

<sup>251</sup> Smith, *supra* note 2, at 146.

<sup>252</sup> *Id.*

<sup>253</sup> Another proposal, that trial courts simply review all the psychotherapeutic records in camera and determine what should be disclosed, is similarly unpredictable in its results. It would also require significant judicial and litigant resources. Furthermore, the danger of an unintentional invasion of privacy is great in an era of electronic records and email communication.

Tying the waiver to the dollar amount of damages sought, rather than a vague idea of what is “normal,” would also bring more predictability for both parties. At present, a jury may award any dollar amount within the statutory limits even for garden variety emotional distress, although a court may reduce the award if it finds it excessive.<sup>254</sup>

Giving plaintiffs the option of preserving the privilege by seeking a set lesser amount would let plaintiffs return the focus of litigation to the alleged misconduct, rather than the plaintiff’s actual mental condition. It makes sense to offer plaintiffs what is basically a set penalty for that conduct, a penalty that would not require waiver of the privilege or even a more than cursory assertion of distress. Such an alternative would also be consistent with the purpose of the civil rights laws, which is to create incentives for plaintiffs to combat discrimination and to act as “private attorneys general.”<sup>255</sup>

There is precedent for the option to seek lower damages that need not be proved. At common law, such “moderate” or “temperate” damages were permitted for certain torts such as defamation or wrongful dishonor of a check.<sup>256</sup> “If the plaintiff be able, he may show special damage, but if he be not able, the jury may give such temperate damages as they may conceive to be a reasonable compensation for the injury which he must have sustained . . . .”<sup>257</sup> Temperate damages are more than nominal damages but must be reasonable.<sup>258</sup> Congress could reasonably conclude that for many plaintiffs the price in privacy lost is too great for them to seek actual emotional distress damages. Congress could fix the amount of moderate damages at what seems reasonable in light of the discriminatory violation, and plaintiffs could choose to accept that amount or seek a higher amount in actual damages.

Some limitations would continue to apply. Even where plaintiffs seek actual damages, defendants would not be entitled to blanket access to the

<sup>254</sup> See, e.g., *Rainone v. Potter*, 388 F. Supp. 2d 120, 126 (E.D.N.Y. 2005) (reversing an award of \$150,000 for what the trial court deemed garden variety emotional distress).

<sup>255</sup> H.R. REP. NO. 102-40 (1991). “When a plaintiff succeeds in remedying a civil rights violation, we have stated, he serves ‘as a “private attorney general,” vindicating a policy that Congress considered of the highest priority.’” *Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam)).

<sup>256</sup> The term “actual damages proved”

was used to negate the presumption of damage, which in defamation cases allows the trier of fact to award “temperate damages” of a “substantial amount” because the fact finder can “infer” that such damages were suffered. Our English cousins, in early cases, distinguished between such damages, and damages supported by quantifiable proof as having been actually suffered.

5 WILLIAM D. HAWKLAND, J. FAIRFAX LEARY, JR. & RICHARD M. ALDERMAN, *UNIFORM COMMERCIAL CODE SERIES* § 4-402:8 (1999).

<sup>257</sup> *Columbia Nat’l Bank v. MacKnight*, 29 App. D.C. 580, 587 (D.C. Cir. 1907).

<sup>258</sup> 22 Am. Jur. 2d *Damages* § 26 (2003) (“Temperate damages are allowed without proof of actual or special damage, where the wrong done must in fact have caused actual damage to the plaintiff, though, from the nature of the case, he cannot furnish independent, distinct proof thereof. Temperate damages are more than nominal damages, but are such as would be a reasonable compensation for the injury sustained.” (footnotes omitted)).

plaintiff's records. Even where there is a waiver or partial waiver, courts should limit the scope of discovery to material that could lead to relevant, admissible evidence. The careful approach advocated by Smith makes sense, and the moderate damages option could be a supplement to her proposal. A plaintiff who seeks only the lower amount could testify about her condition and symptoms, but the court could find waiver of some communications if she introduces privileged material or witnesses.<sup>259</sup> Plaintiffs seeking the lower amount would not need to introduce evidence of actual symptoms and distress, but they may wish to do so in order to persuade the jury of the seriousness of the alleged discrimination. A statutory amendment permitting moderate damages would allow plaintiffs to make this strategic choice without uncertainty as to the privilege.<sup>260</sup>

The advantage of such a legislative compromise would be to take the uncertainty out of the waiver question and accomplish the policy goals of protecting privacy while still providing fairness to defendants when significant money is at stake. It would be a compromise, not perfect justice. Plaintiffs might prefer that Congress impose the narrow view of waiver, while defendants would seek imposition of the broad view. But a legislative compromise like the one here proposed would be an improvement over the current state of affairs with no binding law on waiver, significant disagreement among the federal courts, and an emerging dominant standard with little basis in law or reality. It also has the advantage of taking up far less judicial time than is currently spent on discovery motions related to the privilege.

Proposing such an amendment may be no more realistic than urging the courts to follow a particular view of implied waiver. But it is useful to think about such an idea. At the least, it helps to articulate the motivations behind the garden variety compromise and separate the ideas of what seems an appropriate consequence of the defendant's alleged conduct, plaintiff's actual emotional distress damages, and the scope of the psychotherapist-patient privilege. At present, these ideas are all tangled up in the district court approaches to implied waiver.

## CONCLUSION

Federal litigants cannot predict how a court will rule on the issue of implied waiver of the psychotherapist-patient privilege. There is no clear law; appellate courts have provided only dicta, and district courts are divided.

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<sup>259</sup> Along the lines of Federal Rule of Evidence 502, the statute could provide that where plaintiffs seek the lower amount, waiver by disclosure is limited to the material disclosed and does not waive the privilege for all material relevant to the subject matter of the disclosed material.

<sup>260</sup> It is beyond the scope of this Article to propose a rule for waiver of the privilege which could apply more broadly to all types of litigation, not just civil rights cases. Such an effort would be something for the Advisory Committee to explore. Other types of litigation could involve very different policy and efficiency considerations.

A compromise approach, which allows plaintiffs to avoid waiver if they claim no more than garden variety mental distress, seems to be gaining popularity. But this approach does little to remove uncertainty for litigants, since courts vary in their view of what is ordinary, garden variety mental distress. In addition, the garden variety rule reinforces bias against those who seek mental health treatment and imposes an idea of what is “normal” that has no scientific basis. In fact, the concept of a “normal” amount of mental distress in the context of civil rights violations is troublesome. The concept itself appears to be a form of discrimination.

The compromise struck by the garden variety approach between the rights of defendants and the rights of plaintiffs could be better achieved with a statutory amendment allowing plaintiffs to seek moderate damages without a waiver. Plaintiffs who wish to seek actual damages in a higher amount could do so, although they would have to waive the psychotherapist privilege subject to the requirements of relevance and discovery rules. But plaintiffs who seek lower, moderate damages would retain control over their privacy. Such an approach would save judicial and litigant resources and reintroduce some certainty into civil rights litigation.