

TIPPING THE SCALES OF JUSTICE TOWARDS TRUST: WHY SYSTEM-BASED VICTIM ADVOCATES’ PRIVATE COMMUNICATIONS WITH VICTIMS SHOULD BE CONFIDENTIAL IN NEW YORK STATE

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ABSTRACT

Under current federal and New York State law, state prosecutors must disclose exculpatory and impeachment evidence when such evidence is material to guilt or punishment.¹ In New York, defendants are entitled to view a witness's prior statements, whether or not there are variances from the testimony given on the stand, as long as the statements relate to the subject matter of the witness's testimony and do not contain confidential information.² The prosecutor must turn over any evidence and information in the custody or control of the prosecutor or someone under the prosecutor's direction and control, including that which is known to the police, that tends to: negate the defendant's guilt or reduce the defendant's degree of culpability, support a potential defense, impeach the credibility of a testifying prosecution witness, and so on.³ This broad language includes system-based advocates who are employed by the district attorney's office and work with prosecutors.

A defendant's constitutional right to a fair trial is fundamental, and these stringent discovery standards work to protect this right. However, the right only needs to ensure a fair, not perfect, trial, and it can be reasonably balanced against a victim's right to privacy and need for solid foundations of trust as they navigate the criminal justice system. System-based victim advocates provide both legal and emotional support to victims. Victims typically have difficulty trusting themselves, possibly needing help to navigate tough decisions, and difficulty trusting others due to fear of harm by those around them. This lack of trust applies to those in the criminal justice system, and at least one person during the legal process must serve as a secure base of trust

1. U.S. Dep't of Just., Just. Manual § 9-5.001 (2020).

2. *People v. Rosario*, 173 N.E.2d 881, 883 (N.Y. 1961).

3. N.Y. CRIM. PROC. LAW § 245.20(1), (1)(k) (McKinney 2020).

to encourage disclosure. With the current discovery rules, victims may feel encumbered to disclose and seek the resources they need. A lack of disclosure is associated with poorer outcomes for victims and may hinder the search for truth.

Importantly, social workers, domestic violence advocates, community-based victim advocates, and system-based victim advocates are similar and should be treated similarly. New York and federal law recognize privilege for licensed social workers, and New York law recognizes privilege for domestic violence advocates. Due to their similarity, system-based victim advocates should not be treated as prosecutors, even if they are on the same team. So long as the prosecutor is not made aware of any of the content in a victim's and advocate's communication, that communication and any byproducts of it should be privileged.

INTRODUCTION

Imagine you are a fly on the wall in a prosecutor's office, and you see a person sitting in the waiting room, picking at their lips, with their eyes darting back and forth as people walk past them. You notice that they seem nervous, and you realize it is their first time in this office. That person likely had a few sleepless nights. They have a cup of lukewarm coffee, barely drank, next to them. Their restlessness is also attributable to something that happened to them recently, and since they are in a prosecutor's office waiting to see a lawyer, it makes sense that they are a victim of a crime. Just entering the prosecutor's office proves their strength, but they are confused—"What happens in a prosecutor's office? What do criminal processes even look like? Who am I going to see? What is happening? Who can I trust?" Through the door, a person walks in with a therapy dog by their side. The atmosphere lightens a little; it is a little calmer. "Yes, this is who I can learn to trust."

Now imagine the victim walks into an office with the person, and the dog rests its head on the victim's lap. The person, with a friendly face, explains that they help victims of crimes engage in the criminal justice process—their job is to explain the law, case information, and what rights crime victims have. They also have more concrete tasks, like attending interviews, ensuring victims' voices are heard, and providing support. Really, the person's job is to provide meaningful support to victims and advocate for their needs and safety—they are a victim advocate.

After hearing this, the victim offers a statement or two about what happened, thinking that their statements will remain confidential between the two, and the advocate writes it down on a little yellow notepad. You can tell the victim felt better after sharing just a couple small details.

Later, as the case progresses, pretrial discovery begins, and the advocate must turn their notes over to the defense and share everything they learned. The nervous person you saw in the waiting room before is now experiencing a complex mixture of anxiousness and frustration. “That’s the last time I tell my advocate anything.”

While this is a hypothetical situation, it likely reflects what some victims of crimes in New York State are feeling every day. Currently, system-based victim advocates employed by the State are defined as agents of the prosecutor, and prosecutors are assumed to know everything the advocates know.⁴ This means that all discovery obligations attach to system-based advocates as if they were prosecutors themselves, and advocates are generally required to disclose to prosecutors.⁵

This Note addresses whether system-based victim advocates should have the same discovery obligations as prosecutors merely because they are on the same team. Part I of this paper provides a summary of U.S. Supreme Court precedent and New York law concerning the general discovery requirements for prosecutors and the prosecutor’s team. Part II examines and emphasizes the importance of a defendant’s right to a fair trial. This right should not be understated because it is a pillar to democracy and truth seeking, but it is not a perfect nor absolute right. The right to a fair trial should be balanced with a victim’s right to privacy and confidentiality with system-based advocates. After examining the trauma response and the importance of disclosure, and after balancing these interests with defendants’ rights, the section concludes that all private conversations and communications, including notes, texts, and other observations, between system-based victim advocates and victims should be privileged.

Finally, Section III analogizes system-based victim advocates to other non-prosecutorial professions. System-based victim advocates are substantially similar to social workers and domestic

4. See NAT’L CRIME VICTIM L. INST., LAW ENFORCEMENT-BASED VICTIM SERVICES IN NEW YORK: PRIVACY, PRIVILEGE, AND CONFIDENTIALITY 15 (2020), <https://law.lclark.edu/live/files/32034-privacy-confidentiality-and-privilege-guide-new>.

5. See *id.*

violence/community-based victim advocates. Since those professions have rights granting them privileged communications, New York State should treat system-based advocates the same and promote legal consistency.

The conclusion that victims and system-based advocates should have confidentiality rights supports one of the fundamental aspects of the criminal justice system: to protect victims' rights and provide them redress under the law. However, New York's discovery laws are ignoring victims' needs for trust and disclosure, putting their well-being at risk. New York State should remain a leader in victims' rights legislation by creating victim privacy rights and privilege for communications with system-based advocates. Disclosure should only be compelled if the prosecutor themselves knows of the evidence, not if it remains solely with the victim and the advocate.

I. A HISTORY OF DISCOVERY LAW

A. *Supreme Court Precedent*

To understand how discovery law impacts system-based victim advocates, a brief history of United States's discovery precedent is necessary. One of the leading cases is *Brady v. Maryland*, where the petitioner and his companion were found guilty of murder in the first degree.⁶ Both men were sentenced to death but appealed their convictions, which Maryland's highest court affirmed.⁷ The petitioner and the companion had separate trials, and the petitioner, who was tried first, admitted to some participation in the crime.⁸ However, he stated that his companion did the actual killing.⁹ Before the petitioner's trial began, his legal counsel sought the companion's extrajudicial statements from the prosecution.¹⁰ Although some statements were shown to the petitioner, a statement where the companion admitted to committing the actual killing was withheld by the prosecution, and the petitioner did not learn about it until after his conviction was affirmed.¹¹

The petitioner in *Brady* moved for a new trial after receiving notice of this suppressed statement, and the case ultimately landed in the

6. *Brady v. Maryland*, 373 U.S. 83, 84 (1963).

7. *Id.*

8. *See id.*

9. *Id.*

10. *Id.*

11. *Brady*, 373 U.S. at 84.

U.S. Supreme Court on certiorari.¹² The Court defined the issue through the lens of the Due Process Clause: did the Court of Appeals violate the petitioner's federal right when it restricted the petitioner's new trial to an evaluation of his punishment?¹³ In agreement with the Court of Appeals, the Court found that the prosecution's suppression of the companion's confession violated the Fourteenth Amendment Due Process Clause.¹⁴

When the Court of Appeals analyzed the Due Process issue, it relied on two decisions: *United States ex rel. Almeida v. Baldi* and *United States ex rel. Thompson v. Dye*.¹⁵ *Almeida* held that where evidence tends to show that a defendant did not fire the fatal shot in a murder prosecution and the favorable evidence of the real shooter was suppressed, the defendant is denied Due Process.¹⁶ *Thompson* reiterated the *Almeida* rule and stated that "the suppression of evidence may be a denial of Due Process when it is vital evidence material to the issues of guilt or penalty."¹⁷

In *Brady*, the Supreme Court affirmed the rules used by the Court of Appeals as the correct constitutional rules, and it also stated its ruling was an expansion of the holding in *Mooney v. Holohan*.¹⁸ *Mooney* held that a conviction based on a trial where the truth is hidden and the defendant is deprived of his rights through deliberate deception of the court and jury is a Due Process Clause violation.¹⁹ Prosecutors using testimony known to be perjured is inconsistent with the demands of justice.²⁰ Furthermore, the Court cited *Pyle v. Kansas*, which states the rule in broader terms: State authorities may not use perjured testimony and deliberate suppression of evidence favorable to the defendant to imprison him.²¹ Based on this precedent, the *Brady* Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates Due Process where the evidence is material

12. *Id.* at 84–85.

13. *See id.* at 85.

14. *Id.* at 86–87.

15. *Id.* (citing to *United States ex rel. Almeida v. Baldi*, 195 F.2d 815 (3d Cir. 1952); *United States ex rel. Thompson v. Dye*, 221 F.2d 763 (3d Cir. 1955)).

16. *Almeida*, 195 F.2d at 820.

17. *Thompson*, 221 F.2d at 765 (quoting *United States ex. rel. Thompson v. Dye*, 123 F. Supp. 759, 762 (W.D. Pa. 1954)).

18. *Brady*, 373 U.S. at 86 (citing to *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

19. *Mooney*, 294 U.S. at 112.

20. *Id.*

21. *Brady*, 373 U.S. at 86 (quoting *Pyle v. Kansas*, 317 U.S. 213, 215–16 (1942)).

either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”²² Importantly, the Court highlighted that the criminal justice system is one that requires a delicate balance and that society wins when guilty people are convicted and when trials are fair.²³ Despite this assertion of a federal right, the Supreme Court ultimately affirmed the Court of Appeals’s judgment.²⁴

About nine years later, the Supreme Court heard another important discovery case. In *Giglio v. United States*, the petitioner was convicted of creating forged money orders, and he eventually appealed his five-year imprisonment conviction.²⁵ While the appeal was pending, the petitioner’s counsel discovered that the State failed to disclose evidence favorable to the petitioner: a promise was made to its key witness that he would not be prosecuted if he testified for the State.²⁶ The key witness was the only person who could link the petitioner to the crime, and he testified that the petitioner instigated the passing of forged money orders.²⁷ Ironically, the petitioner’s counsel attempted to discredit the witness by revealing possible agreements with the State, but the prosecutor stated the witness received no promises.²⁸ Again, the Court defined this issue as one of Due Process, and it asked whether the petitioner’s rights were violated by the evidence not disclosed, requiring a new trial.²⁹

In answering this question, the Court again looked back to court precedents, such as *Mooney*, *Pyle*, *Brady*, and *Napue v. Illinois*.³⁰ *Napue* broadened the rules stated in *Mooney* and *Pyle*, holding that the State violates Due Process when it allows false evidence to go uncorrected, whether or not they solicit it themselves.³¹ Furthermore, when the reliability of a witness may determine guilt or innocence, the prosecutor’s failure to disclose is a violation of a defendant’s Due Process rights.³² In *Giglio*, the Court clarified that negligence is not determinative, that the duty to disclose falls on the prosecutor, and that, since the prosecutor’s office is a spokesman for the State, any promise made

22. *Id.* at 87.

23. *Id.*

24. *Id.* at 91.

25. *Giglio v. United States*, 405 U.S. 150, 150 (1972).

26. *Id.* at 150–51.

27. *Id.* at 151.

28. *Id.*

29. *Id.*

30. *Giglio*, 405 U.S. at 153 (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

31. *Napue*, 360 U.S. at 269.

32. *Giglio*, 405 U.S. at 154.

by a prosecutor is one of the State.³³ Ultimately, the Court reversed and remanded for a new trial.³⁴

Taking *Brady* and *Giglio* together, the State and prosecutors have an important duty: they must disclose exculpatory and impeachment evidence when such evidence is material to guilt or punishment.³⁵ These disclosures are of such high constitutional importance that they must be made regardless of whether the defendant requests such evidence.³⁶ They exist to build faith and ensure trust in a system that determines guilt, innocence, punishment, law, and order—but it is important to remember that victims are a part of this system.

B. New York Discovery Law

In 1961, between *Brady* and *Giglio*, the Court of Appeals of New York considered a case, *People v. Rosario*, concerning a judge's refusal to turn over statements by the prosecution's witnesses to defense counsel.³⁷ The appellant was convicted of murder in the first degree during the course of a robbery that he and two accomplices committed.³⁸ The witnesses were as follows: an eyewitness to the robbery, a person who was given appellant's gun after the robbery, and the appellant's girlfriend.³⁹ After each of these individuals testified in court, the defense counsel requested their prior statements be turned over so they could be used during cross-examination.⁴⁰ Instead of being turned over to defense counsel, they were turned over to the judge who identified variances in the statements and only allowed the defense counsel to view the parts containing variances; the defense counsel was not given the opportunity to determine for themselves what would be useful during cross-examination.⁴¹

To understand this issue, the Court of Appeals called attention to an important difference between federal law and New York law. The Court of Appeals stated that, naturally, when a witness for the prosecution has made a prior statement, such as a statement to the police, district attorney, or grand jury, the defense will want to use that

33. *Id.*

34. *Id.* at 155.

35. U.S. Dep't of Just., *supra* note 1.

36. *Id.*

37. *See People v. Rosario*, 173 N.E.2d 881, 882 (N.Y. 1961).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

statement to discredit and impeach the witnesses.⁴² The U.S. Supreme Court “has held that a defendant ‘is entitled to inspect’ any statement made by the Government’s witness which bears on the subject matter of the witness’ testimony.”⁴³ Essentially, under federal law, the defense need not wait for the judge to inspect and find variances in statements for their viewing.⁴⁴ New York had typically fallen on the opposite end of the spectrum: a defendant may be allowed to see and use statements only if they contain information and statements inconsistent with the witness’ current testimony.⁴⁵

Despite this being the leading rule in New York for some time, the Court of Appeals looked to policy and determined that justice demanded a new rule in New York.⁴⁶ The Court of Appeals held that the defense is entitled to view a witness’s prior statements, whether or not there are variances from the testimony given on the stand.⁴⁷ The only times the defendant does not have this right are when the subject matter differs between the testimony on the stand and the statement or when the statements must remain confidential.⁴⁸ In general, due to their high importance, the defendant and his counsel should be allowed to view prior statements and determine how they may use them during cross-examinations.⁴⁹ Pretrial statements may be a source of contradictions, a reflection of bias, or supply evidence to neutralize damaging testimony.⁵⁰ A neutral judge cannot see how omissions and contradictions may be vital to a single-minded defense counsel.⁵¹

The *Rosario* rule is so important that it is codified in New York Criminal Procedure Law section 245.20, “Automatic Discovery.”⁵² The prosecutor, and those under the prosecution’s direction, shall turn over:

[a]ll statements . . . made by persons who have evidence or information relevant to any offense charged or to any potential defense thereto, including all police reports, notes of police and other investigators, and law enforcement agency reports.

42. *Rosario*, 173 N.E.2d at 882.

43. *Id.* at 882–83 (quoting *Jencks v. United States*, 353 U.S. 657, 667 (1957)).

44. *Id.*

45. *Id.* at 883.

46. *Id.*

47. *Rosario*, 173 N.E.2d at 883.

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. N.Y. CRIM. PROC. LAW § 245.20(1)(c) (McKinney 2020).

This provision also includes statements . . . by persons to be called as witnesses at pre-trial hearings.⁵³

Furthermore, the prosecutor must turn over any evidence and information in the custody or control of the prosecutor or someone under the prosecutor's direction and control, including that which is known to the police, that tends to: negate the defendant's guilt or reduce the defendant's degree of culpability, support a potential defense, and impeach the credibility of a testifying prosecution witness.⁵⁴ All of these items, whether they are in the custody of the prosecutor or someone in the prosecutor's control, must be turned over to the defense automatically.⁵⁵

C. Who Are System-Based Advocates and What Does This Discovery Law Mean for Them?

Communities and agencies around the country employ community-based or system-based victim advocates to help serve victims of crime. While their roles are similar, community-based advocates work independently of district attorneys and the government, often working with non-profit organizations instead.⁵⁶ Since they are not linked to a state actor, community-based advocates are not subject to any discovery obligations and their communications with clients are privileged.⁵⁷ Also, community-based advocates provide more comprehensive services to victims—such as crisis intervention, helping victims obtain counseling, finding culturally specific resources for victims, accompanying victims to medical and legal appointments, and increasing victims' access to health services and child care—even if they are not engaged in any criminal justice processes.⁵⁸

On the other hand, system-based advocates, who are employed by governmental agencies like police departments and district attorneys' offices, facilitate victims' engagement in the criminal justice

53. *Id.* § (1)(k).

54. *Id.*

55. *Id.*

56. See *System-Based and Community Based Advocacy—The Need for Both*, VICTIM SUPPORT SERVS., <https://victimsupportservices.org/system-based-and-community-based-advocacy-the-need-for-both/#:~:text=System%2DBased%20advocates%20are%20typically,%2C%20usually%20non%2Dprofit%20organization> (last visited Sept. 2, 2024).

57. See *id.*; NAT'L CRIME VICTIM L. INST. *supra* note 4, at 3–4.

58. *Know Your Team: Community-Based Advocates*, OFF. OF JUST. PROGRAMS, https://www.ncjrs.gov/ovc_archives/sartkit/develop/team-advocate-c.html (last visited Feb. 26, 2024).

process while they navigate the system.⁵⁹ System-based victim advocates provide services to victims while their cases are processed, such as: providing information to victims about financial assistance, child care, policies against victim intimidation, and the detention status of a defendant; assisting victims with safety concerns; notifying victims of hearings and court schedules; attending interviews, hearings, and trials with the victim to provide support; and ensuring victims' rights are maintained.⁶⁰ Despite the differences between community and system-based advocates, both work to provide meaningful support to victims and advocate for their needs and safety.

So, what does all this discovery law have to do with system-based victim advocates? Since system-based advocates are linked to state actors, discovery obligations generally attach to them and override their ability to keep private information confidential.⁶¹ Federal and state courts have consistently found that system-based victim advocates are within the prosecutor's team.⁶² Generally, system-based victim advocates are considered agents of the prosecutor.⁶³ New York State makes this clear by including the language, "of the prosecution or *persons under the prosecution's direction*" (emphasis added) in the preamble of section 245.20(1).⁶⁴ This broad language includes system-based victim advocates who are employed by the district attorney's office and work with the prosecutors.

Because system-based victim advocates are agents of the prosecutor, prosecutors are assumed to know everything the advocates know.⁶⁵ This means that all of the discovery obligations discussed in this section attach to system-based advocates as if they were prosecutors themselves, and advocates are generally required to disclose to prosecutors.⁶⁶ The discovery obligations under federal and New York law trump the advocate's ability to keep all information disclosed to them by a victim confidential, and anything shared to them may have to be disclosed to the prosecutor and the defense.⁶⁷ Essentially,

59. VICTIM SUPPORT SERVS., *supra* note 56; NAT'L CRIME VICTIM L. INST., *supra* note 4, at 3–4.

60. *Know Your Team: Community-Based Advocates*, *supra* note 58.

61. NAT'L CRIME VICTIM L. INST., *supra* note 4, at 3–4.

62. *Id.* at 3, 15.

63. *Id.* at 15.

64. N.Y. CRIM. PROC. LAW § 245.20(1).

65. NAT'L CRIME VICTIM L. INST., *supra* note 4, at 15.

66. *Id.*

67. *See id.*

anything a victim tells their system-based advocate in confidence could end up in the hands of the defendant and the defendant's counsel.⁶⁸

II. BALANCING VICTIMS' RIGHTS OF PRIVACY WITH DEFENDANTS' RIGHTS TO A FAIR TRIAL

A. *The Right to a Fair Trial is Fundamental, and Stringent Discovery Standards Protect This Right*

The Sixth Amendment of the U.S. Constitution states that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.⁶⁹

This amendment underscores that individuals who are accused of a crime shall enjoy the right to a fair trial, which is the only way to truly determine one's guilt or innocence.⁷⁰ Not only has this right been deeply engrained in American culture since 1788, when the Constitution was ratified, it is international in scope in the human rights realm.⁷¹ In fact, the right to a fair trial was affirmed to be a basic human right in 1948 by the Universal Declaration of Human Rights and is recognized in many other human rights documents.⁷²

The State's power to prosecute and punish people who are accused of crimes, sometimes called a "coercive" power, is restrained by

68. *See id.*

69. U.S. CONST. amend. VI.

70. *See The Right to a Fair Trial*, FAIR TRIALS, <https://www.fairtrials.org/the-right-to-a-fair-trial/#:~:text=Fair%20trials%20help%20establish%20the,by%20governments%20and%20state%20authorities> (last visited Feb. 26, 2024).

71. *See id.*; *see also About the Constitution: FAQs*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/about-the-constitution-faqs#:~:text=The%20Constitution%20was%20created%20during,ratified%20on%20June%2021%2C%201788>. (last visited Oct. 30, 2024).

72. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); Sara Stapleton, Note, *Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation*, 31 N.Y.U. J. INT'L L. & POL. 535, 550 (1999).

the right to a fair trial, which helps avoid wrongful convictions.⁷³ As highlighted above, the Constitution requires that the prosecution help protect the right to a fair trial by providing the defense with the evidence the prosecution intends to use at trial, including exculpatory and impeachment evidence that is material to the trial.⁷⁴ Determining materiality is no easy task, and both the Supreme Court and the Department of Justice suggest that the prosecution err on the side of disclosure, especially if admissibility is a close call.⁷⁵ Without the prosecution giving the defense this evidence, the truth could be hidden, and an innocent defendant could be convicted for a crime they did not commit. Furthermore, the right to a fair trial is a cornerstone of democracy because it limits abuse by the State, uncovers hidden material evidence, and fosters fair and just societies founded on truth-seeking.⁷⁶ As stated in *Brady*, the right to a fair trial is a societal good, as society can only advance when guilty people are convicted and innocent people are set free.⁷⁷

B. A Fair, Not a Perfect nor Absolute, Right

It is true that the Sixth Amendment and various international laws guarantee the criminal defendant the right to a fair trial. However, it is important to emphasize, as Maryland's highest court did, that the constitutional standard is merely fairness—not perfection.⁷⁸ The question of fairness is not one that ends at criminal defendants and their rights; that is where it starts. Every right an individual holds has some give or take, balanced with the rights of others and the benefit of society as a whole.

Furthermore, an absolute right cannot be limited in any circumstances or even justifiably infringed.⁷⁹ Accordingly, no constitutional right is an absolute right, as the government can limit or even restrict constitutional rights.⁸⁰ Although disclosure is constitutionally required

73. *The Right to a Fair Trial*, *supra* note 70.

74. See U.S. Dep't of Just., *supra* note 1.

75. See *id.*

76. See *The Right to a Fair Trial*, *supra* note 70.

77. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

78. See *Vigna v. State*, 235 A.3d 937, 960 (Md. 2020).

79. See Alan Gewirth, *Are There Any Absolute Rights?*, 31 *PHILOSOPHICAL Q.* 1, 2 (1981).

80. See E.A. Gjelten, *Basic Constitutional Rights in the United States*, *LAWYERS.COM* (Feb. 8, 2023), <https://legal-info.lawyers.com/criminal/the-basic-constitutional-rights-of-a-us-citizen.html#:~:text=But%20no%20rights%20are%20absolute,speech%2C%20such%20as%20violent%20threats>.

in some cases and the Department of Justice's policy favors expanded disclosures, there is no general right of discovery in criminal cases.⁸¹ Since the right to a fair trial is not a perfect, absolute, or general right, the duty of the prosecutor's team to hand over a witness's prior statements, exculpatory evidence, and impeachment materials can be reasonably balanced with the rights of victims.

C. The Current State of a Victim's Right to Privacy

Unlike criminal defendants, victims of crimes do not have a constitutional amendment granting them specific rights during criminal trials. However, this does not mean that victims' rights are unimportant to the United States as a whole. 18 U.S.C. § 3371, titled the Crime Victims' Rights Act, states that a crime victim has the right to "be treated with fairness and with respect for [their] dignity and *privacy*" (emphasis added) and the right "to be reasonably protected from the accused."⁸² These two rights work together. One of the greatest ways to protect victims from the accused is to allow them a degree of privacy with their system-based advocates. This way, the defendant in a criminal trial would not know private information the victim is revealing to their advocate in confidence.

In addition to federal protection, all states have provisions that enumerate the rights of crime victims.⁸³ However, New York State has been a national leader in advancing victims' rights by: enacting the Rape Shield Law, signing the Son of Sam Bill, providing community-based victim assistance programs funding, enacting the Fair Treatment Standards for Crime Victims law,⁸⁴ making The Victim Information and Notification Everyday system available,⁸⁵ enacting the Sexual Assault Reform Act,⁸⁶ increasing emergency awards,⁸⁷ creating the State

81. See U.S. Dep't of Just., *supra* note 1.

82. 18 U.S.C. § 3371(a)(1), (8) (2015).

83. See *Victims' Rights*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/pjcc/topics/leadership-and-management/victims> (last visited Nov. 7, 2024); see generally N.Y. EXEC. LAW § 632-a (McKinney 2021).

84. See *National Leader in Victim Rights*, N.Y. ST., <https://www.ny.gov/office-victim-services-50th-anniversary/national-leader-victim-rights> (last visited May 23, 2024).

85. See *What is VINE?*, VINE, <https://vinelink.vine-apps.com/state/NY/ENGLISH> (last visited Feb. 25, 2024).

86. See *National Leader in Victim Rights*, *supra* note 84; KAREN MORRIS & DOUGLAS SCHNEIDER, CRIMINAL LAW IN NEW YORK § 6:141 SEXUAL ASSAULT REFORM ACT (4th ed. 2023) (stating that SARA requires sex offenders convicted of certain offenses against a minor may not live within 1,000 feet of a school).

87. See *National Leader in Victim Rights*, *supra* note 84.

Office of Victims Services,⁸⁸ and more.⁸⁹ New York's rich history of major accomplishments towards victims' rights started in 1975 and continues today, working to meet the needs of victims and ensuring their rights in the criminal justice system.⁹⁰ New York also has the Crime Victims Bill of Rights.⁹¹ Although this bill of rights does not explicitly mention a victim's right to privacy, it does include that victims should be "treated fairly and respectfully during the criminal justice process."⁹² Furthermore, right number nine states that victims shall "be free from intimidation, threats or harassment."⁹³ As mentioned above, one of the greatest ways to keep a victim safe and respected is to protect their privacy rights with system-based victim advocates. Since New York is a leader in victims' rights, the State should remain consistent with its morals and explicitly grant victims privacy protection, allowing them to keep their private communications with system-based advocates confidential.

D. Trauma, Trust, and Disclosure: Why Confidentiality with System-Based Advocates is Important

1. The Trauma Response and Trust

Victims' reactions after a trauma can manifest differently and vary in complexity for each person, often ranging in severity depending on one's natural and community support systems.⁹⁴ Emotional dysregulation in trauma victims is not uncommon, even in those who are older and functioning well before the trauma began.⁹⁵ Often, victims will feel either numb, meaning their emotions detach from their

88. *See id.*; OFF. OF VICTIM SERV., <https://ovs.ny.gov/> (last visited Feb. 25, 2024).

89. *See* N.Y. CRIM. PROC. LAW § 60.42 (McKinney 2019) (stating that evidence of a victim's sexual conduct shall not be admissible at trial unless an exception is met); N.Y. EXEC. LAW § 632-a (McKinney 2021) (limiting how much criminals can profit from their crime's publicity); N.Y. EXEC. LAW §§ 640–649 (McKinney 2010) (ensuring that criminal justice services promulgate fair standards for victims).

90. *See id.*

91. *See* OFF. OF THE N.Y. STATE ATT'Y GEN. LETITIA JAMES, CRIME VICTIMS BILL OF RIGHTS, https://ag.ny.gov/sites/default/files/crime_victims_bill_of_rights.pdf (last visited Oct. 13, 2024).

92. *Id.*

93. *Id.*

94. *See* U.S. DEP'T OF HEALTH AND HUM. SERVS., A TREATMENT IMPROVEMENT PROTOCOL: TRAUMA-INFORMED CARE IN BEHAVIOR HEALTH SERVICES, TIP 57, 1, 60 (2014), <https://store.samhsa.gov/sites/default/files/sma14-4816.pdf>.

95. *See id.* at 61, 63.

thoughts and behaviors, or overwhelmed.⁹⁶ Cognition in trauma victims may also be affected as trauma challenges their belief in a just-world and other healthy life assumptions.⁹⁷ Victims may also feel misunderstood because others may not understand their experiences, all while they potentially experience flashbacks, triggers, dissociation, and derealization.⁹⁸ Of particular importance to this Note are the behaviors victims engage in while attempting to manage their trauma and the emotions entangled within it.⁹⁹ Some victims will reduce their stress levels through alcohol abuse, participating in high-risk behaviors, or engaging in self-harm and destruction.¹⁰⁰

More particularly, victims often avoid situations, people, and places that bring up memories associated with their trauma.¹⁰¹ Although avoidance may be an effective tool to alleviate anxiety at first, eventually, victims feel more anxious, increasing their need to avoid social situations that make them feel uncomfortable.¹⁰² Social and interpersonal support are key ingredients to victims' healing, but it is common for them to avoid support because they do not believe anyone is trustworthy or understands their needs.¹⁰³ For victims, developing a close and trusting interpersonal relationship with others may feel frightening and confusing, especially when they may even lose trust in themselves.¹⁰⁴

Crime victims engaged in the criminal justice process deal with emotional, cognitive, and behavioral dysregulation in response to their trauma, all while trying to understand the law and other legal processes. The criminal justice system and those within it, including

96. *See id.* at 63.

97. *See id.* at 66–67. Created by Melvin Lerner, the just-world phenomenon refers to the idea that the world is fair and orderly, and people generally get what they deserve—good things happen to good people only, and bad things happen to bad people only. *See Just-world hypothesis*, AM. PSYCH. ASS'N DICTIONARY (Nov. 15, 2023) <https://dictionary.apa.org/just-world-hypothesis>.

98. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 94, at 67–69.

99. *See id.* at 70.

100. *See id.*

101. *See id.* at 73.

102. *See id.*

103. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 94, at 74.

104. *See Trauma and Relationships*, INT'L SOC'Y FOR TRAUMATIC STRESS STUD. (2005) <https://veterans.networkofcare.org/imperial/HealthLibrary/Article?docType=noc&articleId=2164>; Janelle Schlueter, *Trust Issues After Trauma*, COUNSELING CTR. AT CINCO RANCH (Aug. 19, 2022), <https://cincoranchcounseling.com/trust-issues-after-trauma/#:~:text=After%20experiencing%20a%20trauma%2C%20it,authority%2C%20or%20a%20romantic%20partner.>

prosecutors, defense attorneys, and system-based victim advocates, are not excluded from victims' general distrust towards others and the avoidance they engage in. It is time for the criminal justice system and New York State to meet victims where they are. If victims feel a general lack of trust and fear towards others and the criminal justice system, they should have a consistent person to rely on without fear of disclosure.

2. *The Role of System-Based Victim Advocates and Disclosure*

System-based victim advocates work specifically for victims seeking help in the criminal justice system and are typically the primary contact for victims within a case.¹⁰⁵ The role system-based victim advocates play cannot be understated, as they provide both emotional and legal support to victims as they "navigate a system that was not designed with their interests or needs in mind."¹⁰⁶

Because of the importance of their role, system-based victim advocates have college degrees, with some being fully trained and licensed therapists.¹⁰⁷ Also, some victim advocates are social workers or have other high credentials, and if they do not, they typically receive trauma-informed and victim-centered training.¹⁰⁸ In addition, system-based victim advocates learn the laws and programs that apply to both themselves and the victims they work with at the state and federal level.¹⁰⁹

While working with multiple victims at one time, system-based victim advocates will inform victims about and protect victims' rights within criminal processes, accompany victims to court, create an individualized safety plan, work with law enforcement, attend interviews, help create reports and victim impact statements, ensure victims' voices are heard, and provide emotional support.¹¹⁰ Throughout their

105. See *Know Your Team: Systems-Based Advocates*, OFF. OF JUST. PROGRAMS, https://www.ncjrs.gov/ovc_archives/sartkit/develop/team-advocate-b.html (last visited Feb. 26, 2024).

106. LORI HASKELL & MELANIE RANDALL, *THE IMPACT OF TRAUMA ON ADULT SEXUAL ASSAULT VICTIMS*, THE DEP'T OF JUST. CAN. 32 (2019).

107. See TRACY PRIOR, *VICTIM SERVICES AND VICTIMS' RIGHTS: ELEVATING VICTIMS' VOICES AT A CRITICAL TIME: BEST PRACTICES GUIDE*, NAT'L DIST. ATT'YS ASS'N, WOMEN PROSECUTORS SECTION 1, 12 (Apr. 2021), <https://ndaa.org/wp-content/uploads/WPS-Victim-Advocacy-Best-Practices-Guide-April-2021-FINAL.pdf>.

108. See *id.*

109. See *id.*

110. See *id.*; see also *Know Your Team: Systems-Based Advocates*, *supra* note 105.

work, system and community-based advocates alike serve as a protector for victims and work to prevent victim-blaming from others in the criminal justice system.¹¹¹ Essentially, system-based advocates serve as a part of victims' support networks during the criminal justice process, and they fulfill this important and personal role with multiple victims at once. This requires organization and a solid basis of trust with each victim they work with.

While working with system-based advocates, victims will disclose personal details about their lives and the traumatic experiences they faced. Although it may be uncomfortable to do at first, disclosure of trauma promotes resilience and healing. In fact, it allows the victim to organize their memories and correct any irrational beliefs they hold surrounding the event.¹¹² In addition to its healing properties, disclosure and improving the accuracy of memories is beneficial for the criminal justice system because it protects the right to a truthful and fair trial.

However, as highlighted in the previous section, victims typically have difficulty trusting others, including those who are part of their support networks. Despite this general distrust, system-based advocates are not allowed to meet their victims halfway—victims may be even more unwilling to disclose information to system-based advocates once they learn their communications are not privileged. An important part of this already delicate relationship between system-based advocates and victims is that there is no confidentiality.¹¹³

Any resources, referrals, and information that [law enforcement officer (LEO) victim specialists] obtain from victims are subject to disclosure during the prosecution of a criminal case. Many victims that LEO specialists assist may feel encumbered by this, and it may limit their ability to seek the full extent of services that the victims need in order to successfully leave their situation.¹¹⁴

111. See HASKELL & RANDALL, *supra* note 106, at 12 (quoting Rebecca Campbell & Patricia Y. Martin, *Services for Sexual Assault Survivors: The Role of Rape Crisis Centers*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 227, 231 (Claire M. Renzetti et al. eds., 2001)).

112. See Denise M. Sloan & Blair E. Wisco, *Disclosure of Traumatic Events*, in FACILITATING RESILIENCE AND RECOVERY FOLLOWING TRAUMA 191, 206 (Lori A. Zoellner & Norah C. Feeny eds., 2014).

113. See Melissa Milam et al., *The Survivor-Centered, Trauma-Informed Approach*, 65 U.S. ATT'YS' BULL. 39, 41 (2017).

114. *Id.* at 41–42.

A lack of confidentiality between the system-based victim advocate and the victim is troubling for both parties. On the system-based victim advocate's side, they cannot keep records or notes on any of their conversations or interviews with a victim.¹¹⁵ Since they are on the prosecutor's team, anything they write will be subject to discovery and handed over to the defendant. This means that, despite working with multiple victims, system-based victim advocates cannot take notes that organize their victims' issues, statuses, and concerns. Furthermore, checking in with victims will be harder for the advocates; they cannot easily and privately text or email their victims for check-ins without the messages being subject to discovery.

The critical role of a system-based victim advocate is to provide emotional support, listen, and encourage the victim to engage with the criminal justice system.¹¹⁶ Not only is it more difficult for the advocate to fulfill their role without being able to freely utilize note-taking and easy communication technology, but also victims are discouraged from disclosing their trauma and experiences after learning their conversations with the advocate are not confidential.¹¹⁷ A lack of disclosure may make it more difficult for the system-based victim advocate to provide support to the victim and uncover the truth, an essential pillar of the criminal justice system.

On the victim's side, a lack of confidentiality means that victims may not gain any of the benefits associated with increased disclosure and they may have more trouble adjusting to the world post-trauma.¹¹⁸ Lower disclosure rates lead to "greater interpersonal sensitivity, feelings of inferiority, and self-depreciation."¹¹⁹

Importantly, the duty of a system-based victim advocate to provide information requested by a police officer, prosecutor, or defendant extends past conversations the advocate has with victims.¹²⁰ Anything the advocate observes and learns about the victim or the case is subject to discovery, even if it occurs outside of a private

115. See Kimberly A. Lonsway & Joanne Archambault, *Advocates and Law Enforcement: Oil and Water? Part 1*, END VIOLENCE AGAINST WOMEN INT'L 7 (Mar. 2017).

116. See HASKELL & RANDALL, *supra* note 106, at 32.

117. See Milam et al., *supra* note 113, at 41–42.

118. See Michele Bedard-Gilligan et al., *Individual Differences in Trauma and Disclosure*, 43 J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY 716, 716–23 (2012).

119. *Id.* at 717.

120. See Lonsway & Archambault, *supra* note 115, at 7.

communication.¹²¹ So, not only will victims disclose less once they learn their private communications are not confidential, they may also change their persona and behavior in front of a system-based victim advocate.

3. *The Scale is Currently Unbalanced, Leaving Victims Scathed by the Criminal Justice System*

Criminal defendants should have the right to a fair trial—it is essential to finding the truth and punishing only those who are guilty, an end that upholds our democracy and benefits society. However, victims are a unique class of individuals who experience emotional, cognitive, and behavioral struggles caused by trauma, meaning each victim's life and experiences are unique. While facing these changes, victims enter the criminal justice system—a system not made to support them—alone, often during a time when they may not trust themselves or their loved ones.

System-based victim advocates step in at this moment to support victims, encourage disclosure, and help them engage more positively with the criminal justice system. However, they are hindered from completing their job effectively due to New York's discovery laws, which give advocates the same disclosure responsibilities as prosecutors. System-based advocates cannot take notes to organize their various cases and cannot easily communicate with the victims they work with. Furthermore, once victims realize there is no confidentiality outside of or within their private communications with advocates, they may disclose less or modify their behavior, leading to poorer outcomes like self-depreciation and unorganized memories. A lack of confidentiality may also put their right to safety at risk. Victims may feel like they cannot tell their advocate personal information about the crime because, when it gets back to the defendant during discovery, the defendant could retaliate against the victim. A victim could fear telling their advocate that they are currently in an unsafe situation for this same reason.

Although the right to a fair trial is important, it is not perfect or absolute and should be balanced against victims' rights to privacy and safety. Currently, that scale is tipped too far in favor of criminal defendants, neglecting the needs and rights of victims.

121. *See id.*

III. SYSTEM-BASED VICTIM ADVOCATES' ROLES ARE ANALOGOUS
TO SOCIAL WORKERS AND DOMESTIC VIOLENCE ADVOCATES
WORKING WITH VICTIMS

A. *Analogies to Social Workers and Social Workers'
Confidentiality Requirements*

Despite being on the prosecutor's team, system-based victim advocates are not prosecutors; they are more similar to social workers and domestic violence/community-based victim advocates. Under New York Civil Practice Law and Rules (NY CPLR) Section 4508, a person who is a licensed master social worker or a licensed clinical social worker is not required to disclose a communication made by one of their clients unless one of four exceptions are met: the client consents to disclosure, the communications will reveal a harmful act, the client is under sixteen and the communication reveals they are a victim of a crime, or the client waives their right to confidentiality by suing the social worker.¹²² Although privilege does not exist in all circumstances, social workers and their clients do enjoy a degree of confidentiality so long as there is a professional relationship between the two and the private communication was made in reliance on its confidentiality.¹²³ Clinical and licensed social workers and their clients also enjoy federal protection over communications and notes made in the course of therapy and counseling sessions, meaning they are protected from compelled disclosure.¹²⁴

Social workers and system-based victim advocates are similar, if not the same, and should be treated similarly. A victim advocate has been defined as a type of social worker who provides support to crime victims, and many advocates hold a bachelor's or master's degree in social work.¹²⁵ Although it is not required for system-based advocates to get a degree in social work, many pursue it because they can learn "about the fundamentals and complexities of macro-level systems that affect victim advocacy, as well as strategies for counseling and other services that can help survivors."¹²⁶

122. N.Y. C.P.L.R. § 4508 (McKinney 2004); see Dianne S. Landi, *New York Psychologists and Social Workers: Confidentiality and Professional Malpractice*, 32 CATH. LAW. 139, 139 (2017).

123. See Landi, *supra* note 122, at 140.

124. See *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996).

125. See *How to Become a Victim Advocate*, ONLINE MSW PROGRAMS (Jan. 2022), <https://www.onlinemswprograms.com/careers/how-to-become-a-victim-advocate/>.

126. *Id.*

Even if the system-based advocate did not study social work in school or is not a licensed social worker, their duties overlap in a variety of ways. For example, like system-based advocates, social workers assess and advocate for their clients' needs, find resources, respond to crises, and help clients adjust to changes in their lives.¹²⁷ In fact, social work is so tightly knit to victim advocacy that, from 1999 to 2002, the U.S. Department of Justice, Office for Victims of Crime funded the Victims of Crime: A Social Work Response: Building Skills To Strengthen Survivors Project. One of the main objectives of this project was to develop the links between social workers and victim assistance in the criminal justice system, encouraging the two to work together to provide support for victims.¹²⁸

The professions of social work and victim advocacy are inextricably linked—they both rely on deeply personal communications with their clients and victims, which are based on solid foundations of trust. The Federal Government and the New York State Legislature recognize the importance of privileged communications and therefore do not compel disclosure for social workers to support their clients. Since system-based victim advocates have either the same education as social workers or are licensed social workers, share the same duties as social workers, and since the Department of Justice developed the links between the two fields, system-based advocates should be treated the same as social workers under the law. The only real difference between the two is their employers, with system-based victim advocates working alongside prosecutors. To promote legal consistency, system-based victim advocates and victims' private communications should be confidential like those between social workers and clients. Unless a prosecutor is made aware of the communications, either by directly observing them or indirectly obtaining them, the confidential relationship remains intact. To be clear, the prosecution could not misuse statements made by a victim against a criminal defendant because they would not be aware of their existence—privacy is key.

B. Analogies to Domestic Violence Advocates

NY CPLR section 4510 provides that “[a] rape crisis counselor or domestic violence advocate shall not be required to disclose a

127. See Fran Danis, *The Victim Assistance Field and The Profession of Social Work*, OVC BULL. 3 (Mar. 2006), <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/publications/bulletins/NASWvictimassistance/ncj210592.pdf>.

128. See *id.* at 2.

communication made by his or her client to him or her”¹²⁹ Admittedly, there are differences between domestic violence advocates, who are a type of community-based victim advocate, and system-based victim advocates. Community-based advocates provide services to victims, regardless of whether the victim reported a crime or whether a criminal case exists at all; the services exist before, during, and after a criminal case.¹³⁰ Despite these differences in services, system-based advocates and community/domestic violence advocates have the same goals: protecting victims’ rights, providing emotional support, and enhancing victims’ safety. Again, the only meaningful difference between the two is their employers, with system-based advocates working for the prosecutor’s office and community-based advocates working in independent, often non-profit organizations.¹³¹

When the legislature enacted NY CPLR section 4510, Senator James Sanders recognized that “[e]stablishing in the law a domestic violence advocate-victim privilege [was] long overdue to help address domestic violence by promoting safety, healing and justice for its victims.”¹³² The same is true for system-based advocates who promote safety, healing, and justice for victims navigating the criminal justice system. Like their community-based counterparts, system-based victim advocates’ private communications with victims should be privileged and remain confidential.

CONCLUSION

System-based advocates currently operate under the same discovery obligations as prosecutors merely because they are on the prosecutor’s team. Despite their roles being more similar to social workers and other types of advocates who have federal and state privilege against compelled disclosure, system-based advocates must turn over any communications, notes, and observations they make during their time with victims to the prosecution and ultimately the defense.

However, one of the fundamental aspects of the criminal justice system is to protect victim’s rights and provide them some sort of redress under the law. New York State must create legislation that

129. N.Y. C.P.L.R. § 4510(b) (McKinney 2021).

130. *See System-Based and Community-Based Advocacy—The Need for Both*, *supra* note 56.

131. *See id.*

132. Nick Reisman, New Law Bolsters Privacy for Domestic Violence Victims, *Spectrum News* 1 (Jul. 26, 2021, 5:11 AM), <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2021/07/26/new-law-bolsters-privacy-for-domestic-violence-victims>.

provides victims a right to privacy and privileges all private, meaning outside the ears of the prosecutor and others, communications between system-based victim advocates and victims. Not only will this encourage disclosure and therefore be healing for victims, but it also allows victims to organize their memories. Organized, accurate memories are essential to seeking truth in a trial. Furthermore, New York State has been a leader in victims' rights legislation, and it must continue to be a leader in this area. Without a strong foundation of trust, system-based advocates cannot effectively encourage each victim they work with to engage with the criminal justice system. Establishing privilege for victims and system-based advocates is long overdue to help promote healing and justice for victims.