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NOTES

COMPULSORY PSYCHOLOGICAL EXAMINATION IN SEXUAL OFFENSE CASES: INVASION OF PRIVACY OR DEFENDANT'S RIGHT?

INTRODUCTION

In recent years, the issue of victims' rights in sexual offense¹ cases has raised a variety of troubling legal problems.² Courts are frequently forced to decide thorny issues which are of special importance in sexual offense cases. For example, it must be determined whether the complaining witness will be allowed to testify,³ whether her testimony must be corroborated by independent evidence,⁴ and whether she can be forced to undergo a psychological examination.⁵ Courts that have considered whether a complaining witness in a sexual offense case may be compelled to undergo a psychological examination have reached varying conclusions. Some courts have decided that they can order a psychological examination when a defendant presents a compelling reason to have such an examination conducted.⁶ Another has determined that it may order a psychological examination when the prosecutrix is young.⁷ Courts in another jurisdiction, however, have determined the psychological examination of a complaining witness in a sexual offense case cannot be ordered

1. See Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 Geo. L.J. 429, 429 n.1 (1985).

The term sexual offense describes a variety of incidents, from exposure and fondling to intercourse, incest and rape. There are five separate sexual offenses: 1) forcible rape, in which physical threats are used to achieve sexual intercourse; 2) nonforcible rape, commonly called statutory rape, involving sexual intercourse between an adult and a child who does not resist; 3) sodomy; 4) incest; and 5) indecent liberties, including a wide variety of acts such as physical advances and the use of obscene language. See *id.*

2. Some of these problems have been whether leading questions will be allowed; whether hearsay evidence from a doctor, social worker, teacher, or parent will be admitted; and whether an expert should be permitted to testify that the victim's behavior is indicative of a sexual offense. See *id.* at 430-31.

3. See *id.*; *Jones v. State*, 219 Ga. 245, 246, 132 S.E.2d 648, 648-49 (1963); *Mackler v. State*, 164 Ga. App. 874, 874-75, 298 S.E.2d 589, 591 (1982).

4. See, e.g., *State v. Haston*, 64 Ariz. 72, 74, 166 P.2d 141, 144 (1946) (decision on whether corroboration is required); *Alvarado v. State*, 63 Ariz. 511, 514, 164 P.2d 460, 462 (1945) (same); *Bradley v. Commonwealth*, 196 Va. 1126, 1128, 86 S.E.2d 828, 834-35 (1955) (same).

5. See, e.g., *People v. Russel*, 69 Cal. 2d 187, 195, 443 P.2d 794, 800, 70 Cal. Rptr. 210, 216 (decision on compulsory psychological examination), *cert. denied*, 393 U.S. 864 (1968); *Ballard v. Superior Court*, 64 Cal. 2d 159, 174-76, 410 P.2d 838, 848-49, 49 Cal. Rptr. 302, 312-13 (1966) (same); *Easterday v. State*, 254 Ind. 13, 16-17, 256 N.E.2d 901, 902-03 (1970) (same); *People v. Griffin*, 138 Misc. 2d 279, 282-83, 524 N.Y.S.2d 153, 156 (1988) (same).

6. See, e.g., *Russel*, 69 Cal. 2d at 196, 443 P.2d at 801, 70 Cal. Rptr. at 216-17 (compelling reason that prosecutrix not credible); *Ballard*, 64 Cal. 2d at 176-77, 410 P.2d at 849, 49 Cal. Rptr. at 313 (compelling reason that state's testimony uncorroborated and complaining witness' veracity affected by her mental state).

7. See *Easterday*, 254 Ind. at 17, 256 N.E.2d at 903.

without express legislative authorization to do so.⁸

This Note considers issues involved in court-compelled psychological examinations of prosecutrices in sexual offense cases. Part I discusses the power of courts to order such examinations. Part II examines factors considered by courts in determining whether to order psychological examinations, once the court has concluded that it has the power to do so. Part III examines the constitutional issue raised by a court-ordered psychological examination. Part III also analyzes *Ballard v. Superior Court*,⁹ the first decision to hold that a trial judge has discretion to order a psychological examination of a complaining witness in a sexual offense case if the defendant presents compelling reasons to conduct such an examination. This Note concludes that courts have discretion to order a prosecutrix to undergo a psychological examination if little or no corroboration supports the sexual offense charge, or if the defense charges that the complaining witness's mental or emotional condition casts serious doubt on her veracity.

I. POWER OF COURTS TO COMPEL PSYCHOLOGICAL EXAMINATIONS

Courts are understandably wary of overstepping the authority granted to them by the legislature.¹⁰ This concern has factored into courts' analyses of whether they will compel a prosecutrix to undergo a psychological examination in a criminal case, absent express legislative authorization.¹¹ Federal courts routinely employ a congressional grant of power to order psychological examinations of litigants in civil cases if the mental condition of the party is in controversy.¹² There is, however, no parallel power given to the courts in the Federal Rules of Criminal Procedure;¹³ hence, some courts are reluctant to order such an examina-

8. See, e.g., *State v. Hiatt*, 303 Or. 60, 64-68, 733 P.2d 1373, 1376-77 (1987); *State v. Olsen*, 295 Or. 107, 109, 663 P.2d 767, 768 (1983); *State v. Walgraevae*, 243 Or. 328, 330, 412 P.2d 23, 24 (1966).

9. 64 Cal. 2d at 159, 410 P.2d at 838, 49 Cal. Rptr. at 302.

10. See *Griffith v. Kentucky*, 479 U.S. 314, 330-31 (1987) (White, J., dissenting); *Shea v. Louisiana*, 470 U.S. 51, 62 (White, J., dissenting) (1985); *Howard v. Illinois Cent. R.R. Co.*, 207 U.S. 463, 483 (1908); *People v. Griffin*, 138 Misc. 2d 279, 284, 524 N.Y.S.2d 153, 156-57 (1988); *Hiatt*, 303 Or. at 65, 733 P.2d at 1377; *Olsen*, 295 Or. at 109, 663 P.2d at 768.

11. See *Easterday v. State*, 254 Ind. 13, 15-16, 256 N.E.2d 901, 902 (1970); *Griffin*, 138 Misc. 2d at 284, 524 N.Y.S.2d at 156-57; *Olsen*, 295 Or. at 110, 663 P.2d at 769.

12. See, e.g., *Hayes v. Lockhart*, 869 F.2d 358, 359 (8th Cir. 1989) (court-ordered mental examination of litigant); *Toth v. TWA*, 862 F.2d 1381, 1384 (9th Cir. 1988) (same); *Pool v. Armontrout*, 852 F.2d 372, 375 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 1172 (1989) (same); *Oviedo v. Jago*, 809 F.2d 326, 326 (6th Cir. 1987); see also Fed. R. Civ. P. 35(a) "[w]hen the mental or physical condition of a party . . . is in controversy, the court . . . may order the party to submit to a physical examination . . . or mental examination"

13. See *United States v. Dildy*, 39 F.R.D. 340, 342 (1966) ("The subpoena powers of the Federal Rules of Criminal Procedure fall significantly short of affording a defendant the right to [a] mental examination of an important witness.").

tion.¹⁴ These courts have concluded that a judicial determination giving a court the power to order the psychological examination of a prosecutrix in a sexual offense case is an invasion of the province of the legislature,¹⁵ because the legislature is the branch of government empowered to enact rules regulating court procedures.¹⁶

The weight of authority, however, indicates that courts do have the power to order a prosecutrix to undergo a psychological examination.¹⁷ While no specific statutory authorization or case law exists for ordering a prosecutrix to undergo a psychological examination, neither is needed to give courts the power to order such an examination.¹⁸ Most courts see the lack of express authority as an invitation to interpret a general grant of power¹⁹ as authorizing a court to order the examination when, in the court's discretion, it is proper to do so.²⁰ It is a court's role not only to interpret the law,²¹ but also to take actions reasonably necessary to administer justice.²² A psychological examination could be crucial to the

14. These courts base their refusal on the absence of express authorization in the Federal Rules of Criminal Procedure, which these states have adopted. See *State v. Hiatt*, 303 Or. 60, 65-66, 733 P.2d 1373, 1376 (1987).

15. See *Dildy*, 39 F.R.D. at 342; *Hiatt*, 303 Or. at 65, 733 P.2d at 1376.

16. See Note, *Psychiatric Examination of Prosecutrix in Rape Case*, 45 N.C.L. Rev. 234, 239-40 (1966).

These courts are also concerned with the larger issue of the long-term results of allowing psychologists to testify that a victim is credible. First, the courts are worried that the psychologist's expert opinion about the prosecutrix might confuse the jury. That is, the jury may base its finding of credibility solely on the psychologist's testimony, although the jury is required to reach a conclusion about the victim's credibility on its own. See *Hiatt*, 303 Or. at 65, 733 P.2d at 1378; *Walgraeve*, 243 Or. at 333, 412 P.2d at 24. Second, the courts are concerned with "the delay of the trial of the guilt or innocence of the accused by the [psychologist testifying as to] the mental state of the witness . . ." *Walgraeve*, 243 Or. at 331, 412 P.2d at 24. Third, a jury may have difficulty understanding an expert witness's testimony concerning the effect of a victim's mental state on her ability to distinguish fact from fantasy. See *United States v. Franzen*, 680 F.2d 515, 519 (7th Cir. 1982); Note, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 Cornell L. Rev. 620, 627 (1987). Hence, the time that it would take the expert to explain the effect would delay the judicial proceedings. See *United States v. Weaver*, 882 F.2d 1128, 1136 (7th Cir.), *cert. denied*, 110 S. Ct. 415 (1989).

17. See, e.g., *People v. Russel*, 69 Cal. 2d 187, 195, 443 P.2d 794, 800, 70 Cal. Rptr. 210, 216, *cert. denied*, 393 U.S. 864 (1968); *Ballard v. Superior Court*, 64 Cal. 2d 159, 176, 410 P.2d 838, 849, 49 Cal. Rptr. 302, 313 (1966); *Easterday v. State*, 254 Ind. 13, 17, 256 N.E.2d 901, 903 (1970); *People v. Griffin*, 138 Misc. 2d 279, 284, 524 N.Y.S.2d 153, 156-57 (1988).

18. See *Easterday*, 254 Ind. at 15-16, 256 N.E.2d at 902-03; *Griffin*, 138 Misc. 2d at 284, 524 N.Y.S.2d at 156-57.

19. An example of a grant of power from the legislature is that a court has power to devise procedures necessary to effect its inherent powers of equity. See *Griffin*, 138 Misc. 2d at 284, 524 N.Y.S.2d at 157.

20. See *id.*

21. See *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Marshall, J., concurring); Note, *Special Issue on Legislation—Statutory and Constitutional Interpretation: Legislative Scholarship and Pedagogy in the Post Legal Process Era*, 48 U. Pitt. L. Rev. 691, 692 (1987).

22. See *Michaelson v. United States*, 266 U.S. 42, 65 (1924); *ITT Community Dev.*

truth-seeking process.²³ Because the legislature has granted courts the power to devise and implement the procedures necessary to effect the courts' general powers,²⁴ courts can interpret the existing law, and legitimately order a prosecutrix to undergo a psychological examination, when in the court's discretion, a psychological examination is necessary to ensure a fair trial and to administer justice effectively.²⁵

II. JUDICIAL CONSIDERATIONS IN DECISIONS ON COURT-COMPELLED EXAMINATIONS

If a court determines that it lacks power to order a prosecutrix to undergo a psychological examination, no psychological examination will be ordered.²⁶ However, if it determines or assumes that it has the power to order such an examination, it then considers whether an examination should be ordered based on the particular case under consideration. Most courts addressing the question of whether to compel a psychological examination of a sexual offense prosecutrix weigh two factors in reaching their decision: whether the possibility of a psychological examination will deter victims from reporting their crimes²⁷ and the credibility of the prosecutrix.²⁸

A. *Deterrent Effect of a Court-Compelled Psychological Examination*

A sexual offense victim is often forced to endure embarrassing formalities.²⁹ For example, the government almost always requires an intimate physical examination of the prosecutrix to corroborate her testimony.³⁰ These procedures alone could be enough to discourage a victim of a sexual offense from reporting her crime.³¹ A psychological examination adds an extra impediment to a victim reporting a sexual offense,³² and

Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978); *Smothers v. Lewis*, 672 S.W.2d 62, 64 (Ky. 1984); *Craft v. Commonwealth*, 343 S.W.2d 150, 151 (Ky. 1961).

23. See *People v. Russel*, 69 Cal. 2d 187, 195, 443 P.2d 794, 800, 70 Cal. Rptr. 210, 216, cert. denied, 393 U.S. 864 (1968); *Easterday v. State*, 254 Ind. 13, 17, 256 N.E.2d 901, 905 (1970).

24. See *Griffin*, 138 Misc. 2d at 284, 524 N.Y.S.2d at 157.

25. See *Russel*, 69 Cal. 2d at 195, 443 P.2d at 800, 70 Cal. Rptr. at 216; *Easterday*, 254 Ind. at 16-17, 256 N.E.2d at 903; *Griffin*, 138 Misc. 2d at 284, 524 N.Y.S.2d at 157.

26. See *supra* note 8 and accompanying text.

27. See *Virgin Islands v. Scuito*, 623 F.2d 869, 875-76 (3d Cir. 1980); *United States v. Dildy*, 39 F.R.D. 340, 343 (D.D.C. 1966).

28. See *Russel*, 69 Cal. 2d at 195, 443 P.2d at 800, 70 Cal. Rptr. at 216; *Easterday*, 254 Ind. at 17, 256 N.E.2d at 903; *Griffin*, 138 Misc. 2d at 283, 524 N.Y.S.2d at 156.

29. See *supra* notes 27-28 and accompanying text.

30. See *United States v. Wiley*, 492 F.2d 547, 551 (D.C. Cir. 1973); *People v. Anderson*, 20 Ill. App. 3d 840, 849, 314 N.E.2d 651, 657 (1974). See generally N.Y. Pen. Law § 130.16 (McKinney 1987) ("A person shall not be convicted of . . . [a sexual offense] solely on the testimony of the victim, unsupported by other evidence . . .").

31. See *infra* notes 33-34 and accompanying text.

32. See, e.g., *United States v. Dildy*, 39 F.R.D. 340, 343 (1966) (psychological examination deters victim from reporting crime); *People v. Mills*, 87 Cal. App. 3d 302, 307, 151

would be one more burden for a victim to consider before making the decision to file a complaint.

Courts have recognized and discussed the possible deterrent effect of compulsory psychological examinations.³³ One court determined that a compulsory psychological examination could not be ordered because "[t]he continuous accumulation of intimidating and indelicate procedural probings tend to induce to silence all but the most hardened victims."³⁴ Another court found that a sexual offense victim's trauma might be increased by a compulsory psychological examination, and might deter her from filing a complaint.³⁵

Although this deterrent effect is a legitimate consideration, it may have been overemphasized. The existence of compulsory physical examinations, because of their intrusive nature, also could have a deterrent effect on victims.³⁶ In fact, because the type of physical examination conducted to confirm a sexual attack is more intrusive than a psychological examination,³⁷ physical exams are likely to have a much greater deterrent effect than do psychological examinations.³⁸ It has been determined, however, that courts have the power to order a physical examination of the prosecutrix in a sexual offense case and they frequently exercise it.³⁹ While physical examinations indicate whether a sexual offense occurred,⁴⁰ mental examinations answer the equally crucial question of whether the prosecutrix is credible.⁴¹ Fairness to defendants, therefore, dictates that the need for the examination should not be outweighed by the examination's possible deterrent effect.⁴²

B. *The Relationship Between the Prosecutrix's Age and Her Credibility*

Courts often order psychological examinations of witnesses whose credibility is doubtful.⁴³ In sexual offense cases, courts consider whether

Cal. Rptr. 71, 74 (1978) (same); *State v. Walgraeve*, 243 Or. 328, 331, 412 P.2d 23, 27 (1966) (same).

33. See *Virgin Islands v. Scuito*, 623 F.2d 869, 875-76 (3d Cir. 1980); *United States v. Dildy*, 39 F.R.D. at 343; *Baker v. State*, 526 So. 2d 202, 204 (1988).

34. *Dildy*, 39 F.R.D. at 343; see also *Scuito*, 623 F.2d at 875 (psychological examinations deter victims from reporting crimes).

35. See *Scuito*, 623 F.2d at 875; see also *Baker*, 526 So. 2d at 204 (court would not "permit the random exploration of [a victim's credibility by subjecting her to] embarrassing psychological tests").

36. See Note, *supra* note 16, at 240.

37. See *id.* at 238.

38. See *id.*

39. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 2 (1941); *People v. Kemp*, 139 Cal. App. 48, 50, 34 P.2d 502, 503-04 (1934); *People v. Porcaro*, 6 N.Y.2d 248, 249, 160 N.E.2d 488, 489, 189 N.Y.S.2d 194, 196 (1959).

40. See *People v. Pearson*, 70 Cal. 2d 218, 219, 449 P.2d 217, 219, 74 Cal. Rptr. 281, 283, (1969); *People v. Insignares*, 121 Misc. 2d 921, 930, 470 N.Y.S.2d 513, 520 (1983).

41. See Note, *supra* note 16, at 239.

42. See *id.*

43. See *People v. Russel*, 69 Cal. 2d 187, 196, 443 P.2d 794, 800-01, 70 Cal. Rptr. 210, 216-17, *cert. denied* 393 U.S. 864 (1968); *Easterday v. State*, 254 Ind. 13, 14, 256

the prosecutrix's veracity is subject to doubt either because of her background or because of some personal quality. Children, for example, pose special credibility problems as prosecutrices in sexual offense cases. Small children, at times, may falsely accuse someone of forcing them to engage in sexual acts.⁴⁴ The court in *Easterday v. State*⁴⁵ recognized this tendency when it determined that a ten-year-old prosecutrix in a sexual offense case had to submit to a psychological examination because of her age and because she had lied in the past.⁴⁶

Professor Wigmore espouses a more extreme view: "[n]o judge should ever let a sex-offence [sic] charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician."⁴⁷ Professor Wigmore's view logically would include situations in which the victim is a child because the risks that are present when adults are involved also exist when one of the parties is a child.⁴⁸

The prosecutrix's age, and her resulting credibility, or lack of credibility, are legitimate considerations for the court. Because of their inability to appreciate the consequences of fabricating a story about a sexual offense a child, not realizing the severe consequences of a false accusation, could make such accusations to exact revenge on a parent or caregiver.⁴⁹ In a situation where, either before or after examining the evidence, a court determines that a prosecutrix might have falsely accused the defendant, it should seriously consider ordering a psychological examination of the prosecutrix to protect the accused.⁵⁰

N.E.2d 901, 901 (1970); *People v. Griffin*, 138 Misc. 2d 279, 283, 524 N.Y.S.2d 153, 156 (1988).

44. See *Easterday*, 254 Ind. at 19, 256 N.E.2d at 903-04; see also J. McCaghy, *Child Molesting*, Sexual Behavior, Aug. 1971, at § 16-21 (emotionally disturbed child might falsely accuse stepparent of sexual assault).

45. 254 Ind. at 13, 256 N.E.2d at 901.

46. *Id.* at 17, 256 N.E.2d at 903.

47. J. Wigmore, Evidence § 924(a), at 737 (1970).

48. Professor Wigmore is concerned with various risks, including 1) that "frequently sexual assault is charged or claimed with nothing more substantial supporting this belief than an unrealized wish or unconscious . . . thwarting," J. Wigmore, *supra* note 47, § 924 (a), at 736; 2) the severity of the penalties for sex crimes, see N.Y. Pen. Law at § 130.35 (McKinney 1987); 3) the potential injury to reputation caused by a false accusation, and 4) the emotional harm to the accused that can result from a false accusation. See J. Wigmore, *supra* note 47, § 924(a), at 736.

49. See J. McCaghy, *supra* note 45, at § 16-2 (quoting L. Bender, psychiatrist from New York State Psychiatric Institute). See generally Wash. Post, Nov. 13, at C1, col. 5 (study by Virginia Department of Social Services concluded that since 1978, number of false reports of sexual offenses against children has risen by 300%).

50. See *Easterday v. State*, 254 Ind. 13, 21, 256 N.E.2d 901, 902 (1970); *People v. Griffin*, 138 Misc. 2d 279, 284, 524 N.Y.S.2d 153, 157 (1988).

Courts should also seriously consider the prosecutrix's credibility when, for instance, an adult prosecutrix has a record of perjury convictions. See *Griffin*, 138 Misc. 2d at 283, 524 N.Y.S.2d at 156 n.2.

III. PRIVACY CONSIDERATIONS

If a victim in a sexual offense case is forced to undergo a psychological examination, not only may her emotional well-being be compromised, but her constitutional rights may be violated as well.⁵¹ Because of the potential for a constitutional violation, a court must carefully consider whether the interests supporting the examination outweigh the invasion of the prosecutrix's right of privacy⁵² that could result if she is compelled to undergo the examination.⁵³

The Supreme Court has not addressed the issue of whether the right of privacy encompasses an individual's right to refuse to undergo a psychological examination. However, in *Schmerber v. California*,⁵⁴ the Court found that the unreasonable testing of one's blood is an invasion of the right of privacy,⁵⁵ based on the Court's determination that the right protects individuals against disclosure of personal matters.⁵⁶ A blood test can reveal certain highly personal matters, such as alcoholism⁵⁷ or venereal disease.⁵⁸ A compulsory psychological examination, however, impli-

51. See *infra* note 59 and accompanying text.

52. The right of privacy was first articulated by the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965). The boundaries of the right have not been clearly defined. The Court has stated only that the right protects areas of marriage, family and procreation. See *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3043 (1989); *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Griswold*, 381 U.S. at 483.

53. Jurisdictions that follow this principle have determined that there are several situations in which the merits of the examination outweigh its possible detrimental effect, for example, when the prosecutrix's credibility is doubtful. See *People v. Russel*, 69 Cal. 2d 187, 196-97, 443 P.2d 794, 800-01, 70 Cal. Rptr. 210, 216-17, *cert. denied*, 393 U.S. 864 (1968); *Ballard v. Superior Court*, 64 Cal. 2d 159, 176, 410 P.2d 838, 849, 49 Cal. Rptr. 302, 313 (1966); *Easterday v. State*, 254 Ind. 13, 21-22, 256 N.E.2d 901, 905-06 (1970); see also J. Wigmore, *supra* note 48, § 924(a), at 736 (mental or moral delusion frequently found in young girls, causing distortion of imagination in sex cases); J. McCaghy, *supra* note 45, at § 16-21 (emotionally disturbed children may falsely accuse adults of sex crimes).

A prosecutrix's credibility is not doubtful when the court determines that her mental condition is stable. See *Easterday*, 254 Ind. at 16, 256 N.E.2d at 902 (court noted victim's demeanor and concluded psychological examination unnecessary). The court decides the issue of stability by observing the prosecutrix both before and during trial. *Id.* at 17, 254 N.E.2d at 902.

The value of the examination also outweighs its detrimental effect when the prosecutrix is young, see *Lowe v. State*, 534 N.E.2d 1099, 1101 (1989); *Pearish v. State*, 264 Ind. 339, 340, 344 N.E.2d 296, 298 (1976); *Easterday*, 254 Ind. at 19, 256 N.E.2d at 903, and when the prosecutrix has a reputation for lying. See *Pearish*, 264 Ind. at 342, 344 N.E.2d at 298; *Easterday*, 254 Ind. at 17, 256 N.E.2d at 903.

54. 384 U.S. 757 (1966).

55. *Id.* at 767-68.

56. *Id.*

57. See *New York v. Snow*, 74 N.Y.2d 671, 672, 541 N.E.2d 414, 415, 543 N.Y.S.2d 385, 386 (1989); *Rittenhouse v. State*, 134 A.D.2d 774, 775, 521 N.Y.S.2d 824, 826 (1987).

58. See *Molien v. Kaiser Foundation Hosps.*, 27 Cal. 3d 916, 919, 616 P.2d 813, 814, 167 Cal. Rptr. 831, 832 (1980); *People v. Haeussler*, 41 Cal. 2d 252, 255, 260 P.2d 8, 10 (1953), *cert. denied*, 374 U.S. 931 (1954); *Hathaway v. Superior Court of Fresno County*, 112 Cal. App. 3d 728, 736, 169 Cal. Rptr. 435, 440 (1980).

cates similar privacy interests.⁵⁹ A psychological examination can reveal certain personal matters, such as schizophrenia,⁶⁰ paranoid personality,⁶¹ or neurological deficiencies.⁶² The individual has an interest in preventing the disclosure of such personal matters; therefore, a psychological examination, which may reveal them, should also merit protection by the right of privacy.

A. *Interests of the State, Victim, and Defendant in Sexual Offense Cases*

When a court order could potentially violate an individual's protected constitutional rights, the court balances the interests involved to determine whether the order should issue.⁶³ In a sexual offense case, the state, the victim and the defendant have different and competing interests that the court must weigh in deciding whether to interfere with the prosecutrix's right of privacy by requiring her to undergo a psychological examination.

First, the state has an interest in punishing only guilty defendants.⁶⁴ This interest can be served by compelling a prosecutrix to undergo a psychological examination. If a psychologist examines a prosecutrix before trial⁶⁵ and determines that she cannot distinguish fact from fantasy, the psychologist can testify to this at trial as part of an effort to persuade the

59. In *Daury v. Smith*, 842 F.2d 9 (1st Cir. 1988), the court determined that the right of privacy encompasses the right to refuse to undergo an unreasonable psychiatric examination. *See id.* at 13. In *Daury*, a school principal was required to submit to a psychiatric examination as a condition of continued employment. *See id.* at 12. The principal claimed that this requirement violated his right to privacy as guaranteed by the ninth and fourteenth amendments. *See id.* at 10. Although the court held that the principal's constitutional rights had not been violated by the compulsory psychiatric examination, it determined that the right of privacy does encompass an individual's right to refuse to undergo an unreasonable psychiatric examination. *See id.* The court found that the right of privacy includes "the individual's interest in avoiding disclosure of personal matters." *See id.* By its very nature, a psychological examination involves such a disclosure. *See id.* at 13. Therefore, it should be protected by the privacy right. *See id.*

60. *See Anonymous v. State*, 17 A.D.2d 495, 496, 236 N.Y.S.2d 88, 89-90 (1963).

61. *See Cornell v. Evans*, 88 A.D.2d 684, 684, 450 N.Y.S.2d 903, 904 (1982).

62. *See Ayub v. Ideal Toy Co.*, 50 A.D.2d 1051, 1052, 377 N.Y.S.2d 730, 731 (1975).

63. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (Court balanced individual's interest in religious autonomy and state's interest in educating children); *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905) (Court balanced individual's interest in religious autonomy against state's interest in preventing communicable disease).

64. It is basic to Anglo-American law that only individuals who have broken the law and are responsible for their actions should be punished. *See Hopkins v. Lynn*, 888 F.2d 35, 37 (5th Cir. 1989). *See generally* W. Ferguson & A. Stokke, *Concepts of Criminal Law* 86-89 (1976) (insane defendants, not responsible for their actions, are blameless and should not be punished); S. Kadish, *Blame and Punishment* 238 (1987) (punishment may not be imposed absent blameworthy conduct). Therefore, if an accused is innocent, the purposes of the criminal justice system would be thwarted by punishing him. *See* W. Ferguson & A. Stokke, *supra*, at 90.

65. *See Note, Criminal Law—State v. Looney: Defendant's Need for Court Ordered Psychiatric Evaluations of Witnesses' Outweighed by Witnesses' Right to Privacy*, 57 N.C.L. Rev. 448, 458 n.67 (1979).

jury that the defendant is innocent.⁶⁶

A state also has an interest in punishing the accused,⁶⁷ and in ensuring that the victim is not harmed again.⁶⁸ The victim of a sexual offense shares these interests.⁶⁹ However, the victim also has a privacy interest that may be implicated if a court orders her to undergo a psychological examination.⁷⁰ The court must carefully balance all of the relevant interests in deciding whether to compel the examination. If the interests of the state and the defendant do not outweigh the victim's interests,⁷¹ forcing the victim to undergo such an examination would be an unwarranted invasion of her constitutionally protected right of privacy.⁷²

Finally, a defendant has an interest in remaining free of warrantless accusations.⁷³ This can occur when a victim mistakenly accuses the defendant of a sexual offense, especially where, for example, she suffers from a type of mental defect that renders her unable to distinguish fact from fantasy⁷⁴ or when she is a liar.⁷⁵ The defendant, therefore, has an interest in having the prosecutrix submit to a psychological examination to reveal the falsity of the accusation, thereby sparing him the embarrassment and damage to reputation resulting from a trial. In this situation, the defendant's right to be free from a warrantless accusation outweighs intrusions into the prosecutrix's right of privacy.⁷⁶

B. Ballard *Balancing Test*

Because a balancing of competing interests must be employed to determine whether it is proper for a court to order a psychological examination, an inflexible rule that directs courts to order victims to undergo psychological examinations in all sexual offense cases, or a rule prohibit-

66. Fed. R. Evid. 702 states that "[i]f scientific . . . or other specialized knowledge will assist the trier of fact to understand the evidence . . . [an expert] witness . . . may testify . . . in the form of an opinion or otherwise."

67. See N.Y. Pen. Law, § 130.35 (McKinney 1987).

68. See W. Ferguson & A. Stokke, *supra* note 65, at 90-91.

69. *Id.* The victim can take steps to effectuate these interests by filing a complaint. See Note, *Feminist Jurisprudence: The Difference Method Makes Feminism Unmodified*, 41 Stan. L. Rev. 761, 767 (1989); Note, *Real Reform*, 101 Harv. L. Rev. 1978, 1980 (1988).

70. See *Daury v. Smith*, 842 F.2d 9, 10 (1st Cir. 1988).

71. The interests of the state and defendant do not outweigh the interests of the victim when the victim is credible or when the victim's testimony is corroborated. See *Ballard v. Superior Court*, 64 Cal. 2d 159, 160, 410 P.2d 838, 841, 49 Cal. Rptr. 302, 304 (1966).

72. See *United States v. Dildy*, 39 F.R.D. 340, 342 (1966); *People v. Griffin*, 138 Misc. 2d 279, 284, 524 N.Y.S. 153, 156-57 (1988).

73. See J. Wigmore, *supra* note 48, § 924(a), at 736; *supra* notes 43-47 and accompanying text.

74. See *Easterday v. State*, 254 Ind. 13, 19, 256 N.E.2d 901, 903 (1970).

75. *Id.* at 19, 256 N.E.2d at 903-04.

76. See *People v. Russel*, 69 Cal. 2d 187, 188, 443 P.2d 792, 794, 70 Cal. Rptr. 210, 212 (1968); *Easterday*, 254 Ind. at 14, 256 N.E.2d at 902; *Griffin*, 138 Misc. 2d at 280, 524 N.Y.S.2d at 154.

ing courts from ordering these examinations under any circumstances would be untenable. A rule directing courts to order victims to undergo psychological examinations in all sexual offense cases would consider only the interests of the state and the defendant, ignoring the interests of the victim. This would be a clear invasion of the victim's right of privacy.⁷⁷ Conversely, an absolute rule barring a court from compelling a victim to undergo a psychological examination only considers the victim's privacy interest. The solution that would consider and weigh all of the necessary interests would give the court some degree of discretion. Many courts have realized this necessity⁷⁸ and have adopted the balancing rule espoused in *Ballard v. Superior Court*.⁷⁹

In *Ballard*, the California Supreme Court determined that a trial judge has discretion to order a psychological examination of a prosecutrix in a sexual offense case if the defendant presents compelling reasons for ordering such an examination.⁸⁰ The *Ballard* court developed a balancing test to determine if the defendant's burden had been met.⁸¹ The court noted that a psychological examination might be compelled if little or no corroborative evidence supported the charge, or if the defense questioned the effect of the complaining witness's mental or emotional condition upon her veracity.⁸²

Under a *Ballard* view, the court determines whether the prejudice to the defendant that will result if the prosecutrix is not required to undergo a psychological examination outweighs the intrusion into the prosecutrix's protected right of privacy that will occur if the examination takes place. If undue prejudice is found,⁸³ the court will order a psychological

77. See *Roe v. Wade*, 410 U.S. 113, 154 (1973). This invasion can occur when a psychological examination of the prosecutrix is not necessary to promote the defendant's or the state's interests, for example, where her testimony is corroborated. See *United States v. Dildy*, 39 F.R.D. 340, 341 (1966).

78. See *Ballard v. Superior Court*, 64 Cal. 2d 159, 174-75, 410 P.2d 838, 848, 49 Cal. Rptr. 302, 312 (1966); *Easterday v. State*, 254 Ind. 13, 15, 256 N.E.2d 901, 902 (1970); *People v. Griffin*, 138 Misc. 2d 279, 284, 524 N.Y.S.2d 153, 157 (1988).

79. 64 Cal. 2d at 159, 410 P.2d at 838, 49 Cal. Rptr. at 302.

80. *Id.*, 410 P.2d at 849, 49 Cal. Rptr. at 313.

81. See *id.* at 176-77, 410 P.2d at 849, 49 Cal. Rptr. at 313.

82. See *id.*, 412 P.2d at 849, 49 Cal. Rptr. at 313; see also *People v. Russel*, 69 Cal. 2d 187, 188, 443 P.2d 794, 800, 70 Cal. Rptr. 210, 212, cert. denied 393 U.S. 864 (1968) (witness afflicted by mental disease may have impaired memory or sense of perception); *People v. Griffin*, 138 Misc. 2d 279, 282, 524 N.Y.S.2d 153, 156 (1988) (prosecutrix's mental state may affect her ability to tell truth). The *Ballard* court recognized that there are situations in which a prosecutrix may fabricate a story about a sexual offense, for example, when the evidence demonstrates a history of mental problems impairing her ability to distinguish fact from fantasy. See *Ballard*, 64 Cal. 2d at 171, 410 P.2d at 846, 40 Cal. Rptr. at 310. The court believed that in these situations, a psychological examination is warranted. *Id.* at 161, 412 P.2d at 849-50, 40 Cal. Rptr. at 305. However, the court also noted that where the prosecutrix's testimony is corroborated, or where the court finds no indication that the prosecutrix is lying, or is mentally or emotionally unstable, a psychological examination is unnecessary. *Id.* at 175-76, 412 P.2d at 849, 49 Cal. Rptr. at 313.

83. A court determines whether there is undue prejudice by observing the complain-

examination.⁸⁴ If, however, the intrusion into the prosecutrix's protected right of privacy is greater than the prejudice that will result to the defendant, the examination will not be ordered.⁸⁵

Even if a court determines that a psychological examination is necessary, the prosecutrix could refuse to submit to the examination despite a court order. If this occurs, she cannot be physically forced to acquiesce.⁸⁶ There are, however, several things that a court can do to safeguard a defendant's interests in light of such a refusal.⁸⁷

First, the court can use its contempt powers to place the prosecutrix either in coercive civil or criminal contempt for refusing to comply with a court order.⁸⁸ The court can also impose fines or sanctions on an unwilling prosecutrix as a penalty for non-compliance.⁸⁹ In addition, the court can inform the jury that the prosecutrix has refused to submit to a court-ordered psychological examination, and let the jury consider this as a factor in its deliberations.⁹⁰ This will bring to the jury's attention the court's belief that a psychological examination of the prosecutrix was warranted, and that the victim refused to comply.

Finally, the court may refuse to allow a prosecutrix's testimony into evidence if the prosecutrix refuses a court-ordered psychological examination.⁹¹ At times, a district attorney may put the victim of a sexual crime on the stand, as a witness, to arouse the jury's sympathy.⁹² However, a court may refuse to allow the prosecutrix to testify in a sexual offense case when faced with her unwillingness to submit to a court-or-

ant's habits both before and during trial. *See* *Virgin Islands v. Scuito*, 623 F.2d 869, 874 (3d Cir. 1980); *Easterday v. State*, 254 Ind. 13, 16, 256 N.E.2d 901, 902 (1970). If the court observes that the complainant is a controlled substance user, *see Scuito*, 623 F.2d at 874, is frequently in altered states of consciousness, or uses mind altering drugs, the court will order a psychological examination to avoid undue prejudice to the defendant. *See id.*

Courts do not rely solely on their own observations of the prosecutrix to make this determination. *See Ballard*, 64 Cal. 2d at 160, 410 P.2d at 840, 49 Cal. Rptr. at 305; *Easterday*, 254 Ind. at 17, 256 N.E.2d at 903. The defendant can introduce evidence that puts the prosecutrix's credibility in doubt, for example, a prior perjury conviction, *see Easterday*, 254 Ind. at 18, 256 N.E.2d at 904, or a record of mental illness. *See Ballard*, 64 Cal.2d at 160, 410 P.2d at 840, 49 Cal. Rptr. at 305.

84. *See Easterday*, 254 Ind. at 14, 256 N.E.2d at 901; *Griffin*, 138 Misc. 2d at 282, 524 N.Y.S.2d at 154.

85. *See Ballard*, 64 Cal. 2d at 177, 410 P.2d at 850, 49 Cal. Rptr. at 314.

The intrusion into the prosecutrix's protected right of privacy is greater than any prejudice that will result to the defendant when no corroboration supports the sexual offense charge, *see id.*, 410 P.2d at 840, 49 Cal. Rptr. at 312, or when the victim's mental condition impairs her ability to tell the truth. *See id.*, 410 P.2d at 840, 49 Cal. Rptr. at 313.

86. *See* *People v. Mills*, 87 Cal. App. 3d 302, 304, 151 Cal. Rptr. 71, 73-74 (1978).

87. *Id.* at 305, 151 Cal. Rptr. at 74.

88. *See* R. Shoben & J. Tabb, *Remedies* 229-30 (1989); *see also* *United States v. Profit*, 498 F.2d 1124, 1130 (3d Cir. 1974) (defendant held in contempt for refusal to submit to psychiatric examination). The purpose of criminal and coercive civil contempt is to vindicate the power of the court. *Id.*

89. *See* R. Shoben & J. Tabb, *supra* note 89 at 230.

90. *See Mills*, 87 Cal. App. 3d 302, 304, 151 Cal. Rptr. 71, 74 (1978).

91. *Id.* at 305, 151 Cal. Rptr. at 74.

92. *See* S. Estrich, *Rape*, 95 Yale L.J. 1087, 1088 (1986).

dered psychological examination.⁹³ The prosecution's case may be weakened by its inability to arouse the jury's sympathy, thereby protecting innocent defendants.

CONCLUSION

At times, a prosecutrix may exaggerate or even fabricate a story of a sexual offense, placing an innocent man in danger of being convicted of a serious crime. If, however, there is no reason to doubt her credibility and her testimony is corroborated, forcing the victim to submit to a psychological examination will unnecessarily add to her trauma. In the latter situation, a compulsory psychological examination is neither necessary nor warranted. In the former situation, however, where there is the danger of fabrication, a compulsory psychological examination of the prosecutrix is essential. The *Ballard* balancing analysis gives a court the flexibility to order a psychological examination of a prosecutrix in situations where the harm to the accused outweighs the harm to the prosecutrix. In addition, the *Ballard* balancing analysis preserves the integrity of the criminal justice system and protects the interests of all parties concerned.

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93. See *Mills*, 87 Cal. App. 3d at 303, 151 Cal. Rptr. at 74.