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The Existing Confidentiality Privileges as Applied to Rape Victims

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I. INTRODUCTION

The judicial system often subjects the victim in a rape case to an inordinate amount of prejudicial circumstance in an attempt to preserve and protect the defendant's rights. Most often, the victim has been treated unfairly. This is demonstrated in the lack of confidentiality afforded the victim of rape when her rape-crisis center records are admitted into evidence and scrutinized in court. Of course, this can not be considered
analogous to the lack of confidentiality afforded to the tort victim when his or her medical records are scrutinized in court because medical issues relevant in a tort case are not present in a rape trial.

The victim of rape is clearly distinguishable from the plaintiff in a civil suit. For instance, the victim in a rape case is not a party to the suit, rather the state brings the cause of action. Further, in a tort case, the health of the plaintiff is at issue, whereas in a rape case, the victim's mental anguish is merely a consequence of the crime. The fact at issue in a rape case is the act itself, and not the victim's mental conditions as a result of the act. Yet, our judicial system often subjects the victim to a plethora of inquiries regarding her mental health.¹

It is evident that when this type of questioning occurs, the victim must overcome the presumption that she is at fault. As it exists, the prosecution of the rapist also results in the prosecution of the victim. However, it is undeniable that the defendant in a rape case is presumed innocent until a judicial determination states otherwise.² A dilemma arises when the court attempts to balance the victim's right to bring the accused to trial and the defendant's right to prove his innocence. Currently, the judicial system favors the presumption of the defendant's innocence, presupposing that the victim has falsely accused her attacker.³ Therefore, the victim must not only overcome her fears of facing her attacker in court, she must also deal with the underlying presumption in society that the sexual assault was consensual.⁴

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² In criminal cases, due process requires a presumption of the innocence of the defendant. Therefore, the state has the burden of proving each element of a crime using the requisite standard of "beyond a reasonable doubt." Our judicial system requires that until there is a judicial determination of guilt "beyond a reasonable doubt," at no time is there a presumption that the defendant is guilty of a crime regardless of what the base of supporting facts has established. See Rose v. Clark, No. 84-1974 (U.S. July 2, 1986); Sandstrom v. Montana, 442 U.S. 510, 526 (1979); County Court of Olster County, New York v. Allen, 442 U.S. 140, 149 (1979); Patterson v. New York, 432 U.S. 197, 215-16 (1977); Mullaney v. Wilbur, 421 U.S. 684, 693 (1975); In re Winship, 397 U.S. 358, 363 (1970); 1 J. Weinstein on Evidence § 303(03).

³ As it stands, the legal system perpetuates the societal assumption that women are fabricating rape charges. The women are questioned as to their role as a participant in the sexual act, as opposed to their role as victims. See Note, Rape I, 3 Rutgers L. J., Women's Right Law Report 45, 54 (1976) (arguing for a better understanding of the woman as a victim of rape and not as a defendant in a criminal proceeding).

II. THE SPECIAL CONSIDERATIONS IN A RAPE CASE

A. The Therapy Setting in a Rape Crisis Center

1. The Victim's experience

The trauma that a rape victim endures is a unique aspect of the crime. A victim of rape is affected on two levels, the physical and emotional. This fact differentiates the rape victim from victims of other crimes. Although victims of any crime tend to feel violated, this fact is escalated in rape. This is due to the fact that rape is the ultimate personal violation; the rapist takes the soul.5

Physical complications after a rape may vary. For instance, the victim may experience vaginal, rectal or oral venereal disease, infections caused by lacerations or caused by sexual penetrations, bruises and broken bones, and the fear of pregnancy.6 However, not all victims evidence physical symptoms after being raped. This can be a problem since often society concludes that if the victim is not bruised, she has not struggled.7 This is simply a fallacy. For instance, a victim of acquaintance rape may be overpowered physically but may not evidence any bruises.8 In this instance, it is exceptionally difficult to prove that the victim has not consented.9

The rape experience also results in an inordinate number of psychological symptoms. Emotional scars rendered due to rape are numerous and effect every aspect of the victim's life. For instance, victims evidence emotional symptoms such as a sense of guilt, a fear of participation in further sexual relationships, and the fear of having to explain their trau-

5 Address by the late Dr. Ann Davis, Ph.D. in Sociology, at Miami University (October 10, 1987). See also J. Van Atta, Rape Prevention Program: An Ohio Department of Health Guide for Developing Comprehensive Rape Counseling Services in Ohio 12-15 (1987) (discusses the need to empower women who have lost their sense of worth and energy to overcome psychological difficulties); K. Johnson, If You Were Raped 1-15 (1985).


7 There is also an assumption that physical symptoms need to be present in order to substantiate a woman's claim that she has been raped. See GodMothers, supra note 6, at 12.

8 See Called, supra note 6, at 18-21. (analyzes and discusses the special problems that are faced by a victim of acquaintance rape).

9 Id.
matic experience in the courtroom. As a result, rape is an underreported crime. Meanwhile, approximately 38%-65% of women are sexually assaulted, and of this number, one of every five college women has reported being assaulted. For these women, the problem only begins on the day of the assault. What is to follow is often more traumatic for the victim than the actual rape itself.

2. The Victim's Stages of Recovery

A rape victim often undergoes stages of recovery. First, a rape victim carries with her a current and vivid memory of the traumatic experience. As a result, she may feel voiceless as if she were trapped in an earlier time. Still, such victims are expected to resurface into society and resolve the trust issues with which they have struggled since the rape. This leaves the victim characteristically cautious and confused. She often questions praise from people, since the shame of being raped has deteriorated her self image. Finally, unable to cope, she may deny her experience since her sense of degradation may leave her with a feeling that she has no physical or psychological space.

It is at this crisis stage that women enter therapy. A woman during the crisis stage exhibits her stress through acute anxiety attacks. Her

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10 Telephone interview with T. Nelson, Counselor and student volunteer trainer at Oxford Crisis and Referral Center (December 15, 1989); L. Ledry, Practical Advice in Overcoming the Trauma of Police and Court 33-37 (1986); Goddess, supra note 6, at 52-62.

11 Uniform Bureau of Crime Report, F.B.I. (October 24, 1979); See also D. Bokowski, Sexual Assault Needs Assessment Survey (1988) (also noted was that the F.B.I. records indicate that one of every ten women raped reported the rape and that 4,305 women actually reported being the victim of forcible rape in Ohio in 1987).

12 Uniform Bureau of Crime Report, F.B.I. (October 24, 1979). Often, women who are on record with the F.B.I. for reporting these crimes are never heard from again after their initial contact with rape-crisis center personnel.

13 See D. Roberts, Raped 157-159 (1981); Burgess & Holstrom, Rape Trauma Syndrome, 131 Am. J. Psychiatry 984 (1974) (The victim also may be triggered to recall her experience by the simple smell of the attacker's cologne).

14 Supra notes 10 and 13.

15 Will, supra, note 6, at 386-88; Goddess, supra note 6, at 86-89; R. Courtuis, Working With Rape Victims: Choice Points and Vital Information (1973) (hereinafter Working With Rape Victims).

16 Working With Rape Victims, supra note 15.

17 Castleman, If your lover gets raped, Medical Self Care (1980) (available from "Men Against Rape Crisis Network" brochure).

18 See supra note 5. See also Burgess & Holstrom, supra note 13. (describing long term reorganizational Post Traumatic Stress Disorder symptoms associated with Rape Trauma Syndrome.)

19 K. Johnson, supra note 5, at 13-15. Burgess & Holstrom, supra note 13 (describing the reorganizational phase and noting that the victim often enters therapy to deal with her anxiety).

20 Burgess & Holstrom, supra note 13.
RAPE VICTIMS

obscene thoughts of rape play in her nightmares like a broken record. As a result, the victim engages in compulsive behavior, such as excessive hand washing, to rid herself of guilt. Not only do these victims blame themselves, in an attempt to validate their experiences, they often voice anger towards their attacker and moments later try to mask this feeling by attempting to care for him. It is the recording of these behaviors that often has a detrimental effect on a rape prosecution. Lastly, these victims live with the constant fear that their attacker may strike again. This fear is often a deterrent to women actually prosecuting their attacker.

3. The Therapeutic Relationship: Victim and Therapist Exchange

The counselor/psychologist is often the victim's only outlet. Unless the rape crisis counselor can ensure the victim a confidential relationship, it is nearly impossible for the victim to disclose her feelings. This phenomena can be paralleled to the need for confidentiality between a psychologist and a client in a rape case. Both the rape crisis center counselor and the psychologist serve a similar purpose, which is to allow a rape victim to voice her feelings.

In therapy, it is important for the counselor to validate the victim's experience. The most common occurrence in therapy is that the victim will blame herself. In this instance, the therapist must listen gently but take a strong stand against self blame. However, the notes taken in these sessions are discoverable records which the defendant may seek to use to impeach the victim. It is the rape counselor's duty to focus first and foremost upon the woman. In doing so, the counselor must alleviate the woman's feelings that she is a personal failure and must convince her that she can trust people again. Only in an atmosphere of confi-

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21 Id. See also GODMOTHERS, supra note 6, at 26-29, 75-77; CALLED, supra note 6, at 67-69; telephone interview with T. Nelson, counselor and student volunteer trainer at Oxford Crisis and Referral Center (December 15, 1989).
22 Burgess & Holstrom, supra note 13.
23 Id.
25 Burgess & Holstrom, supra note 13; J. VAN ATTA, A GUIDE FOR DEVELOPING COMPREHENSIVE RAPE COUNSELING SERVICES IN OHIO (September, 1987)(hreinafter GUIDE); GODMOTHERS, supra note 6, at 78-80.
27 See supra note 5. See also GUIDE, supra note 25, at 5.
28 Burgess & Holstrom, supra note 13; CALLED, supra note 6, at 13-17; GODMOTHERS, supra note 6 at 10-11.
29 GUIDE, supra note 25, at 10. See also The seven components against counseling (Feb. 1, 1990) (material available at W.G. Nord Community Health Center); address by Rape Crisis Center Counselor, Oxford Crises and Referral Center Miami University student forum (Oct. 13, 1987).
30 The seven components against counseling (Feb. 1, 1990) (material available at W.G. Nord Community Health Center).
31 Id. See also GUIDE, supra note 25, at 8; Burgess & Holstrom, supra note 13, at 984-85.
dential interpersonal disclosure can these goals be accomplished. Preparing a woman for litigation is "probably the hardest aspect of therapy," and would be substantially more difficult if her personal feelings and fears are sure to become part of the courtroom proceeding.

4. Courtroom Setting

In Commonwealth v. Lloyd, Justice Larsen poignantly acknowledges that victims of rape are treated substantially different than are victims of other crimes. Larsen utilized an example by Connie K. Borkanhagan of Albuquerque, New Mexico which illustrates how the cross-examination of a robbery victim would sound if performed in a similar fashion as a cross-examination of a rape victim:

(Q) "Mr Smith, you were held up at gunpoint on the corner of first and Main?"
(A) "Yes"
(Q) "Did you struggle with the robber?"
(A) "No"
(Q) "Why not?"
(A) "He was armed."
(Q) "Then you made a conscious decision to comply with his demands rather than to resist."
(A) "Yes"
(Q) "Did you scream? Cry Out?"
(A) "No. I was afraid."
(Q) "I see. Have you ever been held up before?"
(A) "No"
(Q) "Have you ever given money away?"
(A) "Yes, of course."
(Q) "And you did so willingly?"
(A) "What are you getting at?"
(Q) "Well let's put it like this, Mr. Smith, you've given money away in the past. In fact, you've had quite a reputation for philanthropy. How can we be sure you weren't contriving to have your money taken from you by force?"
(A) "Listen, if I wanted . . . ."
(Q) "Never mind. What time did this holdup take place, Mr. Smith?"
(A) "About 11:00 pm"
(Q) "You were out on the street at 11:00 pm? Doing what?"
(A) "Just walking"

32 See supra note 25. See also K. Johnson, supra note 5, at 15-17; D. Roberts, supra note 13, at 120-25; address by Rape Crisis Center Counselor, Oxford Crisis and Referral Center Miami University student forum (Oct. 13, 1987).
33 Supra note 32. See also L. Ledray, Practical Advice in Overcoming the Trauma of Police and Court 19-20 (1986).
35 Id. at 1373, 567 A.2d at 1373.
"Just walking? You know that it's dangerous being out in the street that late at night. Weren't you aware that you could have been held up?"
(A) "I hadn't thought about it."
(Q) "What were you wearing at the time, Mr. Smith?"
(A) "Let's see... a suit. Yes, a suit."
(Q) "An expensive suit?"
(A) "Well - yes. I'm a successful lawyer, you know"
(Q) "In other words, Mr. Smith, you were walking around the streets late at night in a suit that practically advertised the fact that you might be a good target for some easy money, isn't that so? I mean, if we didn't know better, Mr. Smith, we might even think you were asking for this to happen, mightn't we?"  

It is evident that this type of questioning would never occur in a trial for robbery. In fact, there is never a question in the incidence of robbery that the victim has "consented" to the act. Further, the police advise robbery victims to ensure their own safety and report the crime to the authorities after the fact. In contrast, the victims of rape and other forms of sexual assault are required to prove their lack of consent. In this instance, their physical safety is in imminent danger, yet they are required to make heroic gestures putting their life at risk in order to avoid the accusation that they were a consensual participant in the heinous crime. This occurrence acts as a deterrent to many women in reporting the crime. Although victims no longer are questioned regarding their past sexual conduct, there are still attempts to demonstrate that a lack of physical struggle indicates consent.

III. DILEMMAS IN ADMITTING RECORDS INTO EVIDENCE

The aforementioned experiences of the rape victim are often not considered when the judicial system reviews the admissible evidence in a rape case. There are two competing concerns that are considered by the court in deciding whether or not to admit the rape crisis counselor's records into evidence. First, the defendant is concerned with his constitutional right of confrontation as well as his right to compel testimony, and often claims that the lack of the admission of the victim's rape crisis...
center records into evidence may be violative of this right.43 In contrast, the victim is concerned with both her constitutional right to privacy44 and the confidentiality privilege which she wishes to invoke in this situation.45

The defendant seeks to use the counselor's records primarily to impeach the victim through the utilization of assertions made during therapy which differ from the those stated in court.46 For instance, the victim may at times state her confusion to a counselor.47 However, by the time she is questioned in court, she is able to speak about her traumatic experience in a more coherent fashion.48 This occurs because the victim's statements in therapy are made in an attempt to sort out her feelings regarding the attack and are not meant as testmonials for the record. Consequently, these conflicting statements tend to shed an unfavorable light upon the victim.49

The defendant may also seek to use these records in the voire dire process.50 In this instance, defense counsel will try to determine whether or not the victim possesses abnormal psychological characteristics which would impair the court from using her as a credible witness.51 This allows the defendant's attorney to make conclusions regarding the mental capacity of the victim, which seems a bit inappropriate. Also, the defendant may use these records in cross-examination of the victim during trial in order to damage or blacken the victim's character.52

All of these uses may substantially damage the victim's case. Yet, the court will admit these records found to be imperative to the defense of the alleged rapist.53 However, the victim may argue that the constitution affords her the right of privacy in certain matters.54 This privacy is especially critical in the case of rape since the symptoms of a rape victim embody a personal conflict.55 As a result, the victim often makes inconsistent and competing statements in her psychological recovery process

43 U.S. CONST. amend. VI, § 10.
44 U.S. CONST. amend I. See also infra note 120 (The Supreme Court has interpreted the Constitution to afford citizens privacy in certain matters).
45 This is a right that has been afforded in similar situations, where there has been a counseling relationship analogous to that of the rape crisis center counselor-victim relationship. See infra notes 97-135.
47 Id. See also GODMOTHER, supra note 6, at 15 - 20.
48 Id.
49 Id.
50 State v. Pierson, 201 Conn. 211, 514 A.2d 724 (1986).
51 Id.
53 Id. (The courts in Grayson and Lloyd noted that the victim may still be cross-examined in the absence of these records).
54 Commonwealth v. Kyle, 367 Pa. Super. 484, 533 A.2d 120, 169 (1987). Also, the courts have already determined that private family matters are protected by the Constitution. See infra note 120.
55 See supra notes 5-24.
that may merely cloud the issue in court. Therefore, it is often difficult to balance the victim's confidentiality privilege with the defendant's right to confront his accuser in court.

In an attempt to balance the concerns of both the victim and the defendant, courts often will view the evidence in-camera. In this instance, the court will view the records and make a determination as to whether or not the evidence is relevant to the issue in the case. Also, the defendant's attorney will have access to these records. This occurrence may allow the defendant to use the records in a fashion that will cause an inordinate amount of prejudice towards the victim. If this is true, even with a limiting instruction, such as would occur after the in-camera inspection of the records, the adverse affect of these records may outweigh their probative value. A representation of this circumstance occurs when the defense counsel is afforded the opportunity to impeach the victim after viewing the records with the eyes of an advocate which may lead to a highly prejudicial line of questioning. When this occurs, the victim's rationalizations in therapy are viewed as contradictory facts in evidence. In this context, the information is unreliable because it is the victim's perception of her feelings and not the alleged rape incident. Further, the atmosphere of the rape crisis counseling center is one of sanctity for the victim, and absent this guarantee, it will be difficult for the victim to have a successful interchange in counseling sessions. The victim will either avoid prosecution, or avoid full disclosure in therapy due to the risk she will be taking of having her feelings of guilt and confusion paraded as exculpatory evidence in a court of law. Therefore, absent a

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56 Lloyd, 523 Pa. at 427, 567 A.2d at 1357 (Justice Larsen points out in his dissent that the conflicting statements of the victim often confuse the jury as to the facts of the case).
58 See Advisory Opinion, 469 A.2d at 1161.
59 See supra note 57.
60 FED. R. EVID. 403 reads as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
61 Courts have determined that if a limiting instruction, such as in FED. R. EVID. 105, does not diminish the danger of the adverse effect, the evidence is still not admissible. See Harris v. Illinois-California Express Inc., 687 F.2d 924, 926 (2d. Cir. 1976); FED. R. EVID. 105 (Rule 105 allows the judge to instruct the jury on the limited purpose for which the evidence will be used).
62 WILL, supra note 6, at 370-71.
63 See Oxford Crisis and Referral Center Manual (1990) which states: "All sexual assault survivors have a right to recover from victimization at their own pace, in their own style, and not one imposed by society." Id.; F. GUEST, TO COMFORT AND RELIEVE THEM: RAPE CRISIS CENTER 3-15 (1977) [hereinafter To COMFORT] (available at Grady Memorial Hospital Atlanta); R. GISSMAN, SURVIVING SEXUAL ASSAULT 23-27 (1977). See also supra note 32.
privilege, this information would not exist in the first place. Rather, therapeutic disclosures would be guarded in anticipation of trial. All of these considerations will be examined in detail later in this note.

IV. SITUATIONS ANALOOGOUS TO THE RAPE-CRISIS CENTER

A. Waiver of Privilege by the Patient-Litigant Exception

In the case of rape, the victim’s mental health is not a probative issue in the determination of whether or not the crime has occurred. In contrast, other situations exist in which a party places his or her mental health in question. When this occurs, courts conclude that by putting mental health into question, the party has waived the physician-patient (and/or psychologist-patient) privilege. This privilege protects the patient by holding the physician responsible for unauthorized disclosures of medical information. When the physician-patient privilege is deemed waived, this waiver enables the judicial system to access medical records which are probative to the issue in the case. However, the tort plaintiff does not waive the confidentiality privilege merely by filing a personal injury action. The opposing party has the burden of proving that the adversary has affirmatively placed his or her medical conditions at issue.

It follows that the victim of rape also should not be viewed as waiving her confidentiality privilege merely by prosecuting her attacker. After all, the issue in a rape trial is not the victim’s mental health, but rather whether or not she was forced into participating in sexual acts against her will. In this instance, the mental health of a rape victim is not placed into question merely by filing charges.

In other contexts, courts have taken into consideration the rights of the psychiatric patient. For instance, in Caeser v. Montanos, Justice Hustedler in his concurrence sets limits upon unnecessary questioning of a

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56 Id.
57 See supra note 64; State ex rel. Lambdin v. Brenton, 21 Ohio St. 2d 21, 254 N.E.2d 681 (1970).
60 Arguably, the issue in a rape case is whether or not the victim has consented. Legally, mental health is not at issue in a rape case as one of the elements of the crime. However, courts have indicated that if “disclosure of [such mental health records] is essential to a fair determination of guilt or innocence . . .” of the accused, there production, at least for an evidentiary hearing, may be required.
psychiatrist by disallowing questions involving the ultimate diagnosis of a patient unless a party has shown that this information is necessary to the ultimate determination of the case.\(^7\) Similarly, in *State v. Trammel*, the court refused to admit any evidence concerning the treatment of the rape victim for a previous mental condition when she was orally, rectally and vaginally sodomized.\(^7\) The court determined that the victim's previous mental condition was not relevant to the issue of whether or not she was raped.\(^7\)

Considerations which disallow past mental conditions to be entered into evidence are present in rape crisis center records as well. These considerations include the basis of trust inherent in any therapeutic relationship, the highly personal nature of rape, and the need to guarantee the victim privacy in order to motivate her initially to seek help.\(^7\) Without this guarantee, victims often do not prosecute their attacker because they fear trepidation in court.\(^7\)

### B. Various Recognized Testimonial Privileges

#### 1. The Licensing Distinction

Confidentiality exists within several professional relationships. The consummate example of privilege is the attorney-client privilege. Recently, there has been an effort to afford privileged communications in other types of relationships\(^6\) because a privilege is established to honor the needs of the client, not the needs of a professional.\(^7\) However, there has been a line drawn by state legislatures and the judicial system making a distinction between licensed practitioners and non-licensed practitioners when affording a confidentiality privilege.\(^7\) For instance, legislatures have granted a physician-patient privilege in civil matters which has been extended to criminal matters as well.\(^7\) Furthermore, professional

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\(^7\) 542 F.2d 1064, 1075 (9th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).

\(^7\) 231 Neb. 137, 435 N.W.2d 197 (1989) (This court, however, still allowed the defendant to view the current psychological data of the victim).

\(^7\) *Id.*

\(^7\) F. GUEST, TO COMFORT AND RELIEVE THEM, RAPE CRISIS CENTER 3-15 (1977) (available at Grady Memorial Hospital, Atlanta). *See also supra* notes 5-33 and accompanying text.


\(^7\) Proposed FED. R. EVID. 504; 2 J. WEINSTEIN ON EVIDENCE 503, 504-18 (1980).


relationships which involve counseling in personal areas by a licensed practitioner have been granted a privilege. The same is not true in matters involving non-licensed practitioners.

State legislatures rationalize this distinction by stating that the state statutes which are drafted to provide confidentiality are intended to promulgate a privilege in order to protect confidential matters within a treatment or diagnosis context. Since unlicensed practitioners approach matters through counseling and do not utilize a diagnostic approach, they are excluded. However, the judicial system has noted that the relationship involved in a therapeutic setting with counselor other than licensed medical doctors is similar to the relationship involving the treatment of a rape victim by an unlicensed practitioner. Those who are properly trained to help rape victims often partake in a counseling relationship which is extremely valuable. Therefore, relationships involving treatment of a rape victim by an unlicensed practitioner should also be taken into consideration when the courts and legislatures are trying to determine whether or not a privilege should be afforded in this context.

After all, a privilege protecting medical records is granted to ensure the client (or victim) that the state is protecting the interest of its citizens in obtaining valuable health care. Therefore, by not also extending this privilege to relationships where the practitioner is not licensed, the citizen's right to receive valuable health care is seriously undermined. It is important to note that the state's method of certifying people to provide the aforementioned safe and valuable services is often the licensing procedure. However, in other circumstances, a practitioner may not be licensed, yet they often are certified as competent in their particular field. For example, a rape crisis center counselor must undergo and pass a test to ensure that they are qualified to counsel victims and to serve as beneficial public servants, as well as private practitioners.

2. Proposed Federal Rule of Evidence Granting a Privilege

The proposed Federal Rules of Evidence consider granting a psychotherapist-patient privilege, however, they do not incorporate such a priv-
The existing Federal Rules of Evidence have yet to specify a broad physician-patient privilege. Instead, the Federal Rule of Evidence which grants such a privilege on its face authorizes federal courts to recognize a federal physician-patient privilege but prohibits state privileges. This authorization is not likely to permit the federal courts to supersede state legislative guidelines. Rather, the federal courts will recognize the states autonomy in this matter. In fact, the Federal Rules of Evidence are not intended to diminish the effect of a state statute which affords a privilege. The committee indicated that the privilege laws carry out such a compelling state interest that it would be inappropriate for federal law to supersede state substantive law in the area. Thus, once a state promulgates a privilege, it will be honored. The rationale of this authorization is to promote quality medical care by encouraging the patient to disclose all of the pertinent information necessary to ensure a quality diagnosis and treatment process. In addition, the privilege also may serve to protect the privacy interests of patients.

This privacy rationale has been criticized because the lay person does not seek treatment by a physician with a lawsuit in the forefront of their mind. This, of course, is not the case for the rape victim who is aware of her legal right to prosecute her attacker prior to seeking therapy. In her case, the lack of a privilege is even more detrimental since she will often avoid prosecution to alleviate any further embarrassment.

Despite criticism, many states have enacted a physician-patient privilege. States are also enacting privileges for patients of psychiatrists and psychologists due to their special need for confidentiality.

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86 "The proposed rules set forth nine substantive areas of privileged communications as well as four procedural provisions. Congress chose, however, to reject this attempt at specification, which also included several modifications of common law privileges." G. WEISENBERGER, FEDERAL EVIDENCE 150, citing Fed. R. Evid. 501, Report of Senate Committee on the Judiciary. See also supra note 77; 1 J. WEINSTEIN ON EVIDENCE § 501[14].

87 1 J. WEINSTEIN ON EVIDENCE § 501 [14].

88 2 D. LOUISELL & C. MUELLER § 215.


90 Id. citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555 (2nd Cir. 1967).

91 E. CLEARY, MCCORMICK ON EVIDENCE § 98, 244 (3rd ed. 1984).

92 See 2 D. LOUISELL & C. MUELLER § 215, 602 (1978) ("personal illness often involves matters which patients reasonably prefer to keep confidential, and the privilege may serve a valid social purpose in this regard.").

93 E. MORGAN, in forward to MODEL CODE OF EVIDENCE at 28 (1942).

94 See Lore, 90% of Rapes not Reported, Scientists Say, The Columbus Dispatch, Jan. 17, 1989, at 3, col. 2. See also supra notes 42 and 75.

95 E. CLEARY, MCCORMICK ON EVIDENCE § 98, 244 n.5 (fewer than ten states do not recognize the physician-patient privilege).

96 G. WEISENBERGER, FEDERAL EVIDENCE 151 citing report no. 45 of Psychiatry 92 (1960). See also FED. R. EVID. 501 (originally approved by the Supreme Court, Article V of the Federal Rules contained 13 rules. These proposed rules are often used).
3. Psychiatrist-Patient Confidentiality Privilege

An example of a privilege granted due to the confidential nature of disclosures in therapy is the privilege often present in the psychiatrist-patient relationship. The privilege afforded a patient comes from two sources: state statutes and a constitutional right which requires protection of privacy in personal matters. For instance, these privileges are not extended to cover situations where a court appointed psychiatrist examines the patient. In addition, the legislature needs to balance the competing concerns regarding both the defendant's constitutional right to confront the victim with the victim's right of privacy. However, in order for the defendant to overcome the victim's right to privileged communications in these matters, case law indicates that the defendant must show a "particularized need" for the information which is sufficient to outweigh society's and the victim's interest in maintaining the confidentiality of communication in a psychotherapeutic relationship.

In Commonwealth v. Lloyd the court noted the limitations of the defendant's right to confront the victim stating:

These rights are not absolute, unlimited rights to discover any and all pieces of information existing anywhere in the world, and are of course subject to the normal evidentiary admissibility rules such as relevancy, materiality and competency, and are subject as well to traditional testimonial privileges against compelled disclosure of protected and/or confidential communications.

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97 See G. WEISENBERGER, supra note 96, citing report no. 45 of Psychiatry 92 (1960) ("Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication.")


99 E. CLEARY, McCO RMICK ON EVIDENCE 246 n. 1 (3rd ed. 1989); U.S. CONST. amend. VI.

100 State v. Whitaker, 520 A.2d 1078, 202 Conn. 289 (1987) (The court honored the defendant's rights to confront his accuser); People v. Foggy, 149 Ill. App. 3d 599, 500 N.E.2d 1026 (1986) (it is not unconstitutional to allow the defendant access to the victim's medical records).

101 Commonwealth v. Lloyd, 523 Pa. 427, 567 A.2d 1357 (1989) (The court in this case held that the defendant was denied his right to confrontation by not having access to the victim's psychiatric records, absent a privilege, but it did note that the state of Pennsylvania honors a privilege in the psychologist-patient relationship).

102 Id. at 136.
With these considerations in mind, state courts have ruled that a rape victim who has consulted a licensed psychiatrist to receive psychotherapy is entitled to a privilege. This privilege is afforded when the confidential nature of the psychotherapeutic relationship is considered. In this therapeutic relationship, it is difficult, if not impossible, for a psychiatrist to succeed if she is unable to assure a confidential and privileged communication. Arguably, a patient in psychotherapy will still be able to communicate whether or not the legal system provides him with a confidentiality privilege. After all, not all patients visit a psychiatrist with thoughts of the legal repercussions of their visit. However, a person who fears disclosure of her admission in therapy is not likely to allow her relationship to transcend into any disclosures of an embarrassing nature. This is likely to hinder the effective and safe use of psychotherapy. Further, that confidentiality is required to ensure successful therapy with a patient because it is necessary for the patient to be comfortable about relaying her innermost thoughts. Therefore, a threat to secrecy is an effective barrier to the treatment of a psychiatric patient which harms the patient as well as society. This is best articulated in the often quoted statement:

The psychiatric patient confides more utterly than anyone else in the world. [She] exposes to the therapist not only what [her] words directly express; [she] lays bare [her] sins, and [her] shame... it would be too much to expect them to do so if they knew that all they say - and all that the psychiatrist learns from what they say - may be revealed to the whole world from the witness stand.

For these reasons, the psychiatrist has a compelling need to maintain confidentiality within a psychotherapeutic setting. This privilege also promotes the well-being of society, as it encourages the citizen to exercise her fundamental freedoms by seeking the help of a psychiatrist.

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104 Confidentiality is necessary for psychiatric treatment to progress successfully. Group for Advancement of Psychiatry, Confidentiality and Privileged Communication in the Practice of Psychiatry, REP. No. 451 at 92 (1960).


106 See supra note 93.

107 See supra note 104.


sequently, citizens who address and resolve mental health problems will be able to cope and be productive members of society. Recognizing this fact, state legislatures in forty-nine states have enacted a psychiatrist-patient privilege protecting communications in psychotherapy.\textsuperscript{113}

4. Non-Licensed Privileges

\textit{a. Psychologist-Patient Privilege}

The concerns surrounding a lack of confidentiality in a psychologist-patient relationship are similar to those considered in the psychiatrist-patient relationship. For instance, in therapy, the relationship hinges solely upon the patient's ability to trust and communicate openly, without fearing the reaction of others concerning their innermost thoughts.\textsuperscript{114} Without this confidentiality, the individual will be unable to receive adequate treatment. Often, a rape victim is traumatized to such an extent that she is unable to cope in society without the assistance of a therapeutic setting. In the absence of an atmosphere where she is able to freely disclose her feelings, feelings which may be embarrassing by nature, the victim becomes a dysfunctional member of society. This rationale was followed in \textit{Commonwealth v. Kyle}, when a Pennsylvania court determined that the need for confidentiality in a psychologist-patient relationship was so great that the defendant was not entitled to the rape victim's records.\textsuperscript{115} In this case, a Pennsylvania statute provided a psychologist-client privilege which created an absolute bar to the disclosure of the psychologist's file concerning the rape victim.\textsuperscript{116} Further, the court did not permit an in-camera review of the file to determine whether or not the file was useful to the defendant's case.\textsuperscript{117}

In this instance, the court found that a medical license is not the dispositive factor. Instead, the court's analysis relied on the legislature's belief that highly confidential communications which take place between a psychologist and a client should be afforded a privilege.\textsuperscript{118} The fact that therapy in this case involved a sexual assault further magnified the need for privacy since a rape is a particularly private invasion of the victim's rights.\textsuperscript{119}


\textsuperscript{114} Supra note 113. (The court granted a psychologist-patient privilege viewing this privilege as analogous to the physician-patient privilege).


\textsuperscript{117} Kyle, 367 Pa. Super. at 488, 533 A.2d at 126.

\textsuperscript{118} Id.

\textsuperscript{119} Id.
In addition, the court in *Kyle* reiterated the Supreme Court's position that the United States Constitution affords an individual the right of privacy under certain circumstances. Arguably, the right of privacy of the psychotherapy of a rape victim is also a constitutional right. Failure to recognize this constitutional right infringes upon a citizen's fundamental rights. To adequately enforce this right, the confidentiality privilege should be absolute unless the victim chooses to waive this right.

The *Kyle* court further noted that the psychologist-client privilege is analogous to the psychiatrist-patient privilege. Regardless of whether a psychiatrist or psychologist is performing psychotherapy, the patient's confidence in her confidentiality is imperative since "[t]hese inner-most thoughts are often so embarrassing or shameful that the patient may never before have allowed themselves to acknowledge them." For these reasons, the legislature in Pennsylvania has promulgated a psychologist-patient privilege. Other states should follow the Pennsylvania lead.

**b. Social Worker-Client Privilege**

A similar type of confidential and personal interaction takes place between a social worker and a client. Similar to a psychologist, the social worker, who also does not have a medical license, is often a party to confidential communication with clients. The social worker-client relationship has been granted a privilege because it has been determined that the social utility of this particular relationship is so great that it outweighs society's interest in having all possible evidence disclosed in the litigation. Further, the vitality of this relationship depends upon strict confidentiality between the parties involved. Therefore, a confidentiality privilege should exist to protect the rights of the victim seeking the aid of a social worker.

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120 *Id.* at 127 citing *Roe v. Wade*, 410 U.S. 113 (1973) (privacy encompasses a woman's right to choose abortion); *Stanton v. Georgia*, 394 U.S. 557 (1969) (privacy entails the right to be free of intrusions and control of one's thoughts); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (privacy includes the right to choose contraceptives). See supra note 98.

121 The *Kyle* court discusses the constitutional dimension of affording the victim privacy in a psychotherapeutic setting. *Kyle*, 369 Pa. Super. at 484, 533 A.2d at 120.

122 Statutes exist in Pennsylvania granting an absolute privilege to protect the patient's/client's constitutional right to privacy. *Kyle*, 369 Pa. Super. at 484, 533 A.2d at 120.


125 *Id.*


127 *Id.* See also 8 J. WIGMORE EVIDENCE 229, 549-53 (McNaughton Rev. 1961) (The rationale behind the proposed federal rules of evidence is that the confidential nature of certain relationships, including the social-worker client relationship, mandates a privilege to ensure the patient that their disclosures will not be divulged in court).

128 *Id.* (Certain relationship are dependent upon the assurance of confidentiality.)
Whether a victim in a rape case visits a licensed psychotherapist or a non-licensed social worker is often an economic determination.\(^{129}\) It seems unjust to exclude the impoverished from the privilege of confidential disclosures merely because they are unable to afford a licensed practitioner. However, critics of this privilege have argued that the ascertainment of truth is more important than whether a person may not enter therapy or may be frightened into non-disclosures during the course of therapy due to lack of confidentiality.\(^{130}\) Opponents also argue that social workers are not adequately trained to do the kind of probing in counseling that a privilege is designed to protect.\(^{131}\) This is simply not the case. A social worker is trained to develop a confidential relationship with her client, especially in the case of rape.\(^{132}\) In fact, in anticipation of her exposure to confidential disclosures, a social worker must take an oath of privacy.\(^{133}\) Taking these factors into consideration, some courts have afforded a privilege to the victim after balancing the defendant's need to have all possible evidence disclosed in litigation against the victim's need for privacy.\(^{134}\) In fact, in the absence of a statute affording this privilege, some courts have extended the confidentiality privileges offered to the psychiatrist-patient and psychologist-client relationship to the social worker-client relationship after considering the analogous relationship involved.\(^{135}\) This current trend is promising to advocates of the rape-crisis center counselor-victim relationship because it demonstrates that the focus towards viewing the privilege is on the relationship involved and not the presence or absence of a medical license.

c. Rape Crisis Center-Victim Privilege

The relationship between a rape-crisis center counselor and a victim is analogous to the psychiatrist-patient, psychologist-client, and social worker-client relationship. In fact, the rape crisis center is often the venue where many rape victims first discuss their feelings.\(^{136}\) Furthermore, the rape crisis center has a similar need to ensure the victim of confidential disclosures.\(^{137}\) In the absence of this, many victims are reluctant to seek therapy and further prosecute their attacker.\(^{138}\)

\(^{129}\) See supra note 126.


\(^{131}\) See also In re Pittsburgh Action Against Rape, 494 Pa. 15, 20, 428 A.2d 126 (1981) (where a rape crisis counseling center states that "volunteers [at the center] are extensively trained in [the specific area of] rape crisis counseling.")

\(^{132}\) See infra note 251.

\(^{133}\) Id.

\(^{134}\) See supra note 126.

\(^{135}\) Id.


\(^{137}\) See supra notes 97-135. See also supra note 63.

\(^{138}\) See supra notes 42 and 75.
A rape victim has several additional reasons which substantiate her need for confidentiality. In contrast to some people who seek psychotherapy, the rape victim has knowledge that they will eventually be in a courtroom setting. Therefore, in the absence of a privilege, the threat of disclosure is imminent. As in the social worker-client relationship, many of these women are unable to afford therapy with a licensed psychiatrist. Insufficient economic means is no reason to limit a woman's right to privacy.

Undeniably, there is a necessity for the courts to develop rules of privilege by balancing the defendant's Sixth Amendment right to confront his accuser with the victim's right to privacy. However, since the issue in a rape case is not the victim's mental health, but rather the events of the incident in question, an absolute privilege will not deter the truth-finding process. As a result, if the state legislatures grant a privilege, as they have in the psychiatrist-patient and the psychologist-client context, the defendant will be entitled to the same leverage in his case as he is under those circumstances. After all, the trial itself and the relationships involved are analogous to the other aforementioned contexts in which the victim is granted a privilege.

The defendant will still be provided the opportunity to cross-examine the victim. Further, the defendant may also question the counselor as to the incident in the absence of a perusal of the victim's rape crisis center records. Therefore, an extension of the privilege to the rape-crisis center context will be fair and just to all of the parties involved in the case.

V. THE CONSTITUTIONALITY OF ADMITTING MENTAL HEALTH RECORDS INTO EVIDENCE

A. The Child Victim

The United States Constitution affords the defendant the right to confront his accuser and to compel evidence in the courtroom setting.

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139 See To Comfort, supra note 63, at 17-22 (1983) and accompanying text (making the argument that a lawsuit is not the forefront of a patient's mind). See also supra note 94 and accompanying text (making the distinction in the often underreported context of rape where a victim has knowledge that they will ultimately face their attacker in court). See also R. Grossman, Surviving Sexual Assault 17-22 (1983).

140 See supra note 129 (referring to the economic disability of several of the social worker's clients).

141 See supra note 43.

142 See supra notes 45 and 120 and accompanying text.


144 See supra notes 97-113 and accompanying text.

145 See supra notes 114-125 and accompanying text.

146 See supra note 53. See also infra note 216.

147 Id. See also supra note 69.

148 See supra note 43.
Arguably, the gathering of all information imperative to the defense of the accused should be available. In addition, the victim has the right to privacy in matters concerning her personal health and welfare. In order to maintain these constitutionally guaranteed rights, the court must carefully balance these considerations.

In Pennsylvania v. Ritchie, the Supreme Court held that the defendant's constitutional rights were not violated when he was denied access to the Children Youth Services file of a victim of rape and sexual incest. However, the Court did allow the trial court to view these records in order to determine their relevance to the case. This occurred because the Pennsylvania statute did not grant an absolute privilege; rather, the statute provided that the records shall be disclosed under certain circumstances pursuant to a court order. The Supreme Court has yet to rule on the constitutionality of a statute providing an absolute privilege.

In order to mandate the overturning of his conviction, on remand, the defendant in Ritchie must show that the information that he was denied would have been favorable to him and would have an effect on the determination of his guilt or innocence. The Court did not deny that the government had the obligation to order access to discoverable evidence which would materially effect the defendant’s case. Rather, the court noted that the statutory privilege existed and should be honored.

Justice Powell noted that the defendant's right to confrontation is not absolute:

Normally, the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. The confrontation clause only guarantees the opportunity for effective cross examination and not cross examination that is effective in whatever way, and to whatever extent, defense may wish.

Powell stated that the availability of these records may seriously undermine the state's efforts to treat child abuse. Although the Court noted

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149 Id.
150 See supra notes 44 and 120.
152 Id.
153 Id. at 58.
154 Id. at 57 (“We express no opinion on whether the result in this case would have been different if the statute has protected the CYS files from disclosure to anyone, including law enforcement and judicial personnel.”).
155 Id. at 57 citing United States v. Agurs, 427 U.S. 97 (1976).
156 Id. at 56 citing United States v. Bagley, 473 U.S. 667, 682 (1985) (“evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different.”)
157 Id. at 53 (“Requiring disclosure here, it is argued, would override the Commonwealth's compelling interest in confidentiality on the mere speculation that the right has been useful to the defense.”).
158 Id. at 53 citing 22 Fed. R. Evid. Serv. 1.
159 Id. at 58.
that the state of Pennsylvania has granted an unqualified statutory privilege for communications between sexual counselors and victims, it does not render opinion on the specific issue.\footnote{Id. at 57 citing \textit{42 Pa. Cons. Stat.} § 35945.1(b) (1982).} However, the Court recognized that the defendant does not have the right to make an unsupervised viewing of the evidence, thereby favoring an in-camera inspection of child abuse records.\footnote{Id. at 56.}

However, when there is child-abuse rape, the state courts do not always limit the privilege of the victim by allowing an in-camera inspection of the records.\footnote{State v. Cusick, 219 N.J. Super. 452, 530 A.2d 806 (1987).} The age of the victim is a central concern to the court in determining the admissibility of psychological records, but the nature of the crime is often the dispositive factor.\footnote{See \textit{Commonwealth v. Ritchie}, 480 U.S. 39 (1987).} This is why a closer examination of these cases is necessary to render an opinion regarding the rape-crisis center records of the adult victim.

Because child abuse is one of the most difficult crimes to detect and prosecute, there is extra care in enforcing the confidentiality privilege of children.\footnote{Id. at 56.} The same is true of rape in general.\footnote{State v. Cusick, 219 N.J. Super. 452, 530 A.2d 806 (1987).} However, in the instance of child abuse, the court is able to use a child abuse statute to justify keeping the records of a child out of the courtroom.\footnote{See supra notes 42 and 75 and accompanying text.}

Special considerations affect the result of the balancing test enacted by the courts when the victim's privilege is found to outweigh the defendant's right to confrontation.\footnote{See \textit{Thiel}, 236 Mont. at 67, 768 P.2d at 345; \textit{Ritchie}, 480 U.S. at 39 (1987).} For instance, if the abuse is from a parent or guardian, the victim's feelings of guilt and vulnerability are escalated.\footnote{Thiel, 236 Mont. at 67, 768 P.2d at 345.} Due to this fact, it is essential to have a counseling atmosphere which provides the victim with the assurance of confidentiality.\footnote{Id. See also \textit{E BASS, COURAGE TO HEAL} 1-35 (1988).} The compelling interest of the commonwealth would be frustrated if they are unable to assure the victim and any suspecting adult that information will be disclosed solely to the counselor and to no other without an eventual disclosure in court.\footnote{See \textit{Commonwealth v. Ritchie}, 480 U.S. 39 (1987).} Conversely, the defendant may argue that the difficulty in disproving this stigmatizing allegation may render the records all the more necessary to his or her defense.\footnote{Id. at 67, 768 P.2d at 345.} However, the Supreme Court has held that the presence of a statute affording the child a privilege must be honored to uphold this right.\footnote{Thiel, 236 Mont. at 68, 768 P.2d at 346.} Therefore, a special guarantee, albeit a limited one, surrounds the children services programs which cannot be outweighed by the defendant's need for the psychological records.\footnote{Id. at 67, 768 P.2d at 345.}

\footnotesize{1990-91}
Evidentiary conclusions analogous to those surrounding the adult victim have been drawn, and the courts have denied the defendant access to the children’s psychological records. For instance, in *People v. Tissois*, the Court held that once a material is deemed confidential, it may not be used to impeach a witness. In addition, the records, even if they are not found to be confidential, may not be a valuable source of impeachment. It is for these reasons that confidentiality clauses have been added to statutes which exist in cases involving children. These confidentiality clauses should be extended to adult rape cases as well. After all, statutes which protect the confidentiality of children have generally been held to be constitutional.

**B. The Adult Victim**

1. State Legislative Action

The Supreme Court has yet to decide the constitutionality of a rape-crisis center counselor-victim privilege. However, several states have instituted statutes which afford the victim of rape privacy when she has confided in a sexual assault counselor. Yet, in some states these statutes are designed to protect the victim but do not necessarily specify that the mental health records of the victim should be excluded from evidence.

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175 *People v. Foggy*, 121 Ill. 2d 337, 521 N.E.2d 86 (1988).
177 *See infra* notes 178-99 and accompanying text.
178 *See Ritchie*, 480 U.S. at 39. In *Commonwealth v. Hyatt*, 1990 WL 200131 (Pa. Super. 1990), the court noted that the Supreme Court will be reviewing two cases which will consider the constitutionality of a rape-crisis center-victim privilege. *Id.* at 8. *See, e.g., Commonwealth v. Aultman*, 387 Pa. Super. 113, 563 A.2d 1210 (1989); *Commonwealth v. Wilson*, 375 Pa. Super. 580, 544 A.2d 1381 (1988). In *Wilson*, the court viewed 42 Pa. Cons. Stat. § 5945.1 (1990) which grants an absolute privilege to rape-crisis center personnel as applying only to protect a sexual assault counselor from being examined as a witness in court. Therefore, the case was remanded to grant an in-camera viewing of the records. In *Aultman*, the privilege was also held to apply only to the testimony of rape-crisis center personnel. Both of these cases undermine the purpose of the privilege which is to protect the victim and not the rape crisis center personnel. The statute, 42 Pa. Conn. Stat. § 5945.1 (1990) was drafted in response to a case which held against granting the rape victim a privilege centering confidential disclosures to a rape counselor. *See In re PARR*, 494 Pa. 15, 60, 428 A.2d 126, 149 (1981). In *Hyatt*, Justice Elliot disagrees with this interpretation stating “it makes little sense that a statute designed to grant a privilege of confidentiality for any communication between a rape victim and a counselor would not further protect the records or reports made by the counselor in the course of his or her counseling efforts.” *Id.* at 6. Hopefully, the Supreme Court will clear up this discrepancy and view the statute as the legislature intended it to be viewed; as one which grants the victim of rape and absolute privilege protecting her disclosures in court.
179 *See infra* notes 190-200 and 297-322 and accompanying text.
Rather, they protect the past sexual history of the victim from court examination.\textsuperscript{181} The legislature has yet to decide whether or not the defendant's Sixth Amendment right to confront the victim can be interpreted as a mechanism for allowing the defendant to enter the victim's psychological records into evidence. State courts remain split on this issue.

Federal courts have noted that in the absence of a Federal Rule of Evidence specifically granting a privilege and federal case law addressing this issue, an alternative source of protection may be the patient's constitutional right to privacy in receiving medical treatment.\textsuperscript{182} This right would still be subject to the licensed practitioner versus the non-licensed practitioner distinction.\textsuperscript{183} This clearly will not afford every victim of rape who has received a counseling privilege. Therefore, a determination of state law on the issue is necessary to this analysis. The Confrontation Clause, which the defendant uses to assert his rights to have access to the victim's records, is made applicable to the states by the Fourteenth Amendment of the United States Constitution.\textsuperscript{184} This is due to the fact that a defendant in a criminal case has certain due process rights.\textsuperscript{185} Among these rights is the "fundamental" right of confronting his accuser in court.\textsuperscript{186} Therefore, if this "fundamental" right of the defendant is violated, his due process rights are thereby violated.\textsuperscript{187} As a result, the defendant has the right to confront the victim and to cross-examine all of the witnesses in his case.\textsuperscript{188} However, this right does not provide the defendant with an unrestricted opportunity to cross-

\textsuperscript{181} For instance in Ohio, the Rape Shield Statute merely protects the victim from an examination of her past sexual history. The Ohio Rape Shield Statute states in pertinent part:

Evidence specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to the fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

\textit{Ohio Rev. Code Ann. § 2907.02(D)} (Baldwin 1989).

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{Hawaii Psychiatric Soc'y v. Anyoshi, 481 F. Supp. 1028, 1030 (D. Hawaii, 1979); Caesar v. Mountainos, 542 F.2d 1064, 1067 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1976).}

\textsuperscript{184} See supra notes 76-85 and accompanying text.

\textsuperscript{185} Pointer v. Texas, 380 U.S. 400, 403-06 (1965). See also U.S. Const. amend. XIV.

\textsuperscript{186} See supra note 2.

\textsuperscript{187} Due process enables a citizen to assert his rights granted by the U.S Constitution.

examine the witness or an unlimited right to discovery.\textsuperscript{189} After all, the victim, especially in a sexual crime, is at least alleging that she has been violated. Therefore, it is imperative to consider the victim's rights as well when determining whether or not the defendant has had his constitutional rights violated.

Legislative intervention is necessary to provide guidelines for courts to follow when considering this issue. On one hand, the defendant is in fact presumed innocent and must be treated as such. Conversely, the victim’s right to privacy under such a sensitive set of circumstances also should be honored. The state of Illinois has addressed the issue and has determined that the defendant’s rights to confront his accuser are outweighed by the rape victim’s rights to privacy.\textsuperscript{190} In \textit{People v. Foggy}, the court noted the importance of maintaining a confidential relationship between the victim and the personnel at the rape-crisis center.\textsuperscript{191} Therefore, the court found an Illinois statute which was drafted specifically to ensure a privilege to the victim for communications made to a rape crisis center counselor to be constitutional.\textsuperscript{192} The court further noted that the purpose of this statute was to protect the victim of rape from the public disclosure of statements made to counselors of organizations which were designed to help the victim.\textsuperscript{193} The dilemma of the absence of such a privilege is illustrated by the state legislature:

Because of the fear and stigma that often results from those crimes, many victims hesitate to seek help where it is available at no cost to them. As a result, they not only fail to receive needed medical care and emergency counseling, but [the victim] may lack the psychological support necessary to report the crime and aid police in preventing future crimes.\textsuperscript{194}

\textsuperscript{189} See supra notes 102, 158 and accompanying text. See also \textit{People v. Bean}, 137 Ill. 2d 65, 560 N.E.2d 258 (1990) (the court held that the defendant's Sixth Amendment rights were not violated when he was denied access to the privileged mental health records of the victim in a murder case.). In \textit{Bean}, the court further noted the public policy favoring the non-disclosure of rape-crisis center records in Illinois due to an unqualified statutory privilege. \textit{Id.} at 92, 560 N.E.3d at 270.

\textsuperscript{190} The State of Illinois has drafted a statute providing victims of rape with a confidentiality privilege for the disclosures they make in confidence to counselors "of organizations established to help them." ILL. REV. STAT. ch. 110, para. 8-802.1 (1985).

\textsuperscript{191} "The victim in this case was told that the services of the Quad City counseling program were both free and confidential, but under the dissent's view the advice would no longer be appropriate. A special admonition would become necessary, to accommodate the very real possibility that a judge later would be examining the records of the counseling sessions. This, we believe would seriously undermine the valuable, beneficial services of these programs that are within the protection of the state." \textit{People v. Foggy}, 149 Ill. App. 3d at 600, 500 N.E.2d at 1028 (1988).

\textsuperscript{192} \textit{Id.} See also \textit{People v. District Court of Denver}, 719 P.2d 722 (Colo. 1986) (sexual assault victim was protected by a privilege established in a state statute for a psychologist-patient relationship).

\textsuperscript{193} \textit{Foggy}, 149 App. 3d at 600, 500 N.E.2d at 1028.

\textsuperscript{194} ILL. REV. STAT. ch. 110, para. 8-8021(a) (1985) (found in the stated purpose of the statute). See also \textit{Foggy}, 149 Ill. App. 3d at 600, 500 N.E.2d at 1028 (citing this quotation).
The Illinois statute which affords the victim of sexual assault a privilege regarding her disclosures in counseling is effective since the privilege is absolute. It is important to note that the legislature originally drafted a statute which allowed for an in-camera inspection of the records. However, the legislature later eliminated that provision, replacing it with a broader statement of confidentiality. The Foggy court noted that this statute does not hinder the defendant's rights since the primary purpose of counseling is to help the victim "understand and resolve her feelings about the event" and "not to investigate the occurrence." Consequently, the "inspection of counseling records would not likely result in any material useful to the accused." Therefore, without damaging the defendant's case, the statutory provision avoids putting the rape victim through an ordeal equaling the horror of the original assault in order to bring her attacker to justice. Some state legislatures have followed this rationale and have drafted similar statutes to the Illinois statute, thereby affording the victim a confidentially privilege extending disclosures made to sexual counselors.

2. Judicial Standards

The acknowledgement of the need for statutory reform is only beginning. Many criminal defense advocates find an absolute privilege unjust, and some state courts have found that the constitutional rights of the victim are not violated by the admission of the rape crisis center records into the courtroom or by in-camera review of these records by the judge. This line of thought exists even though the mental health practice often depends on "emotional" disclosures which may not have reliable eviden-
In contrast, other courts have honored a confidentiality privilege for the victim, finding that the defendant's rights were not violated by the non-disclosure of the victim's records. In the absence of clear precedent, it has been necessary for trial courts to determine the parameters of a defendant's constitutional right to confront when use of the victim's recourse is at issue. In *State v. Apostle*, the trial court considered the following factors in trying to determine whether or not to disclose the victim's records: the nature of the confrontation which is allegedly affected; the nature of the material examined; the remoteness of the material; and the availability of other means of testing the witness' reliability. In considering these factors, the courts will perform a balancing test. This test determines whether or not the defendant's need to obtain confidential matter in order to discover impeaching material necessary to exercise his right to confront the victim outweighs the victim's right to confidential communications in therapy. Of course, it may also follow that the material is not pertinent to perform effective cross-examination.

Another test performed by courts is the "compelling public interest" test. In this test, an interest is "compelling" if the court determines that it is strong enough to merit the non-disclosure of the victim's psychological records. In addition, a "compelling" interest is one in which it is imperative to the nature of the relationship to maintain the sanctity of confidential disclosures. This is applicable to the rape crisis center counselor-victim relationship because this relationship is generally one which has an aura of confidentiality. In fact, the Connecticut court stated the following concerning the nature of the counselor-victim relationship:

Information given by a psychological patient or a victim of sexual assault is generally given with the belief that they may obtain care (or counseling) without fear of unwanted embar-

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201 Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1, 25-30 (1980). In a therapeutic setting, there is generally a confidentiality requirement which is strictly adhered to by the judicial system and the legislatures. There is also a problem with the testimony of a medical patient being hearsay.

202 People v. Foggy, 149 Ill. App. 3d 599, 521 N.E.2d 1026 (1988) (Of course, there was a state statute affording a privilege in this instance).


209 Id.


rassment and without apprehension of fundamental disclosures in court, either of which might deter the patient (or victim) from revealing his true symptoms.\textsuperscript{211}

The Court in \textit{Commonwealth v. Lloyd} noted that a defendant's interest may also be "compelling" if he is unable to defend himself in the absence of his access to records.\textsuperscript{212} This supposition has been denied by the Supreme Court in a case involving the sexual abuse of a child.\textsuperscript{213} The \textit{Lloyd} Court also noted that the defendant must show a "particularized need" for the records which is sufficient to outweigh the victim's need for privacy.\textsuperscript{214} However, "particularized need" is not clearly defined; therefore, it is hard to rationalize the admission of records based upon this test.

Another argument asserted on the defendant's behalf is that the rights of the defendant to cross-examine and impeach the witness are violated by barring such evidence from trial.\textsuperscript{215} This simply is not the case. Courts have rejected this argument because an attorney can still cross-examine and impeach the witness absent this evidence.\textsuperscript{216} Since the defendant is not excluded from a trial, he is not denied the right to physically confront his accuser.\textsuperscript{217} Further, the right to cross-examine a witness is a trial right which does not require the pre-trial disclosure of information by any party.\textsuperscript{218} The Confrontation Clause enables the defendant to have access to effective cross-examination techniques, but it does not enable the defendant to cross-examine in whatever way and to whatever extent he may wish.\textsuperscript{219}

Lastly, the defendant may assert that an in-camera inspection of the records should be granted as a last resort to allow the court to determine their relevance. This has been held to be a viable alternative to admitting records into court.\textsuperscript{220} In fact, it is an inadequate means of protecting the victim's rights since the advocate may discover relevant information gathered from the victim, other witnesses, or circumstances surrounding the rape investigation.\textsuperscript{221} For instance, in \textit{Commonwealth v. Kyle}, where a

\begin{itemize}
  \item \textsuperscript{211} Id. at 316.
  \item \textsuperscript{212} Commonwealth v. Lloyd, 523 Pa. 427, 567 A.2d 1357 (1989).
  \item \textsuperscript{213} Commonwealth v. Ritchie, 480 U.S. 39 (1987).
  \item \textsuperscript{214} 523 Pa. at 427, 567 A.2d at 1357.
  \item \textsuperscript{215} \textit{Id.} \textit{See also} Delaware v. Fensterrer, 474 U.S. 15 (1985) (per curiam); Advisory Opinion to the House of Representatives, 469 A.2d 1161 (1983) (the court held that the proposed statute would indicate the right of the accused to confront the accuser to obtain compulsory process and to offer testimony).
  \item \textsuperscript{217} Id. at 489, 533 A.2d at 122.
  \item \textsuperscript{218} Commonwealth v. Lloyd, 523 Pa. 427, 567 A.2d 1357 (1989).
  \item \textsuperscript{219} \textit{See supra} note 158 and accompanying text. \textit{But see} Commonwealth v. Ritchie, 480 U.S. 39 (1987) (The Supreme Court suggested that making information privileged may violate the compulsory process requirement of the Sixth Amendment. Yet, even taking this into consideration, the privilege afforded these records was still held to be constitutional.).
  \item \textsuperscript{220} Ritchie, 480 U.S. at 58.
  \item \textsuperscript{221} State v. Thiel, 236 Mont. 63, 768 P.2d 343 (1989); People v. Foggy, 121 Ill. 2d 337, 521 N.E.2d 86 (1988) (The Illinois statute was specifically amended to exclude an in-camera viewing of the records by the court).}

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victim was raped at knife point in a storeroom at her place of employment, the court held that it was not a denial of the defendant's constitutional rights to deny him access to the victim's psychological data and an in-camera inspection of the records. In Kyle, the court disallowed an in-camera inspection since it would enable the advocate to misuse sensitive psychological data compiled regarding the victim.

Therefore, the records of the victim should not be admitted into evidence absent any evidence which clearly would mandate their necessity. An absolute privilege granted by statute would guarantee the victim of a sexual assault that her disclosures would remain privileged. Some might object to this absolute privilege, but there is no pertinent principle in the United States Constitution which is likely to strike down a statute providing a rape crisis center counselor-victim privilege.

However, it has been argued that the compulsory process requirement of the Sixth Amendment of a state constitution protects the accused by assuring him of his due process rights. The court in Lloyd reasoned that the Compulsory Process Clause of the state constitution guaranteed the accused the right to have compulsory process to obtain "witnesses in his favor and to have the assistance of counsel for his defense." In his dissent, Justice Larsen suggested that compulsory process rights, though fundamental, are not absolute. For instance, state evidentiary rules based on "legitimate state interests which exclude certain witnesses or certain testimony" can be enforced without violating the defendant's due process rights.

Therefore, just as the right to confront his accuser is not violated by an absolute statutory privilege, the right of compulsory process is also not violated by such a law. Further, implicit in the right to compulsory process is the right to examine witnesses, and this is not nullified by the presence of a privilege. The conclusion that a statutory privilege does not violate the Compulsory Process Clause has been reached by courts who have reviewed the issue. As a result, a statute granting an absolute privilege is not likely to violate the Compulsory Process Clause.

Considering the danger of an in-camera inspection and the uncertainty of the outcome of any of the aforementioned balancing tests, an

223 Id.
224 Foggy, 149 Ill. App. 3d at 599, 521 N.E.2d at 1026.
225 Commonwealth v. Lloyd, 523 Pa. 427, 567 A.2d 1357 (1989). The court held that the right to inspect the records was mandated by the Compulsory Process Clause of the Pennsylvania Constitution which further mandated a disclosure of the victim's records.
226 Id. at 432, 567 A.2d at 1359.
227 Id. at 437, 567 A.2d at 1362 (quoting Commonwealth v. Jackson, 457 Pa. 237, 240, 324 A.2d 350 (1974)).
228 Id. Arguably, the confidentiality of disclosures made in therapy is an adequate state interest which should bar the admissibility of these records in court.
230 See supra note 222.
231 See supra notes 200-13.
absolute privilege is more favorable than a mere qualified privilege. For example, if the privilege is qualified, the victim is not guaranteed confidentiality but is merely assured that she may have this privilege if the court deems it is proper in her case.222

VI. THE SPECIAL CONSIDERATIONS SURROUNDING A CONFIDENTIALITY PRIVILEGE

A. Evidentiary Concerns

In the absence of a confidentiality privilege, it is difficult to ensure the victim that her personal and often embarrassing disclosures will not be subject to the discerning eyes of the defendant's attorney.233 However, as previously noted, the defendant has the constitutional right to confront his accuser in court.234 The state courts are careful to examine the victim's records to determine relevancy, and the existence of different types of privileges which the judiciary may enforce often do not adequately ensure the victim of privacy. After all, once the courts view a victim's records, her privacy is shattered. Therefore, the legislatures will have to examine the propriety of an absolute privilege or a qualified privilege.235

The Federal Rules of Evidence provide that in order to admit matters into evidence, they must be relevant to the issue in the case.236 Assuming arguendo that the evidence is relevant, the probative value of this evidence must substantially outweigh its prejudicial effect.237 Therefore, the defendant's constitutional right to confront his accuser does not encompass the use of evidence which is either irrelevant or highly prejudicial.238 Even if the evidence contained in the victim's records is deemed as relevant, due to the embarrassing and private nature of this evidence, it is highly prejudicial. The costs and benefits of granting a privilege even in the case of relevant evidence will be examined further in another portion of this note.

222 See supra note 191.
223 Id.
234 See supra notes 148-232 and accompanying text (the constitutionality issue is examined in full in the previous section).
235 In Illinois, the legislature at first enacted a qualified privilege, subject to an in-camera inspection. Later, the Legislature made this privilege absolute. See People v. Foggy, 149 Ill. App. 3d 599, 521 N.E.2d 1026 (1988). See also Advisory Opinion to the House of Representatives, 469 A.2d 1161 (R.I. 1983) (where the legislature proposed that the privilege should be qualified to allow an in-camera inspection).
236 Fed. R. Evid. 401 (relevant evidence is all evidence, making the existence of a fact more or less probable); Fed. R. Evid. 402 (all evidence which is not relevant is not admissible).
237 See Fed. R. Evid. 403.
Generally, any such determination of probative value versus prejudicial effect would be a matter for the trial court to decide after viewing the evidence. This should not be necessary in the instance of rape crisis center records because the issue is not the victim’s mental health, but rather the events of the incident in question. Using this rationale, state courts have denied defendant’s access to the victim’s records in a rape case after the legislature afforded her with a confidentiality privilege. Further, defense counsel does not have the right to conduct his own search of the victim’s records in order to determine relevancy.

In order to obtain access to the records, the defendant must demonstrate the record’s relevance to his defense, the materiality of the records, the absence of a less intrusive means of access, and the need for the records. As stated earlier, the records do not concern the central issue in the case, which is whether the victim was forcibly subjected to sexual intercourse. Therefore, it is necessary to subject the victim to scrutiny regarding the guilt, shame, and frustration that she experienced after the event. In addition, there are much less obtrusive means of accessing the necessary information. For instance, the victim may be subject to cross-examination regarding the events in question. In People v. Pena, the court was unable to find any evidence which indicated the utility of the victim’s rape crisis counseling records to the defendant’s defense, and therefore, held these records as inadmissible. Of course, in the absence of a statute which would deem these records as privileged, courts will have to make a case by case determination which will result in the victim having her private disclosures scrutinized by the court, whether or not they are relevant to her case.

The defendant may also try to obtain access to the records by arguing that a patient-litigant exception is applicable since the victim decided to prosecute. This exception waives the patient’s confidentiality privilege if she places her mental health at issue. Usually, this waiver occurs when a tort victim, whose mental health is in question, waives her psychiatrist-patient privilege which would have afforded her the right to partake in

239 See supra notes 69 and 143 and accompanying text.
240 See supra note 200.
241 See Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (“There is no general constitutional right to discovery in a criminal case.”).
244 See supra notes 69, 143 and 238.
245 See supra note 10.
246 See supra note 219.
confidential disclosures with her psychiatrist.\textsuperscript{250} It is highly unlikely that any court will apply the patient-litigant exception to a rape case, as her mental health is not a triable issue.

In fact, the very nature of rape indicates a need to warrant not only a confidentiality privilege, but a more stringent privilege to ensure the victim's well-being. The ethical codes of professional responsibility obligate psychiatrists, psychologists and social workers to keep matters with their patients/clients confidential.\textsuperscript{251} The extension of this obligation to a non-licensed practitioner, such as a social worker, who does not have a medical degree, indicates that the special nature of her work has been taken into consideration.\textsuperscript{252} Therefore, the rape crisis counselor-victim relationship merits special attention and protection by our judicial system as well. This confidential relationship should not be violated when there is no clear indication that its disclosure would aid the truth finding process.\textsuperscript{253}

Even if this evidence is found to be relevant, and further, is not found to be prejudicial enough to outweigh any probative value it may have, it may be hearsay.\textsuperscript{254} Arguably, this may be considered an excited utterance, which is an exception to the hearsay rule. Yet, further examination of the nature of this information indicates that these statements are well thought out rationalizations which are made after the fact in therapy, and thus, do not qualify as excited utterances. In addition, the records often contain the counselor's notes which reflect what she heard the victim say in therapy.\textsuperscript{255} These notes are often taken after the fact, merely stating the recollection of the counselor as to what transpired.\textsuperscript{256} Often, courts admit this information as useful because it is the opinion of an expert, and not a layman.\textsuperscript{257} However, it is important to note that regardless of

\textsuperscript{250} These determinations were made by courts in the examination of the psychotherapist-patient relationship which does not necessarily indicate a highly personal or heinous ordeal such as rape. Smith,\textit{ Medical Psychotherapy Privileges and Confidentiality: On Giving With One Hand and Removing With The Other}, 75 Ky. L.J. 473, 484-502 (1986-1987).


\textsuperscript{254} \textit{See Fed. R. Evid. 801}; In Pittsburgh Action Against Rape, 494 Pa. 15, 428 A.2d 128 (1981), the court noted that the accused is granted the right to ascertain what the plaintiff has originally said. However, even prior inconsistent statements made in therapy are limited to "statements of the complainant" and not interpretations or reflections of the counselor, nor any statements reflecting counseling to be revealed. \textit{Id.} at 132.

\textsuperscript{255} Pittsburgh Action, 428 A.2d at 132.

\textsuperscript{256} \textit{See} Carlson,\textit{ Policing the Biases of Modern Expert Testimony}, 39 \textit{VAND. L. REV.} 577 (1986). \textit{See also supra} note 204.

\textsuperscript{257} \textit{Fed. R. Evid. 702-706}. 
ones opinion concerning the relevancy of those records, the rule barring the use of hearsay prohibits even those out of court statements which are relevant.  

B. The Courts Application of Various Types of Privilege

1. Types of Privilege

With these evidentiary considerations in mind, legislatures promulgate rules regarding privileges. There are three dimensions of privilege to consider. An absolute privilege would bar disclosure of the victim's records to the defendant in all circumstances. A qualified privilege would utilize a balancing test which would allow the defendant to have access to the victim's records if he could prove that the records were necessary to ascertain the truth to such an extent that this outweighed the victim's privilege. Lastly, the courts could merely determine if the records are relevant, and if this is the case, allow their disclosure. The first test is the only solution which would allow the victim to be confident that she could receive therapy in an atmosphere of trust because the other two standards, the qualified privilege or the mere relevancy requirement, are easy to circumvent by a clever manipulation of the Federal Rules of Evidence. For instance, using a balancing test, the court may grant access to these records. Therefore, the victim would not be guaranteed privacy. Also, if defense counsel could assert the record's potential relevancy, at the very least, the court would allow an in-camera inspection of the records to determine this fact. This could undermine the ultimate goal of privilege which is to assure confidentiality under certain circumstances regardless of relevancy considerations.

2. In-Camera Inspections of the Record

In an attempt to maintain a fair balance between the concerns of both the victim and the defendant, legislatures have enacted qualified privileges which often result in the allowance of an in-camera inspection of the records. In doing this, the court would be able to view the records


262 See supra note 191.

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and could determine whether or not the information is exculpatory in nature.264 Thus, this opportunity, which is provided for the defendant to prove relevancy, results in the scrutiny by the court of the victim's confidential disclosures to her counselor.265 After this violation, it is of little comfort to the victim that in the absence of a determination that these records are relevant to the defense, they will not be admitted into evidence.266

Of course, the defendant is presumed innocent and should therefore be able to gather all the pertinent information necessary to his defense.267 It is with these good intentions that legislatures have enacted a qualified privilege, rather than an absolute privilege.268 In fact, in In re Pittsburgh Action Against Rape, the defendant was afforded an in-camera inspection of the records after convincing the court that the disclosure of truth promoted the administration of proper justice.269 Further, in State of Connecticut v. Whitaker, the court held that there was sufficient ground to hold that the failure to produce information is so detrimental to the witness that it could merit counsel to request that the victim's direct testimony be stricken.270 These decisions are a result of the bedrock principal that the truth finding function of our system of criminal justice outweighs the necessity for privacy that an absolute privilege of confidentiality would create.271

Theoretically, these considerations would also apply to the rape crisis counselor-victim privilege. However, the crime of rape does not bring the issue of the victim's mental health to the court's determination.272 In fact, the only issue is whether or not the victim was forced into having sexual intercourse with the defendant.273 With this in mind, the Illinois legislature has determined that the in-camera inspection of records is not helpful in the truth finding process.274 This is due to the fact that the victim's psychological records may be used as a source of impeachment during cross-examination.275 Therefore, this would especially hurt the

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264 Advisory Opinion, 469 A.2d at 1161.
265 See supra note 263.
266 Whitaker, 202 Conn. at 259, 520 A.2d at 1018.
267 See supra note 2.
268 See supra note 261. See also supra note 191 (stating the downside to a qualified privilege).
272 See supra notes 69, 143, 238, and 244.
273 Id.
274 See People v. Foggy, 121 Ill.2d 337, 521 N.E.2d 86 (1988).
prosecution's case if the defense attorney is able to view these records.276 This evidence is not critical to the defense as it merely clouds the issue, often bringing misleading information to the courtroom. The victim's feelings regarding the attack are not important to the defense of proving what actually occurred between the victim and the accused. Rather, they prove to confuse the jury regarding the incident in question.

In-camera inspection is not limited to relevant material.277 This is because courts reason that the defendant should not have to speculate as to what the records contain to determine whether he has been prejudiced by not having access to these records.278 However, absent impeachment purposes, there is no clear need to admit these records into evidence. Also, during the cross-examination of the witness, leading questions are permissible.279 These questions could substantially damage the victim's case by recklessly disclosing her statements made in therapy.280 For instance, questions regarding the victim's guilt after the crime may unnecessarily give the jury the impression that she consented. This would be highly misleading and inappropriate. Therefore, it would be an anomaly to admit this type of testimony. Of course, the in-camera inspection is intended to eliminate this problem.281 But once the defense counsel views the records, the balance is skewed in the defendant's favor because access to the entire record provides the defense attorney with knowledge regarding the victim's mental state, whether or not it is relevant.282

3. Voire-Dire Examinations

An in-camera inspection may lead the court to determine that the records are necessary to the voire dire process.283 Arguably, the records are useful if the voire dire process raises questions concerning the victim's relationship with her therapist.284 This instance only arises in a limited context where the victim may have mental problems outside of those arising from the rape. Therefore, the court, in State v. Pierson, set a limitation upon the use of records in a case where there has been sexual assault.285 In this instance, the defendant may only ask a therapist questions in regard to the victim's narrative describing the assault when a voire dire is conducted which shows that the victim endured a mental

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276 See supra note 223.
279 Fed. R. Evid. 611(C).
280 People v. Foggy, 121 Ill.2d 337, 521 N.E.2d 86 (1988).
282 Foggy, 121 Ill.2d at 337, 521 N.E.2d at 86.
283 Id.
284 State v. Pierson, 201 Conn. 211, 514 A.2d 724 (1986).
285 Id.
abnormality which would affect the credibility of her accusations toward the defendant. Since prior mental history is inadmissible, the therapist must consent to partake in a voire dire examination. If the therapist chooses not to consent to such a voire dire examination, his or her testimony must be stricken.

This creates problems in the prosecution's presentation of her case. A conflict of interest becomes present which the victim and her counsel must resolve. In order to prevent the misuse of the victim's psychological records in the courtroom, the victim must decide whether or not to allow the court to view the very records in question. Since the defendant is present during voire dire, he will hear all of the information presented by the therapist, whether or not this information is ultimately admissible. Yet, these inconsistencies may have little to do with the events of the incident in question. They may be purely a result of the victim's continuing process of recovery. This process often helps to alter the victim's perception of herself in relation to the rape in order to help her cope with the ordeal. This creates an opportunity for the defendant to view this information using the eyes of an advocate to search for inconsistencies which may later come up in the victim's testimony. Therefore, although the voire dire is conducted with the interest to protect the misuse of the victim's records, it ultimately brings harm to the victim. The redeeming factor involved by the use of the voire dire to determine the record's relevance is that the court may exclude the public from the courtroom during these proceedings. Also, portions of the victim's psychiatric record, or the entire record, may ultimately become sealed by the court following these proceedings. This, however, does not alleviate the detrimental effect of having the defense counsel gain access to the records.

4. Policy Considerations

In the absence of a statute granting an absolute privilege, the rape victim's rights are often undermined by the judicial interpretation of the situation. The Illinois state supreme court has upheld a statute granting an absolute privilege as constitutional. In Commonwealth v. Ritchie,
the United States Supreme Court held that it is necessary to honor a statutorily established confidentiality privilege. However, not all states have a specific statute granting the rape-crisis center-victim privilege.

In states such as Ohio, other similar privileges exist. For instance, in Ohio, the reports and records of the probation department are considered confidential. In addition, courts have interpreted the Ohio Rules of Juvenile Procedure to constitute a confidentiality privilege. These rules are a result of the very nature of a social worker’s and probation officer’s duties. A special consideration is made in the case of juveniles due to the special nature of these proceeding. Therefore, it is the next logical step to afford a confidentiality privilege to the rape counselor-victim relationship due to its confidential nature. The only effective means of assuring the victim of this privilege is the promulgation of statutory reform.

5. Cost-Benefit Analysis

Several types of information are communicated in a therapeutic setting. As is well established, information obtained by a therapist which is not relevant is clearly inadmissible. For instance, information regarding the general mental health of a rape victim is inadmissible. However, there are some types of information obtained through therapy which are controversial among legislatures and courts in determining whether or not it is appropriate to grant a privilege to the rape victim. Such controversies arise when a rape victim makes a statement in therapy that is inconsistent with her in-court statement, when a victim raises doubts as to her identification of the key witness, and in the rare instance when a victim states to her counselor that she may perjure herself.

These types of statements cast a serious doubt as to the propriety of a privilege. Yet, in analyzing these statements, this note has considered the fact that rationalizations made in therapy are highly unreliable. Unlike an excited utterance, these victims are in the situation where they are trying to rationalize their traumatic experience by casting doubt upon the situation. The nature of a privilege is to deem that such

292 See supra notes 178-202 and accompanying text.
296 State v. Keaton, No. H-84-47 (Ohio Court of Appeals, Nov. 1, 1985); (The court stated that it is obvious from Ohio Rev. Code Ann. § 2151.14 (Baldwin 1989) and the juvenile rules that there is a presumption of confidentiality in relation to a juvenile court proceeding).
297 State v. Thiel, 236 Mont. at 66, 768 P.2d at 345 (state has a compelling interest to protect the records of social workers in different crimes).
298 FED. R. EVID. 402.
299 See supra note 182. See also supra note 180 (Ohio statute mandates the inadmissibility of evidence regarding the victim’s sexual history).
300 See supra notes 13-24 and accompanying text.
relevant information is less valuable than the guarantee of privacy to the victim. Four fundamental conditions must be met in order to guarantee a privilege: the communications must originate under the assumption that they will not be disclosed; this element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties; the relationship must be one which in the opinion of the community ought to be seriously fostered; and the damage to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.\textsuperscript{301}

In the instance of rape, a victim seeking counseling needs to be assured of privacy in order to pursue help. This victim realizes that she will ultimately appear in a court of law. Therefore, if the victim chooses to prosecute, absent a privilege, the victim will choose not to disclose her doubts for fear that these would hinder prosecution. Worse yet, the victim may choose not to prosecute her attacker for fear that her disclosures will discredit her in court. This is clearly an anomaly. The cost of this information is high due to the unreliable nature of therapy. Often times, patients address issues with their therapist as a means of guilt reduction, and they do not intend their statements to be dispositive of factual issues.\textsuperscript{302}

The nature of this relationship hinges on confidentiality. Prior inconsistent statements that are the therapists recollection are inadmissible.\textsuperscript{303} This is a result of the realization that the therapist’s notes are hearsay.\textsuperscript{304} It follows than that statements which suggest the victim’s doubt as to the accuracy of the events of the evening, although relevant, are highly unreliable. Such statements would not be made by a victim if she viewed them as exculpatory evidence.

Of course, the defendant has a right to an adequate defense. Yet, as the \textit{Wigmore} criteria indicate, there are situations where the maintenance of confidentiality is tantamount to the existence of a confidential relationship.\textsuperscript{305} The rape crisis counselor victim relationship falls under this category. In this instance, the accused attacker is still afforded the opportunity of cross-examination\textsuperscript{306} while the victim is able to maintain a healthy confidential relationship with her therapist. In an area where underreporting of a crime is so prevalent, it would be a great benefit to
society to afford a privilege. The privileges already afforded under Rape Shield laws have been helpful but are merely the first step.\textsuperscript{307} Since the absence of a privilege would destroy the therapeutic relationship, this information will become obsolete because the victim will choose not to disclose her fears. Although granting a privilege is a large step to take in a criminal case,\textsuperscript{308} it is necessary as the benefits of a privilege clearly outweigh the costs of not having such a privilege.\textsuperscript{309}

\textbf{VII. STATUTORY REFORM}

The state of Illinois has drafted a statute affording a victim of sexual assault an absolute confidentiality privilege when she receives counseling from any organization established to help her.\textsuperscript{310} In addition, the Connecticut legislatures has written a statute affording the victim of sexual assault, as well as a battered women with a confidentiality privilege.\textsuperscript{311} This statute carefully defines “sexual assault counselors” to be any person engaging her services in a rape crisis center who has undergone the requisite training and whose primary purpose is to aid victims of sexual assault.\textsuperscript{312} “Victim” is defined as any person who consults a battered women's counselor or sexual assault counselor.\textsuperscript{313} This type of statute is promulgated by the concerns raised when only a medical doctor is afforded such a privilege, since the rape crisis center is more likely to engage in counseling sessions with the victim than is a doctor.\textsuperscript{314} Furthermore, confidentiality is afforded to the victim unless the victim has “waived” this privilege.\textsuperscript{315} This waiver provision has rendered the statute an ineffective safety device for some victims.

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\textsuperscript{307} See supra note 180.
\textsuperscript{308} See supra note 2; see also G. WEISSENBERGER \textit{OHIO EVIDENCE} 107.
\textsuperscript{309} This type of cost benefit analysis may differ in situations of child custody suits, third party defendant suits where therapeutic information is requested, cases where there is an insurance release signed by the victim, and cases where the victim has filed a civil suit against her attacker due to her mental damage caused by the rape. However, these determinations are beyond the scope of this particular article.
\textsuperscript{310} Globe Newspapers Co. v. Superior Court, 407 Mass. 879, 556 N.E.2d 356 (1990) (This case granted confidentiality for a sexual assault case of a minor since confidentiality was a major concern).
\textsuperscript{311} See supra notes 191-200 and accompanying text.
\textsuperscript{312} \textit{CONN. GEN. STAT.} § 52-14k (1990). In Connecticut Privileged Communication between battered women's or sexual assault counselor and victims.
\textsuperscript{313} The rape crisis center is often the first place the victim receives any type of counseling in this matter. Telephone interview, volunteer \textit{Lorain Crises Center} (Feb. 2, 1990); See also supra note 136.
\textsuperscript{314} \textit{Id.} It is important to note that the counselor must be certified by her rape crisis center, but is not a medical professional.
\textsuperscript{315} \textit{CONN. GEN. STAT.} § 52-146k(6) (1990).
\end{flushleft}
Because the victim is prosecuting her attacker, the courts have placed limitation on this privilege. Therefore, courts have held that an in-camera inspection of her records is necessary because the absence of such an inspection would be an impairment to the defendant's right of confrontation. Loopholes such as this should be carefully considered by legislatures who propose confidentiality statutes because an effective statute affording the victim a confidentiality privilege is likely to be held constitutional.

In addition, the in-camera inspection of the victim's records undermines the rationale behind the privilege. The rationale is to ensure the victim absolute privacy in her disclosures to a counselor whether or not she prosecutes the alleged rapist. Further, if a statute which wholly protects the victim from possible exposure of her personal thoughts is non-existent, there is no way for the rape crisis counselor to ensure the victim that they may privately discuss problems which have occurred due to the rape. This fact could result in instigating a chilling effect on rape prosecutions. Of course, the absence of any statute renders an even more stringent result.

For instance, in Commonwealth of Pennsylvania v. Lloyd, the majority held for the admission of the psychotherapeutic records of a six year old victim of rape into evidence. In Lloyd, the court held that the patient-psychotherapist relationship was not privileged due to the fact that the Pennsylvania legislature did not specifically promulgate such a privilege. Ironically, the Pennsylvania legislature had already afforded the sexual assault counselor-victim privilege prior to this case. However, the court did not find this applicable to the child's situation since he did
not visit a rape crisis center. In the absence of a statute, the trial court's in-camera investigation determined that the defendant's accusations that the victim was delusional and/or hallucinatory were unfounded. However, the appellate court overruled the sealing of the records and held that the defendant should have the right to view the records with cross-examination tactics in mind. This approach arguably gives the accused an opportunity to ascertain what the victim has alleged.

The court in Lloyd notes that the defendant, if given the right to examine the entire record, will have access to the comments made by the victim. The court compromised by only allowing an in-camera inspection of the records. Justice Larsen in his dissent held that this compromise is of little benefit to the victim who has had her rights violated by both the alleged rapist and the judicial system.

Larsen poignantly explained the reality of admitting these records into evidence. He stated:

In this tragic case, a six year old child was repeatedly raped, sodomized and otherwise sexually assaulted, her physical and personal integrity violated, her privacy invaded and shattered, by thirty-four year old Stephen Lloyd, who was the child supervisor at the "Playstreet" child care program and a "trusted friend" of her family. The majority of the court now continue the assault upon this young rape victim's personal integrity, assists in further invasion of her privacy, and quite possibly retards her treatment by permitting her attacker virtually unlimited access to all medical records generated by the psychotherapeutic treatment which she has received in an effort to deal with and hopefully overcome the emotional and psychological damage inflicted by Mr. Lloyd. Thus, the criminal "justice" system became an active accomplice in the violation of another rape victim.

See Commonwealth v. Ritchie, 380 U.S. 49 (1987) (noting the absolute privilege afforded to this relationship). See also 42 PA. CONS. STAT. § 59451 (b) (1990) (A sexual assault counselor is defined as "any person who is engaged in any office, institution, or center defined as a rape crisis center under this section, who has undergone 40 hours of training and is under the control of direct services supervisor of a rape crisis center whose primary purpose is the rendering of advice, counseling or assistance to victim's of sexual assault.").

Lloyd, 523 Pa. at 2, 567 A.2d at 1358.

Id. at 430, 567 A.2d at 1358 (citing Commonwealth v. Grayson, 466 Pa. 427, 428, 353 A.2d 428, 429 (1976), where the court began to reason in the defendant's favor. It is this rationale that led the court to the ultimate holding as stated in the text).


Id. at 433, 567 A.2d at 1360.

Id. at 437, 567 A.2d at 136. Larsen stated: "The confidentiality of the psychotherapeutic relationship is breached the moment defense counsel opens the file, regardless of whether this is made in chambers or on a public thoroughfare." Id.

Id. at 433, 567 A.2d at 1360.
As a result, Larsen asked the legislature to respond by drafting a statute which would protect the rape victim who consulted a psychiatrist after receiving treatment, as well as one who consulted a "sexual assault counselor." Two months later, the legislature responded promptly to this plea, amending the statute which provided a psychologist-patient privilege to also afford a psychiatrist-patient privilege. This demonstrates the fact that a statute is the only truly effective means in which to guarantee the victim privileged communications in therapy. Pure semantics should not affect the victim's fate, but as we have seen, it does. Further, social policy reasons lead to allowing a privileged communication when a person partakes in a certain relationship which has a beneficial function towards society and depends upon mutual disclosure between parties in the relationship. This can be done by recognizing an absolute privilege of communication which occurs between a rape victim and whatever type of counselor she chooses to see, be it a psychiatrist, psychologist, social worker, or a rape crisis center counselor.  

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333 Id. at 433, 567 A.2d at 1375-76. ("Once again, I find myself in the position of having to plead with the legislature to do that which this court should have done. Because this court has refused to even acknowledge that some information and potential evidence may, in our society, be protected against disclosure by necessary and well recognized testimonial privileges, this is how no legal protection for the confidential communications between a psychotherapy patient and her or his psychotherapist, not even when the psychotherapist is a psychiatrist.")

334 See Commonwealth v. Lloyd, 562 Pa. 427, 567 A.2d 1357 (1989) (This case was decided in October of 1989). See also 42 PA. CON. STAT. § 5944 (1990). The word "psychiatrist" was inserted into the statute to also afford this privilege. However, this statute as interpreted is limiting the privilege to instances where the counselor testifies. In Commonwealth v. Hyatt, 1990 WL 200131 (Pa. Super. 1990), Justice Elliot discussed the irony of this interpretation and stated: Rape victims were very often stigmatized in our society. In order to circumvent a false accusation of rape, the law of this Commonwealth at one time referred to the rape complaint as the "prosecutrix" required corroborating evidence, and special jury instructions concerning the victim's emotional vulnerability. Moreover, the laws of this state had required prompt reporting of a rape, reasonable resistance by the victim, and even though it was not permissible to scrutinize a rape victim's prior sexual history, a learned defense counsel was always permitted to raise a question of the victim's reputation in the mind of the jury. Such laws were premised on the myth surrounding rape that the victim got what she wanted. Accordingly, often times the legal structure degraded the victim all over again, in the courtroom, in responding to the initial assault. After having evolved socially, legislatively to the point of codifying an absolute privilege concerning confidential communications between a rape victim and a sexual counselor, to now take a step back in time is not only offensive, but should be repugnant to an enlightened society." Id. at 7-8.


VIII. Conclusion

Victims of rape are personally, as well as physically, assaulted. The violation they experience is often extended into the courtroom setting where they are further reminded of the tragic incident. Often, victims seek therapy as a form of solace. When the therapeutic relationship is not confidential, it is not effective because of the personal and embarrassing nature of the crime.

The admission of therapeutic records into the courtroom setting is such an example of the violation of victims rights. Due to societal prejudice, many women are not reporting rapes since they would rather abstain from being further violated in the courtroom. Further, if women knew that their confidential statements made in therapy would become part of public record, even more women would refrain from prosecuting their attacker. As a result, few victims will actually bring their attacker to justice.

The defendants' claim that their constitutional right to confront and their right to compulsory process found in Article VI, Section 10 of the Constitution enables them access to such records. This simply is not true. Courts have repeatedly held that statutes precluding the courts from such access to clinical records are indeed constitutional.

In addition, the courts perform a balancing test when determining whether the defendant's right to ascertain the truth outweighs the victim's privilege of confidentiality. Many legislatures have yet to deem a specific privilege for rape crisis center personnel, but have extended the doctor-patient privilege into the psychotherapeutic setting. One important aspect of this privilege is that it enables the victim to seek effective therapy without fearing that this therapy will have a chilling effect on the prosecution of her attacker.

Often, the victim may feel remorse and guilt. Regardless of whether records disclose this phenomena, her admission into evidence is still a personal invasion of her deepest thoughts.

In an attempt to balance the concerns of both the victim and the defendant, courts have admitted the records into evidence in-camera. This gives the defendant undue leverage because he is able to view these records using the eyes of an advocate to assess the weaknesses of the victim.

Arguments by the victims that these records are not necessary to the pursuance of truth have been persuasive to some state legislatures. The drafters of the Federal Rules of Evidence in Proposed Federal Rule of Evidence 504 considered extending a privilege to the psychotherapeutic setting. In addition, state legislatures have acknowledged that action needs to be taken to protect the confidentiality privilege of sexual assault victims. The next step is to have several state legislatures follow this trend in order to mandate a uniform privilege for the victims of rape by statute. In ensuring the victim a right to confidentiality, these statutes would benefit both the medical and legal profession.

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