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## Emotional Distress and the Psychotherapist-Patient Privilege: Establishing a Certain and Principled Implied-Waiver Rule for Civil Rights Litigants

Armen H. Merjian

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# Emotional Distress and the Psychotherapist-Patient Privilege: Establishing a Certain and Principled Implied-Waiver Rule for Civil Rights Litigants

Armen H. Merjian\*

*Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in Upjohn, 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 results in widely varying applications by the courts, is little better than no privilege at all."<sup>1</sup>*

*[W]e reject respondents' contentions that anybody who requests damages for pain and suffering has waived the psychiatric privilege because the psychiatric records might conceivably disprove the experiencing of the pain and suffering, that any claim of even . . . "garden variety" injury waives the psychotherapist-patient privilege, and that a plaintiff's mental health is placed in issue whenever the plaintiff's claim for unspecified damages may include[] some sort of mental injury.<sup>2</sup>*

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\* Member, New York and Connecticut Bars. B.A. Yale University 1986; J.D. Columbia University 1990. The author is a civil rights and poverty lawyer at Housing Works, Inc., the largest provider of HIV/AIDS services in the State of New York.

1. Jaffee v. Redmond, 518 U.S. 1, 17-18 (1996) (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).

2. Sims v. Blot, 534 F.3d 117, 141 (2d Cir. 2008) (citations and internal quotations omitted).

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### INTRODUCTION

Emotional distress damages are an essential element of most civil rights lawsuits. Indeed, such damages are often the sole means of compensating plaintiffs for the discrimination—the pain, humiliation, and psychological turmoil—that they have suffered.<sup>3</sup> Civil rights claims thus implicate the most sensitive of human thoughts and emotions, ranging from sadness, shame, and humiliation to hopelessness, trauma, and suicidal ideation.<sup>4</sup> Presenting evidence of this distress can be painful and scary, and it can revictimize the civil rights plaintiff, since it “entails reliving or even recreating a sense of powerlessness. Not only must the [plaintiff]

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3. See, e.g., Helen A. Anderson, *The Psychotherapist Privilege: Privacy and “Garden Variety” Emotional Distress*, 21 GEO. MASON L. REV. 117, 126 (2013) (“Compensatory damages for pain, suffering, and mental distress are often a major—if not the only—part of the damages sought [in civil rights cases.]”); Deirdre M. Smith, *An Uncertain Privilege: Implied Waiver and the Evisceration of the Psychotherapist-Patient Privilege in the Federal Courts*, 58 DEPAUL L. REV. 79, 84 (2008) (emotional distress damages “comprise a substantial proportion of civil matters in which plaintiffs seek recovery for personal injuries”); Victor M. Goode & Conrad A. Johnson, *Emotional Harm in Housing Discrimination Cases: A New Look at a Lingering Problem*, 30 FORDHAM. URB. L.J. 1143, 1157 (2003) (“[M]any victims must rely on their emotional harm claim as their primary basis for economic compensation.”).

4. See Armen H. Merjian, *Nothing “Garden Variety” About It: Manifest Error and Gross Devaluation in the Assessment of Emotional Distress Damages*, 70 SYRACUSE. L. REV. 689, 692 (2020) (“Emotional distress can include humiliation, depression, embarrassment, frustration, anger, shock, and a host of other emotional or psychic harms, including trauma, lack of self-esteem, social isolation, loss of confidence, and diminished relationships. Emotional distress can also give rise to physical manifestations, including sleeplessness, nightmares, loss of appetite and weight loss, headaches, forgetfulness, tearfulness, stomach and chest pains, hives and skin rashes, hair loss, and even suicidal ideation and hopelessness.”).

describe her humiliation and despair, but the adequacy of her distress must be ruled upon by the judge or jury.”<sup>5</sup>

Where the plaintiff has sought mental health treatment, the potential harm is even greater, for if mental health records can be discovered, the plaintiff’s most intimate and potentially embarrassing thoughts may be laid bare, quite possibly in a public forum.<sup>6</sup> Recognizing the great sensitivity of these issues, the Supreme Court and all fifty states have established a psychotherapist-patient privilege.<sup>7</sup> The question inevitably arises, however, whether and under what circumstances a plaintiff can be deemed to have waived this privilege. As commentators have noted, it is a question that “arises most frequently in the context of civil rights litigation.”<sup>8</sup>

In *Jaffee v. Redmond*,<sup>9</sup> the Supreme Court recognized a psychotherapist-patient privilege as a matter of federal common law. In a footnote, the Court suggested that the privilege might be waived, but aside from a single, limited example, the Court provided no guidance on this subject. Since *Jaffee*, both state and federal courts have addressed the “far-reaching question,”<sup>10</sup> particularly for civil rights plaintiffs, whether merely stating a claim for emotional distress damages impliedly waives the psychotherapist-patient privilege. Several jurisdictions throughout the United States, however, have failed to establish a certain implied-waiver rule, and thus a certain privilege. Some have adopted “widely varying applications . . . [which] is little

5. Susan Etta Keller, *Does the Roof Have to Cave In?: The Landlord/Tenant Power Relationship and the Intentional Infliction of Emotional Distress*, 9 CARDOZO L. REV. 1663, 1678 (1988).

6. See, e.g., *Jaffee*, 518 U.S. at 10 (“Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace.”); 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, 640 (2001) (“[B]ringing [sexual harassment actions] exposes women to intense examinations of their past sexual history, their personal life, and their mental stability. To tear further into the lives of sexual harassment victims, defendants will often request disclosure of plaintiffs’ mental health records.” (footnote omitted)).

7. *Jaffee*, 518 U.S. at 12.

8. Anderson, *supra* note 3, at 125; accord Smith, *supra* note 3, at 82 (federal civil rights cases provide “the context in which the issues of the psychotherapist-patient privilege and waiver issues generally arise”).

9. *Jaffee*, 518 U.S. at 15 n.14.

10. *Sims v. Blot*, 534 F.3d 117, 129 (2d Cir. 2008); see also Frank, *supra* note 6, at 640 (“Whether damages for emotional distress serve as a waiver is especially important to sexual harassment plaintiffs seeking redress under the Civil Rights Act of 1991.”).

better than no privilege at all,”<sup>11</sup> while others have failed to craft any rule whatsoever.<sup>12</sup>

This Article addresses the issue of implied waiver under the most recent federal and state supreme court decisions. Its aim is to provide the comprehensive and thoughtful analysis that many courts and jurisdictions nationwide have failed to conduct on this seminal issue, and that practitioners may not have the time to undertake. Section II of this Article examines a recent and sadly typical case involving the issue of implied waiver in a civil rights case, highlighting the dangers of an uncertain rule and the urgent need for redress. Section III offers a critical analysis of the jurisprudence regarding implied waiver, with the first comprehensive look at federal circuit and state supreme court decisions on this issue. An assessment of the most recent decisions, together with the old, reveals that courts and commentators alike have overstated support for the “broad” approach to waiver. In fact, the majority of courts nationwide—and a sizeable majority of state supreme courts—have rejected that approach in favor of a narrower and more protective waiver rule. Section IV examines the issue of implied waiver in the state of New York as an exemplar, for unlike New York’s federal courts, New York’s state courts have yet to examine this issue. As the analysis concludes, New York must adopt an approach to privilege at least consonant with the federal standard, but preferably more narrow, for the narrow approach is the only approach that is both certain *and* rooted in established principles of waiver and privilege. A brief Conclusion follows.

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11. *Jaffee*, 518 U.S. at 17–18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)); *see, e.g.*, *Parisi v. Aneglicola*, No. NNHCv176069235S, 2017 Conn. Super. LEXIS 10135, at \*10, \*13 (Dec. 19, 2017) (noting varying approaches in Connecticut: “Several [courts] have thwarted efforts to force disclosure of protected records . . . . In contrast, many judges have compelled disclosure of records of plaintiff’s mental condition, where there was a ‘general’ or ‘garden variety’ claim of emotional distress.”); *Auer v. City of Minot*, 178 F. Supp. 3d 835, 844 (D.N.D. 2016) (“Within the Eighth Circuit, the federal district courts have taken differing positions with respect to whether one of the intermediate approaches can be taken in an appropriate case to foreclose discovery and later use of a plaintiff’s mental health records, including there being a divergence of opinion among the judges of the District of Minnesota.”); *Prescott v. Cnty. of Stanislaus*, No. 1:10-cv-00592 JLT, 2011 U.S. Dist. LEXIS 134137, at \*16–17 n.5 (E.D. Cal. Nov. 21, 2011) (“[D]istrict courts [in California] follow two approaches to determining whether the privilege has been waived. Some courts find a waiver of the privilege whenever emotional distress damages are sought. Others take a more narrow approach and find waiver only where emotional distress claims are more than mere ‘garden variety’ or incidental emotional distress damages claims.” (citations omitted)).

12. *See, e.g.*, *N.D. v. Golden*, No. 2:13cv540-MEF-TFM, 2014 U.S. Dist. LEXIS 60481, at \*13 (M.D. Ala. May 1, 2014) (“The Eleventh Circuit has been silent on the issue of implied waiver of psychotherapist/patient privilege . . . .”); *Stallworth v. Brollini*, 288 F.R.D. 439, 443 (N.D. Cal. 2012) (“[T]he Ninth Circuit has yet to consider the standard . . . .”); *Bullock v. Smith*, No. 3:05CV37-M-A, 2006 U.S. Dist. LEXIS 104103, at \*5 (N.D. Miss. March 28, 2006) (“[T]he Fifth Circuit has remained silent as to both the privilege itself and waiver of the privilege . . . .”); *see infra* Part IV.

## I. INJUSTICE IN ACTION

Linda Gomez,<sup>13</sup> a Latina transgender woman, completed her statutory name change from a traditionally masculine first name in 2017.<sup>14</sup> While Ms. Gomez was walking home through a New York City park one night in 2018, three police officers stopped her and proceeded to question her in English, even after she conveyed to the officers that she did not speak or understand English well. To be thorough, Ms. Gomez provided the officers with both her previous legal name and her current legal name. The officers arrested Ms. Gomez for trespassing in the park and took her to the police precinct. There, she explained through an interpreter why, as a transgender woman, she had provided both first names.<sup>15</sup>

The officers then placed Ms. Gomez in a cell and handcuffed her to a bar or pipe using pink handcuffs. Every other individual who was handcuffed in the precinct had standard metal handcuffs.<sup>16</sup> Throughout Ms. Gomez's overnight detention, multiple officers refused to address her by her correct name and pronouns, utilizing "he" and "him" rather than "Linda," "she," or "her," despite knowing that she was a transgender woman whose name was Linda. Multiple officers also "looked, gestured and laughed at Ms. [Gomez] in a mocking way" as she remained imprisoned in distinctive, pink handcuffs.<sup>17</sup> To add insult to injury, Ms. Gomez was charged with "false personation," i.e., knowingly misrepresenting her actual name to a police officer with the intent to prevent the officer from ascertaining the correct information.<sup>18</sup>

The charges were later dismissed,<sup>19</sup> and in January 2019, Ms. Gomez sued the City and the officers in question, inter alia, for violation of city and state human and civil rights laws. She claimed damages for "mental anguish, ongoing humiliation, and embarrassment due to those events,"<sup>20</sup> citing numerous reports demonstrating that "transgender women in particular are a huge target for NYPD discrimination"<sup>21</sup> and that low-income transgender people of color "experience some of the most egregious cases of police brutality reported."<sup>22</sup>

At a preliminary court conference, defense counsel requested Ms. Gomez's mental health records and demanded that she submit to an examination by

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13. The plaintiff's name has been changed to protect her privacy.

14. Complaint at ¶ 25, *Gomez v. City of New York*, No. 020841/2019E (N.Y. Civ. Ct. Jan. 22, 2019) (A copy of the Complaint is on file with the author.).

15. *Id.* ¶¶ 30–33.

16. *Id.* ¶ 34.

17. *Id.* ¶¶ 37–38.

18. *Id.* ¶ 42.

19. *Id.* ¶¶ 48–49.

20. *Id.* ¶ 52.

21. *Id.* ¶ 13 (citing CTR. FOR CONST. RTS., STOP AND FRISK: THE HUMAN IMPACT (2012), <http://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf> [<https://perma.cc/KGZ9-MWH7>]).

22. *Id.* ¶ 11 (citing AMNESTY INT'L USA, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 3 (2005), <https://www.amnesty.org/en/documents/amr51/122/2005/en/> [<https://perma.cc/5P6N-HV8S>]).

defendants' psychiatrist. Ms. Gomez's counsel refused, arguing that she had only alleged "garden variety" emotional distress,<sup>23</sup> with no intention to rely upon any mental health diagnoses or communications. Accordingly, she had not put her mental health records sufficiently at issue to waive the psychotherapist-patient privilege or to justify an examination. The judge disagreed, informing counsel that Ms. Gomez "can't just demand money without proving she was injured"; that if she alleged emotional distress, then she had absolutely put her mental health in play; and that defendants' requests would be granted. Before the court could issue a formal decision, however, the parties entered into negotiations and eventually settled the matter.<sup>24</sup>

In stark contrast to the majority of both state and federal jurisdictions in the United States,<sup>25</sup> including New York's federal courts,<sup>26</sup> and contrary to fundamental principles of waiver and privilege,<sup>27</sup> the court in *Gomez* adopted the broadest (i.e., least protective) possible approach to implied waiver of the psychotherapist-patient privilege.<sup>28</sup> The court failed to recognize that Ms. Gomez was perfectly capable of "proving she was injured" through her own testimony, and by inference from the awful treatment to which she was subjected, for "[d]amages for humiliation and emotional distress in civil rights cases . . . may be established by testimony or *inferred from the circumstances*."<sup>29</sup> In fact, the New York Court of Appeals (New York's highest court) has expressly ruled that under the human rights laws, a plaintiff may prove emotional distress damages through her testimony alone.<sup>30</sup>

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23. See *infra* notes 52–58 and accompanying text for a discussion of "garden variety" emotional distress.

24. E-mail from Gabriel Arkles, Senior Staff Att'y, ACLU LGBT & HIV Project, to Author (Aug. 7, 2020) (on file with the author).

25. See *infra* Section III.A.

26. See *infra* Section IV.A.

27. See *infra* Parts III–IV.

28. See *infra* note 52 and accompanying text.

29. State *ex rel.* Dean v. Cunningham, 182 S.W.3d 561, 567 (Mo. 2006) (citation and internal quotations omitted); *accord* Seaton v. Sky Realty Co., 491 F.2d 634, 636 (7th Cir. 1974) ("[H]umiliation can be inferred from the circumstances as well as established by the testimony."); N.Y.C. Transit Auth. v. State Div. of Hum. Rts., 577 N.E.2d 40, 45 (N.Y. 1991) (emotional distress may be "corroborated by reference to the circumstances of the alleged misconduct"); Nieves v. Rojas, OATH Index No. 2153/17 Dec. & Ord., 12 (N.Y.C. Human Rights Comm'n May 16, 2019) ("While Complainant's testimony about his experiences of emotional distress is somewhat limited, the Commission is also informed by evidence of the objective circumstances of his experience.").

30. N.Y.C. Transit Auth., 577 N.E.2d at 45 ("[P]sychiatric or other medical treatment is not a precondition to recovery. Mental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct."); Cullen v. Nassau Cnty. Civ. Serv. Comm'n, 425 N.E.2d 858, 861 (N.Y. 1981) (emotional distress "may be established through the testimony of the complainant alone").

The court also failed to consider that while Ms. Gomez's emotional distress was at issue in the case, her privileged communications were not, for she had no intention of relying upon or introducing those communications in support of her claim. This is an all-too-common mistake:

Those cases treating claims for incidental emotional damages as constituting waivers focus on relevancy and on the fact that emotional health is "in issue." This disregards the fact that privileges operate notwithstanding relevancy and that 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.<sup>31</sup>

There are, in addition, strong policy arguments in favor of a narrower approach to implied waiver in civil rights cases. "[W]aiver implicates the important federal policy of vindicating civil rights,"<sup>32</sup> along with similar state and local civil rights policies, as clearly expressed in the law.<sup>33</sup> "To condition recovery for emotional distress incidental to the violation of federal constitutional and statutory rights upon the surrender of the protection of the psychotherapist privilege is . . . antithetical to the purpose of the laws that provide redress for such violations."<sup>34</sup> Indeed, as courts and commentators alike have concluded:

[F]or policy reasons, a waiver of the psychotherapist-patient privilege should not be narrowly construed [i.e., the 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. . . . That purpose would be defeated were the broad or uncertain test of waiver applied and suits vindicating civil rights and seeking recovery for general damages thereby deterred.<sup>35</sup>

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31. *Morrisette v. Kennebec Cnty.*, No. 01-01-B-S, 2001 U.S. Dist. LEXIS 13309, at \*4 (D. Me. Aug. 21, 2001) (second emphasis added); *accord* *Black v. Pan Am Labs, LLC*, No. 1:07-CV-924, 2008 U.S. Dist. LEXIS 126497, at \*8 (W.D. Tex. July 8, 2008). See *infra* Part III for a full discussion of this issue.

32. *Anderson*, *supra* note 3, at 120.

33. See discussion *infra* notes 222–226 and accompanying text.

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

35. *Fitzgerald v. Cassil*, 216 F.R.D. 632, 639 (N.D. Cal. 2003) (citations omitted); *accord* *Ruhlmann*, 194 F.R.D. at 451; *Anderson*, *supra* note 3, at 145 ("The need to further the public good of vindicating civil rights supports a narrow view of waiver."); *Smith*, *supra* note 3, at 81 ("[C]ourts' expansive view 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."); Michael D'Ambrosio, Note, *The Psychotherapist-Patient Privilege in Prison Litigation: How Can You Claim "Garden Variety" Emotional Distress When the Flowers Are Made Out of Steel?*, 43 FORDHAM URB. L.J. 915, 953 (2016) ("[B]road views on waiver effectively chill civil rights litigation, especially for vulnerable populations who may have received mental health treatment in the past.").

Civil rights statutes seek to convert victims of discrimination into “private attorneys general,”<sup>36</sup> *inter alia*, by providing attorneys’ fees for successful litigants.<sup>37</sup> Broad waiver rules undermine these statutes by deterring victims from taking action, lest their most private mental health communications be revealed, and quite possibly used against them.<sup>38</sup> This is the case even where, as in *Gomez*, the victims abjure any intention to use these communications in support of their claims.

Finally, not only did the court signal its intent to forfeit Ms. Gomez’s psychotherapist-patient privilege, but the court approved of defendants’ demand for a psychological evaluation. A psychological exam is highly intrusive, even traumatic.<sup>39</sup>

36. *See, e.g.*, *Dowdell v. Apopka*, 698 F.2d 1181, 1189 (11th Cir. 1983) (“Because civil rights litigants are often poor, and judicial remedies are often non-monetary, the Act shifts the costs of litigation from civil rights victim to civil rights violator. . . . [I]t provides an incentive to individuals to act as ‘private attorneys general,’ playing a significant role in the enforcement of important congressional policies.” (citations omitted)); *Bell v. Helmsley*, No. 111085/01, 2003 N.Y. Misc. LEXIS 537, at \*16 (Sup. Ct. Mar. 4, 2003) (“[I]n civil rights cases there is an overriding transcending principle that plaintiffs in civil rights actions seek to vindicate the important civil and constitutional rights that cannot be valued in monetary terms. In short, each litigant is viewed as a private attorney general to encourage private enforcement for the public benefit . . .”).

37. *See, e.g.*, *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (“The intention of Congress [in providing for attorneys’ fees] was to encourage successful civil rights litigation . . .”); *Northeast Women’s Ctr. v. McMonagle*, 889 F.2d 466, 474 (3d Cir. 1989) (“The legislature considered that the potential recovery of attorneys’ fee in civil rights cases would encourage litigants to act as private attorneys general, vindicating the important policies behind our civil rights laws.”); *Kerr v. Quinn*, 692 F.2d 875, 877 (2d Cir. 1982) (“The function of an award of attorney’s fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.”).

38. *See T.C. ex rel. S.C. v. Metro. Gov’t of Nashville & Davidson Cnty.*, No. 3:17-CV-01098; No. 3:17-CV-01159; No. 3:17-CV-01209; No. 3:17-CV-01277; No. 3:17-CV-01427, 2018 U.S. Dist. LEXIS 113517, at \*32–33 (M.D. Tenn. July 9, 2018) (“[I]n the context of claims brought under anti-discrimination statutes, . . . the prospect of being required to undergo a physical or mental evaluation to vindicate protected rights might cause plaintiffs to abandon their claims. For this reason, courts are reluctant to find that a plaintiff places her mental condition ‘in controversy’ simply by making a claim of emotional distress.”); *Taylor v. ABT Elecs., Inc.*, No. 05 C 576, 2007 U.S. Dist. LEXIS 35819, at \*7–8 (N.D. Ill. May 14, 2007) (“[A]llowing such discovery would discourage people from coming forward to bring these kinds of [discrimination] claims if as a result their whole life becomes an open book.” (internal quotations omitted)); *Anderson*, *supra* note 3, at 145 (“An additional public good is also implicated, however, in the context of federal civil rights lawsuits: the vindication of civil rights through citizens acting as ‘private attorneys general.’ . . . The law of implied waiver of the psychotherapist-patient privilege directly affects the enforcement mechanisms Congress has enacted.” (citation omitted)); *D’Ambrosio*, *supra* note 35, at 953 (“Under the broad view, courts force victims of mental or emotional injury to make a Hobson’s choice: pursue litigation and waive the privilege or do not pursue litigation at all. Such an approach undermines federal civil rights policy, which seeks to vindicate civil rights by making plaintiffs ‘private attorneys general.’”); *Frank*, *supra* note 6, at 663 (“If courts determine that a victim waives the psychotherapist-patient privilege is waived when she brings a civil rights action, then fewer victims will act as ‘private attorneys general’ for fear of invasion of privacy.”).

39. *See, e.g.*, *Jones v. Perea*, No. 05-644, 2006 U.S. Dist. LEXIS 111263, at \*11 (D.N.M. Feb. 16, 2006) (“There can be no dispute that a psychological examination is intrusive.”); *Privee v. Burns*, 749 A.2d 689, 693 (Conn. Super. Ct. 1999) (“[M]any people are likely to find unusually intrusive medical examinations, such as psychiatric and gynecological examinations, uncomfortable or

Indeed, it is among the most invasive kinds of examinations possible. Defendants seek, through a battery of tests and in-depth interviews, to peer into the recesses of [plaintiff's] subconscious, to rummage through the closet of his psyche, and to search under the bed of his most private thoughts and feelings for evidence to challenge his claims.<sup>40</sup>

This is particularly of concern to a transgender plaintiff such as Ms. Gomez, given the discrimination and hardship that the transgender community has experienced with mental health care providers.<sup>41</sup>

For this reason, “courts must obviously treat the issue with great sensitivity,”<sup>42</sup> and they “are reluctant to find that a plaintiff places her mental condition ‘in controversy’ simply by making a claim of emotional distress.”<sup>43</sup> In fact, the majority of courts to address this issue have concluded that a plaintiff asserting a “garden variety” emotional distress claim does not place her mental health sufficiently in controversy to justify a psychological evaluation.<sup>44</sup> This includes New York’s federal

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even traumatic.”); *Hirschheimer v. Associated Mins. & Mins. Corp.*, 94 Civ. 6155, 1995 U.S. Dist. LEXIS 18378, at \*7 (S.D.N.Y. Dec. 12, 1995) (“Psychological examinations are by their nature intrusive and implicate sensitive matters.”); *Smith v. J.I. Case Corp.*, 163 F.R.D. 229, 232 (E.D. Pa. 1995) (observing that “[t]he practice seems to be more and more in vogue of late for defendants to seek to partake of the *in terrorem* tactic of visiting upon a plaintiff a particularly intrusive incursion: examination by a psychiatrist, and other psychological delvings,” and holding that in “garden variety” cases, “psychiatric examination should be the exception, not the rule”); 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, 1272 (1995) (“Compelled mental examinations 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.”).

40. *Jones*, 2006 U.S. Dist. LEXIS 111263, at \*11.

41. See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020) (“[B]eing transgender was pathologized for many years. As recently as the DSM-3 and DSM-4, one could receive a diagnosis of ‘transsexualism’ or ‘gender identity disorder,’ indicat[ing] that the clinical problem was the discordant gender identity.’ Whereas ‘homosexuality’ was removed from the DSM in 1973, ‘gender identity disorder’ was not removed until the DSM-5 was published in 2013.” (citation omitted)); Am. Psych. Ass’n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCH. 832, 837 (2015), <https://www.apa.org/practice/guidelines/transgender.pdf> [<https://perma.cc/W35T-FRZY>] (“In community surveys, TGNC [transgender and gender non-conforming] people have reported that many mental health care providers lack basic knowledge and skills relevant to care of TGNC people and receive little training to prepare them to work with TGNC people. The National Transgender Discrimination Survey reported that 50% of TGNC respondents shared that they had to educate their healthcare providers about TGNC care, 28% postponed seeking medical care due to antitrans bias, and 19% were refused care due to discrimination.” (citations omitted)).

42. *Privee*, 749 A.2d at 693.

43. *T.C. ex rel. S.C.*, 2018 U.S. Dist. LEXIS 113517, at \*33; accord *State v. Biehn*, No. CR040202851T, 2006 Conn. Super. LEXIS 690, at \*6 (March 6, 2006) (“[G]iven the intrusive nature of a compelled psychiatric examination and the implication of various constitutional and statutory rights and privileges, the court should order such an examination only in circumstances deemed necessary to ensure fundamental fairness and the integrity of the justice system.”).

44. *T.C. ex rel. S.C.*, 2018 U.S. Dist. LEXIS 113517, at \*33 (“The majority of courts have held that plaintiffs do not place their mental condition in controversy merely by claiming damages for mental

courts,<sup>45</sup> where federal law governs the issue of privilege, even when examining state and local civil rights claims.<sup>46</sup> Hence, Ms. Gomez would not have been required to hand over her mental health records,<sup>47</sup> or to submit to an intrusive psychological evaluation, if she had brought the same civil rights claims in federal rather than state court. She would also have avoided the difficulty and expense of securing her own expert (to rebut defendants' psychiatrist), along with her own mental health provider (to testify as to her mental health records), significant burdens for litigants of limited means like Ms. Gomez.<sup>48</sup> This unjust double standard unnecessarily complicates civil rights cases and requires immediate correction.

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anguish or 'garden variety' emotional distress." (citation and internal quotations omitted)); *Lewis v. Montana* Eighth Jud. Dist. Ct., 286 P.3d 577, 579–80 (Mont. 2012) ("We have never ruled that a plaintiff's claim for general emotional distress damages is, in and of itself, a sufficient basis for ordering a Rule 35 mental examination. In applying Fed. R. Civ. P. 35, [m]ost cases in which courts have ordered mental examinations pursuant to Rule 35(a) involve something more than just a claim of emotional distress. . . . We further conclude the District Court's mistake of law in compelling Lewis to submit to an intrusive, unjustified psychological examination would cause a gross injustice." (citation and internal quotations omitted)); *LeGendre v. Cnty. of Monroe*, 600 N.W.2d 78, 87 (Mich. Ct. App. 1999) ("Most federal courts that have considered the 'in controversy' requirement . . . have held that a plaintiff in an employment discrimination case does not place the plaintiff's mental condition 'in controversy' merely by alleging emotional distress or 'garden-variety' damages arising from the discrimination claim.").

45. See, e.g., *Hartman v. Snelders*, No. 04 CV 1784, 2010 U.S. Dist. LEXIS 153876, at \*60 (E.D.N.Y. Jan. 28, 2010) ("The general rule is that a claim for mere 'garden-variety' emotional damages does not place a plaintiff's emotional state at issue." (citations omitted)); *Jarrar v. Harris*, No. CV 07-3299, 2008 U.S. Dist. LEXIS 57307, at \*2 (E.D.N.Y. July 25, 2008) ("Such intrusive discovery – a forced psychiatric examination to explore allegations that a plaintiff has experienced universally familiar emotions – is generally not available in comparable [i.e., "garden variety"] cases where a plaintiff claims to have been subjected to illegal discrimination and other civil rights violations by an employer.").

46. See, e.g., *Von Bulow v. Von Bulow*, 811 F.2d 136, 141 (2d Cir. 1987) ("The instant case is a federal question case by virtue of the RICO claim; and pendent state law claims arise in the case. Accordingly, we hold that the federal law of privilege controls the question whether the privileges asserted by Reynolds should be recognized."); see also S. REP. NO. 93-1277 (1974), as reprinted in 1974 U.S.C.A.N. 7051, 7059 n.16 (accompanying Federal Rule of Evidence 501 and stating: "it is also intended that the Federal Law of privileges should be applied with respect to pendent State law claims when they arise in a Federal question case.").

47. See *infra* Section IV.A.

48. A large percentage of civil rights litigants are indigent. See, e.g., *Dowdell v. Apopka*, 698 F.2d 1181, 1189 (11th Cir. 1983) ("[C]ivil rights litigants are often poor . . ."); Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1841 (2008) ("Civil rights plaintiffs are overwhelmingly poor."). Since fee-shifting statutes do not allow for pre-payment of expert witnesses, use of experts places such litigants at a disadvantage, and they "may be given access to the courts . . . only to have their claims dismissed because they cannot afford to bring along their evidence." Kenneth R. Levine, Note, *In Forma Pauperis Litigants: Witness Fees and Expenses in Civil Actions*, 53 FORDHAM L. REV. 1461, 1464 (1985); accord *Reilly v. Berry*, 166 N.E. 165, 167 (N.Y. 1929) ("[A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own [expert] witness the thrusts of those against him."); David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 HASTINGS L.J. 282, 288 (1990) ("Without some form of assistance in these cases, an indigent is unable to assert legitimate claims or defenses solely because of her inability to hire an expert witness.").

## II. EMOTIONAL DISTRESS AND IMPLIED WAIVER OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

A privilege may be waived expressly or impliedly.<sup>49</sup> A plaintiff impliedly waives her privilege when she “testifies concerning portions of the [privileged] communication,” when she “places the [privileged] relationship directly at issue,” and when she “asserts reliance on [the privileged communications] as an element of a claim or defense.”<sup>50</sup> The question arises, then, whether a civil rights plaintiff impliedly waives the psychotherapist-patient privilege by interposing a claim for emotional distress damages incidental to a claim of discrimination. Courts generally take one of three approaches to answering this question: broad, “garden variety,” or narrow:

(1) the broad approach—plaintiff waives the privilege merely by alleging emotional distress in the complaint; (2) the middle approach—plaintiff waives the privilege by alleging either a separate tort of distress or unusually severe emotional distress (i.e., more than “garden variety” emotional distress); or (3) the narrow approach—plaintiff waives the privilege by affirmatively relying on the psychotherapist-patient communication.<sup>51</sup>

While the first and third categories are clearly delineated, the “garden variety” approach varies significantly from one court or jurisdiction to another.<sup>52</sup> Compounding this problem, some courts have defined the term ambiguously, e.g., as “the normal distress that would flow from an unpleasant experience.”<sup>53</sup> In addition, the very term “garden variety,” and the labelling of emotional distress as either “normal” or, by implication, “abnormal,” is inaccurate, imprecise, and

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49. See, e.g., *In re Sweet*, 954 F.2d 610, 613 (10th Cir. 1992) (“Waiver may be express, or, as in this case, implied from conduct.”); Claudine V. Pease-Wingenter, *Skating Too Close to the Edge: A Cautionary Tale for Tax Practitioners About the Hazards of Waiver*, 81 U. CIN. L. REV. 953, 965 (2013) (“In addition to actual waiver triggered by disclosures of privileged communications, certain uses of privileged materials can trigger an ‘implied waiver.’”).

50. *Pritchard v. Cnty. of Erie*, 546 F.3d 222, 228 (2d Cir. 2008) (citation omitted).

51. *Sponer v. Equifax Info. Servs., LLC*, No. 3:17-CV-02035-HZ, 2019 U.S. Dist. LEXIS 71739, at \*3–4 (D. Or. Apr. 26, 2019) (citation omitted); see, e.g., *Barnello v. Bayview Loan Servicing, LLC*, No. 6:14-cv-1383-Orl-41TBS, 2016 U.S. Dist. LEXIS 199489, at \*8 (M.D. Fla. Mar. 11, 2016) (explaining the “three different approaches to the question of waiver”).

52. See, e.g., *Flowers v. Owens*, 274 F.R.D. 218, 225 (N.D. Ill. 2011) (“The courts’ formulations vary, but the thought they seek to convey is the same.”); D’Ambrosio, *supra* note 35, at 957 (“The ‘garden variety’ approach has no genus or species. It is often inconsistent.”).

53. *Lane v. Pfizer, Inc.*, No. 04-CV-683-CVE-PJC, 2007 U.S. Dist. LEXIS 5619, at \*2 (N.D. Okla. Jan. 25, 2007).

demeaning.<sup>54</sup> (Accordingly, going forward, this Article will utilize the term “Tier One” in the place of “garden variety” wherever feasible.<sup>55</sup>)

As a result, courts adopting a Tier One approach, including those that allude to “normal” distress, almost invariably add further elements to the definition. Some courts, for example, examine whether the plaintiff has alleged “complex” emotional distress, “such as that resulting in a specific psychiatric disorder.”<sup>56</sup> Others find no waiver where the plaintiff “does not intend to introduce his medical records, and he will not rely on any medical lay or expert witness testimony.”<sup>57</sup> Regardless of the definition adopted, however, the majority of both federal and state courts have eschewed the “broad” approach in favor of either the narrow or the Tier One approach, as the following discussion reveals.

#### *A. Implied Waiver of the Privilege in the Federal Courts*

Pursuant to Rule 501 of the Federal Rules of Evidence, federal courts may craft new privileges by interpreting “common law principles . . . in the light of reason and experience.”<sup>58</sup> Consonant with this rule, in *Jaffee v. Redmond*, the Supreme Court established an absolute psychotherapist-patient privilege<sup>59</sup> as a

54. See, e.g., *Comm’n on Hum. Rts. & Opportunities v. Cantillon*, No. HHBCV176039406, 2019 Conn. Super. LEXIS 2696, at \*2 n.3 (Oct. 2, 2019) (“The use of the term ‘garden variety’ to describe an emotional distress claim is somewhat objectionable in that it appears to unfairly demean the claim.”); *Taylor v. City of Chicago*, No. 14 C 737, 2016 U.S. Dist. LEXIS 62620, at \*21 (N.D. Ill. May 2, 2016) (“[T]he phrase is inherently imprecise, leading to very different notions of what could grow in the garden.” (citation and internal quotations omitted)); *Flowers*, 274 F.R.D. at 225 (“The problem in these cases is definitional and stems from the imprecision and elasticity of the phrase ‘garden variety.’”); *Merjian*, *supra* note 4, at 693 (“Use of the term ‘garden variety’ for the first tier of emotional distress damages is as ubiquitous as it is unfortunate, demeaning as it is inaccurate. There is nothing ‘garden variety’ about the experience of discrimination. Discrimination is never ‘commonplace’ or ‘forgettable,’ common synonyms for this phrase.”); *D’Ambrosio*, *supra* note 35, at 958–59 (“Any concept that accounts for ‘normal’ mental or emotional distress must account for the accumulated experiences of discrimination and oppression. But, far too often, the decontextualized ordinary person bears the standard. As a result, ‘garden variety’ emotional distress effectively tells civil rights plaintiffs that something is wrong with them when they suffer more than the ‘reasonable dominant group.’”).

55. See *Merjian*, *supra* note 4, at 696 (arguing that use of the term “garden variety” “should be abandoned . . . in favor of a simple, value-neutral nomenclature,” using “Tier One” in its place). This terminology is particularly applicable to New York law, under which there are three tiers of emotional distress damages. See *infra* note 190 and accompanying text.

56. *Sundberg v. Joint Apprenticeship Training Comm. of the Northwest Line Constr. Indus.*, No. 3:17-cv-01360-JR, 2019 U.S. Dist. LEXIS 229977, at \*4–5 (D. Or. July 24, 2019) (citations and internal quotations omitted).

57. *EEOC v. Big Five Corp.*, No. C17-1098RSM, 2018 U.S. Dist. LEXIS 85944, at \*11 (W.D. Wash. May 22, 2018). Although a Tier One case, these elements are essentially the same as those examined under the narrow approach (i.e., whether the plaintiff has waived the privilege by affirmatively relying on the psychotherapist-patient communications). See *supra* note 51 and accompanying text.

58. *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996); see also FED. R. EVID. 501.

59. See, e.g., *Cappetta v. GC Servs. L.P.*, 266 F.R.D. 121, 127 (E.D. Va. 2009) (“The privilege is absolute in that it is not subject to any balancing test . . . .”); *Consol. RNC Cases*, 2009 U.S. Dist. LEXIS 40293, at \*21 (S.D.N.Y. Jan. 8, 2009) (“In *Jaffee*, the Supreme Court rejected the idea that the psychotherapist privilege should be subject to a balancing test – thereby implicitly recognizing it as an absolute rather than a qualified privilege.” (citation omitted)); Lewis M. Wasserman, *The Psychotherapist*

matter of federal common law.<sup>60</sup> In so doing, the Court acknowledged “the general rule disfavoring testimonial privileges”<sup>61</sup> but observed that “a psychotherapist-patient privilege will serve a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”<sup>62</sup> The psychotherapist-patient privilege, the Court explained,

is “rooted in the imperative need for confidence and trust.” Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.<sup>63</sup>

Without an unconditional privilege, the Court added, “confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation.”<sup>64</sup>

Finally, the Court flatly rejected the notion that the rights of the patient should be balanced with the relevance and usefulness of the material in question. “Making the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure,” the Court explained, “would eviscerate the effectiveness of the privilege.”<sup>65</sup> Instead, the Court opted for an absolute privilege:

[I]f 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

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*and the Attorney/Client Privileges as They Arise in Civil Rights Disputes*, 26 *TOURO L. REV.* 579, 581 (2010) (“Jaffee made it clear that the privilege is absolute.”); Ryan M. Gott, Note, *The Evolving Treatment of “Garden-Variety” Claims Under the Psychotherapist-Patient Privilege*, 6 *SUFFOLK J. TRIAL & APP. ADVOC.* 91, 91 (2001) (“Since the United States Supreme Court’s ruling in *Jaffee v. Redmond*, an absolute privilege exists at federal common law regarding the psychotherapist-patient relationship.” (footnote omitted)). Like other privileges, however, absolute privileges can be waived by the privilege-holder, and this is the crux of the issue addressed here.

60. *Jaffee*, 518 U.S. at 1.

61. *Id.* at 9.

62. *Id.* at 15.

63. *Id.* at 10 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

64. *Id.* at 11–12.

65. *Id.* at 17.

privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.<sup>66</sup>

Notably, the Court failed to delineate the circumstances under which the privilege might be waived, merely observing in a footnote: “[W]e do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.”<sup>67</sup> Aside from this passage, the Court provided no guidance on whether, for example, a civil rights plaintiff impliedly waives the psychotherapist-patient privilege by interposing a claim for emotional distress damages. “It is evident from the comment,” however, “that the privilege is not to be readily waived. The *Jaffee* court describes an extreme situation under which harm to the patient or others is likely to occur if the confidential communication is not revealed.”<sup>68</sup>

Since *Jaffee*, myriad federal courts have addressed the issue of implied waiver in both personal injury and civil rights contexts. While there is still no single approach to this issue, there is a clear consensus, with the majority rejecting the broad approach and adopting either a narrow or Tier One approach.<sup>69</sup> This has, in fact, been the case for decades.<sup>70</sup> It is important to note, moreover, that many of the cases cited in support of the broad approach are, upon closer scrutiny, far more narrow than they are at times portrayed. For example, in many of those cases, plaintiffs sought to introduce psychological records or communications, which

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66. *Id.* at 18 (citation and internal quotations omitted).

67. *Id.* at 18 n.19.

68. Fritsch v. City of Chula Vista, 187 F.R.D. 614, 630–31 (S.D. Cal. 1999); accord Frank, *supra* note 6, at 663 (“Although the Court noted possible waiver of the privilege, the extreme situation used as an example implies that a simple claim of emotional distress would not warrant such a waiver.”); Gott, *supra* note 59 (“[T]he Supreme Court only expressed waiver by delineating extreme cases . . . .”); see also Swidler & Berlin v. United States, 524 U.S. 399, 408 n.3 (1998) (suggesting, under the analogous attorney-client privilege, that only “exceptional circumstances . . . might warrant breaching the privilege”).

69. See, e.g., Johnson v. Rogers, No. 1:16-cv-02705-JMS-MPB, 2018 U.S. Dist. LEXIS 233173, at \*9 (S.D. Ind. Apr. 20, 2018) (“The majority of courts, adopting a ‘middle-ground,’ have held that claims of ‘garden variety’ emotional damage do not result in a waiver of the psychotherapist-patient privilege.” (citations omitted)); Kubik v. Cent. Mich. Univ. Bd. of Trs., No. 15-cv-12055, 2016 U.S. Dist. LEXIS 192612, at \*7 (E.D. Mich. Mar. 17, 2016) (“Most courts have adopted a middle approach, which directs courts to inquire into the nature of the claims for mental or emotional distress.”); Pliego v. Hayes, 86 F. Supp. 3d 678, 691 (W.D. Ky. 2015) (“The majority rule is that where the plaintiff seeks ‘garden variety’ emotional damages . . . the [psychotherapist-patient] privilege remains intact and is not waived.” (citations and internal quotations omitted)). The same consensus governs the analogous question whether to order a mental examination under Rule 35 of the Federal Rules of Civil Procedure. See, e.g., Kuminka v. Atlantic Cnty., 551 Fed. Appx. 27, 29 (3d Cir. 2014) (“The general consensus is that ‘garden variety’ emotional distress allegations that are part and parcel of the plaintiff’s underlying claim are insufficient to place the plaintiff’s mental condition ‘in controversy’ for purposes of Rule 35(a).” (citations and internal quotations omitted)).

70. See, e.g., Stevenson v. Stanley Bostitch, Inc., 201 F.R.D. 551, 553 (N.D. Ga. 2001) (declaring, twenty years ago, “[t]he majority of courts have held that plaintiffs do not place their mental condition in controversy merely by claiming damages for mental anguish or ‘garden variety’ emotional distress” (citations omitted)).

would waive the privilege even under a narrow approach.<sup>71</sup> Others sought damages for specific, diagnosable psychic injuries, or for “severe” emotional distress, which would waive the privilege under most Tier One formulations.<sup>72</sup>

Similarly, courts and commentators have been too quick to announce the adoption of a broad rule in several federal circuits, including the Sixth, Seventh, Eighth, and Tenth Circuits.<sup>73</sup> A close reading of the relevant cases, and a review of the developments following each of those decisions, provided below, reveals an interesting fact: not one of these circuits, and thus not one circuit in the country, has definitively adopted a broad approach. The subsequent adoption of narrower approaches by district courts in all four of these circuits makes this abundantly clear.

In *Maday v. Public Libraries*,<sup>74</sup> the Sixth Circuit examined the question whether plaintiff Maday waived her privilege as to records of her meeting with a social worker, some of which “were initially introduced by Maday herself, as proof of the emotional distress damages that she was seeking under Michigan law.”<sup>75</sup> In broad language, the Sixth Circuit observed that “if Maday were not seeking emotional-distress damages, then her conversations with a social worker about how she was feeling would likely be privileged. But when Maday put her emotional state at issue in the case, she waived any such privilege, and the records may come

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71. *See id.* at 556 (“[U]pon close inspection, many of the cases purporting to reject the narrow view and adopt a broad view actually take a middle ground.” (citations omitted)); *Hucko v. City of Oak Forest*, 185 F.R.D. 526, 528 n.3 (N.D. Ill. 1999) (“A number of other district courts have held that allegations of emotional pain and suffering can impliedly waive the psychotherapist-patient privilege, but in factual contexts where—unlike in this case—the plaintiff sought to offer evidence from psychotherapists to bolster that claim.” (citations omitted)); *Fritsch*, 187 F.R.D. at 629 (“[I]n a number of the cases in which courts found waiver of the psychotherapist-patient privilege, the party claiming the privilege intended to call his or her psychotherapist as a witness, or otherwise put the substance of psychotherapist-patient communications directly at issue.” (citations omitted)).

72. *See Ruhlmann v. Ulster Cnty. Dep’t of Soc. Servs.*, 194 F.R.D. 445, 449 (N.D.N.Y. 2000) (“A close reading, however, reveals that many of the cases espousing the broad view distinguish between cases in which significant emotional harm is alleged or the mental condition is at the heart of the litigation, and a claim for ‘garden-variety’ emotional distress damages.”); *see also infra* notes 90, 97 and accompanying text.

73. *See, e.g., Laudicina v. City of Crystal Lake*, 328 F.R.D. 510, 518 (N.D. Ill. 2018) (“[The Seventh Circuit in] *Oberweis* adopted the broad approach to waiving the psychotherapist-patient privilege, and this Court is bound by that decision.”); *Magney v. Truc Pham*, 466 P.3d 1077, 1093 (Wash. 2020) (McCloud, J., dissenting) (noting that the Eighth Circuit decision in *Schoffstall* is “often cited as an example of the broad approach”); *Ostler v. Harris*, No. 2:18-cv-00254, 2019 U.S. Dist. LEXIS 217687, at \*6 n.1 (D. Utah Dec. 17, 2019) (“The court recognizes that some courts in other districts are citing to [the Tenth Circuit’s decision in] *Fisher* to support the proposition that a plaintiff waives privilege merely by making a claim for emotional distress damages.”); D’Ambrosio, *supra* note 35, at 936 (“The Sixth, Seventh, Eighth and Tenth Circuits have adopted a ‘broad’ view as to waiver of the psychotherapist-patient privilege.”) (In fairness, the author did note that at least in the Seventh and Eighth Circuits, “subsequent district court decisions have embraced the ‘garden variety’ view.” *Id.* at 957); Smith, *supra* note 3, at 110 (“Three federal courts of appeals [i.e., the Sixth, Seventh, and Eighth] follow the broad approach, but none has offered close analysis of the controversy in the lower courts.”).

74. *Maday v. Pub. Librs.*, 480 F.3d 815 (6th Cir. 2007).

75. *Id.* at 820.

in . . . .”<sup>76</sup> The court concomitantly concluded, however, that “[t]his is a clear example of voluntary disclosure of privileged information,” and thus her privilege had “clearly been waived.”<sup>77</sup>

The court did not address the question whether a claim for Tier One damages might preserve the privilege, and the finding that voluntary disclosure of privileged communications effectuates a waiver is, in fact, consonant with the narrow approach to waiver.<sup>78</sup> Accordingly, since *Maday*, numerous district courts in the Sixth Circuit have rejected the broad approach in favor of the Tier One approach.<sup>79</sup> *Prewitt v. Hamline University* is illustrative:

The Sixth Circuit holds that a plaintiff waives the psychotherapist-patient privilege by putting his emotional state at issue in a case. *Maday v. Public Libraries of Saginaw*, 480 F.3d 815, 821 (6th Cir. 2007). A majority of courts find an exception to that waiver, however, when the plaintiff alleges only “garden-variety” emotional distress and does not allege “a separate tort for the distress, any specific psychiatric injury or disorder, or unusually severe distress.” . . . Here, Prewitt’s claim falls under the “garden variety” umbrella. Prewitt does not bring a claim of negligent or intentional infliction of emotional distress. The record contains no indication that he anticipates expert proof to support his claim of “mental anguish,” nor does Prewitt plead any facts that might support a finding that his mental anguish has been “unusually severe.” On this record, it appears that Prewitt has not

76. *Id.* at 821 (citations omitted).

77. *Id.*

78. The court also approved of the lower court’s use of a “balancing” test for the admission of the “probative” emotional distress evidence. *Id.* at 821–22. This contravenes fundamental precepts governing privilege, and the Supreme Court’s express rejection of a balancing test in *Jaffee*. See *supra* notes 66–67, 270 and accompanying text.

79. See, e.g., *T.C. ex rel. S.C. v. Metro. Gov’t of Nashville & Davidson Cnty.*, No. 3:17-CV-01098; No. 3:17-CV-01159; No. 3:17-CV-01209; No. 3:17-CV-01277; No. 3:17-CV-01427, 2018 U.S. Dist. LEXIS 113517, at \*33 (M.D. Tenn. July 9, 2018); *Prewitt v. Hamline Univ.*, No. 3:15-cv-0942, 2018 U.S. Dist. LEXIS 181167, at \*6–7 (M.D. Tenn. Jan. 3, 2018), *aff’d* No. 3:15-cv-00942, 2018 U.S. Dist. LEXIS 107278 (M.D. Tenn. June 27, 2018), *aff’d* 764 Fed. Appx. 524 (6th Cir. 2019); *Maysey v. Henkel Corp.*, No. 1:17cv-00108-GNS, 2018 U.S. Dist. LEXIS 2211, at \*7 (W.D. Ky. Jan. 5, 2018); *Bose v. Roberto De La Salud Bea & Rhodes Coll.*, No. 2:16-cv-02308-JTF-tmp, 2017 U.S. Dist. LEXIS 231604, at \*10–11 (W.D. Tenn. Nov. 9, 2017) (“[T]his Court agrees with the Magistrate Judge’s finding that under the middle-ground approach, waiver is not appropriate here because Plaintiff has not placed her mental condition at issue.”); *Kubik v. Cent. Mich. Univ. Bd. of Trs.*, Case No. 15-cv-12055, 2016 U.S. Dist. LEXIS 111318, at \*9 (E.D. Mich. Aug. 22, 2016) (“When a plaintiff waives the right to recover damages for more than ‘garden-variety’ emotional distress, the plaintiff retains the psychotherapist-patient privilege.” (citations omitted)); *Santifer v. Inergy Auto. Sys., LLC*, No. 5:15-cv-11486, 2016 U.S. Dist. LEXIS 45493, at \*6 (E.D. Mich. Apr. 4, 2016); *Mason v. Wal-Mart Corp.*, No. 2:14-cv-446, 2015 U.S. Dist. LEXIS 113960, at \*4 (S.D. Ohio Aug. 27, 2015); *Atkins v. Lq Mgmt.*, No. 3-13-0562, 2014 U.S. Dist. LEXIS 205230, at \*12 (M.D. Tenn. Sept. 30, 2014) (acknowledging *Maday*, but adopting Tier One approach where “plaintiffs have asserted only garden-variety claims of emotional distress”); *Lamb v. Hazel*, No. 5:12-CV-00070-TBR, 2013 U.S. Dist. LEXIS 50238, at \*20 (W.D. Ky. Apr. 8, 2013) (“At this juncture, Plaintiff’s mental health is not at issue because he appears to raise only garden-variety claims of mental or emotional injury. His mental health records remain privileged, and Defendants are not entitled to a medical release authorization.”).

placed his mental health “in controversy” so as to overcome the privilege afforded his mental health records and require their production.<sup>80</sup>

In *Doe v. Oberweis Dairy*,<sup>81</sup> the Seventh Circuit affirmed the lower court’s decision allowing access to the plaintiff’s psychiatric records, broadly opining that “[i]f 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.”<sup>82</sup> This is, however, tautologous, for the seminal question is *when*, precisely, a plaintiff places her mental state at issue and whether a narrow or Tier One strategy by plaintiff preserves the privilege. The court never addressed these issues<sup>83</sup> and likened the psychotherapist-patient privilege to the doctor-patient privilege, despite the fact that the latter privilege is not even recognized under federal law.<sup>84</sup> The court also suggested that the lower court might limit the use of plaintiff’s psychiatric records at trial “to the extent that the plaintiff’s interest in privacy outweighs the probative value of the information contained in the records.”<sup>85</sup> This is plainly contrary to *Jaffee*, in which the Supreme Court expressly rejected the use of a balancing test in determining the privilege.

Not surprisingly, given the ambiguous and flawed nature of the *Oberweis* decision, district courts in the Seventh Circuit “have been hesitant to apply the broad approach. Instead, in various decisions that cite *Oberweis*, courts have gone on to apply either the garden-variety approach or the narrow approach.”<sup>86</sup>

In *Schoffstall v. Henderson*,<sup>87</sup> the Eighth Circuit perfunctorily ruled that “plaintiff waives the psychotherapist-patient privilege by placing his or her medical condition at issue.”<sup>88</sup> The court provided no analysis of the relevant issues, never

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80. *Prewitt*, 2018 U.S. Dist. LEXIS 181167, at \*6–7.

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

82. *Id.* at 718.

83. *See, e.g.*, *Flowers v. Owens*, 274 F.R.D. 218, 224 (N.D. Ill. 2011) (“Although the district court in *Oberweis Dairy* had discussed ‘garden variety’ emotional damages and cited [a Tier One case], the Seventh Circuit’s affirmance . . . neither mentioned [the case] nor used the phrase ‘garden variety.’” (citations omitted)).

84. *Oberweis*, 456 F.3d at 718 (“[T]here is a psychotherapist-patient privilege in federal cases . . . like the closely related doctor-patient privilege . . .”); *see* Anderson, *supra* note 3, at 131 (“The court’s premises are faulty. *Jaffee* analogized to the attorney-client privilege, and the Court has not recognized a doctor-patient privilege.”)

85. *Oberweis*, 456 F.3d at 718 (citations omitted).

86. *Taylor v. City of Chicago*, No. 14 C 737, 2016 U.S. Dist. LEXIS 133715, at \*7 (N.D. Ill. Sept. 28, 2016); *see, e.g.*, *Awalt v. Marketti*, 287 F.R.D. 409, 418 (N.D. Ill. 2012) (“[C]laims for ‘garden variety’ emotional distress damages do not waive the privilege.”); *Noe v. R.R. Donnelley & Sons*, No. 10 C 2018, 2011 U.S. Dist. LEXIS 39492, at \*7–8 (N.D. Ill. Apr. 12, 2011) (“[T]he Court finds that Noe’s allegations concerning emotional harm constitute a garden variety distress claim that does not place his psychological state at issue in such a way that would waive the psychotherapist-patient privilege.”); *Flowers*, 274 F.R.D. 218; *Kronenberg v. Baker & McKenzie LLP*, 747 F. Supp. 2d 983 (N.D. Ill. 2010); *Taylor v. ABT Elecs., Inc.*, No. 05 C 576, 2007 U.S. Dist. LEXIS 35819, at \*4–6 (N.D. Ill. May 14, 2007).

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

88. *Id.* at 823 (citations omitted); *see Koch v. Cox*, 489 F.3d 384, 390 (D.C. Cir. 2007) (*Schoffstall* “does not explain what it might mean to place one’s mental condition in issue”).

once mentioning the term “garden variety” or acknowledging the questions implicated by a broad versus more narrow approach. In addition, the plaintiff in *Schoffstall* alleged “extreme emotional distress,”<sup>89</sup> which would waive the privilege even under a Tier One approach.<sup>90</sup> As one district court has observed:

[I]n *Schoffstall*, the court characterized plaintiff as claiming “extreme emotional distress” and did not address whether an intermediate approach would be appropriate in cases when severe distress is not being claimed. Further, . . . one of the four cases cited by the Eighth Circuit . . . (*Jackson v. Chubb. Corp.*) was a case where the court concluded that, although the broad approach to waiver of the *Jaffee* privilege applies, the plaintiff could avoid discovery if she limited her claim for damages to recovery for garden variety emotional distress.<sup>91</sup>

As a result, numerous district courts in the Eighth Circuit have since ruled that plaintiffs do not place their mental health at issue, and thus do not waive the psychotherapist-patient privilege, by asserting Tier One emotional-distress claims.<sup>92</sup>

Finally, in *Fisher v. Southwestern Bell Telephone Co.*,<sup>93</sup> the Tenth Circuit ruled that plaintiff’s “request for emotional-distress damages placed her psychological state in issue and entitled [defendant] to discover her therapy records.”<sup>94</sup> The court cited *Oberweis* and *Schoffstall*, and like both of those cases, provided no analysis, failing even to mention the term “garden variety” or to acknowledge the issues at

89. *Schoffstall*, 223 F.3d at 822.

90. See Anderson, *supra* note 3, at 131 (“In fact, the outcomes in both *Schoffstall* and [*Oberweis*] can be squared with the garden variety—or even a narrow—approach.”).

91. *Auer v. City of Minot*, 178 F. Supp. 3d 835, 843–44 (D.N.D. 2016) (citations omitted).

92. See, e.g., *Uyin Jildo Alau v. Morse*, No. 3:16-cv-250; No. 3:16-cv-251; No. 3:16-cv-252, 2018 U.S. Dist. LEXIS 232891, at \*8 (D.N.D. Jan. 29, 2018) (“They will also be prohibited from offering any evidence of emotional distress, other than ‘garden variety’ emotional distress.”); *Feinwachs v. Minn. Hosp. Ass’n*, Case No. 11-cv-8, 2018 U.S. Dist. LEXIS 25109, at \*7–8 (D. Minn. Feb. 13, 2018) (utilizing Tier One approach to conclude that plaintiff “has not placed his medical condition at issue”); *Williams v. Perdue*, No. 4:17-cv-01531-JAR, 2018 U.S. Dist. LEXIS 122341, at \*2 n.1 (E.D. Mo. July 23, 2018) (“Garden variety emotional distress does not put a Plaintiff’s medical condition in controversy, and therefore a plaintiff does not waive the privilege to her medical records.”); *Auer*, 178 F. Supp. 3d at 844–45 (“[T]he undersigned concludes it would find persuasive at least the position taken by the federal district court in *Santelli*, i.e., a civil rights plaintiff’s mental health records are either not relevant or of such marginal relevance that they should not be subject to discovery and later use if plaintiff: (1) limits his or her claim to recovery of damages for hurt feelings, humiliation, anger, and embarrassment; (2) does not offer evidence of treatment or of any resulting physical manifestation; and (3) relies only upon his or her own testimony to support the claim.”); *Williams v. Feeney*, No. 8:13CV287, 2015 U.S. Dist. LEXIS 52757, at \*11 (D. Neb. Apr. 22, 2015) (“It is clear that when the plaintiff pleads emotional distress, it is a ‘garden-variety’ claim that does not constitute a waiver of the privilege by the plaintiff.” (citation omitted)); *Womack v. Wells Fargo Bank, N.A.*, 275 F.R.D. 571, 572 (D. Minn. 2011) (“But, ‘allegations of “garden variety emotional distress,” . . . are insufficient to place her mental condition in controversy.’” (citation and internal quotations omitted)); *Miles v. Century 21 Real Est. LLC*, No. 4:05-CV-1088 GTE, 2006 U.S. Dist. LEXIS 67974, at \*19–20 (E.D. Ark. Sept. 21, 2006) (“Considering Plaintiffs’ representations that they will not offer these counseling records or expert testimony to prove their emotional distress claims, Plaintiffs have met their burden to show that they have not waived the psychiatrist-patient privilege.”).

93. *Fisher v. Sw. Bell Tel. Co.*, 361 Fed. App’x. 974 (10th Cir. 2010).

94. *Id.* at 978.

play.<sup>95</sup> In addition, the lower court ruling affirmed in *Fisher* noted that the plaintiff claimed “extreme emotional distress” and ruled that her claims “appear inconsistent with Plaintiff’s allegations of only ‘garden variety’ emotional distress.”<sup>96</sup> *Fisher*, then, hardly established a clear, broad rule, and as a result, numerous district courts in the Tenth Circuit have since adopted a Tier One approach.<sup>97</sup>

By contrast, along with the myriad and majority of district court cases adopting a narrower approach, both the Second and the D.C. Circuits have expressly adopted a Tier One and narrow approach, respectively.<sup>98</sup>

### B. Implied Waiver of the Privilege in the State Supreme Courts

A strong majority of state supreme courts examining waiver and the psychotherapist-patient privilege have rejected the broad approach. This includes the Supreme Courts of Alabama,<sup>99</sup> Alaska,<sup>100</sup> Colorado,<sup>101</sup> Missouri,<sup>102</sup> New

95. *Id.* at 977–78. *See Ostler v. Harris*, No. 2:18-cv-00254, 2019 U.S. Dist. LEXIS 217687, at \*7 (D. Utah Dec. 17, 2019) (“The middle ground approach is the majority approach. The Tenth Circuit does not appear to have spoken on this issue after Jaffee . . .”).

96. *Fisher v. Sw. Bell Tel. Co.*, No. 07-CV-433-CVE-SAJ, 2008 U.S. Dist. LEXIS 133226, at \*7–8 (N.D. Okla. Oct. 29, 2008). *See Ostler*, 2019 U.S. Dist. LEXIS 217687, at \*6 n.1 (“[U]pon further review, the court notes that the 10th Circuit in *Fisher* agreed with the lower court’s ruling, in which the plaintiff made claims for extreme emotional distress . . . Plaintiff’s claims in the lower court were sufficient to find waiver [i.e., under a Tier One approach].”).

97. *See, e.g., Ostler*, 2019 U.S. Dist. LEXIS 217687, at \*7–8 (“Plaintiff asserts mere garden-variety claims of emotional distress. . . Thus, the court finds Plaintiff did not put Ms. Ostler’s mental state in issue in this case . . .”); *Cribari v. Allstate Fire & Cas. Ins. Co.*, No. 16-cv-02450-NRN, 2018 U.S. Dist. LEXIS 228365, at \*8–9 (D. Colo. Sept. 13, 2018) (“To the extent that Ms. Cribari’s position at trial will be that ‘Plaintiff will not present any evidence of Plaintiff’s psychological diagnoses,’ Ms. Cribari is free to make an appropriate objection to the introduction of therapy record evidence at that time.” (citation omitted)); *Gordon v. T.G.R. Logistics, Inc.*, 321 F.R.D. 401, 404 (D. Wyo. 2017) (“In issuing this order the court recognized that such discovery was appropriate for alleged severe emotion distress, as opposed to ‘garden variety’ emotional distress.”); *Thompson v. TCI Prods. Co.*, No. 13-CV-824-CVE-PJC, 2014 U.S. Dist. LEXIS 143812, at \*7–8 (N.D. Okla. Oct. 9, 2014) (“[W]here the survivor’s grief and emotional distress from the loss of the decedent is limited to the sort of ‘generic’ or ‘garden variety’ claim of the sort that would be suffered by an ordinary person in similar circumstances, the privilege has not been waived.”); *Kear v. Kohl’s Dep’t Stores, Inc.*, No. 12-cv-1235-JAR-KGG, 2013 U.S. Dist. LEXIS 84943, at \*9 (D. Kan. June 18, 2013) (“‘Garden variety’ emotional distress can exempt a plaintiff from being subjected to a mental examination. It may also prevent disclosure of information protected under psychotherapist-patient privilege.” (citations omitted)); *EEOC v. Fisher Sand & Gravel Co.*, No. CV 09-0309 MV/WPL, 2010 U.S. Dist. LEXIS 146973, at \*7 (D.N.M. Mar. 4, 2010) (ruling, two months after *Fisher*: “In this case, the EEOC denies that it intends to use any of Encinias’s doctors or medical evidence to support its claims. Accordingly, the EEOC was not required to provide the names of Encinias’s medical and mental health providers, her medical records, or medical releases with its initial disclosures.”).

98. *See Sims v. Blot*, 534 F.3d 117 (2d Cir. 2008); *Koch v. Cox*, 489 F.3d 384 (D.C. Cir. 2007); discussion *infra* Section IV.A. (analyzing *Sims*).

99. *Ex parte W. Mental Health Ctr.*, 884 So. 2d 835 (Ala. 2003).

100. *Kennedy v. Mun. of Anchorage*, 305 P.3d 1284 (Alaska 2013).

101. *Johnson v. Trujillo*, 977 P.2d 152 (Colo. 1999).

102. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo. 2006).

Hampshire,<sup>103</sup> New Jersey,<sup>104</sup> Oklahoma,<sup>105</sup> Texas,<sup>106</sup> and Washington.<sup>107</sup> In *Kinsella*, the New Jersey Supreme Court ruled that where “expert medical testimony is not required to prove the effect of the defendant’s behavior,” an allegation of extreme cruelty “does not put the plaintiff’s mental condition in sufficient issue” to justify a court-ordered psychological examination.<sup>108</sup> As to defendant’s request for plaintiff’s psychotherapy records, the court similarly adopted a narrow approach, noting that “Plaintiff is not seeking to introduce any evidence related to his treatment by [his treating psychologist]” and “intends to rely for his proof of extreme cruelty on proof of the alleged acts of defendant . . . and his own testimony concerning their emotional effects on him.”<sup>109</sup>

Of the remaining eight state supreme courts to reject the broad approach, Alaska, Colorado, Missouri, and New Hampshire have expressly adopted a Tier One approach.<sup>110</sup> The Alabama Supreme Court has ruled that there is no implied waiver or “exception” to the psychotherapist-patient privilege where “the plaintiff merely alleges mental anguish.”<sup>111</sup> In addition, the court ruled that there is no exception to the privilege where a party merely “seeks information relevant to the issue of the proximate cause of another party’s injuries.”<sup>112</sup> The court did not, however, specify whether the narrow or Tier One approach should govern.

In *R.K. v. Ramirez*,<sup>113</sup> the Texas Supreme Court examined the question of waiver under a patient-litigant exception<sup>114</sup> adopted in 1988 that expressly provides

103. *Desclos v. S. N.H. Med. Ctr.*, 903 A.2d 952 (N.H. 2006).

104. *Kinsella v. Kinsella*, 696 A.2d 556 (N.J. 1997).

105. *Ellis v. Gurich*, 73 P.3d 860 (Okla. 2003).

106. *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994).

107. *Magney v. Pham*, 466 P.3d 1077 (Wash. 2020).

108. *Kinsella*, 696 A.2d at 574.

109. *Id.* at 576.

110. *See Kennedy v. Mun. of Anchorage*, 306 P.3d 1284, 1285 (Alaska 2013) (“[W]e conclude that the assertion of garden-variety mental anguish claims in an employment discrimination case does not automatically waive the physician and psychotherapist privilege.”); *Johnson v. Trujillo*, 977 P.2d 152, 153 (Colo. 1999). (“[W]e hold that by making generic claims for damages for mental anguish, emotional distress, pain and suffering, and loss of enjoyment of life that are incident to her physical injuries and that do not exceed the suffering and loss an ordinary person would likely experience in similar circumstances, Johnson has not impliedly waived her statutory physician-patient and psychotherapist-client privileges to keep these sensitive records private. Therefore, we now make the rule absolute.”); *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 568 (Mo. 2006) (“[E]vidence of Dean’s medically or psychologically diagnosable mental or physical condition is irrelevant to the question of whether she suffered ‘garden variety’ emotional distress as a result of the incidents pleaded in her sex discrimination and sexual harassment claims. Her particular past or present mental condition, in that respect, is not in controversy.”); *Desclos v. S. N.H. Med. Ctr.*, 903 A.2d 952, 960 (N.H. 2006) (“If, however, the mental suffering that [plaintiff] claims involves only generic mental suffering, then such claims would not waive her psychotherapist-patient privilege.”).

111. *Ex parte W. Mental Health Ctr.*, 884 So. 2d 835, 841 (Ala. 2003).

112. *Id.* (quoting *Ex parte Pepper*, 794 So. 2d 340, 344 (Ala. 2001)).

113. *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994).

114. Although they are phrased differently, patient-litigant exceptions typically allow disclosure of privileged information where plaintiffs put their mental health conditions at issue. *See, e.g., Vahai v. Gertsch*, 455 P.3d 1218, 1240 (Wy. 2020) (Gray, J., concurring) (“The patient-litigant exception

an exception to the psychotherapist-patient privilege “as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as part of the party’s claim or defense.”<sup>115</sup> Rejecting the broad approach,<sup>116</sup> the court ruled that the exception applies

[w]hen a party’s condition relates in a significant way to a party’s claim or defense. Communications and records should not be subject to discovery if the patient’s condition is merely an evidentiary or intermediate issue or fact, rather than an “ultimate” issue for a claim or defense, or if the condition is merely tangential to a claim rather than “central” to it.<sup>117</sup>

The court also rejected a test based merely upon relevance, “because such a test would ignore the fundamental purpose of evidentiary privileges, which is to preclude discovery and admission of relevant evidence under prescribed circumstances.”<sup>118</sup>

The court’s rejection of a broad, automatic waiver, and its focus upon whether the emotional condition is “merely an evidentiary or intermediate issue or fact,” or “merely tangential” rather than central, echoes the Tier One approach. Under this approach, claims for emotional distress that are merely “incidental” to the plaintiff’s claim of, e.g., discrimination, do not waive the privilege.<sup>119</sup> And indeed, following *R.K.*, Texas courts have adopted a Tier One approach to the question of implied waiver.<sup>120</sup>

allows disclosure of otherwise privileged communications in cases where the patient’s mental health is at issue.”)

115. *R.K.*, 887 S.W.2d at 840–41 (emphasis omitted) (quoting TEX. R. EVID. 509(d)(4), 510(d)(5)).

116. *See id.* at 843 (“[T]his test prevents the privilege from evaporating as a matter of course simply because a lawsuit has been filed.”); John Matney, Note, *What’s It Worth? The Patient-Litigant Exception Whittles Away at the Physician-Patient and Mental Health Information Privileges*: *R.K.*, M.D. v. *Ramirez*, 887 S.W.2d 836 (Tex. 1994), 26 TEX. TECH L. REV. 993, 1006 (1995) (noting that the *R.K.* decision is “not as broad as opinions which allow for discovery of medical information any time any party merely makes mention of the patient’s medical condition in its claim or defense”).

117. *R.K.*, 887 S.W.2d at 842.

118. *Id.* at 842 (citation omitted); *see also* *Coates v. Whittington*, 758 S.W.2d 749, 753 (Tex. 1988) (holding, under a now-superseded rule governing mental examinations: “A routine allegation of mental anguish or emotional distress does not place the party’s mental condition in controversy. The plaintiff must assert mental injury that exceeds the common emotional reaction to an injury or loss”).

119. *See, e.g.*, *Diunugala v. Dep’t of Conservation*, No. CV 16-03530-DSF, 2018 U.S. Dist. LEXIS 229721, at \*3 (C.D. Cal. Jan. 31, 2018) (“Garden variety emotional distress is ordinary or commonplace emotional distress that is simple and usual or incidental.”); *Malowsky v. Schmidt*, No. 3:15-CV-666, 2017 U.S. Dist. LEXIS 229306, at \*6–7 (N.D.N.Y. Jan. 9, 2017) (“Nor will the assertion of a mere ‘garden variety’ claim for emotional distress—such as that the plaintiff suffered less acute mental injury or generalized emotional distress that was merely ‘incidental’ to defendant’s alleged conduct—give rise to forfeiture.” (citation omitted)); *Morrisette v. Kennebec Cnty.*, No. 01-01-B-S, 2001 U.S. Dist. LEXIS 13309, at \*3 (D. Me. Aug. 21, 2001) (“These same cases held that the mere assertion of a damages claim for ‘garden variety’ or ‘incidental’ emotional distress is not sufficient to constitute waiver of the psychotherapist-patient privilege.”).

120. *See, e.g.*, *In re Williams*, No. 10-08-00364-CV, 2009 Tex. App. LEXIS 1561, at \*13–14, \*19 (Mar. 4, 2009) (“A claim for mental anguish or emotional distress will not, standing alone, make a

In *Ellis v. Gurich*, the Oklahoma Supreme Court examined the question of waiver under a patient-litigant exception to the privilege “as to a communication relevant to the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon that condition as an element of the patient’s claim or defense.”<sup>121</sup> The lower court had “concluded that the mere ‘filing’ of the underlying action placed [petitioners] . . . mental or emotional condition in issue, making their mental health care history, if any, discoverable.”<sup>122</sup> Petitioners asserted, however, that “with respect to grief, loss of companionship, and the like, no expert witnesses are expected to testify.”<sup>123</sup> Rejecting the broad approach, the Oklahoma Supreme Court explained that petitioners “do not rely upon their mental or emotional conditions as an element of their claims within the meaning of [the Oklahoma statute],” and thus defendants were not entitled to “discovery of the mental health care history, if any, of petitioners.”<sup>124</sup>

The recent decision of the Washington Supreme Court is more complicated (and, frankly, convoluted). In *Magney v. Pham*,<sup>125</sup> the court examined the “marital counseling privilege” in connection with a claim of medical malpractice.<sup>126</sup> The court rejected the broad approach, ruling that there is no “automatic waiver of privilege” when filing a claim involving mental anguish.<sup>127</sup> The decision is otherwise of limited usefulness to our inquiry, however, and distinguishable for several reasons. *First*, this was not a civil rights claim but a “medical negligence claim.”<sup>128</sup>

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plaintiff’s mental or emotional condition a part of the plaintiff’s claim. . . . [T]he testimony merely raises routine allegations of mental anguish resulting from his mother’s death and does not address a mental injury exceeding a common emotional reaction to such a loss.” (citations omitted)); *In re Doe*, 22 S.W.3d 601, 610 (Tex. App. 2000) (“[S]he has not alleged any ‘severe emotional condition’ that would place her mental condition at issue so as to trigger the litigation exception and waive her privilege regarding her mental health records. . . . To hold otherwise would suggest that every time a plaintiff raises a claim for past and future mental anguish damages her mental condition would be in issue and thereby all mental health records would be discoverable.”).

121. OKLA. STAT. tit. 12, § 2503(D)(3) (2021).

122. *Ellis v. Gurich*, 73 P.3d 860, 860 (Okla. 2003) (citation and internal quotations omitted).

123. *Id.*

124. *Id.* (citations and internal quotations omitted); *accord* *Moody v. Ford Motor Co.*, No. 03-CV-784-JOE-PJC, 2005 U.S. Dist. LEXIS 42659, at \*3–5 (N.D. Okla. Aug. 10, 2005); *Baylon v. Wells Fargo Bank, N.A.*, CIV 12-0052, 2013 U.S. Dist. LEXIS 191255, at \*4 (D.N.M. Dec. 26, 2013) (agreeing with plaintiffs’ argument “that because they will not call any medical experts or rely on Cruz Baylon’s medical records at trial as to his emotional distress damages claim, a release for his medical and mental health records was not required under [district court statute requiring disclosure ‘[i]n all cases in which the physical or mental medical condition of a party is an issue’]”); *see* D.N.M. LR-Civ. 26.3(d).

125. *Magney v. Pham*, 466 P.3d 1077 (Wash. 2020).

126. *Id.* at 1080.

127. *Id.* at 1083; *see id.* at 1089 (McCloud, J., concurring in part and dissenting in part) (“Respondents assert that the Magneys automatically waived privilege simply by filing a lawsuit in which they seek damages for mental anguish. The majority rejects that assertion, and I agree.”); *id.* at 1094 (McCloud, J., concurring in part and dissenting in part) (“[W]e have already rejected the broad approach . . .”).

128. *Id.* at 1083.

*Second*, as the court acknowledged, “the marital counseling privilege is not sufficiently analogous to the psychologist-client privilege to equate them.”<sup>129</sup> *Third*, the court failed to establish a clear approach to the implied-waiver issue, finding that “the discretion of whether a privilege has been impliedly waived belongs to the trial court judge, who has access to the entirety of the record . . . and who can determine whether any disclosures thus far impliedly waived the privilege.”<sup>130</sup> The court provided no clear guidance, however, on how the trial court should make that determination.

As the dissent noted, the three main approaches to implied waiver “reflect a thorough and thoughtful analysis of the issue.”<sup>131</sup> The majority eschewed this analysis entirely. Instead, the majority observed that “a person impliedly waives privilege on an issue when that person testifies, introduces evidence, or fails to object to another’s testimony *as to the ailment or privileged conversation*.”<sup>132</sup> The latter exception is clear and well settled: introducing privileged conversations, even under the narrow approach, waives the privilege.<sup>133</sup> Use of the term “ailment,” however, only clouds the issue, for it arguably suggests a medically diagnosed condition, “a bodily disorder or chronic disease,”<sup>134</sup> and thus does not rule out a Tier One approach, honoring the privilege where the testimony and evidence of emotional distress do not rise to such a level. The decision from which the court borrowed this term, *McUne v. Fuqua*,<sup>135</sup> supports this conclusion. In *McUne*, a personal injury case,<sup>136</sup> three doctors testified as to plaintiff’s medical woes, one of whom “diagnosed [his] arm condition as ‘brachial neuritis.’”<sup>137</sup> Plaintiff “took the witness stand and testified that the injuries and disabilities described by his doctors resulted from the accident.”<sup>138</sup> The “particular ailments for which plaintiff received treatment,” moreover, included “lumbago,” “rheumatic conditions in both [shoulders],” and “neuritis of the right shoulder and arm.”<sup>139</sup> Under any approach—broad, narrow, or Tier One—the introduction of such evidence would effect a waiver. The court’s analysis therefore sheds little light on the proper approach for Washington’s lower courts.

Finally, the *Magney* court based its remand upon the fact that the record was unclear as to “the extent of any mental anguish discussed [in] marital counseling or

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129. *Id.* at 1087.

130. *Id.* at 1080.

131. *Id.* at 1091 (McCloud, J., concurring in part and dissenting in part).

132. *Id.* at 1087 (emphasis added).

133. *See, e.g.,* *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 230 (D. Mass. 1997) (“Should she use the substance of her communication, by calling her psychotherapist as a witness, for example, or by testifying to the substance of the communication herself, then she would waive the privilege.”).

134. *Ailment*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/ailment> [<https://perma.cc/YD2T-4VLJ>] (last visited Sep. 28, 2021).

135. *McUne v. Fuqua*, 253 P.2d 632 (Wash. 1953).

136. *Id.* at 634.

137. *Id.* at 639.

138. *Id.* at 638.

139. *Id.* at 637.

whether that particular mental anguish has any bearing on or connection to the mental anguish as pleaded in the complaint.”<sup>140</sup> The first clause of the sentence seemingly implicates a typical Tier One approach, under which “the extent of any mental anguish” is examined to determine whether the plaintiff is claiming “garden variety” emotional distress (no waiver) or more serious mental anguish (waiver).<sup>141</sup> The second clause, however, introduces a mere relevancy test (“any bearing”). This is a recurrent error in cases that find implied waiver of the privilege.<sup>142</sup>

Examining relevance in determining the question of waiver fundamentally misapprehends the very essence of privilege. Testimonial privileges are in derogation of the common law principle favoring the inclusion of all relevant evidence.<sup>143</sup> They therefore reflect a studied and, in the case of statutory privileges, express legislative decision to shield certain communications from discovery even where those communications might be relevant. “The very nature of a privilege is that it prevents disclosure of information that may be relevant in the case, in order to serve interests that are of over-arching importance.”<sup>144</sup> As the New Hampshire Supreme Court has explained, “[s]uch exceptions are justified by a public good that transcends the general principle of using all rational means for ascertaining truth. Evidentiary privileges promote sufficiently important interests to justify the sacrifice of some available probative evidence.”<sup>145</sup> Hence, “relevance alone cannot be the test, because such a test would ignore the fundamental purpose of evidentiary privileges, which is to preclude discovery and admission of relevant evidence under

140. *Magney v. Pham*, 466 P.3d 1077, 1087 (Wash. 2020).

141. *See supra* note 51 and accompanying text.

142. *See, e.g., Black v. Pan Am Labs, LLC*, No. 1:07-CV-924, 2008 U.S. Dist. LEXIS 126497, at \*8 (W.D. Tex. July 8, 2008) (“Those cases treating claims for incidental emotional distress as constituting waivers . . . [erroneously] focus on relevancy and on the fact that emotional health is ‘in issue.’” (citation and internal quotations omitted)).

143. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (“[A] psychotherapist-patient privilege will serve a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”); *United States v. Bryan*, 339 U.S. 331, 331 (1950) (“When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.” (citations and internal quotations omitted)); *Desclos v. S. N.H. Med. Ctr.*, 903 A.2d 952, 956 (N.H. 2006) (“Evidentiary privileges are exceptions to the general duty to give all testimony that one is capable of giving.” (citations omitted)).

144. *Fitzgerald v. Cassil*, 216 F.R.D. 632, 637 (N.D. Cal. 2003) (quoting *Hucko v. City of Oak Forest*, 185 F.R.D. 526, 530 (N.D. Ill. 1999)); *accord Noe v. R.R. Donnelley & Sons*, No. 10 C 2018, 2011 U.S. Dist. LEXIS 39492, at \*6 (N.D. Ill. Apr. 12, 2011) (“Indeed, privileges often protect information that is relevant to the litigants’ dispute.” (citation omitted)).

145. *Desclos*, 903 A.2d at 956 (citations omitted). *See, e.g., Deborah Paruch, From Trusted Confidant to Witness for the Prosecution: The Case Against the Recognition of a Dangerous-Patient Exception to the Psychotherapist-Patient Privilege*, 9 U.N.H.L. REV. 327, 331 (2011) (“[U]nlike other rules of evidence designed to improve the reliability of the fact-finding process, the rules governing the scope and effect of privileges operate to ‘impede the search for truth by excluding evidence that may be highly probative.’ Privileges are justified by the need to protect the privacy of certain relationships and the need to encourage open communications within these relationships.”); *Anderson, supra* note 3, at 122 (“[P]rivileges by their nature exclude relevant evidence but do so in favor of a competing public policy.”); *Smith, supra* note 3, at 117 (“[P]rivileges necessarily run counter to truth-seeking functions.”).

prescribed circumstances.”<sup>146</sup> Numerous state supreme courts have echoed this conclusion,<sup>147</sup> as did the Supreme Court, definitively, in *Jaffee*.<sup>148</sup>

Injecting a relevancy test when deciding the question of waiver, then, ignores the seminal fact that a testimonial privilege *perforce* sacrifices potentially relevant information in favor of the public policies that led the legislators to codify the privilege or, in the case of the federal common law, the Supreme Court to do so. Indeed, Justice Scalia’s dissent in *Jaffee* is telling on this score. Justice Scalia protested that the “purchase price” of the Court’s decision to recognize the privilege is “occasional injustice,” adding that “[t]hat is the cost of every rule which excludes reliable and probative evidence.”<sup>149</sup> Justice Scalia was the only member of the Court to so argue: all of the other justices voted in favor of imposing that cost,<sup>150</sup> explaining that “a psychotherapist-patient privilege will serve a public good transcending the normally predominant principle of utilizing all rational means for

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146. *R.K. v. Ramirez*, 887 S.W.2d 836, 842 (Tex. 1994) (citation omitted); *accord Hoffman v. Brookfield Republic, Inc.*, 87 P.3d 858, 864 (Colo. 2004) (quoting the same sentence in *R.K.*).

147. *See, e.g., Ex parte W. Mental Health Ctr.*, 884 So. 2d 835, 841 (Ala. 2003) (“[N]or do we find any implication that the Legislature intended an exception to the psychiatrist-patient privilege to be applied where a party seeks information relevant to the issue of the proximate cause of another party’s injuries.”); *People v. District Court of Denver*, 719 P.2d 722, 727 n.3 (Colo. 1986) (“[W]e reject the application of a balancing test.” (citation omitted)); *Gould, Larson, Bennet, Wells & McDonnell, P.C. v. Panico*, 869 A.2d 653, 659 (Conn. 2005) (“[O]ur recent case law clearly underscores that mere need and relevance are not a sufficient basis to waive the [attorney-client] privilege.”); *Woods v. State*, No. 69237, 2017 Nev. Unpub. LEXIS 838 (Nev. Sept. 28, 2017) (“[E]ven if the information were relevant to Woods’ criminal proceeding, adopting a balancing test would introduce uncertainty into the attorney-client privilege’s application.”); *Desclos v. S. N.H. Med. Ctr.*, 903 A.2d 952, 957 (N.H. 2006) (“Relevance alone is not the standard for determining whether or not privileged materials should be disclosed.” (citations omitted)); *Cirale v. 80 Pine Street Corp.*, 316 N.E. 2d 301 (N.Y. 1974) (“[I]f the information sought is in fact privileged, it is not subject to disclosure no matter how strong the showing of need or relevancy.”); *In re Miller*, 584 S.E.2d 772, 785 (N.C. 2003) (“Such a [balancing] test, regardless of how well intentioned and conducted it may be, or how exigent the circumstances, would likely have, in the immediate future and over time, a corrosive effect on the privilege’s traditionally stable application and the corresponding expectations of clients.”); *In re J.M.G.*, 229 A.3d 571, 579 (Pa. 2020) (“[T]he policy goals underlying the psychotherapist-patient privilege is not dependent on evidentiary value or ‘protection of the fact finding process.’ Rather, it is designed to strengthen and protect the therapeutic relationship between a patient and his or her mental health treatment providers, without which the goals of this Commonwealth’s mental health treatment policies could not be achieved.”); *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994) (“[R]elevance alone cannot be the test, because such a test would ignore the fundamental purpose of evidentiary privileges, which is to preclude discovery and admission of relevant evidence under prescribed circumstances.” (citation omitted)); *State ex rel. Med. Assurance of W. Va., Inc. v. Recht*, 583 S.E.2d 80, 92 (W. Va. 2003) (“[U]sing a balancing test to govern the discoverability of privileged communications is unknown to the common law.”).

148. *See Jaffee*, 518 U.S. at 17; *see, e.g., Kronenberg v. Baker & McKenzie LLP*, 747 F. Supp. 2d 983, 985 (N.D. Ill. 2010) (“[C]onsistent with the importance attached to that vital public interest, the Court in *Jaffee* rejected any balancing test that would allow a judge, in determining questions of privilege, to weigh the privilege against the asserted need for the evidence.”).

149. *Jaffee*, 518 U.S. at 18–19 (Scalia, J., dissenting).

150. Chief Justice Rehnquist joined the majority in establishing the psychotherapist-patient privilege. *See id.* at 18 (noting that Chief Justice Rehnquist joined Justice Scalia only as to Part III of his dissent, i.e., regarding extension of the privilege to social workers).

ascertaining truth.”<sup>151</sup> Legislatures that have passed statutes codifying the psychotherapist-patient privilege have similarly voted to impose that cost: “By creating an evidentiary privilege, society has made a judgment that fostering certain ideals or relationships is worth the potential sacrifice involved in terms of the loss of relevant evidence.”<sup>152</sup> Courts should not, through judicial fiat, engraft an antithetical balancing test upon those statutes.<sup>153</sup>

As the dissent in *Magney* pointed out, finally, the majority conflated waiver with relevance.<sup>154</sup> Relevance is a threshold requirement for the discovery of facts in any litigation. In Washington, for example, Civil Rule 26(b)(1) limits discovery to material that “is relevant to the subject matter involved in the pending action.”<sup>155</sup> As we have just seen, however, the whole point of the psychotherapist-patient privilege is to preclude discovery and admission of evidence even when it is relevant. “[I]f relevance were the test, then privilege may as well not exist, because even unprivileged material must be relevant to be discoverable.”<sup>156</sup> This is precisely the conclusion that eight justices of the Supreme Court reached in *Jaffee*: “Making the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.”<sup>157</sup>

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151. *Id.* at 15 (citation and internal quotations omitted).

152. *Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 631 (S.D. Cal. 1999); *accord* *Smith*, *supra* note 3, at 117 (“Privileges exist where courts or legislatures have determined, for policy reasons, that such evidence should be protected from disclosure, notwithstanding its relevance.”).

153. *See, e.g., Ex parte W. Mental Health Ctr.*, 884 So. 2d 835, 841 (Ala. 2003) (“[N]or do we find any implication that the Legislature intended an exception to the psychiatrist-patient privilege to be applied where a party seeks information relevant to the issue of the proximate cause of another party’s injuries.”); *Clark v. Dist. Court*, 668 P.2d 3, 9 (Colo. 1983) (“There being no statutory language conditioning the applicability of the physician-patient and psychologist-client privileges on a judicial balancing of interests, we decline to engraft one onto the statute.”).

154. *Magney v. Pham*, 466 P.3d 1077, 1089 (Wash. 2020). (McCloud, J., concurring in part and dissenting in part); *accord* Megan I. Brennan, *Evidence, Social Psychology, and Health Care: Scalpel Please: Cutting to the Heart of Medical Records Disputes in Employment Law Cases*, 41 WM. MITCHELL L. REV. 992 (2015) (“Courts often conflate privilege/waiver with relevancy . . . .” (footnote and internal quotations omitted)); Melissa L. Nelken, *The Limits of Privilege: The Developing Scope of Federal Psychotherapist-Patient Privilege Law*, 20 REV. LITIG. 1, 22 (2000) (“Compelling disclosure of confidential communications simply because the plaintiff claimed emotional distress damages would confuse relevance and the limits of privilege . . . .”).

155. Wash. CR 26(b)(1).

156. *Magney*, 466 P.3d at 1092 (McCloud, J., concurring in part and dissenting in part).

157. *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996); *accord* *Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1998) (“Balancing ex post the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege’s application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege.” (citations omitted)); *United States v. Salerno*, 505 U.S. 317, 323 (1992) (“Parties may forfeit a privilege by exposing privileged evidence, but do not forfeit one merely by taking a position that the evidence might contradict.”); *Sims v. Blot*, 534 F.2d 117, 141–42 (2d Cir. 2008) (“If this principle were not the rule, then in virtually every case a forfeiture might be found, as in virtually every case the party opposing the privilege could argue that the psychological record might reveal evidence that the party asserting the privilege is testifying falsely.”).

The Iowa Supreme Court's decision in *Fagen v. Grand View Univ.*<sup>158</sup> is similarly of limited usefulness to our analysis. In *Fagen*, a personal injury case,<sup>159</sup> the court examined the issue of implied waiver under patient-litigant exception.<sup>160</sup> In addition, the court announced that “[t]he person seeking the patient’s waiver need only advance some good-faith basis demonstrating how the records are reasonably calculated to lead to admissible evidence germane to an element or factor of the claim or defense.”<sup>161</sup> As in *Magney*, the court thus erroneously conflated waiver with relevancy and suggested a rule for waiver that is no different than the fundamental rule that all evidence sought must be reasonably calculated to lead to admissible evidence.<sup>162</sup> *Fagen* is plainly wrong to the extent that it vitiates the psychotherapist-patient privilege based upon a mere showing of relevancy, and it is limited to the statute upon which it is based.<sup>163</sup>

Nonetheless, the court left the door open to a garden variety approach:

[T]he record on appeal does not include discovery documents identifying the mental injury damages Fagen is seeking. The briefs and pleadings indicate he is only claiming damages for garden-variety pain and suffering and mental distress, which he defines as the emotional suffering any normal person would have experienced because of the assault he endured, and not as a specific psychiatric or psychological condition. He also claims in his brief and pleadings that he does not intend to introduce expert witnesses to support this claim.

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158. *Fagen v. Grand View Univ.*, 861 N.W.2d 825 (Iowa 2015).

159. *Id.* at 828.

160. *See id.* at 832; *see, e.g.*, *Gunzinger v. John Lucas Tree Experts Co.*, No. 2:17-CV-00125-GZS, 2017 U.S. Dist. LEXIS 186903, at \*19 n.4 (D. Me. Nov. 12, 2017) (noting, analogously, that an Iowa district court’s assessment “pertained to an implied waiver of the privilege by virtue of the application of Iowa’s patient-litigant exception,” and concluding that “it interprets Iowa state law and is neither controlling nor persuasive”). As this Article makes clear, and as the New Mexico, Oklahoma, and Texas decisions cited *supra* confirm, a plaintiff does not put her mental health “at issue,” and thus does not trigger a patient-litigant exception, by merely alleging emotional distress damages. *See supra* notes 112–123 and accompanying text. Accordingly, this statutory exception should not have altered the court’s conclusion.

161. *Fagen*, 861 N.W.2d at 835.

162. *See* Iowa R. Civ. P. 1.503(1) (information sought in discovery must be “relevant to the subject matter involved in the pending action” and “reasonably calculated to lead to the discovery of admissible evidence”).

163. The court repeatedly explained that its decision was based upon, and indeed mandated by, the specific patient-litigant exception in question. *See, e.g.*, *Fagen*, 861 N.W.2d at 832 (“The statute provides for a patient-litigant exception.” (citation omitted)); *id.* at 832 (“Iowa has deemed that when a person files a claim he or she waives privilege under section 622.10. . . .” (citation omitted)); *id.* at 832 (“The statute recognizes two competing interests . . . .” (citation omitted)); *id.* at 832 (“If the patient-litigant exception is applicable, Iowa law no longer protects as privileged the information to which the exception applies.”); *id.* at 833 (“The last sentence of Section 622.10(2) clearly limits the admissibility of the waived record only if . . . .” (citation omitted)); *id.* at 834 (“The language of Section 622.10 is clear and unambiguous. The legislature has determined the patient-physician privilege is not absolute in the context of civil litigation.”); *id.* at 834 (“To decide when and how a party will be required to provide a waiver to allow another party in a civil case to access mental health records, we must construe section 622.10.”).

However, the record on appeal does not include discovery documents limiting his claim to a garden-variety mental distress claim. Additionally, the record does not include any discovery responses stating the extent or nature of his mental distress claim. Furthermore, the record does not include medical records regarding his physical injuries to gain further insight into his damage claims in this case.<sup>164</sup>

If mere relevance is the test, then the question of “garden variety” mental distress is irrelevant, as are the other hallmarks of Tier One analysis cited by the court: whether plaintiff experienced “a specific psychiatric injury or psychological condition”; whether plaintiff “intend[s] to introduce expert witnesses to support [her] claim”; and “the extent or nature of [her] mental distress claim.”<sup>165</sup> As one of the three bases for his dissent, moreover, Judge Mansfield protested: “I do not believe the underlying statute . . . allows for a garden-variety exception.”<sup>166</sup> Not surprisingly, then, *Fagen* has sewn confusion among commentators. One commentator has observed: “[T]he court deemed the plaintiff’s mental health records irrelevant to the garden-variety emotional distress damages he was claiming, and his medical records were kept confidential,”<sup>167</sup> while another has observed that, contrary to the Tier One approach, “in Iowa, under *Fagen*, the need for information is the controlling principle.”<sup>168</sup>

Finally, the only two state supreme court cases to clearly adopt a broad approach involve, like *Fagen*, personal injury claims and express patient-litigant exceptions. Hence, in *Vahai v. Gertsch*,<sup>169</sup> the Supreme Court of Wyoming adopted a broad rule under an exception to the privilege “where a patient or client, *by alleging mental or emotional damages* in litigation, puts his mental state in issue.”<sup>170</sup> Similarly, in *Dudley v. Stevens*,<sup>171</sup> the Supreme Court of Kentucky adopted a broad approach under a Kentucky statute providing an exception where “the patient is asserting that patient’s mental condition as an element of a claim or defense.”<sup>172</sup>

In sum, a sizeable majority of state supreme courts has rejected the broad approach to implied waiver. Those that have adopted the broad approach have done so in personal injury cases and pursuant to express patient-litigant statutes,

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164. *Id.* at 830, 836 (“Both [parties] are urging an absolute rule. We disagree with both positions.”).

165. *Id.* at 836.

166. *Id.* at 837 (Mansfield, J., dissenting).

167. Emma Garl Smith, *The Importance of the Garden-Variety Exception to Mental Health Privilege Waivers in Protecting Patient Privacy*, 27 ANNALS HEALTH L. ADVANCE DIRECTIVE 72, 77 (2017). Note that, among other things, in *Fagen*, the court did not rule that plaintiff’s mental health records be kept confidential, but instead found: “we are unable to determine from the record before us and the arguments made by the parties whether [defendant] is entitled to a waiver releasing the specific records he seeks,” and remanded the case to the district court. *Fagen*, 861 N.W.2d at 836.

168. Abdullah M. Azkalany, Note, *A Comparative Examination of the Doctor-Patient Privilege in State and Federal Courts in Iowa*, 67 DRAKE L. REV. 495, 509 (2019).

169. *Vahai v. Gertsch*, 455 P.3d 1218 (Wy. 2020).

170. WYO. STAT. ANN. § 33-27-123 (emphasis added). See *Vahai*, 455 P.3d at 1237.

171. *Dudley v. Stevens*, 338 S.W.3d 774 (Ky. 2011).

172. KRE 507(c)(3); see *Dudley*, 338 S.W.3d at 776.

circumstances inapposite to the interpretation of civil rights claims and state privilege laws lacking such exceptions.

### III. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE AND EMOTIONAL-DISTRESS CLAIMS IN NEW YORK: ESTABLISHING A CERTAIN AND PRINCIPLED RULE

“[T]he question of whether this privilege has indeed been forfeited requires careful scrutiny.”<sup>173</sup> In the quarter century since *Jaffee*, many federal and state courts throughout the country have applied that scrutiny, including New York’s federal courts.<sup>174</sup> Anomalously, however, New York’s state courts from top to bottom have failed to address this question. As a result, a quarter century of jurisprudence has simply passed New York by. Civil rights (and other) plaintiffs in New York have no idea whether, and under what circumstances, they will be deemed to have impliedly waived their privilege. This has created an unjust discrepancy: claimants in New York’s federal court are subject to the established “garden-variety” rule, which protects the privilege (if imperfectly) in many instances, while claimants in state court—advancing the same civil rights claims—face an “uncertain privilege.”<sup>175</sup> Still worse, when courts perfunctorily, and without analysis, resort to the broad rule, as in *Gomez* (discussed in Section II, *supra*), they enjoy no privilege at all.

Civil rights litigants in the nation’s third-largest state, and the nation’s largest city, deserve better. New York courts must reject the broad approach to waiver, as New York’s federal courts, and the clear majority of both federal and state supreme courts, have done. In doing so, the courts should adopt a narrow approach. As the following discussion reveals, this approach not only provides the certainty that is essential to protecting patients’ rights, but it comports with fundamental principles of waiver and privilege and the spirit and purpose of New York’s civil rights laws.<sup>176</sup>

#### *A. Implied Waiver of the Privilege in New York’s Federal Courts*

In *Sims v. Blot*,<sup>177</sup> an excessive force lawsuit against corrections officers,<sup>178</sup> respondents/defendants argued that application of the psychotherapist-patient privilege “will deny defendants information vital to their defense” and necessary “to allow defendants to rebut Sims’s testimony.”<sup>179</sup> They contended that anyone who asks for pain and suffering damages “has waived the psychiatric privilege,” and that

173. *Malowsky v. Schmidt*, No. 3:15-CV-666, 2017 U.S. Dist. LEXIS 229306, at \*6 (N.D.N.Y. Jan. 9, 2017).

174. See *infra* Section IV.A.; *Laudicina v. City of Crystal Lake*, 328 F.R.D. 510, 512 (N.D. Ill. Oct. 29, 2018) (“The judges in the U.S. District Court for the Northern District of Illinois – indeed, nationwide – have been collectively wrapped around an axle on this issue for decades.” (citations omitted)).

175. *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996).

176. See *infra* Section IV.C.

177. *Sims v. Blot*, 534 F.3d 117 (2d Cir. 2008).

178. *Id.* at 120.

179. *Id.* at 127 (emphasis omitted). Respondents so argued even after plaintiff represented “that he would not offer any evidence at trial with respect to his mental state.” *Id.*

“psychiatric records might conceivably disprove the experiencing of the pain and suffering.”<sup>180</sup> Rejecting these arguments, the court observed that if it accepted these rationales for discovery, “the confidentiality of the psychotherapist-patient communications would be uncertain—if not extinguished—in a great number of cases.”<sup>181</sup> Citing “the transcendent importance of the psychotherapist-patient privilege as discussed in *Jaffee*,”<sup>182</sup> the court rejected the lower court’s finding that “fairness required that Sims’s disclose his psychiatric records,”<sup>183</sup> ruling:

[W]e reject respondents’ contentions that anybody who requests damages for pain and suffering has waived the psychiatric privilege because the psychiatric records might conceivably disprove the experiencing of the pain and suffering, that any claim of even . . . “garden variety” injury waives the psychotherapist-patient privilege, and that a plaintiff’s mental health is placed in issue whenever the plaintiff’s claim for unspecified damages may include some sort of mental injury. In reality respondents simply seek to have the privilege breached whenever there is a possibility that the psychiatric records may be useful in testing the plaintiff’s credibility or may have some other probative value. To accept these contentions would inject the balancing component that *Jaffee* foreclosed, and would disregard the principle that “[p]arties . . . do not forfeit [a privilege] merely by taking a position that the evidence might contradict.” If this principle were not the rule, then in virtually every case a forfeiture might be found, as in virtually every case the party opposing the privilege could argue that the psychological record might reveal evidence that the party asserting the privilege is testifying falsely.<sup>184</sup>

The Second Circuit did not expressly define the term “garden variety” other than the unhelpful “garden-variety emotional injury that would ordinarily result from a physical assault.”<sup>185</sup> The court did, however, note: “[W]e look to see whether the privilege holder took affirmative steps to inject privileged materials into the litigation.”<sup>186</sup> The court also favorably cited the analysis in *Koch v. Cox*,<sup>187</sup> under which a plaintiff waives the privilege “if he ‘does the sort of thing that would waive the attorney-client privilege, such as basing his claim upon the psychotherapist’s communications with him,’ or ‘selectively disclos[ing] part of a privileged communication in order to gain an advantage in litigation,’ or ‘su[ing] the therapist

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180. *Id.* at 130 (emphasis omitted).

181. *Id.* at 129.

182. *Id.* at 134.

183. *Id.* at 120.

184. *Id.* at 141–42 (quoting *United States v. Salerno*, 505 U.S. 317, 323 (1992)) (additional citations and quotations omitted).

185. *Id.* at 129.

186. *Id.* at 132 (internal quotations removed) (quoting *United States v. Doe*, 219 F.3d 175, 187 (2d Cir. 2000)).

187. *Koch v. Cox*, 489 F.3d 384 (D.C. Cir. 2007).

for malpractice.”<sup>188</sup> These factors, it should be noted, are the touchstones of a narrow approach to waiver.

Since *Sims*, New York’s federal courts have adopted varying definitions of “garden variety,” with some focusing on whether the plaintiff advances claims for “serious distress,” i.e., “the inducement or aggravation of a diagnosable dysfunction or equivalent injury.”<sup>189</sup> Others have cited plaintiff’s agreement “not to offer any privileged communication or other evidence regarding her psychiatric treatment or condition” and disavowal of “any claim to non-garden-variety emotional injuries.”<sup>190</sup> A comprehensive review of all relevant cases, however, reveals a consensus in favor of the definition set forth in *Olsen v. County of Nassau*:

In “garden variety” emotional distress claims, the evidence of mental suffering is generally limited to the testimony of the plaintiff, who describes his or her injury in vague or conclusory terms, without relating either the severity or consequences of the injury. Such claims typically lack extraordinary circumstances and are not supported by any medical corroboration.<sup>191</sup>

Like all Tier One formulations, this definition is imprecise, with the words “generally” and “typically” signaling room for additional discretion.<sup>192</sup> Nonetheless, the broad contours are there, with two essential elements emerging. *First*, Tier One claims are not supported by medical testimony and evidence.<sup>193</sup> *Second*, and relatedly, Tier One claims generally do not involve the kind of “substantial harm” that might

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188. *Sims*, 534 F.3d at 133–34 (quoting *Koch*, 489 F.3d at 391).

189. Willey v. Kirkpatrick, No. 07-CV-6484CJS, 2011 U.S. Dist. LEXIS 105863, at \*8 (W.D.N.Y. Sept. 19, 2011) (quoting *Kunstler v. City of New York*, No. 04 Civ. 1145, 2006 U.S. Dist. LEXIS 61747, at \*7 (S.D.N.Y. Aug. 29, 2006)); accord *Diunugala v. Dep’t of Conservation*, No. CV 16-03530-DSF, 2018 U.S. Dist. LEXIS 229721, at \*3 (C.D. Cal. Jan. 31, 2018) (“Emotional distress that is not garden variety may be complex, such as that resulting in a specific psychiatric disorder.”).

190. *Griffin v. Quest Diagnostics, Inc.*, No. CV 10-4560, 2011 U.S. Dist. LEXIS 74595, at \*2 (E.D.N.Y. July 12, 2011).

191. *Olsen v. Cnty. of Nassau*, 615 F. Supp. 2d 35, 46 (E.D.N.Y. 2009) (citations and internal quotations omitted). Courts in the Second Circuit utilize three tiers of emotional distress claims. According to this formulation:

“Significant” emotional distress claims differ from the garden-variety claims in that they are based on more substantial harm or more offensive conduct, are sometimes supported by medical testimony and evidence, evidence of treatment by a healthcare professional and/or medication, and testimony from other, corroborating witnesses. Finally, “egregious” emotional distress claims generally involve either outrageous or shocking discriminatory conduct or a significant impact on the physical health of the plaintiff.

*Id.* at 46–47.

192. For example, in *United States v. Asare*, one plaintiff produced a witness to his emotional distress at trial, but she was a lay witness. He did not proffer any medical diagnosis or corroboration, and claimed only Tier One damages. *United States v. Asare*, 476 F. Supp. 3d 20, 32, 37, 40 (S.D.N.Y. 2020).

193. The contradistinction with Tier Two claims buttresses this conclusion. See *Olsen*, 615 F. Supp. 2d at 46 (explaining that Tier Two claims differ from Tier One claims in that they “are sometimes supported by medical testimony and evidence”).

warrant evidence of treatment.<sup>194</sup> Whether testimony of emotional distress is “vague or conclusory” is arguably subsumed under these elements, for without the testimony of a mental health professional or evidence of a diagnosed mental health condition, the plaintiff’s testimony will by definition lack the specificity that only such evidence can provide.<sup>195</sup>

### *B. Implied Waiver of the Privilege in New York’s State Courts*

#### *1. New York’s Psychotherapist-Patient Privilege*

In New York, the psychotherapist-patient privilege is a creature of statute. In three different provisions of the Civil Practice Law and Rules, New York law establishes the privilege for psychiatrists,<sup>196</sup> psychologists,<sup>197</sup> and any “licensed master social worker” or “licensed clinical social worker.”<sup>198</sup> The provision governing psychologists, for example, provides: “The confidential relations and communications between a [registered] psychologist . . . and his client are placed on the same basis as those provided by law between attorney and client, and nothing in such article [of the education law] shall be construed to require any such privileged communications to be disclosed.”<sup>199</sup>

Like the Supreme Court, New York courts have recognized that for psychotherapy to be effective, there must be an atmosphere of confidence and trust:

Imbedded in these three statutes is the recognition that such professionals could not provide the service of mental and emotional healing unless their patients “opened up” to them, disclosing innermost secrets, longings and conflicts of the individual’s psyche. Without such frank disclosure by the patient, the rewarding fruits of a psychotherapist’s careful and important work can never be realized.<sup>200</sup>

Also like the Supreme Court, the New York Court of Appeals has recognized that the privilege “is in derogation of the common law,” but it should nonetheless

194. *See id.*

195. *See, e.g.,* Henderson v. Rite Aid of N.Y., Inc., No. 16-CV-785V, 2018 U.S. Dist. LEXIS 101620, at \*12 (W.D.N.Y. June 18, 2018) (“[T]o the extent that plaintiff intends to use mental health records as *evidence of significant trauma or a diagnosable mental health condition* caused by the allegations in her complaint, she cannot shield her mental health records, including her mental health history, from review by defendants.” (emphasis added)); Willey v. Kirkpatrick, No. 07-CV-6484CJS, 2011 U.S. Dist. LEXIS 105863, at \*8 (W.D.N.Y. Sept. 19, 2011) (“[C]laims for serious distress refer to claims for ‘the inducement or aggravation of a *diagnosable dysfunction or equivalent injury*.’” (emphasis added) (quoting Kunstler v. City of New York, No. 04 Civ. 1145, 2006 U.S. Dist. LEXIS 61747, at \*7 (S.D.N.Y. Aug. 29, 2006))).

196. N.Y. C.P.L.R. 4504(a) (McKinney 2021).

197. N.Y. C.P.L.R. 4507 (McKinney 2021).

198. N.Y. C.P.L.R. 4508 (McKinney 2021).

199. N.Y. C.P.L.R. 4507 (McKinney 2021).

200. Siesto by Siesto v. Lenox Hill Hosp., 640 N.Y.S.2d 737, 739 (Sup. Ct. 1996) (citation omitted).

“be afforded a broad and liberal construction to carry out its policy of encouraging full disclosure by patients so that they may secure treatment.”<sup>201</sup>

Under New York’s separate evidentiary privileges, only the psychologist-patient privilege is expressly placed on the same footing as the attorney-client privilege.<sup>202</sup> There is, however, no principled basis for distinguishing among these privileges with respect to psychotherapy and implied waiver. All three—psychiatrists, licensed social workers, and psychologists—engage in psychotherapy.<sup>203</sup> Indeed:

Whether the protected relationship involves physician, psychologist or certified social worker, all share the common purpose of encouraging the patient or client fully to disclose the nature and details of his illness or his emotions without fear of later revelation by one in whom he placed his trust and confidence.”<sup>204</sup>

Not surprisingly, the Supreme Court included all three under the federal common law, in furtherance of the “public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”<sup>205</sup>

The Court of Appeals, moreover, has specifically ruled that the privilege governing the patient-*psychiatrist* relationship should be liberally construed “to carry out its policy of encouraging full disclosure by patients so that they may secure treatment.”<sup>206</sup> Meanwhile, the statute governing licensed social workers expressly provides four exceptions to the privilege, none of which resembles a patient-litigant exception.<sup>207</sup> In addition, excluding licensed social workers would be both discriminatory and antithetical to the civil rights laws, for “social workers are often the predominant mental health providers in inner-cities, frequently serving non-Caucasian populations.”<sup>208</sup> As the Supreme Court concluded in *Jaffee*, social workers’ “clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions

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201. *People v. Rivera*, 33 N.E.3d 465, 469 (N.Y. 2015) (citation and internal quotations omitted). *Rivera* concerned defendant’s “admissions to his psychiatrist.” *Id.* at 470.

202. *See* N.Y. C.P.L.R. 4504 (McKinney 2021); N.Y. C.P.L.R. 4507 (McKinney 2021); N.Y. C.P.L.R. 4508 (McKinney 2021).

203. *See* N.Y. EDUC. LAW § 8401(2) (McKinney 2021) (containing broad definition of “Psychotherapy”).

204. *Perry v. Fiumano*, 403 N.Y.S.2d 382, 384 (App. Div. 1978) (citations omitted); *accord* *Liberatore v. Liberatore*, 955 N.Y.S.2d 762, 765 (Sup. Ct. 2012) (“The shared purpose of these statutes is to encourage ‘the patient or client fully to disclose the nature and details of his illness or his emotions without fear of later revelation by one in whom he placed his trust and confidence.’” (quoting *Perry*, 403 N.Y.S.2d at 384)).

205. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

206. *Rivera*, 33 N.E.3d at 469.

207. *See* N.Y. C.P.L.R. 4508(a) (McKinney 2021) (providing exceptions only: upon client authorization; for communications regarding a crime or harmful act; where the client is under 16; and where the client brings charges against the social worker).

208. Rebecca S. Auerbach, Comment, *New York’s Immediate Need for a Psychotherapist-Patient Privilege Encompassing Psychiatrists, Psychologists, and Social Workers*, 69 ALB. L. REV. 889, 909 (2006).

serve the same public goals.”<sup>209</sup> Hence, “[d]rawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose.”<sup>210</sup>

## 2. *The Case Law*

In *Quinter-Dolenz v. Choy*,<sup>211</sup> the *only* New York case on point, future Court of Appeals Justice Abdus-Salaam ruled that “[e]ven if plaintiff has consulted or is being treated by mental healthcare providers, plaintiff’s garden variety emotional pain and suffering claim (as distinguished from a specific claim for psychological damages) does not necessitate discovery of plaintiff’s psychiatric or psychological records.”<sup>212</sup> Judge Abdus-Salaam adopted a “garden variety” approach without providing an analysis of the relevant issues or the myriad cases, post-*Jaffee*, that have thoughtfully engaged with the principles implicated by this question.<sup>213</sup> Unfortunately, no New York court has ever done so.

In *Koump v. Smith*,<sup>214</sup> the Court of Appeals adopted a general personal injury rule: “[B]y bringing or defending a personal injury action in which mental or physical condition is affirmatively put in issue, a party *waives* the [doctor-patient] privilege.”<sup>215</sup> This rule is plainly inapposite to the question of implied waiver of the psychotherapist-patient privilege in civil rights cases and is distinguishable on a number of grounds. *First*, this general personal injury rule merely begs the questions: when, precisely, is privileged material placed “in issue” and does a civil rights plaintiff place privileged psychological material at issue where she disavows any intent to reply upon or introduce privileged records or communications in support of her claim? The law has evolved on this issue over the past few decades,<sup>216</sup> and this hoary formulation does not begin to answer these questions. This explains why Justice Abdus-Salaam did not even mention this rule in adopting a Tier One approach.<sup>217</sup> *Koump* and its progeny shed no light on the specific issue addressed here, for decisions that fail to assess the relevant issues and approaches are neither enlightening nor persuasive.<sup>218</sup>

209. *Jaffee*, 518 U.S. at 16 (citation omitted).

210. *Id.* at 17 (quoting *Jaffee v. Redmond*, 51 F.3d 1346, 1358 n.19 (7th Cir. 1995)).

211. *Quinter-Dolenz v. Choy*, No. 103874/05, 2007 N.Y. Misc. LEXIS 9494 (Sup. Ct. Apr. 16, 2007).

212. *Id.* at \*4.

213. *See id.*

214. *Koump v. Smith*, 250 N.E.2d 857 (N.Y. 1969).

215. *Id.* at 861; accord *Dillenbeck v. Hess*, 536 N.E.2d 1126, 1132 (N.Y. 1989).

216. *See, e.g., Atkins v. LQ Mgmt.*, No. 3-13-0562, 2014 U.S. Dist. LEXIS 205230, at \*9 (M.D. Tenn. Sept. 30, 2014) (“[T]he law has evolved somewhat since 1998, in terms of the development of a majority view that psychiatric and psychological records of a plaintiff asserting only garden variety emotional distress claims are not discoverable.”).

217. *See Quinter-Dolenz*, 2007 N.Y. Misc. LEXIS 9494.

218. *See, e.g., LeGendre v. Cnty. of Monroe*, 600 N.W.2d 78, 90 (Mich. App. 1999) (rejecting broad approach to waiver and observing: “We have found very few cases holding to the contrary, and agree with the conclusion of other courts that have considered these cases that they are either

*Second*, as noted, this rule was crafted in personal injury rather than civil rights cases. In fact, in formulating the rule, the Court of Appeals in *Koump* opined that “in personal injury actions there is little reason for the [doctor-patient privilege].”<sup>219</sup> As the Supreme Court of Missouri has noted, however, “[i]njuries caused by deprivations of civil rights differ from most other tort claims,”<sup>220</sup> and in civil rights cases, there are strong policy arguments in favor of a narrow approach, for broad waiver is “antithetical to the purpose” of civil rights laws.<sup>221</sup>

This is particularly the case in New York: both New York’s state and city human rights laws express a strong policy against discrimination and a remedial purpose even broader than that provided under federal law.<sup>222</sup> Indeed, in 2005, the New York City Council (City Council) passed the Local Civil Rights Restoration Act of 2005 “to reverse the pattern of judicial decisions that had improvidently narrowed the scope of the law’s protections.”<sup>223</sup> Pursuant to the “uniquely broad and remedial purposes” of the Human Rights Law (HRL),<sup>224</sup> “courts must analyze [HRL] claims separately and independently from any federal and state law claims,

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distinguishable or were decided without analysis and are thus not persuasive”); *see also* Mara Kent and Thomas Kent, *Michigan Civil Rights Claimants: Should They Be Required to Give up Their Physician-Patient Privilege When Alleging Garden-Variety Emotional Distress?*, 77 U. DET. MERCY L. REV. 479, 498–99 (2000) (“It is clear that *for the courts that have thoroughly analyzed the issue*, production of privileged documents or compulsion to undergo a mental examination should be used only in certain, limited circumstances.” (emphasis added)).

219. *Koump*, 250 N.E.2d at 861.

220. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 567 (Mo. 2006).

221. *Ruhlmann v. Ulster Cnty. Dep’t of Soc. Servs.*, 194 F.R.D. 445, 451 (N.D.N.Y. 2000); *accord Kennedy v. Mun. of Anchorage*, 305 P.3d 1291, 1291(Alaska 2013) (“Moreover, wide-ranging inquiry into an individual’s medical and psychiatric history could deter legitimate discrimination claims.”); *Cunningham*, 182 S.W.3d at 566 (“To allow a wide-ranging and legally irrelevant inquiry into a claimant’s medical and psychological history could work at cross-purposes to the [Human Rights] Act by deterring legitimate claims.”). *See supra* notes 32–38 and accompanying text.

222. *See* N.Y. EXEC. LAW § 300 (McKinney 2021) (“The provisions of this article shall be construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed. Exceptions to and exemptions from the provisions of this article shall be construed narrowly in order to maximize deterrence of discriminatory conduct.”); N.Y. Inst. of Tech. v. State Div. of Hum. Rts., 353 N.E.2d 598, 603 (N.Y. 1976) (noting “[t]he State’s strong and important public policy against discrimination,” and finding that “the [state] Human Rights Law should be liberally construed in order to accomplish its purposes”); *infra* notes 223–226 and accompanying text (explaining uniquely broad, remedial purpose of New York City Human Rights Law).

223. *Williams v. N.Y.C. Hous. Auth.*, 872 N.Y.S.2d 27, 31 (App. Div. 2009) (quoting COMM. ON GEN. WELFARE, REPORT ON PROP. INT. No. 22-A, N.Y.C. LEGISLATIVE ANNUAL 536 (2005)); *accord* Local Civil Rights Restoration Act of 2005, N.Y.C. LOCAL LAW 85, § 1 (2005) (“It is the sense of the Council that New York City’s Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law.”).

224. N.Y.C. ADMIN. CODE § 8-130 (emphasis added); *see also Williams*, 872 N.Y.S.2d at 31 (“[T]he City HRL now explicitly requires an independent liberal construction analysis in all circumstances, even where State and federal civil rights laws have comparable language. The independent analysis must be targeted to understanding and fulfilling what the statute characterizes as the City HRL’s ‘uniquely broad and remedial’ purposes, which go beyond those of counterpart State or federal civil rights laws.”).

construing the [HRL]'s provisions broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible."<sup>225</sup> Finding that civil rights plaintiffs forfeit their psychotherapist-patient privilege by merely claiming emotional distress damages—an inevitable concomitant of civil rights lawsuits—robs civil rights litigants of the protections afforded in New York's federal courts and directly contravenes the legislature's "aim of making [the HRL] the most progressive in the nation."<sup>226</sup>

*Third*, the general personal injury rule lumps the physician-patient and psychotherapist-patient privileges together, sweepingly referring to any "mental or physical condition."<sup>227</sup> The privileges are different, however, and the question whether a personal injury plaintiff waives her privilege as to medical records is very different from the question whether a civil rights litigant waives the psychotherapist-patient privilege for distress incidental to the discrimination claim. As the Supreme Court explained in *Jaffee*:

Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.<sup>228</sup>

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225. *Mihalik v. Credit Agricole Cheuvreux N. Am.*, 715 F.3d 102, 109 (2d Cir. 2013) (citations and internal quotations omitted); *Albunio v. City of New York*, 947 N.E.2d 135, 137 (N.Y. 2011).

226. *Bumpus v. N.Y.C. Transit Auth.*, 859 N.Y.S.2d 893, 893 (Sup. Ct. 2008), *aff'd*, 883 N.Y.S.2d 99 (N.Y. App. Div. 2009) ("The New York City Human Rights Law sets forth a broad purpose. The legislative history contemplates that the Law be independently construed with the aim of making it the most progressive in the nation." (citations omitted)); *accord Jordan v. Bates Advert. Holdings, Inc.*, 816 N.Y.S.2d 310, 317 (Sup. Ct. 2006) ("The Administrative Code's legislative history clearly contemplates that the New York City Human Rights Law be liberally and independently construed with the aim of making it the most progressive in the nation.").

227. *Koump v. Smith*, 250 N.E.2d 857, 861; *accord Dillenbeck v. Hess*, 536 N.E.2d 1126, 1132 (N.Y. 1989).

228. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996); *accord Wei v. Bodner*, 127 F.R.D. 91, 97 (D.N.J. 1989) ("The relationship between a psychotherapist and her patient is substantially different from that between a doctor and her patient. Patients must confide their most intimate dreams, hopes, fears, and other personal information to their therapists. Without full disclosure there is little hope that the therapy can be successful. While there are other medical situations in which confidentiality may be equally important, courts have recognized the special relationships that psychotherapists have with their patients in according these communications legal confidentiality in some situations." (citations omitted)); *Mazza v. Huffaker*, 300 S.E.2d 833, 837 (N.C. App. Ct. 1983) ("Psychiatrists are physicians. The first duty of a physician to a patient is to do no harm; the second is to maintain the patient's trust and confidence in the physician. These basic duties apply and are even more stringent with psychiatrists, since a psychiatrist's patient reveals his innermost thoughts, feelings, worries, and concerns."); *Michael*

Perhaps for the same reason, “in New York, the confidentiality of an individual’s clinical psychiatric records is held to a stricter standard than an individual’s general medical records.”<sup>229</sup>

*Fourth*, the chief argument in favor of waiver cited in *Koump* and its progeny is that recognizing the privilege “would allow a party to use it as a sword rather than a shield.”<sup>230</sup> Under the sword-shield analogy, however, “a party cannot partially disclose *privileged communications* or affirmatively rely on *privileged communications* to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party.”<sup>231</sup> This analogy is plainly inapplicable where a plaintiff makes no use of the privileged communications in support of her emotional distress claim. As the court in *Vanderbilt v. Chilmark*<sup>232</sup> reasoned:

Plaintiff, here, is not using the privileged communication as a sword. Were she to introduce evidence regarding the substance of her conversations with her psychotherapist in order to further her claim of emotional damage, this court would agree that she could not shield the communication for others. She has, however, done no such thing.<sup>233</sup>

“[P]recluding plaintiffs from relying on the privileged communications to further their own claim,” the Alaska Supreme Court has explained, “prevents the privilege from being used as both a shield and a sword.”<sup>234</sup> Hence, provided that

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L. Orenstein, *The Psychotherapist-Patient Privilege*, 20 *TOURO L. REV.* 679, 702 (2004) (“During the diagnosis of a patient, a doctor does not need confidential information to recognize a heart attack. Nor would a doctor require confidential information to diagnose a sprained ankle. However, in mental health therapy, treatment necessarily requires reliance upon things that are extremely confidential, very sensitive, and there is a tremendous privacy concern.”); David L. Hayden, *Should There Be a Psychotherapist Privilege in Military Courts-Martial?*, 123 *MIL. L. REV.* 31, 40 (1989) (“Unlike the physician who may be able to cure ailments without the patients’ trust or communications, the psychotherapist must have the patients’ confidence. In few other situations will individuals bare their souls and subject themselves to the mental dissection of another. Communications in the psychotherapist-patient relationship can only originate in confidence that they will not be disclosed.”).

229. *Midgett v. Beth Israel Med. Ctr.*, 916 N.Y.S.2d 888, 893 (Sup. Ct. 2010). The generic lumping of the “mental or physical” is categorically wrong at least with respect to the psychologist-patient privilege, for the New York Legislature placed the psychologist-patient privilege on a higher footing, i.e., “on the same footing as that between attorney and client rather than physician and patient.” *People v. Wilkins*, 480 N.E.2d 373, 377 (N.Y. 1985). As discussed *supra*, however, at least with respect to implied waiver, the policy considerations in favor of a broad privilege apply equally to all three psychotherapist-patient privileges. See *supra* notes 203–210 and accompanying text.

230. *Koump*, 250 N.E.2d at 861. See, e.g., *Dillenbeck*, 536 N.E.2d at 1135 (“[T]he person asserting the privilege cannot have it both ways and especially may not use the shield as a sword.”).

231. *United States v. Doe*, 219 F.3d 175, 182 (2d Cir. 2000) (emphasis added).

232. *Vanderbilt v. Chilmark*, 174 F.R.D. 225 (D. Mass. 1997).

233. *Id.* at 230.

234. *Kennedy v. Mun. of Anchorage*, 305 P.3d 1284, 1289 (Alaska 2013) (quoting *Fitzgerald v. Cassil*, 216 F.R.D. 632, 637 (N.D. Cal. 2003)); accord *Morrisette v. Kennebec Cnty.*, 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.”); *Hucko v. City of Oak Forest*, 185 F.R.D. 526, 528 n.3 (N.D. Ill. 1999) (“A number of other district courts have held that allegations of emotional pain and suffering can impliedly waive the psychotherapist-patient privilege,

the plaintiff does not “use the substance of her communication, by calling her psychotherapist as a witness, for example, or by testifying to the substance of the communication herself,”<sup>235</sup> she has not used the privilege as a sword and thus has not waived it, as numerous courts and commentators have concluded.<sup>236</sup>

The provenance of the sword-shield analogy under New York law buttresses this conclusion. In the first usage of the analogy, the Court of Appeals examined a case in which a physician “testified fully in [plaintiff’s] behalf as to all of the facts bearing upon her physical condition, as affected by the accident on the defendant’s railroad.”<sup>237</sup> In a second trial against the same defendant, the plaintiff objected to the introduction of physician-patient communications with the same physician “upon the ground that the information acquired by a physician, while attending a patient, was privileged and could not, therefore, be admitted against the plaintiff without her consent.”<sup>238</sup> The Court of Appeals rejected this argument,

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but in factual contexts where—unlike this case—the plaintiff sought to offer evidence from psychotherapists to bolster that claim.”)

235. *Vanderbilt*, 174 F.R.D. at 230 n.8.

236. *See, e.g.*, *Sims v. Blot*, 534 F.3d 117, 140 (2d Cir. 2008) (finding that where plaintiff “will not offer any testimony from Dr. Mihalakis concerning the effect of [his] emotional state . . . the district court erred in indicating that [plaintiff] essentially used his privilege as a sword” (citation omitted)); *Koch v. Cox*, 489 F.3d 384, 390 (D.C. Cir. 2007) (acknowledging sword-shield analogy but finding no issue since, “in this case [plaintiff] neither sued his therapist nor relied upon her communications with him”); *United States v. Robinson*, 5 F. Supp. 3d 933, 940 (S.D. Ohio 2014) (“In short, a plaintiff must use the privileged communication as evidence herself before she waives the privilege.”); *Johnson v. Trujillo*, 977 P.2d 152, 157 (Colo. 1999) (finding that where plaintiff, *inter alia*, “does not plan to call any expert witness to testify about her mental suffering,” there was no “danger that [plaintiff] is effectively making an unseemly, offensive use of the privilege”); *Noe v. R.R. Donnelley & Sons*, No. 10 C 2018, 2011 U.S. Dist. LEXIS 39492, at \*3–4 (N.D. Ill. Apr. 12, 2011) (“[T]he psychotherapist-patient relationship is not waived when a plaintiff does not intend at trial to offer evidence of consultations with a psychotherapist or rely on expert testimony concerning the distress allegedly caused by a defendant’s actions.”); *Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 632 (S.D. Cal. 1999) (“Even if the Plaintiff can be said to have placed her mental or emotional condition at issue by claiming damages for emotional distress, the Court finds that she has not waived the psychotherapist-patient privilege since she has not put the substance of communications between herself and her psychotherapist(s) at issue in this litigation.”); *D’Ambrosio*, *supra* note 35, at 942 (sword-shield analogy only applicable where plaintiff is “disclosing or introducing some privileged material”); *Smith*, *supra* note 3, at 143–44 (“[C]ourts should consider whether a plaintiff has truly attempted to use the privilege as a sword instead of a shield. Where the plaintiff seeks no claim to recover for payment of mental health treatment related to [an] accident and lists no mental health provider as a witness, there can generally be no finding that the plaintiff has made an offensive use of the privilege upon which a court could infer waiver.”) (citations and internal quotations omitted); *Nelken*, *supra* note 153, at 29 (regarding court’s use of sword-shield analogy: “The court’s reasoning ignores the fact that the plaintiff had not indicated any intent to use the counselor’s testimony to support her emotional distress claim”); *see also Hucko*, 185 F.R.D. at 528 n.3 (“A number of other district courts have held that allegations of emotional pain and suffering can impliedly waive the psychotherapist-patient privilege, but in factual contexts where—unlike in this case—the plaintiff sought to offer evidence from psychotherapists to bolster that claim.”).

237. *McKinney v. Grand St., P. P. & F. R. Co.*, 10 N.E. 544, 544 (N.Y. 1887).

238. *Id.*

observing: “The patient cannot use this privilege both as a sword and a shield, —to waive when it inures to her advantage, and wield when it does not.”<sup>239</sup>

Some courts posit, finally, that a plaintiff’s testimony as to the symptoms she has experienced implicates the psychotherapist-patient relationship and thus waives the privilege.<sup>240</sup> Provided that the plaintiff testifies without relating any privileged communications or evidence, this is incorrect. “[I]f emotional distress damages are to be supported by expert testimony or evidence of medical or psychological treatment, the privilege is waived. If such damages are to be inferred from the circumstances, the privilege is not waived.”<sup>241</sup> In the latter instance, the plaintiff sacrifices her ability to bolster her emotional distress claims with the significant assistance of expert testimony and professional diagnoses,<sup>242</sup> leaving both plaintiff

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239. *Id. See, e.g.,* U.S. Fid. & Guar. Co. v. Am. Re-Insurance Co., No. 604517/02, 2008 N.Y. Misc. LEXIS 10434, at \*6 (Sup. Ct. Oct. 21, 2008) (“[T]o selectively disclose privileged communications would cause the attorney-client privilege to be used as both a sword and a shield, resulting in fundamental unfairness.” (emphasis added) (quoting Weizmann Inst. of Sci. v. Neschis, No. 00 Civ. 7850, No. 01 Civ. 6993, 2004 U.S. Dist. LEXIS 4254, at \*9 (S.D.N.Y. Mar. 16, 2004)).

240. *See, e.g.,* Flowers v. Owens, 274 F.R.D. 218, 227 (N.D. Ill. 2011) (“[Plaintiff] could not testify about resulting symptoms or conditions such as his claimed persistent and pervasive fear of retaliation by the [police] . . . and still maintain the psychotherapist/patient privilege.”); Santelli v. Electro-Motive, 188 F.R.D. 306, 309 (N.D. Ill. 1999) (“[S]he may not offer evidence through any witness about symptoms or conditions that she suffered (e.g., sleeplessness, nervousness, depression).”). Testimony regarding persistent fear, and sleeplessness, nervousness, and depression, unadorned by psychotherapist communications or testimony, is merely factual, lay testimony, well within the ken of a lay jury. *See, e.g.,* Duarte v. St. Barnabas Hosp., 341 F. Supp. 3d 306, 321 (S.D.N.Y. 2018) (plaintiff’s complaints of “insomnia, lower self-esteem, depression, anxiety, and stomach aches and headaches — unsupported by medical corroboration — establish no more than ‘garden variety’ emotional distress”); MacCluskey v. Univ. of Conn. Health Ctr., 2017 U.S. Dist. LEXIS 23520, at \*49–50 (D. Conn.) (finding no waiver where plaintiff “described how the experience had affected and continues to affect her,” including her testimony of feeling “ashamed and embarrassed,” “afraid to be home alone,” and “afraid to go out in public”; that she “didn’t sleep for weeks”; that “her work was affected and that she used all of her time off when she started working at a new facility”; that she “always trusted people and now I don’t trust anybody”; and that “the harassment has also affected her relationship with her children”), *aff’d*, 707 Fed. Appx. 44 (2d Cir. 2017); Makinen v. City of New York, 167 F. Supp. 3d 472, 497 (S.D.N.Y. 2016) (finding merely “garden variety” claim where plaintiff testified that she “suffers from continuing anxiety, depression, restless legs, sleeplessness, and panic attacks as a result of Defendants’ conduct”; “described the physical symptoms of her panic attacks: her legs and arm[s] cramp up, her tongue swells, her heart races, and she experiences tunnel vision and shortness of breath”; and “testified that she had been prescribed anti-anxiety medication to treat her symptoms and that she continues to take the medication”), *aff’d in part and rev’d in part on other grounds*, 722 Fed. Appx. 50 (2d Cir. 2018); Ewald v. Royal Norwegian Embassy, Civil No. 11-CV-2116, 2014 U.S. Dist. LEXIS 192896, at \*16–17 (D. Minn. April 15, 2014) (finding claim merely “garden variety” where plaintiff alleged discrimination “damaged her self-esteem and self-confidence, and caused significant emotional distress, embarrassment, inability to trust, and other mental and physical symptoms of severe stress and anxiety”).

241. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 568 (Mo. 2006).

242. *See, e.g.,* Johnson v. Trujillo, 977 P.2d 152, 158 (Colo. 1999) (“[W]hen the jury calculates the amount of damages to award [plaintiff] . . . the jury will not be made aware of the details of her treatment for depression or her marriage counseling.”); *Flowers*, 274 F.R.D. at 220 n.2 (“An agreement to limit an emotional distress claim to ‘garden variety emotional damages’ limits not only the extent of allowable discovery by the defendant, but also limits the proof at trial and the amount of recoverable damages.”); *Santelli*, 188 F.R.D. 306, 309 (N.D. Ill. 1999) (“She may be better off disclosing her

and defendant in the same position they would have occupied if the plaintiff never sought treatment.<sup>243</sup>

A lay jury is perfectly capable of assessing the testimony of a lay witness as to the common symptoms of distress—e.g., headaches, sleeplessness, fatigue, sadness, depression, embarrassment, anxiousness, fear, strained relationships, and humiliation. Indeed, “[a] party seeking to have a mental health professional opine as to whether an opposing party truly felt embarrassed or humiliated or as to what it means to experience such emotions would be hard pressed to explain why such testimony was beyond the ken of a lay jury.”<sup>244</sup> A defendant can cross-examine the plaintiff and any fact witnesses,<sup>245</sup> and the “weight to be accorded the testimony of witnesses who testify about emotional distress is for the jury to determine under appropriate instructions.”<sup>246</sup> The fact that the privileged communications might nonetheless be relevant and useful to the defendant is irrelevant, for, as the Court of Appeals has explained, “if the information sought is in fact privileged, it is not subject to disclosure no matter how strong the showing of need or relevancy,”<sup>247</sup> and “[p]arties . . . do not forfeit [a privilege] merely by taking a position that the evidence might contradict.”<sup>248</sup>

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psychological records, which would allow her to make a broader damage claim.”); Anderson, *supra* note 3, at 143 (“The plaintiffs in these . . . cases chose to maintain the privilege rather than seek full recovery for their emotional distress.”).

243. See, e.g., Pritchard v. Cnty. of Erie, 546 F.3d 222, 229 (2d Cir. 2008) (“Here, . . . there is no unfairness . . . because [respondents] are ‘in no way worse off’ as a result of the disclosure that communications exist than they would be if they were unaware of them.” (quoting John Doe Co. v. United States, 350 F.3d 299, 305 (2d Cir. 2003))).

244. Jarrar v. Harris, No. CV 07-3299, 2008 U.S. Dist. LEXIS 57307, at \*7 (E.D.N.Y. July 25, 2008) (citation and internal quotations omitted); *accord id.* at \*16 (“Lay jurors are entirely competent to evaluate [plaintiff’s] allegations that he was scared, embarrassed, shamed, and humiliated as a result of the defendants’ alleged misconduct, and that he continues to feel similar emotions in certain situations to this day.”).

245. See, e.g., EEOC v. Big Five Corp., No. C17-1098RSM, 2018 U.S. Dist. LEXIS 85944, at \*12 (W.D. Wash. May 22, 2018) (“[W]hile the privilege may bar access to those records, [defendant] may cross-examine Mr. Sanders about other stressors or contributing factors that may explain or have contributed to the alleged emotional distress.”); Latour v. Town of Plainfield, No. CV 136006398, 2014 Conn. Super. LEXIS 1524, at \*14 (June 18, 2014) (“Defendant retains the right to attempt through cross examination or other means to impeach plaintiff’s credibility . . . .”); Fitzgerald v. Cassil, 216 F.R.D. 632, 638 (N.D. Cal. 2003) (“[The] broad approach to waiver . . . is not necessary to achieve basic fairness to the defendant. While the privilege may bar access to medical records, the defendant may cross-examine the plaintiff . . . about other stressors or contributing factors that may explain or have contributed to the alleged emotional distress.”).

246. *Flowers*, 274 F.R.D. at 226.

247. *Cirale v. 80 Pine St. Corp.*, 316 N.E.2d 301, 303 (N.Y. 1974).

248. *United States v. Salerno*, 505 U.S. 317, 323 (1992). See *Kronenberg v. Baker & McKenzie LLP*, 747 F. Supp. 2d 983, 985 (N.D. Ill. 2010) (“If this principle were not the rule, then in virtually every case a waiver might be found since the party opposing the privilege could argue plausibly that the psychological records might well reveal significant evidence that would contradict the evidence offered by the party asserting the privilege or call into question the privilege holder’s veracity.”).

*C. Adopting a Certain and Principled Approach*

Civil rights litigants in New York's state courts should enjoy a psychotherapist-privilege at least as strong as that accorded plaintiffs in New York's federal courts.<sup>249</sup> The lack of a certain rule in New York's state courts is not only unjust, but it has a chilling effect, forcing plaintiffs to eschew state court (if possible) for fear that their psychotherapist-patient privilege might be waived.<sup>250</sup> This means, at a minimum, rejecting a broad approach in favor of the Tier One approach utilized by New York's federal courts. The Tier One approach is, however, a compromise approach,<sup>251</sup> and like many compromises, it sacrifices principle, along with both certainty and justice. It is anything but certain, as courts have pointed out: "[T]he use of a test for waiver that hinges on an after-the-fact judicial assessment of numerous qualitative factors introduces a risk of uncertainty that the Supreme Court in *Jaffee* sought to avoid."<sup>252</sup> Indeed, to the extent that it calls upon a court to determine whether a plaintiff "does not exceed the kind of mental suffering that an ordinary person would experience in similar circumstances,"<sup>253</sup> it is, as noted, both wildly imprecise and offensive.<sup>254</sup> Additionally, it is "based more on considerations of relevance and fairness than on the law of privilege and waiver."<sup>255</sup> Relevance and fairness, however, are irrelevant to the question of implied waiver, for waiver

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249. See, e.g., *Claim of Lazarus*, 52 N.Y.S.2d 682, 687 (App. Div. 1944) ("While federal statutes and decisions are not binding on us they are highly persuasive and uniformity in interpretation is desirable."); *People v. Perez*, 848 N.Y.S.2d 525, 531 (Sup. Ct. 2007) ("Although not binding, federal court decisions concerning federal statutes analogous to state laws are generally highly persuasive authority, since uniformity in the interpretation of federal statutes and state statutes is desirable.").

250. See *supra* notes 47–48 and accompanying text.

251. See, e.g., *Wright v. Martinez*, No. 2:18-cv-01126-WJ-KRS, 2019 U.S. Dist. LEXIS 174421, at \*7 (D.N.M. Oct. 7, 2019) ("[T]he garden-variety concept represents a compromise between, obviously enough, the 'narrow approach' and the 'broad approach.'"); *Laudicina v. City of Crystal Lake*, 328 F.R.D. 510, 518 (N.D. Ill. 2018) ("But the 'garden variety' approach—being a compromise approach—can be problematic for plaintiffs as well.").

252. *Fitzgerald v. Cassil*, 216 F.R.D. 632, 639 (N.D. Cal. 2003); *accord* *Flowers v. Owens*, 274 F.R.D. 218, 225 (N.D. Ill. 2011) (noting "the imprecision and elasticity of the phrase 'garden variety'"); *McKenna v. Cruz*, No. 98 Civ. 1853, 1998 U.S. Dist. LEXIS 18293, at \*6 (S.D.N.Y. Nov. 19, 1998).

253. *Desclos v. S. N.H. Med. Ctr.*, 903 A.2d 952, 959 (N.H. 2006).

254. See *supra* notes 54–55 and accompanying text.

255. *Anderson*, *supra* note 3, at 119.

focuses upon the affirmative acts of the privilege holder,<sup>256</sup> and not the relevance of the material sought<sup>257</sup> or the “fairness” of honoring the privilege.<sup>258</sup>

Unlike the Tier One approach, the narrow approach provides the certainty that, among others, the Supreme Court and the Second Circuit have recognized as essential to the psychotherapist-patient privilege.<sup>259</sup> And unlike the broad approach, the narrow approach adheres to fundamental rules of waiver and privilege, by which a party waives the privilege only when she “does the sort of thing” that would waive the privilege, such as disclosing or relying upon privileged communications in support of her claim.<sup>260</sup>

Arguments against this approach almost invariably echo arguments against adoption of the privilege itself. Whether explicitly or implicitly, opponents of the narrow approach protest that the psychotherapist-patient privilege derogates from the principle that all relevant material should be discoverable and admissible.<sup>261</sup> They then ironically proceed to craft a rule that itself derogates from the principle that testimonial privileges are waived only where the party relies upon or discloses privileged communications. This is often done in the professed interest of “fairness.”<sup>262</sup>

256. See, e.g., *Amerex Group, Inc. v. Lexington Ins. Co.*, 678 F.3d 193, 201 (2d Cir. 2012) (“[T]he doctrine of waiver appropriately focuses on the actions—or inaction—of the party against whom waiver operates.”); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1125 (9th Cir. 2008) (“[W]aiver focuses on the actions of the party charged with waiver.”); *Hyland v. Sheldon*, 686 N.W.2d 198, 204 (Iowa 2004) (“Like waiver, this doctrine focuses on the action of the individual who holds the right to determine whether it has been waived.”); *Sims v. Blot*, 534 F.2d 117, 136 (2d Cir. 2008) (“[N]othing in the record here suggests that Sims made a knowing election to waive his psychotherapist-patient privilege.”); Smith, *supra* note 3, at 105 (“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.”).

257. See *supra* notes 142–156 and accompanying text.

258. See, e.g., *Sims*, 534 F.3d at 120 (rejecting lower court’s finding that “fairness required that Sims disclose his psychiatric records”); *Fitzgerald v. Cassil*, 216 F.R.D. 632, 637 (N.D. Cal. 2003) (fairness considerations “would render the psychotherapist-patient privilege pointless”); *Hucko v. City of Oak Forest*, 185 F.R.D. 526, 530 (N.D. Ill. 1999) (“[A]nalyzing the ‘fairness’ of whether to permit a claim of privilege or instead deem it waived would promote uncertainty in the scope of the privilege . . . .”); *Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 631 (S.D. Cal. 1999) (“Defendants’ argument that it would be ‘unfair’ not to require production of the records they seek because to do so might deprive them of important evidence that is relevant to the issue of emotional distress damages reflects a fundamental misunderstanding of the nature of the law of privilege.”); *infra* note 263 and accompanying text.

259. See *supra* notes 1, 64, 157, 181, 184 and accompanying text.

260. See *Sims*, 534 F.3d at 133–34; *Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007).

261. See, e.g., Boyd Isherwood, Note, *The Psychologist-Patient Privilege: Time for a Change in Kansas, or Is It All in Our Heads?*, 37 WASHBURN L.J. 659, 672 (1998) (“The chief argument against the psychotherapist privilege is that the court has ‘a right to every man’s evidence.’” (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950))).

262. See *Fitzgerald*, 216 F.R.D. at 636 (“The rationale behind the [broad] line of cases is generally based on fairness considerations.”); Smith, *supra* note 3, at 82 (“[U]nder the guise of implied waiver, many courts analyze the controversy employing considerations of privacy and fairness developed under the rules governing discovery procedure. . . . Such considerations, however, have no place in a determination of waiver.”); Anderson, *supra* note 3, at 135 (“Arguments for the broad

The difference, however, is that the legislature, in establishing the psychotherapist-patient privileges, has *already* considered the various policy issues involved in creating a privilege, and has *already* determined that establishing the privilege, and thus potentially sacrificing relevant evidence, is fair: “By creating an evidentiary privilege, society has made a judgment that fostering certain ideals or relationships is worth the potential sacrifice involved in terms of the loss of relevant evidence.”<sup>263</sup> The Court of Appeals has in fact recognized that the privilege must “be afforded a broad and liberal construction to carry out its policy of encouraging full disclosure by patients so that they may secure treatment.”<sup>264</sup> The Court of Appeals has also recognized that

it is inherent in the very nature of an evidentiary privilege that it presents an obstacle to discovery and it is precisely in those situations where confidential information is sought in advancing a legal claim that such privilege is intended to operate. Were we to carve out an exception to the privilege whenever it inhibited the fact-finding process, it would quickly become eviscerated.<sup>265</sup>

This is particularly the case in civil rights litigation, in which the purpose of the psychotherapist-patient privilege “would be defeated were the broad or uncertain test of waiver applied and suits vindicating civil rights and seeking recovery for general damages thereby deterred.”<sup>266</sup> Hence:

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.<sup>267</sup>

The standard of implied waiver in New York’s federal courts contains strong elements of the narrow approach, focusing as it should upon the question whether

approach rely mainly on the need for ‘fairness’ to defendants, who should be allowed to challenge the causation of emotional distress.”); D’Ambrosio, *supra* note 35, at 952 (broad view’s “fairness argument rests on an inactionable relevance argument”).

263. Fritsch v. City of Chula Vista, 187 F.R.D. 614, 631 (S.D. Cal. 1999); *accord Ex parte W. Mental Health Ctr.*, 884 So. 2d 835, 841 (Ala. 2003) (“[N]or do we find any implication that the Legislature intended an exception to the psychiatrist-patient privilege to be applied where a party seeks information relevant to the issue of the proximate cause of another party’s injuries.” (quoting *Ex parte Pepper*, 794 So. 2d 340, 344 (Ala. 2001))); *Zion v. New York Hosp.*, 590 N.Y.S.2d 188, 190 (App. Div. 1992) (“While, doubtless, the exemption from disclosure for the JCAH records may, on occasion, hamper a malpractice plaintiff’s ability to ascertain relevant information, the Legislature has made a determination that, on balance, this consideration is outweighed by the benefit the privilege confers on the general public.”); Smith, *supra* note 3, at 117 (“Privileges exist where courts or legislatures have determined, for policy reasons, that such evidence should be protected from disclosure, notwithstanding its relevance.”).

264. *People v. Rivera*, 33 N.E.3d 465, 469 (N.Y. 2015) (citation and internal quotations omitted). *Rivera* concerned defendant’s “admissions to his psychiatrist.”

265. *Dillenbeck v. Hess*, 536 N.E.2d 1126, 1133 (N.Y. 1989).

266. *Fitzgerald*, 216 F.R.D. at 639. *See supra* notes 32–41 and accompanying text.

267. *Smith*, *supra* note 3, at 119.

the plaintiff has sought to rely upon the testimony of or communications with the psychotherapist.<sup>268</sup> New York courts now have the opportunity to take the final step and adopt a narrow rule that is at once precise, easy to administer, and consonant with established principles of waiver and privilege.

#### CONCLUSION

As the majority of both federal and state supreme courts have concluded, the mere fact that emotional distress is “at issue” or “in controversy” does not mean that psychotherapist-patient communications are at issue or in controversy, even if they might be relevant to the litigation or helpful to the defendant. Instead, as both the Second and the D.C. Circuits have explained, a plaintiff waives the privilege only “if he ‘does the sort of thing that would waive the attorney-client privilege.’”<sup>269</sup> If the plaintiff never proffers confidential communications or the testimony of a psychotherapist in support of her claim, then she has not used the privilege as a “sword,” and she has not waived its protections.

Echoing Justice Scalia’s dissent in *Jaffee*,<sup>270</sup> critics of the narrow approach to implied waiver object to the perceived unfairness of honoring the privilege. Like Justice Scalia, however, critics lost this argument when their legislatures voted to enact a psychotherapist-patient privilege without including a balancing test, or an exception based upon “fairness” or “relevance.”<sup>271</sup> Until those legislatures change the laws to include automatic waivers based merely upon the interposition of an emotional distress claim, there is no principled basis for reading this exception into the law, and there can be no argument based upon “fairness.” Fairness requires that the laws be enforced as written, without engrafting exceptions that the legislature never intended. Such exceptions would eviscerate the privilege by rendering it uncertain, as numerous courts—including a nearly unanimous Supreme Court—have concluded. Concerns over fairness, moreover, are satisfied by precluding plaintiffs’ use of psychotherapist communications or testimony in support of their claims.

This is particularly of concern for civil rights plaintiffs, who invariably rely upon emotional distress damages for compensation. If a mere claim for such damages waives the privilege, then civil rights claimants will be deterred from bringing suit—from acting as “private attorneys general”—in contravention of the

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268. See *supra* note 193 and accompanying text.

269. *Sims v. Blot*, 534 F.3d 117, 133 (2d Cir. 2008) (quoting *Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007)).

270. *Jaffee v. Redmond*, 518 U.S. 1, 18–19 (1996) (Scalia, J., dissenting).

271. See, e.g., *Magney v. Pham*, 466 P.3d 1077, 1083 (Wash. 2020) (“To read an automatic waiver into the statute would violate the interpretive canon *expressio unius est exclusio alterius*.”); *Clark v. Dist. Ct., Second Jud. Dist.*, 668 F.2d 3, 9 (Colo. 1983) (“The legislature in enacting the physician-patient and psychologist-client privileges clearly delineated the type of information to which the privileges apply and, with equal clarity, designated those situations to which a particular privilege does not apply. When the legislature intended to qualify a privilege by permitting a court to balance interests in determining its applicability, it made its intent known in unmistakable terms.”).

spirit and purpose of federal, state, and local civil rights statutes. In light of this, and of “the transcendent importance of the psychotherapist-patient privilege,”<sup>272</sup> federal and state courts nationwide must reject the broad approach to implied waiver in favor of a narrow approach, which not only confers certainty, but which adheres to established principles governing waiver and testimonial privileges. Only then will plaintiffs be able to file suit “with some degree of certainty”<sup>273</sup> that the privilege will be honored.

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272. *Sims*, 534 F.3d at 134.

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

