WHY *DWYER* GOT IT WRONG: A CALL TO REBALANCE THE SCALE AND PROTECT ABSOLUTE PRIVILEGED COMMUNICATIONS BETWEEN SEXUAL ASSAULT VICTIMS AND COUNSELORS

Meagen K. Monahan∗

INTRODUCTION

A woman in Massachusetts has been sexually assaulted.[1] She decides to report the assault to the police. The police conduct an investigation, find

∗ J.D., Boston University School of Law, 2016; B.A. American Studies, B.A. Economics, College of William & Mary, 2013. Thank you to the members of Boston University Law Review for their tireless efforts, Professor Gerald Leonard for his insightful feedback, and my parents for their constant support. A most special and sincere thank you to the women at the Victim Rights Law Center, especially Lindy Aldrich, Stephanie Holt, and Kelsey Worline, who not only introduced me to this topic but served as my mentors and support team throughout the researching, writing, and editing of this Note. This Note would not exist without their lessons and guidance.

[1] While acknowledging that sexual assault cases involve both male and female victims, as well as both male and female accused-defendants, this Note refers to victims in the

sufficient evidence to support her claim, and arrest the accused perpetrator. After building the case, the local district attorney indicts the accused. While this is all happening, the victim has chosen to begin to rebuild her life, which includes seeking counseling. During counseling, the victim processes her feelings about the attack. She discusses her feelings of anger, shame, frustration, grief, and even self-blame—all common and natural reactions to a sexual assault.[2] However, this counseling is in no way an attempt to figure out the facts of what happened, but only to help the victim regain control over her life.[3]

Meanwhile, as the prosecution and defense prepare for trial, the prosecutor receives notice that the defense has requested access to the victim's counseling records, which are statutorily protected by Chapter 233, Section 20J of the General Laws of Massachusetts ("Section 20J").[4] On its face, Section 20J does not permit a third party, including a criminal defendant, to review a victim's sexual assault counseling records.[5] The victim also receives notice that her attacker has requested access to her counseling records, which contain her most private and personal reflections concerning the assault. The trial court sets the date to hear the parties' arguments as to whether the court should pierce Section 20J's privilege and allow the defense to review these records in preparation for trial. At the scheduled hearing, defense counsel arrives, the prosecutor is present, and the victim presents herself with counsel, assuming she is fortunate enough to know that she has standing at this hearing.[6] Each party has the opportunity to argue why the records should or should not remain sealed. Thus begins what is known in Massachusetts as a *Dwyer* hearing.

The *Dwyer* hearing is the result of the Massachusetts Supreme Judicial Court ("SJC")'s decision, *Commonwealth v. Dwyer*.[7] In *Dwyer*, the defendant

feminine form and accused-defendants in the masculine form for simplicity's sake, given this is the typical breakdown for these cases.

[2] Adrienne Kotowski, *"How Confidential Is This Conversation Anyway?": Discovery of Exculpatory Materials in Sexual Assault Litigation*, 3 SUFFOLK J. TRIAL & APP. ADVOC. 65, 70-71 (1998) ("Sexual assault victims often have feelings of shame, guilt, helplessness, fear, denial, anger and powerlessness, and sexual assault counselors act as critical agents in assisting victims to confront past traumatic experience in a supportive environment.").

[3] *See* Anna Y. Joo, Note, *Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor*, 32 HARV. J. ON LEGIS. 255, 262-67 (1995) (discussing the critical role a sexual assault counselor plays in a survivor's life immediately following the assault); *see also* Commonwealth v. Fuller, 667 N.E.2d 847, 854 (Mass. 1996) ("[T]he purpose of sexual assault counselling is not to gather evidence for prosecution, but to mend a damaged psyche.").

[4] MASS. GEN. LAWS ch. 233, § 20J (2014) (defining "[c]onfidential communication" to include counseling session reports).

[5] *Id*.

[6] *Commonwealth v. Dwyer*, 859 N.E.2d 400, 418 (Mass. 2006), permits the victim to be heard and represented by independent counsel.

[7] *Id*.

was convicted of rape of a child by force and indecent assault and battery on a child less than fourteen years of age.[8] On appeal, the defendant claimed that the trial court abused its discretion when it repeatedly denied the defendant's requests to review the victim-witness's therapy records, which were protected by Section 20J.[9] Additionally, the defendant claimed that the protocol governing at the time of trial, which determined whether criminal defendants could review these statutorily protected, third-party records, "impose[d] an unconstitutionally high burden on defendants, leading to the unavailability of exculpatory evidence."[10] On appeal, the SJC agreed to reconsider the protocol.[11] Finding it caused "continuing difficulties," the SJC created a new protocol—the *Dwyer* protocol.[12]

The *Dwyer* protocol has four critical aspects: (1) it gives notice to privilege holders when the defense requests access to their records; (2) it permits privilege holders' standing at the hearing that determines whether defendant's counsel may review their records; (3) it requires the defense to show that the records are evidentiary and relevant, and that the request otherwise meets the showing under *Commonwealth v. Lampron*,[13] which governs pre-trial access to third-party records; and (4) if the defense makes the proper showing, it grants defense counsel an initial review of the records.[14] Though the *Dwyer* protocol applies to all statutorily privileged records, this Note focuses on this protocol's implications for Section 20J's absolute privilege and its effect on victims of sexual assault.

In order to properly assess the strengths and weaknesses of the *Dwyer* protocol, this Note will go step-by-step through a typical *Dwyer* hearing for a sexual assault trial. By taking the reader through each stage of a *Dwyer* hearing, this Note will evaluate the SJC's decision to change the protocol and whether such a change was necessary or proper. The SJC's decision attempts to strike the appropriate balance between several parties' interests: (1) the legislature's interest in furthering Section 20J's purpose; (2) the victim's interest in maintaining the privacy of her communications with her sexual assault counselor; and (3) the defendant's interest in access to these communications in preparation for his defense.[15]

Part I of this Note walks through the initial inquiry of the trial court at a *Dwyer* hearing: whether, in fact, the counseling records are privileged. In doing so, Part I examines Section 20J's statutory language and the legislative intent behind enacting an absolute sexual assault victim-counselor privilege.

[8] *Id.* at 403-04.

[9] *Id.*

[10] *Id.* at 403.

[11] *Id.*

[12] *Id.* at 417.

[13] 806 N.E.2d 72, 76-78 (2004).

[14] *Dwyer*, 859 N.E.2d at 415.

[15] *Id.* at 417-18.

Part I then explains the effect of an absolute privilege and the strength of its protection against third-party review. Part II examines the United States Supreme Court's decision in *Pennsylvania v. Ritchie*[16] and the SJC's decision in *Commonwealth v. Two Juveniles*.[17] These decisions highlight how courts typically interpret statutory privileges when faced with a criminal defendant's claim that the privilege violates his constitutional right to due process.[18] As shown in both cases, traditionally, courts apply a balancing test, weighing the defendant's rights against the victim's interest in privacy and the societal interest in maintaining the privilege.[19] Part II provides the necessary background for one to understand the *Dwyer* protocol and its sharp contrast from case precedent by requiring the defendant to only show that the communications are "relevant" to the defense, rather than both "relevant" and "material." Part III returns to this Note's hypothetical *Dwyer* hearing and outlines the arguments that each side may or may not present concerning whether the court should grant the defense access to the records. By presenting the limited arguments that the privilege-holding victim may put forward, Part III shows why, as a policy matter, *Dwyer*'s "relevancy standard" is too low and does not properly consider the victim's, as well as society's, interest in maintaining the privilege.

Assuming that the defense demonstrates that the records are relevant to an issue in the case, Part IV discusses the implications of *Dwyer*'s final phase, which grants defense counsel access to the records for initial review. Based upon the discussion of *Dwyer*'s strengths and weaknesses in Parts I through IV, Part V assesses *Dwyer*'s overall effectiveness and critiques its most critical issue, namely its "relevancy" standard. Finally, Part VI proposes a new protocol to replace *Dwyer*. This proposed protocol attempts to fill the gaps in the *Dwyer* protocol, particularly its failure to adequately account for victims' personal privacy interests and society's collective interest in preserving the privileged relationship between a victim and her sexual assault counselor.

I. WHETHER THE RECORDS ARE PRIVILEGED COMMUNICATIONS

At the *Dwyer* hearing, the trial judge must first determine whether the records are privileged and, thus, legally protected from unrestricted third-party

[16] 480 U.S. 39 (1987) (assessing whether a criminal defendant's constitutional rights require pre-trial access to statutorily privileged state-held records).

[17] 491 N.E.2d 234 (Mass. 1986) (examining whether testimonial statutory privileges must yield to a criminal defendant's right to confrontation).

[18] *See, e.g.*, *id.* at 236-37.

[19] *See Ritchie*, 480 U.S. at 58-59 n.15 (suggesting state courts should require criminal defendants to establish a showing of relevance and materiality before granting in camera review of privileged records); *Two Juveniles*, 491 N.E.2d at 239 (requiring a defendant to show a legitimate need in order to gain access to statutorily privileged records).

access.[20] Records can be protected by either a common law privilege or statutory privilege.[21] The following discussion will focus on statutory privileges for two reasons: (1) this Note addresses sexual assault counseling records, which are protected by Section 20J, a statutory privilege; and (2) the SJC has not yet decided whether *Dwyer* grants access to common law privileged records.[22]

First, it is imperative to understand the distinction between qualified privilege statutes and absolute privilege statutes.[23] Such an understanding will clarify and emphasize the scope and strength of Section 20J, an absolute privilege statute. A qualified privilege statute establishes that the records are privileged, but lists specific, enumerated exceptions for when a third party (e.g., a criminal defendant, police officer, or medical professional) may access these records.[24] In contrast, an absolute privilege statute on its face does not provide any exceptions for third-party access.[25] As discussed below, Section 20J does not provide any enumerated exceptions, and therefore is an absolute privilege statute.[26]

Generally, whether a record falls under qualified privilege or absolute privilege depends on the legislature's privacy concerns for that record.[27] That

[20] *See Dwyer*, 850 N.E.2d at 418-19. The custodian of the records and the victim need not attend the *Dwyer* hearing. *Id*. at 418. If this is the case, all records "likely to be covered by a statutory privilege shall remain and shall be treated as presumptively privileged." *Id*. at 419. At the first stage, the judge does not need to determine the records "are in fact privileged." *Id*.

[21] Examples of common law privileges include attorney-client privilege, spousal privilege, and priest-penitent privilege. *See, e.g*., *In re* Bank of N.Y. Mellon Corp. Forex Transactions, 66 F. Supp. 3d 406, 409 (S.D.N.Y. 2014).

[22] *See* Commonwealth v. Sealy, 6 N.E.3d 1052, 1060 n.12 (noting *Dwyer* did not address "common-law privilege such as the attorney-client privilege").

[23] Some scholars create a third category: "semi-absolute" privilege. *See, e.g*., Joo, *supra* note 3, at 271-77. However, for the purposes of this Note, we may assume any listed statutory exception to the privilege constitutes a "qualified privilege." *Cf*. Commonwealth v. Fuller, 667 N.E.2d 847, 853 (Mass. 1996).

[24] *See e.g*., MASS. GEN. LAWS ch. 112, § 135A (2014) (qualifying the protected communications between client and social worker with eight exceptions).

[25] *See e.g*., *id*. at ch. 233, § 20J.

[26] *Id*.

[27] Several scholars have utilized the "Wigmore" utilitarian view to justify the existence of the sexual assault counselor-patient privilege. *See e.g*., Kotowski, *supra* note 2, at 68 ("Wigmore's four elements justify the existence of the counselor-patient privilege."); Anne W. Robinson, *Evidentiary Privileges and the Exclusionary Rule: Dual Justifications for an Absolute Rape Victim Counselor Privilege*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 331, 335-36 (2005); Joo, *supra* note 3, at 259. The Wigmore utilitarian view consists of the four following elements:

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

is, the more sensitive, private, and personal the information contained in the record, the more likely the record will be protected by an absolute privilege.[28] The following discussion will compare a general access statute, a qualified privilege statute, and an absolute privilege statute in order to illustrate the principle that restrictions on access to records increase as society's expectations of privacy increase.

Chapter 66, Section 10 of the General Laws of Massachusetts ("Section 10") is an example of a general access statute. Section 10 governs third-party access to inter-agency or intra-agency reports, papers, and letters relating to the development of Massachusetts's governmental policy.[29] Section 10 defines these records as "public records."[30] As a result, a custodian of the records must allow any person to examine or inspect them.[31] Permitting the general public to access these government papers derives from the basic principle that a democratic government should be as transparent as possible.[32]

Compare the general access of Section 10 with General Laws of Massachusetts Chapter 112, Section 135A ("Section 135A").[33] Unlike Section 10, Section 135A is a qualified privilege statute. Section 135A preserves the confidentiality of communications between social workers and their clients.[34] Section 135A states: "All communications between a social worker licensed . . . or a social worker employed in a state, county or municipal governmental agency, and a client are confidential."[35] Here, confidentiality allows a social worker to assist her clients with sensitive matters such as custody disputes, marital problems, and even situations escalating to domestic

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Robinson, *supra*, at 335-36.

[28] This supposition falls most in line with elements three and four of Wigmore's test: a relation that the community deems valuable, and the injury from disclosure is greater than the benefit that would be gained.

[29] MASS. GEN. LAWS ch. 66, § 10 (2014).

[30] *Id*.

[31] *Id*.

[32] *See* Anthony B. Joyce, Note, *The Massachusetts Approach to the Intersection of Governmental Attorney-Client Privilege and Open Government Laws*, 42 SUFFOLK U. L. REV. 957, 967-68 (2009) (explaining that open access laws "attempt to make government more transparent" and "purport to facilitate government openness, accountability, and greater democratic participation").

[33] *Compare* MASS. GEN. LAWS ch. 66, § 10 (2014) (providing open access to certain government records), *with id*. at ch. 112, § 135A (providing a qualified privilege for communications between client and social worker).

[34] *Id*. at ch. 112, § 135A.

[35] *Id*.

violence and child abuse.[36] Such confidentiality permits a client to confide in her social worker without fear of reprisal.[37] For example, a victim of domestic violence who reports to social services depends on the fact that her communications with her social worker are confidential. The fact that these communications are confidential allows her to take action without fear that her abusive partner will discover the investigation before she is safely out of the home.[38]

Despite this critical need for confidentiality, as a qualified privilege statute, Section 135A provides several explicit exceptions to this confidentiality.[39] Such exceptions include where: (1) the client presents a "clear and present danger" to herself and "refuses explicitly to voluntarily accept further appropriate treatment"; (2) "the client has communicated . . . an explicit threat to kill or inflict serious bodily injury upon a reasonably identified victim"; (3) the social worker needs "to collect amounts owed by the client for professional services rendered"; (4) the information is needed to initiate proceedings such as those involving emergency child custody; and (5) an adult patient provides written consent.[40]

The legislature's inclusion of several enumerated exceptions in Section 135A underscores its concern for privacy and confidentiality in respect to Section 20J, an absolute privilege statute. Unlike Section 135A, Section 20J does not list any nondisclosure exceptions.[41] As discussed above, Section 20J protects the communications between a sexual assault counselor and a client-victim.[42] Section 20J states:

> A sexual assault counsellor shall not disclose such confidential communication, without the prior written consent of the victim . . . . Such

[36] *See, e.g.*, Commonwealth v. Jones, 535 N.E.2d 221, 223 (Mass. 1989) (discussing the importance of both the privilege and the exception for disclosure of child abuse). In *Jones*, the SJC recognizes: "In enacting § 135, the Legislature recognized that maintaining the confidentiality of communications acquired by a social worker is necessary for successful social work intervention. . . . The statutory exceptions to the social worker privilege reflect the legislative goals of protecting confidential relationships as well as protecting the well-being of children." *Id.*

[37] *Id.*; *see also* Commonwealth v. Collett, 439 N.E.2d 1223, 1226 (Mass. 1982) ("Whether the protected relationship involves physician, psychologist or certified social worker, all share the common purpose of encouraging the patient or client fully to disclose the nature and details of his illness or his emotions without fear of later revelation by one in whom he placed his trust and confidence." (quoting Perry v. Fiumano, 403 N.Y.S.2d 382, 384 (N.Y. Sup. Ct. 1978))).

[38] *See, e.g.*, *Collett*, 439 N.E.2d at 1226.

[39] *See* MASS. GEN. LAWS ch. 112, § 135A (listing eight exceptions to the privileged communications).

[40] *See id.* § 135A(a)-(i).

[41] *Id.* at ch. 233, § 20J (granting absolute privilege for communications between victim and sexual assault counselor).

[42] *See id.*

> 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.[43]

Unlike Section 10 and Section 135A, Section 20J explicitly denies all third-party access to communications between a sexual assault counselor and a client-victim.[44] Unlike Section 135A, Section 20J explicitly prohibits all access, including access in furtherance of judicial proceedings.[45] On its face, Section 20J suggests paramount consideration for the private and personal nature of these records. Presumably, a sexual assault victim is just as likely as a social worker's client to go through a civil or criminal proceeding, and yet the legislature saw it necessary to provide greater protection for the confidentiality of sexual assault communications. Furthermore, one can reasonably infer that a sexual assault victim will speak to her counselor about the assault, which may be relevant to the proceedings.[46] Yet, the Massachusetts legislature has explicitly prohibited all access. In doing so, the Massachusetts legislature has weighed the social value of confidentiality between a sexual assault victim and her counselor, and deemed it critical enough to explicitly deny third-party access.[47]

---

[43] *Id*. (emphasis added).

[44] *Id*. (providing only a narrow exception for the defense to cross-examine a sexual assault counselor's testimony when that testimony was given with the informed consent of the victim).

[45] *Compare* MASS. GEN. LAWS ch. 112, § 135(A) (2014), *with id*. at ch. 233, § 20J. Indeed, the SJC has acknowledged Section 20J's exceptional privilege:

> To the extent it is able, the Legislature has already determined [the privilege's existence and scope]. Section 20J, like few other testimonial privilege statutes, is a statement of absolute privilege. Statutory privileges normally have exceptions, some of which are quite general, and, for that reason, they indicate a less firmly based legislative concern than § 20J does for the inviolability of the communication being protected.

Commonwealth v. Two Juveniles, 491 N.E.2d 234, 237 (Mass. 1986) (citations omitted).

[46] *Cf*. Commonwealth v. Fuller, 667 N.E.2d 847, 854 (Mass. 1996). In *Fuller*, the SJC recognized that:

> During sexual assaulting counseling, a client may be encouraged to discuss the facts of the assault. She almost certainly will discuss her feelings about the assault and about the perpetrator. As a result, "where § 20J applies, the very circumstances of the communications indicate that they are likely to be relevant" to an issue in the case.

Id.

[47] MASS. GEN. LAWS ch. 233, § 20J (2014) (emphasis added) (deliberately employing broad language to underscore the extent of the privilege). In contrast, the statutory structure of the qualified social worker privilege reveals that the Massachusetts legislature knew how to qualify privileges when it wanted to. *See* Commonwealth v. Collett, 439 N.E.2d 1223, 1226 (Mass. 1982) ("The Legislature has determined that while the preservation of the confidential relationship is an important objective, under certain circumstances, this goal

After analyzing the language of Section 10, Section 135A, and Section 20J, one may reasonably conclude that the Massachusetts legislature deliberately chose to preserve the privileged sexual assault counselor-victim relationship, even at the expense of a criminal defendant's interest in mounting a defense. That clear legislative purpose should make courts hesitant to create exceptions to an intentionally broad and robust privilege.[48] If the legislature believed that a third party, under certain circumstances, should have access to the sexual assault counseling records, then the legislature would have constructed Section 20J similarly to Section 135A, a qualified privilege statute.[49] Accordingly, the Massachusetts legislature, in drafting Section 20J, rejected the qualified privilege model and deliberately created an absolute privilege for sexual assault counseling records.[50]

Returning to this Note's hypothetical *Dwyer* hearing, the trial court first examines the records to determine (1) whether the records are protected by a statutory privilege[51] and (2) whether the privilege is absolute or qualified.[52] Typically, this is a relatively simple determination because the victim's counsel can point to Section 20J, which protects the records.[53]

must give way in favor of other societal interests. Therefore, the Legislature has carved out five exceptions to the statutory privilege.").

[48] *Cf.* Commonwealth v. Welosky, 177 N.E. 656, 658-59 (Mass. 1931) (positing that laws should "be interpreted . . . in connection with their development, their progression through the legislative body, the history of the times, prior legislation, contemporary customs and conditions and the system of positive law of which they are a part").

[49] *See supra* note 45 and accompanying text.

[50] Though Section 20J was enacted in 1984 and Section 135A was enacted in 1989, Section 20J was amended in 1987 and again in 1998. Therefore, the Massachusetts legislature reaffirmed its intent to maintain an absolute privilege for sexual assault counseling records as late as 1998. *See Welosky*, 177 N.E. at 661 ("It is a general principle of statutory construction that the re-enactment of a statute in substantially the same words does not change its meaning or extend its scope. Its words are presumed to continue to have attached to them the same sense as in the preceding enactment.").

[51] *See* Commonwealth v. Dwyer, 859 N.E.2d 400, 420 (Mass. 2006) ("Following the [*Dwyer*] hearing, the judge shall make oral or written findings with respect to the records sought . . . and that the records sought are or are not presumptively privileged.").

[52] *See id.* at 422. The distinction between qualified and absolute privilege is critical because it can place the records on two separate tracks of disclosure. Upon inspection of the records, defense counsel can challenge the "privilege designation," argue that the records or portions thereof are not protected by privilege, and file a motion to release specified records from the terms of the protective order. *Id.* In contrast, if the records are presumptively privileged, a judge must conduct an in camera review in order to determine "that the copying or disclosure is necessary for the defendant to prepare adequately for trial." *Id.* Furthermore, the "judge shall consider alternatives to full disclosure, including agreed to stipulations or disclosure of redacted portions of the records." *Id.*

[53] *See* MASS. GEN. LAWS ch. 233, § 20J (2014); *id.* at ch. 112, § 135A; *see also Dwyer*, 859 N.E.2d at 420.

Based upon the discussion above, one would assume that once the trial judge determines the records are protected by Section 20J, this finding ends the *Dwyer* hearing. Section 20J explicitly states that the records are inadmissible "in any criminal or civil proceeding."[54] Yet, despite finding that the records are protected by Section 20J, the trial judge moves to step two: whether the defense should, despite Section 20J's absolute privilege, have access to the sexual assault counseling records.[55]

II. WHETHER DEFENSE MAY PIERCE ABSOLUTE PRIVILEGE

Next, the trial court determines whether the defense can access these records despite Section 20J's explicit language.[56] In fact, courts have historically permitted defendants' access to these privileged communications.[57] The following part will discuss two decisions: *Pennsylvania v. Ritchie*,[58] a United States Supreme Court decision, and *Commonwealth v. Two Juveniles*,[59] an SJC decision. These decisions recognize a criminal defendant's constitutional right to access privileged records after a particular showing of legitimate need[60] or materiality.[61] Moreover, these decisions set the foundation for *Commonwealth v. Dwyer*.[62]

A. Pennsylvania v. Ritchie*: When Can a Defendant Access Privileged Records?*

In 1987, the Supreme Court, in *Pennsylvania v. Ritchie*, examined "whether and to what extent a State's interest in the confidentiality of its investigative files . . . must yield to a criminal defendant's Sixth and Fourteenth Amendment right to discover favorable evidence."[63] Specifically, the Supreme Court addressed the issues of (1) whether a defendant can access statutorily

[54] MASS. GEN. LAWS ch. 233, § 20J.

[55] *See Dwyer*, 859 N.E.2d at 415 (explaining that the defendant must prove that "the documents are evidentiary and relevant").

[56] *Id*.

[57] *See infra* Section II.A.

[58] 480 U.S. 39 (1987) (addressing a qualified statutory privilege that included a specific exception for courts of competent jurisdiction).

[59] 491 N.E.2d 234 (Mass. 1986) (addressing an absolute statutory privilege with no exceptions).

[60] *Id*. at 239 (requiring that the defendant show "a legitimate need for access to the communications").

[61] *Ritchie*, 480 U.S. at 58 (arguing that a materiality test would necessarily capture all information that is relevant).

[62] 859 N.E.2d 400 (Mass. 2006) (synthesizing the prior cases to establish the "relevant and evidentiary" test).

[63] *Ritchie*, 480 U.S. at 42-43.

privileged records during criminal proceedings and, if so, (2) when a defendant might access these records.[64]

In *Pennsylvania v. Ritchie*, the defendant Ritchie "was charged with rape, involuntary deviate sexual intercourse, incest, and corruption of a minor."[65] The victim was his thirteen-year-old daughter, who claimed that Ritchie had assaulted her two or three times per week for four years.[66] When Ritchie's trial took place, protocol mandated that Children and Youth Services ("CYS"), a Pennsylvania protective service agency, investigate cases of suspected child abuse and neglect.[67] A qualified privilege statute, similar to Section 135A, Massachusetts's social workers' communications statute, protected CYS's reports and records.[68] The relevant section of the statute stated:

> (a) [R]eports made pursuant to this act including but not limited to report summaries of child abuse . . . and written reports . . . as well as any other information obtained, reports written or photographs or x-rays taken concerning alleged instances of child abuse in the possession of the department, a county children and youth social service agency or a child protective service shall be confidential and shall only be made available to: . . . (5) A court of competent jurisdiction pursuant to a court order.[69]

Similar to Massachusetts's social worker statute, Title 11, Section 2215(a) of the Pennsylvania Statutes ("Section 2215(a)") permitted access for judicial proceedings.[70]

During pretrial discovery, Ritchie requested his daughter's CYS files and reports.[71] The CYS files allegedly contained a report of his daughter's abuse.[72] CYS refused to comply with Ritchie's request and the court's subpoena.[73] CYS asserted that the records were protected under Section 2215(a).[74] Though the statute permitted CYS to release the records to a "court of competent jurisdiction,"[75] it appears that CYS refused in order to protect the privacy and well-being of Ritchie's daughter.[76] That is, CYS took the position that the

---

[64] *See id*. at 61.

[65] *See id*. at 43.

[66] *See id*.

[67] *See id*.

[68] *See id*. at 43-44 .

[69] Act No. 136, 1982 Pa. Laws 460; *see Ritchie*, 480 U.S. at 43 n.2 (noting the applicable statutory exception to the privilege).

[70] Act No. 136, 1982 Pa. Laws 460.

[71] *See Ritchie*, 480 U.S. at 43.

[72] *Id*.

[73] *Id*.

[74] *Id*. at 43-44.

[75] Act No. 136, 1982 Pa. Laws 460.

[76] *See* Brief of *Amicus Curiae* County of Allegheny, Penn. on Behalf of Allegheny Cty. Children and Youth Servs. in Support of Petitioner, at 3-6, Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (No. 85-1347).

exceptions should not be construed to allow the child's attacker to use the documents to challenge the child but rather to allow a court to remove her from a dangerous situation.[77] Moreover, CYS believed releasing this information would have a chilling effect on reporting of suspected child abuse.[78] Regardless of CYS's reasons, its refusal forced Ritchie to request that the trial court order CYS to release its records to Ritchie.[79] The trial court denied Ritchie's request, finding that "no medical records are being held by [CYS] that would be of benefit to the defendant in the case."[80] A jury convicted Ritchie on all counts.[81]

On appeal, the Pennsylvania Superior Court held that (1) Ritchie was entitled to inspect any portion of CYS's files "which reflects statements regarding abuse made by [his daughter] to the [CYS] worker who examined her" and (2) the trial judge's failure to review the CYS records violated Ritchie's constitutional rights under the Confrontation Clause of the Sixth Amendment.[82] At the next level of appeals, the Supreme Court of Pennsylvania affirmed the Superior Court's constitutional findings; however, it held that defense counsel must conduct the initial review of the entire file in order to search for "any useful evidence."[83] The Supreme Court of Pennsylvania's analysis rested on two principles of statutory construction: (1) "[e]very statute shall be construed, if possible, to give effect to all its provisions"[84] and (2) the Pennsylvania legislature "does not intend to violate the Constitution of the United States or of this Commonwealth."[85] Because the statute already had an enumerated exception, permitting access to the records for "courts of competent jurisdiction," the Pennsylvania Supreme Court simply found the statute constitutional but that it required access for criminal defendants.[86]

---

[77] *Id*.

[78] *Id*. at 5 ("By making a non-mandated reporter's anonymity less likely, the decision of the Pennsylvania Supreme Court clearly undermines the vital interest of the Commonwealth and of CYS in identifying and in protecting children from physical and sexual abuse.").

[79] *See Ritchie*, 480 U.S. at 44 (outlining Ritchie's somewhat vague allegations that the confidential files "might contain" potential witnesses and "other, unspecified exculpatory evidence").

[80] Commonwealth v. Ritchie, 472 A.2d 220, 224 (Pa. Super. Ct. 1984).

[81] *Id*. at 222.

[82] *Id*. at 225 (remanding the case for the trial court to inspect the CYS records for relevancy to the case).

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

[84] Commonwealth v. Ritchie, 502 A.2d 148, 150-51 (Pa. 1985).

[85] *Id*.

[86] *Id* at 151. ("There can be no absolute protections that cancel the fundamental mandates of [the Sixth Amendment]; all that can be accomplished is a careful balance between them, the counters always in favor of the Amendment.").

The United States Supreme Court thereafter granted certiorari.[87] First, the Supreme Court discussed the Supreme Court of Pennsylvania's holding that Ritchie had a right to access these records based upon the Confrontation and the Compulsory Process Clauses of the Sixth Amendment.[88] Four justices, a plurality of the Court, rejected the Confrontation Clause argument,[89] holding "that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination."[90] Consequently, "[t]he ability to question adverse witnesses . . . does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony."[91] Based upon this reading of the prior case law, the plurality held, "the Confrontation Clause was not violated by the withholding of the CYS file."[92]

Next, a majority of the Court analyzed whether Ritchie's rights were violated under the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment.[93] First, the Court acknowledged that it "had little occasion to discuss the contours of the Compulsory Process Clause"[94] and that the Court typically evaluated these cases under the Due Process Clause of the Fourteenth Amendment.[95] Therefore, because the "compulsory process provides no *greater* protection in this area than those afforded by due process" and "because [the] Fourteenth Amendment precedents addressing the fundamental fairness of trials establish a clear framework for review, [the Court] adopt[ed] a due process analysis for purposes of this case."[96]

Under the Due Process Clause analysis, the Court acknowledged, "that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment."[97] However, in Ritchie's case, such evidence was protected by a statutory privilege and thus, the Commonwealth argued the evidence could not be disclosed upon

[87] Pennsylvania v. Ritchie, 480 U.S. 39, 46 (1987) ("In light of the substantial and conflicting interests held by the Commonwealth and Ritchie, we granted certiorari.").

[88] *Id*. at 51.

[89] *Id*. at 51-55 (plurality opinion) ("If we were to accept [the lower court's] broad interpretation of *Davis*, the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery.").

[90] *Id*. at 52; *see also* Davis v. Alaska, 415 U.S. 308, 320 (1974).

[91] *Ritchie*, 480 U.S. at 53.

[92] *Id*. at 54.

[93] *Id*. at 55 (majority opinion).

[94] *Id*.

[95] *Id*. at 55-56.

[96] *Id*. at 56.

[97] *Ritchie*, 480 U.S. at 57 (citations omitted).

request, regardless of whether it was material to the accused's defense.[98] Furthermore, any required disclosure would improperly override both the Commonwealth's and the victim's interest in confidentiality as outlined in Section 2215(a).[99] Although the Court "recognize[d] that the public interest in protecting this type of sensitive information is strong,"[100] the Court found that because the "Pennsylvania Legislature contemplated *some* use of CYS records in judicial proceedings," it could not hold "that the statute prevents all disclosure in criminal prosecutions."[101] Specifically, because Section 2215(a) provides an enumerated exception for "a court of competent jurisdiction," the Court could not bar a criminal trial court from ordering that the records be disclosed to the criminal defendant.[102] Therefore, the Court concluded: "In the absence of any apparent state policy to the contrary, we therefore have no reason to believe that relevant information would not be disclosed when a court of competent jurisdiction determines that the information is 'material' to the defense of the accused."[103]

In *Ritchie*, the Court maintained that because the Pennsylvania legislature only protected the records with a qualified privilege and contemplated release of the records to courts under some circumstances, the Due Process Clause required review of these records by the trial court.[104] The Court then ordered the lower court to review the records to determine whether any material evidence existed that would warrant a new trial.[105] The Court did not, however, mandate a specific showing for future criminal defendants to establish in order to be entitled to review of privileged evidence.[106] On the other hand, the Court stated in a footnote that a defendant "may not require the trial court to search through the . . . file without first establishing a basis for his claim that it contains material evidence."[107] Moreover, the Court noted, "[h]e must at least make some plausible showing of how their testimony would have been both material and favorable to his defense."[108] Earlier in the *Ritchie* opinion, the Court defined a showing of materiality as "if there is a reasonable probability that, had the evidence been disclosed to [Ritchie's] defense, the result of the

[98] *Id*.

[99] *Id*.

[100] *Id*.

[101] *Id*. at 58.

[102] *Id*.

[103] *Id*.

[104] *Id*. at 57-58.

[105] *Id*. at 58.

[106] *See id*. at 57-58.

[107] *Ritchie*, 480 U.S. at 58 n.15.

[108] *Id*. (quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982) (internal quotation marks omitted)).

proceeding would have been different."[109] Though the Court did not specifically hold that a defendant must make a plausible showing of materiality, lower courts, when creating their respective protocols, have cited *Ritchie's* dicta concerning the materiality standard as governing authority.[110]

Although the majority of Court affirmed Ritchie's right to in camera review of the CYS files, the Court rebuked the Supreme Court of Pennsylvania for its decision to require access by defense counsel.[111] The United States Supreme Court found "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."[112] The Court continued on to state that a "defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's files."[113] The Court reasoned that "[t]o allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child-abuse information."[114] The Supreme Court, therefore, affirmed the Pennsylvania Supreme Court's decision to grant access but reversed the finding that the defendant's constitutional rights required review by defense counsel.[115]

The Supreme Court's holding rests on the fact that Pennsylvania's CYS statute was one of qualified privilege. As stated above, the Court observed that because the statute contemplated use of the records in some judicial proceedings and "[i]n the absence of any apparent state policy to the contrary," the Court had "no reason to believe that relevant information would not be disclosed when a court of competent jurisdiction determines that the information is 'material' to the defense of the accused."[116] Moreover, the Court noted, "We express no opinion on whether the result in this case would have been different if the statute had protected the CYS files from disclosure to *anyone*, including law-enforcement and judicial personnel."[117] Following the Court's logic, an absolute privilege statute, which prohibits disclosure to *anyone*, illustrates a state policy contrary to disclosure. Therefore, the Court left open whether a statute of absolute privilege, which expresses a greater

[109] *Id*. at 57 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)).

[110] *See e.g*., Commonwealth v. Barroso, 122 S.W.3d 554, 564 (Ky. 2003); State v. Spath, 1998 N.D. 133 (N.D. 1998); Gale v. State, 792 P.2d 570, 584 (Wyo. 1990).

[111] *Ritchie*, 480 U.S. at 59 ("A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's files.").

[112] *Id*. at 60.

[113] *Id*. at 59.

[114] *Id*. at 60.

[115] *Id*.

[116] *Id*. at 58.

[117] *Id*. at 57 n.14.

concern for privacy than a statute of qualified privilege, is sufficient enough to override the due process concerns expressed in *Ritchie*.

B. Commonwealth v. Two Juveniles*: The Fate of Section 20J*

Since *Ritchie*, state courts, including the SJC, have grappled with the questions the Supreme Court declined to answer. Should a statute expressing an absolute testimonial privilege yield to a criminal defendant's due process rights? Or, is an absolute privilege a sufficient expression of state policy contrary to disclosure? If the absolute privilege must yield, when should it give way? In 1986, one year before *Ritchie*, the SJC, in *Commonwealth v. Two Juveniles*, answered the first question in the affirmative.[118] In regards to when the privilege should yield, the SJC held that upon a showing of "legitimate need," an in camera review is necessary regardless of whether the records are protected by a qualified privilege or an absolute privilege.[119] Though later decisions, which are briefly discussed below, have overruled the *Two Juveniles* "legitimate need standard," the ability to pierce both qualified privilege and absolute privilege statutes remains good law to this day.

In *Two Juveniles*, the SJC addressed two questions posed by the trial court. First, does Section 20J prevent the court from conducting an in camera review of communications between a sexual assault counselor and the victim?[120] Second, if Section 20J does prevent in camera review, is it constitutional "in light of the Confrontation Clause of the Sixth Amendment of the Constitution of the United States or the cognate provisions of the Massachusetts Declaration of Rights?"[121]

As an answer to the trial court's first question, the SJC found that Section 20J, on its face, "prevents the trial court from conducting an in camera inspection of communications between a sexual assault counselor and an alleged victim of sexual assault."[122] However, despite this conclusion, the SJC recognized "the judge's basic concern was whether the constitutional rights of

---

[118] Commonwealth v. Two Juveniles, 491 N.E.2d 234, 238 (Mass. 1986).

[119] *See id*. at 237-39 ("Any conflict between the testimonial privilege and a defendant's constitutional rights to confront witnesses against him and to summon witnesses must be resolved on the facts of each case.").

[120] *Id*. at 236.

[121] *Id*. at 236. Note here that the SJC decided *Two Juveniles* in 1986, a year prior to the Supreme Court's decision in *Ritchie*, hence why the trial court referred to the Confrontation Clause. *Compare Two Juveniles*, 491 N.E.2d at 234, *with Ritchie*, 480 U.S. 39. However, because *Ritchie*'s holding regarding the Confrontation Clause was only adopted by a plurality of the Court, lower courts may still find defendants have rights via the Confrontation Clause. *See Ritchie*, 480 U.S. at 54 (plurality opinion) (finding the Confrontation Clause does not extend to pretrial rights). Therefore, notwithstanding *Ritchie*, *Two Juveniles* is still relevant despite its analysis under the Confrontation Clause.

[122] *Two Juveniles*, 491 N.E.2d at 236; *see also supra* Part I.

the [defendants] would be violated by the total ban against access to communications made confidential by [Section] 20J."[123] As the SJC observed:

> Use of the device of an in camera inspection would derive not from an interpretation of [Section] 20J but rather from a determination that the [defendants] have a constitutional right which transcends the statute and requires the courts to fashion an exception to the statute (or perhaps, alternatively, to strike it down).[124]

The SJC then turned to the trial court's second question: whether the statute violated the United States Constitution or the Massachusetts Declaration of Rights.[125] However, the SJC found it could not definitively answer this question because "it would require a determination of the constitutionality of § 20J in the abstract."[126] The SJC explained: "In many cases it would be difficult or even impossible to say abstractly and unconditionally that a statute is or is not constitutional. In part its provisions may be unconstitutional, yet the remainder may be constitutional . . . ."[127] Or, the SJC continued, "'[a] statute may be unconstitutional as applied to some states of fact, but constitutional as applied to others.'"[128] Thus, "[o]nly when the impact of a statute upon particular individuals . . . and upon a set of definite facts established after genuine controversy, has been shown, can a court decide a constitutional question with confidence . . . ."[129] Though the SJC refused to definitively assess the constitutionality of Section 20J, it concluded that "in certain circumstances the absolute privilege expressed in § 20J, *a nonconstitutionally based testimonial privilege,* must yield at trial to the *constitutional right of a criminal defendant* to have access to privileged communications."[130]

With this determination, the SJC then outlined when Section 20J should yield to a criminal defendant's constitutional right.[131] Relying on other state courts' decisions, the SJC agreed with the notion that the privilege should not be pierced when the defendant simply asserts that an "inspection of information is needed only for a possible attack on [the] credibility [of the victim]."[132] The SJC observed that piercing the privilege based upon such a

---

[123] *Two Juveniles*, 491 N.E.2d at 237.

[124] *Id*.

[125] *Id*.

[126] *Id*.

[127] *Id*. (quoting Bowe v. Sec'y of the Commonwealth, 69 N.E.2d 115, 126 (Mass. 1946)).

[128] *Id*.

[129] *Id*.

[130] *Id*. at 238 (emphasis added).

[131] *Id*. at 238-40 (surveying relevant case law from other jurisdictions and summarizing considerations that might bear on the suspension of the privilege).

[132] *Id*. at 239.

speculative request "would substantially destroy the privilege."[133] Moreover, "Section 20J, like few other testimonial privilege statutes, is a statement of absolute privilege."[134] Whereas "[s]tatutory privileges normally have exceptions, some of which are quite general, and for that reason, they indicate a less firmly based legislative concern,"[135] Section 20J, as an absolute privilege, represents "the inviolability of the communication being protected."[136] Additionally, the SJC opined, "[i]t is not sufficient that, as is apt to be the case where [Section] 20J applies, the very circumstances of the communications indicate that they are likely to be relevant and material to the case."[137] Specifically, in criminal sexual assault cases, the SJC found it is likely that the victim's records protected by Section 20J will be relevant and material to the case.[138] Therefore, the SJC imposed a higher standard for Section 20J, holding that "[b]efore any in camera inspection of the privileged material can be justified, the defendant must show a *legitimate need* for access to the communications."[139]

Over the next twenty years, the SJC returned to this issue of whether defendants could gain access to victims' privileged records on several occasions.[140] Despite the SJC's holding of a legitimate need standard, these later decisions continued to grapple with *what showing* a defendant must make in order to pierce the privilege of Section 20J. The SJC decisions post-*Two Juveniles* adopted different standards, ranging from seemingly no standard,[141] to a "likely to be relevant" standard,[142] to a "relevant and material" standard,[143] and now, under *Dwyer*, an "evidentiary and relevant" standard.[144] These

[133] *Id*. (citing State v. Siel, 444 A.2d 499, 503 (N.H. 1982); People v. Gissendanner, 399 N.E.2d 924, 930 (N.Y. 1979); Brown v. Commonwealth, 204 S.E.2d 429, 431 (Va. 1974); State v. Rinaldo, 689 P.2d 392, 395 (Wash. 1984).

[134] *Id*. at 237 (citation omitted).

[135] *Id*. (citation omitted).

[136] *Id*. (citation omitted).

[137] *Id*. at 239 ("[T]he unavailability of the information from another source will not be sufficient to establish a legitimate need.").

[138] *Id*.

[139] *Id*. (emphasis added).

[140] *See* Commonwealth v. Fuller, 667 N.E.2d 847, 854 (Mass. 1996) (rejecting the "likely to be relevant" standard as "too broad and flexible"); Commonwealth v. Bishop, 617 N.E.2d 990, 996 (Mass. 1994) (requiring judges to conduct the in camera review and identify the relevant materials in privileged records); Commonwealth v. Figueroa, 595 N.E.2d 779, 786 (Mass. 1992) (affirming *Stockhammer*'s decision to permit defense counsel to conduct the initial review of qualified privileged records); Commonwealth v. Stockhammer, 570 N.E.2d 992, 1002-03 (Mass. 1991) (holding defense counsel may conduct the initial review of *qualified* privileged records).

[141] *See Stockhammer*, 570 N.E.2d at 1000-03.

[142] *Bishop*, 617 N.E.2d at 996.

[143] *Fuller*, 667 N.E.2d at 855.

[144] *Commonwealth v. Dwyer*, 859 N.E.2d 400, 415 (Mass. 2006).

decisions, particularly the *Fuller* "relevant and material" standard,[145] will be briefly discussed in Part IV in comparison to *Dwyer*.

Based on *Two Juveniles* and its progeny, the explicit language of Section 20J does not necessarily shield the victim's sexual assault counseling records from the eyes of the court. However, before moving to the trial court's next question of whether a defendant has made the necessary showing to access the records, this Note will discuss another route that state courts may take. Unlike the SJC in *Two Juveniles*, a state court can hold that the absolute privilege is, as the plain language clearly asserts, "absolute."

C. *Absolute is "Absolute"*

Unlike Massachusetts, several states have concluded that a criminal defendant does not have a constitutional right to pierce the absolute sexual assault counselor privilege.[146] One example of an absolute-absolute privilege framework is the Supreme Court of Colorado's decision in *People v. Turner*.[147] In *Turner*, the court examined whether an absolute victim-advocate privilege, similar to Massachusetts's Section 20J, must yield to a defendant's constitutional right to confrontation.[148] Relying upon previous decisions,[149] the Supreme Court of Colorado affirmed that "the defendant's right to cross-examine is not absolute . . . [and that] the trial court may limit the defendant's right of confrontation."[150] Conversely, the court held that "the defendant's right to cross-examine adverse witnesses must bow to the strong public policy

[145] 667 N.E.2d at 855.

[146] *See e.g.*, People v. Turner, 109 P.3d 639, 647 (Colo. 2005) (holding that the victim-advocate privilege cannot be pierced); *In re* Crisis Connection, Inc., 949 N.E.2d 789, 802 (Ind. 2011) (holding that the defendant's constitutional rights do not require access to the victim-advocate's records); Albuquerque Rape Crisis Ctr. v. Blackmer, 120 P.3d 820, 826-27 (N.M. 2005) (holding that the victim-advocate privilege does not interfere with the defendant's right to a fair trial, and referring the issue to a judicial committee for further consideration); Commonwealth v. Wilson, 602 A.2d 1290, 1297 (Pa. 1992) (holding that the privilege does not violate the defendant's federal constitutional rights because the privilege is "narrowly tailored to achieve the compelling interest in protecting the victim's privacy so that her treatment and recovery process will be expedited"); State v. Gomez, 63 P.3d 72, 76-79 (Utah 2002) (distinguishing *Ritchie*'s qualified privilege from Utah's absolute victim-counselor privilege); *see also* State v. J.G., 619 A.2d 232, 234 (N.J. Super. Ct. App. Div. 1993) (holding that the victim-counselor privilege is absolute and extends even to "secondary victims of violence").

[147] 109 P.3d at 647.

[148] *Id.* at 644 (finding the victim-advocate privilege "provides no exceptions and requires no balancing of competing interests").

[149] The *Turner* court relied heavily on its prior decision in *Clark v. Dist. Court*, 668 P.2d 3, 9 (Colo. 1983) (en banc), where it held that patient-physician and psychologist-client privileges are as absolute as the terms of the underlying statutes demanded.

[150] *Turner*, 109 P.3d at 646 (citing People v. Dist. Court, 719 P.2d 722, 726 (Colo. 1986)).

interest in encouraging victims of sexual assault to obtain meaningful psychotherapy."[151] Therefore, because "the underlying purpose of the victim-advocate privilege and the plain language of the statute forbid the disclosure of records or reports," granting access to such records would "betray [the] clear intent" of the absolute privilege.[152] As a result, the court held that lower courts must maintain, under all circumstances, the statutorily prescribed absolute privilege for victim-advocate records.[153]

Similarly, the Supreme Court of Indiana has refused to pierce the absolute victim-advocate privilege.[154] In *In re Crisis Connection, Inc*., the Indiana Supreme Court found "that the strong interest in maintaining the confidentiality of [communications between victim advocates and victims]" outweighed the countervailing interest in the "fair administration of criminal justice."[155] Additionally, the court found that the defendant's right to a fair trial was "well-protected by his extensive access to other sources of evidence."[156] Finally, the court noted that because "the primary function of groups protected by the victim advocate privilege is not to investigate crimes but rather to provide counseling for emotional and psychological needs, we think it unlikely that [the defendant] would find evidence in [the rape crisis center's] records that is not available to him by way of other discovery sources."[157] As compared to Colorado and Indiana, the New Jersey Superior Court took the absolute victim-counselor privilege one step further by not only prohibiting discovery of the victim's statement to a counselor, but also statements made to counselors by "secondary victims of violence" (e.g., a parent of a sexually abused child).[158] In *State v. J.G.*, the court found "no basis to require an *in camera* inspection" of these communications and "view[ed] even such a limited disclosure as a substantial dilution of the statutory privilege."[159]

These decisions serve as a contrast to the SJC's decision in *Two Juveniles*, which found that a testimonial privilege must yield at times to a criminal defendant's constitutional rights.[160] Because the SJC has consistently held that a defendant's constitutional rights may override a statutory testimonial privilege,[161] this Note rests upon the assumption that Section 20J must, at

[151] *Id*.

[152] *Id*. at 647.

[153] *See id*.

[154] *In re* Crisis Connection, Inc., 949 N.E.2d 789, 802 (Ind. 2011).

[155] *Id*. at 802.

[156] *Id*.

[157] *Id*.

[158] State v. J.G., 619 A.2d 232, 234 (N.J. Super. Ct. App. Div. 1993).

[159] *Id*. at 234.

[160] *See supra* Section II.B.

[161] *See, e.g*., Commonwealth v. Dwyer, 859 N.E.2d 400, 417 (Mass. 2006); Commonwealth v. Bishop, 617 N.E.2d 990, 994-95 (Mass. 1994); Commonwealth v. Two Juveniles, 491 N.E.2d 234, 238 (Mass. 1986).

times, yield to a defendant's constitutional rights. However, Colorado, Indiana, and New Jersey serve as examples that the SJC's decision to pierce the victim-counselor privilege is neither inevitable nor necessarily required under the United States Constitution or individual state constitutions.[162] Moreover, because some states have found that upholding the absolute victim-counselor privilege does not violate a defendant's constitutional rights, one may reasonably assume states such as Massachusetts can limit a defendant's access to these records and require such defendant to meet a higher standard of showing, such as the *Two Juveniles* "legitimate need" standard.[163] The remainder of this Note will primarily focus upon this issue and attempt to answer the following question: When must Section 20J and the victim's interest in privacy yield to a defendant's right to due process? Next, Part III will discuss the showing that a defendant must make under *Commonwealth v. Dwyer* to gain access to a victim's counseling records. As part of this discussion, this Note will also highlight the policy arguments proffered by victim's counsel as to why a defendant should never have access to these records.

III. WHETHER THE SECTION 20J RECORDS ARE "RELEVANT"

Returning to this Note's hypothetical *Dwyer* hearing, after determining that the records are in fact protected by Section 20J, the trial court next evaluates whether the defense may nonetheless pierce Section 20J's privilege and gain access to the records.[164] At such a hearing, the defense must show, pursuant to *Dwyer*, *Commonwealth v. Lampron*,[165] and Massachusetts Rule of Criminal Procedure 17(a)(2)[166] that (1) the communications are evidentiary and relevant; (2) the communications are not otherwise reasonably procurable in advance of trial; (3) the party cannot properly prepare for trial without the documents and a failure to obtain the record may unreasonably delay the trial; and (4) the request is made in good faith and not intended as a fishing expedition.[167] To

[162] *See, e.g.*, *In re* Crisis Connection, 949 N.E.2d 789, 800 (Ind. 2011) ("[W]e think that other Supreme Court case law supports our conclusion that [the defendant] does not have a constitutional right to [the rape crisis center's] records.").

[163] *Two Juveniles*, 491 N.E.2d at 239; *see also* Commonwealth v. Fuller, 667 N.E.2d 847, 855 (Mass. 1996) ("We are not concerned that this more stringent standard improperly limits a defendant's Federal or State constitutional rights to due process.").

[164] *See Dwyer*, 859 N.E.2d at 420 ("At the [*Dwyer*] hearing, the judge shall hear from all parties, the record holder, and the third-party subject, if present." (footnote omitted)).

[165] 806 N.E.2d 72, 77-78 (Mass. 2004) (establishing the protocol for pre-trial discovery of third-party records).

[166] MASS. R. CRIM. P. 17(a)(2) (outlining the procedure for summonsing documentary evidence and objects).

[167] *See Dwyer*, 859 N.E.2d at 415 (adopting *Lampron*'s requirements under Rule 17(a)(2)); *Lampron*, 806 N.E.2d at 76-78 (discussing the requirements of Massachusetts Rule 17(a)(2) as analogous to the Federal Rule of Criminal Procedure 17(c)); *see also* FED.

show that the communications are "evidentiary and relevant," the defense must establish that "the documentary evidence sought has a 'rational tendency to prove [or disprove] an issue in the case.'"[168] Furthermore, the defendant must establish with "specificity the relevancy of the requested documents."[169] As expounded upon in *Commonwealth v. Labroad*[170] and *Commonwealth v. Sealy*,[171] "specificity" requires demonstrating relevancy with a factual basis whereas "potential relevancy and conclusory statements regarding relevance are insufficient."[172] Both *Sealy* and *Labroad* suggest that a defendant must provide specific information demonstrating that a victim spoke to a counselor or rape crisis center about the sexual assault.[173] Moreover, *Sealy* requires the defendant to *specify and substantiate* any allegations concerning the victim's bias or motive to lie.[174] The specificity requirement attempts to ensure that Rule 17(a) is not invoked for a general fishing expedition or "merely for the exploration of potential evidence."[175] Instead, Rule 17(a)(2) is intended to provide the defense with evidence in the possession of a third party, which the defendant is already aware of and expects to be relevant to his defense.[176] Under *Dwyer*, victim's counsel is also afforded the opportunity to refute the communications' relevance.[177]

For the purposes of understanding the threshold that the defense must meet under *Dwyer*'s "relevancy" standard, this Note will lay out the victim's arguments, which justify preserving the privilege.[178] First, this Note will begin with the proposition that a victim's counseling records are protected both by

R. CRIM. P. 17(c) (outlining the procedure for the production of documents and records pursuant to a subpoena).

[168] *Lampron*, 806 N.E.2d at 77 (quoting Commonwealth v. Fayerweather, 546 N.E.2d 345, 347 (1989)) (applying the Federal Rule 17(a)'s evidentiary standard to Massachusetts's Rule 17(a)).

[169] *Id*. at 78.

[170] 2 N.E.3d 869, 871-72 (Mass. 2014) (finding the defendant met *Dwyer*'s particularity requirement).

[171] 6 N.E.3d 1052, 1061 (Mass. 2014) (assessing whether *Dwyer*'s protocol applies to records protected by the attorney-client privilege).

[172] *Id*. (quoting *Lampron*, 806 N.E.2d at 77).

[173] *Sealy*, 6 N.E.3d at 1061.

[174] *Id*.

[175] Commonwealth v. Lampron, 806 N.E.2d 72, 77 (Mass. 2004).

[176] *Id*. at 77-78.

[177] Commonwealth v. Dwyer, 859 N.E.2d 400, 420 (Mass. 2006) ("The record holder and third-party subject shall be heard on whether the records sought are relevant and statutorily privileged.").

[178] Though, in practice, because the defense moves to access these records, the defense presents its arguments first. These arguments must meet Rule 17(a)'s requirements of specificity—(1) not a "fishing expedition," and (2) relevancy. As a theoretical discussion, this Note presents more general arguments. However, in practice, the arguments presented by both defense counsel and victim's counsel are understandably more fact-specific.

Section 20J and the United States Constitution's recognition of a right to privacy. Second, this Note will present the public policy arguments that support a victim's right to privacy, and therefore, justify the preservation of Section 20J's privilege.

A. *Victims Have a Constitutional Right to Privacy*

In regards to the constitutional right to privacy, "the entire spectrum of the right to privacy has yet to be fully explored or declared within the American court system."[179] In *Griswold v. Connecticut*,[180] the Supreme Court acknowledged a right to privacy.[181] Although the Court could not agree on which Amendment protected the right to privacy, a majority of the Court nonetheless recognized a fundamental right to privacy.[182] At the very least, the United States Supreme Court has recognized an individual's right to protect and control the dissemination of personal information.[183]

Though state courts, including the SJC, have limited the right to privacy, it is critical to recognize that there is a baseline.[184] Indeed, in *Whalen v. Roe*,[185] the Supreme Court recognized that the Constitution protects "the individual interest in avoiding disclosure of personal matters."[186] As applied to sexual assault counseling records because "[r]ape has been described as a 'total assault on an individual,' with physical, psychological, and social effects," victims of rape confide in their counselors a wide range of emotions such as

[179] Jennifer L. Hebert, Note, *Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants*, 83 TEX. L. REV. 1453, 1472 (2005) (exploring the definition of the right to privacy in the context of mental health records).

[180] 381 U.S. 479 (1965).

[181] *Id*. at 486 (holding law forbidding use of contraceptives intrudes upon the constitutional right of privacy).

[182] *Id*. at 485 (holding a right of privacy derives from "the zone of privacy created by several fundamental constitutional guarantees"); *id*. at 492-93 (Goldberg, J., concurring) (justifying a right of privacy by the history and language of the Ninth Amendment); *id*. at 500 (Harlan, J., concurring) ("[T]he proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.'"); *id*. at 502 (White, J., concurring) (concluding the Connecticut statute is unconstitutional under the Fourteenth Amendment, which includes the right to marry, establish a home, and bring up children).

[183] *See* Whalen v. Roe, 429 U.S. 589, 599 (1977).

[184] *See* Joo, *supra* note 3, at 261 ("The right to privacy . . . is limited and must yield to narrowly drawn, compelling state interests."); *see also* Commonwealth v. Fuller, 667 N.E.2d 847, 853 (Mass. 1996) (declining to decide whether "a complainant has a constitutionally protected 'right of confidentiality' in records of sexual assault counselling" but maintaining there is a compelling interest to protect such records).

[185] 429 U.S. 589 (1977).

[186] *Id*. at 599.

fear, anger, anxiety, and self-blame.[187] Such expression is a critical step in a victim's recovery process.[188] Conversely, disclosure of these incredibly personal communications could jeopardize the counselor-victim relationship and even deter victims from seeking counseling all together.[189] Therefore due to the critically sensitive and intimate nature of sexual assault counseling communications, a victim's interest in preventing disclosure of counseling records falls squarely under *Whalen v. Roe* and accordingly, the constitutional right to privacy should extend to such communications.[190]

Indeed in *Jaffee v. Redmond*,[191] the Supreme Court laid the framework and policy justifications for protecting psychotherapist records.[192] Though not a constitutional decision, *Jaffee*'s discussion implicates the fundamental liberty interests discussed above.[193] In *Jaffee*, the Court recognized, based upon longstanding common-law principles, a federal privilege for communications between a psychotherapist and patient.[194] The Court began its analysis by addressing the principles underlying the recognition of testimonial privileges:

> The common-law principles underlying the recognition of testimonial privileges can be stated simply. "For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[195]

---

[187] *See* Joo, *supra* note 3, at 262-63.

[188] *Id*. at 263 (explaining the two-step process associated with "Rape Trauma Syndrome").

[189] *Id*. at 264-65 ("[A] sexual assault survivor is more apt than the general population to be deterred from seeking counseling."); *see also Fuller*, 667 N.E.2d at 852 ("If clients cannot be given reasonable assurance of confidentiality, they may not feel able to make full disclosure to a counsellor, or they may forgo altogether the benefits of counselling.").

[190] *Whalen*, 429 U.S. at 599.

[191] 518 U.S. 1 (1996).

[192] *Id*. at 17 (recognizing a federal psychotherapist privilege); *see also* Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 OR. L. REV. 1, 5 (2007) (discussing *Jaffee*'s holding within the context of a criminal defendant's request to seek a victim's counseling records).

[193] *Jaffee*, 518 U.S. at 10-13 (discussing the private and public interests for creating a federal psychotherapist privilege).

[194] *Id*. at 17.

[195] *Id*. at 9 (quoting United States v. Bryan, 339 U.S. 323, 331 (1950) and Trammel v. United States, 445 U.S. 40, 50 (1980)).

With this guiding principle, "[b]oth 'reason and experience' persuade[d]"[196] the Court that a privilege protecting psychotherapist records "promotes sufficiently important interests to outweigh the need for probative evidence . . . ."[197]

First, the Court reasoned that effective psychotherapy "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears."[198] Due to the "sensitive nature of the problems for which individuals consult psychotherapists,"[199] the Court found "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."[200] Second, connecting back to the guiding principles of testimonial privilege, the Court determined that "[t]he psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."[201]

Additionally, after recognizing the psychotherapist privilege, the Court rejected "the balancing component of the privilege implemented by [the lower] court and a small number of States."[202] The Court found "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."[203] Thus, echoing the principles discussed in *Whalen*, *Jaffee*'s holding and dicta clearly express a desire to protect the confidential communications between therapist/counselor and patient/victim. Therefore, though the Court does not directly address the right to privacy, its discussion regarding the need for confidential communications between psychotherapist and patients and the social good it ultimately serves supports the conclusion that the constitutional right of privacy extends to sexual assault counseling records.[204]

---

[196] *Id*. at 10.

[197] *Id*. at 9-10 (quoting *Trammel*, 445 U.S. at 51).

[198] *Id*. at 10.

[199] *Id*.

[200] *Id*.

[201] *Id*. at 11.

[202] *Id*. at 17.

[203] *Id*.

[204] *See, e.g*., Haw. Psychiatric Soc'y, Dist. Branch of Am. Psychiatric Ass'n v. Ariyoshi, 481 F. Supp. 1028, 1039 (D. Haw. 1979) (holding that "the constitutionally protected right of privacy extends to an individual's liberty to make decisions regarding psychiatric care without unjustified governmental interference," though may be limited by compelling state interests); McMaster v. Iowa Bd. of Psychology Exam'rs, 509 N.W.2d 754, 758-59 (Iowa 1993) (extending the constitutional right to privacy to professional records of mental health, however, holding the right to privacy is not absolute, but at most qualified).

B. *Public Policy Demands Preserving Section 20J's Privilege*

Now that this Note has established that there is a plausible right to privacy of some scope for sexual assault counseling communications, it will develop three policy arguments that support preserving the communications' privilege. Namely, piercing the privilege: (1) frustrates the intent of the Legislature to preserve the valued relationship between victims and sexual assault counselors; (2) erodes the public's faith in confidential communications; and (3) will discourage future victims from either seeking counseling, reporting crimes, or both. Ultimately, these arguments should encourage courts to appropriately weigh a victim's right to privacy against a defendant's due process rights. Particularly, these arguments should serve as illustrations of why a statutory testimonial privilege should not automatically—or even frequently—yield to a criminal defendant's due process rights during pretrial discovery.

As the Supreme Court recognized in *Jaffee*, therapy is a "public good of transcendent importance."[205] As such, society should and does place an even greater value on sexual assault counseling.[206] Such value may be measured by legislative privileges. As discussed above, the elected representatives of the Massachusetts legislature intentionally invoked an absolute privilege for sexual assault counseling records with the enactment of Section 20J.[207] This choice confirms the Legislature's belief that society values a victim's right to privacy over a defendant's right to access these particular records.[208] The piercing of this privilege through court order undermines the authority of the Legislature to protect the interests and privacy of victims.[209] Additionally, if courts routinely abrogate an absolute privilege without proper consideration of the interests at stake, the statutory protection becomes meaningless.[210] For instance, when a court pierces Section 20J's privilege without considering a victim's expectation of and need for privacy, the court sends a damaging message to all sexual assault victims: a victim's path to recovery and healing is

[205] *Jaffee,* 518 U.S. at 11.

[206] *See e.g.*, Robinson, *supra* note 27, at 344-45 (discussing the "indisputable public interest" in sexual assault counseling).

[207] *See supra* Part I.

[208] *See supra* note 45 and accompanying text.

[209] *See, e.g.*, *Jaffee*, 518 U.S. at 13 ("[I]t is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience.'" (citing Funk v. United States, 290 U.S. 371, 376-81 (1933))).

[210] *See* Commonwealth v. Fuller, 667 N.E.2d 847, 854 (Mass. 1996) ("[A] standard and protocol that would result in virtually automatic in camera inspection . . . would make the privilege no privilege at all, and would substitute an unwarranted judicial abridgement of a clearly stated legislative goal."); *see also* Ellen M. Crowley, Note, *In Camera Inspections of Privileged Records in Sexual Assault Trials: Balancing Defendants' Rights and State Interests Under Massachusetts* Bishop *Test*, 21 AM. J.L. & MED. 131, 154 (1995) ("Ironically, if courts automatically deem all post-rape records 'relevant' and systematically conduct *in camera* reviews, they will directly abrogate the very privileges designed to encourage post-rape counseling.").

not important enough to protect. This message directly contradicts the Legislature's intent in passing Section 20J.

An absolute privilege for sexual assault records permits sexual assault victims to seek help without fear of disclosure, particularly to her attackers.[211] Prior to *Dwyer*, the SJC elaborated on the purpose of Section 20J in *Commonwealth v. Fuller*:

> By its terms, the privilege clearly promotes two important interests. First, it encourages victims of the brutal and degrading crime of rape to seek professional assistance to alleviate the psychological scarring caused by the crime, which may be more damaging than the physical invasion itself. Second, the privilege supports the reporting of rapes, which . . . occur in considerable numbers, but frequently are not disclosed, because the victim may feel shame about the assault and may not be able to face the grueling nature of the adversary process that occurs at trial.[212]

Conversely, piercing Section 20J's privilege discourages victims from either seeking counseling or reporting the crime to the police.[213] Indeed, in the early 1990s, rape crisis centers in Massachusetts noted this chilling effect.[214] In 1991, the SJC established a protocol in *Commonwealth v. Stockhammer*,[215] which led to the "routine, systematic disclosure of privileged records."[216] Following *Stockhammer*, rape crisis centers reported a drop in victims' willingness to discuss their assaults.[217] Sexual assault counselors at the Beth Israel Hospital's Rape Crisis Intervention Center ("RCIP") reported that "when told of *Stockhammer's* implications upon confidentiality, 30% of victims raised concerns about counseling and avoided full disclosure of their emotional and personal history, and 10% refused counseling outright. Moreover, RCIP counselors observed a 20% drop in clients reporting to the police."[218] This

---

[211] *See* Crowley, *supra* note 210, at 144 (discussing how "routine, systematic disclosure of privileged records" has had a "noticeable chilling effect on rape victims' willingness to openly communicate with therapists and counselors").

[212] *Fuller*, 667 N.E.2d at 852 (footnotes omitted).

[213] *See supra* note 211.

[214] *See* Crowley, *supra* note 210, at 144 n.133.

[215] 570 N.E.2d 992, 1000-03 (Mass. 1991) (holding that the defendant was "entitled to review the records of the complainant's treatment" due to the "defendant's constitutional right to use privileged communications in his defense" but that a judge would later review any evidence defendant wished to admit to "ensure that the information contained in the records will not be disclosed beyond the defendant's need to prepare and present his defense").

[216] Crowley, *supra* note 210, at 144.

[217] *Id.* at 144 nn.133-35 (citing rape crisis centers' reports in Massachusetts in the early 1990s regarding an increase in rape victims refusing to discuss rapes after being informed the centers could not guarantee confidentiality).

[218] *Id.* at 144 n.133 (citing Appellate Brief of the Attorney General, The District Attorneys & the Department of Mental Health as Amici Curiae at 11 n.6, Commonwealth v.

evidence highlights how routine disclosure inevitably forces victims to forgo counseling, to refuse to press criminal charges, or both. Such a result not only obviously harms the victim who would like to seek counseling or press criminal charges, but also irreparably harms society as a whole. If a victim does not feel safe enough to seek counseling due to the risk of disclosure of her thoughts and feelings, then she is foreclosed from a helpful avenue to cope with the assault. Furthermore, obstacles to reporting sexual assault and rape will presumably only perpetuate these horrific crimes, as a lack of accountability will lead rapists to believe they may attack with impunity.

C. *The Defense's Showing*

Thus far, this Note has constructed the arguments for preserving Section 20J's privilege: a victim's critical interest in privacy; the legislature's intent to maintain such a privilege; and public policy reasons for preserving confidential communications between victim and sexual assault counselor. However, despite the critical privacy needs of rape victims and the societal interest in protecting privileged counseling communications, none of these arguments are taken into consideration under *Dwyer*'s relevancy standard. Defense counsel need only show that the records are relevant and have a "rational tendency to prove [or disprove] an issue in the case."[219] Under a mere relevancy standard, courts are not permitted to consider or weigh the privacy needs of rape victims.[220] Rather, the courts simply examine whether the records themselves are relevant to an issue in the case.[221] However, if the standard were higher, for example, requiring the defendant to show that the records are material to or necessary to his defense, then courts could at least consider and account for the victim's right to privacy and critical interest in preventing disclosure of said records.[222] Though the defendant must allege relevancy with a certain level of specificity (e.g., the name of the provider and evidence that the victim spoke to the counselor about the assault), specificity only prevents defendants from engaging in speculative general fishing expeditions for potentially relevant materials. Otherwise, specificity does little to prevent a defendant's access to the counseling records. For instance, as previously noted by a pre-*Dwyer* SJC, a victim "almost certainly will discuss her feelings about the assault and about

Rape Crisis Program of Worcester, Inc., 617 N.E.2d 637 (Mass. 1993) (No. SJC-06194)); *see also In re* Pittsburgh Action Against Rape, 428 A.2d 126, 147 n.2 (Pa. 1981) (noting that Pittsburgh Action Against Rape's affidavit reported an increase in anonymous calls to the rape crisis center from thirty-seven to sixty-one per cent since the case's potential implications of disclosure were made public).

[219] Commonwealth v. Lampron, 806 N.E.2d 72, 77 (Mass. 2004) (citing Commonwealth v. Fayerweather, 546 N.E.2d 345 (Mass 1989)).

[220] *See* State v. Cashen, 789 N.W.2d 400, 415 (Iowa 2010) (Cady, J., dissenting).

[221] *Id.*

[222] *See id.*

the perpetrator" during sexual assault counseling.[223] Therefore, theoretically, the defendant needs only the name of the counselor in order to meet the required showing of specificity. But given that an overwhelming majority of sexual assaults are committed by friends, family members, or acquaintances, the defendant is likely to know the names and information of the victim's providers or can easily discover the information through mutual friends or other family members.[224] Thus, where Section 20J applies, "specificity" is only a slight hurdle for the defense (e.g., the records' relation to an issue in the case).[225] Consequently, *Dwyer*'s "relevancy" standard leaves no room for a judge to weigh the victim's right to privacy and the societal harm of disclosure against the defendant's right to due process and his need for the records.[226]

As a result of this relevancy standard, victim's counsel cannot pursue any of the arguments discussed in the previous section. Instead, victim's counsel may only effectively pursue the following arguments: (1) the particular counseling records are irrelevant to the case at hand; (2) the request is too speculative and is "couched in hypothetical language";[227] or (3) the request is too broad[228]—e.g., the defense should not, in theory, gain access to records going back years prior to the assault.[229] However, due to the nature of the records—communications derived from sexual assault counseling—the defense can generally connect the records to the charges based solely on the shared nexus, the sexual assault itself.[230] Consequently, unless defense counsel is clearly on a

[223] Commonwealth v. Fuller, 667 N.E.2d 847, 854 (Mass. 1996).

[224] *See* PLANTY ET AL., U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010 (2013), http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf [https://perma.cc/4ZL3-7B2E] (finding seventy-eight per cent of rape or sexual assault victims knew the offender).

[225] *See* Commonwealth v. Lampron, 806 N.E.2d 72, 77 (Mass. 2004) (requiring the defendant to "show that the documentary evidence sought has a 'rational tendency to prove [or disprove] an issue in the case.'" (quoting Commonwealth v. Fayerweather, 546 N.E.2d 345 (Mass. 1989))). *Dwyer* adopted the requirements outlined in *Lampron*. Commonwealth v. Dwyer, 859 N.E.2d 400, 415 (Mass. 2006).

[226] *See* Crowley, *supra* note 210, at 154.

[227] Commonwealth v. Sealy, 6 N.E.3d 1052, 1060-61 (Mass. 2014) (denying the defendant's request as it was riddled with "entirely speculative" language).

[228] *Dwyer*, 859 N.E.2d at 416 (mandating that the "motion is made in good faith and is not intended as a 'general fishing expedition'" (quoting United States v. Nixon, 418 U.S. 683, 699-700 (1974))).

[229] For a thoughtful analysis of why the absolute privilege for sexual assault counseling records should be maintained as absolute because sexual assault counseling records are rarely relevant in respect to the court's truth-seeking purposes, see Robinson, *supra* note 27, at 333.

[230] *See* Commonwealth v. Fuller, 667 N.E.2d 847, 854 (Mass. 1996) ("'[W]here § 20J applies, the very circumstances of the communications indicate that they are likely to be relevant' to an issue in the case." (quoting Commonwealth v. Two Juveniles, 491 N.E.2d 234, 238 (Mass. 1986))). Even if defense counsel cannot make the necessary showing for a

fishing expedition for potentially exculpatory information, the court pursuant to *Dwyer* may pierce Section 20J's privilege without a second thought.

IV. REVIEWING THE RECORDS

After determining that the victim's records are relevant to the case, the trial judge issues a Rule 17(a)(2) summons.[231] This summons permits defense counsel to review the records.[232] The privileged records are retained in court under seal and defense counsel must sign a protective order to inspect these records.[233] This protective order prohibits defense counsel from copying any records or disclosing their contents to any person, including the defendant.[234]

Prior to *Dwyer*, the SJC required trial judges to conduct in camera reviews of the privileged records.[235] In fact, most states require judges to conduct the preliminary inspection of the records.[236] Typically, a state opts for review by the trial judge because the state considers the trial judge a neutral party, and review by a neutral party is less invasive than, for example, review by defense counsel who represents the accused.[237] The *Dwyer* protocol departs from common practice by giving the first look to defense counsel.[238] The SJC justified departure from in camera reviews for two reasons.[239] First, the SJC reasoned that the trial judge, as a neutral party, is not properly suited to review the records and determine what would be relevant for the defense—"[r]equiring judges to take on the perspective of an advocate is contrary to the

particular case, the damage is already done from a societal perspective. As discussed above, routine piercing of a privilege erodes society's faith in confidential communications. Such piercing also jeopardizes the relationship between victims and counselors as well as victims and the justice system as a whole. *See, e.g.*, Commonwealth v. Collett, 439 N.E.2d 1223, 1226 (Mass. 1982) ("If it becomes known that confidences are violated, other people may be reluctant to use social work services, and may be unable to use them to maximum benefit. The purpose of enacting a social worker-client privilege is to prevent the chilling effect which routine disclosures may have in preventing those in need of help from seeking that help."). A "relevancy" standard opens the door for such routine disclosure.

[231] *Dwyer*, 859 N.E.2d at 421.

[232] *Id.*

[233] *Id.* at 422.

[234] *Id.*

[235] *See* Commonwealth v. Fuller, 667 N.E.2d 847, 855 (Mass. 1996); Commonwealth v. Bishop, 617 N.E.2d 990, 994-95 (Mass. 1993); Commonwealth v. Two Juveniles, 491 N.E.2d 234, 239-40 (Mass. 1986).

[236] Fishman, *supra* note 192, at 29 (discussing how each state that permitted any review of privileged records required the trial court to conduct an in camera inspection, provided the defendant met the appropriate preliminary showing).

[237] *See id.* at 29-33 (analyzing the pitfalls of defense counsel conducting the initial review of privileged records).

[238] *Dwyer*, 859 N.E.2d at 418-19.

[239] *Id.* at 418.

judge's proper role as a neutral arbiter."[240] Second, the SJC found that defense counsel, as an advocate for the defendant, is in the best position to review the records and determine what is relevant for the defense.[241] At this phase of trial, only the defense counsel has a full understanding of what the defense requires for preparation and execution of trial tactics.[242]

In consideration of the victim's rights and concerns, the SJC imposed strict procedures for defense's review of the records.[243] For instance, "[t]he clerk of court shall permit only defense counsel who obtained summons to inspect the records, and only on counsel's signing and filing a protective order in a form approved by this court."[244] Furthermore, the protective order must provide that any violation of the protective order's term "shall be reported to the Board of Bar Overseers by anyone aware of such violation."[245] The SJC reasoned that defense counsel, as an officer of the court, could be expected to follow these procedures and preserve the privilege, thereby respecting the confidentiality of the records.[246] If defense counsel violates the protective order, he or she may face serious sanctions.[247]

Dwyer's approach invites several criticisms. First, *Dwyer*'s protocol "may not adequately protect the records from unauthorized disclosure."[248] Simply put, when the SJC invites another party into the room, the risk of disclosure increases, regardless of protective orders. Second, the SJC's decision in *Dwyer* barely acknowledges the impact that this procedure may have on a victim.[249] After revealing to her counselor her "thoughts, fears, and self-doubts of the most intensely personal and private kind" regarding her rape and recovery, "she must take the witness stand knowing that her rapist's lawyer, whose primary responsibility is to attack her testimony, credibility and character, has read the entire file of her counseling."[250] Despite the protective orders, to the victim such measures "may provide little comfort compared to the sense of betrayal, humiliation, and exposure she is likely to experience."[251]

With respect to the court's concern regarding the trial judge taking on an improper advocacy role, the court is indeed correct that upon a mere showing

[240] *Id*.

[241] *See id*. ("The absence of an advocate's eye may have resulted in over-production, as well as underproduction, of privileged records . . . .").

[242] *See id*.

[243] *Id*. at 422.

[244] *Id*.

[245] *Id*.

[246] *Id*. at 419.

[247] *Id*.

[248] Fishman, *supra* note 192, at 32.

[249] *Id*. at 33 ("[T]he court failed to consider—indeed, expressed not a syllable of concern about—the impact they are likely to have on the witness.").

[250] *Id*.

[251] *Id*.

of relevancy, the trial judge may not be able to deduce which records are relevant to the defendant's defense and therefore, may release too many or even too few of the records.[252] However, this issue only arises with a relevancy standard. Presumably, a trial judge, as a neutral arbiter, could determine during an in camera review which records are material to the defense, as these records would be those that are necessary to prove the defendant's innocence.[253] Additionally, as the Supreme Court reasoned in *Pennsylvania v. Ritchie*, "[a]lthough this rule denies Ritchie the benefits of an 'advocate's eye,' . . . the trial court's discretion is not unbounded. If a defendant is aware of specific information in the file . . . he is free to request it directly from the court, and argue in favor of its materiality."[254] As discussed below, this Note advocates for a "relevant and material" standard. Consequently, the SJC may then return to the traditional in camera review and in doing so, provide another layer of protection for the victim and her privacy.

V. WHETHER THE *DWYER* PROTOCOL WORKS

At this point, the *Dwyer* hearing has concluded.[255] The victim's counseling records have been disclosed to defense counsel.[256] The next step requires the defense to argue the admissibility of the records as evidence at trial.[257] Regardless of whether the records are used at trial, at least from the victim's perspective, the damage is done. Her unfiltered thoughts and feelings regarding the attack are now in the hands of her attacker.[258] The overriding question is whether this violation of the victim's privacy rights is necessary to preserve the defendant's right to mount a defense. Does *Dwyer* achieve the optimal balancing of interests? If not, what would the optimal protocol look like?

Some scholars have argued for maintaining the absolute privilege.[259] Others have advocated virtually complete access based on defendants' constitutional rights.[260] Considering the parties' competing interests, the conflict of

[252] *See* Commonwealth v. Oliveira, 780 N.E.2d 453, 464 (Mass. 2002) ("A conscientious and well-informed judge can still fail to grasp the significance of a particular item in a record, especially where its significance lies not in its own immediate relevance but rather in its indication of the existences of some other avenue of fruitful inquiry.").

[253] *See* State v. Thompson, 836 N.W.2d 470, 487 (Iowa 2013) ("[W]e trust Iowa district court judges will be able to recognize exculpatory information when they see it.").

[254] 480 U.S. 39, 60 (1987).

[255] Commonwealth v. Dwyer, 859 N.E.2d 400, 420 (Mass. 2006).

[256] *Id.*

[257] *Id.*

[258] *See supra* note 250 and accompanying text.

[259] *See generally* Robinson, supra note 27 (contending that maintaining an absolute privilege is the *only* way to adequately protect sexual assault victims).

[260] *See generally* Reina R. Garrett, *S.B. 1369: A Zero-Sum Equation for the Rights of the Accused*, 6 PHOENIX L. REV. 830 (2013) (criticizing a legislative initiative protecting

constitutional rights, and the unique circumstances posited by each case, there is limited value in any absolute rule. From a practical standpoint, circumstances on each end of the spectrum will call for a court, at one point or another, to either disclose the records or protect them. As a result, courts must impose a protocol that is flexible enough to account for both extremes. Accordingly, this Note contends that the optimal protocol must properly balance the defendant's Sixth (or Fourteenth) Amendment rights as well as the victim's right to privacy.

Before this Note discusses *Dwyer*'s weaknesses, namely its "relevancy" standard, it must acknowledge *Dwyer*'s strengths. The *Dwyer* protocol provides notice to both the prosecution and the privilege-holder (here, the victim).[261] Further, *Dwyer* gives the victim standing at the hearing and does not rely solely on the prosecutor's arguments.[262] By allowing the victim to participate in the hearing, *Dwyer* ensures that she can advocate for her own interests, which may or may not align with the prosecutor's interests.[263] Moreover, she can properly address "particular issues such as whether the information sought from the privileged counseling records could be obtained through other sources."[264] Both notice and standing allow a victim the opportunity to protect her privacy and maintain Section 20J's purpose. As discussed in the previous section, if the SJC returns to a "relevant and material" standard, it may also return to the traditional in camera review, which would not infringe upon the defendant's due process rights and yet further protect the victim's privacy. Together, these procedures plausibly balance the interests and rights of both parties.

The critical flaw of *Dwyer* is its "relevancy" standard, which vitiates Section 20J's protections for the constitutional and statutory rights of victims. As discussed in Part III, *Dwyer*'s relevancy standard does not accommodate a victim's privacy interest or the societal harms that disclosure will inevitably cause.[265] However, *Dwyer*'s relevancy standard is misguided for several other

communications between victims and victim-advocates as destroying the accused's right to confront his or her accusers).

[261] Commonwealth v. Dwyer, 859 N.E.2d 400, 418 (Mass. 2006) ("[T]he custodian of the records (record holder) and the third party who is the subject of the records (third-party subject), where applicable, shall be afforded notice. . . .").

[262] *Id*. (holding the custodian of the record and the third-party subject "shall be afforded . . . an opportunity to be heard on whether the records sought are relevant or covered by statutory privilege"). *Dwyer* also recognizes that in sexual assault cases, the third party will often be the complainant; however, this protocol may apply to any witness. *Id*. at 418 n.28. Furthermore, a parent or legal guardian may exercise the right to defend the records on behalf of a third-party subject who is a minor. *Id*.

[263] Commonwealth v. Tripolone, 8 Mass. L. Rptr. 116, 117 (Mass. Super. Ct. 1997) ("As the alleged victim in this case has her own representative, or spokesperson, there is no need to leave her interests solely in the hands of the prosecutor for the Commonwealth.").

[264] *Id*.

[265] *See supra* Part III.

legal and policy reasons. First, this relevancy standard undermines the legislative intent and jeopardizes the public policy reasons for instituting such a privilege in the first place. Second, by uniformly imposing Rule 17(a) procedure to all absolute privilege statutes but not necessarily absolute common law privileges, such as attorney-client privilege, the SJC risks creating an unwarranted double standard. Third, *Dwyer* sharply departs from both United States Supreme Court constitutional precedent as well as SJC decisions by dropping the materiality element.

A. Dwyer *Ignores Legislative Intent and Public Policy*

Given the critical public policy reasons for Section 20J's absolute privilege,[266] abrogating the privilege cannot be a routine matter, but rather, requires a careful consideration of each individual case and the rights and needs of both sides.[267] The *Dwyer* protocol replaced Massachusetts's previous protocol, the *Bishop-Fuller* protocol, which required a "good faith, specific, and reasonable basis for believing that records will contain exculpatory evidence which is *relevant and material* to the issue of the defendant's guilt."[268] The *Bishop-Fuller* protocol defined "material evidence" as "evidence which is not only likely to meet criteria of admissibility, but which also tends to create a reasonable doubt that might not otherwise exist."[269] In replacing *Bishop-Fuller*, *Dwyer* dropped "materiality" and adopted a showing of relevancy for all statutorily privileged records.[270] In justifying this change, the court merely stated, with little explanation, that *Bishop-Fuller* had "given rise to continuing difficulties."[271]

With its elimination of the materiality requirement, *Dwyer* "omitted the half of the constitutional balancing test pertaining to the public interests underlying the particular privilege."[272] Consequently, pursuant to *Dwyer*, courts do not and cannot consider the societal interests behind the enactment of a particular privilege and the individual's interests in each case.[273] Moreover, by applying Rule 17(a)(2) and *Lampron*'s protocol to *all statutorily privileged records*, the

---

[266] *See supra* Parts I, III.

[267] Commonwealth v. Fuller, 667 N.E.2d 847, 854 (Mass. 1996) ("[T]he presumption, buttressed by the demonstrated legislative concern for the inviolability of [Section 20J's] privilege, that disclosure . . . even in the limited form of an in camera inspection, should not become the general exception to the rule of confidentiality.").

[268] *Id*. at 855 (emphasis added).

[269] *Id*.

[270] *See* Commonwealth v. Dwyer, 859 N.E.2d 400, 418-20 (Mass. 2006).

[271] *Id*. at 417.

[272] *See* Substitute Brief of Amici Curiae at 39, Commonwealth v. Sealy, 6 N.E.3d 1052 (Mass. 2014) (SJC No. 11416).

[273] *Id*. ("*Dwyer* instead applied the same Rule 17 factors indiscriminately to all privileges, and admitted no possibility that countervailing public interests might prevent breach of a privilege.").

SJC created a framework where the trial courts must analyze *all third party records*—absolute privileged, qualified privileged, or otherwise—under the same standard.[274] Consequently, courts may not consider the significance of the Legislature's decision to enact Section 20J as an absolute privilege or the critical privacy concerns associated with Section 20J.[275] Instead, under *Dwyer*, a qualified privilege such as Section 135A and an absolute privilege such as Section 20J are both pierced upon a mere showing of "relevancy," without any consideration for the respective societal interests or privacy concerns at play.[276] Such an expansive and overly broad grouping surely frustrates the Legislature's intent to enact different levels of privileges—general access, qualified, and absolute.

B. Dwyer *Creates a Double Standard for Statutory and Common Law Privileges*

Similar to the issue of clumping all statutorily privileged records under the same framework, *Dwyer* poses a problem for the SJC in regards to the treatment of common law privileged records versus statutorily privileged records. *Dwyer*'s simple application of a relevancy standard to Section 20J would seem to equally apply to common law privileges, such as attorney-client privilege.[277] Both are absolute privileges and both shield potentially exculpatory evidence.[278] And yet *Dwyer* makes no mention as to whether the relevancy standard extends to common law privileges.

In 2014, in *Commonwealth v. Sealy*, the SJC faced the issue of applying *Dwyer* to common law privileges where the defendant, charged with rape,

---

[274] *See Dwyer*, 859 N.E.2d at 416 (extending *Lampron* to privileged records and "add[ing] further requirements applicable where some or all of the records sought by the defendant from a third party are presumptively covered by a statutory privilege").

[275] *See* Commonwealth v. Tripolone, 681 N.E.2d 1216, 1218 (Mass. 1997). In *Tripolone*, the court applied the *Bishop-Fuller* protocol to records protected by Chapter 233, Section 20K of the Massachusetts General Laws, a qualified privilege statute, which protects communications between domestic violence victim and counselor. *Id*. Under *Bishop-Fuller*, the court was able to assess the privacy concerns of a domestic violence victim under Section 20K as compared to a sexual assault victim under Section 20J. *Id*. Concluding that both statutes sought to protect the same interests, the court extended *Bishop-Fuller* to Section 20K. *Id*. *Dwyer*'s protocol does not allow courts to engage in such a thoughtful analysis.

[276] *See supra* note 275 and accompanying text.

[277] *See Sealy*, 6 N.E.3d at 1059 (questioning whether *Dwyer* "applies only to records covered by a statutory privilege").

[278] Compare Section 20J, which denies on its face pre-trial access to counseling records, with the attorney-client privilege, which "shields from the view of third parties all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice." Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., 870 N.E.2d 33, 37 (Mass. 2007).

requested the victim's attorney's records.[279] Side-stepping the issue as to whether the common law attorney-client privilege may be pierced on a showing of mere relevancy, the court held that the defendant failed to meet the relevancy standard because his request was based on broad speculation.[280] The court commented in a footnote, however, that the application of *Dwyer* to attorney-client privilege "is not a foregone conclusion given the deep roots of that privilege in the common law and the purposes it serves."[281] Yet, as discussed below, this distinction between the common law attorney-client privilege and the statutory psychotherapy privilege is superficial at best.

One need only look at the Supreme Court's reasoning for recognizing a federal psychotherapy privilege in *Jaffee* to see that this gap between common law and statutory privileges is nonexistent.[282] In *Jaffee*, the Supreme Court recognized a federal psychotherapist privilege based upon *both* common law principles *and* the overwhelming number of state legislatures that protect these communications through statutes.[283] In upholding a psychotherapist-patient privilege, the Supreme Court relied upon the same principle that justifies spousal and attorney-client privileges: the utmost need for confidence and trust.[284] Though it may be easier to see the dangerous effect abrogating the attorney-client privilege would have on the justice system, abrogation of the sexual assault counseling privilege also has a deleterious effect on the justice system by frustrating the reporting of crime.[285]

This distinction between common law privilege and statutory privilege, according to the Supreme Court, "is of no consequence."[286] In *Jaffee*, the Supreme Court found that "[a]lthough common-law rulings may once have been the primary source of new developments in federal privilege law, that is no longer the case."[287] Additionally, the Supreme Court noted that affirming a statutory privilege "reflects the fact that once a state legislature has enacted a privilege there is no longer an opportunity for common-law creation of the protection."[288] Finally, the Court found the fact that "the privilege may have developed faster legislatively than it would have in the courts demonstrates only that the States rapidly recognized the wisdom of the rule as the field of psychotherapy developed."[289] Rather than completely reject the Legislature's decision to protect sexual assault counseling records with an absolute privilege,

[279] *Sealy*, 6 N.E.3d at 1055.

[280] *Id*. at 1060-61.

[281] *Id*. at 1060 n.12.

[282] *See* Jaffee v. Redmond, 518 U.S. 1, 10-15 (1996).

[283] *Id*.

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

[285] *See supra* Section III.B.

[286] *Jaffee*, 518 U.S. at 13.

[287] *Id*.

[288] *Id*.

[289] *Id*. at 14.

the SJC should consider the sexual assault counseling privilege as inviolable as the attorney-client privilege, which remains absolute in Massachusetts. It seems absurd for the judiciary to pierce Section 20J, an absolute privilege carefully worded and deliberately enacted by the legislature, but to then uphold the absolute privilege bestowed upon the attorney-client relationship.

C. Dwyer *Ignores Constitutional Precedent*

Dwyer completely ignores constitutional precedent, which has acknowledged a right to privacy.[290] Additionally, the *Dwyer* protocol ignores both Supreme Court and Massachusetts precedent, which dictates how to balance a victim's right to privacy against a defendant's right to due process.[291]

In *Pennsylvania v. Ritchie*, the Supreme Court suggested that the federal Due Process Clause gives criminal defendants a right only to privileged therapy records that are material to their defense.[292] A decade thereafter, the SJC, finding that "[t]he Federal and the State Constitutions do not require a more liberal right of access to absolutely privileged records," also imposed a "relevant and material" standard.[293] In doing so, the SJC replaced a mere "likely to be relevant" standard, which had been extant for a brief interval, finding that such a standard was too low with respect to Section 20J.[294] And yet *Dwyer* returned to a relevancy standard,[295] rebalancing the scale overwhelmingly in favor of defendants.[296]

Surprisingly, the SJC justified its radical departure from precedent by simply stating that the higher standard set forth in *Fuller* "has given rise to continuing difficulties" for defendants to access records despite the fact that such "records *may* contain exculpatory evidence."[297] Given the SJC's 180-degree turn after *Fuller*'s ten-year reign, it is surprising that the court did not

---

[290] *See e.g.*, Whalen v. Roe, 429 U.S. 589, 598-99 (1977); Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

[291] *See* Substitute Brief of Amici Curiae the Victim Rights Law Center, et al. at 37-40, Commonwealth v. Sealy, 6 N.E.3d 1052 (Mass. 2014) (No. 11416) (contending *Dwyer* departs from both Supreme Court and Massachusetts SJC decisions by relaxing the requirement that a defendant show materiality of the privileged information, declining to consider the public interests of the psychotherapist-patient privilege, and allowing defense counsel to review privileged information).

[292] 480 U.S. 39, 57 (1987) ("It is well settled that the government has the obligation to turn over evidence in its possession that is . . . material to guilt or punishment.").

[293] Commonwealth v. Fuller, 667 N.E.2d 847, 855 (Mass. 1996).

[294] *Id.* at 854-55 (holding *Bishop*'s "'likely to be relevant' standard is too broad and flexible when applied to records protected by § 20J").

[295] Commonwealth v. Dwyer, 859 N.E.2d 400, 414-15 (Mass. 2006).

[296] *See* State v. Cashen, 789 N.W.2d 400, 417 (Iowa 2010) (Cady, J., dissenting) ("The new [relevancy] test developed by the majority may be easy and beneficial to defendants, but it is a step back both for victims and for the progress made in addressing domestic violence over the last decade.").

[297] *Dwyer*, 859 N.E.2d at 417 (emphasis added).

explain its reasons for dropping materiality more thoroughly.[298] One must look at Justice Sosman's concurring opinion (joined by Justices Ireland and Cowin) in *Commonwealth v. Sheehan*,[299] a decision rendered five years prior to *Dwyer*, in order to piece together the *Dwyer* court's reasoning.[300] In her concurring opinion, Sosman criticizes the *Bishop-Fuller* protocol as "unduly cumbersome and constitutionally flawed."[301] Specifically, Sosman found that *Fuller*'s materiality standard "provide[s] inadequate protection to a defendant's right to a fair trial."[302] Requiring the defendant to make a substantial showing of materiality, Sosman notes, "could place the defendant in a 'Catch 22' situation."[303] In particular, in order to "gain access to the privileged records defendant must specifically allege what useful information may be contained in the target records. However, defendant has no way of making these specific allegations until he has seen the contents of the records."[304] Assuming Justice Sosman's criticism guided the change to mere relevancy in *Dwyer*,[305] her Catch-22 argument fails for several reasons.

First, courts, as expressed by the SJC in *Fuller*, agree that a materiality standard does not violate a defendant's right to due process.[306] Even in *Dwyer*,

---

[298] *Id*. at 417-18.

[299] 755 N.E.2d 1208 (Mass. 2001).

[300] *See id*. at 1215-20 (Sosman, J., concurring).

[301] *Id*. at 1216.

[302] *Id*. at 1219.

[303] *Id*. at 1219 n.7 (quoting People v. Foggy, 521 N.E.2d 86 (1988) (Simon, J., dissenting)).

[304] *Id*.

[305] Given the lack of explanation in *Dwyer*, one is left to speculate why the court chose to dismantle the *Bishop-Fuller* protocol. Complicating this speculation further, Justice Greaney wrote a separate concurrence in *Sheehan* rebuking and criticizing Justice Sosman's attack on the *Bishop-Fuller* protocol. *See id*. at 1214 (Greaney, J., concurring). Justice Spina also wrote a concurring opinion defending the *Fuller* standard. *See id*. at 1215 (Spina, J., concurring) ("In my view the protocol strikes an appropriate balance between the competing interests of a defendant's right to a fair trial and a witness's expectation that his or her privacy will be protected by the privileges created by the Legislature."). Therefore, one cannot say with certainty that Justice Sosman's reasoning is the sole justification for dropping the materiality standard. However, given that Justice Sosman's concurrence has been cited at least twice by members of the SJC, we can conclude that her reasoning finds some support on the bench. *See* Martin v. Commonwealth, 884 N.E.2d 442, 447 (Mass. 2008) (citing Justice Sosman's concurrence in *Sheehan*, 755 N.E.2d at 1216, to support overturning the result of *Bishop-Fuller* proceedings); Commonwealth v. Pelosi, 805 N.E.2d 1, 7 (Mass. 2004) (Cowin, J., concurring) ("I adhere, as previously, to the view expressed by Justice Sosman, *Commonwealth v. Sheehan* . . . that the protocol governing access to these types of records is 'both unduly cumbersome and constitutionally flawed.'").

[306] *See e.g*., Commonwealth v. Fuller, 667 N.E.2d 847, 855 (Mass. 1996) ("We are not concerned that this more stringent standard improperly limits a defendant's Federal or State constitutional rights to due process. . . . [M]ost courts that have addressed the issue of a

the court held that its decision was "not constitutionally compelled."[307] In fact, the majority of states apply *at a minimum* a relevancy and materiality standard when assessing a defendant's right to in camera review of sexual assault counseling records.[308] Forty-two states and territories (including Puerto Rico and Washington, D.C.) have a sexual assault counselor statutory privilege.[309] Of the forty-two states, six do not permit an in camera review of the records and uphold the victim's privacy regardless.[310] Twenty-five permit an in camera review upon some level of showing.[311] Of the twenty-five states that have a sexual assault counselor statutory privilege and require an in camera review, twenty-two require at least a relevancy and materiality standard.[312] Only three states—Maine, Massachusetts, and Washington—require the defendant to show relevancy without any materiality requirement.[313] These figures not only

defendant's access to privileged records have required a threshold showing before a privilege is abrogated.").

[307] Commonwealth v. Dwyer, 859 N.E.2d 400, 404, 419 (Mass. 2006).

[308] *See, e.g.*, People v. Stanaway, 512 N.W.2d 557 (Mich. 1994) (applying a materiality and necessity standard); State v. Bassine, 71 P.3d 72 (Or. Ct. App. 2003) (requiring defendant to show that information sought is material to his case and that his interest in such evidence outweighs the legitimate interest in maintaining the privilege); State v. Green, 646 N.W.2d 298 (Wis. 2002) (requiring a showing of a reasonable likelihood that the privileged information will be necessary to determination of guilt).

[309] *See Confidentiality Laws*, RAINN, https://rainn.org/pdf-files-and-other-documents/Public-Policy/Legal-resources/2012/Privilege%20Database%20Summary.pdf [https://perma.cc/L3NF-WAFH] (indicating that thirty-five states and territories have a partial privilege and seven states and territories have an absolute privilege).

[310] *See supra* note 146 (listing some of the states that refuse to pierce the victim-counselor privilege).

[311] *See, e.g.*, Goldsmith v. State, 651 A.2d 866 (Md. 1993) (allowing in camera review of privileged information during trial but not in the pre-trial phase); *Bassine*, 71 P.3d 72 (allowing in camera review of privileged information only upon showing that information is material); *Green*, 646 N.W.2d 298 (permitting in camera review of privileged information upon a showing that the information is reasonably likely to be necessary in determining guilt).

[312] *See, e.g.*, *Goldsmith*, 651 A.2d 866 (requiring a defendant to show a reasonable likelihood that the privileged records will be exculpatory); *Stanaway*, 512 N.W.2d 557 (applying a materiality standard and requiring that the evidence be necessary to the defense); *Bassine*, 71 P.3d 72 (allowing in camera review of privileged information only upon showing that information is material); Commonwealth v. Wilson, 602 A.2d 1290 (Pa. 1992) (finding the privilege to be absolute); *Green*, 646 N.W.2d 298 (permitting an in camera review of privileged information upon a showing that the information is reasonably likely to be necessary in determining guilt).

[313] *See* State v. Watson, 726 A.2d 214, 216 (Me. 1999) (imposing what appears to be a relevancy standard by following the same application of the Federal Rule of Criminal Procedure 17 as *Dwyer*); Commonwealth v. Dwyer, 859 N.E.2d 400, 416 (Mass. 2006) (setting a new standard for review of privileged information that requires such information to be relevant); State v. Kalakosky, 852 P.2d 1064, 1078 (Wash. 1993) ("In order to make

demonstrate that a relevancy and materiality standard is constitutionally acceptable but that *Dwyer*'s relevancy standard is a clear national outlier.

Second, Justice Sosman's—and the *Dwyer* court's, for that matter—primary focus on the defendant's constitutional rights disregards the fundamental principle of testimonial privileges, that an overarching societal interest outweighs an individual defendant's right to due process.[314] Testimonial privileges "may be justified, however, by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"[315] For instance, common law testimonial privileges such as attorney-client privilege and spousal privilege surely shield exculpatory evidence from defendants. And yet, these privileges remain intact because society has deemed that society's need to protect the confidential communications between spouses or between attorneys and their clients transcends an individual's right to due process.[316] Here, the legislature has placed the sexual assault counselor and victim relationship on the same level as spousal and attorney-client relationships by making the privilege explicitly absolute.[317] Furthermore, as discussed above, the Supreme Court affirmed in *Jaffee v. Redmond* the legitimacy of a federal psychotherapist-patient privilege and deemed it as equivalent to the attorney-client and spousal privileges.[318] Therefore, in *Dwyer*, the SJC improperly focused its attention on a defendant's "continuing difficulties" to access *potentially* exculpatory evidence.[319] Instead, as with all testimonial privileges, the SJC should have focused, first and foremost, on the nature of the privilege, the societal interests that the privilege protects, and to what extent disclosure harms these interests. With *Dwyer*'s relevancy standard, the SJC radically departs from precedent by adopting a "mere evidentiary relevance" standard, "one of the weakest tests known to the law," with little discussion as to why the Supreme Court and twenty-two other states who have ruled upon this issue have gotten it wrong.[320]

VI. WHAT TO DO GOING FORWARD

As this Note has demonstrated, *Dwyer*'s relevancy standard provides inadequate protection for victims. Furthermore, *Dwyer*'s relevancy standard

an adequate threshold showing to justify an in camera inspection, a defendant must make a particularized factual showing that information useful to the defense is likely to be found in the records.").

[314] Jaffee v. Redmond, 518 U.S. 1, 9 (1987).

[315] *Id*. (quoting Trammel v. United States, 445 U.S. 40, 47 (1980)).

[316] *Id*. at 13.

[317] *See supra* note 44 and accompanying text.

[318] *See supra* Section V.B.

[319] Commonwealth v. Dwyer, 859 N.E.2d 400, 417 (Mass. 2006).

[320] *See* Substitute Brief of Amici Curiae the Victim Rights Law Center, et al. at 38-39, Commonwealth v. Sealy, 6 N.E.3d 1052 (Mass. 2014) (No. 11416) (quoting State v. Cashen, 789 N.W.2d 400, 411 (Iowa 2010) (Cady, J., dissenting)).

undermines legislative intent in passing an absolute privilege statute and creates future obstacles for the SJC in distinguishing between statutory and common law privileges. In order to remedy this ongoing problem, the SJC should again incorporate a materiality requirement as seen in *Commonwealth v. Fuller*. A relevant and material standard would require a defendant to show that the requested records tend "to create a reasonable doubt that might not otherwise exist."[321] A relevant and material standard would protect the records from unnecessary disclosure, but would allow room for defendants to access records that are truly exculpatory. For instance, such a standard would permit access upon "a credible showing that a complainant previously had fabricated allegations of sexual assault or a showing of bias against the defendant, or credible information tending to suggest the complainant has difficulty distinguishing fantasy from reality . . . ."[322] This appropriately balances the rights of both victims and defendants. A relevant and material standard provides a framework where privileged communications retain a useful and beneficial function in society, and yet the privilege still gives way when the defendant's rights to due process demand as such.

The new Massachusetts protocol should reflect the current *Dwyer* protocol, in such respects that it provides notice to victims and gives victims standing to defend their records.[323] However, the new protocol should return to traditional in camera reviews and require the defense to demonstrate the records are both relevant and material. This standard will appropriately consider the defendant's compelling need and due process rights to access these records, society's interest in protecting the counselor-victim relationship, and the victim's right to maintain the privilege.

CONCLUSION

Dwyer is a dramatic departure from the norm. Its relevancy standard does not appropriately account for the policy and constitutional reasons to maintain a privilege. Furthermore, given the absolute privilege of Section 20J, *Dwyer* provides no mechanism for the courts to consider the legislative intent in enacting an absolute privilege as compared to a qualified privilege or general access statute. This Note's proposal to require the defendant to show the sexual assault counseling records are both relevant and material is neither new nor extraordinary. In order to properly protect victims and maintain the value of Section 20J's privilege, a return to the relevant and material standard is necessary.

[321] Commonwealth v. Fuller, 667 N.E.2d 847, 855 (Mass. 1996).

[322] *Id*. (footnote and citation omitted).

[323] *Dwyer*, 859 N.E.2d at 418.