NOTE

RAPE PROSECUTIONS AND PRIVILEGED PSYCHOLOGICAL COUNSELLING RECORDS: HOW MUCH DOES A DEFENDANT HAVE A RIGHT TO KNOW ABOUT HIS ACCUSER?

I. INTRODUCTION

The criminal defendant has a federal constitutional right to obtain certain information about his accuser.[1] Simultaneously, each state grants individuals a number of statutory rights to the confidentiality of communications produced in various relationships.[2] When the criminal defendant seeks access to communications made by his accuser and covered by such a privilege of confidentiality, a conflict arises between the criminal defendant's interest in a fair trial and the societal interest in protecting the confidentiality of the communications.[3] Rape prosecutions illustrate the intensity of this conflict quite clearly.

Aside from the fact that rape prosecutions illustrate the conflict clearly, I choose to discuss this conflict in the context of rape prosecutions because rape law seems particularly susceptible to both substantive and procedural aberrations from constitutional and criminal law norms. I submit that these aberrations are partially the product of powerful subjective value judgements about rape and the social milieu in which it arises. I believe that it is especially important to scrutinize a difficult conflict in the legal context most susceptible to subjective passions because this is the context in which values, fundamental to our system of justice, are most likely to be slighted without adequate justification. Accordingly, a few words about the evolving legal context of rape prosecutions are necessary in order to place this discussion in perspective.

As normative attitudes about sexual encounters evolve, legislatures, juries, and courts are beginning to reevaluate the definition of rape and procedural questions relating to rape prosecutions. Specifically, they are rethinking the admissibility of character evidence ("[W]hat do we need to know about the defendant and the victim in order to determine who is telling the truth?").[4]

---

[1] *See infra* section II.

[2] *See, e.g.*, MASS. GEN. L. ch. 111, § 70E (1992) (hospital/patient); MASS. GEN. L. ch. 112, § 135A (1992) (social worker/client); MASS. GEN. L. ch. 233, § 20B (1992) (psychotherapist/patient); MASS. GEN. L. ch. 233, § 20J (1992) (sexual assault counsellor/victim).

[3] For a thorough study of this larger conflict, see Robert Weisberg, Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, 30 STAN. L. REV. 935 (1978).

[4] Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509, 517 (1992).

Assuming the absence of evidence of force, a rape prosecution often is reduced to a credibility contest between the complainant and the defendant. In this situation, the judge's decision whether or not to admit character evidence determines the outcome of the case.

Historically, rape law has been subject to a number of troubling idiosyncracies that set it apart from the rest of criminal law.[5] Virtually all such exceptions may be traced to a misogynistic legal system's irrational and "deep distrust of the female accuser."[6] Feminist legal scholars have pushed these exceptions into the sunlight of public discussion and have uncovered the biased assumptions upon which they are based.[7] These scholars have persuaded the United States Congress and most state legislatures[8] to pass rape-shield statutes "to protect rape victims from the humiliation of public disclosure of the

---

[5] *See generally* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Court Room*, 77 COLUM. L. REV. 1 (1977). Rape is a sex-specific crime in most jurisdictions, usually defined as "unlawful sexual intercourse with a female person without her consent." ROLLIN M. PERKINS, CRIMINAL LAW § 5 (2d ed. 1969). Certain jurisdictions have injected a requirement of force which "led to the rather illogical idea that the victim had to 'resist to the utmost.' " Berger, *supra*, at 8 (citing Reidhead v. State, 250 P. 366, 367 (Ariz. 1926); Starr v. State, 237 N.W. 96, 97 (Wis. 1931)). In most jurisdictions a man cannot rape his wife by forcing her to submit to intercourse. Berger, *supra*, at 9 (citing PERKINS, *supra*, at 156). Rape law has also been subject to special requirements of corroboration. *See* Frederick J. Ludwig, *The Case for Repeal of the Sex Corroboration Requirement in New York*, 36 BROOK. L. REV. 378 (1970); Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137 (1967); Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365 (1972); Note, *Recent Statutory Developments in the Law of Forcible Rape*, 61 VA. L. REV. 1500, 1529-33 (1975). Evidence respecting the complainant's "chastity" (i.e., abstention from premarital or extramarital intercourse) has played a critical role in rape trials. Berger, *supra*, at 15. "The underlying thought here is that it is more probable that an unchaste woman would assent . . . than a virtuous woman." People v. Collins, 186 N.E.2d 30, 33 (Ill. 1962). Finally, rape cases have included special jury charges, most derived from the words of Sir Matthew Hale, warning the trier of fact that a rape accusation "is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent." Berger, *supra*, at 10 (citing CALIFORNIA JURY INSTRUCTIONS, CRIM. (CALJIC) No. 10.22 (3d ed. 1970)). Such instructions conclude: "[T]he law requires that you examine the testimony of the [complainant] with caution." *Id.*

[6] Berger, *supra* note 5, at 10.

[7] *See generally* Berger, *supra* note 5; Abraham P. Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 97-102 (1977); J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 549 n.22 (1979-80) (collection of articles).

[8] All but four states (Arizona, Connecticut, Maine, and Utah) have passed rape shield statutes. Tanford & Bocchino, *supra* note 7, at 592. Virginia passed a rape shield statute in 1981. *See* VA. CODE ANN. § 18.2-67.7 (Michie 1986).

details of their prior sexual activities."[9] The broad acceptance of these statutes suggests that the legal system now generally views rape complainants' prior sexual activities as evidence with very little probative value. This shift in attitude marks a new systemic sensitivity to the complexities and strong cultural biases inherent in rape prosecutions.

One scholar noted that "the overall purpose of these reforms is to treat rape more like other offenses. A major motif is that rape prosecutions should concentrate on the *defendant's* conduct, inquiring into the actions of the complaining witness only when fairness so requires."[10] Reasonable people disagree as to when fairness requires an inquiry into the actions of the complaining witness. Moreover, reasonable people disagree as to the appropriate extent of such an inquiry.

After an alleged rape, a complainant commonly obtains medical treatment, psychotherapy, and/or counseling. Ordinarily, the defense attorney will seek access to evidence of such treatment (e.g., medical records, counseling records) in order to determine whether this evidence contains any exculpatory information. The prosecution typically will oppose this request on the grounds that the release of these records would violate the state's interest in protecting the complainant's privacy and the confidentiality of certain other statutorily specified relationships (e.g., doctor/patient, psychotherapist/patient, social worker/client). This dispute establishes a conflict between the defendant's constitutional rights and the complainant's statutory privileges.

Where legislatures have provided communications between rape victims and rape treatment counsellors with absolute statutory privilege against disclosure, courts have uniformly held that such statutes precluded all discovery requests by rape defendants and furthermore did not violate defendants' constitutional rights.[11] Where legislatures have provided communications with some lesser

---

[9] Tanford & Bocchino, *supra* note 7, at 544. A rape shield law restricts a criminal defendant's ability to present to the jury evidence of the complainant's past sexual history. *Id.* Rape victim shield laws are "aimed at eliminating a common defense strategy of trying the complaining witness rather than the defendant. The result of this strategy was harassment and further humiliation of the victim as well as discouraging victims of rape from reporting the crimes to law enforcement authorities." *Id.* at n.1 (quoting State v. Williams, 580 P.2d 1341, 1343 (Kan. 1978)). Rule 412 of the Federal Rules of Evidence is the federal rape shield statute.

[10] Berger, *supra* note 5, at 12 (emphasis in original). *But see* Tanford & Bocchino, *supra* note 7, at 545 (noting that certain rape shield laws are so restrictive of a criminal defendant's ability to present evidence in his own defense that they raise Sixth Amendment concerns).

[11] *See* People v. District Court, 719 P.2d 722, 727 n.3 (Colo. 1986) (en banc); People v. Foggy, 521 N.E.2d 86 (Ill. 1988); Commonwealth v. Wilson, 602 A.2d 1290 (Pa. 1992). *But see* Commonwealth v. Two Juveniles, 491 N.E.2d 234, 238 (Mass. 1986) ("We think it clear that in certain circumstances the absolute privilege . . . must yield at trial to the constitutional right of a criminal defendant to have access to privileged communications."); Advisory Opinion to the House of Representatives, 469 A.2d 1161 (R.I. 1983).

statutory privilege, courts generally agree that a defendant must make some sort of threshold showing of likelihood that treatment records contain valuable information, in order to justify piercing the privilege.[12] Assuming the defendant is able to meet this initial burden, courts again generally agree that the trial judge should review such records *in camera*. The courts split, however, over the sort of information which the trial judge should look for. The majority of courts have held that the trial judge shall look for information material[13] to the trial proceedings.[14] The Massachusetts Supreme Judicial Court (the "SJC"), on the other hand, has held that the trial judge shall look for merely relevant information, theoretically a lower standard.[15] The SJC requires that the trial judge then allow both defense counsel and the prosecutor access to the relevant privileged records for the limited purpose of determining, on motions by the parties, whether any of the relevant information is material and, hence, admissible at trial.[16]

This Note compares the majority rule, *in camera* review by the trial judge for material evidence, with the minority rule, *in camera* review by the trial judge for relevant evidence followed by review of such relevant evidence by counsel for material evidence. The Note will argue that the minority rule is superior to the majority rule because, when properly administered, it strikes a better balance between the defendant's Sixth and Fourteenth Amendment rights to confrontation,[17] compulsory process,[18] and due process,[19] and the

---

[12] Commonwealth v. Bishop, 617 N.E.2d 990, 995 n.5 (Mass. 1993) (compiling authority). *But see* State v. Allman, 352 S.E.2d. 116 (W. Va. 1986) (permitting limited disclosure to counsel for the purpose of an *in camera* relevancy hearing without a threshold showing of any kind).

[13] The federal materiality standard is defined in United States v. Bagley, 473 U.S. 667 (1985). *See infra* section II.

[14] *See* Pennsylvania v. Ritchie, 480 U.S. 39 (1987); *In re* Robert H., 509 A.2d 475 (Conn. 1986); People v. Barkauskas, 497 N.E.2d 1183 (Ill. App. Ct. 1986); State v. Perry, 552 A.2d 545 (Me. 1989); State v. Paradee, 403 N.W.2d 640 (Minn. 1987). This position will be referred to as the "majority rule."

[15] *Bishop*, 617 N.E.2d at 997. *Cf.* Zaal v. State, 602 A.2d 1247 (Md. 1992); State v. Gagne, 612 A.2d 899 (N.H. 1992).

[16] *Bishop*, 617 N.E.2d at 997. This position will be referred to as the "minority rule."

[17] The Sixth Amendment to the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. CONST. amend. VI. This clause, referred to as the Confrontation Clause, grants the defendant the right to be present at trial and to be given an opportunity to effectively cross-examine witnesses. *Ritchie*, 480 U.S. at 51; Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 182 (1974).

[18] The Sixth Amendment also provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI. This clause, referred to as the Compulsory Process Clause, has not been clearly defined by the United States Supreme Court. *Ritchie*, 480 U.S. at 55-56; Peter Westen, *Confrontation and Compulsory Process: A Unified The-*

state's interest in protecting the privacy and confidentiality of the complaining witness. The Note will argue further that even the minority rule contains shortcomings which could be overcome to provide greater protection to the defendant's constitutional rights without damaging the privacy and confidentiality of the complaining witness.

Since both the majority and minority rule rely upon federal constitutional discovery doctrine, section II of this Note will discuss the minimal pretrial discovery requirements in place before the United States Supreme Court adopted the majority rule in *Pennsylvania v. Ritchie*.[20] Section III will briefly summarize *Ritchie* in order to outline the majority rule and the rationale behind it. Section IV will outline Massachusetts case law on the disclosure of an alleged victim's psychological treatment records in a rape prosecution. The section will focus primarily on *Commonwealth v. Stockhammer*,[21] a Massachusetts case which highlights the importance of the distinction between the majority rule and the minority rule. Section V will analyze four potential methods of handling a defense request to view psychological treatment records: (1) no disclosure to either the trial judge or counsel through the invocation of an absolute privilege; (2) *in camera* review of the records by the trial judge for material evidence only if counsel makes a preliminary showing of legitimate need for review (the majority rule); (3) *in camera* review of the records by the trial judge for relevant evidence only if counsel makes a preliminary showing of legitimate need for review, followed by counsel's review of such relevant evidence for material evidence (the minority rule); and (4) pretrial review of the complainant's post-incident records by counsel without any preliminary showing followed by an *in camera* hearing on the admissibility of any information counsel would like to introduce into evidence.

Section VI will argue that courts should adopt the minority rule, subject to certain modifications mentioned in the fourth position, whenever defense counsel requests access to the complainant's psychological treatment records,

---

ory of Evidence for Criminal Cases, 91 HARV. L. REV. 567, 586-587 (1978). According to one author: "Commentators have viewed this right as more expansive than the right of confrontation and both state and federal courts have interpreted it, as articulated by the Sixth Amendment, to encompass at least the rights guaranteed by due process." Felice B. Rosan, Note, *State Constitutional Law - Pennsylvania Extends Defendant's Rights to Confrontation and Compulsory Process Beyond the Sixth Amendment* - Commonwealth v. Lloyd, 63 TEMP. L. REV. 465 (1990) (citing Westen, *supra* note 17, at 183-84; *Ritchie*, 480 U.S. at 56).

[19] The Fourteenth Amendment to the United States Constitution provides in part: "[N]or shall any State deprive any person of . . . liberty . . . without due process of law." U.S. CONST. amend. XIV. The Due Process Clause, as construed in the criminal procedure context, requires at a minimum that states apply those procedures which are "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), or which are "fundamental to the American scheme of justice," Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[20] 480 U.S. 39 (1987).

[21] 570 N.E.2d 992 (Mass. 1991).

whether such records are covered by an absolute statutory privilege, a qualified statutory privilege, or no statutory privilege. Furthermore, this discussion will illustrate general flaws in the rationale behind the federal minimal constitutional discovery requirements. The reasoning supporting the minority rule should be applied beyond its present limited context in order to develop a new constitutional discovery standard in all criminal proceedings.

II. MINIMAL FEDERAL CONSTITUTIONAL DISCOVERY REQUIREMENTS IN CRIMINAL PROCEEDINGS PRIOR TO *RITCHIE*

In *Brady v. Maryland*,[22] *United States v. Agurs*,[23] and *United States v. Bagley*,[24] the Supreme Court outlined constitutional discovery requirements in criminal proceedings. As construed by the Court, the Due Process Clause of the Fourteenth Amendment obliges the prosecutor to disclose all information which is favorable and material to the defense of the accused.[25]

Brady established a defendant's right to all exculpatory evidence, the absence of which would render the proceedings against him fundamentally unfair.[26] The Court stated that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment."[27] *Brady* does not, however, require the prosecutor to open her file to the defendant.[28] An open file rule would allow the defendant access to both inculpatory and exculpatory evidence. *Brady* requires disclosure of only exculpatory evidence.[29] As a result, the prosecutor, rather than the defense attorney, must determine what evidence is favorable to the defendant. One commentator has recognized the difficulty of this task: "The prosecutor must proceed to some extent on his/her hunch about the outcome of trial, how the government's case will proceed, and what the defense will be."[30]

---

[22] 373 U.S. 83 (1963).

[23] 427 U.S. 97 (1976).

[24] 473 U.S. 667 (1985).

[25] *Id.* at 682. For a more complete summary of the discovery rules laid out by the *Brady, Agurs, Bagley* trilogy, see Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problem of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391 (1984); Chris Hutton, *Confrontation, Cross-Examination and Discovery: A Bright Line Appears After* Pennsylvania v. Ritchie, 33 S.D. L. REV. 437, 444-59 (1987-88).

[26] *Brady*, 373 U.S. at 87-88.

[27] *Id.*

[28] *See* Moore v. Illinois, 408 U.S. 786, 795 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.").

[29] Capra, *supra* note 25, at 393.

[30] Hutton, *supra* note 25, at 455. The common criticism of this approach is that a prosecutor cannot possibly decide what information must be released when she does not know what the defense strategy. Moreover, a biased advocate cannot be expected to

In *Agurs*, the Court held that the prosecutor's duty to disclose information favorable to the defense depends on the specificity of defense counsel's discovery requests.[31] If defense counsel makes a specific request for information in the prosecutor's possession, the prosecutor must disclose such information if it "might . . . affect[] the outcome of the trial."[32] In the absence of a specific request for information from defense counsel, the prosecutor must disclose only material evidence. Material evidence "creates a reasonable doubt that did not otherwise exist."[33] The Court placed the burden on the defendant to prove that the omitted evidence creates a reasonable doubt that did not otherwise exist.[34]

Finally, in *Bagley*, the Court determined that "[e]vidence 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."[35] Furthermore, the Court stated that this test is "sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused."[36] In other words, the Court held that 'specific request' cases must also meet its new materiality standard. The Court thereby discarded the lower disclosure threshold in cases where defense counsel makes a specific request for information.

As a practical matter, a defendant cannot challenge a prosecutor's non-disclosure until after conviction. In order to challenge non-disclosure, a defendant must establish the materiality of the information which the prosecutor withheld. In order to establish materiality, the defendant must gain access to the prosecutor's file. Typically, defendants seek access to such information pursuant to state or federal Freedom of Information Acts.[37] This process is costly and time consuming. Moreover, the defendant must conduct his search while incarcerated.

In sum, the Constitution requires the disclosure to the accused of evidence that is favorable and material. The burden is on the accused to prove that any particular evidence is material, i.e., that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. If the evidence does not meet this test of materiality, the accused has no federal constitutional right to see it.

---

perform this task, even if her overriding concern is to see that justice is done. *See, e.g.*, Capra, *supra* note 25, at 394.

[31] *Agurs*, 427 U.S. at 104-06.

[32] *Id.* at 104.

[33] *Id.* at 112.

[34] *Id.; see also* Strickland v. Washington, 466 U.S. 668, 694 (1984).

[35] *Bagley*, 473 U.S. at 682.

[36] *Id.*

[37] *See, e.g.*, 5 U.S.C. § 552 (1988).

III. THE MAJORITY RULE: *PENNSYLVANIA V. RITCHIE*[38]

Academics and law students have analyzed *Ritchie* in great detail.[39] The majority of states confronted with a sexual abuse or rape defendant's request to review psychiatric treatment records protected by a qualified privilege have adopted the *Ritchie* majority's solution: *in camera* review by the trial judge for material evidence.[40] A brief summary of the case and these analyses illustrate the majority rule and its rationale.

A. *The Case*

In 1979, the Commonwealth of Pennsylvania charged George Ritchie with several offenses relating to the sexual abuse of his 13-year-old daughter.[41] The charges resulted from a complaint that his daughter made to police alleging that Ritchie had repeatedly sexually assaulted her.[42] The police referred the matter to Children and Youth Services ("CYS"), a protective service agency charged with investigating cases of suspected mistreatment and neglect.[43]

During pretrial discovery, Ritchie requested all CYS records relating to his daughter.[44] CYS refused to release its records on the grounds that they were privileged under Pennsylvania law.[45] Ritchie argued that he was entitled to the information because the file might contain the names of favorable witnesses, medical records, or exculpatory evidence.[46] The trial judge denied Ritchie's discovery motion, even though the judge had not examined the entire CYS file.[47]

At trial, the main witness against Ritchie was his daughter.[48] On cross-examination, defense counsel attempted to impeach her testimony by asking

---

[38] 480 U.S. 39 (1987).

[39] *See, e.g.*, Hutton, *supra* note 25, at 455; Lynn H. Frank, Note, Pennsylvania v. Ritchie: *The Supreme Court Examines Confrontation and Due Process in Child Abuse Cases*, 34 LOY. L. REV. 181 (1988); Jeffrey M. Galkin, Note, *Sixth and Fourteenth Amendments — A Defendant's Right to Disclosure of a State's Confidential Child Abuse Records*, 78 J. CRIM. L. & CRIMINOLOGY 1014 (1988).

[40] *See supra* note 14.

[41] *Ritchie*, 480 U.S. at 43.

[42] *Id.*

[43] *Id.*

[44] *Id.* Ritchie sought any information concerning the charges against him and records from a separate 1978 CYS investigation of allegations that Ritchie's children were being abused. *Id.*

[45] *Id.* The relevant statute, PA. STAT. ANN. tit. 11, § 2214 (1986) (current version at 23 PA. CONS. STAT. § 6339 (1993)), provides that all reports and other information obtained in the course of a CYS investigation must be kept confidential, subject to eleven specific exceptions. *Ritchie*, 480 U.S. at 43 n.2.

[46] *Ritchie*, 480 U.S. at 44.

[47] *Id.* The trial judge stated that he did not read "50 pages or more of an extensive record." *Id.* at 44 n.3.

[48] *Id.* at 44.

her why she did not report the incident sooner.[49] With the exception of routine evidentiary rulings, the trial court placed no limitations on the scope of cross-examination.[50] The jury convicted Ritchie on all counts and the judge sentenced him to three to ten years in prison.[51]

B. *The Supreme Court of Pennsylvania's Analysis*

The Supreme Court of Pennsylvania concluded that Ritchie had a federal constitutional right to review the entire CYS file prior to trial to search for any useful evidence.[52] The Pennsylvania Supreme Court concluded that by denying defense counsel pretrial access to the file, the trial court order had violated both the Confrontation Clause and the Compulsory Process Clause of the United States Constitution.[53] The constitutional infirmity of the trial court's order was its denial of the opportunity to have the records reviewed by "the eyes and the perspective of an advocate" who may see relevance in places that a neutral judge would not.[54]

C. *The United States Supreme Court's Analysis*

On appeal, a majority of the United States Supreme Court held that Ritchie's Fourteenth Amendment right to due process was violated because the trial court never determined whether information in a part of the CYS file was material.[55] The Court remanded and instructed the trial court to review the remainder of the CYS file *in camera* and determine whether it contained any material information.[56]

Although the Court recognized the strong public interest in protecting sensitive information such as the CYS record, it found that the interest did not override a defendant's right to material information contained in the record. Noting that the Pennsylvania statute authorizing protection of CYS records permitted some disclosure and use of the records in judicial proceedings,[57] the

---

[49] *Id.* at 45.

[50] *Id.*

[51] *Id.*

[52] Pennsylvania v. Ritchie, 502 A.2d 148, 153 (Pa. 1985) ("When materials gathered become an arrow of inculpation, the person inculpated has a fundamental constitutional right to examine the provenance of the arrow and he who aims it."). The court instructed the trial court to take "appropriate steps" to guard against improper dissemination of the confidential material, including, for example, "fashioning of appropriate protective orders, or conducting certain proceedings in camera," subject to "the right of [Ritchie], through his counsel, to gain access to the information." *Id.* at 153 n.16.

[53] *Id.*

[54] *Id.*

[55] *Ritchie*, 480 U.S. at 57-58.

[56] *Id.* at 61.

[57] The statute provided that information such as that contained in the CYS file shall be disclosed in certain circumstances, including when CYS is directed to do so by court order. PA. STAT. ANN. tit. 11, § 2215(a)(5) (1986) (current version at 23 PA. CONS.

Court concluded the statute did not bar all disclosure in criminal prosecutions.[58] Consequently, the accused had a right to see any information in the file that the trial court determined was material to his defense.[59]

The Court stated that "[d]efense counsel has no right to conduct his own search of the State's files to argue relevance."[60] It then found that "Ritchie's interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for *in camera* review."[61] The Court believed that the trial judge could accurately determine what information, if any, was material to the defense.

The majority maintained that full disclosure to defense counsel could have a seriously adverse effect on Pennsylvania's effort to uncover and treat child abuse.[62] Such disclosure might discourage relatives, neighbors, and victimized children themselves from reporting abuse.[63] The Court concluded that "[t]he Commonwealth's purpose would be frustrated if this confidential material had to be disclosed upon demand to a defendant charged with criminal child abuse, *simply because a trial court may not recognize exculpatory evidence.*"[64] Apparently, the Court believed that while a trial judge may not be able to recognize "exculpatory" evidence, she is sufficiently capable of identifying material evidence to avoid constitutional problems. Furthermore, the Court seemed to believe that the possibility that exculpatory evidence might never reach the defense does not amount to a violation of the defendant's Fourteenth Amendment right to due process or his Sixth Amendment rights of confrontation and compulsory process, in light of the Commonwealth's interest in combating child abuse.

A plurality[65] of the *Ritchie* Court held that "the Confrontation Clause only protects a defendant's trial rights and does not compel the pretrial production of information that might be useful in preparing for trial."[66] The plurality argued that the Confrontation Clause guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[67] The plurality concluded that "in this case the Confrontation Clause was not violated by the

---

STAT. § 6340(A)(6)).

[58] *Ritchie*, 480 U.S. at 58.

[59] *Id.*

[60] *Id.* at 59 (citing Weatherford v. Bursey, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case . . . .")).

[61] *Ritchie*, 480 U.S. at 60.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 61 (emphasis added).

[65] Justice Blackmun did not "accept the plurality's conclusion . . . that the Confrontation Clause protects only a defendant's trial rights and has no relevance to pretrial discovery." *Id.* at 61 (Blackmun, J., concurring in part and concurring in the judgment).

[66] *Id.* at 53 n.9.

[67] *Id.* (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam)).

withholding of the CYS file; it only would have been impermissible for the judge to have prevented Ritchie's lawyer from cross-examining the daughter."[68]

D. *Justice Blackmun's Concurring Opinion*

In his concurring opinion, Justice Blackmun disagreed with the plurality's conclusion that the denial of access to the CYS file did not raise Confrontation Clause problems.[69] He concurred in the outcome, however, because he felt that an *in camera* review of the CYS file by the trial court avoided potential Confrontation Clause violations.[70] He stated that in his view, material information "would certainly include such evidence as statements of the witness that might have been used to impeach her testimony by demonstrating any bias toward [Ritchie] or by revealing inconsistencies in her prior statements."[71] Despite his faith in the efficacy of an *in camera* review, Justice Blackmun reminded trial judges that withholding from defense counsel impeachment evidence could potentially undermine confidence in the outcome of the trial.[72]

E. *Justice Brennan's Dissenting Opinion*

In *Jencks v. United States*, the Court held that the Confrontation Clause granted a defendant the right to obtain the prior statements made by witnesses to government agents.[73] The *Jencks* Court also held that a defendant is entitled to inspect any information "with a view to use on cross-examination" when that information "[is] shown to relate to the testimony of the witness."[74] The Court insisted that defense counsel, not the trial court, should perform

---

[68] *Ritchie*, 480 U.S. at 54.

[69] *Id.* at 61-62 (Blackmun, J., concurring in part and concurring in the judgment).

[70] *Id.* at 65 (Blackmun, J., concurring in part and concurring in the judgment).

[71] *Id.* Justice Blackmun cited *Bagley* for the proposition that "nondisclosure of impeachment evidence falls within the general rule of *Brady* '[w]hen the reliability of a given witness may well be determinative of guilt or innocence,' " and that "while a restriction on pretrial discovery might not suggest as direct a violation on the confrontation right as would a restriction on the scope of cross-examination at trial, the former [is] not free from confrontation concerns." *Ritchie*, 480 U.S. at 65 n.2 (Blackmun, J., concurring in part and concurring in the judgment) (citing *Bagley*, 473 U.S. at 677-78) (internal citation omitted).

[72] *Ritchie*, 480 U.S. at 65 (Blackmun, J., concurring in part and concurring in the judgment). With this reminder, Justice Blackmun seemed to subvert the notion that trial judges have the ability to identify evidence material to the defense of the accused. If Justice Blackmun truly believed that trial judges were sufficiently adept at identifying evidence material to the defense of the accused as to avoid constitutional concerns, one wonders why he felt the need to remind them what to look for.

[73] *Jencks v. United States*, 353 U.S. 657, 668 (1957). Note that the statements in *Jencks* were not covered by any statutory privilege.

[74] *Ritchie*, 480 U.S. at 68 (Brennan, J., dissenting) (quoting *Jencks*, 353 U.S. at 669).

such an evaluation "[b]ecause only the defense is adequately equipped to determine the effective use for the purpose of discrediting the Government's witness and thereby furthering the accused's defense."[75] Relying heavily on *Jencks*, Justice Brennan argued that prior statements made by the alleged victim were crucial to any effort to impeach her at trial.[76] Therefore, the trial court's refusal to give such statements to defense counsel violated the Confrontation Clause of the Sixth Amendment.[77]

Justice Brennan noted the potential distinction between a defendant's Fourteenth Amendment Due Process right of access to material information and his Sixth Amendment right to confrontation. He stated:

> Prior statements on their face may not appear to [be material], since their utility may lie in their more subtle potential for diminishing the credibility of a witness. The prospect that these statements will not be regarded as material is enhanced by the fact that due process analysis requires that information be evaluated by the trial judge, not defense counsel.[78]

Statements useful for their impeachment value might not strike the trial judge as material.

IV. Massachusetts Law Governing Disclosure of Psychological Counselling Records in a Rape Prosecution

The Massachusetts Supreme Judicial Court (the "SJC") established the procedure governing a criminal defendant's request for information protected by a statutory privilege in *Commonwealth v. Bishop*.[79] That procedure's theoretical foundations, however, were laid in *Commonwealth v. Stockhammer*.

A. Commonwealth v. Stockhammer[80]

Stockhammer is the "hard case" in the realm of rape prosecutions. The complainant and the defendant were close friends before the alleged rape.

---

[75] *Id.* at 72 (Brennan, J., dissenting) (quoting *Jencks*, 353 U.S. at 668-669).

[76] *Ritchie*, 480 U.S. at 66 (Brennan, J., dissenting). Justice Brennan quoted from *Jencks*:

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the report of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Id. at 71 (Brennan, J., dissenting) (quoting *Jencks*, 353 U.S. at 667).

[77] *Ritchie*, 480 U.S. at 66 (Brennan, J., dissenting).

[78] *Id.* at 71-72 (Brennan, J., dissenting).

[79] 617 N.E.2d 990 (Mass. 1993).

[80] 570 N.E.2d 992 (Mass. 1991).

There was no evidence of force. The entire case, therefore, came down to a credibility contest.

1. The facts of *Stockhammer*

The facts illustrate that the complainant's credibility was a crucial, if not dispositive issue. Without a full understanding of the facts, it would be impossible to appreciate the importance of any potential evidence which might sway the jury on that question. *Stockhammer* embodies the case posited by Justice Brennan in which the complainant's treatment records might contain the "subtle potential for diminishing the credibility of a witness"[81] sufficient to create a reasonable doubt but not evidence which a trial judge might consider "material" under the *Bagley* standard.

a. Undisputed facts prior to the alleged rape[82]

In the fall of 1987, the defendant, Jonathan Stockhammer, and the complaining witness, Melissa Met, entered Brandeis University as first year students.[83] They became close friends during the fall semester.[84] At the same time, Met continued to date her high school boyfriend, Carlos Spinelli, who was in his senior year of high school.[85] On December 21, 1987, Met sent Stockhammer some birthday gifts[86] and a birthday card in which she wrote, in part: "[Y]ou're the greatest friend I have, I love you."[87] In March of 1988, Met signed a university room assignment form requesting to live with Stockhammer and his friends.[88] At the time of the alleged rape,[89] Stockhammer was about 5 feet tall and weighed approximately 100 pounds.[90] Met was

---

[81] *Ritchie*, 480 U.S. at 72 (Brennan, J., dissenting).

[82] These facts are "undisputed" because they were drawn from either Section A of the SJC's opinion, titled "Undisputed Facts," or are assertions made by the defendant which were not contested by the prosecution.

[83] *Stockhammer*, 570 N.E.2d at 994.

[84] *Id.*

[85] Brief for Appellant at 1, Commonwealth v. Stockhammer, 570 N.E.2d 992 (Mass. 1991) (No. AC-90-P-421) [hereinafter Brief for Appellant]. Note that the docket number prefix "AC" connotes that the brief was originally submitted to the Appeals Court. However, the Supreme Judicial Court transferred the case to its docket on its own motion before the appeals court heard the case, so counsel actually submitted all appellate briefs directly to the Supreme Judicial Court.

[86] *Id.*

[87] *Stockhammer*, 570 N.E.2d at 994.

[88] Brief for Appellant at 2.

[89] I refer to the sexual encounter between Met and Stockhammer on April 19, 1988, as an "alleged" rape, because, despite the fact that Stockhammer was convicted in the trial court, his conviction was overturned by the Supreme Judicial Court and the State declined to prosecute Stockhammer a second time.

[90] Brief for Appellant at 5.

about 5 feet 4 inches tall and weighed approximately 140 pounds.[91]

On April 19, 1988, the date of the alleged rape, Met spent the day with Spinelli, who was visiting the Massachusetts Institute of Technology ("MIT") in order to decide whether to attend that school or Yale.[92] After visiting MIT, Spinelli told Met that he would probably go to Yale, and he left the Boston area at 5 p.m.[93] Met was very disappointed.[94]

That evening, Met went to dinner with Stockhammer and her suite mate, Connie-Ann Ravdel.[95] After dinner, Met and Stockhammer went to Met's room and talked.[96] At this point, Met's and Stockhammer's accounts of the evening's events diverge radically.

b. Met's version of events

Met testified that Stockhammer made sexual advances toward her. He asked her to "fool around," followed her around the room, and began "teasing" her, pulling at her skirt and trying to lift up her shirt. She kept moving away, rejected his advances and asked him to leave, which he did.[97] Before Stockhammer left, however, Met invited him to return later that evening to get drunk.[98]

Stockhammer called Met at around 11:00 p.m. He reminded her of their plan to drink, informed her that he was coming over later, and asked her if she could get some alcohol.[99] Met agreed to the visit and went to Ravdel's room to obtain a bottle of Southern Comfort Whiskey.[100] On direct examination, Met testified that when she returned to her room, Stockhammer was there waiting for her. On cross-examination, however, she testified that she told the Brandeis Police that he had knocked on her door and she had let him into the room.[101]

---

[91] *Id.* at 6.

[92] *Stockhammer*, 570 N.E.2d at 994-95.

[93] *Id.*

[94] Brief for Appellant at 3, 7. Met testified that Spinelli had indicated that he would leave it to her to decide which college he would attend. *Id.* at 7 n.14. Spinelli denied that he had left the decision to her. *Id.* Met had engaged in sexual intercourse with Spinelli prior to April 19, 1988. *Id.* at 7. She testified that their relationship was serious and that she had told various people that she and Spinelli planned to marry. *Id.* Furthermore, she testified that they had encountered difficulties since she began attending Brandeis, including a break-up for a month in 1988. *Id.*

[95] *Stockhammer*, 570 N.E.2d at 995; Brief for Appellant at 3.

[96] Brief for Appellant at 3. Both Met and Stockhammer testified that they frequently visited each other alone in their rooms. Met testified further that in this instance she did not consider it unusual that Stockhammer accompanied her to her room. *Id.* at 3 n.3.

[97] *Id.* at 3 n.5.

[98] *Id.* at 3.

[99] *Stockhammer*, 570 N.E.2d at 995.

[100] *Id;* Brief for Appellant at 3.

[101] Brief for Appellant at 4 n.6. Met further testified on cross-examination that she could not remember whether or not she had let Stockhammer in. *Id.* She also signed a

Met immediately poured two drinks, each containing four to six ounces of Southern Comfort, one for herself and one for Stockhammer.[102] She immediately consumed her drink.[103] Stockhammer did not drink anything.[104] Stockhammer started making sexual advances again. He tried to kiss her, waved a condom at her, pulled at her clothing and suggested that they "fool around."[105] Met immediately left the room and went into Ravdel's room for about fifteen minutes, hoping that Stockhammer would leave her room.[106] Stockhammer went to Ravdel's room to get Met and they returned to Met's room.[107] Stockhammer then locked the door, removed his shirt, pushed Met from a chair near the bed onto the bed, and got on top of her. In this position, Stockhammer removed his pants, raised Met's shirt and skirt, removed Met's bra and underpants, and, holding her down, raped her.[108] Met shook during the assault, pushed at Stockhammer with her hands, and told him to stop.[109] Immediately after, and while still sitting on Met's chest, Stockhammer attempted to force Met to engage in oral sex, which Met resisted by shaking her head.[110] Stockhammer then dressed and left Met's room.[111]

After Stockhammer left, Met called her close friend and classmate, Laura Bogart. She told Bogart that Stockhammer had raped her. Bogart went to Met's room five minutes later and found Met crying. Met recounted what had happened. Met instructed Bogart not to tell anyone about the incident.[112]

c. Stockhammer's version of events

Stockhammer testified that after dinner, he and Met listened to music, danced closely, and kissed. Met consented to this kissing. Met removed her shirt, at which point she and Stockhammer fondled one another.[113] Stockham-

---

statement for the Waltham Police indicating that Stockhammer had knocked and she had let him in. *Id.* Both Spinelli and Melissa Weintraub, a Brandeis classmate, testified that Met had told them that the person who had raped her had forced his way into her room. *Id.*

[102] *Id.* at 4 n.8.

[103] *Stockhammer*, 570 N.E.2d at 995; Brief for Appellant at 4.

[104] *Stockhammer*, 570 N.E.2d at 995.

[105] Brief for Appellant at 4 n.7.

[106] *Stockhammer*, 570 N.E.2d at 995; Brief for Appellant at 3.

[107] Brief for Appellant at 5 n.9 and accompanying text. Ravdel simply testified that Met left. She did not testify that Stockhammer came to her door. *Id.* In fact, Ravdel later testified that she could not recall whether Met had come back to her room a second time that evening or not. *Id.* at 12.

[108] *Stockhammer*, 570 N.E.2d at 995.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* Bogart, a friend of Met since sixth grade, also testified that Met had been depressed for a while prior to that night and that she cried when she was depressed. Brief for Appellant at 6.

[113] *Stockhammer*, 570 N.E.2d at 995.

mer then left to attend a rehearsal and audition for an air band, with the understanding that he would return after the audition.[114]

When Stockhammer returned, he knocked on Met's door and she opened it, wearing a bathrobe.[115] They immediately resumed their physical intimacies and eventually engaged in consensual sexual intercourse.[116] Afterwards, Stockhammer returned to his own room.[117] Stockhammer testified that he did not see a bottle of Southern Comfort and did not see Met drink that evening.[118] Stockhammer did not recall Met leaving to go to Ravdel's room; however, he left the room twice to go to the bathroom.[119]

d. Events after the alleged rape

Melissa Weintraub, a friend and classmate of Met, testified that she went to dinner with Met and Stockhammer shortly after April 19th and that they seemed to be good friends.[120] In the following month, Stockhammer accepted Met's standing offer to visit her at her parents' home in Connecticut.[121]

Met testified that she had no further sexual encounters with Stockhammer after April 19, 1988. Stockhammer testified that he and Met had intercourse on numerous occasions after April 19th, including the first night of his visit to her home in Connecticut.[122]

In December 1988, Met and Spinelli ended their relationship. In January 1989, Met swallowed a large number of cold pills and was hospitalized at Waltham-Weston Hospital for two days. She told doctors that she was having a minor problem with her boyfriend but did not mention being raped.[123] During her hospitalization, an anonymous telephone caller informed Met's father that Met had been telling others she had been sexually assaulted.[124] The day after she was released from the hospital, Met's father confronted her with this allegation. She told him that Stockhammer had raped her.[125] Soon after, Met

---

[114] Brief for Appellant at 4.

[115] *Stockhammer*, 570 N.E.2d at 995.

[116] *Id.*

[117] *Id.*

[118] Brief for Appellant at 4 n.8.

[119] *Id.* at 5.

[120] *Id.* at 10.

[121] *Stockhammer*, 570 N.E.2d at 995. Met took steps to insure that Stockhammer received corrected travel directions. Brief for Appellant at 6 n.12. A Waltham Police report indicates that Met told the Waltham Police that she invited Stockhammer to her home with the hope that "he would attempt to assault her again and her father would be there and make him sorry." *Id.* at 7. On the stand, Met denied that she had told the Waltham police that she invited Stockhammer to her home so that her father would catch Stockhammer in the act of raping her again. *Id.* at 6.

[122] *Stockhammer*, 570 N.E.2d at 996.

[123] *Id.*

[124] *Id.*

[125] *Id.*

filed a report with the Waltham Police Department charging Stockhammer with rape.[126]

On February 1, 1989, the day after she informed her father that she had been raped by Stockhammer, Met was admitted to the New York Hospital-Cornell Medical Center because of her mental and emotional state.[127] She stayed at the Center until February 6th.[128] From February 7 through June 6, 1989, Met received counseling from a social worker as an outpatient.[129] On March 30, 1989, a grand jury indicted Stockhammer for rape and assault with intent to rape.[130]

2. Trial court proceedings

Defense counsel sought and was granted access to the Waltham-Weston Hospital records.[131] Encouraged by this information, defense counsel sought further discovery concerning Met's mental condition before, during, and after the alleged rape.[132] In response, the judge ordered the production of all records of psychotherapists or counselors who treated Met after April 19, 1988.[133] The judge received the social worker's records, reviewed them *in camera*, and ruled that they need not be disclosed to counsel.[134] The New York Hospital records were not produced, and neither the judge, the prosecutor nor the defense counsel learned of their existence until after the trial.[135]

During the trial, defense counsel attempted to impeach Met with evidence that she was biased and motivated to lie because she did not want her parents to learn that she was sexually active.[136] The judge limited cross-examination by precluding any inquiry into the topic of Met's parents' reactions on discovery of her sexual activity.[137] The judge did not articulate any basis for his decision.[138]

After Stockhammer's conviction, defense counsel continued to press his argument that Met had a motive to lie:

> [W]ithdrawing her accusation would subject her to consequences that were intolerable to her, namely, damage to her relationship with her parents, especially her father. The examination would have shown that her parents sternly disapproved of pre-marital sex, and the strength of her

---

[126] *Id.*
[127] Brief for Appellant at 9.
[128] *Stockhammer*, 570 N.E.2d at 996.
[129] *Id.*
[130] Brief for Appellant at 1.
[131] *Stockhammer*, 570 N.E.2d at 996.
[132] Brief for Appellant at 33.
[133] *Stockhammer*, 570 N.E.2d at 996.
[134] *Id.*
[135] Brief for Appellant at 34.
[136] *Stockhammer*, 570 N.E.2d at 998.
[137] *Id.* at 997 n.3.
[138] *Id.* at 1000.

> fear about any revelation to her parents of her consensual sexual activity . . . . Had the proper cross-examination been permitted . . . the court would have heard evidence and found that [the complainant's] fear of disclosure concerning her sex life was so great that her sexual relationship with [her boyfriend] remained unknown to her parents [for over a year]. [The complainant's] efforts to conceal this sexual relationship with [her boyfriend] provide strong corroboration for her motivation to falsify her accusation against the defendant.[139]

In an effort to find evidentiary support for this theory, Stockhammer's attorney requested access to the New York Hospital records as soon as he learned of them.[140] He also argued that an *in camera* inspection of the records by the judge might not adequately protect Stockhammer's constitutional rights[141] to confrontation, compulsory process, and a fair trial.[142] In its opposition to the motion, the Commonwealth contended that the records were privileged.[143] In

---

[139] *Id.* at 998 n.4 (bracketed terms in original).

[140] *Id.* at 1000. On appeal to the Supreme Judicial Court, defense counsel argued:

> The undisclosed records could be critical to the defense since they are records of the complainant's words, deeds and effects just at the time she was first making open accusations against the defendant. Ms. Met's credibility could be vitally affected if, notwithstanding the time of the hospitalization, they fail to mention a rape at all; if they mention the events Ms. Met described at trial but characterize them in ways that are inconsistent with her current version of the offense; if they reflect skepticism on the part of the examining medical professionals based on hearing Ms. Met's version or observing her affect while communicating with them; if they evidence traits doctors deem indicative of an hysterical personality or one prone to exaggeration; if they suggest that her accusation stems from parental disapproval of pre-marital sex.

Brief for Appellant at 35.

[141] This case was argued and decided under Article 12 of the Massachusetts Declaration of Rights. The relevant constitutional language parallels the Sixth and Fourteenth Amendments to the United States Constitution. State constitutional questions are finally determined by a state's highest court and, when based upon adequate and independent state grounds, are not reviewable by the United States Supreme Court. *See* 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4019 (1977); Commonwealth v. Upton, 476 N.E.2d 548 (Mass. 1985).

[142] *Stockhammer*, 570 N.E.2d at 1001. For an elaboration of the rights, see *supra* notes 17-19.

[143] *Id. See* MASS. GEN. L. ch. 233, § 20B (1992) (psychotherapist/patient); MASS. GEN. L. ch. 112, § 135 (1981) (current version at MASS. GEN. L. ch. 112, § 135A (1992)) (social worker/client). MASS. GEN. L. ch 233, § 20B provides in relevant part:

> Except as hereinafter provided, in any court proceeding and in any proceeding preliminary thereto . . . a patient shall have the privilege of refusing to disclose, and of preventing a witness from disclosing, any communication, wherever made, between said patient and a psychotherapist relative to the diagnosis or treatment of the patient's mental or emotional condition.

The statute then lists six specific exceptions in which the privilege does not apply. None of these exceptions applied to Met.

addition, the Commonwealth argued that Stockhammer's rights were adequately protected by the judge's *in camera* review.[144] The judge denied the motion and reviewed the records *in camera*.[145] Stockhammer appealed this decision to the SJC.[146]

3. The Supreme Judicial Court's analysis

The SJC determined that the federal *in camera* review standard established in *Ritchie* was based on two assumptions: (1) that trial judges can temporarily and effectively assume the role of advocate when examining such records; and (2) that the state's and complainant's interests in the confidentiality of the records could not be adequately protected any other way.[147] The SJC attacked both assumptions and held that defense counsel could review the New York Hospital records for relevant and admissible evidence.

The SJC undermined the first assumption by citing contradictory language in United States Supreme Court cases and its own decisions. The court pointed to *Dennis v. United States*,[148] in which the Supreme Court stated:

> "[I]t [is] extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the [information] that would be useful in impeaching a witness." . . . Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment . . . would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.[149]

The SJC then cited its own precedent on this point, "[t]he danger lurking in the practice of . . . *in camera* review [of privileged documents] by the trial judge is a confusion between the roles of trial judge and defense counsel. The judge is not necessarily in the best position to know what is necessary to the defense."[150] The SJC apparently believed that the cited precedent sufficiently undermined the first assumption as it did not elaborate further on this argu-

---

MASS. GEN. L. ch 112, § 135 provides in relevant part:

> No social worker in any licenced category, including those in private practice, may disclose any information he may have acquired from persons consulting him in his professional capacity except:

The statute then lists seven specific exceptions in which the privilege does not apply. None of these exceptions applied to Met.

[144] *Stockhammer*, 570 N.E.2d at 1001.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] 384 U.S. 855 (1966).

[149] *Id.* at 874-875 (internal citations omitted).

[150] Commonwealth v. Clancy, 524 N.E.2d 395 (Mass. 1988). The SJC also cited Commonwealth v. Liebman, 446 N.E.2d 714 (Mass. 1983), for language to the same effect.

ment. Of course, the effectiveness of *in camera* review is debatable. Nevertheless, at the very least, the SJC illustrated that *in camera* review poses a potential threat to the quality of the defense.

In response to the second assumption, the SJC argued that trial judges can effectively protect confidentiality while simultaneously allowing defense counsel access to medical records.[151] The SJC suggested that the trial judge could allow counsel access to privileged records only in their capacity as officers of the court, as opposed to their role as advocates.[152] Moreover, the judge could condition any reference to the privileged information at trial on prior judicial approval, which could only be given after an *in camera* hearing and a determination that the information is not available from any other source.[153] Finally, trial courts could issue protective orders forbidding defense attorneys from disclosing such confidential information to anyone, including the accused.[154]

The SJC noted that the state statutes[155] that address disclosure of the medical records at issue in *Stockhammer* do not provide an absolute privilege from disclosure, as does Massachusetts General Law ch. 233, § 20J, the statute covering communications between sexual assault counsellors and sexual assault victims.[156] The SJC observed that both sections contain exceptions limiting their scope.[157] Therefore, the Court concluded that the privileges at issue derive from a "less firmly based legislative concern . . . for the inviolability of the communication being protected."[158] The Court balanced these qualified privileges against the defendant's constitutional rights to Confrontation, Compulsory Process, and Due Process. The Court concluded:

Because we have said that, in appropriate circumstances, even absolute

---

[151] *Stockhammer*, 570 N.E.2d at 1002.

[152] *Id.*; *cf.* Commonwealth v. Jones, 535 N.E.2d 221, 224 (Mass. 1989) (Lynch, J., dissenting) (recommending defense counsel act as trial judge's designee and review privileged information according to the judge's instructions).

[153] *Id.*

[154] *Stockhammer*, 570 N.E.2d at 1002. *See* Commonwealth v. Amral, 554 N.E.2d 1189 (Mass. 1990) (Liacos, C.J., dissenting).

[155] MASS. GEN. L. ch. 233, § 20B (1992) (psychotherapist/patient) and MASS. GEN. L. ch. 112, § 135 (1981) (social worker/client). *See supra* note 143 for the relevant text of these statutes.

[156] *Stockhammer*, 570 N.E.2d at 1002. MASS. GEN. L. ch. 233, § 20J provides in relevant part:

> A sexual assault counsellor shall not disclose . . . confidential communication, without the prior written consent of the victim; provided, however, that nothing in this chapter shall be construed to limit the defendant's right of cross-examination of such counsellor in a civil or criminal proceeding if such counsellor testifies with such written consent. Such confidential communications shall not be subject to discovery and shall be inadmissible in any criminal or civil proceeding without the prior written consent of the victim to whom the report, record, working paper or memorandum relates.

[157] *Id.*

[158] *Id.* (quoting Commonwealth v. Two Juveniles, 491 N.E.2d at 234 (1986)).

> statutory privileges (nonconstitutionally based) must yield to a defendant's constitutional right to use privileged communications in his defense, we are not persuaded that allowing counsel access to the treatment records at issue in this case would do great violence to the less firmly based policies represented by §§ 20B and 135. In these circumstances, those policies must give way to the defendant's need to examine the complainant's treatment records.[159]

The SJC concluded that the accused's right to have defense counsel review medical records covered by a qualified privilege, subject to a protective order by the trial judge, outweighed the Commonwealth's interest in protecting the alleged victim's privacy.[160] The SJC, therefore, ordered that defense counsel was entitled to review the New York Hospital records and the Greenwich, Connecticut, social worker's records in order to search for evidence of bias, prejudice or motive to lie.[161]

B. Commonwealth v. Bishop[162]

In *Bishop*, the SJC established the procedure governing a criminal defendant's request for information protected by an absolute or qualified statutory privilege. The SJC laid out a five stage process. In stage 1, the rape defendant requests production of the complainant's treatment records. If the keeper of the records refuses to produce them on the grounds that they are protected by a statutory privilege, the judge decides whether they are, in fact, privileged.[163] If the judge finds the records to be privileged, the defendant, in stage 2, submits his theories under which the records sought are likely to be relevant to the case.[164] If the judge decides that the records are likely to be relevant to the case, the judge reviews them *in camera* in order to determine whether any part of them is relevant.[165] In stage 3, the judge allows defense counsel and the prosecutor access to the relevant portions of the privileged records.[166] If defense counsel desires to introduce any of this information at trial, he must demonstrate, in stage 4, that disclosure to the trier of fact is necessary to

---

[159] *Id.* (citing *Two Juveniles*, 491 N.E.2d at 234).

[160] *Id.* at 1002.

[161] *Id.*

[162] 617 N.E.2d 990 (Mass. 1993).

[163] *Bishop*, 617 N.E.2d at 997.

[164] *Id.* The SJC noted that "during this relevancy determination stage . . . the defendant must . . . advance in good faith, at least some factual basis which indicates how the privileged records are likely to be relevant to an issue in the case and 'that the quest for its contents is not merely a desperate grasping at a straw.' " *Id.* (quoting People v. Gissendanner, 399 N.E.2d 924, 928 (N.Y. 1979)).

[165] *Bishop*, 617 N.E.2d at 998.

[166] *Id.* The SJC noted that "the judge shall ensure that breaches of confidentiality attending access to the relevant portions of the privileged records are limited only to those absolutely and unavoidably necessary" and that "the judge shall allow counsel access to the privileged records only in their capacity as officers of the court." *Id.*

provide the defendant a fair trial.[167] Finally, in stage 5, at trial, the judge conducts a voir dire examination to determine the admissibility of the records that counsel may wish to introduce.[168]

V. Four Positions

This Note considers four positions which a court might take when confronted with a defense request to review a rape complainant's psychological counselling records. First, a court could refuse to review such records and deny counsel access to such records (the absolute immunity rule). Second, a court could require *in camera* review of such records by the trial judge with instructions to identify material evidence, but only if counsel makes a preliminary showing of legitimate need for review (the majority rule). Third, a court could require *in camera* review of all such records by the trial judge with instructions to identify relevant evidence, again only if counsel makes a preliminary showing of legitimate need for review, followed by review of relevant evidence by counsel for material evidence (the minority/*Bishop* rule). Fourth, a court could require pretrial review of all such records by counsel, followed by an *in camera* hearing as to admissibility of any information counsel would like to introduce into evidence (disclosure to counsel).

A. *The Absolute Immunity Rule*

A rule granting psychiatric treatment records an absolute privilege against disclosure to anyone, including the trial judge, has been justified on the grounds that it would ensure greater protection of rape victims' privacy rights, encourage more rape victims to seek counselling,[169] and lead to a higher reporting rate of rapes.[170] Furthermore, such a rule would serve as a prophylactic measure against the risk that evidence of psychological counselling might unfairly undermine the credibility of the complainant. Mental health treatment carries a stigma which might prejudice the jury against the complainant.[171]

Although it seems clear that an absolute immunity rule would protect against the various risks mentioned above, such a solution truncates the defendant's constitutional rights to confrontation, compulsory process and due process. Due process requires a system which ensures fundamental fairness to

---

[167] *Id.*

[168] *Id.*

[169] Bella English, *Rape Victims, Beware the SJC*, Boston Globe, May 15, 1991, at 25. This justification applies to rape victims who report their rapes to the police and are deterred from seeking counselling by fear of breach of the privilege.

[170] Doris Sue Wong, *SJC Decision Seen By Some as a Step Back for Rape Victims*, Boston Globe, May 3, 1991, at 17. This justification applies to rape victims who seek counselling and are deterred from reporting their rapes by fear of breach of the counselling privilege.

[171] *Id.*

the accused. No procedure which completely blinds the trial court and the finder of fact to evidence which might potentially prove the defendant innocent, or at least raise a legitimate reasonable doubt as to his guilt, can meet such a standard. Yet, an absolute privilege does precisely that. This extreme measure is not necessary to protect the valid public policies mentioned above. *In camera* review would serve the state's interest in preserving the confidentiality of privileged relationships such as that between a rape victim and her rape treatment counsellor.[172]

Rape victim advocates might ask, justifiably, why the rape defendant's constitutional right to due process deserves as much protection as other important public policies such as minimizing the risk of stigmatization in the eyes of the jury, encouraging victims to report rapes, and encouraging victims to seek counselling. Our criminal justice system is supposed to operate as a search for truth. To that end, procedural due process guarantees that evidence which is both favorable to the accused and material to guilt must be produced.[173] The values underlying our criminal justice system, however, require more than procedural due process. As Justice Harlan noted, our criminal justice system is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[174] If society must choose between the risk of discouraging the reporting of rapes or counselling, on the one hand, and denying a presumptively innocent criminal defendant a constitutional right to effectively cross-examine his accuser on the other, I suggest it ought to choose the former. The latter course increases the risk of convicting an innocent person of a serious crime.

B. *The Majority Rule*

The *Ritchie* Court believed that a defendant's constitutional rights could be adequately protected by *in camera* review by the trial judge.[175] The Court believed that the trial judge could accurately determine what information, if any, was material to the defense. The majority rule suffers from three major defects. First, by requiring a preliminary showing by the defendant that the records are likely to contain helpful information, the majority rule poses the risk of placing the defendant in a "catch-22."[176] One state supreme court Justice noted, "[t]o gain access to the privileged records defendant must specifically allege what useful information may be contained in the records. However, defendant has no way of making these specific allegations until he has seen the contents of the records."[177]

---

[172] People v. Foggy, 521 N.E.2d 86, 93 (Ill. 1988) (Simon, J., dissenting); Commonwealth v. Wilson, 602 A.2d 1290, 1300 (Pa. 1992) (Zappala, J., dissenting).

[173] *Ritchie*, 480 U.S. at 57. *See supra* section II.

[174] In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

[175] *Ritchie*, 480 U.S. at 60.

[176] *Bishop*, 617 N.E.2d at 996 n.6.

[177] *Foggy*, 521 N.E.2d at 96 (Simon, J., dissenting).

Second, by placing the burden of reviewing the complainant's files on the trial judge, the majority rule denies the criminal defendant the benefit of an advocate's perspective. Moreover, despite the fact that during the pretrial phase of a case the trial judge is the least knowledgeable party in the proceeding,[178] the majority rule places the trial judge in the impossible position of anticipating the defendant's case and the potential value of information as impeachment evidence. The majority rule forces the trial judge into the role of defense advocate, which inherently conflicts with her primary role as neutral arbiter.[179]

Third, because the majority rule is framed as a discovery right stemming from the Due Process Clause of the Fourteenth Amendment, it is limited to "material" evidence (evidence with a reasonable probability of affecting the outcome of the trial). As Justice Brennan notes, this results in an overly restrictive reading of the Confrontation and Compulsory Process Clauses.[180] Should a trial judge fail to anticipate defense counsel's impeachment strategy, she will incorrectly determine that certain information is not material. In so doing, the trial judge denies the defendant the opportunity to fully and effectively cross-examine his accuser.

C. *The Minority Rule*

The minority rule, (*in camera* review of privileged records by the trial judge with instructions to identify relevant evidence when counsel makes a preliminary showing of legitimate need for review, followed by review of relevant evidence by counsel for material evidence), partially overcomes the second and third defects of the majority rule. First, the minority rule requires the trial judge to make a more realistic relevance inquiry. As a result, the fact that the trial judge lacks an advocate's eye does not pose a serious threat to the defendant's constitutional right to counsel. The trial judge still might not recognize the potential impeachment value of information, but the risk of denying the defendant access to helpful information is reduced. The minority rule places the trial judge in the more familiar and constructive role of deciding relevance[181] and admissibility questions by weighing probative value and prejudicial effect.[182] It simultaneously allows prosecutors and defense counsel to take over their roles as advocates and develop and argue theories of probative value, prejudicial effect and admissibility.

Second, because defense counsel is making the admissibility argument, there

---

[178] Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136, 149 (1964); Steve Williams, Note, *Implementing* Brady v. Maryland: *An Argument for Pretrial Open File Policy*, 43 U. CIN. L. REV. 889, 903 n.177 (1974).

[179] Williams, *supra* note 178, at 903.

[180] *Ritchie*, 480 U.S. at 71 (Brennan, J., dissenting).

[181] *Bishop*, 617 N.E.2d at 997.

[182] *See, e.g.*, FED. R. EVID. 403.

is a greater likelihood that she will be able to convince the trial judge that a piece of evidence should be admitted because of its impeachment value. While the minority rule still requires the defense to prove that disclosure of relevant evidence to the trier of fact is necessary to provide the defendant a fair trial, this standard overcomes Justice Brennan's concern that statements which might not strike the trial judge as material might nevertheless be admissible for their impeachment value. As a result, the minority rule gives appropriate weight to the defendant's Sixth Amendment rights.

D. *Disclosure to Counsel*

A disclosure rule, preliminary review by counsel of all of the complainant's post-incident records, followed by *in camera* requests for admissibility, would provide much stronger protection to criminal defendants without significantly jeopardizing the state's interest in protecting the privacy of rape victims and the confidentiality of the counselling relationship. First, such an automatic right of review would eliminate the preliminary showing requirement. This should not be a significant change because any post-incident records are likely to contain relevant information and therefore should meet a reasonable preliminary burden anyway.

Second, this rule would completely free the trial judge from the task of predicting the defense and gauging the potential impeachment value of information. Like the minority rule, the disclosure rule places the trial judge in the more familiar and constructive role of deciding admissibility questions by weighing probative value and prejudicial effect.[183] Moreover, to an even greater extent than the minority rule, the disclosure rule successfully serves the search for truth by placing potential impeachment evidence in the hands of the party most capable of using it. Indeed, one commentator has noted:

> [T]he right to confront and cross-examine witnesses has been the hallmark of the common law system adopted in the United States. Probably the most frequently-quoted comment about cross-examination is that it 'is beyond any doubt the greatest legal engine ever invented for the discovery of truth.' The technique of using leading questions to cross-examine will, in theory, expose to the fact-finder the witnesses' faulty perception, fading memory, bias, motive, and lack of opportunity to observe. Cross-examination points out discrepancies in witnesses' testimony and gives the fact-finder the opportunity to evaluate which version most closely approximates reality. This process, it is hoped, is the most effective way of discerning the truth.[184]

Criticism of a discovery rule underestimates the ability of trial judges to protect the privacy of the rape complainant. The *Ritchie* Court feared that full disclosure to defense counsel could have a seriously adverse effect on Pennsyl-

---

[183] *Id.*

[184] Hutton, *supra* note 25, at 459 (citations omitted).

vania's effort to uncover and treat child abuse.[185] The majority hypothesized that disclosure of records of such communications to defense counsel might discourage relatives, neighbors and victimized children themselves from reporting abuse.[186] The Court stated that "a child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality."[187] The Court stated that relatives and neighbors "will be more willing to come forward if they know that their identities will be protected."[188] This rationale does not apply in the context of the alleged rape of an adult non-family member. However, even on its own terms and in its own context, this rationale does not justify denying defense counsel an opportunity to review records such as the CYS file.

If the Court had applied the disclosure rule, it could have instructed the trial judge to order counsel not to remove the records from the courthouse, not to copy the records, and not to disclose the information gathered from the records to anyone other than the trial judge. Furthermore, it could have required counsel to submit any CYS file information to the trial judge during an *in camera* hearing before offering it for admission at trial.[189] If the information gleaned from the records were inadmissible, it would remain confidential and the *Ritchie* majority's public policy justification would not be implicated. While a finding of admissibility would overcome the privilege and implicate the concerns of the *Ritchie* majority, I argue that the finding of admissibility would be required by the defendant's rights to counsel, cross-examination and due process which trump the public policy of protecting children, relatives and neighbors.

E. *The Mental Health Profession's Response to the Disclosure Rule*

Some Massachusetts mental health professionals and rape treatment counselors have decried any breach of the statutory privileges discussed in this paper for many of the reasons mentioned previously.[190] They raise concerns of unfair prejudice to the complainant and of an increased risk that rape victims will not seek counseling, or will not report their rapes to the police. These arguments do not provide any valid justification for choosing the majority or minority rules over the disclosure rule. First, neither the majority rule nor the minority rule precludes the admission into evidence of the fact that a com-

---

[185] *Ritchie*, 480 U.S. at 60.

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *See* Maggie Mulvihill, *Victory for Rape Victims*, THE TAB, Mar. 2, 1993, at 13 (offering an example of an application of the disclosure rule in concert with a restrictive order issued to protect the privacy of the complaining witness).

[190] English, *supra* note 169, at 25; Wong, *supra* note 170, at 17.

plainant has undergone mental health treatment or counseling. The rules merely require that such information be "material" to the proceedings for it to be admissible. In other words, to the degree that rape victims fear the possibility that their mental health treatment records might be admitted into evidence, and to the degree that the fear deters them from filing rape complaints, the three rules will not differ in effect. All three rules will deter rape victims from filing criminal complaints because ultimately, all three permit the admission of information from mental health treatment records.

Second, under the disclosure rule, the trial judge has the discretion to exclude the information if she determines that its prejudicial effect substantially outweighs its probative value.[191]

VI. CONCLUSION

Advocates of rape victims have fought hard to gain procedural protections for rape victims in order to encourage the prosecution of rapists. They have alerted the criminal justice system to many societal biases which have infected the handling of rape complaints and in turn have affected the reporting of rape cases. It is understandable, therefore, that a rape victim advocate might react with suspicion to any rule crafted by a judiciary granting rape defendants greater protection. The judiciary, after all, has granted husbands immunity for rapes of their wives, required rape victims to "resist to the utmost," formulated aberrant corroboration requirements, allowed inquiries into the chastity of the complainant, and quoted, for too long, Sir Matthew Hale's immortal, misogynistic, paranoid conclusion that a rape accusation "is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent."[192]

Nevertheless, rape defendants, like all other criminal defendants, deserve procedural protection. Despite its unjustified focus on allegations of rape, Hale's comment is accurate in one respect. Any allegation that pits the alleged victim's word against the defendant's is difficult to counter, even if the person accused is innocent. This is especially true if the Court restricts the defendant's ability to impeach the credibility of the alleged victim.

Every society fears violence. The danger that a jury might give short shrift to the "presumption of innocence" in order to avoid the danger of putting a guilty person back on the street hangs over every violent crime prosecution. In order to guard against this human instinct, the Supreme Court should construe the Sixth Amendment Confrontation and Compulsory Process Clauses as broadly as possible.

Finally, it is worth noting that the criticisms which have been leveled at the absolute immunity rule, the majority rule and the minority rule apply with equal if not greater force in the general context of criminal discovery. If the trial judge is not the most appropriate person to determine what evidence is

---

[191] FED. R. EVID. 403.

[192] *See* Berger, *supra* note 5 at 10.

"material" to the defendant, as this Note contends, a prosecutor certainly is less suited to this task. Because the prosecutor is an interested party, she is the least appropriate person to determine which evidence in her file is "material" to the defense. Yet the Supreme Court has placed the burden on the prosecutor to make just this determination in the first instance.[193] As a result, the criminal discovery process mandated by the Federal Constitution presently resembles a game of "hide and seek" or "twenty questions" more than it does an instrument in the quest for truth.[194]

It is hopeless to expect a prosecutor, as a zealous advocate, to be able to determine with any degree of accuracy which evidence is material to the defense.[195] As the Massachusetts Supreme Judicial Court set forth in *Stockhammer*, defense lawyers can review even the most sensitive records without damaging strong state interests. If the trial court is vigilant in ensuring that defense counsel does not abuse the discovery process, a policy of allowing defense counsel access to all information she seeks, including information in the possession of the prosecutor, will best serve the quest for truth and the defendant's interest in effectively defending himself without unduly jeopardizing potential government interests.

Chauncey B. Wood

---

[193] *See supra* section II.

[194] William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279.

[195] Capra, *supra* note 25, at 394.