Fordham Urban Law Journal

Volume 43
Number 3 *Mental Health, the Law, & the Urban Environment*
Article 11

2016

The Psychotherapist-Patient Privilege in Prison Litigation: How Can You Claim "Garden Variety" Emotional Distress when the Flowers Are Made out of Steel

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THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IN PRISON LITIGATION: HOW CAN YOU CLAIM "GARDEN VARIETY" EMOTIONAL DISTRESS WHEN THE FLOWERS ARE MADE OUT OF STEEL?

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INTRODUCTION

On December 20, 1999, correctional officers Mike Blot and Francisco Caraballo stopped and frisked Nathaniel Sims while he was incarcerated at New York's Sing Sing Correctional Facility.[1] The officers told Sims to face the wall, place his hands behind his back, and remove his shoes and pants.[2] As Sims began taking his pants off, Blot punched him in the back of his head and took him to the ground.[3] Carabello proceeded to kick, stomp, and punch Sims.[4] As Sims suffered through the attack, Carabello shouted, "You hit a f—-ing officer, you piece of s—-, we'll kill you."[5] Carabello then pulled out a pocket knife and swung it at Sims.[6]

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1. *In re* Sims, 534 F.3d 117, 120 (2d Cir. 2008).
2. *Id.* (quoting *Pro Se* Complaint Item IV).
3. *Id.*
4. *Id.* Carabello was accompanied by several other officers who were not named in the lawsuit. *Id.*
5. *Id.* at 121.
6. *Id.*

Sims sued the officers and Sing Sing prison.[7] Although the district court dismissed Sims's complaint for failure to exhaust administrative remedies under section 7 of the Prison Litigation Reform Act (PLRA),[8] the parties had already engaged in substantial discovery.[9] During Sims's deposition, he discussed his subsequent placement in Sing Sing's psychiatric satellite unit (PSU) and his emotional injuries: fear of correctional officers holding knives, dreaming about the incident, and fear of being cut by an officer.[10] Defendants sought Sims's psychiatric records, and Sims objected on grounds that the psychotherapist-patient privilege protected the records.[11]

The magistrate judge held that Sims had waived his psychotherapist-patient privilege because fear of knives was not "garden variety" emotional distress—a category of judicially determined emotions usually protected by the psychotherapist-patient privilege.[12] Further, the defendants contended that the psychiatric records contained vital information for their defense, such as Sims suffering from mental illness rather than fear of defendants.[13] On appeal, however, the Second Circuit disagreed with the district court. The Second Circuit held that plaintiffs do not forfeit a privilege—not subject to a balancing test of party needs—by merely asserting a claim for injuries, which may include depression or anxiety.[14] Further, the court stated, the defense cannot overcome the psychotherapist-patient privilege when they place the plaintiff's mental state in issue.[15] To hold otherwise would eviscerate the psychotherapist-patient privilege.[16]

Civil rights violations and damages from such violations rarely depend on mental health history. Yet, the suggestion that a plaintiff has a mental disorder has proven a powerful defense in civil rights cases.[17] Unlike character evidence and sexual history, courts often permit defendants' introduction of mental health histories to prove alternative theories of causation and even to discredit civil rights

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7. *See id.*
8. *See* 42 U.S.C. § 1997e (2013).
9. *See In re* Sims, 534 F.3d at 121.
10. *Id.* at 122-24.
11. *Id.* at 124.
12. *Id.* at 124-25; *see also infra* Part II.E.
13. *In re* Sims, 534 F.3d at 127.
14. *Id.* at 134.
15. *Id.*
16. *Id.*
17. Deirdre M. Smith, *The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation*, 31 CARDOZO L. REV. 750, 751 (2010).

plaintiffs.[18] When courts admit a plaintiff's mental health records as evidence, they operate under the assumption that the plaintiff implicitly waived his or her psychotherapist-patient privilege.[19] These admissions frequently go unexamined, unquestioned, and unregulated.[20]

This Note considers whether incarcerated persons waive their psychotherapist-patient privilege upon filing civil rights claims against correctional institutions for mental or emotional injury. Scholarship on the subject has mostly focused on employment discrimination and sexual harassment.[21] This Note analyzes the scope of waiver for the psychotherapist-patient privilege in the context of prison litigation. Part I of this Note provides background for this unique analysis and reviews the rights of the incarcerated under the Eighth Amendment of the Constitution.[22] These rights include the right to adequate medical and mental health care, the right to be free from assault and battery, and the right to access courts. Part I also reviews the law governing evidentiary privileges and closes with the Supreme Court's codification of the psychotherapist-patient privilege.

Part II of this Note surveys the circuit split (and divergent district courts) on waiver of the psychotherapist-patient privilege. Courts have adopted "broad" and "narrow" approaches as well as a "middle view" compromise in assessing whether to waive the psychotherapist-patient privilege when a plaintiff claims mental or emotional injury. Finally, Part III of this Note analyzes the three approaches to waiver through tort law, civil rights litigation policy, and normative frameworks. Part III critiques the "garden variety" approach for imposing normative limitations on the subjective experience of incarcerated persons who experience civil rights violations. Such limitations reinforce bias and stigma, carry a potential to discriminate

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18. *See id.* at 752.

19. *Id.* at 751.

20. *Id.*

21. *See, e.g.*, Mara Kent & Thomas Kent, *Michigan Civil Rights Claimants: Should They Be Required to Give Up Their Physician-Patient Privilege When Alleging Garden-Variety Emotional Distress?*, 77 U. DET. MERCY L. REV. 479 (2000); 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 (2008) [hereinafter *An Uncertain Privilege*]; Smith, *supra* note 17; Ellen E. McDonnell, Note, *Certainty Thwarted: Broad Waiver Versus Narrow Waiver of the Psychotherapist-Patient Privilege After* Jaffee v. Redmond, 52 HASTINGS L.J. 1369 (2001).

22. U.S. CONST. amend. VIII ("[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

against persons with mental illness, and fail to consider the context of incarceration.

This Note concludes that the narrow approach to waiver would be necessary to effectuate the policy of civil rights statutes to make plaintiffs "private attorneys general." Although sensible in many circumstances, the middle view's limitation of the psychotherapist-patient privilege to "garden variety" emotional distress devalues the subjective experience of incarceration, as well as histories of violence-induced trauma, oppression, poverty, and racial disparities in the justice system.

I. CIVIL RIGHTS, EVIDENTIARY PRIVILEGES, AND THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

The United States leads the world in incarceration.[23] In 2012, prisons and jails housed 2.2 million people, a population that has increased over five hundred percent in the last forty years.[24] Such a rapid expansion of the prison population has resulted in prison overcrowding and fiscal burdens on the state that, ultimately, affect the living conditions and health needs of incarcerated persons.[25] For example, California's Receiver—the person appointed by the court to oversee remedial efforts in state prisons—noted that overcrowding and staff shortages created "regular 'crisis' situations," which increased incidences of infectious disease, prison violence, and inhibited the delivery of medical care.[26]

A. Mass Incarceration and Mental Illness

Persons with mental illness are overrepresented in corrections.[27] Experts estimate that 200,000 to 400,000 persons with mental illness

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23. The Sentencing Project, *Fact Sheet: Trends in U.S. Corrections*, 1, 2 (Nov. 2015), http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf [https://perma.cc/G3SK-SG8X]. The United States leads the world in incarceration (716 per 100,000), followed by Rwanda (492 per 100,000), Russia (475 per 100,000), Brazil (274 per 100,000), and Australia (130 per 100,000). *Id.* at 1.

24. *Id.* at 2.

25. *See Brown v. Plata*, 131 S. Ct. 1910, 1917-19 (2011).

26. *Id.* at 1926-27.

27. Human Rights Watch, *Ill Equipped: U.S. Prisons and Offenders with Mental Illness* § 3 (last updated Sept. 2003), http://www.hrw.org/reports/2003/usa1003/ [https://perma.cc/D5F4-XS52]. Approximately 2.3%-3.9% of incarcerated persons have schizophrenia or a psychotic disorder; 13.1%-18.6% suffer from major depression; 2.1%-4.3% have bipolar disorder; 8.4%-13.4% exhibit dysthymia; 6.2%-11.7% have post-traumatic stress disorder; and 22%-30.1% have an anxiety disorder. *Id.* (quoting National Commission on Correctional Health Care, *The Health Status of Soon-to-be-Released Inmates, A Report to Congress* 1, 22 (Mar. 2002),

are currently incarcerated, which is 8%–19% of the prison population, while mental illness appears in about 5% of the U.S. population.[28] Mental health professionals frequently link the mass incarceration of persons with mental illness to inadequate community mental health services and criminal justice policies that punish unemployment, homelessness, and poverty.[29] Drug policy has also played a significant role.[30] Because many persons with mental illness cannot access adequate mental health treatment, they turn to substance abuse to control their behavior.[31] As a result, 25%–40% of *all* mentally ill persons in the United States can expect to engage with the criminal justice system at some point in their lives.[32]

1. Stigma and Mental Illness

Persons with mental illness are more likely to experience stigma, discrimination, and segregation from the general population.[33] Society generally sees persons with mental illness as "shameful, dangerous, and irresponsible."[34] Stigma and discrimination are often implacable barriers to social inclusion and recovery.[35] Legal institutions also have difficulty in shedding assumptions about mental illness, especially the view that disabilities are limited only to the

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http://www.ncchc.org/filebin/Health_Status_vol_1.pdf [https://perma.cc/72LH-YZXB].

28. *Id.*

29. LIZ SAYCE, FROM PSYCHIATRIC PATIENT TO CITIZEN, OVERCOMING DISCRIMINATION AND SOCIAL EXCLUSION 19 (2000) (noting that in the United States, 70%-90% of persons with mental disabilities are unemployed or not seeking work); Human Rights Watch, *supra* note 27, §3.

30. *See* The Sentencing Project, *supra* note 23, § 3.

31. *See generally* Ralph M. Rivera, Note, *The Mentally Ill Offender: A Brighter Tomorrow Through the Eyes of the Mentally Ill Offender Treatment and Crime Reduction Act of 2004*, 19 J.L. & HEALTH, 107 (2004-2005).

32. Human Rights Watch, *supra* note 27, § 3.

33. Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585, 586-87 (2003).

34. *Id.* at 587; *see also* Americans with Disabilities Act (ADA), 42 U.S.C. § 12101(a)(1) (2012) (finding that people with mental disabilities have been precluded from "all aspects of society . . . because of discrimination" and others with a record disability have been subjected to similar discrimination); Susan Stefan, *The American With Disabilities Act and Mental Health Law: Issues for the Twenty-First Century*, 10 J. CONTEMP. LEGAL ISSUES 131, 136, 145 (1999) (noting state mental health systems are predicated on "sanism," which segregates and stigmatizes people with mental disabilities).

35. *See, e.g.*, Bruce G. Link et al., *Stigma as Barrier to Recovery: The Consequences of Stigma for the Self-Esteem of People with Mental Illnesses*, 52 PSYCHIATRIC SERVS. 1621 (2001).

physically observable disabilities.[36] For example, tort law holds persons with physical disabilities to "a reasonably prudent person with the same physical disability" standard while rejecting similar standards for persons with mental disabilities.[37]

2. Access to Mental Health Care in Prison

Prisons and jails have a legal duty to provide adequate mental health services to the people in their custody.[38] The legal duty placed on correctional institutions runs in contrast to the common law's understanding that healthcare providers have "no obligation" to provide care absent a special relationship (i.e., the physician-patient relationship).[39] Although individuals do not have a constitutional right to medical care,[40] an exception exists for those subject to state action that impedes access to medical services.

In *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court articulated this principle by holding that the Fourteenth Amendment's Due Process Clause did not impose an affirmative obligation on a social worker to prevent child abuse, even when the social worker "had reason to believe" abuse was occurring.[41] The Due Process Clause protects against undue government interference, but it does not confer an entitlement to government aid.[42]

DeShaney, however, built in an exception for persons held in state custody against their will.[43] Institutionalized persons are dependent on the state, and the state has "a corresponding duty to assume some responsibility for [their] safety and general well-being."[44] This exception became known as the *DeShaney* principle: the state has a legal duty to provide necessary medical care to persons under its control or custody.[45] In other words, the government's custody or control places a person in a *worse* situation (i.e., unable to access medical care) than that person would have been in with full legal

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36. *See* Korn, *supra* note 33, at 589.

37. *Id.* at 618. However, people with mental disabilities are excused from contract performance and may be found not guilty by reason of "insanity." *Id.* at 617.

38. *See* Coleman v. Wilson, 912 F. Supp. 1282, 1298 (E.D. Cal. 1995).

39. *See, e.g.*, Agnew v. Parks, 343 P.2d 118, 123 (Cal. Dist. Ct. App. 1959).

40. *See* Wideman v. Shallowford Cmty. Hosp., Inc., 826 F.2d 1030, 1034-36 (11th Cir. 1987) (holding that there is no constitutional right to medical care).

41. DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 191 (1989).

42. *Id.* at 196.

43. *See id.* at 200.

44. *Id.* (internal quotations and citations omitted).

45. *See id.* at 199-200; *see also Wideman*, 826 F.2d at 1034.

liberty.[46] Therefore, the state is responsible for the person subjected to the circumstances of state custody or control.[47]

Correctional healthcare has its origins in the Supreme Court decision *Estelle v. Gamble.*[48] In *Estelle*, the plaintiff, Gamble, was performing a prison work assignment for the Texas Department of Corrections when a bale of cotton fell on him.[49] Physically unable to work and experiencing intense pain, Gamble refused orders to continue work.[50] Prison staff responded by placing Gamble in solitary confinement to discipline his defiance.[51] While in solitary confinement, Gamble experienced severe chest pains and frequently blacked out.[52] Prison officials waited four days before sending a medical assistant to Gamble's aid and a doctor on the fifth day.[53] After some treatment, Gamble "swore out his complaint" against Texas's Department of Corrections and its officers.[54]

The Supreme Court in *Estelle* held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' that violates the Eighth Amendment."[55] Furthermore, the Court held that the Eighth Amendment proscribes more than just "physically barbarous punishments"; it also embodies the basic concepts of dignity, humanity, and decency.[56]

Once the Supreme Court established the state's duty in *Estelle* and *DeShaney*, the Tenth Circuit first identified the necessary medical services to treat serious medical needs.[57] In *Ramos v. Lamm*, Fidel Ramos began an action against the "totality of the conditions" at Canon City, Colorado's state penitentiary (i.e., "Old Max").[58] The complaint sought declaratory and injunctive relief for numerous Eighth Amendment violations, including inadequate medical, dental,

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46. *Id.* at 1035.

47. *DeShaney*, 489 U.S. at 200.

48. 429 U.S. 97 (1976). Correctional healthcare is the provision of medical care for persons in jails and prisons. *Id.* at 103.

49. *Id.* at 98-99.

50. *Id.* at 100-01.

51. *Id.* at 101.

52. *Id.*

53. *See id.*

54. *Id.*

55. U.S. CONST. amend. VIII ("[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *Estelle*, 429 U.S. at 104.

56. *Estelle*, 429 U.S. at 102.

57. *See* Ramos v. Lamm, 639 F.2d 559, 574 (10th Cir. 1980).

58. *Id.* at 562. The complaint was later amended as a class action. *Id.*

and psychiatric care.[59] *Ramos* held that the constitutional obligation to provide medical care to incarcerated persons included medical care for physical ills, dental care, and psychological or psychiatric care.[60] Inadequate care in any of these fields, the Tenth Circuit held, violated the Eighth Amendment.[61]

The evolving Eighth Amendment jurisprudence set a standard for all prisons and jails to employ mental health professionals; provide intervention services, psychiatric medication, and techniques for preventing suicide; and properly store adequate and confidential clinical records.[62] In reality, many incarcerated persons with mental illness go untreated and decompensate into serious psychoses.[63] Those that do receive mental health services likely have the most severe mental health needs, which are usually determined through a screening procedure.[64] Prison conditions and understaffing, however, disrupt psychological and psychiatric treatment.[65] This is not to understate the presence of post-traumatic stress disorder (PTSD), anxiety, depression, and a sense of helplessness that affects many incarcerated persons.[66] If a mental health concern goes untreated by a licensed mental health professional, many incarcerated persons seek counseling from other prison health workers, such as prison nurses.[67] Still, many incarcerated persons go without adequate mental healthcare—not to mention physical healthcare.[68] It is no surprise,

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59. *Id.*

60. *Id.* at 574.

61. *Id.* at 575.

62. Human Rights Watch, *supra* note 27, § 3.

63. *See* Rivera, *supra* note 31, at 109-10; Human Rights Watch, *supra* note 27, § 3 (quoting an anonymous prison psychiatrist, "[w]e are literally drowning in patients, running around trying to put our fingers in the bursting dikes, while hundreds of men continue to deteriorate psychiatrically before our eyes into serious psychoses").

64. *See* Rivera, *supra* note 31, at 125.

65. *See* Coleman v. Wilson, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995).

66. Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257, 259 (2013).

67. *See In re* Sims, 534 F.3d 117, 122-23 (2d Cir. 2008). Nathaniel Sims had sought assistance from a prison nurse and explained his fears and concerns to her about correctional officers. *Id.* at 123.

68. *See* Kelly Bedard & H.E. Frech III, *Prison Health Care: Is Contracting Out Healthy?*, (U.C. Santa Barbara Dep't of Econ. 5, Working Paper No. 11, 2007) (citing MARGO SCHLANGER, INMATE LITIGATION: RESULTS OF A NATIONAL SURVEY, NAT'L INST. OF CORRECTIONS INFO. CTR. (NICIC), LJN EXCHANGE (2003)) (noting the vagueness of the "reasonably adequate medical care" standard).

then, that inadequate medical care accounts for a significant portion of prison litigation.[69]

B. Vindicating the Rights of the Incarcerated

Incarcerated persons may vindicate their Eighth Amendment rights through civil litigation.[70] Under 42 U.S.C. § 1983 ("Section 1983"), they may sue state and federal officials who have violated their constitutional rights "under color of any" state law.[71] Courts have described Section 1983 actions as a "species of tort liability."[72] Tort law principles, therefore, help courts determine the relevant evidence that supports or limits a damage claim in a civil rights action.[73] In general, plaintiffs are entitled to compensation for all damages proximately caused by the defendant(s) even if "aggravated by reason of a preexisting physical or mental condition."[74] Thus, a defendant may not use the plaintiff's mental or emotional vulnerability to escape liability for aggravated mental or emotional distress damages.[75]

The most litigated matters in prison litigation include physical assaults, inadequate medical care, due process violations in disciplinary sanctions, and living conditions, such as nutrition or sanitation.[76] On their face, inmate complaints are anything but trivial or undeserving of serious concern.[77] In 1995, prison litigation accounted for 19% of the federal civil docket (nearly 40,000 cases)—a reflection on prison conditions and the treatment of the incarcerated.[78] However, the PLRA, which was a rider to an appropriations bill, reduced prison litigation by 43% in five years despite a concomitant 23% increase in the prison population overall.[79] This dramatic decline in prison litigation is attendant to the PLRA's

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69. *Id.*; *see also* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1571 n.48 (2003) (noting that medical care cases make up 10.8% to 25% of all inmate litigation).

70. *See* Schlanger, *supra* note 69, at 1570-71.

71. 42 U.S.C. § 1983 (2014); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 427-28 (1971).

72. *See, e.g.*, Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305 (1986).

73. *An Uncertain Privilege*, *supra* note 21, at 122.

74. *Id.* at 122 (quoting 22 AM. JUR. 2D DAMAGES § 239 (2003)).

75. *Id.*

76. Schlanger, *supra* note 69, at 1570-71. Incarcerated persons also litigate freedom of speech, free exercise of religion, and access to courts or mail cases. *Id.* at 1571.

77. *Id.* at 1573.

78. *Id.* at 1558.

79. *Id.* at 1559-60.

additional procedural hurdles imposed upon incarcerated persons rather than substantive reforms in correctional institutions.[80]

1. The PLRA's Filing Fees

One of the PLRA's most imposing hurdles requires incarcerated litigants to pay filing fees for all actions, despite indigence, and requires "frequent filers" to pay all filing fees in advance.[81] The PLRA's filing fee provision conceptually operates within an economic theory of incentives.[82] The fees are intended to deter potential plaintiffs from filing cases expected to yield values lower than the fee but would proceed with cases expected to yield higher values than the fee.[83] Far from nominal, $150 court filing fees are equivalent to months or more of prison labor.[84] If an incarcerated person does not succeed on the merits of their case, the filing fee comes out of their prison account.[85]

Any incarcerated person may become a "frequent filer" after a court strikes down three of their claims.[86] "Frequent filers" must pay the entire $150 fee in advance regardless of indigence.[87] Congress intended to eliminate jailhouse lawyers from filing lawsuits or assisting other inmates in their lawsuits through the "frequent filer" provision.[88] With the imposition of fees and "three-strike" penalties, the provision effectively eliminates litigation as a means to redress grievances and reduces an incarcerated person's access to legal assistance.[89]

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80. *Id.* at 1644.

81. *See id.* at 1645; *see also* 42 U.S.C. § 1997e. The PLRA also limits attorney's fees, which effectively reduces successful prisoner litigation. Schlanger, *supra* note 69, at 1654.

82. Schlanger, *supra* note 69, at 1646.

83. *Id.* The "value" of the case is the chance of success and expected damages. *Id.*

84. *Id.* at 1646. The average minimum wage for prisoners paid by the states for non-industry work is $0.93 an hour. *See* Peter Wagner, *The Prison Index*, PRISON POLICY INITIATIVE (2003), http://www.prisonpolicy.org/prisonindex/prisonlabor.html. [https://perma.cc/UD96-A4RH].

85. Schlanger, *supra* note 69, at 1645.

86. *See id.* at 1649. Schlanger notes that a "strike" may only entail failure to state a claim or dismissal as a frivolous lawsuit. Losing on summary judgment or at trial would not count. *Id.*

87. *Id.* at 1648.

88. *Id.*

89. *See id.*

2. The PLRA's Mandate to Exhaust Administrative Remedies

The PLRA's highest hurdle requires incarcerated persons to exhaust administrative remedies before filing Section 1983 actions.[90] Prison grievance systems often have no time limit, no limit on procedural complexity or difficulty, and no rules to govern the grievance process.[91] Administrative remedies all too often foreclose judicial review of constitutional violations.[92] Moreover, the grievance process does not necessarily consider the "fit" between a claim for relief and the administrative remedies available.[93] Incarcerated persons, therefore, are left with a complex and potentially unending set of obstacles before seeking redress for a civil rights violation.

3. The PLRA's Limitation on Damages

In addition to creating monetary and procedural obstacles, the PLRA effectively prohibits incarcerated persons from recovering for a mental or emotional injury without a prior showing of physical injury or the commission of a sexual act.[94] This provision eliminates claims seeking relief from threats or poor living conditions.[95] Although 42 U.S.C. § 1997e(e) ("Section 1997e(e)") seemingly absolves prison officials from liability for mental and emotional injury, the provision does not preclude injunctive relief, which saves the statute from unconstitutionality.[96] For example, an incarcerated person exposed to asbestos while working in a prison kitchen may not sue for mental or emotional injury without demonstrating a concomitant physical injury.[97]

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90. *Id.* at 1649; 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted").

91. *See* Amy Petre Hill, *Death Through Administrative Indifference: The Prison Litigation Reform Act Allows Women to Die in California's Substandard Prison Health Care System*, 13 HASTINGS WOMEN'S L.J. 223, 239-40 (2002).

92. *Id.* at 240-42.

93. Schlanger, *supra* note 69, at 1651.

94. 42 U.S.C. § 1997e(e) ("Limitation on recovery. No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act").

95. *See* Schlanger, *supra* note 69, at 1630.

96. John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 435-36 (2001) (citing Zehner v. Trigg, 133 F.3d 459 (7th Cir. 1997)).

97. *Zehner*, 133 F.3d at 460-61.

Mental or emotional injuries are also ambiguous and undefined in the PLRA.[98] Such injuries could range from "stress, fear, and depression" to deprivation caused by prison policies that prevent an incarcerated person from attending religious services,[99] physical removal from ordinary prison life, and enforced idleness.[100] Similar provisions exist under the Federal Tort Claims Act (FTCA)[101] that prevent incarcerated persons from claiming mental or emotional injuries "without a prior showing of physical injury."[102] The laws governing prison litigation, for the most part, preclude or chill claims for mental or emotional injury.[103] This Note recognizes the difficulty in putting forward these claims before turning to the psychotherapist-patient privilege.

C. The Development of Evidentiary Privileges

The justice system depends on fair and accurate evidence to resolve disputes.[104] Its fundamental maxim is that "the public . . . has a right to every man's evidence."[105] Evidentiary privileges, however, exempt certain information from the fact-finding process.[106] A party in litigation may invoke a privilege during pre-trial discovery or attempt to compel testimony without losing the right to advance a claim or defense related to the privileged material.[107]

Privilege law concerns "extrinsic social policy" that places certain values and social relationships above judicial truth-seeking and efficiency.[108] Privileges safeguard privacy, freedom, trust, and honor in important social and professional relationships.[109] Privileges also further certain professional interests by encouraging individual clients

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98. Boston, *supra* note 96, at 437.

99. *See* Allah v. Al-Hafeez, 226 F.3d 247 (3d Cir. 2000).

100. Boston, *supra* note 96, at 438-39.

101. 28 U.S.C. § 1331 (2014).

102. 28 US.C. § 1346(b)(2) (2013).

103. *See* 42 U.S.C. § 1997e(e).

104. 6 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 43.1 (7th ed. 2014).

105. Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (quoting 8 J. WIGMORE, EVIDENCE § 2192, at 64 (3d ed. 1940)).

106. *See* United States v. Bryan, 339 U.S. 323, 331 (1950); s*ee generally* 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5.2 (4th ed. 2014).

107. MUELLER & KIRKPATRICK, *supra* note 106, § 5.2.

108. *Id. cf.* 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 547 (1827) ("Evidence is the basis for justice: exclude evidence and you exclude justice.").

109. MUELLER & KIRKPATRICK, *supra* note 106, § 5.2.

to engage in open and candid communication.[110] Additionally, they allow professionals to avoid the ethical dilemma of seeking information necessary for the delivery of services without placing their client at risk for future liability or embarrassment.[111] Evidentiary privileges, therefore, promote a public good that transcends "the normally predominant principle of utilizing all rational means for ascertaining truth [in court]."[112]

The types of recognized privileges vary among state courts and between state and federal courts.[113] To determine whether a privilege exists, lawmakers and scholars often employ a four-part test developed by the Dean of Northwestern Law School, John Henry Wigmore, who became well known in the early twentieth century after publication of his treatise on evidence.[114] The test considers the following factors: (1) whether communication in the usual circumstances of a professional relationship originates "in a confidence that it will not be disclosed";[115] (2) the necessity of confidentiality to achieve the purpose of the professional relationship;[116] (3) whether the relationship should be fostered;[117] and, (4) whether fear of disclosure may cause greater injury to the professional relationship than the expected benefit in obtaining testimony.[118] Wigmore's test has influenced legislators and courts for decades and has effectively limited evidentiary privileges to a small handful of relationships, such as the attorney-client relationship.[119]

Wigmore opposed evidentiary privileges.[120] He took a strict rationalist and empirical approach to evidence and questioned "humanistic rationales" for privileges.[121] Wigmore's texts still

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110. *Id.*

111. *Id.*

112. Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (citing Trammel v. United States, 445 U.S. 40, 50 (1980)).

113. Christina L. Lewis, Note, *The Exploitation of Trust: The Psychotherapist-Patient Privilege in Alaska as Applied to Prison Group Therapy*, 18 ALASKA L. REV. 295, 298 (2001) (citing STEVEN I. FRIEDLAND ET AL., EVIDENCE LAW AND PRACTICE 647 (2000)).

114. *Id.* at 297-98; 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIAL AT COMMON LAW § 2285, at 527 (McNaughton rev. 1961).

115. *Lewis*, *supra* note 113, at 298.

116. *Id.*

117. *Id.*

118. *Id.* (citing RALPH SLOVENKO, PSYCHOTHERAPY, CONFIDENTIALITY, AND PRIVILEGED COMMUNICATION 10 (1966)).

119. *An Uncertain Privilege*, *supra* note 21, at 91 n.57.

120. *Id.* at 91.

121. *Id.*

influence judicial opinions as courts tend to disfavor privileges as impediments to the truth-seeking process and construe such privileges strictly.[122] For example, when state legislatures began enacting physician-patient privileges, courts and legal scholars vociferously resisted its inclusion in the Model Code of Evidence because "secrecy in court is prima facie calamitous."[123] However, attorneys from jurisdictions that enacted legislation to create the privilege lobbied for its inclusion, which eventually led to a compromise through a broad "patient-litigant exception."[124] If a patient's condition is an element or factor in a lawsuit, then the patient loses their physician-patient privilege because the condition has been disclosed to the world through the suit itself.[125]

D. Federal Rules of Evidence and Privilege

The Federal Rules of Evidence apply to evidentiary privileges in federal civil rights litigation.[126] In Article V of the Proposed Federal Rules of Evidence, the House Committee on the Judiciary originally set forth thirteen rules related to evidentiary privileges.[127] Nine rules define specific privileges that fall outside the privileges already enumerated in the Constitution,[128] and three others addressed collateral problems related to the waiver of privilege.[129] The House, however, eliminated all thirteen proposed rules and replaced them with one: Federal Rule of Evidence 501 (Rule 501).[130] Rule 501 provided that "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege" unless the Constitution, federal statute, or Supreme Court

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122. *Id.* at 92.

123. *Id.* (quoting Zechariah Chaffee, Jr., *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607, 609 (1942)).

124. *Id.*

125. *Id.* at 92-93.

126. *See* MUELLER & KIRKPATRICK, *supra* note 106, § 5.4.

127. H.R. REP. NO. 93-650, at 8 (1975).

128. *Id.* Originally, the House Rules recognized a privilege in required reports, attorney-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of an informer. NOTES OF H. COMM. ON THE JUDICIARY, H.R. REP. NO. 93-650, at 8 (1975).

129. *Id.* Collateral problems included voluntary waiver by disclosure, disclosure by compulsion or without an opportunity to claim privilege, and jury instructions. *Id.*

130. *Id.*; FED. R. EVID. 501.

rules provide otherwise.[131] The Conference Committee later adopted the House provision, which Congress enacted in 1975.[132]

Federal courts generally recognize the traditional common law privileges,[133] but resist claims of new privileges.[134] Although Rule 501 does not require federal courts to recognize state-created privileges, federal courts tend to accept state privileges on the basis of "comity" and "reason and experience."[135] Privilege claims are viewed with an eye toward underlying values rather than litigation impact.[136] Although pragmatic and utilitarian reasons justify many professional privileges, underlying values demand a focus on individual freedom, privacy and trust, and ethical and moral convictions to justify a privilege.[137]

E. The Psychotherapist-Patient Privilege

In 1996, the Supreme Court recognized the psychotherapist-patient privilege in *Jaffee v. Redmond*.[138] The Court held that confidential communications between a psychotherapist and her patient in the course of treatment or diagnosis are protected under Rule 501.[139]

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131. FED. R. EVID. 501.

132. H.R. REP. NO. 93-1597 (1975) (Conf. Rep.).

133. MUELLER &, *supra* note 106, § 5.4 (identifying the common law privileges as attorney-client, spousal testimonial, spousal confidential communications, clergyman-penitent, and qualified privileges for trade secrets, secrets of state, informer's identity, political vote, and the highly qualified journalist's privilege) (citations omitted).

134. *Id.* (noting that federal courts do not recognize an accountant-client privilege, physician-patient privilege, and parent-child or other family member privileges other than spouses); *see also In re* Grand Jury, 103 F.3d 1140, 1152 (3d Cir. 1997) (declining to recognize a parent-child privilege).

135. Hilton v. Guyot, 159 U.S. 113, 163 (1895) (noting that comity is neither an absolute obligation nor courtesy and good will); MUELLER & KIRKPATRICK, *supra* note 126, § 5.4.

136. MUELLER & KIRKPATRICK, *supra* note 126, § 5.4.

137. *Id.* In contrast to Wigmore's four-part test, Mueller and Kirkpatrick suggest an alternative six-part test that emphasizes social relationships and moral values. *Id.* Accordingly, proposed new privileges should examine: "(1) the importance to the community of the relationship sought to be protected; (2) whether community values would be offended by governmental intrusion into the privacy of the relationship; (3) the extent to which social traditions and professional standards create a reasonable expectation of confidentiality in such a relationship; (4) whether the purpose of the relationship depends on full and open communication; (5) the extent to which such communication would be impeded if it goes unprotected by a privilege; and (6) the benefits to the public from encouraging the communication and protecting the privacy of the relationship in comparison to the cost to the litigation process resulting from the loss of evidence." *Id.* (citations omitted).

138. 518 U.S. 1 (1996).

139. *Id.* at 15.

Justice Stevens, writing for the majority, analogized to the spousal and attorney-client privilege and found that reason and experience demonstrate the psychotherapist-patient privilege "promotes sufficiently important interests to outweigh the need for probative evidence."[140] The privilege covers all confidential communications made to licensed psychiatrists, psychologists, and social workers acting in the course of psychotherapy.[141]

Jaffee, however, presented a unique case where the *plaintiff sought the defendant's psychotherapy records*.[142] Defendant-Mary Lu Redmond, a former police officer in Illinois, had responded to a "fight in progress" at an apartment complex.[143] When Redmond approached the building, several men burst out of the building, one waving a pipe and one—Ricky Allen—brandishing a butcher knife.[144] Redmond shot and killed Allen, who allegedly disregarded Redmond's commands and "was about to stab the man he was chasing."[145] Allen's estate filed a civil rights suit alleging excessive force under Section 1983.[146] During trial, the plaintiff presented evidence that contradicted Redmond's story, including testimony that Redmond drew her gun before exiting the squad car and that Allen was unarmed.[147] When the plaintiff sought to discover notes from a licensed social worker that Redmond saw after the shooting, Redmond refused to turn them over.[148] The jury was allowed to draw an adverse inference and, subsequently, found for Allen's estate.[149] The Seventh Circuit, however, reversed and concluded that "reason and experience" among all fifty states who had adopted the psychotherapist-patient privilege barred disclosure.[150]

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140. *Id.* at 9-10 (citing Trammel v. United States, 445 U.S. 40, 51 (1980) ("Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust.'")).

141. *Id.* at 15.

142. *Id.* at 5 (emphasis added).

143. *Id.* at 4.

144. *Id.*

145. *Id.*

146. *Id.* at 5; *see also* 42 U.S.C. § 1983. Petitioner also filed suit for damages and wrongful-death. *Jaffee*, 518 U.S. at 5; *see also* 740 ILL. COMP. STAT. 180/1-2.2 (1994).

147. *Jaffee*, 518 U.S. at 5.

148. *Id.*

149. *Id.* at 5-6. The jury awarded the petitioner $45,000 on the federal claim and $500,000 on the state-law claim. *Id.*

150. *Id.* at 6; Jaffee v. Redmond, 51 F.3d 1346, 1355, 1358 (7th Cir. 1995) (holding that the psychotherapist-patient privilege should be recognized in light of therapy records with minimal probative value as compared with Redmond's substantial privacy interests).

The Supreme Court granted certiorari to the Seventh Circuit case because other circuit courts had split on whether to recognize a psychotherapist-patient privilege under Rule 501.[151] Although recognizing the privilege, the Court's rationale in *Jaffee* was exclusively instrumental.[152] As the Court noted, the imperative for confidence, trust, and effective psychotherapy requires "[a patient] to make frank and complete disclosure of facts, emotions, memories, and fears."[153] The psychotherapist-patient privilege serves the "mental health of our citizenry . . . a public good of transcendent importance."[154] Finally, the Court reasoned, all fifty states and the District of Columbia recognize a psychotherapist-patient privilege.[155] To effectuate the privilege, *Jaffee* said patients "must be able to predict with some degree of certainty" the confidentiality of conversations with psychotherapists: "An uncertain privilege, or one which purports to be certain but results in widely varying applications by courts, is little better than no privilege at all."[156] *Jaffee*, therefore, rejected the Seventh Circuit's balancing of privacy interests against disclosure and, instead, adopted an absolute psychotherapist-patient privilege.[157]

But could the patient waive her psychotherapist privilege? *Jaffee* only recognized the possibility of waiver in a footnote, without reference to the circumstances of waiver.[158] In fact, the Court refused to "speculate about most future developments in the federal psychotherapist privilege."[159] But the comparison of waiver to "other testimonial privileges" paved the way for future courts to reason by analogy—whether to the attorney-client or spousal privilege—in making waiver determinations.

Justice Scalia, joined in part by Justice Rehnquist, dissented.[160] Justice Scalia focused on the instrumental rationale motivating the privilege ("successful psychotherapy treatment") and the traditional judicial preference for truth in arguing that the Court created an ill-

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151. *Jaffee*, 518 U.S. at 7 (citations omitted).
152. *An Uncertain Privilege*, *supra* note 21, at 99.
153. *Jaffee*, 518 U.S. at 10.
154. *Id.* at 11.
155. *Id.* at 12.
156. *Id.* at 18 (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).
157. *Id.* at 17-18.
158. *Id.* at 15 n.14 ("Like other testimonial privileges, the patient may of course waive the protection.").
159. *Id.* at 18 n.19.
160. *Id.* at 18.

defined privilege by including social workers.[161] As an instrument that may prevent proving a valid claim or establishing a valid defense, Justice Scalia argued that the psychotherapist-patient privilege would transform courts of law into "instruments of wrong" as opposed to justice.[162] Justice Scalia also questioned whether the normal rules of evidence would even undermine psychotherapy.[163]

Since *Jaffee*, some scholars have challenged the instrumental rationale for the psychotherapist-patient privilege on empirical grounds.[164] Confidentiality is important in the therapeutic relationship, while an evidentiary privilege is not.[165] Instead, the Supreme Court could have better justified the psychotherapist-patient privilege through a "humanistic rationale" that emphasized privacy, autonomy, and the vindication of civil rights.[166] These deontological rationales are more congruent with democratic principles, principles the psychotherapist-patient privilege actually serves, as opposed to paternalistic medical advice.[167]

II. DETERMINING WHEN THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IS WAIVED

Privileges belong to the holder, who may assert or waive the privilege.[168] Professional privileges usually belong to the person receiving professional services (i.e., the client, not the lawyer; the patient, not the psychotherapist).[169] Voluntary disclosures in court or

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161. *Id.* at 19-22.

162. *Id.* at 19.

163. *Id.* at 22, 27; *see also id.* at 22 ("For most of history, men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, best friends, and bartenders."); *cf. id.* at 16, 27-28 ("Today social workers provide a significant amount of mental health treatment. Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals.") (internal quotation marks omitted).

164. *See generally* DANIEL W. SHUMAN & MYRON F. WEINER, THE PSYCHOTHERAPIST-PATIENT PRIVILEGE: A CRITICAL EXAMINATION 113 (1987); Edward J. Imwinkelried, *A Psychological Critique of the Assumptions Underlying the Law of Evidentiary Privileges: Insights from the Literature on Self-Disclosure*, 38 LOY. L.A. L. REV. 707 (2004).

165. *An Uncertain Privilege*, *supra* note 21, at 101 n.130.

166. *Id.* (citing EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 6.2.7, at 507 (2002)).

167. *Id.* (citing EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 6.2.7, at 509-12 (2002)).

168. MUELLER & KIRKPATRICK, *supra* note 106, § 5.11.

169. *Id.* Professional providers, however, may claim the privilege for the holder in court unless the holder has waived the privilege. *Id.*

to third parties are universal waivers, but psychotherapists also have an affirmative duty to disclose patient conversations upon a reasonable determination that the patient "poses a serious danger of violence to others."[170] Because this Note only focuses on civil rights actions brought by incarcerated persons, that duty falls outside the scope of its analysis. This Part reviews express and implied waivers as well as exceptions to the psychotherapist-patient privilege. This Part focuses specifically on the three approaches to implied waivers: broad, narrow, and the "middle" view compromise.

A. The General Framework: Express and Implied Waivers and Privilege Exceptions

Voluntary and knowing conduct on the part of the privilege holder are the operative components of waiver. Black's Law Dictionary defines "waive" as "[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a right or claim) voluntarily. [] Ordinarily, to waive a right one must do it knowingly — with knowledge of the relevant facts."[171] During litigation, privilege waivers occur when a holder makes a voluntary disclosure or fails to invoke the privilege.[172]

Courts recognize two types of waivers: express and implied.[173] Express waivers are an "autonomous choice by the holder" and usually involve signing a release or contract.[174] Express waivers have an "intent" requirement, meaning that the actor must understand the act and its consequences.[175] Implied waivers, on the other hand, occur when the privilege holder fails to exercise a right or loses a right based on the holder's decision "directly related to the right in question."[176] Privileges are also limited by several exceptions based on the content of the communication.[177] For example, a privilege never attaches when a patient threatens to harm others ("dangerous patient exception"),[178] commits criminal fraud, or commits a tort.[179]

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170. *See* Tarasoff v. Regents of Univ. of California, 551 P.2d 334, 345 (Cal. 1974).

171. *Waive*, BLACK'S LAW DICTIONARY (10th ed. 2014).

172. *See* MUELLER & KIRKPATRICK, *supra* note 106, § 5.4.

173. *An Uncertain Privilege*, *supra* note 21, at 103.

174. *Id.* at 103-04.

175. Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281, 314 (2003).

176. Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 480-84 (1981). *But see An Uncertain Privilege*, *supra* note 21, at 103 (questioning the very notion of "implied" waiver).

177. *An Uncertain Privilege*, *supra* note 21, at 104.

178. *See* discussion *supra* Part I.C. Courts vary on the "dangerous patient exception." *Compare* United States v. Glass, 133 F.3d 1356, 1359 (10th Cir. 1998)

Courts, however, only consider waiver after a privilege has attached.[180] This Note only considers the scope of implied waivers of the psychotherapist-patient privilege. Express waivers are voluntarily, knowingly, and conclusively waived. This Note considers whether civil actions brought by incarcerated persons constitute a voluntary and knowing waiver.

B. Waiver of the Psychotherapist-Patient Privilege

Because *Jaffee* recognized the psychotherapist-patient privilege for the defendant in a civil action, the Court did not address the issue of waiver for a plaintiff's civil action.[181] Further, *Jaffee* only recognized that a waiver may occur without specifying under what circumstances.[182] Whether plaintiffs impliedly waive their psychotherapist-patient privilege often turns on the extent to which the plaintiff places their mental or emotional state "at issue."[183]

Federal courts frequently adopt evidentiary privilege exceptions identified in the proposed Federal Rules of Evidence.[184] Proposed Rule 504, in particular, had set out three exceptions to the psychotherapist-patient privilege: (1) hospitalization proceedings; (2) court-ordered examinations; and (3) in litigation where the patient's mental condition is an element of the claim or defense.[185] Exception three, the "patient-litigant exception," provides that if a patient places a sufficient degree of her mental state "in issue," the adverse party may discover the patient's psychotherapy records.[186] This is the same consideration as an implied waiver of the psychotherapist-patient privilege.

This Part reviews the circuit court decisions—and seminal district court cases—that delineate the scope of the "patient-litigant exception."[187] Courts either adopt a "broad" view granting total waiver, a "narrow" view requiring the plaintiff to place privileged communications in issue, or a "middle" view that preserves the

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(recognizing the "dangerous patient exception"), *with* United States v. Chase, 340 F.3d 978, 991-92 (9th Cir. 2003) (finding no dangerous patient exception).

179. *An Uncertain Privilege*, *supra* note 21, at 104.

180. *Id.*

181. *Id.*

182. Jaffee v. Redmond, 518 U.S. 1, 15 n.14 (1996).

183. *An Uncertain Privilege*, *supra* note 21, at 104.

184. Anne Bowen Poulin, *The Psychotherapist-Patient Privilege After* Jaffee v. Redmond*: Where Do We Go From Here?*, 76 WASH. U. L. Q. 1341, 1373-74 (1998).

185. *Id.*; *see* FED. R. EVID. 504(d)(3) (proposed Nov. 20, 1972).

186. Poulin, *supra* note 184, at 1376.

187. *Id.*

privilege only for "garden variety" claims of mental or emotional distress.[188]

C. The Majority Rule: "Broad View" on Waiver of the Psychotherapist-Patient Privilege

The Sixth, Seventh, Eighth, and Tenth Circuits have adopted a "broad" view as to waiver of the psychotherapist-patient privilege.[189] The broad view holds that placing one's mental state at issue, even through a non-specific claim of damages for mental or emotional distress, waives the psychotherapist-patient privilege.[190] Courts permit defendants' requests for privileged material with minimal review and waive the privilege regardless of the plaintiff's intention to call an expert to testify on their mental condition.[191] Thus, all psychotherapist-patient communications are discoverable under the broad view.[192]

In 1997, soon after *Jaffee*, the Eastern District of Pennsylvania adopted the broad view in *Sarko v. Penn-Del Directory Co.*[193] *Sarko* has proven to be a seminal decision for its analysis and subsequent influence on federal courts.[194] In *Sarko*, the plaintiff sued former employer-defendant under the Americans with Disabilities Act (ADA).[195] Sarko's employer had fired her for chronic tardiness.[196] Sarko, however, alleged that her employer failed to reasonably accommodate her clinical depression, which required a medication that made it difficult for the plaintiff to wake up in the morning.[197]

The *Sarko* court held that plaintiff placed her mental condition "directly at issue" through an ADA claim.[198] The court identified three reasons for its decision: (1) pre-*Jaffee* precedent on waiver; (2)

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188. *Id.*

189. *An Uncertain Privilege*, *supra* note 21, at 107; *see* Fisher v. Sw. Bell Tel. Co., 361 F. App'x 974, 978 (10th Cir. 2010); Maday v. Pub. Libraries of Saginaw, 480 F.3d 815, 821 (6th Cir. 2007); Doe v. Oberweis Dairy, 456 F.3d 704 (7th Cir. 2006); Schoffstall v. Henderson, 223 F.3d 818, 823 (8th Cir. 2000).

190. *See, e.g.*, Speaker *ex rel.* Speaker v. Cty. of San Bernardino, 82 F. Supp. 2d 1105, 1118 (C.D. Cal. 2000).

191. *Id.*; *see also An Uncertain Privilege*, *supra* note 21, at 107.

192. *Speaker*, 82 F. Supp. 2d at 1118; *An Uncertain Privilege*, *supra* note 21, at 107.

193. Sarko v. Penn-Del Directory Co., 170 F.R.D. 127, 130 (E.D. Pa. 1997), *aff'd,* 189 F.3d 464 (3d Cir. 1999).

194. *See An Uncertain Privilege, supra* note 21, at 115; Poulin, *supra* note 184, at 1376 n.165.

195. *Sarko*, 170 F.R.D. at 129.

196. *Id.*

197. *Id.*

198. *Id.* at 130.

similarity to waiver of attorney-client privilege when advice (here, one's "mental condition") is placed at issue; and (3) that fairness and justice caution against "allowing a plaintiff to hide . . . behind a claim of privilege."[199] A privilege, the court stated, cannot and should not be used as a sword to advance litigation as well as a shield to guard against discoverable evidence.[200] Plaintiffs who claim mental or emotional distress must release all confidential communications relevant to their mental condition.[201]

Soon after the Eastern District of Pennsylvania decided *Sarko*, the Eighth Circuit found *Sarko*[202] and three similar district court decisions[203] persuasive and adopted the broad view of waiver.[204] In *Schoffstall v. Henderson*, the plaintiff sued the postal service for sex discrimination, retaliation, and sexual harassment.[205] Although Schoffstall moved for a protective order[206] and invoked her psychotherapist-patient privilege, the court denied the motion.[207] *Schoffstall* held that the psychotherapist-patient privilege may be waived by placing one's mental condition at issue by claiming emotional distress.[208] Similarly, in 2010, the Tenth Circuit, in *Fisher v. Southwestern Bell Telephone Co.*, followed *Schoffstall*'s precise reasoning in finding that a request for emotional-distress damages placed one's psychological state in issue and waived the privilege.[209]

In the Seventh Circuit, Judge Posner held in *Doe v. Oberweis Dairy* that: "If a plaintiff by seeking damages for emotional distress

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199. *Id.* (citations and internal quotation marks omitted).

200. *See* Vanderbilt v. Town of Chilmark, 174 F.R.D. 225, 230 (D. Mass. 1997) (quoting Inserra v. Hamblett & Kerrigan, P.A., 1995 WL 54402 (D.N.H. 1995) (citations omitted) (commenting on attorney-client privilege)).

201. *Vanderbilt*, 174 F.R.D. at 230; *see also* Poulin, *supra* note 184, at 1377 ("In *Sarko*, given the fact that the plaintiff's claim was founded on a specific medical condition, proving her claim probably would have required the testimony of her therapist or of an expert. Thus, a narrow waiver court would likely have reached a similar result under these facts."). *But see An Uncertain Privilege*, *supra* note 21, at 134 (noting that federal courts are too preoccupied with the definition of disability and, therefore, require proof that requires a broad waiver of privilege).

202. *Sarko*, 170 F.R.D. at 130.

203. *See, e.g.*, Jackson v. Chubb Corp., 193 F.R.D. 216, 225 (D.N.J. 2000); Vann v. Lone Star Steakhouse & Saloon of Springfield, Inc., 967 F. Supp. 346, 349-50 (C.D. Ill. 1997); E.E.O.C. v. Danka Indus., Inc., 990 F. Supp. 1138, 1142 (E.D. Mo. 1997).

204. Schoffstall v. Henderson, 223 F.3d 818, 823 (8th Cir. 2000).

205. *Id.* at 821.

206. *Id.* at 823; *see* FED. R. CIV. P. 26(c).

207. *Schoffstall*, 223 F.3d at 823.

208. *Id.* (analogizing to waiver of attorney-client privilege by placing the attorney's representation at issue).

209. Fisher v. Sw. Bell Tel. Co., 361 F. App'x 974, 978 (10th Cir. 2010).

places his or her psychological state in issue, the defendant is entitled to discover any record of that state."[210] *Doe* involved a sixteen-year-old part-time ice cream "scooper" who sued her shift supervisor for sexual harassment that culminated in sexual intercourse.[211] The shift supervisor was prosecuted, convicted, and imprisoned for statutory rape.[212] Plaintiff appealed after the district court overruled her objection to disclosing her psychotherapy records, and upon disclosure subsequently caused her to limit her claim to emotional distress.[213]

Unlike the courts in *Jaffee* or *Schoffstall*, Judge Posner analogized the psychotherapist-patient privilege to the "doctor-patient privilege."[214] He also employed a balancing provision where the judge could review plaintiff's psychiatric records under seal in the interest of privacy.[215] Ironically, there is no federal doctor-patient privilege (nor is there one in the Proposed Federal Rules of Evidence), and *Jaffee* explicitly rejected the balancing test.[216] More concretely, Judge Posner noted that Rule 35 of the Federal Rules of Civil Procedure would entitle the defendant to demand a psychiatric examination of the plaintiff.[217] But *Doe*'s broad language could also endorse the "middle" or "garden variety" view, and even the "narrow" view, depending on the severity of the emotional distress and how the plaintiff places his or her psychological state in issue.[218]

Last, the Sixth Circuit has held that any claim for emotional distress damages waives the psychotherapist-patient privilege by putting one's emotional state at issue.[219] In *Maday v. Public Libraries of Saginaw*, plaintiff Maday sued for age discrimination after receiving negative performance reviews and termination from Saginaw Public Library.[220] During the trial, Maday introduced records from meetings with a social worker as proof of emotional

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210. Doe v. Oberweis Dairy, 456 F.3d 718 (7th Cir. 2006).

211. *Id.* at 707.

212. *Id.* at 707-08 (noting that the age of consent in Illinois rises to eighteen if the accused holds a "position of trust, authority, or supervision").

213. *Id.* at 708.

214. *Id.* at 718.

215. *Id.*

216. Jaffee v. Redmond, 518 U.S. 1, 17 (1996); Helen A. Anderson, *The Psychotherapist Privilege: Privacy and "Garden Variety" Emotional Distress*, 21 GEO. MASON L. REV. 117, 133 n.90 (2013).

217. *Doe*, 456 F.3d at 718 (discussing FED. R. CIV. P. 26).

218. Anderson, *supra* note 216, at 133.

219. Maday v. Pub. Libraries of Saginaw, 480 F.3d 815, 821 (6th Cir. 2007).

220. *Id.* at 816-17.

distress damages.[221] Defendant library then introduced additional conversations between Maday and her social worker about an on-going disagreement on legal strategy with her attorney as an alternative cause for her emotional distress.[222] On appeal for admission of privileged information, the Sixth Circuit ignored the fact that the plaintiff had introduced records from her session with a social worker.[223] Instead of citing Maday's specific conduct (e.g., introducing records), the Sixth Circuit held that seeking emotional-distress damages puts one's emotional state at issue and waives the privilege.[224]

D. The Minority Rule: "Narrow View" Preserving the Psychotherapist-Patient Privilege

The Second and D.C. Circuits have adopted a narrower approach to waiver of the psychotherapist-patient privilege.[225] The "narrow" view declines to find a waiver unless the plaintiff affirmatively places privileged communications in issue or lists her psychotherapist as a witness for trial.[226] The narrow waiver closely parallels the attorney-client privilege[227]—as articulated in *Jaffee*[228]—and does not reach claims for emotional damages.[229]

Soon after *Sarko*, Massachusetts's district court rejected the broad view and, instead, affirmed *Jaffee*'s proscription against balancing privacy and the need for evidence.[230] In *Vanderbilt v. Town of Chilmark*, plaintiff Vanderbilt had alleged gender discrimination and retaliation against defendant Town of Chilmark, and claimed emotional damages.[231] The court denied Chilmark's motion to compel discovery of Vanderbilt's therapeutic records and to depose her therapist.[232] *Vanderbilt* held that waiver only occurs when the patient: (1) explicitly waives it; (2) discloses privileged material; or (3)

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221. *Id.* at 820.
222. *Id.* at 820-21.
223. *Id.* at 820.
224. *Id.* at 821 (citations omitted).
225. *See, e.g.*, *In re* Sims, 534 F.3d 117, 117 (2d Cir. 2008); Koch v. Cox, 489 F.3d 384, 392 (D.C. Cir. 2007).
226. *An Uncertain Privilege*, *supra* note 21, at 107.
227. *See* Vanderbilt v. Town of Chilmark, 174 F.R.D. 225, 229 (D. Mass. 1997).
228. Jaffee v. Redmond, 518 U.S. 1, 10 (1996).
229. McDonnell, *supra* note 21, at 1381-82.
230. *Vanderbilt*, 174 F.R.D. at 229.
231. *Id.* at 225.
232. *Id.* at 230.

uses privileged material as evidence to support a claim or defense.[233] Otherwise, the substance of psychiatric care, counseling, and therapy would remain privileged.[234]

For example, in the context of attorney-client privilege, a plaintiff waives the privilege when using attorney advice as a defense or suing an attorney for malpractice.[235] A claim for attorney's fees, however, does not waive the privilege.[236] In *Hucko v. City of Oak Forest*, the Northern District of Illinois adopted a similar rationale.[237] In *Hucko*, plaintiff filed an excessive force and misconduct claim against the city and its police officers under Section 1983.[238] *Hucko* held that the plaintiff had not impliedly waived his psychotherapist-patient privilege by merely seeking damages for humiliation, emotional distress, and pain and suffering.[239] Although a plaintiff may waive the privilege by calling an independent expert or presenting evidence of a past psychotherapy consultation to bolster a claim for emotional distress, the plaintiff did not intend to offer medical testimony and did not place his diagnosis or treatment at issue.[240]

In 2007, the D.C. Circuit found *Vanderbilt*'s reasoning and analogy to attorney-client privilege more persuasive than the broad view decisions of the Seventh and Eight Circuits.[241] In *Koch v. Cox*, plaintiff Koch sued his employer, the Securities and Exchange Commission (SEC), alleging discrimination, retaliation, and failure to accommodate his medical condition.[242] Although Koch acknowledged that he suffered from depression during discovery, he

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233. *Id.* at 228.

234. *Id.*; *see also* McDonnell, *supra* 21, at 1382.

235. *Vanderbilt*, 174 F.R.D. at 229.

236. *Id.*

237. Hucko v. City of Oak Forest, 185 F.R.D. 526, 529 (N.D. Ill. 1999) ("[T]he principles governing implied waiver of the attorney-client privilege should apply in determining what is sufficient to constitute an implied waiver of the psychotherapist-patient privilege.") (citing Garcia v. Zenith Elecs. Corp., 58 F.3d 1171, 1175 n.1 (7th Cir. 1995); Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851 (3d Cir. 1984)).

238. *Hucko*, 185 F.R.D. at 527.

239. *Id.* However, the plaintiff impliedly waived his psychotherapist-patient privilege for maintaining that "preoccupation" with treatment or the effects of various medications were the reason why he failed to file suit within the applicable statutory limitations. *Id.*

240. *Id.* at 529.

241. Koch v. Cox, 489 F.3d 384, 389 (D.C. Cir. 2007) (distinguishing Doe v. Oberweis Dairy, 456 F.3d 718 (7th Cir. 2006); Schoffstall v. Henderson, 223 F.3d 818, 823 (8th Cir. 2000)); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80.

242. *Koch*, 489 F.3d at 386.

had not claimed emotional distress damages.[243] During discovery, the SEC sought Koch's psychotherapy records because he "had put his mental state in issue and thereby waived the psychotherapist-patient privilege."[244]

The D.C. Circuit, however, held that the broad view of waiver is a standard that *sub silentio* overrules *Jaffee* by eviscerating the psychotherapist-patient privilege.[245] Waiving the privilege for any party involved in litigation with a mental element—who just so happens to have received psychotherapy in the past—would eviscerate that privilege.[246] Waiver does not occur when a plaintiff acknowledges that he or she suffers from depression.[247] Nor may a defendant place the plaintiff's mental state in issue and overcome the privilege.[248] Waiver, therefore, should only occur in circumstances similar to waiver of the attorney-client privilege: when a plaintiff bases a claim on communication with his psychotherapist or selectively uses such communication to gain an advantage in litigation.[249]

The Second Circuit agreed with *Koch*.[250] In *In re Sims*, the court held that a broad view of waiver would effectively eviscerate the psychotherapist-patient privilege and overrule *Jaffee*.[251] In *Sims*, the Second Circuit reversed a trial court order to disclose plaintiff's psychiatric records in an excessive force case brought by an incarcerated person against two correctional officers.[252] Although Sims had withdrawn his claim for emotional distress damages,[253] defendants sought Sim's mental health records to impeach his credibility at trial.[254] Defendants actually argued that Sims's excessive force claim raised the question of whether Sims started the fight "due to uncontrolled aggression, a persecution complex, or some

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243. *Id.* at 389.
244. *Id.* at 387.
245. *Id.* at 390.
246. *Id.*
247. *Id.* at 391.
248. *Id.*
249. *Id.* at 390-91 (citations omitted).
250. *In re* Sims, 534 F.3d 117, 134 (2d Cir. 2008).
251. *Id.*
252. *Id.* at 141.
253. *Id.* at 120, 125, 134 (indicating that the incident occurred at New York's Sing Sing Correctional Facility and implicated correctional officers Mike Blot and Francisco Caraballo for assault without provocation or justification).
254. *Id.* at 126. Defendants sought to undermine Sims' claim that Blot's attack was unprovoked because his "psychiatric records might show that he had masochistic or suicidal tendencies." *Id.* at 135 (citations omitted).

other psychological problem."[255] The Second Circuit summarily rejected this argument because starting a fight has no bearing on whether "Sims was motivated by such a mental condition."[256]

As the Second Circuit reasoned, Sims had claimed physical injuries *not* serious emotional injuries.[257] In fact, Sims only testified to dreaming about the assault and becoming anxious upon seeing a corrections officer holding a knife.[258] He did not claim to suffer mental injuries, nor did he claim to receive treatment for any mental or emotional injuries.[259] The court noted that merely stating that one suffers from depression or anxiety does not waive the privilege, nor, can an opposing party place one's mental state "in issue" based on this information.[260] Only by disclosing or introducing some privileged material would a party waive the privilege.[261] In sum, Sims had not used privileged material as a "sword" to advance litigation while simultaneously trying to "shield" privileged communications from scrutiny.[262]

E. The Compromise: A "Middle View" that Preserves the Psychotherapist-Patient Privilege for "Garden Variety" Claims of Emotional Distress

Both the broad view and narrow view agree that calling a mental health professional as an expert witness would constitute a waiver of the psychotherapist-patient privilege.[263] The distinction between the two views turns on claims for emotional distress damages.[264] Plaintiffs that claim only emotional distress damages need not produce an expert or introduce their mental health records.[265] A party can prove emotional distress damages through its own

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255. *Id.* at 141 (emphasis omitted).
256. *Id.*
257. *Id.* at 135 (emphasis added).
258. *Id.*
259. *Id.*
260. *Id.* at 134 (quoting Koch v. Cox, 489 F.3d 384, 391 (D.C. Cir. 2007)).
261. *Id.* at 132.
262. *Id.* at 138 (citing *In re* Grand Jury Proceedings, 219 F.3d 175, 187 (2d Cir. 2000)).
263. McDonnell, *supra* note 21, at 1386.
264. *Id.*
265. *Id.* at 1387; *see also* Melissa L. Nelken, *The Limits of Privilege: The Developing Scope of Federal Psychotherapist-Patient Privilege Law*, 20 REV. LITIG. 1, 25 (2000).

testimony, and an opposing party may then depose the testifying party during discovery.[266]

As a result, several courts have differentiated claims of "garden variety emotional distress" from claims of mental injury or "serious" emotional distress.[267] Seven years before *Jaffee*, in a civil rights case alleging racial discrimination, the District Court of Massachusetts recognized that claiming "garden variety" emotional distress does not place one's mental condition at issue in litigation.[268] In *Sabree v. United Brotherhood of Carpenters & Joiners*, Sabree, the plaintiff, alleged that a union unlawfully denied him membership because of his race.[269] Sabree sought damages for lost wages and emotional distress.[270] When the union requested Sabree's psychotherapy records, Sabree asserted his psychotherapist-patient privilege.[271]

The *Sabree* court employed a four-pronged test to determine whether the court should recognize or disclose the evidentiary privilege: (1) Would courts recognize such a privilege?; (2) Is the asserted privilege "intrinsically meritorious"?; (3) Should such a privilege be actively fostered?; and (4) would disclosure injure the relationship more than benefit the court proceeding?[272] The *Sabree* court found that all four-prongs had been met to preserve the privilege: Massachusetts recognized the psychotherapist privilege to foster treatment and advance society's mental health.[273] Further, the court found that Sabree's privacy interest "overwhelmingly" outweighed any benefit to the defendant-Union, and the records at issue were "perspicuously irrelevant to the instant lawsuit."[274] The court concluded by asserting that no exception to the psychotherapist-patient privilege applies because Sabree had claimed "garden variety" emotional distress, not psychological injuries and psychiatric disorders, as damages.[275]

Similarly, in *Johnson v. Trujillo*, the plaintiff brought a personal injury suit after a motor vehicle accident with Trujillo, the

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266. *See* Nelken, *supra* note 265, at 25.

267. *See An Uncertain Privilege*, *supra* note 21, at 112; Kent & Kent, *supra* note 21, at 480.

268. Sabree v. United Bhd. of Carpenters & Joiners of Am., Local No. 33, 126 F.R.D. 422, 426 (D. Mass. 1989).

269. *See id.* at 423.

270. *Id.*

271. *Id.*

272. *Id.* at 425 (citing *In re* Hampers, 651 F.2d 19, 22-23 (1st Cir. 1981)).

273. *Id.* at 425-26.

274. *Id.* at 426.

275. *Id.*

defendant.[276] During her deposition, Johnson described the fallout from the accident to be "very upsetting" and "extremely emotional and scary."[277] She also expressed concern about having to undergo future surgery.[278] Trujillo then sought Johnson's psychiatric and marriage-counseling records because she had "injected her mental condition into the case" and claimed more than ordinary damages.[279]

The *Johnson* court held that "bare allegations of mental anguish, emotional distress, pain and suffering, and loss of enjoyment of life" did not place plaintiff's mental condition at issue.[280] Only placing the specific mental or emotional condition at issue would contravene fairness and justice.[281] If Johnson had called her psychiatrist as a witness to further a damages claim, the court would have ruled differently.[282] In such a situation, the privilege would become a sword to advance the plaintiff's litigation.

Courts tend to find psychiatric diagnoses or treatment as moving beyond the realm of "garden variety" emotional distress.[283] Yet, diagnoses and treatment reveal little about an individual's conscious subjective sensation of an emotional injury.[284] But anything beyond subjective sensation, such as producing records to support a severity claim, would require mental health records or expert testimony that would waive the privilege.[285]

Still, the District of New Jersey has held that claiming emotional distress while pursuing or continuing to receive psychotherapy waives the privilege.[286] In *Jackson v. Chubb Corp.*, the District Court for the District of New Jersey considered a protective order to prevent discovery of plaintiff''s mental health records after plaintiff sued her former-employer for race discrimination.[287] Jackson not only wanted to vindicate her rights, but also needed to receive mental health

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276. Johnson v. Trujillo, 977 P.2d 152, 153 (Colo. 1999).
277. *Id.*
278. *Id.*
279. *Id.* at 154.
280. *Id.* at 157.
281. *See* Sarko v. Penn-Del Directory Co., 170 F.R.D. 127, 130 (E.D. Pa. 1997).
282. *Johnson*, 977 P.2d at 157 n.5.
283. Stevenson v. Stanley Bostitch, Inc., 201 F.R.D. 551, 557 (N.D. Ga. 2001) (collecting cases).
284. *See An Uncertain Privilege*, *supra* note 21, at 113.
285. *See id.* at 113 n.205.
286. Jackson v. Chubb Corp., 193 F.R.D. 216, 226 (D.N.J. 2000).
287. *See id.* at 217.

treatment because she had been diagnosed as seriously depressed and had experienced hallucinations in the past.[288]

After assessing the case law supporting the psychotherapist-patient privilege, *Jackson* criticized the narrow view of waiver for failing to reconcile its position with Federal Rule of Civil Procedure 35(a) (Rule 35(a)), which permits courts to order a mental examination when a plaintiff places her mental condition at issue.[289] Because mandated psychiatric exams are no less intrusive than disclosing treatment records, the *Jackson* court held that failure to question Rule 35(a)'s fairness of the "at issue" rule made fairness in consideration of waiver insignificant.[290] *Jackson*, therefore, held that the broad view of waiver best serves party interests and adequately addresses fairness issues considered in other courts.[291]

The *Jackson* court, however, carved out claims of "garden variety" emotional distress from claims that place a mental condition at issue because it does not satisfy Rule 35(a)'s requirement that the "mental condition" must be "in controversy."[292] Several courts have held that mental anguish or "garden variety" emotional distress does not place plaintiff's mental condition in controversy.[293] Although the *Jackson* court recognized the Hobson's choice between unfettered psychotherapy and a plaintiff's right to pursue litigation, the court found it more inequitable to bar a defendant from gathering necessary evidence.[294] To preserve the privilege and prevent disclosure, plaintiffs must abandon or limit their claims to "garden variety" emotional distress, regardless of the actual damage incurred.[295]

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288. *Id.* (citing FED. R. CIV. P. 26(c)).

289. *Id.* at 222, 225 n.8; FED R. CIV. P. 35 ("Mental Health Examination:" (1) plaintiff asserted a specific cause of action for intentional or negligent infliction of emotional distress; (2) plaintiff has alleged specific mental/psychiatric injury or disorder; (3) plaintiff claimed severe emotional distress; (4) plaintiff offered expert testimony in support of emotional distress damages; and (5) plaintiff concedes mental condition is "in controversy."); *see also* Fitzgerald v. Cassil, 216 F.R.D. 632, 636-38 (N.D. Cal. 2003) (analogizing to FED. R. CIV. P. 35(a) in adopting the "middle" view of waiver).

290. *Jackson*, 193 F.R.D. at 222.

291. *Id.* at 224.

292. *Id.* at 225 n.8 (citing Smith v. J.I. Case Corp., 163 F.R.D. 229, 231 (E.D. Pa. 1995); Turner v. Imperial Stores, 161 F.R.D. 89, 97 (S.D. Cal. 1995); Bridges v. Eastman Kodak Co., 850 F. Supp. 216, 222 (S.D.N.Y. 1994)); *see also* Stevenson v. Stanley Bostitch, Inc., 201 F.R.D. 551, 553 (N.D. Ga. 2001).

293. *See Stevenson*, 201 F.R.D. at 553 (N.D. Ga. 2001) (citations omitted) (collecting cases).

294. *Jackson*, 193 F.R.D. at 226.

295. *Id.* at 227.

English dictionaries define "garden variety" as "[o]rdinary, common, or unexceptional."[296] "Garden variety" emotional distress is a legal—not medical term—that gives judges considerable discretion to decide what falls within its scope.[297] The District Court for the Northern District of Illinois defined "garden variety" emotional damages in *Santelli v. Electro-Motive* as "negative emotions that [a plaintiff] experienced as the intrinsic result of defendant's alleged conduct, [such as] humiliation, embarrassment, and other similar emotions."[298] However, "garden variety" emotions do not include "any resulting symptoms or conditions that [one] might have suffered, [including] sleeplessness, nervousness, [and] depression."[299] The *Santelli* court cites no legal or scientific authority for excluding sleeplessness, nervousness, and depression.[300] In fact, judicial discretion is so wide and varied that some courts have ordered magistrate judges to conduct *in camera* reviews of medical records before determining the scope and extent of permissible emotional distress claims.[301]

More recently, in *Flowers v. Owens*, the Northern District of Illinois considered whether persistent fear, anxiety, and depression about leaving the house (i.e., subtle agoraphobia) qualified as "garden variety" emotional distress.[302] Flowers, the plaintiff, sued Will County Correctional Facility after being detained and beaten in custody.[303] After the incident, Flowers feared retaliation from law enforcement, especially the people involved in the case.[304] The *Flowers* court held that the plaintiff could testify generally about "humiliation, embarrassment, anger, and feeling depressed, anxious and dejected," but could not testify about resulting symptoms or persistent conditions and maintain the psychotherapist-patient privilege.[305]

Flowers could not testify that he feared retaliation, leaving home, or thinking about the incident every day because these symptoms are

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296. *Garden Variety*, WIKTIONARY, http://en.wiktionary.org/wiki/garden_variety [https://perma.cc/7PZP-E5G3].

297. *See An Uncertain Privilege*, *supra* note 21, at 112.

298. Santelli v. Electro-Motive, 188 F.R.D. 306, 309 (N.D. Ill. 1999).

299. *Id.* at 309.

300. *Id.*

301. *See* Doe v. City of Chula Vista, 196 F.R.D. 562, 570 (S.D. Cal. 1999). The *in camera* review process, however, undermines the entire purpose of a privilege.

302. Flowers v. Owens, 274 F.R.D. 218, 221 (N.D. Ill. 2011).

303. *Id.* at 220-21.

304. *Id.*

305. *Id.* at 227.

indicative of agoraphobia or PTSD.[306] As the court noted, agoraphobia and PTSD are disorders classifiable in the Diagnostic and Statistical Manual of Mental Disorders (DSM), not "garden variety" emotional distress.[307] The *Flowers* court thus reaffirmed the *Jackson* court's reading that even a description of "garden variety" emotional distress symptoms overcomes the psychotherapist-patient privilege.[308] Emotional distress, therefore, must not reach beyond the purely subjective and most general-description of an emotional response to a civil wrong.

III. THE SCOPE OF WAIVER IN PRISON LITIGATION: DAMAGES, FAIRNESS, AND MOVING BEYOND "GARDEN VARIETY" EMOTIONAL DISTRESS

Part III of this Note analyzes the broad, narrow, and middle views on waiver of the psychotherapist-patient privilege through legal, policy, and normative frameworks. Tort law principles, fairness in litigation, confidentiality in guarding against social stigma, and the context of incarceration all militate in favor of the narrow approach to waiver. This Part argues against the "broad" view and critiques the growing "middle" view of the psychotherapist-patient waiver. In particular, the "garden variety" approach to waiver takes the psychotherapist-patient privilege out of the holder's hands and places it within the judge's vision of "normal" emotions.[309] This Note concludes that in the context of prison litigation, imposing "garden variety" or "normative" limits on emotional distress—such as those experienced by an imagined "healthy, well-adjusted person"—is biased, unrealistic, and discriminatory against incarcerated persons.

A. Damages: The "Eggshell-Plaintiff" Rule and Apportionment

Legal causation provides attorneys with creative avenues to argue for or against admissible evidence.[310] Civil defendants frequently offer evidence of an alternative factual cause to a plaintiff's injuries to avoid or mitigate liability.[311] Alternative causes also require findings

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306. *Id. But see id.* at 228 ("This is not to say that Mr. Flowers is suffering from agoraphobia or PTSD. Mr. Flowers makes no such claim, and only a qualified medical professional can make that diagnosis.").

307. *See id.*

308. *See* Jackson v. Chubb Corp., 193 F.R.D. 216, 223 (D.N.J. 2000) (citing Santelli v. Electro-Motive, 188 F.R.D. 306, 309 (N.D. Ill. 1999)).

309. *See generally* Anderson, *supra* note 216, at 120.

310. *See* Smith, *supra* note 17, at 760.

311. *Id.*

on the "apportionment" of the injury caused by a defendant's actions.[312] For civil rights plaintiffs that claim mental or emotional injuries, defendants frequently pursue alternative causation theories centered on the plaintiff's mental health history. It is important to note, however, that causation is different from *valuating* the harm of an injury—that is, damages.[313] Moreover, the subjective nature of mental or emotional injuries makes apportionment of the injury nearly impossible to calculate.[314] If a court attempted to apportion a mental or emotional injury based on a plaintiff's mental health history, it would only engage in ungrounded speculation.

Tort law relies on the "eggshell-skull plaintiff" rule to guide courts in valuating damages for plaintiffs with preexisting conditions.[315] Black's Law Dictionary defines the "eggshell-skull plaintiff" as "[a] plaintiff whose physical or mental condition makes the person exceptionally vulnerable to injury."[316] Tortfeasors must take their victim as they find them regardless of susceptibility. Defendants, therefore, are liable for damages that exacerbate the plaintiff's preexisting condition; not what is expected to happen to the "ordinary person."[317] Furthermore, defendants may only apportion damages to other causes when harms are distinct or reasonably divisible.[318] Otherwise, the harm is "indivisible" when no logical division is apparent.[319] Mental or emotional states, injuries, or distress are often context-dependent and vary considerably over time. By the very nature of mental and emotional states, it is near impossible to apportion a single cause to a subjective condition, especially for a third-party fact finder.[320] Courts, however, still allow attenuated speculation into a mental or emotional injury: if the plaintiff had not suffered anxiety, depression, or insomnia, the mental or emotional injury would have never occurred.[321] But a plaintiff's preexisting condition or past experience with anxiety, depression, or insomnia does not automatically relate to a similar response proximately caused by a civil rights violation.

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312. *Id.*
313. *See id.* at 762.
314. *See generally id.*
315. *See* Tompkins v. Cyr, 202 F.3d 770, 780 (5th Cir. 2000).
316. *Eggshell-Skull Plaintiff*, BLACK'S LAW DICTIONARY (10th ed. 2014).
317. Smith, *supra* note 17, at 761.
318. RESTATEMENT (SECOND) OF TORTS §§ 433A(1)(a)-(b) (1965).
319. *Id.* §§ 433A(2), 433A cmt. i.
320. *See* Smith, *supra* note 17, at 787.
321. *See id.*

For claims of mental or emotional injury in prison, the "eggshell-skull plaintiff" rule is significant because the experience of incarceration involves coercive arrest, the loss of privacy, and exposure to violence in correctional institutions.[322] Many prisoners experience PTSD, panic attacks, depression, paranoia, and a sense of helplessness from these highly stressful and traumatic events.[323] Furthermore, civil rights violations carry their own incumbent mental or emotional injuries.[324] Life-altering fear, anxieties, trauma, and accompanying physical symptoms, such as insomnia and indigestion, are all common.[325] As a consequence of history and context, incarcerated persons are more susceptible to preexisting conditions and aggravated mental or emotional injuries subsequent to a civil rights violation.[326] Because tortfeasors must take their victim as they exist in this particularized context, they are responsible for the exacerbation of damages claimed by the victim regardless of his or her past mental health history.[327] A civil defendant that attempts to mitigate damages based on past mental health treatment moves beyond the *valuation* of damages.[328]

Yet, the broad approach to waiver of the psychotherapist-patient privilege permits defendants to plumb the plaintiff's entire mental health history to mitigate damages and explore alternative theories of causation.[329] Broad view courts posit that claims of mental or emotional injury create a legal matter "at issue."[330] When courts grant a broad waiver of the psychotherapist-patient privilege, they usurp the plaintiff-privilege holder's right to decide whether or not to put forward his preexisting condition. In fact, broad waivers provide

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322. *See generally* DeVeaux, *supra* note 66 (commenting on academic literature detailing the psychological and traumatic experience of incarceration from the perspective of a formerly incarcerated person).

323. *Id.* at 259.

324. From words to violence, civil rights violations have profound psychological effects. *See* Richard Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135 (1982); *see also* Anderson, *supra* note 216, at 126 ("Victims . . . often endure terrible humiliation, pain and suffering. This distress often manifests itself in emotional disorders and medical problems.").

325. *See* Flowers v. Owens, 274 F.R.D. 218, 221-22 (N.D. Ill. 2011).

326. *See generally* DeVeaux, *supra* note 66.

327. *See* Smith, *supra* note 17, at 760-61.

328. *Id.* at 769.

329. *See* discussion *supra* Part II.C.

330. *See* Doe v. Oberweis Dairy, 456 F.3d 704, 718 (7th Cir. 2006).

the defense with irrelevant and, sometimes, stigmatizing information.[331]

The middle view of waiver more appropriately adopts tort principles by excluding claims for "garden variety" emotional distress. Underlying psychological conditions are irrelevant when considering a plaintiff's emotional response to a civil rights violation. But the middle view discounts the traumatic experience of incarceration and civil rights violations.[332] It ignores personal histories of abuse, racial discrimination, poverty, oppression, and the on-going invasion of privacy and identity reconstruction taking place in prison.[333] The middle view, therefore, is insufficient.

In the context of prison litigation, the narrow view of waiver proves most reasonable. The narrow view mirrors the attorney-client privilege by keeping the psychotherapist-patient privilege in the privilege holder's hands.[334] If the plaintiff makes a claim for exacerbated injuries through proof of a preexisting condition, the plaintiff may voluntarily waive his privilege to introduce relevant evidence. Once a plaintiff proves his preexisting condition, the "eggshell-skull plaintiff" rule would hold a defendant liable for the damages proximately caused by their wrong. Moreover, the privilege stops defendants from engaging in attenuated speculation into alternative causes of a mental or emotional injury. Ultimately, the narrow approach prevents defendants from grafting past subjective states onto the present injury litigated in court.

B. Fairness: Truth-Seeking, Vindicating Prisoner Rights, and Confidentiality as a Means to Guard Against the Stigma of Mental Illness

To effectuate justice and protect individual rights, courts must objectively weigh evidence and provide litigants with a fair hearing. Courts consider fairness to parties in litigation when deciding whether to admit or exclude evidence, including whether to invoke a broad, narrow, or middle approach to the scope of the waiver.[335] This Part

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331. Smith, *supra* note 17, at 786.

332. *See supra* Part II.E.

333. *See generally* DeVeaux, *supra* note 67, at 260-63 (describing verbal abuse, the historical and cultural trauma of slavery and life in a race-conscious society, and identity loss and reconstruction).

334. *See* Vanderbilt v. Town of Chilmark, 174 F.R.D. 225, 229 (D. Mass. 1997).

335. *See* FED. R. EVID. 403; Jackson v. Chubb Corp., 193 F.R.D. 216, 224 (D.N.J. 2000); Sarko v. Penn-Del Directory Co., 170 F.R.D. 127, 130 (E.D. Pa. 1997), *aff'd,* 189 F.3d 464 (3d Cir. 1999).

conducts a three-pronged analysis of fairness considerations for the implied waiver of the psychotherapist-patient privilege: (1) truth-seeking in discovery; (2) not chilling civil rights actions; and (3) preserving confidential information that may be used to impeach, discredit, and stigmatize the plaintiff. Although the broad view of waiver would expand the domain of potentially admissible evidence, the narrow view of waiver promotes important social policies consonant with the goals of evidentiary privileges.

1. Truth-Seeking During Discovery

Evidentiary privileges are not favored in the justice system.[336] By their nature, they obstruct the revelation of probative evidence.[337] As the institution of justice, courts demand "every man's evidence in search for the truth."[338] However, as the *Jaffee* court recognized, the psychotherapist-patient privilege was a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[339] Fairness reenters the court as a consideration when waiver of the privilege becomes an issue in litigation. Because the psychotherapist-patient privilege is an evidentiary privilege, courts tend to strictly construe the privilege and favor arguments for its waiver.[340] The fairness argument, however, must be more than the potential to exclude relevant evidence.[341] Courts characterize the fairness consideration as proscribing the use of the privilege "as a sword instead of a shield."[342]

In *Johnson v. Trujilo*, the court's fairness assessment of waiver supported the "middle view" approach.[343] Johnson had claimed "garden variety" emotional damages incident to physical injuries—injuries unrelated to a specific mental or emotional condition at issue.[344] However, courts that employ the broad view of waiver find

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336. *See supra* Part I.D; *see also* Trammel v. United States, 445 U.S. 40, 50-51 (1980).

337. Robert H. Aronson, *The Mental Health Provider Privilege in the Wake of* Jaffee v. Redmond, 54 OKLA. L. REV. 591, 593 (2001).

338. *See* United States v. Nixon, 418 U.S. 683, 710 (1974).

339. Jaffee v. Redmond, 518 U.S. 1, 15 (1996).

340. *See* Univ. of Pa. v. E.E.O.C., 493 U.S. 182, 189 (1990).

341. Johnson v. Trujillo, 977 P.2d 152, 157 (1999).

342. *Id.* Some courts also express concern about the psychotherapist-patient privilege being used as both a sword and shield. *See, e.g.*, Vanderbilt v. Town of Chilmark, 174 F.R.D. 225, 230 (1997) (citing Inserra v. Hamblett & Kerrigan, P.A., No. CIV. 94-454-M, 1995 WL 54402 (D.N.H. 1995)).

343. *See supra* Part II.E.

344. *Johnson*, 977 P.2d at 157.

any assertion of mental or emotional distress operates as a "sword" to advance a claim or defense while, simultaneously, the psychotherapist-patient privilege "shields" the opposing party from reviewing the evidence supporting the claim or defense.[345] These courts are highly skeptical of the psychotherapist-patient privilege and find that nearly all confidential information falls within an expansive category of mental or emotional injuries. Broad view courts find all psychotherapist-patient communication relevant and helpful to defendants without distinguishing the scope, extent, or type of a mental or emotional distress claim made by a plaintiff.[346]

Under the "broad" view, fairness for civil rights *defendants* is the primary concern. Broad view courts hold that it would be unfair to deny the defendant an opportunity to inquire into the plaintiff's past "to show alternative causes for her emotional distress."[347] The broad view fails on two levels: (1) its fairness argument rests on an inactionable relevance argument, and (2) it runs counter to the over-arching principle of privileges to serve more important social interests.[348] Moreover, courts that engage in a fairness analysis to overcome the psychotherapist-patient privilege ostensibly eviscerate the privilege and violate *Jaffee*'s holding.[349]

Narrow view courts, on the other hand, would avoid this tendency to favor defendant requests for privileged material. Because narrow waiver courts distinguish the type, extent, and scope of a mental or emotional distress claim, only claims that affirmatively place a specific condition at issue would waive the privilege.[350] Further, a mental or emotional injury "in issue" should directly relate to proximate or concurrent mental illness, and not "alternative stressors" such as divorce or financial stress.[351]

2. Vindicating the Rights of the Incarcerated

Evidentiary privileges are manifestations of "extrinsic social policy."[352] They place certain values and social relationships above

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345. *See, e.g.*, *Vanderbilt*, 174 F.R.D. at 230.

346. *See* Sidor v. Reno, No. 95 Civ. 9588, 1998 U.S. Dist. LEXIS 4593, at *4-7 (S.D.N.Y. Apr. 7, 1998).

347. *See id.* at *4-5.

348. *See* McDonnell, *supra* note 21, at 1384.

349. *Id.* at 1384-85.

350. *Id.* at 1379.

351. Smith, *supra* note 17, at 787.

352. MUELLER & KIRKPATRICK, *supra* note 106, § 5.2.

judicial truth-seeking and efficiency.[353] As described in Part I.D of this Note, privileges safeguard one's privacy, freedom, and interpersonal trust, especially in certain professional relationships.[354] In a democratic society that values individual rights, these are all public goods of "transcendent importance."

The psychotherapist-patient privilege belongs to the privilege holder.[355] As such, fairness analysis should focus on how waiver affects the privilege holder. Notably, broad views on waiver effectively chill civil rights litigation, especially for vulnerable populations who may have received mental health treatment in the past. Under the broad view, courts force victims of mental or emotional injury to make a Hobson's choice: pursue litigation and waive the privilege or do not pursue litigation at all.[356] Such an approach undermines federal civil rights policy, which seeks to vindicate civil rights by making plaintiffs "private attorneys general."[357] Vindicating civil rights in corrections redresses acts of violence and discrimination so that society at-large, and conduct in correctional institutions, might benefit.[358]

The middle and narrow views of waiver fall within the letter and spirit of *Jaffee*. Courts should not review waiver of the psychotherapist-patient privilege through balancing privacy interests and fairness in litigation; nor should the privilege be waived automatically upon filing a civil rights suit that alleges mental or emotional distress.[359] First, erosion of the privilege is not the only way to find the truth.[360] Defendants may inquire into the past and posit alternative theories of causation independent of mental health records. Second, *Jaffee* effectively prohibited balancing access to evidence against the privilege to prevent courts from moving the privilege from the hands of the holder to the judge.[361] Third, for the middle view, non-specific emotional distress is within a layperson's sphere of knowledge.[362] Plaintiffs may testify as to their emotional

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353. *See id.*
354. *Id.*
355. *Id.* § 5.11.
356. McDonnell, *supra* note 21, at 1385-86.
357. Newman v. Piggie Park Enters. Inc., 390 U.S. 400, 402 (1968) (noting that private attorneys general vindicate Congressional policy of the highest priority).
358. Anderson, *supra* note 216, at 145.
359. McDonnell, *supra* note 21, at 1386.
360. *See* Hucko v. City of Oak Forest, 185 F.R.D. 526, 531 (N.D. Ill. 1999).
361. Jaffee v. Redmond, 518 U.S. 1, 17-18 (1996).
362. McDonnell, *supra* note 21, at 1386.

distress without an expert witness to detail the substance of psychotherapy.[363]

Finally, *Jaffee* expressed a concern with chilling psychotherapist-patient communications in the absence of a reliable privilege.[364] Therapists and patients would speak with reservation if the prospect of litigation loomed. But discussing the "restricted issue" may be the most important aspect of improving a patient's mental health.[365] Moreover, plaintiffs interested in maintaining their privacy may forgo an emotional distress claim. Even under the middle view, plaintiffs may severely limit their emotional distress claim to preserve their psychotherapist-patient privilege.[366] Coupled with the PLRA's limitations,[367] the broad waiver may effectively foreclose an incarcerated person's redress for mental or emotional injury subsequent to a civil rights violation.

3. Confidentiality to Guard Against Stigma

Jaffee's recognition of the psychotherapist-patient privilege sought to foster uninhibited communication during mental health treatment through the certainty of confidentiality. Privileging communication in a treatment relationship also protects against the emotional upheaval attendant to public revelation of certain information.[368] There are two harms inherent to revealing a patient's confidential information: (1) making public highly personal information, and (2) the stigma that attaches to diagnoses of certain mental health conditions. Unlike the broad and middle views of waiver, the narrow approach would guard against the negative social consequences attendant to past behavior or medical conditions.

The stigma that attaches to mental illness grows out of normative "sanism" in society and the legal system, which segregates and discriminates against people with mental illness, constructing them in the public consciousness as "shameful, dangerous, and irresponsible."[369] It is ironic that the Federal Rules of Evidence exclude other stigmatizing information, such as character, criminal

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363. *Id.*
364. *Jaffee*, 518 U.S. at 11-12.
365. McDonnell, *supra* note 21, at 1388.
366. *See id.* (citing Santelli v. Electro-Motive, 188 F.R.D. 306, 309 (N.D. Ill. 1999)).
367. *See supra* Part I.C.
368. McDonnell, *supra* note 21, at 1389.
369. Stefan, *supra* note 34, at 136, 145. *See also* MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL 21-24, 39-43 (2000) (describing "sanism").

behavior, or sexual behavior,[370] but not a plaintiff's disability. As a result, defendants in civil rights actions have used evidence of a plaintiff's psychiatric diagnosis or treatment to discredit their claim and testimony.[371]

For example, in the context of prison litigation, mental health status frequently comes in to discredit a plaintiff's testimony.[372] When the plaintiff and other incarcerated persons are the only witnesses to a civil rights violation, correctional officers use mental health records to undermine the accuracy of their perception of events.[373] Although witnesses are given a presumption of competency, mental disabilities are broadly construed by the public to represent an incapacity to recall events accurately.[374] Fact-finders may "draw inappropriate and prejudicial inferences regarding [a] plaintiff's character and credibility" because American society continues to stigmatize mental illness as well as past criminal conduct.[375]

Unlike most medical diagnoses, mental illness does not evoke "empathic" responses.[376] Erving Goffman's classic study of stigma placed the problem succinctly as a discrediting, dehumanizing, and disempowering attribute.[377] Stigma profoundly impacts civil litigation; it may end a civil rights claim entirely, because the fact-finder often rules on the credibility of the plaintiff.[378] Moreover, fact finders may give inappropriate weight to evidence of mental illness to reach conclusions on events, motives, causation, and damages.[379] Plaintiffs may also face issues collateral to trial, including social alienation and employment discrimination.

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370. *See* FED. R. EVID. 404, 412 (2014).

371. Smith, *supra* note 17, at 751.

372. *See, e.g., In re* Sims, 534 F.3d 117 (2d Cir. 2008).

373. *See* Smith, *supra* note 17, at 788.

374. *See id.* at 790 (citing United States v. Hiss, 88 F. Supp. 559, 560 (S.D.N.Y. 1950) (discussing criminal defendants use of mental illness to generate reasonable doubt)) (noting that the "value of psychiatry" to court proceedings came to be recognized only during the decades just prior to the decision).

375. Smith, *supra* note 17, at 808.

376. *Id.* at 809. People often construe one's subjective experience as wholly in control of the person, as opposed to a physical injury or disease. *Id.* The rationale of individual control over one's mental condition results in blaming responses to a mental health diagnosis. *Id.* Even less severe forms of mental illness incur the same stigma. *Id.*

377. *Id.* (citing ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 5 (1963)).

378. Smith, *supra* note 17, at 809.

379. *See generally id.*

Similar concerns about confidentiality and privacy arose in the 1980s and 1990s for people living with HIV.[380] Since the very start of the epidemic, HIV-positive individuals have faced employment discrimination and social alienation.[381] Many feared that a positive test result would be made public.[382] As a result, states passed strict confidentiality protections to avoid discrimination and encourage testing.[383] With mental illness, confidentiality protections would provide a bulwark against discrimination, encourage treatment, and allow victims of civil rights violations to bring lawsuits without the emotional upheaval of a publicly stigmatizing trial.

C. Critique of "Garden Variety" Emotional Distress

In *Kunstler v. City of New York*, the Southern District of New York defined "garden variety" emotional distress as "the distress that any healthy, well-adjusted person would likely feel as a result of being so victimized [by a civil rights violation]."[384] Evidence demonstrative of "garden variety" emotional distress includes the plaintiff's testimony that they felt isolated, hurt, shocked, sad, worried, embarrassed, or humiliated.[385] Psychic injury, the step beyond the "garden variety" would include symptoms indicative of PTSD or depression, such as heart palpitations, insomnia, agoraphobia, or indigestion.[386] Courts also consider a plaintiff's conduct outside of court to render determinations as to whether an injury is psychiatric or "garden variety" emotional distress. Courts consider seeking psychotherapy after the incident as indicative of psychic injury.[387]

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380. *See generally* Hannah R. Fishman, Comment, *HIV Confidentiality and Stigma: A Way Forward*, 16 U. PA. J. CONST. L. 199, 201 (2013).

381. *Id.*

382. *Id.*

383. *Id.* Fishman also considers whether confidentiality actually contributes to stigma rather than mitigates it.

384. Kunstler v. City of New York, No. 04CIV1145(RWS)(MHD), 2006 WL 2516625, at *9 (S.D.N.Y. Aug. 29, 2006). *See* Flowers v. Owens, 274 F.R.D. 218, 225 (N.D. Ill. 2011) (collecting cases). For a discussion of the "garden variety" compromise see *supra* Part II.E.

385. Michael L. Orenstein, *The Psychotherapist-Patient Privilege*, 20 TOURO L. REV. 679, 698-701 (2004).

386. *See id.*

387. *See also* Jackson v. Chubb Corp., 193 F.R.D. 216 (D.N.J. 2000). *See generally* Orenstein, *supra* note 385.

1. Inconsistency Among Courts in Interpreting the Scope of Waiver

The "garden variety" approach has no genus or species. It is often inconsistent.[388] For example, in *In re RNC Consolidated Cases*, the Southern District of New York summarily decided all plaintiff claims for mental or emotional injuries went beyond "garden variety" emotional damages.[389] The court did not bother distinguishing "'mental injury,' 'emotional injuries,' 'severe emotional distress,' 'embarrassment, humiliation, shock, fright,' 'mental anguish,' and 'apprehension.'"[390] The court also summarily ignored cases that have recognized similar claims of emotional distress and preserved the psychotherapist-patient privilege.[391] Furthermore, the court read *In re Sims* as authoritative support for its "garden variety" analysis, even though *Sims* recognized a narrow approach to waiver.[392]

Similar inconsistencies have arisen in the Seventh and Eighth Circuits. After the *Doe* and *Schoffstall* courts embraced the broad approach to waiver, subsequent district court decisions have embraced the "garden variety" view.[393] Inconsistency arises when the court finds a mental condition "at issue."[394] Thus, the "broad" view and "middle" view can co-exist because "garden variety" emotional distress may not put a mental condition "at issue." However, district courts are still at liberty to decide which emotional responses place a mental condition "at issue" and waive the psychotherapist-patient privilege. Circuit courts and district courts offer little guidance or predictability on waiver. These courts also fail to provide any consistent approach to placing a mental condition "at issue" or what constitutes "garden variety" emotional distress. Although judges have defined "garden variety" emotional distress,[395] in practice the term has proven indeterminate and elastic.[396]

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388. *See* Anderson, *supra* note 216, at 129.

389. *In re* RNC Consol. Cases, 2009 WL 130178, at *7 (S.D.N.Y. Jan. 8, 2009).

390. *Id.*

391. *See generally* Hucko v. City of Oak Forest, 185 F.R.D. 526, 529 (N.D. Ill. 1999).

392. *In re* RNC Consol. Cases, 2009 WL 130178, at *5-7. *Cf. In re* Sims, 534 F.3d 117, 134 (2d Cir. 2008).

393. Anderson, *supra* note 216, at 130 n.87 (citations omitted). *See generally* Flowers v. Owens, 274 F.R.D. 218, 226 (N.D. Ill. 2011).

394. *See* Anderson, *supra* note 216, at 130 n.87.

395. *See* Orenstein, *supra* note 385, at 698-701.

396. Anderson, *supra* note 216, at 138-39 (listing definitions).

2. Discriminatory Impact

Although seemingly a fair compromise, the "garden variety" approach actively discriminates against persons with mental illness. Most obviously, the "garden variety" approach privileges patients who never sought psychotherapy.[397] Civil rights plaintiffs without mental health records are free to file claims for mental or emotional injuries because they have nothing to waive or disclose. But plaintiffs who have sought psychotherapy in the past may only claim "garden variety" emotional distress unless they are willing to disclose their entire mental health history to the defendant.

More importantly, the "garden variety" approach only protects plaintiffs whose mental or emotional suffering appears "normal" and "ordinary" to the district court judge.[398] When judges refer to "garden variety" emotional distress, they envision what a decontextualized ordinary person would experience.[399] But who is the reasonably emotionally distressed person? And do gender, race, and incarceration factor into the judge's consideration?[400]

Because most judges and lawyers come from privileged backgrounds,[401] they should not predetermine a plaintiff's emotional response to civil rights violations, especially for protected classes that have experienced discrimination in the past.[402] Incarcerated persons, in particular, have disproportionately experienced racial discrimination, poverty, oppression, and the ongoing invasion of privacy and identity reconstruction in prison.[403] Any concept that accounts for "normal" mental or emotional distress must account for the accumulated experiences of discrimination and oppression.[404] But, far too often, the decontextualized ordinary person bears the standard. As a result, "garden variety" emotional distress effectively

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397. *Id.* at 140.

398. *See id.*

399. *Id.*

400. *Id.*

401. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 407 (2000).

402. Anderson, *supra* note 216, at 140.

403. Compare the experiences of women who have experienced a history of gender discrimination and sexual harassment. What would qualify as "garden variety" emotional distress for hostile workplace claims considering this historical trauma? Does "garden variety" emotional distress, then, account for history or jettison lived experience for a "normal" legal subject?

404. Anderson, *supra* note 216, at 140.

tells civil rights plaintiffs that something is wrong with them when they suffer more than the "reasonable dominant group."[405]

"Garden variety" emotional distress also discriminates against persons with mental illness or emotional problems. It perpetuates the stigma of mental illness by placing a person beyond "normal" based on their subjective condition.[406] Someone with a mental health diagnosis, who experiences a civil rights violation, is effectively rebuffed as "abnormal" and "unreasonable" should they experience emotional distress differently than an "ordinary" civil rights plaintiff.

3. When "Garden Variety" Emotional Distress Rewrites Civil Claims

The "garden variety" approach does more damage to the truth-seeking function of courts than any marginally relevant evidence protected by a privilege. It encourages plaintiffs to reduce or fictionalize their mental condition or emotional response to preserve the privilege.[407] For example, in *Flowers*, describing one's fears and testifying as to the symptoms of emotional distress came too close to agoraphobia and PTSD, and the court waived the privilege.[408] Similarly, the *Santelli* court held that descriptions of sleeplessness, nervousness, and depression went beyond the scope of "garden variety" emotional distress.[409] If one's emotional distress approximates a diagnosable condition in the DSM, courts waive the psychotherapist-patient privilege.[410] Plaintiffs, therefore, are encouraged to limit their damage claims and testimony to purely subjective statements, such as sadness, humiliation, embarrassment, and fear.

Incarcerated persons may find navigating the "garden" extraordinarily difficult. The "garden" is both ill-defined and decontextualized from the experience of prison. Prisons are not open-air patches of flowers, but penal institutions made from concrete and steel. Incarcerated persons who bring civil rights claims

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405. *Id.* at 141.

406. *Id.* This runs counter to federal policy seeking to eliminate bias, discrimination, and the stigma that surrounds mental illness. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., THE FEDERAL MENTAL HEALTH ACTION AGENDA (2005), http://media.samhsa.gov/Federalactionagenda/NFC_TOC.aspx [https://perma.cc/UNS7-CM9S].

407. Anderson, *supra* note 216, at 142.

408. Flowers v. Owens, 274 F.R.D. 218, 227 (N.D. Ill. 2011).

409. Santelli v. Electro-Motive, 188 F.R.D. 306, 309 (N.D. Ill. 1999).

410. *Flowers*, 274 F.R.D. at 228.

may adversely affect their credibility and misrepresent their demeanor trying to stay within the garden's boundaries.[411] Lay juries may question rights claims arising in prison to an even further extent. And, coupled with the enormity of PLRA barriers, these hurdles may foreclose the vindication of the rights of the incarcerated.

CONCLUSION

Jaffee established an absolute psychotherapist-patient evidentiary privilege, but recognized that the privilege may be waived under certain circumstances.[412] Implied waiver of the psychotherapist-patient privilege has produced extensive case law and three legal categories that govern its scope: broad, narrow, and middle views.[413] Federal courts have varied widely on which approach to adopt and, even, on their interpretation of the same categorical approach.[414] Variations either depend on the facts of the case or are entirely decontextualized. Currently, the "broad" view of waiver has won over most circuits, but a growing number of district courts have qualified the waiver to exclude "garden variety" emotional distress. It is foreseeable that the "middle" view will eventually supersede the "broad" view.[415]

Prison litigation and the realities of incarceration, however, may shed new light on the "narrow" approach. Incarcerated persons who wish to vindicate their civil rights after a physical assault may find themselves trapped in the labyrinthine "garden" of prison litigation.[416] Under the broad view of waiver, the Hobson's choice of waiving the privilege and filing suit as opposed to not filing at all is a stark reality. Moreover, the middle view that preserves the privilege for "garden variety" claims of mental or emotional distress is insufficient. Incarcerated persons who diminish their claims to fall within the "garden" and preserve their privilege may inadvertently self-discredit their claim after a physical assault.

"Normalizing" mental or emotional injuries to simple, subjective adjectives runs against tort law principles, undermines federal civil rights policy, imposes more barriers upon incarcerated plaintiffs, and further excludes persons with mental illness from the law and "normal" society. Courts, therefore, should reconsider the narrow

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411. Anderson, *supra* note 216, at 143.
412. Jaffee v. Redmond, 518 U.S. 1, 15 n.14 (1996).
413. *See supra* Part II.
414. *See supra* Part III.C.1.
415. *See* Orenstein, *supra* note 385, at 698-701.
416. *See generally In re* Sims, 534 F.3d 117 (2d Cir. 2008).

view of waiver in the context of prison litigation, return the psychotherapist-patient privilege to the privilege holder, restore legal agency to incarcerated civil rights plaintiffs, and guard against the stigma of mental illness and imposition of a normative response to civil rights violations.