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AN UNCERTAIN PRIVILEGE: IMPLIED WAIVER AND THE EVISCERATION OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IN THE FEDERAL COURTS

Deirdre M. Smith*

An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.¹

INTRODUCTION

The psychotherapist-patient privilege is, in many respects, in its nascent years in the federal courts, having been first recognized by the United States Supreme Court only twelve years ago in Jaffee v. Redmond.² In holding that federal courts must protect confidential communications arising in psychotherapy notwithstanding the “likely evidentiary benefit” of such communications, the Supreme Court reasoned:

The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.³

Psychotherapy is the context in which, perhaps more than in any other, a person is most likely to reveal unflattering information about herself, as well as her fears, vulnerabilities, guilt, disappointments, doubts, and anxieties. By recognizing the privilege in broad terms, the Court appeared to create a wall of protection against disclosure of such statements in litigation, including responses to discovery re-

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² See id.
³ Id. at 11.
quests, marking the first time that the Court had recognized the over-
riding significance of mental health treatment.

Now that Jaffee is in its second decade, we can begin to take stock of its vitality and impact. In the short time since Jaffee, the federal courts have created a body of law in disarray, with inconsistent approaches to enforcement of the privilege found even within the same district. The source of the chaos is the courts’ contradictory treatment of the question of when a civil litigant is deemed to have waived the psychotherapist-patient privilege by placing her mental condition in issue through the assertion of a particular claim or defense. The issue of waiver of the psychotherapist-patient privilege can arise in any case in which a plaintiff who has received mental health treatment at some point in her life seeks emotional distress damages. The federal case law on this question, however, has developed almost exclusively in the context of civil rights cases. Since the federal court system is a primary forum for the vindication of civil rights claims, such as those alleging discrimination or excessive force, the federal courts’ approaches to the psychotherapist-patient privilege and their conceptualization of waiver of the privilege can have a crucial impact on the course of civil rights litigation and on whether litigation even occurs. Properly framed, the psychotherapist-patient privilege can serve as a critical tool to ensure that those with mental illness may enforce their rights under federal law without concern that their mental health histories will become a central issue in the litigation. Conversely, waiver formulations can chill federal civil rights litigation,

4. Id. Under the Federal Rules of Evidence, the rules with respect to privileges apply not only to the admissibility of evidence at trial but to “all stages of all actions, cases, and proceedings.” FED. R. EVID. 1101(c).


7. Bernabei & Schroeder, supra note 5, at 32 (assuming that plaintiffs likely do not choose in which forum to litigate a discrimination case, where given a choice, based upon the level of protection provided to confidential medical records, but noting that the choice of forum can dictate the degree to which medical records much be disclosed).
virtually ensuring that some plaintiffs' civil rights will never be vindicated.

Despite the Supreme Court's emphasis on the importance of recognizing and enforcing a psychotherapy patient's right to maintain the confidentiality of her communications, lower courts have eroded the privilege beyond recognition through the notion of implied waiver. While the case law is entirely unsettled, one fact has clearly emerged: by filing suit in federal court seeking any form of compensation for psychic injury, a plaintiff runs a substantial risk that her current and past mental health treatment will become a focus of discovery and perhaps of the defense theory at trial. With a significant number of individuals in the United States seeking mental health treatment, and with recent enhancement of remedies available under federal civil rights laws, courts' expansive views of waiver have resulted in a collision between plaintiffs' efforts to vindicate their civil rights in federal court and defendants' ability to exploit the issues that arise in plaintiffs' mental health treatment to gain an advantage in litigation. However, in developing the waiver doctrine, courts utterly fail to weigh the potential impact on future plaintiffs' decisions whether to pursue civil rights claims at all.

Prior scholarship on the development of the psychotherapist-patient privilege in federal courts has noted the sharp division in the courts on the issue of waiver. This scholarship, however, has neither considered the broader impact of such uncertainty on the role of federal courts in protecting civil rights nor advanced an alternative configuration of waiver to be adopted in this context. This Article analyzes the questions implicated by waiver of the psychotherapist-patient privilege and proposes a reasoned and coherent approach to resolving waiver disputes to ensure that the concept of waiver does not vitiate


the privilege entirely and therefore undermine the important purposes it serves.

Part II of this Article examines the role of mental health evidence during discovery in civil litigation, particularly in federal civil rights cases, the context in which the issues of the psychotherapist-patient privilege and waiver issues generally arise.11 Part III then traces the origins of the psychotherapist-patient privilege to the Supreme Court’s *Jaffee* opinion and reviews the various assumptions and rationales that shaped the debate regarding the development of the privilege in the state legislatures and eventually in the federal courts.12

Part IV reviews and critiques the post-*Jaffee* case law regarding implied waiver of the psychotherapist-patient privilege.13 The courts’ inconsistent approaches stem from the significant variation in their conceptualizations of the privilege and of waiver, as well as the underlying rationales of each. Federal courts too often fail to apply the broader principles implicated by questions of whether one has waived a legally protected right. Most significantly, courts do not predicate a finding of waiver on whether the holder of that right took some affirmative step that can be properly characterized as waiving the right. Instead, under the guise of implied waiver, many courts analyze the controversy employing considerations of privacy and fairness developed under the rules governing discovery procedure. Others allow conceptions of relevance and evidentiary value—expressly disallowed by *Jaffe*—to creep into or dominate the analysis of waiver questions. Such considerations, however, have no place in a determination of waiver.

In Part V, the Article proposes a new framework for analyzing issues of waiver of the psychotherapist-patient privilege, especially in the discovery context.14 It first offers an alternative conceptualization of the underlying rationale of the privilege. Specifically, the privilege encourages individuals to seek remedies for violations of their civil rights who might otherwise be discouraged from doing so out of fear that their mental health treatment history will become a central issue in the litigation. Part V then advances a new approach that is consistent with both the Supreme Court’s formulation of the privilege in *Jaffee* and with the broader principles applicable to questions of waiver.15 Part VI concludes that the Supreme Court must provide

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11. See infra notes 17–44 and accompanying text.
12. See infra notes 45–132 and accompanying text.
13. See infra notes 133–324 and accompanying text.
14. See infra notes 325–349 and accompanying text.
15. See infra notes 350–394 and accompanying text.
guidance to lower courts on the issue of waiver of the psychotherapist-patient privilege in order to preserve meaningful access to the federal courts for all individuals, regardless of their history of mental health treatment.\textsuperscript{16}

II. DISCOVERY OF MENTAL HEALTH RECORDS IN CIVIL LITIGATION

The operation of the psychotherapist-patient privilege is at issue most often and most contentiously when a defendant in a civil action involving claims for emotional distress damages seeks records, testimony, and other information regarding a plaintiff’s current and past mental health treatment.\textsuperscript{17} Unrestricted access to a plaintiff's mental health records, particularly notes and records from psychotherapy sessions and diagnostic evaluations, can yield some of the most valuable discovery to a defendant. Such records may provide the most direct and uninfluenced view of the plaintiff, her life, her opinions, her personality, and her vulnerabilities.\textsuperscript{18} Mental health records may contain admissions about the incident at issue in the litigation, or even the plaintiff's impressions of the litigation itself. Alternatively, mental health records may place the incident at issue in the litigation in context by revealing other circumstances in the plaintiff’s life, such as marital problems and struggles with childhood trauma.\textsuperscript{19}

By contrast, other forms of discovery generally yield less useful information. Non-psychotherapy medical records tend to reveal little, as physicians typically do not record—or later recollect—a patient’s statements during a fifteen-minute office visit. Plaintiffs’ lawyers draft interrogatory answers with the object of disclosing as little as possible. Depositions occur once litigation is underway, after extensive preparation sessions with counsel, and when a litigant is quite guarded about making revelations in response to questions from opposing counsel. Psychotherapy records, however, contain few similar mediat-

\textsuperscript{16} See infra notes 395–400 and accompanying text.

\textsuperscript{17} See Michael L. Orenstein, The Psychotherapist-Patient Privilege, 20 Touro L. Rev. 679, 679 (2004) (noting that the issue of privilege generally arises when a defendant is seeking a plaintiff’s mental health records).

\textsuperscript{18} See Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955) ("The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame." (internal quotation marks omitted) (quoting Manfred S. Guttman & Henry Weihofen, Psychiatry and the Law 272 (1952))).

ing influences. The information is as close to a peek into a litigant’s mind as one can presently achieve through discovery.\textsuperscript{20} Thus, defendants’ attorneys are highly motivated to develop creative arguments to gain access to such records, and plaintiffs’ attorneys are at least as equally motivated to resist such arguments.

The most commonly offered rationale by civil defendants in support of their discovery requests for psychotherapy records is a plaintiff’s claim for emotional distress damages.\textsuperscript{21} In the 1990s, a confluence of factors transformed the landscape of emotional distress damages in federal civil rights actions, which themselves comprise a substantial proportion of civil matters in which plaintiffs seek recovery for personal injuries.\textsuperscript{22} Prior to that time, the primary vehicles for collecting emotional distress damages in federal courts were either tort actions based upon diversity of the parties, or civil rights actions brought pursuant to § 1983,\textsuperscript{23} through which plaintiffs could receive most state-law tort remedies.\textsuperscript{24} In 1990, Congress enacted the Americans with Disabilities Act (ADA), which greatly expanded the reach of the anti-discrimination provisions of the Rehabilitation Act to include a significant number of public and private entities and employers.\textsuperscript{25} A year later, Congress enacted the Civil Rights Act of 1991,\textsuperscript{26} which extended the right to seek compensatory damages, including damages for emo-

\begin{itemize}
\item[20.] Access to treatment notes covering treatment prior to the litigation, or even the incident at issue, can be particularly valuable since it avoids the common “contaminating factors” that can be present in forensic psychological examinations. \textit{Id.}
\item[22.] In 2007, civil rights complaints comprised twelve percent of all civil case filings in the federal courts, a figure slightly lower than the number of personal injury and product liability filings. \textit{Administrative Office of the Court, Federal Court Management Statistics}, http://www.uscourts.gov/cgi-bin/cmsd2007.pl (last visited Feb. 18, 2008). The remaining categories of civil filings (e.g. social security, prisoner filings, forfeitures, contracts, intellectual property matters) do not generally involve recovery for personal injuries.
\end{itemize}

tional distress, to employment discrimination plaintiffs pursuing claims under Title VII of the Civil Rights Act of 1964 and the ADA.  

As a result of these two statutes, mental health issues quickly became predominant in employment discrimination cases. Whereas previously employers' attorneys argued that access to a plaintiff's mental health records was necessary to defend on the issue of liability, the availability of emotional distress damages and the expansion of discrimination claims based upon mental illness enhanced the relevancy arguments regarding access to these records. The same year of the enactment of the Civil Rights Act of 1991, public awareness of sexual harassment brought about by the confirmation hearings of Clarence Thomas may have led to a multifold increase in sexual harassment claims. These trends were well underway when the Su-

30. See, e.g., id. at 219 (explaining that an employee's pre-existing "personality disorder" may "produce cognitive distortions and unreasonable expectations and demands that may impact liability issues in an employment lawsuit"); see also Robinson v. Jacksonville Shipyards, Inc., 118 F.R.D. 525, 531 (M.D. Fla. 1988) (denying discovery of sexual harassment plaintiff's mental health treatment where defendant sought to establish plaintiff's "hypersensitivity to pornography").
31. Prior to the enactment of the Civil Rights Act of 1991, employment discrimination plaintiffs frequently included separate tort claims for negligent and intentional infliction of emotional distress as a means to seek compensatory damages for emotional distress. See, e.g., Green v. Am. Broad. Co., 647 F. Supp. 1359, 1362 (D.D.C. 1986). However, plaintiffs must prove each of the elements of those torts in order to recover emotional distress damages and such efforts are not always successful. Id. at 1362–64 (granting summary judgment for defendants on plaintiff's claim for intentional infliction of emotional distress). Also, some courts have held that such tort claims are pre-empted by state workers' compensation statutes. See generally Jarod S. Gonzales, State Antidiscrimination Statutes and Implied Preemption of Common Law Torts: Valuing the Common Law, 59 S.C. L. REV. 115 (2007).
32. Equal Employment Opportunity Commission filings reflected a more than twofold increase in sexual harassment cases over a five-year period, from 6127 in 1991 to 15,342 in 1996. Jennifer Steinhauer, If the Boss is Out of Line, What's the Legal Boundary? Testing a Wider Concept of Sexual Harassment, N.Y. TIMES, Mar. 27, 1997, at D1. See also Noelle C. Brennan, Comment, Hostile Environment Sexual Harassment: The Hostile Environment of a Courtroom, 44 DePaul L. REV. 545, 545 n.3 (1995) ("In the three months following the Clarence Thomas confirmation hearings, the Equal Employment Opportunity Commission (EEOC) reported a 70% increase in reports of sexual harassment, as compared to the previous year."); Allen R. Myerson, As Federal Bias Cases Drop, Workers Take Up the Fight, N.Y. TIMES, Jan. 12, 1997, at 1 (reviewing possible causes of increase in employment discrimination filings and noting that "[e]xperts attribute the growth in sexual-harassment cases to Anita Hill's confrontation of Judge Clarence Thomas at his Supreme Court confirmation hearings"). However, it is not apparent to what extent the increase in filings is attributable to the Hill-Thomas controversy or the expansion of available remedies. Kirstin Downey Grimsley, Worker Bias Cases Are Rising Steadily:
A claim for emotional distress damages raises issues of causation, severity, and sincerity, including whether a plaintiff is accurately stating the source or extent of her emotional distress. Mental health records may offer tools for defendants seeking to limit damages by challenging the claim on any of those aforementioned issues. Establishing causation for emotional distress damages is not a straightforward task. Given the complexity of the human psyche, a defendant can argue that anything in a plaintiff’s life contributed to her emotional or mental condition. Psychotherapy treatment notes may reveal “prior or concurrent alternative stressors, such as childhood sexual abuse or marital discord,” any of which could arguably be a contributing or alternative cause of emotional distress. Thus, defendants have easily fashioned and found support for superficially valid arguments for a need to obtain a wide range of mental health

New Laws Boost Hopes for Monetary Awards, WASH. POST, May 12, 1997, at A1 (“Employment discrimination cases are surging into the federal courts in record numbers, more than doubling in the past four years because of new laws and new attitudes in the workplace.”).

33. Drukteinis, supra note 19.


Employers should explore in discovery alternative causes for the plaintiff’s alleged emotional distress. Employers should consult with psychiatric or psychological experts as necessary or appropriate to develop discovery on injuries and to perform examination of the plaintiff’s mental state. Such matters might include recent divorce, bankruptcy, surgery, accidents, or other traumatic personal events. All prior psychiatric records of the plaintiff should be requested.

35. Similarly, defendants have successfully sought and obtained marital counseling records in loss of consortium claims. See, e.g., Price v. County of San Diego, 165 F.R.D. 614, 622–23 (S.D. Cal. 1996) (recognizing the psychotherapist-patient privilege pre-Jaffee, but also finding waiver based solely upon plaintiffs’ claim for loss of consortium as part of an excessive force, wrongful death claim).

36. James J. McDonald, Jr. & Francine B. Kulick, Preparing the Case for the Expert, in MENTAL AND EMOTIONAL INJURIES, supra note 29, at 262, 272. The authors of this defense-oriented book suggest several questions to be asked of a discrimination plaintiff for the purpose of eliciting information about the plaintiff’s mental health. Id. at 279–82.
Defendants who plan to use mental health professionals as either testifying or consulting experts are particularly motivated to access as much information as possible about a plaintiff’s mental health history and present condition.\(^\text{38}\)

At the same time, a plaintiff may be horrified to learn that her psychotherapy history will be made available, not only to the opposing counsel, but also to the opposing party (perhaps an employer who subjected her to sexual harassment), the court, the jury, and the gen-

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37. Johnson v. Trujillo, 977 P.2d 152, 158 (Colo. 1999) ("It is not difficult to consider the many ways in which it would be argued that the mental conditions of claimants are at issue."); David A. Robinson, Discovery of the Plaintiff's Mental Health History in an Employment Discrimination Case, 16 W. NEW ENG. L. REV. 55, 59 (1994); see also Zachary D. Fasman, Taking the Plaintiff's Deposition: The Defense Viewpoint, 712 PLI/LTR 513 (Nov. 2004). The author advises defense attorneys to cover the following in a deposition of a plaintiff in an employment discrimination claim:

(40) Where the plaintiff is claiming emotional distress damages, obtain as much information as possible about the symptoms which plaintiff claims support emotional distress: when they began; how severe they were; how they interfered with his/her normal activities; whether they still do, if not, when they ceased to do so; whether they were similar in kind or character to anything plaintiff had experienced previously or since.

(41) When plaintiff initially sought treatment for such ailments, and if the treatment was not sought immediately why not.

(42) Whether plaintiff was suffering from any other problems at or about the time the symptoms began, and if so what those events were like in comparison to the trauma suffered at the hands of the employer.

Fasman, supra, at 535. The author further advises defense attorneys to “[i]nquire about the existence of alternative stressors (e.g., a death in the family, marital and family problems, financial problems, medical problems) contemporaneous with the alleged stressful events in plaintiff's workplace” and to “[i]nquire about pre-existing mental disorders and symptoms of emotional distress. This is a crucial area.” Id. at 539, 541 (emphasis added). As a follow-up to the deposition, the author continues, “if plaintiff has claimed emotional distress damage and has identified medical practitioners, depose them promptly.” Id. at 537. If the therapist took “notes during the sessions . . . subpoena the writings.” Id. at 543. But see infra notes 256–284 and accompanying text, questioning whether the “alternative sources of emotional distress” basis for discovery of psychotherapy records is consistent with basic notions of the law of tort damages.

38. See, e.g., McDonald & Kulick, supra note 36, at 271 (emphasizing that defense counsel should obtain and provide to an examining psychiatric expert all mental health records, deposition transcripts, and similar items in advance of the expert's meeting with the plaintiff). Another tool frequently used by defense counsel, particularly in sexual harassment cases, is a compelled mental health examination pursuant to Rule 35 of the Federal Rules of Civil Procedure. Although this Article provides a brief analysis of the core issues in Rule 35 disputes, infra at notes 285–310 and accompanying text, comprehensive treatment of the scope and application of the rule is found elsewhere. See, e.g., Richard A. Bales & Priscilla Ray, The Availability of Rule 35 Mental Examinations in Employment Discrimination Cases, 16 REV. LITIG. 1 (1997); Kent D. Streseman, Note, Headshrinkers, Manmunchers, Moneygrubbers, Nuts & Sluts: Reexamining Compelled Mental Examinations in Sexual Harassment Actions Under the Civil Rights Act of 1991, 80 CORNELL L. REV. 1268 (1995).
The controversies over the psychotherapist-patient privilege and the discovery of mental health records generally arise in those cases where a plaintiff chooses not to offer some or all of her mental health treatment records in support of her claims and resists a defendant’s efforts to obtain such records through discovery. In many instances in which a plaintiff seeks emotional distress damages, a plaintiff who has received psychotherapy treatment for such emotional distress will list one or more treating therapists as expert witnesses and plan to introduce some or part of her treatment records as evidence of her emotional distress. In other cases, however, a plaintiff may plan to offer only her own testimony as to the psychological impact of the defendant’s actions. She may have received mental health treatment for such distress but could choose not to offer the testimony of her treating therapist. The plaintiff also may have been in treatment at the time of, or prior to, the incident at the center of the litigation, and she may attempt to keep all records of such treatment out of the hands of the defendant’s attorney.

Where a plaintiff produces her psychotherapy records in discovery, she may be asked at her deposition about certain statements she made in treatment, perhaps with a copy of her therapist’s notes in front of the deposing attorney. Some of the specific content of the psychotherapy records may have relatively low value to the defense attorney in terms of proof of the central issues in contention in the case, such as liability or the extent of emotional distress damages, but the defense attorney may use the records to paint a negative picture of the plaintiff or to cause embarrassment, thereby improving settlement chances. For example, notes of psychotherapy sessions after the plaintiff initiates litigation may include references to the plaintiff’s feelings about

39. See Bernabei & Schroeder, supra note 5, at 32 (discussing plaintiffs' feelings of "violation" at having to disclose medical records, especially mental health records, in employment discrimination cases).

40. Rodney J. S. Deaton et al., The Role of the Mental Health Professional in Employment Litigation, in Mental and Emotional Injuries, supra note 29, at 50, 58. Indeed, in some instances, a plaintiff’s attorney may refer her to a therapist for evaluation and treatment so as to ensure that the emotional distress is documented and can be proven through a witness other than the plaintiff herself. See generally Jon R. Abele, Emotional Distress: Proving Damages 103-08 (2003) (discussing benefits of offering expert medical testimony in support of claims for emotional distress).
the litigation itself.\textsuperscript{41} In short, disclosure of such records is of high value to defendants and correspondingly high cost to plaintiffs.\textsuperscript{42}

Given the significant value and cost associated with the disclosure of records from psychotherapeutic treatment in civil litigation, it is not surprising that, as psychotherapy became more widespread and the availability of emotional distress damages expanded in federal courts, the controversies over the role of such records in civil litigation became increasingly common. As discussed in the next section, due largely to the efforts of psychotherapists and psychiatrists to receive protection for their professional communications, state legislatures and later the federal courts fashioned a new privilege to limit the dis-

\textsuperscript{41} For example, in \textit{Maday v. Public Libraries of Saginaw}, 480 F.3d 815 (6th Cir. 2007), the plaintiff unsuccessfully attempted to preclude the introduction into evidence at trial on her Family and Medical Leave Act claim certain statements she had made to her therapist to the effect that she was "unhappy with her attorney who told her he didn't want to be used as a tool for her revenge." \textit{Id.} at 820. The defendant's attorney argued in response to the plaintiff's objection: "She's depressed, it makes reference to her mood, and we're entitled to explore and argue anything that would have [an] impact on her mood." \textit{Id.} at 820-21. The appeals court affirmed the trial court's admission of the record on the basis that she had waived her psychotherapist-patient privilege by alleging emotional distress damages. \textit{Id.} at 821. The court concluded that the trial court's admissibility analysis under Federal Rule of Evidence 403 was "reasonable." \textit{Id.}; see also \textit{Murray v. Bd. of Educ.}, 199 F.R.D. 154, 156 (S.D.N.Y. 2001) (requiring plaintiff in an employment discrimination case to disclose those portions of her psychotherapist's notes that revealed references to and communications with her attorney in that case).

\textsuperscript{42} In addition to these factors, other consequences may flow from the release of psychotherapy records in litigation. There is a real risk, which likely cannot be quantified or proven, that a fact finder would use such evidence impermissibly at trial to judge a plaintiff's character, credibility, or likeability. There is little question that stigma, discrimination, and prejudice against people with mental illness continue to pervade American society. \textit{See} MICHAEL L. PERLIN, \textsc{The Hidden Prejudice: Mental Disability on Trial} 21-24, 39-43 (2000) (describing the nature and pervasiveness of sanism); SUSAN STEFAN, \textsc{Unequal Rights: Discrimination Against People with Mental Disabilities and the Americans with Disabilities Act} 5 (2001) ("Social science research confirms that mental illness is one of the most—if not the most—stigmatized of social conditions."); Elizabeth F. Emens, \textit{The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA}, 94 GEO. L.J. 399, 401 (2006) ("Social discrimination against people with mental illness is widespread."). What is far from certain, however, is what impact these factors may have on juror decision making. \textit{See} EDIE GREENE & BRIAN H. BORNESTEIN, \textsc{Determining Damages: The Psychology of Jury Awards} 52 (2003). The authors note:

\textit{Id.}; see Edith Greene et al., \textit{Juror Decisions about Damages in Employment Discrimination Cases}, 17 \textit{Behav. Sci.} & L. 107, 108 (1999) ("Whether juries are competent to make reasonable assessments of claims for lost wages and pain and suffering in age and other discrimination cases is unknown.").
closure of such records. However, as discussed in Part IV, this tool is of limited effect as federal courts apply a broad conceptualization of waiver to the privilege, which enables defendants’ attorneys to gain access to such records in most cases in which the records are sought.

III. The Evolution of the Psychotherapist-Patient Privilege

The controversies that surround the psychotherapist-patient privilege and its application to civil litigation in federal courts trace their origins to the development of the privilege itself. The contemporary case law addressing questions of waiver of the psychotherapist-patient privilege reflects the long-standing resistance to the expansion of testimonial privileges first to physicians and later to psychotherapists. Indeed, as Part IV explains, in many respects, the broad view of waiver is simply a reconfiguration of the classic arguments against the privilege.

A. Origins of the Psychotherapist-Patient Privilege

The psychotherapist-patient privilege developed in the second half of the twentieth century in the face of strong hostility to evidentiary privileges in Anglo-American law. Privilege law generally reflects and concerns “extrinsic social policy,” perhaps more so than any other realm of evidence. While other evidentiary rules aim to improve the reliability of evidence, leading to enhanced truth-seeking by fact finders and more efficient trials, privileges provide benefits outside adjudication, such as the preservation or protection of certain interpersonal relationships. Such purposes are central to many evidentiary privileges recognized today, including those shielding communications arising in marital, attorney-client, and clergy-believer relationships. As a result, privileges are antithetical to the primary object of evidentiary trials, as expressed in one of the oft-cited maxims in privilege cases: “The public [ ] has a right to every man’s evidence.”

43. See infra notes 69–132 and accompanying text.
44. See infra notes 133–324 and accompanying text.
45. See infra notes 227–255 and accompanying text.
47. Id. § 1.1, at 4 (noting that numerous witnesses at the Congressional hearings on the proposed federal rules of evidence commented that “unlike most evidentiary rules, privileges protect interpersonal relationships outside of the courtroom”).
Few evidentiary privileges were recognized at common law and, therefore, state legislatures took the lead in establishing new privileges from the nineteenth century to the present.49 Privilege law often reflects a struggle between legislatures and courts, in which the latter take a narrow view of the codified privileges established by the former.50 Indeed, many privileges—including the psychotherapist-patient privilege—came about by intensive lobbying efforts by professionals seeking special status for their communications.51 Judges resented and resisted restrictions on their authority to make evidentiary rulings, particularly where the restrictions resulted in the exclusion of evidence that was quite often plainly relevant to the issues before the court.52

Dean John Henry Wigmore, considered the preeminent American evidence scholar in the early twentieth century, notably opposed the wide recognition of evidentiary privileges.53 Scholars such as Wigmore, who took a rationalist and empiricist approach to evidence,54 expressed skepticism that most privileges were truly necessary as mechanisms in social relationships.55 Wigmore questioned any "humanistic rationales" for privileges where an empirical basis was lacking.56 That skepticism led him to dismiss most proposed privileges.57 Wigmore urged courts to take an approach of strict construction to the

49. IMWINKELRIED, supra note 46, § 4.1, at 147.
50. Id. § 3.2.2, at 127.
51. Id. at 128.
52. Id.
53. Id. § 3.1, at 119–22.
54. Id. § 3.1, at 121, § 3.2.1, at 125. Another early critic of privileges, and one who influenced Wigmore's approach, was the British philosopher Jeremy Bentham, who wrote that privileges and other exclusionary rules interfered with the "natural" process of fact finding. Id. § 2.5, at 113–17. He also dismissed the proffered rationales for privileges because there was no empirical proof to support them. Id. § 2.5, at 113–17. As Bentham once stated: "Evidence is the basis for justice: exclude evidence and you exclude justice." 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 38 (1827).
55. IMWINKELRIED, supra note 46, § 3.2.1, at 124–25, § 3.2.3, at 130–31.
56. Id. § 3.2.1, at 124–25. Wigmore dismissed humanistic rationales as mere "sentiments." Id. at 125.
57. Wigmore developed an influential four-part test for privilege and argued that only a small handful of asserted privileges, including the attorney-client privilege, fulfilled the requirements:

(1) The communications must originate in a confidence that they will not be disclosed.
(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (McNaughton rev. 1961) (emphasis omitted).
new privileges, and courts have generally heeded that suggestion.58 Wigmore’s writings continue to pervade contemporary judicial opinions, as courts note that privileges are disfavored, are to be construed strictly, and ultimately impede truth-seeking.59

The physician-patient privilege, a forerunner of the psychotherapist-patient privilege, was among those privileges that legislatures enacted and courts resisted.60 By the turn of the twentieth century, several states had enacted a physician-patient privilege of some kind.61 Commentators’ criticisms of the new privilege, including those by Wigmore himself, were “vociferous.”62 One of the most-cited and influential attacks on the privilege was that of Harvard Professor Zechariah Chaffee, Jr., who wrote that “[s]ecrecy in court is prima facie calamitous, and is permissible only when we are very sure that frankness will do more harm than good.”63

The same year of Chaffee’s call for abolition of the physician-patient privilege, the American Law Institute’s Committee on Evidence issued a Model Code of Evidence.64 Initial drafts of the Model Code contained no provision for a physician-patient privilege, but attorneys from jurisdictions that already recognized such privilege lobbied for its inclusion in the final draft.65 The rules provided for several fairly broad exceptions to the privilege, including what is now commonly referred to as a “patient-litigant exception”:

There is no [physician-patient] privilege . . . in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.66

58. IMWINKELRIED, supra note 46, § 3.2.2, at 129.
59. See, e.g., In re Grand Jury, 103 F.3d 1140, 1152 (3d Cir. 1997) (applying Wigmore’s four-part test in declining to recognize a parent-child privilege).
61. 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5522, at 68 (West 1989).
62. Id. § 5522, at 70. Many rejected the privilege by employing Wigmore’s four conditions, essentially an instrumental and utilitarian approach. Id. § 5522, at 76; see also Comment, Waiver of a Patient’s Privilege, 31 YALE L.J. 529, 529–30 (1922) (noting that many legislatures have enacted such privileges in the face of “much hostile criticism”).
64. MODEL CODE EVID. (1942). The code proposed to displace all common law privileges with those set out in the model code. MODEL CODE EVID. R. 9.
65. MODEL CODE EVID. R. 220–23; 2 MANFRED S. GUTTMACHER & HENRY WEIHOFEN, PSYCHIATRY AND THE LAW 269 (1952); see also Chaffee, supra note 63, at 616.
66. MODEL CODE EVID. R. 223(3).
This exception was recognized in many jurisdictions that had already enacted the privilege.\textsuperscript{67} Tying the exception to the purported instrumental rationale of the privilege itself, Wigmore noted:

\begin{quote}
The whole reason for the privilege is the patient's supposed unwillingness that the ailment should be disclosed to the world at large, hence the bringing of a suit in which the very declaration and much more the proof discloses the ailment to the world at large is of itself an indication that the supposed repugnancy to disclosure does not exist.\textsuperscript{68}
\end{quote}

By mid-century, commentators began discussing the need for a separate psychotherapist-patient privilege.\textsuperscript{69} There were two primary impetuses for the drive for a new privilege. First, the physician-patient privilege, which could apply to psychiatry, was not uniformly established throughout the country, notwithstanding its inclusion in the Model Code. Thus, psychiatrists' ability to avoid testifying was tied to the insecure fate of other medical doctors, as described above.\textsuperscript{70} Second, and more significantly, courts did not consistently apply the physician-patient privilege to communications arising in psychotherapy. Even where a physician-patient privilege was recognized—as was the case in approximately thirty states by 1960—questions occasionally arose regarding whether treatment of "mental and emotional disorders" was in fact "the practice of medicine," triggering the operation of the privilege.\textsuperscript{71} Further, the field of clinical psychology grew exponentially as psychologists began to provide treatment in private practice in the years following World War II.\textsuperscript{72} That expansion raised the question of whether to extend the physician-patient privilege to encompass non-physicians—such as licensed psychologists—or to distinguish the physician's privilege entirely and establish a new privilege based, not upon the status of the person with whom the communica-

\textsuperscript{67} Present Status of Medical Privilege, 81 U. PA. L. Rev. 755, 762 (1933); MODEL CODE EVID., supra note 64, at 29.
\textsuperscript{68} 8 Wigmore, supra note 57, § 2388, at 855, quoted in Jean V. McHale, Medical Confidentiality and Legal Privilege 111 (1993).
\textsuperscript{69} The question of whether there should be a psychotherapist-patient privilege is distinct from issues regarding a psychotherapist's duty of confidentiality, which was already well established in ethical rules and statutes by this time. See Daniel W. Shuman & Myron F. Weiner, The Psychotherapist-Patient Privilege: A Critical Examination 11-24 (1987).
\textsuperscript{70} David Louisell, The Psychologist in Today's Legal World: Part II: Confidential Communications, 41 MINN. L. REV. 731, 734 (1956). In fact, in New York, the new privilege was limited to psychologists and followed the same scope as the state's attorney-client privilege. Id.
\textsuperscript{71} Abraham S. Goldstein & Jay Katz, Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute, 118 AM. J. PSYCHOL. 733, 735 (1962) (internal quotation marks omitted).
\textsuperscript{72} Edward Shorter, A History of Psychiatry: From the Era of the Asylum to the Age of Prozac 293-95 (1997); Roderick D. Buchanan, Legislative Warriors: American Psychiatrists, Psychologists, and Competing Claims Over Psychotherapy in the 1950s, 39 J. Hist. BEHAV. SCI. 225, 228-46 (2003).
tions occurred, but upon the context and nature of the communications themselves.

In the years that followed, two influential scholars called for the widespread recognition of a psychotherapist-patient privilege. In 1956, Professor David Louisell argued that a privilege should be extended to psychologists' communications with patients in the context of providing "psychodiagnosis and psychotherapy." 73 Four years later, Professor Ralph Slovenko authored a widely regarded law review article on the subject urging the recognition of a privilege for communications between psychiatrists and their patients. 74 He noted that Wigmore had not considered the "psychotherapeutic relationship" when he expressed his disapproval of evidentiary privileges and that many of the criticisms leveled at the physician-patient privilege did not apply to psychiatry. 75 Referring primarily to psychoanalytic treatment, including free association—which predominated the psychotherapy field at that time—Slovenko noted that the psychotherapeutic relationship "is unique and unlike any other that the patient or anyone else is likely to encounter . . . [as it] bear[s] little resemblance to the usual social relationship." 76 He concluded: "A privilege for those receiving psychotherapy is necessary if the psychiatric profession is to fulfill its medical responsibility to its patients." 77

In 1960, apparently buoyed by Professor Slovenko's arguments, the field of psychiatry launched a full campaign for the enactment of the psychiatrist-patient privilege. 78 The American Psychiatric Association's Group for the Advancement of Psychiatry (GAP) issued a report outlining its argument for recognition of the privilege. The report set forth a classic instrumental rationale for the privilege: "[T]here is wide agreement that confidentiality is a sine qua non for

73. Louisell, supra note 70, at 744-45.
75. Id. at 185, 199.
76. Id. at 185. He also noted the "difference of language between the inner and outer world" and that there is a "higher degree of accuracy in data" in the latter. Id. at 194. See also Shorter, supra note 72, at 146 (noting that by the mid-20th century, "[i]n the mind of the public, psychotherapy and psychoanalysis became virtually synonymous"); Shuman & Weiner, supra note 69, at 34 (noting that the basis for the instrumental or utilitarian rationale for the psychotherapist-patient privilege is rooted in the psychoanalytic model of psychotherapy and its emphasis on "total disclosure by patient to therapist").
77. Slovenko, supra note 74, at 199. Interestingly, by 1974, Professor Slovenko had apparently reversed course on the psychotherapist-patient privilege and concluded that, because the great number of exceptions carved into the privilege "leave[s] little or no shield cover," the privilege should be abolished. Ralph Slovenko, Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope, 23 CATH. U. L. REV. 649, 649, 673 (1974).
78. 25 Wright & Graham, supra note 61, § 5522, at 89.
successful psychiatric treatment.” Thus, the psychiatrists argued, absent a guarantee that the words exchanged with their patients could not become evidence in a courtroom, patients could not fully enjoy the potential benefits of their treatment. The “model statute” proposed in the GAP report followed essentially the same approach that had been adopted with respect to psychologists in six states in prior years: to extend to communications between psychiatrists and patients the same privilege recognized for communications between attorneys and their clients. Where exceptions or waivers applied to the attorney-client privilege, the same approach would be taken with the psychiatrist-patient privilege.

The following year, Connecticut became the first state to consider adopting the GAP proposal. A committee convened by the state branch of the American Psychiatric Association offered the Connecticut Legislature a bill that was more detailed and did not tie the scope of the privilege to the attorney-client privilege. Thereafter, the Connecticut statute, rather than the GAP proposal, served as a model psychotherapist-patient privilege. By the end of the decade, at least four other states had enacted statutes based upon Connecticut’s statute.

The Connecticut statute was the first psychotherapist-patient privilege to expressly include a patient-litigant exception. The statute provided that there would be no privilege “in a civil proceeding in which

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80. See also ROBERT G. MEYER & CHRISTOPHER M. WEAVER, LAW AND MENTAL HEALTH: A CASE-BASED APPROACH 70 (2006) (“Confidentiality forms the foundation upon which successful mental health services stand.”).

81. Arkansas, Georgia, Kentucky, New York, Tennessee, and Washington had enacted statutes providing communications between a psychologist and client the same degree of protection as those between an attorney and client. Goldstein & Katz, supra note 71, at 735 n.8.

82. Id. at 735. The language of the GAP’s model statute read, in its entirety: “The confidential relationship and communication between the psychiatrist and patient shall be placed on the same basis as regards privilege, as provided by law between attorney and client.” Id. at 736.

83. Id. (“The GAP statute suggest[ed] a host of problems which call into question the appropriateness of the attorney-client model.”).

84. Paul Frederic Slawson, Patient-Litigant Exception: A Hazard to Psychotherapy, 21 ARCHIVES GEN. PSYCHIATRY 347, 349 (1969). Georgia had enacted a statute that provided some level of protection to psychiatrists. Goldstein & Katz, supra note 71, at 735. It provided simply: “There are certain admissions and communications excluded from consideration of public policy. Among those are . . . [p]sychiatrists and patient.” Id. at 735 n.7 (internal quotation marks omitted).

85. Slawson, supra note 84, at 349 (Florida, Illinois, Kentucky, and Maryland). In 1967, California enacted another influential psychotherapist-patient privilege statute as part of its new evidence code. Id.
the patient introduces his mental condition as an element of his claim or defense . . . [if] the judge finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychiatrist be protected."86 While this language was somewhat similar to that in the Model Code’s physician-patient privilege,87 the psychiatrists convinced the Connecticut Legislature to include additional language enabling the trial court to uphold the privilege even where the patient “introduce[d] his mental condition as an element of his claim or defense.”88 Under the Connecticut law, it was the burden of the party seeking disclosure of the confidential communications to demonstrate that the “interests of justice” outweighed the need to protect the psychotherapist-patient relationship.89

The inclusion of patient-litigant exceptions in the statutory psychotherapist-patient privileges did not generate much, if any, debate during enactment of these early privileges.90 However, in 1969, as states rapidly enacted specific psychotherapist-patient privileges that contained patient-litigant exceptions, one psychiatrist, Paul Frederic Slawson, published a critique of the exception as applied to communications arising in psychotherapy.91 While initially the exception “seems reasonable and consonant with our sense of fair play,” he noted, “[o]n second look, the words of the patient-litigant exception fall out of sharp focus.”92 Slawson questioned the notion of a patient’s “mental or emotional condition” as being an easily ascertainable construct.93 He also argued that what is revealed in psychotherapy notes “is prone to distortion and consistently invites misunderstanding” and therefore offers little “pertinent information.”94 He went so far as to

86. Goldstein & Katz, supra note 71, at 737. Although the Connecticut statute has undergone significant revision since its enactment, the essential language of that exception remains in effect to this date. CONN. GEN. STAT. ANN. §§ 52-146c(c)(2) (psychologists), 146f(5) (psychiatrists) (West & West Supp. 2008). A few other state statutes set forth similar balancing language today. 740 ILL. COMP. STAT. ANN. 110/10(2) (West 2007) (exception applies only where a court determines that “disclosure is more important to the interests of substantial justice than protection from any injury which disclosure is likely to cause”); MASS. GEN. LAWS. ANN. ch. 233, § 20B(c) (West 2000).
87. See supra note 66 and accompanying text.
88. Goldstein & Katz, supra note 71, at 737.
89. Id.
90. Slawson, supra note 84, at 349.
91. Id. at 350–52. However, Slawson thought that such exception “makes sense” in the physician-patient context. Id.
92. Id. at 350.
93. Id. at 350–51. He was especially concerned about the abuse of the exception in divorce proceedings. Id.
94. Id. at 351.
assert that a psychiatric diagnosis "may be no more than the product of a feeble inductive attempt made to satisfy administrative or actuarial needs." "Lawyers," he reasoned, "want facts and psychiatrists can do remarkably well without them."

Dr. Slawson's cautions apparently made no impact. By 1996, all states had codified some kind of psychotherapist-patient privilege either by statute or court rule, and each contained a patient-litigant exception, either through a specific provision in the codification of the rule or through a court ruling.

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95. See Barbara A. Weiner & Robert M. Wettstein, Legal Issues in Mental Health Care 213 (1993); Daniel A. Cantu, Comment, When Should Federal Courts Require Psychotherapists to Testify About Their Patients? An Interpretation of Jaffee v. Redmond, 1998 U. Chi. Legal F. 375, 383 n.73. There is significant variation among the states in terms of the scope and operation of the patient-litigant exception. Some state statutes delineate in which kinds of proceedings the privilege may or may not operate. For example, some states have specific exceptions for child custody proceedings. Nat'l Conf. of Comm'rs. of Uniform State Laws, Uniform Rules of Evidence 503 (1997 draft), at 2. available at http://www.law.upenn.edu/bll/archives/ulc.htm/ulc/ure/ev503.pdf; see, e.g., Mass. Gen. Laws. Ann. ch. 233, § 20B(e) (West 2000). A substantial number of statutes provide that the exception does not apply in workers compensation cases. David M. Greenwald et al., Testimonial Privileges § 7:23 (3d ed. 2005, updated 2007) (citing 8 Wigmore, supra note 57, § 2380 n.6). Others place medical malpractice cases, by contrast, squarely within the exception. Id.; see Md. Code Ann., Cts. & Jud. Proc. § 9-109(d)(4) (LexisNexis 2006). And at least one state, Michigan, frames its exception so that if a party asserts the privilege during discovery, he is foreclosed from offering evidence at trial on his condition. Mich. Ct. R. 2.314(B)(2) (“Unless the court orders otherwise, if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable . . . the party may not thereafter present . . . any . . . evidence relating to the party’s medical history or . . . condition.”). Thus, rather than finding a waiver of the privilege, the rule provides that invocation of the privilege operates to limit the admissibility of evidence offered at trial by the plaintiff.
B. The Psychotherapist-Patient Privilege in the Federal Courts

The development of the psychotherapist-patient privilege in the federal courts took a markedly different route from that in the states. In contrast to the states’ statutory privileges, federal privilege law continues to develop through the common law. Even after enacting the Federal Rules of Evidence in 1975, Congress left it to the courts to determine which, if any, privileges would be recognized in all but strict diversity jurisdiction cases, based upon judges’ own “reason and experience.”99 The federal courts, however, continue to display a reluctance to recognize privileges. Many heed the cautious language of the Supreme Court’s 1974 opinion, United States v. Nixon, in which the Court rejected a broad view of presidential privilege, underscoring that privileges “are not lightly created nor expansively construed, for they are in derogation of the search for truth.”100 Until the Supreme Court addressed this issue in 1996, federal courts considered the merits and application of the psychotherapist-patient privilege on a case-by-case basis and were sharply divided on whether to recognize the privilege and on its appropriate contours.101

In Jaffee v. Redmond, the Supreme Court addressed the psychotherapist-patient privilege in a lethal force civil rights case brought by the survivors of Ricky Allen, Sr. against Mary Lu Redmond, a police of-

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99. Fed. R. Evid. 501. Among the draft federal rules proposed by the Supreme Court were several evidentiary privileges, including proposed Rule 504, a psychotherapist-patient privilege. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 240–44 (1972). The commentary noted that Cal. Evid. Code §§ 1010–26 (West 2008) and Conn. Gen. Stat. § 52-146a (1966 Supp.) served as two of the “illustrative statutes” consulted during the proposed rule’s drafting. Id. at 242. The drafters also concluded that the rationale for such privilege had been convincingly stated in the GAP Proposal, supra note 79, as well as in Professor Slovenko’s article, supra note 74. Id. The proposed privilege included a patent-litigant exception typical of that found in many state statutes. The inclusion of the proposed privileges proved extremely controversial and Congress removed them from the final enactment. In their place, Congress enacted Federal Rule of Evidence 501 which provides:

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


ficer who shot and killed Allen when responding to a report of a fight. Plaintiffs' counsel learned during discovery that, after the shooting, Redmond had participated in approximately fifty counseling sessions with a social worker employed by the municipality. The plaintiffs' attorneys sought the records in discovery "for use in cross-examining Redmond," most likely because they hoped that such records would contain valuable admissions about the incident such as statements of guilt or remorse, or a description of the events at variance with others Redmond had provided. Redmond's attorneys and counselor refused to produce the counseling records or to permit witnesses to respond to questions regarding the counseling sessions, despite court orders compelling disclosure. As a sanction, the trial court instructed the jury that they could make an adverse inference about the content of the records since there was "no legal justification" for the refusal to produce them. The court entered judgment for plaintiffs on the jury's verdict of $545,000.

The Court of Appeals for the Seventh Circuit reversed. The panel concluded that Evidence Rule 501's "reason and experience" standard led to the conclusion that the federal common law should recognize a psychotherapist-patient privilege. However, in language echoing the standard first seen in the 1960 Connecticut statute, the panel also noted that the privilege would not apply where "in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs the patient's privacy interests." The court concluded that the privilege should be recognized in that case based upon the minimal probative value of the therapy records as compared with Redmond's substantial privacy interests. Noting that the circuit courts were divided on the issue of the psychotherapist-patient privilege (two had recognized the privi-
In recognizing the psychotherapist-patient privilege, the Court relied almost exclusively on an instrumental rationale. Justice Stevens noted that the privilege is "‘rooted in the imperative need for confidence and trust,'"116 since "effective psychotherapy" requires a patient to be "willing to make a frank and complete disclosure of facts, emotions, memories, and fears."117 The psychotherapist-patient privilege would also "serve public ends,"118 because the "mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."119 The majority contrasted these benefits with the merely "modest" evidentiary benefit if there were no privilege. "Without a privilege," the Court reasoned, "much of the desirable evidence to which litigants... seek access... is unlikely to come into being."120 The majority also gave great weight to the fact that, by this point in time, "all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege."121

Although the Supreme Court affirmed the holding of the Seventh Circuit, it tinkered with the lower court's conceptualization of the privilege. Specifically, it rejected the "balancing" approach employed by the panel and instead recognized the privilege as absolute.122 The Court incorporated and applied the reasoning first articulated in *Upjohn Co. v. United States*123:

[1]If the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but re-

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117. *Id.*
118. *Id.* at 11.
119. *Id.*
120. *Id.* at 12.
121. *Jaffee*, 518 U.S. at 12.
122. *Id.* at 17–18.
results in widely varying applications by the courts, is little better than no privilege at all.”

The Court did not suggest what circumstances would give rise to a waiver of the privilege; it simply acknowledged in a footnote: “Like other testimonial privileges, the patient may of course waive the protection.” In a separate footnote, the Court also acknowledged that there could be occasions where the privilege would need to “give way,” such as “if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.”

Commentators have noted that Jaffee appears to be an aberration when compared with the general hostility of the federal courts, including the Supreme Court, to the recognition of privileges. Professor Imwinkelried reasons that the “extraordinary fact pattern[,] a highly plausible instrumental argument . . . [and] unanimous support for the privilege among the states” led to the result in Jaffee. However, the decision did not silence the critics of the psychotherapist-patient privilege, and Justice Scalia’s dissent reflects many of their criticisms. Notably, contemporary commentators and researchers continue to question the instrumental rationale upon which the privilege is based. Nonetheless, the holding of Jaffee established a psycho-

125. Id. at 15 n.14.
126. Id. at 18 n.19.
127. IMWINKELRIED, supra note 46, § 4.2.4, at 229.
128. Id. at 231.
129. Jaffee, 518 U.S. at 22–25 (Scalia, J., dissenting) (taking aim at the instrumental rationale, among other things).
130. For a discussion of the various rationales offered and questioned with respect to the psychotherapist-patient privilege, see generally SHUMAN & WEINER, supra note 69, at 39, 25–43 ("There is substantial disagreement about the extent of confidentiality required for effective therapy . . . . The question of the relationship between patients’ complete openness and the quality of their treatment has yet to be established."). The authors conducted a series of empirical studies to test the instrumental rationale and concluded that, "while confidentiality is important in therapeutic relationships, privilege is not." Id. at 113. They also noted, however, that "[t]he deontological argument for a psychotherapist-patient privilege, frequently ignored by the privilege’s proponents in common law jurisdictions, is persuasive both on its own terms and as a vehicle for avoiding the quagmire created by the assumptions underlying the utilitarian arguments." Id. at 135.
therapist-patient privilege that was to be recognized and enforced in the context of litigation, without regard to the principles with which courts generally concern themselves during discovery disputes such as relevance, necessity, and fairness to the party seeking discovery of privileged communications. However, in the years since the opinion, the Supreme Court’s absolute privilege has emerged as one that is truly “uncertain” and ultimately illusory.

IV. IMPLIED WAIVER OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IN THE FEDERAL COURTS

While Jaffee answered the basic questions that had previously divided federal courts—whether there should be a federal psychotherapist-patient privilege, to which professions should it apply, and whether the privilege should be absolute—the most common question in federal courts regarding the enforcement of the privilege did not arise in that case. Namely, under what circumstances should a court decline to enforce the privilege where doing so would limit a defendant’s ability to access records and testimony that may be relevant to a plaintiff’s claim? The federal courts have generally framed the issue as whether a plaintiff’s allegations and claims have resulted in an implied “waiver” of the psychotherapist-patient privilege such that the psychotherapy records are subject to discovery. However, the case law on this issue generates more questions than answers.

A. A Problem of Terminology: “Waiver” Versus “Exception”

When considering the approaches to waiver of the psychotherapist-patient privilege in federal courts, courts and codifiers are inexact and inconsistent with their terminology. What developed in the state legislatures as the “patient-litigant exception” to the psychotherapist-patient privilege—where the patient has somehow injected his or her mental condition into litigation she may not simultaneously assert the psychotherapist-patient privilege to limit discovery of any records of such mental condition—emerged in the federal courts in the terminology of the “in issue,” or “at issue” waiver of the privilege. In both

the “humanistic rationale,” which is based upon core democratic principles of privacy and autonomy. Jaffee, 518 U.S. at 17–18. While some existing privileges do not pass muster under that rationale, Professor Imwinkelried concludes that the psychotherapist-patient privilege would serve such principles. Id. at 509–12.


132. Id. at 18.

133. IMWINKELRIED, supra note 46, § 6.12.4, at 873–85. The notion of an issue-driven waiver is not unique to the psychotherapist-patient privilege but can arise in the context of the attorney-client privilege and the physician-patient privilege, among others. Id.
Commentators analyzing the general concept of “waiver” consistently emphasize the central roles of intentionality and voluntariness as indispensible preconditions for a finding of waiver. Professor Jessica Wilen Berg noted that the requirement of “intention” contains the corresponding requirement that “the actor must understand the act and its consequences.” Similarly, Professor Edward Rubin observed that the most “general” definition of waiver is “a decision not to exercise a right, or, more precisely, a judicial finding that a person has lost a right as a result of his decision.” Rubin argued that, since one could argue that someone waived his right to liberty by committing a crime, to effectuate a waiver the decision must be “directly related to the right in question.” Thus, each of these formulations looks to an affirmative act by an individual holding a legal right to determine if the individual has waived her right. Indeed, this framework calls into question the very notion of an “implied” waiver and suggests that the concept should be applied with caution.

In American law, a testimonial privilege is a legal right that, once held, can be waived, and the general terminology and conceptualization of waiver, therefore, apply as they would to other rights that a person may waive. Generally, waiver of a privilege is a failure to assert the privilege at a juncture where one would be expected to do so, such as through voluntary disclosure, or a failure to object to disclosure in other phases of litigation. The law recognizes both implied and actual waivers of privileges by a wide range of actions,

134. 25 WRIGHT & GRAHAM, supra note 61, § 5543, at n.39.
137. Rubin, supra note 135, at 483. Rubin disputed that intention and knowledge are merely “criteria by which the quality of a particular decision can be judged.” Id.
138. Id. at 484.
139. Similarly, Slawson, in arguing the privilege should only be set aside where there is a waiver by the patient, noted that the concept of waiver “implies full knowledge and understanding of what is being waived” and “awareness of the consequences of [such] disclosure.” Slawson, supra note 84, at 351. He suspected that patients in fact have little understanding of what is in their psychiatrists’ notes and charts. Id.
140. IMWINKELRIED, supra note 46, § 6.12.1, at 842.
141. See, e.g., 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:11 (3d ed. 2007).
including by execution of releases of information,\textsuperscript{142} by contract,\textsuperscript{143} and by disclosure to third parties.\textsuperscript{144} The assumption is that any such act is "an autonomous choice by the holder" of the privilege.\textsuperscript{145} This approach is reflected in the specific section on waiver set forth in rejected Federal Rule of Evidence 511 and similar provisions in the uniform and model rules under which "waiver" occurs only through voluntary disclosure or consent to others' disclosure of the privileged communication.\textsuperscript{146}

The term "exception" as applied to privileges, such as the "dangerous patient" or "crime fraud" exceptions to the psychotherapist-patient privilege, generally limits the privilege based upon the content of the communication, such as a threat to do harm to others.\textsuperscript{147} In these instances, the privilege is regarded as never attaching to the communication. By contrast, the concept of waiver is more appropriately considered \textit{after} the fact of the confidential communication, once the privilege and the accompanying rights of enforcement have attached.\textsuperscript{148} Thus, a patient may enjoy the privilege for an extended

\begin{enumerate}
\item[(a)] Voluntary disclosure. A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person's predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.
\item[(b)] Involuntary disclosure. A claim of privilege is not waived by a disclosure that was compelled erroneously or made without an opportunity to claim the privilege.
\end{enumerate}

\textsuperscript{142} IMWINKELRIED, \textit{supra} note 46, § 6.12.1, at 853.
\textsuperscript{143} \textit{Id}.
\textsuperscript{144} \textit{Id} at 859.
\textsuperscript{145} \textit{Id} at 843; \textit{see also id} § 6.12.4, at 877 (noting that filing a pleading containing an allegation concerning the substance of confidential communications is "an affirmative act placing the issue[s] in dispute" which may trigger the "at issue" waiver doctrine of privileges).
\textsuperscript{146} For example, the Uniform Rules of Evidence provides, in the section titled "Waiver of Privilege":
\begin{enumerate}
\item[(a)] Voluntary disclosure. A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person's predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.
\item[(b)] Involuntary disclosure. A claim of privilege is not waived by a disclosure that was compelled erroneously or made without an opportunity to claim the privilege.
\end{enumerate}
\textsuperscript{147} \textit{Unif. Rules Evid.} 510, 13A U.L.A. 100 (2004); \textit{see also Rules of Evidence for United States Courts and Magistrates,} 56 F.R.D. 183, 258–59 (1972) (setting forth text of Proposed Rule 511, upon which Uniform Rule 511(a) is based).
\textsuperscript{148} Some federal courts and several state evidence rules recognize a so-called "crime-fraud" exception to the psychotherapist-patient privilege. \textit{See In re Grand Jury Proceedings (Gregory P. Violette),} 183 F.3d 71, 76–77 (1st Cir. 1999). Courts are divided on the so-called "dangerous patient" exception. \textit{Compare United States v. Glass,} 133 F.3d 1356, 1359 (10th Cir. 1998) (holding that there may be an exception to the psychotherapist-patient privilege where disclosure is the only means to avoid harm), \textit{with United States v. Chase,} 340 F.3d 978, 991–92 (9th Cir. 2003) (en banc) (holding that there is no dangerous patient exception), \textit{and United States v. Hayes,} 227 F.3d 578, 586–87 (6th Cir. 2000) (holding that there is no dangerous patient exception in criminal cases). \textit{See also Orenstein, supra} note 17, at 687 (questioning why the courts struggling with the dangerous patient exception did not consider whether the communications would fall under the crime-fraud exception).
\textsuperscript{149} \textit{Cf. Comment, supra} note 62, at 530–31 (noting that the physician-patient privilege "confers a power on the patient" which can be either exercised or waived only by the patient himself).
period of time—even decades—before some subsequent action by the patient, such as executing a release, vitiates the privilege. This distinction appears in Jaffee, where Justice Stevens notes, “[l]ike other testimonial privileges, the patient may of course waive the protection,” and “we do not doubt that there are situations in which the privilege must give way.” Thus, in a case in which the privilege at issue is framed in broad terms, the Court itself appears to be making a distinction between “waiver,” which is premised on actions by the patient, and exceptions to the privilege itself which turn on the “situation.”

This variation in terminology with respect to the same mechanism is significant because it may serve as one explanation of federal courts’ failure to approach the question as one truly concerning a “waiver,” as that general concept is understood and applied in the law. As noted above, the psychotherapist-patient privilege in the states is largely a creature of statute or rule. Following the Model Code, the revised Uniform Rules of Evidence, and the early Connecticut and California statutes, a significant number of states include a “patient-litigant exception” in the privilege’s codification. In the federal courts, the term “patient-litigant exception” is essentially absent from the federal common law of the psychotherapist-patient privilege. However, the same reasoning underlying the exception in state courts is now seen in the analysis of implied waiver in federal courts, as discussed below.

The underlying principles of waiver, in whatever context, require courts, when determining whether there has been a waiver, to focus exclusively on the knowledge, decisions, and actions of the holder of the right allegedly waived. Considerations such as the potential bene-

149. Professor Slovenko suggested that the distinction should be between waiver and “termination” of the privilege and that the latter is a more accurate description of the operation of filing suit in which a patient’s mental or emotional condition is at issue and that “the term ‘waiver’ ought to apply only in the situation where the patient voluntarily gives up his privilege and requires the physician to testify.” RALPH SLOVENKO, PSYCHOTHERAPY, CONFIDENTIALITY, AND PRIVILEGED COMMUNICATION 155 (1966).


151. Id. at 18 n.19 (emphasis added).

152. See also SHUMAN & WEINER, supra note 69, at 7 (drawing a distinction between whether the privilege is “waived by the patient” and exceptions to the privilege). Thus, the state law “patient-litigant exception” could be considered a misnomer.

153. See 25 WRIGHT & GRAHAM, supra note 61, § 5543 n.44 (noting that applying the concept of “waiver” to the patient-litigant exception “distort[s] the waiver doctrine”).

154. See Cantu, supra note 98, at 383 n.73 (referring to specific statutes or court rules, rather than limitations emerging from court decisions, “[t]wenty-nine states provide no privilege for information raised as evidence for a claim or defense”).

155. See infra notes 156–324 and accompanying text.
fits flowing to others if the right is not enforced, while useful and important when determining a privilege’s exceptions and limitations at the time of its initial construction, have no place in the analysis of waiver. However, as the review of the case law below reveals, the general principles that apply to the questions of waiver of rights are largely absent from the analysis of waiver of the psychotherapist-patient privilege in federal courts. The decisions too infrequently consider the plaintiff’s actions and choices in direct relation to the right allegedly waived. Indeed, most federal courts are not in fact treating the issue of the waiver of the psychotherapist-patient privilege as a question of waiver at all.

B. The Federal Courts’ Approach to Waiver

The case law concerning waiver of the psychotherapist-patient privilege revolves around a basic question with a very complex answer: What does it mean to place one’s “mental condition” in issue such that it effectuates a waiver of the privilege? In Jaffee, the Court addressed the existence of the privilege in one of the very rare cases in which a court considered the privilege without also grappling with the concept of waiver, because it was a defendant asserting the privilege in that case. After previously denying certiorari in at least five cases where the existence of the psychotherapist-patient privilege was squarely at issue, the Supreme Court finally weighed in on the privilege question in a case with no waiver issue. Since Jaffee, the Supreme Court has been squarely presented with the issue of the appropriate approach to questions arising under the “at issue” waiver, but has declined, as recently as 2007, to grant certiorari on such issue. Indeed, as was the case with the privilege itself prior to Jaffee, courts are left stumbling along, trying to fashion a rule on a case-by-case basis.

156. Jaffee, 518 U.S. at 5-6.
157. Id. at 7.
158. In Doe v. Oberweis Dairy, 127 S. Ct. 1815 (2007), the Court denied a petition for a writ of certiorari in an appeal from a decision of the Court of Appeals for the Seventh Circuit, Doe v. Oberweis Dairy, 456 F.3d 704 (7th Cir. 2006), discussed infra at note 183 and accompanying text. Plaintiff-appellant phrased the question presented for review as follows:
Under what circumstances does a Plaintiff in a Title VII case, who seeks compensatory damages under Title VII for emotional distress, waive the psychotherapist-patient privilege that this Court recognized in Jaffee? Guidance is needed to resolve the split in the circuit courts and in the more than sixty district courts that have reported their decisions.
Petition for Writ of Certiorari, Doe, 127 S. Ct. 1815 (No. 06-735).
159. One should always be cautious when drawing generalizations about what happens in litigation, including discovery, based upon written opinions that find their way into official reporters or electronic databases. Given the state of the case law, or ignorance of it, plaintiffs’ counsel may not challenge defense attorneys’ attempts to obtain counseling records, or to take the depo-
1. "Broad" Versus "Narrow" Approaches to Waiver

Nearly all of the discussion and analysis of waiver of the psychotherapist-patient privilege divide the judicial approaches into two camps: broad and narrow. Courts that take a broad approach to waiver are less scrutinious of a defendant's assertion that there has been a waiver and are more likely to order disclosure of psychotherapy records. By contrast, those taking the narrow, minority approach are more likely to deny disclosure by finding that a plaintiff's actions in the litigation fell short of that required to effectuate a waiver. However, the procedural posture of the cases, the rationales applied by the courts, and other factors reveal that the case law cannot be analyzed and critiqued using this simple dichotomy.

The "broad approach" label generally applies to cases in which courts find a waiver of the psychotherapist-patient privilege based solely upon a plaintiff's assertion of a nonspecific claim for emotional distress, though the plaintiff has not offered the testimony of an expert psychological witness to support her claim. Courts adopting a more narrow approach will usually decline to find a waiver unless the plaintiff has listed her psychotherapist as a witness for trial or otherwise proposed to place the privileged communications directly or indirectly in issue.

sition of a current or former treating psychotherapist. If there is a discovery dispute, it is likely that it would not result in a reported decision, but rather would be resolved through a telephonic conference with a federal magistrate judge. See Fed. R. Civ. P. 37(a)(3). Thus, one can assume that in a significant number of federal civil rights actions in which the plaintiff's psychiatric history is sought, any controversy regarding discovery of mental health treatment is unknown to those outside of the proceedings. Cf. Minna J. Kotkin, Invisible Settlements, Invisible Discrimination, 84 N.C. L. Rev. 927, 927 (2006) (noting that the prevalence of confidential settlements in workplace discrimination claims "skews empirical studies of discrimination litigation"). Nonetheless, there are a sufficient number of written decisions addressing implied waiver of the psychotherapist-patient privilege to provide a good indication of how the question is generally framed and addressed in the courts.

160. See generally Aronson, supra note 10, at 605-07; McDonnell, supra note 10, at 1370.
164. See Stevenson v. Stanley Bostitch, Inc., 201 F.R.D. 551, 556 (N.D. Ga. 2001) ("This Court...has found that, upon close inspection, many of the cases purporting to reject the narrow view and adopt a broad view actually take a middle ground.").
The leading case under the narrow approach is *Vanderbilt v. Town of Chilmark*,\(^{167}\) decided the year after *Jaffee*. Drawing on case law analyzing alleged waivers of attorney-client privilege, the *Vanderbilt* court reasoned that a waiver results not from the plaintiff raising an issue arguably related to her mental health, but rather from offering communications with a mental health care provider as evidence in the litigation.\(^{168}\) Thus, absent notice that the plaintiff intended to call her therapist as a witness who would then reveal privileged communications, there could be no waiver.\(^{169}\) Some courts have followed this rationale and concluded that, where the plaintiff has not listed her therapist as a potential expert, there has been no waiver of the psychotherapist-patient privilege.\(^{170}\) Similarly, in cases where a plaintiff has listed her treating psychotherapist as a witness, defendants generally prevail in their assertions that there has been a waiver of the privilege.\(^{171}\)

The approach to waiver taken in *Vanderbilt* and by courts that follow the opinion is generally consistent with the essential principles of waiver. The court focused its analysis on whether the privilege-holder, the plaintiff, had undertaken an act directly related to the privileged communications (i.e. offering the communications in support of her claims) that was plainly inconsistent with an assertion of the privilege such that it can be properly regarded as a waiver of the privilege. Considerations such as the impact on the parties’ positions, the relevance of the information, and notions of fairness play little, if any, role, in these courts’ determination of whether there has been a waiver.\(^{172}\)

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\(^{168}\) *Id.* at 228–29; see also *Hucko*, 185 F.R.D. at 529 (drawing similar analogy to waiver of the attorney-client privilege and concluded that there was no waiver because the plaintiff did not plan to offer evidence of “prior consultations with psychotherapists in order to prove his claim of emotional harm”).

\(^{169}\) *Vanderbilt*, 174 F.R.D. at 229.

\(^{170}\) See *Miles v. Century 21 Real Estate LLC*, No. 4:05-CV-1088, 2006 WL 2711534 (E.D. Ark. Sept. 21 2006); *Kunsler*, 2006 WL 2516625, at *9; *Fitzgerald*, 216 F.R.D. at 639; cf. United States v. Doyle, 1 F. Supp. 2d. 1187, 1190 (D. Or. 1998) (holding that the defendant was not entitled to discover the victim's counseling records when victim did not intend to discuss the“content of her counseling sessions” at the sentencing hearing).

\(^{171}\) See, e.g., *Morrisette v. Kennebec County*, No. Civ. 01-01-B-S, 2001 WL 969014, at *2 (D. Me. Aug. 21, 2001) (“[T]he proper subject for the waiver analysis is whether the substance of a particular communication has been placed in issue, not whether the topic of communication is relevant to the factual issues of the case.”).
However, the majority of courts that have considered the question of waiver of the psychotherapist-patient privilege have taken a very different course.\footnote{173}{Cuoco v. U.S. Bureau of Prisons, No. 98 Civ. 9009, 2003 WL 1618530, at *2 (S.D.N.Y. Mar. 27, 2003).} \footnote{174}{Doe v. City of Chula Vista, 196 F.R.D. 562 (S.D. Cal. 1999). The issue arose in an ADA case, but because the plaintiff asserted a claim only under the “regarded as” prong of the definition of disability, and did not allege an actual disability, the ADA claim did not come into play in the waiver question.} \footnote{175}{Fritsch v. City of Chula Vista, 187 F.R.D. 614 (S.D. Cal. 1999).} \footnote{176}{Doe, 196 F.R.D. at 562.} \footnote{177}{Id. at 563.} \footnote{178}{Fritsch, 187 F.R.D. at 629-30.} \footnote{179}{Id. at 633.} \footnote{180}{Doe, 196 F.R.D. at 568. The court based this conclusion, in part, on the “Court’s” (albeit through an advisory committee and twenty-five years earlier) inclusion of a patient-litigant exception in the psychotherapist-patient privilege ultimately rejected by Congress.} \footnote{173}{Doe v. City of Chula Vista provides an example of the reasoning employed by courts taking a broader view of waiver in the context of emotional distress claims.\footnote{174}{Doe v. City of Chula Vista, 196 F.R.D. 562 (S.D. Cal. 1999).} The opinion is remarkable in two respects: first, it contains a lengthy analysis of the relative merits of the narrow-versus-broad approaches, and second, it reverses a magistrate’s decision that provided an even lengthier analysis leading to precisely the opposite conclusion on the same facts.\footnote{175}{Fritsch v. City of Chula Vista, 187 F.R.D. 614 (S.D. Cal. 1999).} A former assistant city attorney filed a claim for discrimination on the basis of perceived disability, alleging that her employer terminated her after she refused to submit to a psychiatric evaluation.\footnote{176}{Doe, 196 F.R.D. at 562.} Pointing to the plaintiff’s claim for emotional distress damages, the defendants sought documents of “each and every mental and psychological disorder” for which the plaintiff had sought treatment in the previous ten years.\footnote{177}{Id. at 563.} The discovery dispute was presented to the magistrate judge who, after reviewing the case law, found the “narrow view” to be more persuasive.\footnote{178}{Fritsch, 187 F.R.D. at 629-30.} Nonetheless, the magistrate ordered the disclosure of the names of healthcare providers who treated the plaintiff within the previous year and permitted the defendants to inquire into other “events and circumstances” in the plaintiff’s life to determine if there were any other potential causes of emotional distress.\footnote{179}{Id. at 633.} In response to the defendants’ objection to the magistrate judge’s ruling, the district court significantly broadened the information to which the defendants could have access. The judge first reviewed the rationales and approaches of the two competing lines of cases regarding waiver and concluded that the United States Supreme Court would adopt the broad view of waiver.\footnote{180}{Doe, 196 F.R.D. at 568.} Since the plaintiff there sought emotional distress damages, the court concluded, her “emotional health, near the time of the defendants’ alleged misconduct, is
an issue in the litigation” and she “is relying on her emotional state to make her case.” Accordingly, the plaintiff could not shield her psychotherapy records from discovery.

Several other courts have followed the same basic reasoning of *Doe v. City of Chula Vista*, but few have provided an in-depth discussion of the issue. Three federal courts of appeals follow the broad approach, but none has offered close analysis of the controversy in the lower courts. In *Doe v. Oberweis Dairy*, writing on behalf of the Court of Appeals for the Seventh Circuit, Judge Richard Posner noted simply, “If a plaintiff by seeking damages for emotional distress places his or her psychological state in issue, the defendant is entitled to discover any records of that state.” Similarly, in *Schoffstall v. Henderson*, the Court of Appeals for the Eighth Circuit held that the plaintiff had “placed[d]... her medical condition at issue” by seeking emotional distress damages and therefore had waived the psychotherapist-patient privilege. Finally, in *Maday v. Public Libraries of Saginaw*, the Court of Appeals for the Sixth Circuit reasoned that by seeking emotional distress damages, the plaintiff had “put her emotional state at issue in the case” and therefore waived any psychotherapist-patient privilege.

More recently, two federal appeals courts have indicated that they would follow a different approach. However, neither court was required to address squarely the issue of whether a claim for emotional distress is a basis for finding a waiver of the psychotherapist-patient privilege. In *Koch v. Cox*, an employment discrimination case in the Court of Appeals for the District of Columbia Circuit, the plaintiff chose to withdraw his claim for emotional distress. In reversing the district court’s finding that the plaintiff had nonetheless waived the privilege by acknowledging in discovery responses that he had been diagnosed with depression, the panel indicated that it found Vanderbilt’s reasoning more persuasive than the *Oberweis Dairy* and *Schoffstall* v. *Henderson*.

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181. *Id.* at 569.
186. *In re Sims*, 534 F.3d 117 (2d Cir. 2008); Koch v. Cox, 489 F.3d 384 (D.C. Cir. 2007).
187. *Koch*, 489 F.3d at 388.
stall decisions, particularly with respect to the Vanderbilt court’s analogy to the attorney-client privilege.\textsuperscript{188} The panel noted that, were it to follow the broad view of waiver adopted by the district court, it would “\textit{sub silentio . . . overrule}” Jaffee, without the authority to do so.\textsuperscript{189} The court reasoned that it must “supply a standard for determining whether a patient has waived the privilege . . . that does not eviscerate the privilege.”\textsuperscript{190} Accordingly, the court concluded that a plaintiff waives the psychotherapist-patient privilege only when he has “bas[ed] his claim upon the psychotherapist’s communications with him” or “selectively disclos[ed] part of a privileged communication in order to gain an advantage in litigation.”\textsuperscript{191}

Similarly, in \textit{In re Sims} the Court of Appeals for the Second Circuit granted the plaintiff’s request for a writ of mandamus after concluding that the trial court in that excessive force case had abused its discretion when it ordered the disclosure of the plaintiff’s psychiatric records.\textsuperscript{192} The plaintiff had expressly and unambiguously withdrawn his claims for emotional distress damages, and the issue of the plaintiff’s psychiatric history arose only in response to defense counsel’s questions during the plaintiff’s deposition.\textsuperscript{193} The appeals court found the reasoning in \textit{Koch} to be persuasive and, in reversing the district court’s order, emphasized the “transcendent importance of the psychotherapist-patient privilege.”\textsuperscript{194}

\textsuperscript{188.} \textit{Id.} at 391. The panel also implicitly rejected the holding in a prior employment discrimination case, \textit{Kalinoski v. Evans}, 377 F. Supp. 2d 136, 138 (D.D.C. 2005), which found a waiver based solely upon a claim that the plaintiff suffered extreme emotional distress requiring treatment with a psychotherapist. \textit{Koch}, 489 F.3d at 387. The district court itself issued an opinion distinguishing \textit{Kalinoski} and taking a fairly narrow approach a week after \textit{Koch} was argued but before it was decided. Barnett v. PA Consulting Group, Inc., No. 04-1245, 2007 WL 845886, at *4 (D.D.C. Mar. 19, 2007).

\textsuperscript{189.} \textit{Koch}, 489 F.3d at 390.

\textsuperscript{190.} \textit{Id.}

\textsuperscript{191.} \textit{Id.} (quoting S.E.C. v. Lavin, 111 F.3d 921, 933 (D.C. Cir. 1997)) (construing the marital privilege). By rejecting the defendant’s arguments that the plaintiff’s discovery responses triggered a waiver of the privilege, the \textit{Koch} court implicitly recognized that a response under the compulsion of the broad discovery rules does not satisfy the voluntariness requirement of a waiver. \textit{See also} Duquette v. Superior Court, 778 P.2d 634, 637 (Ariz. Ct. App. 1989) (holding that there was no waiver of patient-physician privilege by revealing communications in response to deposition questioning by opposing counsel); Kromenacker v. Blystone, 539 N.E.2d 675, 678 (Ohio Ct. App. 1987).

\textsuperscript{192.} \textit{In re Sims}, 534 F.3d 117, 141 (2d Cir. 2008).

\textsuperscript{193.} \textit{Id.}

\textsuperscript{194.} \textit{Id.} at 134.
Several courts have adopted the category of “garden-variety emotional distress” as a means to differentiate cases where there has not been an implied waiver of the psychotherapist-patient privilege.\(^{195}\)

This distinction was apparently first coined in a discovery ruling in \textit{Sabree v. United Brothers of Carpenters & Joiners of America, Local No. 33}, a pre-\textit{Jaffee} race discrimination case.\(^{196}\) A magistrate judge initially determined that the court should recognize a psychotherapist-patient privilege.\(^{197}\) In concluding that there was no applicable “exception” to the psychotherapist-patient privilege present, she noted: “Sabree has not placed his mental condition at issue. Sabree makes a ‘garden-variety’ claim of emotional distress, not a claim of psychic injury or psychiatric disorder resulting from the alleged discrimination.”\(^{198}\) The courts that have employed this distinction will decline to order disclosure of psychotherapy records if a plaintiff asserts a claim for emotional distress without alleging a specific diagnosable mental condition as a component of compensatory damages or without offering the testimony of an expert witness to prove emotional distress.\(^{199}\)

“Garden-variety emotional distress” is a legal term, not a psychiatric term,\(^ {200}\) and it is not a particularly useful construct.\(^ {201}\) One commentator refers to it as a “vegetarian metaphor” used to distinguish “meatier” claims of emotional distress.\(^ {202}\) A few courts have at-


\textsuperscript{197} Id.

\textsuperscript{198} Id.


\textsuperscript{200} Saul Rosenberg & Mark Levy, \textit{Unwarranted Restrictions on the Independent Examination of Emotional Damages}, DEF. COMMENT, Spring 2004, at 11-12 (critiquing development of the term “garden-variety” in the context of compelled mental examinations as a “scientifically meaningless concept”).

\textsuperscript{201} See \textit{RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE} (2d ed. 2006), which defines garden-variety as “common, usual, or ordinary; unexceptional.”

\textsuperscript{202} 25 WRIGHT & GRAHAM, \textit{supra} note 61, § 5543 n.94.2.
tempted to define “garden-variety” emotional distress, while others simply employ the term to describe a plaintiff’s claims.\textsuperscript{203} Many courts employing such terminology place great weight on the presence of a psychiatric diagnosis.\textsuperscript{204} But a diagnosis reveals little in terms of the severity of emotional damages. While a plaintiff may indicate in response to discovery queries that she has been diagnosed with a particular mental disorder, it does not necessarily follow that she will offer evidence of such diagnosis to support her claim for damages.\textsuperscript{205}

Further, it is highly unusual for an individual receiving psychotherapy of some kind to not be diagnosed with a condition found in the American Psychiatric Association’s \textit{Diagnostic and Statistical Manual of Mental Disorders}.\textsuperscript{206} Insurance companies and publicly funded health care programs invariably require a clinical diagnosis in order to approve coverage for psychotherapy,\textsuperscript{207} and there are several diagnoses appropriate for temporary or mild conditions.\textsuperscript{208} Accordingly, a plaintiff’s diagnosis with a mental disorder is not a sound basis for

\begin{itemize}
\item \textsuperscript{203} See, e.g., Santos v. Boeing Co., No. 02-C-9310, 2003 WL 23162439, at *2 (N.D. Ill. Oct. 21, 2003) (denying defendant’s motion to compel discovery of plaintiff’s mental health records).
\item \textsuperscript{205} If she does offer the diagnosis as evidence, most courts would likely require her to do so through expert medical testimony, in which case there might be a waiver as a result of offering such evidence. See, e.g., 32 C.J.S. Evidence § 551 (1996). The practice guide explains:
\begin{quote}
While a nonexpert or lay witness may not give expert testimony as to his physical condition, he may state simple inferences drawn from his conscious subjective sensations concerning such condition. . . . According to some authority, a witness should be confined to testimony or statements relating to the outward appearance of his injuries and to the symptoms experienced by him, such as pain, suffering, and the like, and should not be permitted to testify as to the nature of his injuries, the applicable medical terminology, and the like, and the medical prognosis or treatment. According to some cases, a witness may not testify as to whether or not he had a particular disease or was treated for a particular disease.
\end{quote}
\item \textsuperscript{206} \textit{AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS} (4th ed. text rev. 2000).
\item \textsuperscript{207} See \textit{id.} at 1 (noting that the United States Health Care Finance Administration mandates use of the DSM’s codes “for purposes of reimbursement” and that many private insurers require use of the codes as well). While not every person receiving psychotherapy is covered by insurance or a publicly funded program, it is likely to be a substantial percentage that, at one point or another in treatment, has some degree of coverage, thus triggering the diagnosis requirement.
\item \textsuperscript{208} See, e.g., \textit{id.} at 683 (“Adjustment Disorders” are a group of conditions marked by “the development of emotional or behavioral symptoms in response to an identifiable stressor(s) occurring within three months of the onset of the stressor(s)’’); \textit{id.} at 604 (“Primary Insomnia” is a disorder primarily characterized by a “difficulty initiating or maintaining sleep, or nonrestorative sleep, for at least 1 month’’).\end{itemize}
determining whether there is a waiver of the psychotherapist-patient privilege.\textsuperscript{209}

Similarly, some courts distinguish garden-variety emotional distress from other emotional distress based upon whether the plaintiff has sought psychotherapy for the condition. As one magistrate judge explained with respect to his understanding of non-garden-variety emotional distress, "Generally what we find in these cases is someone sought psychotherapy."\textsuperscript{210} Under this circular reasoning, a person who has psychotherapy records, and therefore something to protect with the psychotherapist-patient privilege, does not by definition have garden-variety emotional distress. Of course, there are several reasons why one does or does not seek therapy, which may have little to do with the severity of the emotional distress.\textsuperscript{211} Indeed, once litigation is inevitable, a plaintiff may decide to discontinue psychotherapy for the very reason that her records would be subject to discovery, only to find that the defendant can successfully argue that the alleged emotional distress was minimal as demonstrated by the plaintiff's failure to seek treatment.\textsuperscript{212}

3. Applying Privacy, Fairness, and Relevance Rationales to Waiver Questions

In \textit{Jaffee}, the Supreme Court took to task the balancing approach followed by the Ninth Circuit Court of Appeals, which had established only a conditional privilege, meaning that the application of the privilege would consider the defendant's need for the evidence.\textsuperscript{213} This conceptualization is similar to that seen in the Connecticut statute which requires courts to weigh the "interests of justice" implicated by disclosure of privileged communications.\textsuperscript{214} Instead, the Supreme Court established the psychotherapist-patient privilege as an "absolute" privilege, which means that the opposing party's need for the evidence would not bear on whether a court would enforce the privilege. The absolute approach is not as inflexible as the name would

\textsuperscript{209} Edward Imwinkelried proposed a waiver distinction based upon whether the plaintiff is merely asserting "transitory feelings . . . or sensations," rather than a true "condition." \textit{Imwinkelried}, supra note 46, \S 6.12.4, at 882-83.

\textsuperscript{210} Orenstein, \textit{supra} note 17, at 699. Magistrate Judge Orenstein went on to say that he thought that the garden-variety distinction in mental health cases, as opposed to general medical cases, was created to provide an additional layer of privacy for plaintiffs. \textit{Id.} at 702.

\textsuperscript{211} One study by the American Psychiatric Association suggested that the overwhelming majority of individuals who experience anxiety and depression never seek treatment. Robinson, \textit{supra} note 37, at 70.

\textsuperscript{212} \textit{Id.} at 68.

\textsuperscript{213} \textit{Jaffee} v. \textit{Redmond}, 518 U.S. 1, 7 (1996).

\textsuperscript{214} See \textit{supra} notes 86-89 and accompanying text.
imply; the Supreme Court expressly acknowledged the possibility of waiver and exceptions. Nonetheless, the stated effect of creating an absolute privilege is to wholly eliminate from the analysis any consideration of competing interests of fairness, relevance, and truth-seeking. However, while no trial or appeals court of course admits to a rejection of the absolute approach set forth in Jaffee, such balancing in fact pervades the post-Jaffee case law in the context of the question of waiver.

The tension between absolute and conditional privileges stems in large part from the broad scope of discovery under the Federal Rules of Civil Procedure and federal courts’ general reluctance to limit the disclosure of any potentially relevant information. As one federal magistrate judge noted recently, “Contrary to the common law’s approach, contemporary thought has concluded that secrecy is not congenial to truth-seeking, and that trial by ambush is incompatible with the just determination of cases on their merits.”

Thus, the magistrate judge continued, “As expansive as is the definition of relevancy under Rule 401 of the Federal Rules of Evidence, the [relevancy] standard under Rule 26 [of the Federal Rules of Civil Procedure] is even broader.”

The burden of challenging the scope of a discovery rule falls entirely upon the party seeking to limit disclosure, and it is generally a difficult burden to meet.

Federal courts invoking notions of fairness and truth-seeking when considering questions of waiver of the psychotherapist-patient privilege employ analyses based upon the scope of discovery permitted under Federal Rule of Civil Procedure 26, an approach that is separate from, and independent of, privilege considerations. The often-cited ruling in Sarko v. Penn-Del Directory Co., an ADA case considered soon after Jaffee, may have perpetuated the trend of weighing the truth-seeking functions of broad discovery in the face of the newly established privilege. In finding a waiver by the plaintiff, the district court judge noted, relying on pre-Jaffee case law, that federal and state courts had long recognized waiver through raising the issue of one’s psychological state. The judge concluded that it would be

216. Id. (internal citations omitted). Rule 26 provides, in pertinent part: “Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” FED. R. CIV. P. 26(b)(1).
219. Id. at 130.
“contrary to the most basic sense of fairness and justice” to permit the plaintiff to “hide [] behind a claim of privilege.”

Several other courts adopted and expanded this approach. A Tennessee federal court, applying Tennessee law but relying upon federal law precedent, including Sarko, found a waiver of the psychotherapist-patient privilege in a sexual harassment case because the plaintiff sought emotional distress damages and therefore, “application of the privilege would have denied the opposing party access to information vital to his defense.” A judge in the Northern District of Illinois found a waiver of the psychotherapist-patient privilege and noted that the plaintiff’s psychotherapist’s treatment notes were “extremely probative and material to [the defendant’s] defense.” Another court taking the broad view of waiver of the psychotherapist-patient privilege noted in its decision: “It is a well-established rule of law that discovery in discrimination cases should not be narrowly circumscribed. The scope of discovery is particularly broad in discrimination cases.” Notably, however, all of the cases that the court cited for support were cases permitting broad discovery of defendants’ employment practices and none involved claims of the psychotherapist-patient privilege.

By basing decisions regarding whether or not there has been a waiver of the psychotherapist-patient privilege on the importance of the truth-seeking purposes of discovery and trial, these courts make two critical errors. First, as noted above, a waiver is most properly construed as an affirmative act of an individual through which known rights are not asserted. The benefit flowing to another party from such waiver of rights, or the corresponding burden imposed by the assertion of the rights, has no place in the analysis. Although the concept of waiver requires courts to focus on a plaintiff’s intentional actions, courts often give weight to how such evidence would play into and support defendants’ theories to avoid liability or to lessen a damage award. Once courts employ this lens to determine whether to find a waiver, defendants almost invariably prevail. It is a rare case in

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220. Id.
224. Id.
which the evidence would be both relevant and not subject to waiver, especially given the countless ways that a defendant could use such evidence at trial.\footnote{226}{See supra notes 33–37 and accompanying text.}

The second flaw in these courts’ reasoning is that it overlooks the fact that privileges necessarily run counter to truth-seeking functions. Privileges exist where courts or legislatures have determined, for policy reasons, that such evidence should be protected from disclosure, notwithstanding its relevance.\footnote{227}{Kunstler v. City of New York, No. 04CIV1145, 2006 WL 2516625, at *9 (S.D.N.Y. Aug. 29, 2006) ("[R]elevance alone cannot trigger a finding that a party has waived a privilege, and most certainly not an absolute privilege.").} As Dr. Slawson observed in his 1969 criticism of the patient-litigant exception: “Truth like all other good things may be loved unwisely—maybe pursued too keenly—may cost too much.”\footnote{228}{Slawson, supra note 84, at 352 (quoting Lord Justice Knight Bruce in John Frelighuysen Hageman, Privileged Communications as a Branch of Legal Evidence 10 (1889)).} Thus, balancing privacy, facilitation of communications, or other values associated with privileges against truth-seeking, fairness, and other aims of discovery occurs in the initial determination of whether to recognize a privilege in the first place, not whether to infer that a particular plaintiff has waived such privilege. With respect to the psychotherapist-patient privilege specifically, \textit{Jaffee} answered the balancing question by concluding, as a general matter, that “communications between a psychotherapist and her patient ‘promote[] sufficiently important interests to \textit{outweigh} the need for probative evidence.”\footnote{229}{Jaffee v. Redmond, 518 U.S. 1, 9-10 (1996) (emphasis added) (alteration in original) (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).}

The Supreme Court of Colorado in \textit{Johnson v. Trujillo} acknowledged the fundamental nature of a privilege when addressing the issue of waiver of the psychotherapist-patient privilege.\footnote{230}{Johnson v. Trujillo, 977 P.2d 152 (Colo. 1999).} The court noted that the defendant’s “most compelling argument” for why he needed access to a personal-injury-claim plaintiff’s psychiatric records was that “the information sought may be relevant to a determination of the extent to which Johnson’s mental suffering is properly attributable to the accident as opposed to some other cause.”\footnote{231}{Id. at 157.} However, the court noted, “it is the \textit{very nature} of evidentiary witness privileges to ‘sacrifice some availability of evidence relevant to an administration of justice.’”\footnote{232}{Id. (emphasis added) (quoting Charles T. McCormick, McCormick on Evidence § 72, at 101 (John W. Strong et al. eds., 4th ed. 1992)).} Accordingly, “relevance alone cannot be the test
The rationale for court-implied waivers of the privilege arose, not out of a concern for the unfairness of excluding potentially relevant evidence, but rather the unfairness that may accompany a plaintiff’s use of the privilege as a “sword instead of a shield,” by “parading” a mental or physical condition while asserting the privilege at the same time.234

As noted above, the nature of psychological harm and the broad scope of discovery generally enable defendants seeking such records to easily articulate the potential relevance of a wide range of mental health records. Relevance, like necessity, is an appropriate consideration under Rule 26, but it is not applicable to the question of waiver.235 A magistrate judge for the District of Maine accurately and succinctly noted this important distinction: “[P]rivileges operate notwithstanding relevancy and... the proper subject for the waiver analysis is whether the substance of a particular communication has been placed in issue, not whether the topic of communication is relevant to the factual issues of the case.”236

Nonetheless, many courts weigh the potential relevance of the psychotherapy discovery sought when determining whether to find waiver of the psychotherapist-patient privilege. The District Court’s rationale in Doe v. City of Chula Vista is typical:

[T]o insure a fair trial, particularly on the element of causation [of emotional distress],... defendants should have access to evidence that Doe’s emotional state was caused by something else. Defendants must be free to test the truth of Doe’s contention that she is emotionally upset because of the defendants’ conduct.237

In Sanchez v. U.S. Airways, Inc., a court similarly confused absolute and conditional privileges.238 In that case, the plaintiffs alleged discrimination on the basis of race and national origin, and the defendant sought the complete file of the plaintiffs’ psychotherapist. The court recognized that the records may be subject to a psychotherapist-patient privilege but, after briefly citing the conflicting case law regarding waiver, the court concluded: “It is clear that a balancing of the interests must be done, the Defendant’s interest in obtaining informa-

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233. Id. (quoting R.K. v. Ramirez, 887 S.W.2d 836, 842 (Tex. 1994)).
234. Id. (citing MCCORMICK, supra note 232, § 103, at 146).
235. IMWINKELRIED, supra note 46, § 6.12.4, at 884 (“[S]tanding alone, the relevance of the information [sought in discovery] is inadequate to support a finding of an implied waiver.”).
tion directly relevant to the claims being made by Plaintiffs, and the Plaintiffs' privacy interest in shielding personal and potentially irrelevant information."\(^{239}\) The district court concluded that precluding disclosure of the records, "[t]hough convenient to Plaintiffs . . . is unsatisfactory to our adversarial system of justice."\(^{240}\) Accordingly, it held, "[I]t is clear that Defendant's interest in defending Plaintiffs' claim must outweigh Plaintiffs' privacy interest in these records."\(^{241}\) While notions of fairness to the parties and the importance of providing fact finders competing evidence are central, important aims in our system of adversary litigation, their consideration has no place in an analysis of whether a plaintiff has waived a privilege if that privilege is to be given any force.\(^{242}\)

*Sanchez* is among those federal court decisions that not only incorrectly weigh the relevance of the information sought to be discovered, but also improperly frame the question as that of the extent of a plaintiff's nebulous "privacy" interest, rather than a legally defined privilege.\(^{243}\) Setting up a comparison of "privacy" to the broad right to discovery, these courts fail to acknowledge the critical distinction between privacy, as that concept is generally applied in Rule 26,\(^{244}\) and

\(^{239}\) *Id.* at 135–36.

\(^{240}\) *Id.* at 136.

\(^{241}\) *Id.*


\(^{244}\) *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 n.21 (1984) (noting that, although Rule 26 "contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule."). For example, under Rule 26(c)(1) regarding protective orders: "[T]he court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression,
the less flexible concept of privilege. For example, the U.S. District Court for the Southern District of New York found that, by seeking a claim for emotional distress in association with his ADA claim, a plaintiff “may not maintain a claim of privacy in any mental health records.” The U.S. District Court for the District of Minnesota, in a decision granting a defendant’s motion to compel production of mental health records, reasoned that, “[W]hile the Court is mindful of the privacy issues involved in the discovery of medical records, the Court also favors the broad contours of discovery.” Thus, “where [the] plaintiff put his emotional condition into issue . . . he effectively waives his right to privacy in any relevant and unprivileged medical records.” Notions of privacy, like those of relevance and fairness, while laudable, simply have no place in determining whether a plaintiff has taken affirmative steps that a court should regard as a knowing and deliberate waiver of a legally held right.

Notably, the Supreme Court’s rationale for the psychotherapist-patient privilege was not one of privacy, but of the broader societal interest in encouraging psychotherapy and, presumably, candor during treatment. Under this rationale, when the privilege is given limited effect, the adverse impact is on society, not the individual’s privacy interests. For this reason, Jaffee held that a balancing inquiry would “eviscerate the effectiveness of the privilege.” In other words, because a broader concern for social welfare is implicated through recognition of the psychotherapist-patient privilege, consideration of fairness to individual litigants is beyond the authority of the courts.

Ironically, the instrumental rationale’s role as an underpinning of the psychotherapist-patient privilege may contribute to courts’ misplaced application of the concept of waiver. Individual judges may share the skepticism towards the rationale expressed in Justice Scalia’s dissent, in which the Justice quipped: “[H]ow come psychotherapy

or undue burden or expense . . . .” Fed. R. Civ. P. 26(c). This can include unnecessary invasions of a litigant’s privacy. See also 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2036, at 487 (2d. ed. 1994). The U.S. District Court for the Eastern District of New York has noted that “balanc[ing] [a plaintiff’s] right to privacy with [a] defendant[s] . . . need for the information . . . invokes the principles of Federal Rule 26(c)(4).” Duck v. Port Jefferson Sch. Dist., No. CV07-2224, 2008 WL 222590, at *3 (E.D.N.Y. Jan. 25, 2008).


247. Id.


249. See IMWINKELRIED, supra note 46, § 6.12.1, at 842 (“Waivability flows from the instrumental rationale.”).
got to be a thriving practice before the ‘psychotherapist privilege’ was invented?"²⁵⁰ In the absence of recognition of rationales such as protecting privacy and autonomy and encouraging individuals to enforce their federally protected rights, courts fail to appreciate how they undermine the privilege by summarily finding waivers.²⁵¹ Cases such as *Doe v. City of Chula Vista*²⁵² that emphasize the importance of “test[ing] the truth” of emotional distress claims suggest another possible explanation for courts’ extreme reluctance to shield mental health records from discovery: the essentially unquantifiable extent of emotional distress and the imprecise nature of emotions and mental functioning and their causes.²⁵³ The current civil justice system grants wide latitude to fact finders to place monetary value on nonpecuniary damages, which can sometimes result in seemingly large verdicts. Public perception and political arguments that there are too few outer limits to the values that jurors can assign to such damages have lead to tort reform legislation,²⁵⁴ as well as damages caps under the Civil Rights Act of 1991.²⁵⁵ Under this view, limiting defendants’ access to potentially relevant discovery on this form of damages may appear to simply provide yet another advantage to plaintiffs seeking oversized verdicts.

4. Scope of the Waiver and Alternative Sources of Emotional Distress

Determining whether a party has waived the psychotherapist-patient privilege does not necessarily resolve precisely what the party has waived. Thus, judges often grapple with an additional layer of controversy regarding which records fall within the scope of the waiver. One significant area of discovery sparring is whether a plaintiff who is found to have waived the psychotherapist-patient privilege

²⁵⁰ Jaffee, 518 U.S. at 24 (Scalia, J., dissenting).
²⁵¹ See Shuman & Weiner, supra note 69, at 136–37 (arguing that basing the psychotherapist-patient privilege on a deontological, rather than instrumental, rationale enables courts to take a “different [and superior] approach to the structure of the privilege and its exceptions”).
²⁵³ See Abele, supra note 40, at 8 (suggesting that there is a long-standing judicial suspicion of emotional distress claims).
²⁵⁴ William Haltom & Michael McCann, Distorting the Law: Politics, Media, and the Litigation Crisis 96 (2004) (noting that awards for nonpecuniary damages are a particular target of tort reform advocates because such awards are regarded by many as “arbitrary”); Steve Lohr, Bush’s Next Target: Malpractice Lawyers, N.Y. Times, Feb. 27, 2005, § 3, at 1 (noting that one feature of “tort reform” proposals is caps on “non-economic damages,” including those for emotional distress).
must disclose mental health treatment received prior to the incident at issue in the litigation. Generally, once a court concludes that there has been an implied waiver of the psychotherapist-patient privilege, it grants defendants broad access, not only to records of treatment for the emotional distress for which recovery is sought, but also to any and all mental health records including those from years prior to the incident at issue in the litigation. In so doing, it skips two critical steps in a proper analysis: it fails to consider whether such discovery falls within the Rule 26 concept of relevance, and it fails to link the scope of the waiver to the purported affirmative conduct on the part of the plaintiff giving rise to the waiver.

While the relevance of records sought in discovery is not a proper consideration for determining whether there has been a waiver of any privilege with respect to such records, a court may always limit discovery of information that is not “reasonably calculated to lead to the discovery of admissible evidence.” Because recovery of damages in civil rights claims, including those brought pursuant to § 1983 or any of the federal nondiscrimination statutes, is a remedy that essentially sounds in tort, parties and judges look to tort law principles to determine the relevance of evidence in support of or limiting damages claims. A plaintiff is entitled to full compensation for all injuries proximately caused by the defendant’s acts even if the injuries were “aggravated by reason of a preexisting physical or mental condition.” Accordingly, a defendant may not use a plaintiff’s preexisting condition, such as a particular emotional vulnerability, as a vehicle to escape liability for emotional distress damages. This is reflected by the “eggshell skull” rule that a “defendant takes the plaintiff as it finds him or her.” The EEOC’s Enforcement Guidance on compensatory


259. Id. See also Tompkins v. Cyr, 202 F.3d 770, 780 (5th Cir. 2000) (noting that, under Texas law: “[T]ortfeasors take their victims as they find them, even when the claimed harm is mental anguish or emotional distress. A victim’s particular susceptibility will not reduce the damages
damages also indicates that a defendant will be liable for emotional distress damages of a plaintiff who was previously "emotionally sensitive." This rule suggests that a defendant may not offer evidence of a plaintiff's preexisting mental condition as a means to avoid liability for emotional distress that results from the defendant's actions.

What is less clear, however, is whether a defendant may assert that it should not be held liable for the full amount of the plaintiff's emotional distress damages, due to an underlying mental disorder or alternative sources of emotional distress. A defendant is liable for any harm, including emotional distress, so long as her "conduct is a substantial factor in bringing about the harm." As a general principle, a defendant may seek apportionment of damages among other causes, but only where it makes a showing that "there is a reasonable basis for determining the contribution of each cause to a single harm." Otherwise, the harm is deemed to be "indivisible" and not subject to apportionment.

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261. RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965) ("The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause . . . ."). The same analysis applies to the torts of negligence or intentional infliction of emotional distress, which are sometimes included in complaints alleging discrimination or violation of civil rights. The defendant's wrongful actions need not be the sole cause of the plaintiff's emotional distress, but must be a "substantial cause." See Ferguson v. United States Army, 938 F.2d 55, 57 (6th Cir. 1991); see also Enforcement Guidance, supra note 260.

262. RESTATEMENT (SECOND) OF TORTS § 433A (1965). The rules set forth in section 433A apply not only to instances where there may be more than one tortfeasor, but also where one or more of the contributing causes is an innocent one, as where the negligence of a defendant combines with the innocent conduct of another person, or with the operation of a force of nature, or with a pre-existing condition which the defendant has not caused, to bring about the harm to the plaintiff.

Id. cmt. a.

263. Id. cmt. i ("Certain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division."). See also Lovely v. Allstate Ins. Co., 658 A.2d 1091, 1093 (Me. 1995) ("The single injury rule places any hardship resulting from the difficulty of apportionment on the proven wrongdoer and not on the innocent plaintiff."); Dobbs, supra note 24, at 425.
The Court of Appeals for the Eighth Circuit applied these principles to questions of discovery and burden shifting in a sexual harassment class action case where the defendants had advanced an alternative source of emotional distress damages argument. In *Jenson v. Eveleth Taconite Co.*, female employees of a large mining company brought a class action lawsuit under Title VII seeking remedies for widespread and systematic sexual harassment.  

The Special Master appointed by the district court permitted broad discovery of the plaintiffs' personal backgrounds including "detailed medical histories, childhood experiences, domestic abuse, abortions, and sexual relationships."  

Although the Special Master initially reasoned that such discovery was proper because it was the defendants' burden to show that events other than the alleged harassment proximately caused the plaintiffs' emotional distress, at the time of trial he re-assigned plaintiffs the burden of disproving alternative causes of their distress.  

Reversing on appeal, the Eighth Circuit criticized both the denial of the plaintiffs' requests for protective orders against such invasive discovery and the reassignment of the burden of proof on causation. Citing a string of cases from other courts and legal contexts, the panel noted that a "tortfeasor is liable for all of [the] natural and proximate consequences" of its actions, which "include[d] damages assessed . . . for harm caused to a plaintiff who happens to have a fragile psyche." Because the Special Master in *Jenson* had concluded that the plaintiffs' emotional harm was indivisible, the defendants were foreclosed from seeking apportionment, rendering the plaintiffs' prior psychological and medical histories irrelevant.

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264. *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997). The claims were filed prior to the effective date of the Civil Rights Act of 1991, but the plaintiffs were able to seek emotional distress damages under the Minnesota Human Rights Act. *Id.* at 1290.  

265. *Id.* at 1292.  

266. *Id.* at 1293.  

267. *Id.* at 1292–93.  

268. *Id.* at 1294.  

269. *Id.*  

270. *Jenson*, 130 F.3d at 1295. The plaintiffs were unable to meet their burden largely because the Special Master also precluded them from offering any expert testimony in support of their emotional distress claims on the basis that none of the proffered experts had "advanced a validated theory" for allocating "causal effect of multiple psychological stresses or trauma." *Id.* at 1297. This ruling was also reversed on appeal. *Id.* at 1298.  

271. *Id.* at 1294. However, a comment to section 433 of the Restatement (Second) of Torts, titled *Considerations Important in Determining Whether Negligent Conduct is Substantial Factor in Producing Harm*, suggests that a fact finder may consider whether "[s]ome other event which is a contributing factor in producing the harm may have such a predominant effect in bringing it about as to make the effect of the actor's negligence insignificant and, therefore, to prevent it from being a substantial factor." Restatement (Second) of Torts § 433 cmt. d
Following Jenson, the United States District Court for the Eastern District of Missouri in Robinson v. Canon U.S.A., Inc. precluded defendants from seeking discovery regarding whether the plaintiff in the sexual harassment claim had any extramarital affairs at the time of the alleged harassment. While the case did not involve the discovery of mental health records, the analysis applies with equal force in cases in which a defendant bases a discovery request for such records on the rationale that it is exploring potential alternative causes of emotional distress. The judge in Robinson noted that the defendants there had suggested “no way in which they can satisfy their obligation to segregate the ‘harassment-induced stress’ from the ‘extramarital affair-induced stress,’” and therefore would have no basis to make such argument to the jury at trial. The significance of the ruling was not lost on the judge, as she noted: “The Court concedes that it may be impossible for any defendant to satisfy this burden because psychological considerations are not subject to such nice categorizations; nonetheless, the rule is clearly established in Jenson.” Accordingly, “[d]efendants cannot simply present evidence of alleged stressors and leave it to the jury to determine whether, and to what extent, the emotional damage attributable to Plaintiff’s various stress factors is divisible.”

Indeed, it is fair to question whether emotional distress damages and other psychological injuries can ever meet the requirements for a “divisible” harm that could be subject to apportionment. Determining and quantifying causation of psychological distress is not an exercise that contemporary psychotherapists generally undertake. The

(1965). This would suggest that some alternative causes of harm, including emotional distress, may be the proper subject of trial evidence (and by extension discovery).

272. Robinson v. Canon U.S.A., Inc., 82 FEP Cases 1129 (W.D. Mo. Apr. 6, 2000). A separate, additional basis of the court’s ruling was Federal Rule of Evidence 412, which limits the admissibility of evidence of a civil plaintiff’s sexual history. Id.

273. Id. at 1130.

274. Id.

275. Id. Further, there are indications that evidence of prior mental health treatment can be effective in lowering defendants’ exposure. Courts, and presumably juries, have decreased damage awards in civil rights cases based upon evidence of alternative and preexisting causes of emotional distress. For example, in a sexual harassment case, Hurley v. Atlantic City Police Department, 933 F. Supp. 396 (D.N.J. 1996), the court granted the defendant’s motion for remittitur, reducing the jury’s award of $575,000 in compensatory damages for emotional distress to $175,000. The court based its decision in part upon the opinion of the defendant’s expert psychiatric witness that “the difficulties plaintiff has faced and continues to face are rooted in sources other than workplace harassment, such as a troubled childhood marked by sexual molestation, abandonment, and foster homes; physical abuse by both of her husbands; and other severe personal, marital and family problems unrelated to her work environment.” Hurley, 933 F. Supp. at 424.
Diagnostic and Statistical Manual of Mental Disorders has little to say about the causes of such disorders.\textsuperscript{276} As one pair of defense-oriented forensic examiners asserted:

\begin{quote}
[I]n the contemporary biopsychosocial medical model of diagnosis, the "causation" of mental events is explained from the perspective of multiple interactions between biology, psychology and the social milieu. From the biopsychosocial perspective, \textit{all} of the potentially interacting causes (preexisting, concurrent, and subsequent) that may explain a particular mental injury must be investigated in order to arrive at a comprehensive and valid understanding of the alleged mental damages.\textsuperscript{277}
\end{quote}

The authors argue that this comprehensive approach to causation justifies "a thorough and careful investigation of a plaintiff's life course and developmental history prior to, during, and after the allegedly injurious event."\textsuperscript{278} But the complexity of determining causation cannot alone provide the rationale for compelling discovery of a plaintiff's lifetime of mental health records absent a clear legal vehicle to advance such arguments.

Nonetheless, courts generally permit defendants to discover historical mental health records upon a finding of waiver, and they offer little scrutiny of the relevance of such records. Apparently, no court considering the issue of waiver of the psychotherapist-patient privilege has followed the reasoning of \textit{Jenson} or \textit{Robinson} or broader tort principles of apportionment of harm. In \textit{Rose v. Vermont Mutual Insurance Co.}, the court permitted extensive discovery of a plaintiff's mental health history as a result of her claim for emotional distress damages, which is typical of courts' bare mention of the scope of discovery in cases where a defendant seeks a plaintiff's mental health records.\textsuperscript{279} Once the plaintiff was found to have waived the psychotherapist-patient privilege, the court concluded that such waiver "ap-

\begin{footnotesize}
\textsuperscript{276} Drukteinis, \textit{supra} note 19 ("In general, \textit{DSM-IV-TR} does not focus on the etiology of psychiatric diagnosis and, by extension, causation."). The notable exception is the diagnostic criteria for Post-Traumatic Stress Disorder, which includes: \"[T]he person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others.\" \textit{AM. PSYCHIATRIC ASS'N, supra} note 206, at 467.

\textsuperscript{277} Mark I. Levy & Saul E. Rosenberg, \textit{The "Eggshell Plaintiff" Revisited: Causation of Mental Damages in Civil Litigation}, 27 \textit{MENTAL \& PHYSICAL DISABILITY L. REP.} 204, 205 (2003).

\textsuperscript{278} \textit{Id.}

\textsuperscript{279} \textit{Rose v. Vt. Mut. Ins. Co.}, No:1:06-CV-211, 2007 WL 3333394 (D. Vt. Nov. 8, 2007) (diversity case in which the court purported to follow Vermont law on the scope of the psychotherapist-patient privilege). The court also concluded that the fact that the plaintiff's depression had an onset prior to the accident took it out of the possible "garden-variety" protection afforded to some emotional distress claims. \textit{Id.} at \textsuperscript{*}2.
\end{footnotesize}
plie[d] to the discovery of matters causally or historically related to the patient-plaintiff's health put in issue by the injuries and damages claimed in the action." \(^{280}\)

Similarly, in *EEOC v. Woodmen of the World Life Insurance Society*, the plaintiff alleged sexual harassment and gender discrimination.\(^{281}\) The court denied the plaintiff's request to limit discovery of her mental health records to the health care providers she saw during or after her period of employment with the defendant and to further limit the information to that "associated with [the plaintiff's] employment."\(^{282}\) The trial court reasoned that "information in the records may shed light on other contributing causes of [the plaintiff's] claims of emotional distress."\(^{283}\)

In addition to addressing these questions of relevance before a plaintiff's lifetime of mental health treatment can be subject to discovery, a court must also make a specific finding that the plaintiff waived the psychotherapist-patient privilege with respect to the communications with each treatment provider, a step notably absent from federal courts' analysis of waiver. Thus, merely stating a claim for emotional distress arising from an incidence of discrimination in 2005, for example, cannot serve as a basis for seeking psychotherapy records from the year 2001. Rather, a court must identify an affirmative act by the plaintiff consistent with a waiver of the psychotherapist-patient privilege as to those communications from 2001 as well. In a case where the plaintiff releases the earlier records to a current psychotherapist or a forensic examiner who will offer an expert opinion based in part upon such records, a court may properly find an express or implied waiver with respect to those records. In the absence of evidence of an action by a plaintiff effectuating such a waiver, the records cannot be

\(^{280}\) *Id.* (quoting Mattison v. Poulen, 353 A.2d 327, 330 (Vt. 1976)).


\(^{282}\) *Id.*

\(^{283}\) *Id.* See also Bujnicki v. Am. Paving & Excavating, Inc., No. 99-CV-0646S, 2004 WL 1071736, at *19 (W.D.N.Y. Feb. 25, 2004) (permitting discovery of plaintiff's psychotherapy records for a period back to two years prior to the commencement of her employment with defendants); Garrett v. Sprint PCS, No. 00-2583-KHV, 2002 WL 181364, at *3 (D. Kan. Jan. 31, 2002) (permitting discovery of plaintiff's psychotherapy records for a period back to three years prior to when the discriminatory conduct was alleged to have occurred); McKenna v. Cruz, No. 98 CIV. 1853, 1998 WL 809533, at *3 (S.D.N.Y. Nov. 19, 1998) (permitting discovery of plaintiff's psychotherapy records for the five-year period prior to the incident at issue in plaintiff's excessive force claim).
subject to discovery, regardless of the defendant’s theory of relevance.\textsuperscript{284}

5. Compelled Psychological Exams Under Rule 35

In several cases, a discovery request for the release of psychotherapy records is paired with a demand for a psychological or psychiatric evaluation under Rule 35 of the Federal Rules of Civil Procedure.\textsuperscript{285} Courts sometimes couple and often confuse the analysis of waiver of the psychotherapist-patient privilege and Rule 35 psychological examinations.\textsuperscript{286} Such confusion is not entirely surprising. In the years before federal courts analyzed whether a plaintiff could be compelled to turn over records and other information regarding her mental health under a theory of implied waiver, courts considered whether she could be compelled to submit to a psychological examination by placing her mental condition “in controversy.”\textsuperscript{287} While the two questions appear similar, the distinctions are critical to the proper application of waiver of a privilege.

Rule 35, in a somewhat different form from its current language, was among the original civil procedure rules promulgated by the United States Supreme Court in 1938.\textsuperscript{288} It was met with controversy because Rule 35 reversed, through court rule rather than statute, the well-settled rule in federal courts prohibiting compelled physical ex-

\footnotesize{284. See Fitzgerald v. Cassil, 216 F.R.D. 632, 638 (N.D. Cal. 2003) (noting that, while the psychotherapist-patient privilege may limit a defendant’s access to certain records, a defendant has other means, such as cross-examination, to challenge a plaintiff’s emotional distress claims).}


\footnotesize{286. In Gaines-Hanna, the trial court applied the post-Jaffee case law of implied waiver to determine whether the defendants were entitled to subject the plaintiff to a Rule 35 psychiatric examination, and based upon that analysis, further concluded that the defendants were entitled to receive records documenting the plaintiff’s psychiatric treatment during the prior twelve years. Gaines-Hanna, 2006 WL 932074, at *8, 11-12.}

\footnotesize{287. FED. R. CIV. P. 35(a).}

\footnotesize{288. 8A WRIGHT ET AL., supra note 244, § 2231.}
amination of litigants. One of the earliest challenges came in *Sibbach v. Wilson & Co.*, in which the Supreme Court upheld the new rule as a valid exercise of the Court's power to promulgate procedural rules pursuant to the 1934 Rules Enabling Act. Joined by three Justices, Justice Frankfurter vigorously argued in dissent that the Court did not have the power to effect such a "drastic change in public policy," which affected the "inviolability of a person." In 1964, a divided Supreme Court construed Rule 35 in *Schlagenhauf v. Holder*, a case that considered the applicability of the rule to a compelled examination of a defendant. The Court specifically rejected the argument that *Sibbach* had been decided on the grounds that a plaintiff, by bringing an action for damages, had somehow waived his privacy interests. Indeed, Justice Goldberg, writing for the majority, seemed to reject a waiver rationale, noting that it would mean that "a plaintiff has waived a right by exercising his right of access to the federal courts," and that "[s]uch a result might create constitutional problems." Rather, the basis for compelling examinations of either plaintiffs or defendants was nothing more than the plain language of Rule 35, which was within the Court's authority to promulgate.

Although the Court upheld Rule 35, it also provided guidelines to the lower courts regarding the application of the rule. It emphasized that the rule "requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements of 'in controversy' and 'good cause.'" As an example of a fairly straightforward determination of these issues, the Court noted: "A plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the exis-

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291. *Id.* at 17–18 (Frankfurter, J., dissenting).


293. *Id.* at 113–14.

294. *Id.* at 114. The comments on waiver were prompted by Justice Douglas's dissent, in which he argued that a defendant cannot be considered to have waived the "inviolability of the person" because he has been "dragged" to court. *Id.* at 126 (Douglas, J., dissenting). By contrast, a plaintiff may "choose between his privacy and his purse." *Id.*

295. *Id.* at 114 (majority opinion).

296. *Id.* at 118–19.
tence and extent of such asserted injury.” By contrast, the defendant in that case had not “affirmatively put into issue his own mental or physical condition” through any sort of claim or defense of his own.

In case law that parallels and sometimes intersects that regarding waiver of the psychotherapist-patient privilege, many courts have held that Rule 35 psychiatric examinations are not warranted solely on the basis of a claim for emotional distress damages, or with respect to liability in sexual harassment claims. Generally, courts do not order such examinations absent allegations of ongoing emotional distress. For example, in Fox v. Gates Corp., the court attempted to summarize the guidelines that had developed for determining when a court may order a Rule 35 mental health examination and concluded that there were five pertinent factors, one or more of which must be present:

1. plaintiff has asserted a specific cause of action for intentional or negligent infliction of emotional distress;
2. plaintiff has alleged a specific mental or psychiatric injury or disorder;
3. plaintiff has claimed unusually severe emotional distress;
4. plaintiff has offered expert testimony in support of her claim for emotional distress damages; and
5. plaintiff concedes that her mental condition is “in controversy” within the meaning of Fed.R.Civ.P. 35(a).

Relying on case law involving waiver of the psychotherapist-patient privilege, the court noted that claims for mere “garden-variety” emotional distress were not sufficient to trigger the Rule 35 factors. However, in the same opinion the court concluded that the plaintiff had waived the psychotherapist-patient privilege with respect to dis-

297. Id. at 119 (internation citations omitted).
298. Schlagenhauf, 379 U.S. at 121.
301. Id.; see also Bridges v. Eastman Kodak Co., 850 F. Supp. 216, 222 (S.D.N.Y. 1994) (holding that, because the plaintiffs’ claims were for “past, not present” emotional distress, there was no basis to order a Rule 35 psychological examination).
303. Id. (citing Sabree v. United Bhd. of Carpenters & Joiners of Am., Local No. 33, 126 F.R.D. 422, 426 (D. Mass. 1989)).
closure of her psychotherapy records as a result of her emotional distress damage claim.\textsuperscript{304}

As the majority noted in \textit{Schlagenhaus}, Rule 35 provides federal courts the authority to determine, on a case-by-case basis, whether to compel a litigant to submit to a particular form of pretrial discovery.\textsuperscript{305} It does not provide authority to compel a waiver of a recognized right. However, courts have ignored this important distinction and instead based their decisions on their own perception of the relative intrusiveness of a mental examination versus the compelled disclosure of mental health treatment records. Specifically, some courts erroneously conclude that a Rule 35 examination is necessarily more intrusive and, therefore, courts can be less circumspect about the release of psychotherapy records.\textsuperscript{306}

Rule 35 examinations are unquestionably intrusive and can be quite distressing, particularly where an inordinate focus is given to abuse, trauma, and sexual and gynecological history in sexual harassment cases.\textsuperscript{307} However, such examinations do not implicate the psychotherapist-patient privilege unless disclosure of prior treatment records is included in the order compelling examination.\textsuperscript{308} While an examiner might request past psychotherapy records or ask the plaintiff some questions about past treatment, detailed disclosure of prior psychiatric treatment is not a necessary component of the exam. Rather, the examination is a one-time evaluation during litigation in which no privileged communications are made. There is little risk that the Rule 35 exam will result in the revelation of deep secrets and vulnerabilities, such as might be revealed during a psychotherapy session outside of the context of litigation, because the plaintiff knows that the results of the exam and all statements made during the course of it will be revealed to the opposing party.\textsuperscript{309} Indeed, in \textit{Vasconcellos v. Cybex}

\begin{itemize}
\item \textsuperscript{304} Id. at 306. The court did impose some limitations on the time frame on records that would be subject to disclosure and, indeed, it was not clear from the ruling whether there were in fact any records that would be disclosed as a result.
\item \textsuperscript{305} Schlagenhaus v. Holder, 379 U.S. 104 (1964).
\item \textsuperscript{306} See, e.g., Price v. County of San Diego, 165 F.R.D. 614, 623 (S.D. Cal. 1996) ("The invasion of privacy occasioned by allowing opposing counsel to obtain copies of a plaintiff's psychological records, where there is a claim of ordinary mental distress, is exceedingly less burdensome than a Rule 35(a) examination.").
\item \textsuperscript{307} See Louise F. Fitzgerald, \textit{A New Framework for Sexual Harassment Cases}, \textit{TRIAL}, Mar. 2003, at 36, 38; Streseman, \textit{supra} note 38, at 1272.
\item \textsuperscript{308} Kobera & Cass, \textit{supra} note 300, at 99.
\item \textsuperscript{309} See EEOC v. Serramonte, 237 F.R.D. 220, 224 (N.D. Cal. 2006) ("[I]f anything, delving into a plaintiff's medical or psychological records is even more invasive than conducting a medical or psychological examination . . . "); Fritsch v. City of Chula Vista, 187 F.R.D. 614, 632 (S.D. Cal. 1999) ("Many, if not most, people would undoubtedly prefer to submit to a mental examination, in which they have a degree of control over what information is revealed, than to have the
International, Inc., the plaintiff volunteered to undergo a psychiatric
examination in support of her motion to quash defendant’s subpoena
of her treating psychotherapist’s records.\textsuperscript{310}

Thus, intrusiveness is not the proper lens through which the two
discovery issues should be addressed; rather, courts should look to the
nature of the rights at stake. The Supreme Court has recognized the
psychotherapist-patient privilege as a right held by all individuals,
which must be respected and enforced in the absence of a finding of
waiver. Accordingly, the analysis employed under a discovery rule
has no application.

6. The Special Problem of ADA Cases

The issue of waiver of the psychotherapist-patient privilege in the
context of ADA cases presents a special problem. Several courts have
been quick to conclude that asserting a claim under the ADA effectu-
ates a waiver of the psychotherapist-patient privilege, either because
the plaintiff seeks emotional distress damages or simply because she
alleges that she is disabled due to a psychiatric condition. Some courts
have made remarkably broad proclamations of this conclusion while
being particularly dismissive of plaintiffs’ assertions of the psychother-
apist-patient privilege.

One of the leading cases articulating the broad view of waiver,
Sarko v. Penn-Del Directory Co.,\textsuperscript{311} is an ADA case decided the year
after Jaffee. The plaintiff alleged that she was terminated from her
employment after she disclosed to her employer that she required
medication to treat depression and sought an accommodation.\textsuperscript{312} The
court noted, based largely on Third Circuit and Pennsylvania state
court precedent, that a party waives the psychotherapist-patient privi-
lege by “placing her mental condition at issue.”\textsuperscript{313} The court easily
found that the plaintiff had placed her mental condition in issue and

\begin{itemize}
  \item We can imagine many circumstances in which the compelled disclosure of sensitive and
  private medical and counseling records is as offensive or more offensive to a litigant’s
  privacy, health, and dignity interests as a court-ordered mental examination would be.
  Moreover, unlike a court-ordered mental examination, court-ordered disclosure of con-
  fidential records related to mental health treatment undercuts the additional, public
  interest furthered by the privileges of encouraging citizens to seek help for their emo-
  tional problems.
\end{itemize}

312. Id. at 129.
313. Id. at 130.
therefore waived any psychotherapist-patient privilege by asserting that she was a qualified individual with a disability "by virtue of suffering from clinical depression."\footnote{314} Accordingly, the court ordered her to release "all records that contain[ed] confidential communications with her psychiatrist that [were] relevant to her mental condition during the time she was in Defendant's employ."\footnote{315}

One of the starkest statements of waiver in the ADA context was made by a judge in Butler v. Burroughs Wellcome, Inc.\footnote{316} The court considered the issue of waiver in a case in which the plaintiff brought a claim under the ADA alleging that the defendant failed to reasonably accommodate her Post-Traumatic Stress Disorder and "severe depression."\footnote{317} The court ordered the plaintiff to comply with all outstanding requests for discovery—including those seeking her medical records—and to "make all of her experts available for deposition."\footnote{318} The court reasoned: "In an action under the ADA, a plaintiff's medical history is relevant in its entirety."\footnote{319} The court made no reference to the existence of a psychotherapist-patient privilege or whether a finding of implied waiver was appropriate, and instead expressed surprise that the plaintiff resisted releasing her records.\footnote{320} Although the court acknowledged that "[e]lements of a claim under the ADA touch upon the most private and intimate details of a plaintiff's life," the court stated broadly: "ADA plaintiffs, like plaintiffs in an action for medical malpractice, waive all privileges and privacy interests related to their claim by virtue of filing the complaint."\footnote{321} Several other cases have followed a similar approach, holding that the assertion of an ADA claim is sufficient in itself to waive the psychotherapist-patient privilege.\footnote{322}

\footnote{314. Id.}
\footnote{315. Id. The court also ordered the plaintiff to submit to a mental examination pursuant to Rule 35. \textit{Id.} at 131.}
\footnote{317. Id. at 91.}
\footnote{318. Id. at 92. It is not clear from the decision whether any treating psychotherapists had been designated by the plaintiff as testifying experts.}
\footnote{319. Id.}
\footnote{320. The court noted, "Although the action is based on the ADA, plaintiff has resisted disclosing her medical records." \textit{Id.} at 91.}
\footnote{321. Id. at 92.}
These cases reveal misplaced assumptions about the relevancy and significance of such evidence. With respect to establishing disability—as opposed to emotional distress damages—the court will not ask the jury to quantify precisely the extent of a plaintiff's mental condition, and questions of causation have no role whatsoever in an ADA analysis. Rather, the definition of disability is a threshold inquiry regarding the application of the statute. Similarly, analogies to medical malpractice cases, such as that found in the Butler case, are improper. In those cases, the medical care by the defendant is the central issue and filing such a claim is deemed to be a waiver of otherwise privileged communications with the defendant. In an ADA case, the evidence and the fact finder should focus on whether there was unlawful discrimination based upon the plaintiff's disability. As commentators have observed, however, federal courts are too preoccupied with the definition of disability; therefore, it is not surprising that they would use the necessity of proof as a basis to find a broad waiver of the privilege.

V. Bringing Certainty to the Question of Waiver

Clearly, the current framing of the question of waiver of the psychotherapist-patient privilege is unworkable, as courts themselves note the sharp differences among their approaches. This uncertainty renders the privilege nearly illusory, and by so doing, undermines an alternative instrumental rationale for the existence of the privilege: the privilege enables those who have sought mental health treatment to bring civil rights claims in federal court without concern that their treatment will necessarily become a central focus of discovery, and perhaps trial, over their objections. In order to serve this rationale, federal courts should approach questions of waiver of the psychotherapist-patient privilege in a manner that is consistent with the general

323. Deirdre M. Smith, Who Says You’re Disabled? The Role of Medical Evidence in the ADA Definition of Disability, 82 TUL. L. REV. 1, 64, 69–70 (2007) (contrasting jury assessments of tort damages and determinations of whether an ADA plaintiff meets the statute's definition of disability).

324. See, e.g., Chai R. Feldblum, Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?, 21 BERKELEY J. EMP. & LAB. L. 91, 92 (2000). One wonders whether courts would be so quick to conclude that there is a waiver of the clergy-believer privilege in every claim based upon religious discrimination. Indeed, I have not found a single case in which this issue was even raised.

concepts of waiver in the law and that provides all litigants meaningful protection from unnecessary intrusion into their mental health history.

A. An Alternative Instrumental Rationale

Individuals who have sought mental health treatment hold an uncertain privilege against disclosure of their psychotherapy records and therefore face a difficult dilemma when considering whether to pursue a civil claim in federal court. They must consider whether they are willing to run the risk of opening the door to detailed information about their mental health treatment by alleging emotional injury resulting from a deprivation of civil rights or other wrongdoing, or by alleging discrimination on the basis of mental illness. Undoubtedly, for some, the answer may simply be that the risk is too great. Thus, on the question of waiver, courts must shift their focus from an instrumental rationale based upon the questionable assumption that the psychotherapist-patient privilege ensures that individuals seek psychotherapy in the first place, to a more realistic and pertinent instrumental rationale, namely, that of ensuring that those who have or had a mental illness and received treatment are not broadly discouraged from using the courts to remedy a deprivation of their rights.

Professor Anita Hill, whose mental health was the subject of scrutiny during the confirmation hearing of Justice Clarence Thomas, spoke on this issue in 1993. She noted that only three percent of victims of sexual harassment pursue relief through litigation, and she attributes this to the financial and emotional burdens of pursuing such claims. She specifically argued that evidence rules that allow discovery of a sexual harassment plaintiff’s mental health history have a “chilling effect” on victims’ decisions whether to pursue litigation.

326. Robinson, supra note 37, at 77 (“Millions of American workers are effectively thwarted from exercising their civil rights merely because they have undergone psychotherapy.”).

327. PERLIN, supra note 42, at 22; see also JANE FLAX, THE AMERICAN DREAM IN BLACK & WHITE: THE CLARENCE THOMAS HEARINGS 65 (1998) (“Ostensibly searching for a motive, the senators speculated extensively about Anita Hill’s psychology and relationships with men.”).


329. Id. See also Priest v. Rotary, 98 F.R.D. 755, 761 (N.D. Cal. 1983) (noting that “[d]iscovery of intimate aspects of plaintiffs’ lives . . . has the clear potential to discourage sexual harassment litigants from prosecuting lawsuits such as the instant one.”); Beth S. Frank, Note, Protecting the Privacy of Sexual Harassment Plaintiffs: The Psychotherapist-Patient Privilege and Recovery of Emotional Distress Damages Under the Civil Rights Act of 1991, 79 WASH. U. L.Q. 639, 663 (2001) (“Without the protection of the psychotherapist-patient privilege, individuals who seek therapy will be reluctant to bring suit or will not bring suit at all for legitimate claims of harassment out of fear that their mental health will be placed on trial.”).
Similarly, the Supreme Court of California, in an early decision analyzing the patient-litigant exception, considered the risk that a broad reading of the exception "might effectively deter many psychotherapeutic patients from instituting any general claim for mental suffering and damage out of fear of opening up all past communications to discovery."\textsuperscript{330} Such "result would clearly be an intolerable and overbroad intrusion into the patient's privacy, not sufficiently limited to the legitimate state interest embodied in the provision and would create opportunities for harassment and blackmail."\textsuperscript{331} Accordingly, the court construed the exception as a "limited waiver concomitant with the purposes of the exception."\textsuperscript{332}

More recently, the EEOC noted the importance of a court's construction of waiver of the psychotherapist-patient privilege to the agency's ability to bring actions to remedy incidents of discrimination. When, in a class action race discrimination case, a magistrate judge denied a defendant's motion to compel discovery of, among other things, the plaintiffs' mental health histories and records, the agency's regional attorney praised the ruling as "one of those genuinely important court decisions which, unfortunately, sometimes disappear without ever making it onto the radar screen."\textsuperscript{333} The attorney noted that the magistrate judge "forcefully rejected the employer's attempt to use discovery to put the lives of victims of employment discrimination under the microscope" and that it was "good to win this one and to see civil rights litigants protected from having their lives turned upside-down and unnecessarily subjected to the proverbial 'third degree.'"\textsuperscript{334}

Before the \textit{Jaffee} opinion, one commentator noted that compelled mental examinations under Rule 35

\textsuperscript{330} \textit{In re Lifschutz}, 467 P.2d 557, 570 (Cal. 1970).

\textsuperscript{331} \textit{Id.}

\textsuperscript{332} \textit{Id.} (holding that the communications subject to disclosure must be "directly relevant" to the specific conditions alleged by the plaintiff in seeking damages for personal injuries, and not for "other aspects of the patient-litigant's personality, even though they may in some sense, be 'relevant' to the substantive issues of litigation.").

\textsuperscript{333} Press Release, \textit{Equal Employment Opportunity Comm'n, Federal Court Sharply Limits Employer's Attempt to Probe Job Bias Victims' Medical, Arrest and Litigation Histories} (Nov. 29, 2007), available at \url{http://www.eeoc.gov/press/11-29-07.html} (hereinafter EEOC Press Release) (quoting John Hendrickson). The court had adopted a somewhat narrow view of the waiver and held that merely asserting claims for emotional distress did not in itself effectuate a waiver of the psychotherapist-patient privilege provided that the plaintiffs limited their claims to "negative emotions . . . experienced as the intrinsic result of the defendant's alleged conduct." \textit{EEOC v. Area Erectors, Inc.}, 247 F.R.D. 549, 552 (N.D. Ill. 2007) (internal quotation marks omitted).

\textsuperscript{334} \textit{EEOC Press Release, supra} note 333.
may best serve defendants not by illuminating facts at issue in a case, but by intimidating potential sexual harassment plaintiffs into silence. The scope of such examinations can be dauntingly broad and invasive, permitting inquiry into the plaintiff’s entire psychological and sexual history. The specter of this invasive inquiry may discourage victims from bringing valid claims.335 Given that many consider disclosure of psychotherapy notes to be even more invasive, one can assume that such disclosure serves as a more significant deterrent than does the possibility of a psychological examination.

Moreover, where plaintiffs are not dissuaded altogether from bringing claims, they may attempt to avoid triggering a finding of implied waiver by narrowing their claims. In light of the case law reviewed above, astute plaintiffs’ attorneys will engage in careful complaint-drafting or make subsequent amendments to pleadings where they seek to preserve their clients’ privilege.336 For example, in Santelli v. Electro-Motive, the plaintiff avoided waiver only by restricting her damages claim to “negative emotions” such as “humiliation, embarrassment, and other similar emotions . . . as the intrinsic result of the defendant’s alleged conduct.”337 She was barred from presenting any evidence of “symptoms or conditions that she suffered (e.g. sleeplessness, nervousness, depression).”338 As a direct result of these self-imposed limitations, her communications with her psychotherapist were “no longer relevant” and for that reason there would be no waiver of the privilege.339 Similarly, in Koch v. Cox, the appellate court noted that the plaintiff’s complaint made no reference to emotional distress damages, eliminating one of the defendant’s bases for seeking psychotherapy records.340 Although courts generally deny access to the records as a result of such strategic pleading, the final result is of course a victory for the defendants since they succeed in avoiding any exposure to liability for emotional distress damages.341

335. Streseman, supra note 38, at 1272.
336. See, e.g., In re Sims, 534 F.3d 117, 136 (2d Cir. 2008) (reversing the trial court’s finding of waiver in part because the plaintiff had withdrawn his emotional distress claim); Doe v. Mercer Island Sch. Dist., No. 400, No. C06-395JLR, 2006 WL 3361777, at *1 (W.D. Wash. Nov. 20, 2006) (noting that the plaintiff dropped his emotional damages claim).
338. Id.
339. Id.; see also Krocka v. City of Chi., 193 F.R.D. 542, 544 (N.D. Ill. 2000) (imposing limitations similar to those in Santelli).
341. See Santelli, 188 F.R.D. at 309 (noting that the plaintiff’s success in avoiding waiver of the psychotherapist-patient privilege was “a meager victory,” because the limitations on the evidence she could offer “may prevent her from fully recovering for her alleged emotional distress”); see also Covell v. CNG Transmission Corp., 863 F. Supp. 202, 206 (M.D. Pa. 1994) (pre-
Some courts require plaintiffs to take steps to clarify or curtail their claims as a condition for enforcement of the psychotherapist-patient privilege. For example, in the recent case of *Duck v. Port Jefferson School District*, the magistrate judge ruled that he would deny the defendants' motion to compel disclosure of the plaintiff's mental health records with respect to those records unrelated to the facts of the case, provided that [the plaintiff] file a statement that she is seeking only "garden variety" emotional distress claims, that she does not have "any permanent emotional distress or damage" from the underlying events, will not call a mental health expert witness at trial, and has not suffered any physical injuries as a result of the defendants' alleged conduct.\(^\text{342}\)

The *Santelli* court noted: "Parties . . . know for certain that if they want to maintain the [psychotherapist-patient] privilege, they cannot seek emotional distress damages."\(^\text{343}\) The question is whether that kind of certainty is an acceptable consequence of courts' approach to implied waiver. A psychologist has hypothesized that women likely scale back their sexual harassment claims for emotional damages and choose not to offer testimony of an expert witness to avoid findings that they have waived the psychotherapist-patient privilege, which would open up their entire mental health history.\(^\text{344}\) However, such strategic decisions will result in juries hearing no expert testimony on the psychological impact of sexual harassment, potentially undermining plaintiffs' arguments on both liability and damages.\(^\text{345}\) These confined claims also undermine one of the stated goals of the Civil Rights Act of 1991, which was enacted after Congress had determined that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace."\(^\text{346}\)

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\(^{343}\) *Santelli*, 188 F.R.D. at 309.

\(^{344}\) Kovera & Cass, *supra* note 300, at 109; see also *McDonald & Kulick, supra* note 29, at xxxvii (observing that plaintiffs have responded to defendants' broad access to mental health records by curtailing their own use of mental health experts in litigation, eliminating one of defendants' arguments in support of an order compelling disclosure of a plaintiff's mental health history).

\(^{345}\) Kovera & Cass, *supra* note 300, at 110.

\(^{346}\) Pub. L. No. 102-166, § 2(1), 105 Stat. 1071 (codified at 42 U.S.C. § 1981). One of the stated purposes of the statute was "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace." *Id.* § 3(1).
For ADA cases in particular, the result could be especially ironic. The construction of waiver should be more, not less, narrow where the jury is not being asked to quantify emotional injury or to determine its cause but only to make a threshold finding of whether someone is disabled. The purpose of the ADA would be undermined as well if one subset of people with disabilities—those with mental illness—found that their valued legal right to prevent disclosure of mental health treatment records had been quickly discarded solely because they tried to vindicate their right to be free from discrimination based on having the conditions for which they received such treatment.\textsuperscript{347}

As the federal courts emphasize repeatedly, privileges are regarded with disfavor in the courts. However, once we have determined that a set of communications is among those warranting the protection of a privilege, that protection must be meaningful. Courts and defendants are unrealistic in their demand for cost-free privileges. There is no question that there is a cost imposed by maintaining the secrecy of a certain kind of relevant evidence, but finding waiver and compelling disclosure of psychotherapy records are not cost-free alternatives. Such actions broadly discourage people with a history of mental health treatment from seeking the full range of remedies available through federal litigation for deprivation of their rights under the Constitution or the civil rights laws enacted by Congress. Indeed, one district court explicitly adopting the narrow approach to waiver of the psychotherapist-patient privilege reasoned that “for policy reasons, a waiver of the psychotherapist-patient privilege should not be narrowly construed, particularly in civil rights cases where Congress has placed much importance on litigants’ access to the courts and the remedial nature of such suits.”\textsuperscript{348} As Justice Goldberg noted in Schlagenhauf v. Holder, a court cannot conclude that “a plaintiff has waived a right by exercising his right of access to the federal courts.”\textsuperscript{349}

B. An Alternative Approach to Waiver

In order to serve a rights-vindicating instrumental rationale, and to limit the other costs of an uncertain privilege—most notably the burden on courts and litigants to litigate the issue of waiver repeatedly—

\textsuperscript{347} See 42 U.S.C. § 12101(b)(1) (2000) (stating that one purpose of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”). Cf. Smith, supra note 323, at 71–72 (arguing that requiring ADA plaintiffs to provide medical proof of their disability serves to disempower people with disabilities by, among other things, compelling them to disclose detailed information regarding their disabilities and suggesting that the requirement may deter people from pursuing ADA claims).

\textsuperscript{348} Fitzgerald v. Cassil, 216 F.R.D. 632, 639 (N.D. Cal. 2003).

most federal courts will need to change course entirely in their approach to waiver of the psychotherapist-patient privilege. The following proposed approach addresses the most common scenarios in which these questions arise; namely, during discovery of psychotherapy records, when a plaintiff has sought a motion for a protective order, a plaintiff or psychotherapist files a motion to quash a subpoena, or a defendant files a motion to compel responses to discovery requests.

When a plaintiff resists a defendant's request for current or past mental health records, the first step in the analysis should be an initial determination, pursuant to Rule 26 of the Rules of Civil Procedure, of whether such records are in fact within the scope of permissible discovery. As noted above, courts generally fail to consider that, even if a party has apparently waived the psychotherapist-patient privilege, Rule 26 nonetheless permits discovery only of information reasonably calculated to lead to the discovery of admissible evidence and furnishes a basis to shield certain information from discovery based upon considerations of privacy, embarrassment, oppression, and burden. At the outset, therefore, the court should consider whether all or any of the information sought by the defendant is "relevant to the claim or defense of any party." As discussed above, while this is a broad standard, courts should not fail to consider—and should require defendants to demonstrate—that the information sought is in fact relevant. At this stage, the court can consider the time frame of the records sought and the relation to the plaintiff's claims and facts alleged in the action. For example, a court may conclude that the documents sought are too distant in time from the events at issue in the litigation or that the records are simply unrelated to any of the issues in dispute.

350. At least one pair of commentators has suggested that states have taken a more accepting view of the privilege and a far narrower view of waiver. Kent & Kent, supra note 195, at 480 (noting that Michigan was one of the few states in which a claim for emotional distress alone was considered to have effectuated a waiver of the physician-patient privilege).

351. FED. R. CIV. P. 26(c).

352. FED. R. CIV. P. 26(b)(1).

353. Id.

354. An example of a court giving a narrow view of the scope of discovery where psychotherapy records are in issue is Vasconcellos v. Cybex International, Inc., 962 F. Supp. 701 (D. Md. 1997). The court noted that even where a patient has put her "mental condition at issue" she "has a right to have discovery limited to information that is directly relevant to the lawsuit" and therefore the scope of the inquiry would be limited to the extent to which the defendant's conduct caused her alleged harm. Id. at 709.

355. See generally 8 WRIGHT ET AL., supra note 244, § 2009, at 124 ("A specific request for discovery is measured by the court against the background of a specific case. What may be relevant, and subject to discovery, in one case of a certain type may be irrelevant in another
Specifically, there is little basis to require disclosure of mental health records that predate the incident at question in a particular case, unless such records served as the basis for a testifying expert’s opinion, as discussed below. Courts should carefully evaluate a defendant’s “alternative sources of emotional distress” argument to determine if such evidence could in fact be used properly to avoid liability or to argue for reduced damages under theories of causation and apportionment. A preexisting mental health condition does not entitle a defendant access to a plaintiff’s entire mental health history to fish for past stressors, trauma, diagnoses, personality disorders, or other facts that could be used to discredit the plaintiff. A defendant must make a specific showing of the relevancy of such past records to a claim or defense asserted by the parties, even if the current treating psychotherapist created the records. Thus, considerations of relevancy are appropriate in the overall analysis of a dispute regarding the discovery of mental health records, but only with respect to the scope of discovery, not to whether there has been a waiver of the psychotherapist-patient privilege.

Rule 26 provides other limitations on discovery as well. A court may, “for good cause,” issue an order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” A litigant’s privacy interests may be considered as part of this analysis. Prior to Jaffee, when the existence of a privilege was far more in doubt and Rule 26 served as plaintiffs’ primary means of avoiding disclosure of psychotherapy records, courts were much more willing to consider Rule 26 arguments to limit the scope of discovery of such records. Since Jaffee, however, the discussion focuses almost entirely on waiver of the psychotherapist-patient privilege with little discussion of the outer limits of the scope of discovery. How-

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356. Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1294 (8th Cir. 1997). Assuming that the court also finds a waiver of the psychotherapist-patient privilege, it should consider conducting an in camera review of the records to determine whether they meet the Rule 26 definition of relevance. See Doe v. City of Chula Vista, 196 F.R.D. 562, 570 (S.D. Cal. 1999).


358. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 n.21 (1984); see also Kunstler v. City of New York, No. 04CIV1145, 2006 WL 2516625, at *11-12 (S.D.N.Y. 2006) (concluding that, even in the absence of the psychotherapist-patient privilege, Rule 26 gives the court discretion to limit defendant’s access to “what is plainly very sensitive information”).

359. See, e.g., Bottomly v. Leucadia Nat’l., 163 F.R.D. 617, 621 (D. Utah 1995) (holding that defendant’s access to plaintiff’s psychotherapy records in sexual harassment action would be limited to those reasonably calculated to lead to admissible evidence, which would be determined by the court after an in camera review).
ever, there is no reason to disregard notions of privacy in making initial determinations of whether the information sought is properly the subject of discovery.\textsuperscript{360}

If the records fall within the scope of discovery under Rule 26, the next matter to consider is whether they are covered by the psychotherapist-patient privilege, and specifically whether the discovery sought consists of “confidential communications between a psychotherapist and her patient.”\textsuperscript{361} This is a determination made without reference to fairness or necessity and considers only whether the records reflect communications made “in the course of diagnosis or treatment” by a “licensed psychotherapist.”\textsuperscript{362} If the privilege does not apply, then the plaintiff may be ordered to produce the information sought.

Assuming, however, that these two questions are answered in the affirmative—that the information sought falls within the scope of discovery and also is covered by the psychotherapist-patient privilege—the court should next consider a defendant’s arguments that the psychotherapist-patient privilege has been waived through some action of the plaintiff. Many courts impose on the plaintiff the burden of disproving waiver.\textsuperscript{363} This approach is misplaced. Courts uniformly view the burden of proving the existence of the privilege (i.e. that there was a psychotherapist-patient relationship and that the communications were confidential) as being properly imposed on the party asserting the privilege.\textsuperscript{364} However, a waiver, or lack thereof, is not an “essential element” of the privilege itself. Rather, it occurs only through affirmative conduct of the person asserting privilege after the communication has occurred and has the effect of vitiating the waiver.\textsuperscript{365}

\textsuperscript{360} For example, records detailing communications concerning sexual dysfunction might be the subject of a protective order where such dysfunction is not an issue in the litigation.

\textsuperscript{361} Jaffee v. Redmond, 518 U.S. 1, 11 (1995). See United States v. Romo, 413 F.3d 1044, 1048-49 (9th Cir. 2005), cert. denied, 126 S. Ct. 1638 (2006); United States v. Schwensow, 151 F.3d 650, 657-58 (7th Cir. 1998) (holding that communications with alcoholics anonymous telephone volunteers do not fall within the privilege).

\textsuperscript{362} Jaffe, 518 U.S. at 15.


\textsuperscript{364} See IMWINKELRIED, supra note 46, § 6.3.1, at 524-25 (“It is well-settled that the person claiming the privilege has the ultimate burden of proof under Federal Rule of Evidence 104(a) on all . . . elements.”).

\textsuperscript{365} Federal courts are generally divided on the issue of which party bears the burden of proof on the issue of waiver of a privilege. Id. § 6.12.2, at 844-46. Some courts assume that the burden should be borne by the party with the better access to information and evidence about
Thus, the burden of showing waiver should fall on the party asserting that such subsequent action has occurred, rather than requiring the privilege holder to prove a negative.\textsuperscript{366}

In order to determine whether the party asserting that there was a waiver has met its burden, the court should focus solely on the actions of the privilege holder, generally the plaintiff. The inquiry is whether the plaintiff voluntarily took steps that can be properly viewed as effectuating a waiver of the psychotherapist-patient privilege.\textsuperscript{367} The easiest cases in which to find a waiver are those where the plaintiff has specifically authorized disclosure of the communications, or where the plaintiff indicates an intention to use the privileged communications as evidence to support her claim, such as to demonstrate damages or the fact of a disability. She may do so by designating a psychotherapist as an expert witness, producing mental health records through automatic disclosure or otherwise in the discovery process,\textsuperscript{368} signing release forms, or turning the records over to third parties who are not covered by that or another privilege.\textsuperscript{369}

If the defendant argues that a waiver is implied by other conduct, courts should consider whether a plaintiff has truly attempted to use “the privilege as a sword instead of a shield.”\textsuperscript{370} Where the plaintiff seeks no claim to recover for payment of mental health treatment related to the accident and lists no mental health provider as a witness, there can generally be no finding that the plaintiff has made an “of-

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\textsuperscript{366} \textit{Id.} § 6.12.2, at 845. Other courts have set forth a burden-shifting analysis under which after the privilege holder has demonstrated the existence of the privilege itself, a burden of “going forward” shifts to the other party which must produce evidence upon which a fact finder could find that the privilege has been waived. \textit{See, e.g.}, Carmona v. State, 947 S.W.2d 661, 663 (Tex. Ct. App. 1997).

\textsuperscript{367} \textit{See Johnson v. Trujillo}, 977 P.2d 152, 155 (Colo. 1999) (“The party seeking to overcome the privilege bears the burden of establishing that the privilege has been waived.”).

\textsuperscript{368} \textit{See generally} \textit{Fed. R. Civ. P. 26(a)(1)(A)} (describing categories of information and documents that must be provided even in the absence of a specific discovery request); \textit{Fed. R. Civ. P. 26(a)(2)} (information to be disclosed regarding any potential trial witness who may offer expert opinion testimony); \textit{Fed. R. Civ. P. 33} (interrogatories to be answered under oath); \textit{Fed. R. Civ. P. 34} (request for production of documents).

\textsuperscript{369} Providing records to her attorney would not limit a plaintiff’s ability to later claim privilege since communications with her attorney are themselves covered by a privilege. \textit{Imwinkelried}, \textit{supra} note 46, § 6.12.4, at 859–60.

\textsuperscript{370} \textit{Johnson}, 977 P.2d at 157; \textit{see also} Richard L. Marcus, \textit{The Perils of Privilege: Waiver and the Litigator}, 84 \textit{Mich. L. Rev.} 1605, 1607 (1986) (“[T]he principle concern is selective use of privileged materials to garble the truth, which mandates giving the opponent access to related privileged material to set the record straight.”) (referring to the attorney-client privilege).
fensive use of the privilege” upon which a court could infer waiver. 371 And where an act effectuating waiver is found, it should operate as an implied waiver only as to confidential communications connected to such waiver.

Thus, even where a plaintiff lists a mental health professional as an expert witness, the scope of the privilege waiver reaches only those communications upon which the expert bases her opinion. 372 In the case of a treating psychotherapist offering an opinion, this would necessarily include communications between the plaintiff and the psychotherapist. Similarly, if the treating or consulting therapist reviewed notes and records from other treatment and relied upon those in reaching the expert opinions to be offered at trial, such records would also be subject to discovery. However, if the psychotherapist has not relied upon the treatment records of other psychotherapists, then there is no basis to use waiver as a rationale for requiring disclosure. 373 A defendant may ask the plaintiff whether she has sought any other mental health treatment, and an expert’s failure to review or consider other diagnostic impressions and treatment records is certainly fair fodder for cross-examination, but it does not warrant a court order compelling plaintiff to produce the content of such other treatment records. 374

A court cannot assume that any claim for emotional harm or mental disability will necessarily involve expert testimony. Unquestionably, a plaintiff can present emotional distress testimony without expert testimony or offer her own testimony in support of claim of mental disa-

372. A party is entitled to discovery of “the data or other information considered by the [opposing party’s designated expert] witness in forming [her] opinions.” FED. R. CIV. P. 26(a)(2)(B).
373. If a party withholds psychotherapy records from the expert witness, such records would not be subject to discovery under either Rule 26 or as a result of waiver of the psychotherapist-patient privilege. The court in Santelli v. Electro-Motive, 188 F.R.D. 306 (N.D. Ill. 1999), while finding no waiver, rejected the “narrow waiver rule,” because it would “enable a party who had undergone psychotherapy to offer at trial only the testimony of a retained, non-treating expert and thereby prevent discovery of what she had told her treating psychotherapist.” Id. at 308. This ability to present only a “selective ‘history’” of one’s mental health treatment would “thwart the truth seeking process by using the privilege as both a shield and a sword.” Id. While the court may not approve of the result of the recognition of the privilege in Jaffee, the basic principles underlying privileges and waivers would indeed result in restricted access to potentially relevant information. See supra notes 218–259 and accompanying text.
374. In addition, the opposing party may take the deposition of an expert designated by the plaintiff. FED. R. CIV. P. 26(b)(4) (“A party may depose any person who has been identified as an expert whose opinions may be presented at trial.”).
375. Dobbs, supra note 24, at 832 (“Medical testimony is not ordinarily required to demonstrate either the severity of [severe emotional distress] or its cause.”). See also Lewis R. Hagood, Claims of Mental and Emotional Damages in Employment Discrimination Cases, 29 U. MEM. L.
bility; she may therefore choose to forego calling a treating or evaluating psychotherapist. Jurors can infer emotional distress from the fact of discrimination alone. A plaintiff's decision not to designate her treating psychotherapist may ultimately make it more difficult for her to convince a jury as to the degree of her emotional distress, or the fact that she is disabled, but that is her choice to make. Defense attorneys can use cross-examination, testimony of other witnesses, and argument to attack the sufficiency of the plaintiff's claim. The key is to put the control of the issue in the hands of the party with the burden of proof as part of the strategy for the prosecution of her case.

A defendant may demonstrate implied waiver of certain records by pointing to a plaintiff's claim for recovery of the cost of treatment, but such waiver will only extend to communications directly relating to such costs. Courts should not be too quick to conclude that a plaintiff seeks such compensation based upon the typical, broad language found in the civil complaint's damages clause. A better approach is to require defendants to show that a plaintiff has made such claims through statements included in Rule 26(a)(1) “Initial Disclosures,” or through answers to interrogatories or deposition testimony containing explanations from plaintiffs of the nature of the claims they will be

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376. See generally Smith, supra note 323 (arguing that courts may not require ADA plaintiffs to offer expert medical evidence to establish a prima facie case of disability).


378. See Hagood, supra note 375, at 583–85, 589. An absence of expert testimony in support of claims may also make any award more vulnerable to attack on appeal. Id.

379. Hucko v. City of Oak Forest, 185 F.R.D. 526, 531 (N.D. Ill. 1999) (“[I]t may be that the plaintiff—without the benefit of medical testimony—will be compromised in his efforts to persuade the jury that he has emotional distress that was caused by the defendants, and that is not instead the product of his preexisting condition. However, that will be for the jury to decide at a later time.”); see also IMWINKELRIED, supra note 46, § 6.12.4, at 884 (noting that although privileged information may be “logically relevant” to a plaintiff's claims, defense counsel has “alternative means” either to “attack the weight of the plaintiff's damages evidence or to suggest an alternative cause”).

380. FED. R. CIV. P. 8(a)(3).

381. FED. R. CIV. P. 26(a)(1). For example, plaintiffs must provide the opposing party a computation of any category of damages claimed by the disclosing party at the outset of the discovery period. FED. R. CIV. P. 26(a)(1)(C).
pursuing. A court may find waiver only where, through such state-
ments, the plaintiff has indicated that she intends to include such spe-
cific amounts in her damage claims.

But even where a waiver is found, however, a court must nonethe-
less take steps to limit disclosure and ensure that there is a direct link
between the plaintiff’s actions leading to waiver and the records for
which the privilege has been waived—the actual confidential commu-
nications she intends to use to support her claim. Thus, if a plaintiff
includes a claim for recovery of the costs of certain mental health
treatment, the waiver only extends to certain records regarding such
treatment. For example, the billing, treatment plan, diagnostic im-
pression, and similar documents may demonstrate that the costs were
incurred for the alleged injury. Courts should not compel disclosure
of treatment notes and psychological examinations, which are likely
the most sensitive records, if the implied waiver is based solely upon
seeking payment for psychotherapy. 382

A court may not conclude that the plaintiff has waived the psycho-
therapist-patient privilege based solely upon a plaintiff’s claim for
emotional distress damages, a separate claim for negligent or inten-
tional infliction of emotional distress, or an allegation that she is dis-
abled on the basis of a mental illness. In many, if not most, cases in
which a plaintiff puts forth such claims and allegations, she will desig-
nate her psychotherapist or a consulting mental health professional as
a testifying expert witness to support the claims. Because such expert
testimony is not required, however, a plaintiff who has sought treat-
ment, perhaps for the emotional distress caused by the defendant’s
misconduct and perhaps at another time in her life, may choose not to
offer the testimony of a past or current psychotherapist.

Thus, absent use of such confidential communications in support of
her claim, a court should not conclude that a plaintiff has waived the
psychotherapist-patient privilege with respect to those communica-
tions. Unquestionably, such psychotherapists may have relevant and
revealing evidence to offer the fact finder, and such a reading of
waiver would keep the evidence from the fact finder. 383 But basing a

382. A plaintiff would likely offer in evidence some record of payment for treatment in sup-
port of such claim.
2006). The court explained:
   In rejecting the at-issue argument pressed by defendants, we note that, in substance, it
   rests on the notion that access to treatment records might, in some not-too-specifically
defined way, be helpful to defendants in preparing to rebut plaintiffs’ damage case. To
accept this notion as the touchstone of waiver would be inconsistent with the far more
demanding standards generally recognized for at-issue waiver of other privileges, and
finding of waiver upon mere allegations of emotional harm is inconsistent with underlying principles of absolute privileges and waiver in American law. As Professor Imwinkelried has noted with respect to waiver of testimonial privileges, the fundamental issue should be whether a litigant “introduces trial testimony that expressly or implicitly discloses substance of the protected communications.”

Even where a court finds a waiver, the court should take additional measures to protect litigants and to follow the broader aims of discovery and litigation. Rule 26 not only provides that certain information is entirely outside the scope of discovery, as discussed above, but it also authorizes trial judges to exercise their discretion to ensure that discovery is pursued fairly and appropriately. For example, courts should consider limitations on the disclosure of the plaintiff’s confidential statements made during the course of litigation to enable the

would be particularly inappropriate in view of the very strong emphasis of the Supreme Court on the notion that this particular privilege is not a conditional one, that is, not one that can be set aside on the basis of a party’s showing of need. If need alone does not justify waiver, still less can a speculative definition of conceivable relevance be sufficient to justify eviscerating this privilege.

Id. Further, enforcement of the privilege does not necessarily require exclusion of otherwise relevant evidence pertaining to a plaintiff’s mental health and other potential causes of emotional distress. Defense counsel remains free to inquire regarding these areas—with some limitations, such as those set forth under Federal Rule of Evidence 412 and Civil Procedure Rule 26, more generally—in depositions and on cross-examination. Bernabei & Schroader, supra note 5, at 33. Defense counsel may depose or call at trial other witnesses to testify regarding a plaintiff’s emotional health. Fasman, supra note 37, at 537. A plaintiff may find that she has painted herself into a corner by not offering testimony or records from her treating psychotherapist. 384. See supra notes 133–155 and accompanying text. Further, because the state of the law of waiver based solely upon claims for emotional distress is so unsettled, arguably, one cannot knowingly waive the psychotherapist-patient privilege by including a claim for emotional distress in her prayer for relief on a complaint. In effect, courts fail to offer proper disclosure when they find implied waiver given the current state of the law. See Berg, supra note 135, at 322–23.

IMWINKELRIED, supra note 46, § 6.12.4, at 885 (emphasis added).

386. FED. R. CIV. P. 26. Rule 26(c), “Protective Orders,” provides the following, nonexclusive list of measures that a trial court may take “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense”:

(A) forbidding the disclosure or discovery;
(B) specifying terms, including time and place, for the disclosure or discovery;
(C) prescribing a discovery method other than the one selected by the party seeking discovery;
(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
(E) designating the persons who may be present while the discovery is conducted;
(F) requiring that a deposition be sealed and opened only on court order;
(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

Id.
plaintiff to continue such treatment without concern that her statements will be subjected to scrutiny.\textsuperscript{387} Thus, if treatment is ongoing, any records created after the request for discovery should remain confidential and there should be no continuing disclosure requirement or subsequent request for records absent a specific showing for good cause.\textsuperscript{388} Similarly, any and all references to the litigation itself,\textsuperscript{389} regardless of when created, may be redacted. Disclosure certainly would chill the sessions once a plaintiff knows that all records will be subject to a continuing disclosure requirement.

Courts should also limit review of any mental health information obtained in discovery, including deposition testimony, to the parties’ attorneys, absent a special showing of need, and courts should further require that attorneys not offer the information in support of a motion for summary judgment or at trial without the court’s prior authorization.\textsuperscript{390} To the extent that such records are filed in support of a motion, the court should seal and redact the filings to limit access to such information through users of PACER—the federal courts’ on-line case filing system—or online legal research services. All of these requirements should be contained in a standard Protective Order issued upon the request of a party in a civil case in which mental health records may be sought or produced. Further, because a Rule 35 exam would be far less intrusive in many instances, courts can give plaintiffs who seek damages for ongoing and future psychiatric injury the option of

\textsuperscript{387} For example, courts should afford plaintiffs some level of protection against discovery of statements such as those admitted at trial in \textit{Maday v. Public Libraries of Saginaw}, 480 F.3d 815, 820 (6th Cir. 2007), discussed \textit{supra} at note 41. The marginal probative value of such statements to the central issues in dispute is slight compared with the potential injury to both a psychotherapy-patient relationship and the attorney-client relationship.

\textsuperscript{388} \textit{See} \textit{Fed. R. Civ. P. 26(e)} (requiring supplementation of prior discovery responses under certain circumstances); Vasconcellos \textit{v. Cybex Int’l, Inc.}, 962 F. Supp. 701, 708 (D. Md. 1997) (granting motion to quash subpoena of records of treating psychotherapist based upon “serious concerns that the disclosures will adversely affect [the plaintiff’s] psychiatric treatment”).

\textsuperscript{389} Plaintiffs may discuss or refer to—expressly or impliedly—any otherwise privileged communications in the context of communications with their attorneys. Since they are only disclosing the communications in the context of another privileged communication, there is no waiver of the attorney-client privilege. IMWINKELRIED, \textit{supra} note 46, § 6.12.4, at 859–60. Accordingly, in order to provide an additional level of protection against possible disclosure of such communications, or, more generally, the mental impressions and strategies of the plaintiff and her attorney, courts should guard against disclosure of such discussions.

\textsuperscript{390} \textit{See} Doe \textit{v. City of Chula Vista}, 196 F.R.D. 562, 570 (S.D. Cal. 1999) (ordering magistrate to conduct initial in camera review of psychotherapy records to determine “if, and to what extent, the evidence is relevant to [the plaintiff’s] claim for emotional distress” and upon the release of the records to “place an appropriate protective order on the materials to preserve the confidentiality of the medical information”); \textit{see also In re Lifschutz}, 467 P.2d 557, 572 (Cal. 1970) (suggesting that a protective order may be appropriate where psychotherapy records are disclosed).
submitting to such an examination in lieu of producing records of treatment. Finally, courts can tie the production of documents to the prospect of a trial.

The approach advocated here is not only consistent with principles of privileges and waiver, but it also provides several important advantages to litigants and the courts. While court rules and legal principles must of course provide flexibility to fit the wide range of scenarios that may arise in a case, all participants in litigation—and those contemplating or facing possible litigation—benefit from some degree of certainty on the questions that are likely to arise. At this time in the federal courts, there is little, if any, certainty as to how a judge or magistrate may approach a dispute over the application and waiver of the psychotherapist-patient privilege in civil litigation. As a result, waiver disputes must be litigated repeatedly, with no resolution of the broader questions raised by these controversies.

391. See Fed. R. Civ. P. 26(c)(1)(C) (authorizing a court to “prescribe[e] a discovery method other than the one selected by the party seeking discovery”); Vasconcellos, 962 F. Supp. at 709 (granting motion to quash subpoena of psychotherapy records where plaintiff volunteered to undergo a psychiatric examination).

392. In Dominguez-Silva v. Harvey, No. Civ:3:04-CV-135-JTC, 2006 WL 826091, at *2 (N.D. Ga. Mar. 23, 2006), for example, the court concluded that there had been a waiver of the psychotherapist-patient privilege due to the plaintiff's inclusion of a claim for intentional infliction of emotional distress, but the court ruled that the plaintiff would not be compelled to disclose his mental health records unless and until his claims for intentional infliction of emotional distress survived the pending motion for summary judgment since the records were not needed for summary judgment purposes. See also Stevenson v. Stanley Bostitch, Inc., 201 F.R.D. 551, 558 (N.D. Ga. 2001).

393. Since there are conflicts within the same district on this issue, litigants can enjoy some certainty only if there is a prior decision by the same judge or magistrate. However, given the number of recent cases in the courts of appeals, which appear to set forth rules but which provide little analysis, see supra notes 183–186 and accompanying text, there is an increased chance that some lower courts will feel compelled to reverse themselves.

394. While this Article focuses on discovery of mental health records, because that is usually the juncture at which these issues arise, a court should also consider the impact on the plaintiff and her psychotherapy to the extent that such information is used as trial evidence. It is one thing to order disclosure subject to a protective order of such communications. It is quite another to permit the admissibility of such communications at trial, which may be attended by the public and the media. Comprehensive treatment of the issue of admissibility of mental health records at trial is beyond the scope of this Article, but I would note that courts should be conscious of the potential misuse of such evidence by jurors and employ Federal Rule of Evidence 403 or other rules of evidence to guard against such misuse. See In re Lifshutz, 467 P.2d 557, 572–73 (Cal 1970) (suggesting that Rule 403 discretion should be exercised with respect to the compelled testimony of a treating psychotherapist “to provide substantial protection for the patient’s legitimate interests”).
VI. CONCLUSION

The issue of waiver of the psychotherapist-patient privilege implicates a collision of competing aims. The Supreme Court in *Jaffee* recognized the importance of mental health treatment, both to the individual patient and to society. The federal statutes underlying the plaintiffs’ claims in the cases in which waiver issues arise were broadly designed to discourage and to remedy unlawful discrimination and deprivations of federally protected rights. At the same time, our court system’s central aim is to facilitate a search for the truth, as reflected in a litigant’s broad right to obtain discovery from other parties. As a result of this truth-seeking objective, evidentiary privileges—legal rights that necessarily inhibit access to the truth—are regarded with disfavor. However, as one commentator noted more than twenty years ago with respect to courts’ construction of the attorney-client privilege: “loss of privilege protection should be justified by something more than antipathy toward the privilege.” This observation equally captures the central problem with the conceptualization of waiver of the psychotherapist-patient privilege in federal courts today.

While truth-seeking is unquestionably a central and important object of federal litigation, it cannot be invoked in ways that undermine the predominant goal of facilitating justice. Courts must ensure that those litigants who have sought mental health treatment are not dissuaded from seeking vindication of their rights through the federal courts merely because they fear that their mental health history will become the focus of discovery and trial. As one federal magistrate judge noted: “Treating claims for incidental emotional damages as waivers of the [psychotherapist-patient] privilege unfairly disadvantages those litigants who seek mental health counseling services as compared to otherwise identical litigants who refrain from seeking professional counseling.” Courts must take an approach that follows the precedent set down by the Supreme Court in *Jaffee* and the legal traditions regarding both the enforcement and waiver of rights, while preserving the federal courts as a place where all litigants, re-

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396. Marcus, supra note 370, at 1607.
397. *Johnson* v. *Trujillo*, 977 P.2d 152, 158 (Colo. 1999) (“Amongst those in our populace who, through no fault of their own, find themselves on the plaintiff side of a tort case, there will always be a certain proportion who have sought counseling for unrelated personal problems or who are suffering from unrelated emotional difficulties.”).
Regardless of their mental health history, can fairly seek compensation for injuries.

Indeed, such reform will likely be ineffective unless it originates with the Supreme Court itself, which has thus far declined to grant certiorari on the question of the waiver of the psychotherapist-patient privilege.399 The Court must set a course for lower courts on this important question. Absent such guidance, the psychotherapist-patient privilege recognized in Jaffee will continue to be "uncertain" and, therefore, "little better than no privilege at all."400 Federal courthouses will continue to be effectively shut to many potential civil rights plaintiffs with a history of mental illness.

400. Jaffee, 518 U.S. at 18 (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).