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The Scope of the Physician-Patient Privilege in Criminal Actions: A New Balancing Test: *People v. Florendo*, 92 Il. 2d 155, 447 N.E.2d 282 (1983)

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The Scope of the Physician-Patient Privilege In Criminal Actions: A New Balancing Test

People v. Florendo, 92 Ill. 2d 155, 447 N.E.2d 282 (1983)

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I. INTRODUCTION

At common law there was no physician-patient privilege for confidential information imparted in the course of the medical relationship.¹ However, beginning with New York in 1828,² most states have enacted statutes that protect disclosures made in the course of the

1. E. CLEARY, HANDBOOK OF ILLINOIS EVIDENCE § 10.20 (2d ed. 1963); MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 98 (E. Cleary 2d ed. 1972); 8 J. WIGMORE, EVIDENCE § 2380 (McNaughton rev. 1961).

2. II N.Y. REV. STATS., pt. III, ch. 7, tit. 3, art. 8, § 73 (1829). The New York statute served as a model for many other states and provided that:

No person duly authorised (sic) to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him, as a surgeon.

physician-patient relationship.³

The usual policy justification for the privilege is that it promotes the general health and welfare by assuring that the intimate details a patient reveals to his or her physician will not be disclosed to the general public to the patient's humiliation, embarrassment, or disgrace.⁴ Thus, patients will not hesitate to seek medical attention and to give the physician all possible relevant information.⁵

Another justification for the privilege is that it protects doctors from the possible legal consequences arising from conflicts between the professional ethical duty of silence and the legal duty of disclosure.⁶ Furthermore, at least one commentator has asserted that the real force underlying the privilege is the pressure exerted on legislatures by the medical profession's "natural repugnance to becoming the means of disclosure of a personal confidence."⁷ In addition, others have justified the privilege on the basis of the special fiduciary relationship between a doctor and patient and a "theory of community outrage and repugnance at having one's physician act against his patient's interest."⁸ As a result, there is a limit the community places on a search for truth when a medical relationship intervenes. Thus, legislatures have recognized that in certain instances the needs of justice will be subrogated to the privacy rights of patients via invocation of the physician-patient privilege.⁹

One of the latest states to adopt the physician-patient privilege was

3. 8 J. WIGMORE, *supra* note 1, at § 2380 n.5 (compiles and quotes relevant parts of these statutes). See also Note, *The Physician-Patient Privilege*, 56 NW. U.L. REV. 263, 264 n.6 (1961).

4. Note, *supra* note 3, at 266.

5. In justifying establishment of the privilege, the New York Commissioners on Revision stated that "unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art . . ." III N.Y. REV. STATS. 737 (2d ed. 1836). See also *Edington v. Mutual Life Ins. Co.*, 67 N.Y. 185, 194 (1876), reflecting that the New York statute:

[I]s a just and useful enactment, introduced to give protection to those who were in [the] charge of physicians from the secrets disclosed to enable them properly to prescribe for diseases of the patient. To open the door to the disclosure of secrets revealed on the sick bed, or when consulting a physician, would destroy confidence between the physician and the patient, and, it is easy to see, might tend very much to prevent the advantages and benefits which flow from this confidential relationship.

6. See *supra* note 4 (fear of perjury when called upon to testify). See also III N.Y. REV. STATS. 737 (2d ed. 1836): "[D]uring the struggle between legal duty on the one hand, and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will, in most cases, furnish a temptation to the pervasion or concealment of truth, too strong for human resistance."

7. 8 J. WIGMORE, *supra* note 1, at § 2380(a).

8. Note, *supra* note 3, at 267.

9. *Id.*

Illinois.¹⁰ A recent case heard by the Illinois Supreme Court tested the scope of this privilege.¹¹ Although the Illinois statute is similar to many other states' statutes, in that it allows for fairly broad application aside from certain enumerated exceptions,¹² the court construed the statute narrowly so as to exclude application of the privilege where the names of women visiting an abortion clinic were subpoenaed by a grand jury. This Article will review the analysis of the Illinois Supreme Court in *People v. Florendo*,¹³ and discuss its relation to the general physician-patient privilege adopted in most jurisdictions.

II. FACTS AND DISPOSITION OF THE CASE

On February 21, 1979 an Illinois grand jury issued a subpoena duces tecum ordering Dr. Regalado Florendo, as president of the Michigan Avenue Medical Center, to produce medical, billing, and receipt records for thirty-four listed "case numbers" and thirteen named individuals.¹⁴ The information sought concerned patients who had received public aid in obtaining treatment at the Medical Center. The defendant subsequently made a motion to quash the subpoena based on his interpretation of the physician-patient privilege.¹⁵ In response, the trial court ruled that the scope of the subpoena included only pho-

10. ILL. REV. STAT. ch. 51, § 5.1 (1979). The first version of this Act was adopted in 1959. This statute provides:

No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve such patient, except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in actions, civil or criminal, against the physician for malpractice, (3) with the expressed consent of the patient, or in case of his or her death or disability, of his or her personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his or her life, health, or physical condition, (4) in all actions brought by or against the patient, his or her personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his or her estate wherein the patient's physical or mental condition is an issue, (5) upon an issue as to the validity of a document as a will of the patient, (6) in any criminal action where the charge is either murder by abortion, attempted abortion or abortion, (7) in actions, civil or criminal, arising from the filing of a report in compliance with the "Abused and Neglected Child Reporting Act", approved June 26, 1975 or (8) to any department, agency, institution or facility which has custody of the patient pursuant to State statute or any court order of commitment.

11. *People v. Florendo*, 95 Ill. 2d 155, 447 N.E.2d 282 (1983).

12. ILL. REV. STAT. ch. 51, § 5.1 (1979). See *supra* note 10 for a listing of the eight exceptions to the physician-patient privilege.

13. 95 Ill. 2d 155, 447 N.E.2d 282 (1983).

14. The subpoena commanded the defendant to produce "'any and all medical records including but not limited to treatment, correspondence and billing and receipt records'. . . ." *Id.* at 602, 420 N.E.2d at 507.

15. The defendant apparently placed the requested documents in the custody of the

tocopies of the patient's identification cards, resulting in disclosure of their names.

The defendant refused to disclose the names of the women treated at the Medical Center. He felt that to do so would necessarily reveal other privileged information regarding their treatment, since the Center only provided abortion related services. The trial court rejected the defendant's argument and issued an impounding order for the documents. The appellate court affirmed the trial court's ruling based on its conclusion that "the public's interest in maintaining the power of the grand jury" outweighed the patients' interest in avoiding revelation of their identities.¹⁶ On appeal to the Illinois Supreme Court, the majority affirmed the appellate court decision and held that the subpoena did not violate the physician-patient privilege.¹⁷

III. ANALYSIS

In reaching its decision in *Florendo*, the Illinois Supreme Court applied a balancing test whereby the individual's interest "in maintaining confidentiality in his or her dealings with a physician"¹⁸ was weighed against the public interest "in maintaining the breadth of the grand jury's power to conduct investigations necessary to ferret out criminal activity."¹⁹ The court noted that the grand jury's power should be afforded "the broadest scope possible" consistent with constitutional limitations, and therefore held that the balance in the present case favored the public interest.²⁰ The court based its decision on four arguments. First, the "plain meaning" of the statute limits application of the privilege to information necessary to enable a physician to render professional services. Since "mere identification" is not required for treatment it falls outside its scope. Second, courts reaching a contrary result have involved civil proceedings and are therefore distinguishable from the present controversy. Third, any intrusion on the women's privacy rights will be minimal and will be safeguarded sufficiently by the peculiar nature of the grand jury investigation. Fourth, the women affected had received public-aid funds to help pay for their treatment and had impliedly waived the privilege to a significant extent. Close scrutiny of the relevant authorities, however, renders the court's reasoning unpersuasive in light of the extreme

trial court for safekeeping while the case proceeded in the lower courts. *Id.* at 602 n.1, 420 N.E.2d at 507 n.1.

16. *Id.* at 157, 447 N.E.2d at 283 (quoting *People v. Florendo*, 95 Ill. App. 3d 601, 605, 420 N.E.2d 506, 509 (1981)).

17. *Id.* at 155, 447 N.E.2d at 282 (quoting *People v. Bickham*, 89 Ill. 2d 1, 6, 431 N.E.2d 365, 368 (1982)).

18. *Id.* at 158, 447 N.E.2d at 284.

19. *Id.*

20. *Id.* at 159, 447 N.E.2d at 284 (quoting *People v. Dorr*, 47 Ill. 2d 458, 462, 265 N.E.2d 601, 603 (1970)).

personal intrusions that might result and the legislative policy underlying the privilege. Therefore, the remaining sections of this Article will examine each of the above arguments in some detail.

1. The Illinois Statute May be Interpreted to Protect Disclosure of Patients' Names

The statute creating the Illinois physician-patient privilege provides: "No physician or surgeon shall be permitted to disclose any information he may have acquired in attending any patient in a professional character, necessary to enable him professionally to serve such patient" ²¹ The statute then lists eight exceptions to the privilege, none of which were found applicable to the present case. ²² Based on a narrow interpretation of this statute, the State argued successfully that "the privilege has no application when, as here, the only thing sought from the physician are [sic] the names of his patients." ²³ The State relied on a 1979 appellate court decision, *Geisberger v. Wil-luhn*, ²⁴ wherein the appellate court held that disclosure of the patient's name alone did not violate the privilege since a "physician need not know the name of the patient in order to treat him" ²⁵

21. ILL. REV. STAT. ch. 51, § 5.1 (1979).

22. *People v. Florendo*, 95 Ill. 2d 155, 158, 447 N.E.2d 282, 284 (1983). See also *supra* note 10 for a list of the eight exceptions. The appellate court briefly considered and rejected application of exceptions (2) and (6) to the present circumstances. Exception (2) applies to physician malpractice actions. The court noted that "the state does not indicate its basis for asserting that a malpractice action is involved here" and therefore found this exception to be inapplicable. Exception (6) applies to criminal actions where the charge is either murder by abortion, attempted abortion, or abortion. The court rejected application this exception because the vague nature of the subpoena prohibited a presumption that the investigation involved a criminal action for abortion. *People v. Florendo*, 95 Ill. App. 3d 601, 603-04, 420 N.E.2d 506, 507-08 (1981).

23. *People v. Florendo*, 95 Ill. App. 3d 601, 604, 420 N.E.2d 506, 508 (1981).

24. 72 Ill. App. 3d 435, 390 N.E.2d 945 (1979). In this case, a patient brought an action against his physician for disclosure of his name to the police in connection with an armed robbery. Count X of patient-plaintiff's complaint alleged that the disclosure of his name by the doctor's employee constituted a breach of the physician-patient privilege established by statute. Count XI alleged that the disclosure of the plaintiff's name constituted a breach of an implied contract not to divulge confidential information acquired through the physician-patient relationship. This implied contract was alleged to arise out of custom and usage in the community, the statutory physician-patient privilege, and the Hippocratic Oath and Canons of Medical Ethics. Count XII alleged that the disclosure constituted an invasion of privacy. *Id.* at 436, 390 N.E.2d at 946.

25. *Id.* at 437, 390 N.E.2d at 947. The court relied on the authority of CORPUS JURIS SECUNDUM: "the privilege exists as to, and only as to, information necessary to enable the physician to act or serve in a professional capacity, that is, to information necessary to act or prescribe for patient, or diagnose or treat his ailments" 97 C.J.S. *Witnesses* § 295b(2) (1957). However, the court distinguished cases such as *Geisberger* where the circumstances surrounding the disclosure of patients' names necessarily revealed privileged information regarding their treat-

In the present case, the defendant agreed that as a general proposition a patient's name is not per se privileged,²⁶ but countered that in certain instances a name may be privileged if its disclosure inevitably leads to revelation of other traditionally privileged information.²⁷ Therefore, the defendant argued that the names ordered by the subpoena were privileged since the patients involved were treated at a clinic offering exclusively abortion-related services.²⁸

The Illinois Supreme Court, however, rejected straightforward application of the statutory physician-patient privilege to such cases. Instead, it established what appeared to be a conditional privilege for disclosure of patient names.²⁹ The court ruled that patient names would not be privileged whenever the public interest in elimination of criminal activity outweighed the individual's interest in confidentiality of medical dealings.³⁰ It is important to note that such a balancing test was only applied to disclosure of patient names and not to any other traditionally privileged information. Although the court offered several policy arguments justifying its special treatment of patient names,³¹ the primary reason was to enable the grand jury to locate potential witnesses and obtain waivers of the physician-patient privilege in order to obtain other medical information.³²

An alternative position proposed by the defendant and adopted by

ment. *Geisberger v. Willuhn*, 72 Ill. App. 3d 435, 437, 390 N.E.2d 945, 947 (1979). The fundamental difference was illustrated by the following quote from *Marcus v. Superior Court*, 18 Cal. App. 3d 22, 25, 95 Cal. Rptr. 545, 547 (1971):

We recognize that the disclosure of the patient's name does not necessarily violate the privilege In the case at bench it is not merely the disclosure of the name and address, but the joining of that information with the limitation in the question that these were patients who had received the specified tests.

26. The dissent, however, notes that the defendant's brief may be read not to concede this point but rather to argue that in cases such as the present one, patient's names should be privileged. *People v. Florendo*, 95 Ill. 2d 155, 165, 447 N.E.2d 282, 287 (1983) (Simon, J., dissenting).
27. *Id.* at 160, 447 N.E.2d at 285. This position has been adopted by a number of other courts. See, e.g., *Rudnick v. Superior Court*, 11 Cal. 3d 924, 523 P.2d 643, 114 Cal. Rptr. 603 (1974); *Marcus v. Superior Court*, 18 Cal. App. 3d 22, 95 Cal. Rptr. 545 (1971); *Schechet v. Kesten*, 372 Mich. 346, 126 N.W.2d 718 (1964).
28. In a similar case, a California court recognized that "persons do not ordinarily consult physicians from idle curiosity." *Marcus v. Superior Court*, 18 Cal. App. 3d 22, 24, 95 Cal. Rptr. 545, 547 (1971). Thus, the *Marcus* court held that disclosure of patients' names and addresses, in a context that necessarily revealed information concerning their condition or the physician's diagnosis, was protected by the physician-patient privilege. *Id.*
29. This is not a "conditionally privileged communication" in the sense the term is used in certain tort law contexts. Rather the term "conditional privilege" here refers to a privilege whose application is dependant on the presence of a predetermined set of circumstances.
30. *People v. Florendo*, 95 Ill. 2d 155, 447 N.E.2d 282 (1983).
31. These policy arguments will be discussed in the remaining sections of this Article.
32. *Id.* at 161, 447 N.E.2d at 285.

a number of other courts provides that, at least in certain contexts, disclosure of patient names should be protected under the traditional statutory physician-patient privilege. If this view is followed, there is no need to apply a balancing test since the legislature has already defined the scope of the privilege, which leaves no room for judicial discretion.³³ It may be argued that such a view more closely effectuates the avowed purpose of the privilege: "to encourage free disclosure between the physician and the patient and to protect the patient from the embarrassment and invasion of privacy that disclosure would entail."³⁴

In his comprehensive dissent, Judge Simon took this alternative position one step further. He contended that it is unrealistic to conclude that a patient's name is not in the first instance necessary to enable a physician to professionally serve his or her patient.³⁵ Judge Simon noted that knowledge of the patient's name is necessary to prescribe medication as well as for many other routine medical dealings.³⁶ Therefore, he concluded logically that disclosure of the patient's name was protected by the "plain meaning" of the statute.³⁷

33. Such a view has had support from one commentator who notes that "exceptions to the physician-patient privilege are within the legislative domain since the legislature is the exponent of both the privilege and its exceptions." Note, *Physician-Patient Privilege Prevents Disclosure of Patient's Identity to Grand Jury Homicide Investigation*, 58 ST. JOHN'S L. REV. 434, 439 (1984).

34. *People v. Herbert*, 108 Ill. App. 3d 143, 149 438 N.E.2d 1255, 1259 (1982).

35. *People v. Florendo*, 95 Ill. 2d 155, 165-66, 447 N.E.2d 282, 287 (1983) (Simon, J., dissenting).

36. *Id.* Judge Simon noted, for example:

If it became necessary during the abortion to transfer a patient to a hospital, how could that be accomplished if defendant did not know her name? If for some reason it was necessary to impart information about the patient's condition to the patient, how could that be done if the defendant did not have her name or at least her address or telephone number? A physician who performed a surgical procedure without knowing how to identify his patient for admission to a hospital, who to contact in case an emergency arose or how to contact the patient later if it were necessary to do so would be guilty of extremely sloppy practice, if not malpractice. This is particularly true, I should think, in the case of a surgical procedure such as an abortion.

Id.

37. ILL. REV. STAT. ch. 51, § 5.1 (1979), provides that the privilege shall extend to "any information [a physician] may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve such patient . . ."

The Michigan Supreme Court has interpreted a similar statute to extend the physician-patient privilege to names and treatment of patients who were not parties to the action:

The statute imposed an absolute bar. It protects "within the veil of privilege," whatever in order to enable the physician to prescribe, "was disclosed to any of his senses, and which in any way was brought to his knowledge for that purpose . . ." It prohibits the physician from disclosing, in the course of any action wherein his patient or patients are

The majority apparently rejected both these alternative views and instead adopted a new rule whereby (at least in criminal cases) patients' names will not be privileged, regardless of the surrounding circumstances, unless the court first determines that the public interests involved do not outweigh the individual's interests. This is contrary to the public policy recognized by the Illinois legislature in adopting the statute creating the privilege that "assured patients of confidentiality in relationships with their physician, as superior to the requirements of the investigation."³⁸

2. There Is No Legislative Authority for Applying the Privilege Differently In Criminal Cases

The Illinois Supreme Court distinguished the present case from other cases that have applied the physician-patient privilege to protect disclosure of patient names on the basis that these other cases involved civil rather than criminal controversies.³⁹ The court thereby appeared to establish different standards for extending the scope of the privilege in criminal versus civil actions. Although the court does not set out these standards clearly, it hinted at a stricter standard for criminal cases based on "the public's interest in the investigation of criminal activities"⁴⁰

The underlying legislative policy of the privilege, however, applies equally to civil and criminal cases. In establishing the privilege, the Illinois legislature recognized the patient's interest in maintaining confidentiality in dealings with a physician.⁴¹ Furthermore, it has been noted that "there is nothing inherent in the nature of a criminal action to indicate that the legislature intended that the privilege should not apply to such actions."⁴² Therefore, since there is nothing in the language of the Illinois statute that limits the privilege to civil cases, there is no reason to infer a legislative intent to differentiate

not involved and do not consent, even the names of such non-involved patients.

Schechet v. Kesten, 372 Mich. 346, 351, 126 N.W.2d 718, 720-21 (1964).

38. *People v. Calvo*, 89 Ill. 130, 137, 432 N.E.2d 223, 226 (1982).

39. *See, e.g., supra* note 27.

40. *People v. Florendo*, 95 Ill. 2d 155, 161, 447 N.E.2d 282, 285 (1983). The court noted that the public has an interest "in maintaining the breadth of the grand jury's power to conduct investigations necessary to ferret out criminal activity This power should be accorded 'the broadest scope possible' consistent with constitutional limitations." *Id.* at 158-59, 447 N.E.2d at 284 (quoting *People v. Dorr*, 47 Ill. 2d 458, 462, 265 N.E.2d 601, 608 (1970)). *See also* *People v. Herbert*, 108 Ill. App. 3d 143, 150, 438 N.E.2d 1255, 1259 (1982) ("Society's interests are thus best served by a thorough and broad investigation. The grand jury must pursue all available clues and examine all witnesses.").

41. *People v. Herbert*, 108 Ill. App. 3d 143, 438 N.E.2d 1255 (1982).

42. 7 A.L.R.3d 1460 (1960).

criminal applications.⁴³

Other courts have recognized that the physician-patient privilege may act as an obstacle in the fact-finding process, yet have declined to apply the privilege differently in criminal cases. Accordingly, in upholding application of the privilege in a medical malpractice action, the New Jersey Superior Court noted that:

[T]his Court is constrained to hold that the policy behind the physician-patient privilege is of greater weight than the evidence it makes unavailable None of the statutory exemptions from and exceptions to the privilege evince any legislative intention to subordinate the benefits which inure to the relationship of patient-physician from the privilege to any countervailing benefit to society⁴⁴

Similarly, in *People v. Bickham*,⁴⁵ the Illinois Supreme Court held that the statute providing for the physician-patient privilege in Illinois shielded a doctor's records from the State's demand for production in connection with a criminal investigation. In reaching that conclusion, the *Bickham* court recognized that the legislative policy behind the statute placed the confidentiality of the medical relationship above the evidentiary requirements of a criminal investigation.⁴⁶

Such reasoning seems equally persuasive in the present case, wherein the issue is whether to extend application of the privilege to protect disclosure of patients' names in a criminal investigation. Since the Illinois Supreme Court implied that the privilege may be extended to protect such information in certain cases,⁴⁷ it should have looked to the established legislative policy to guide its analysis. Furthermore, as discussed above, there is no statutory justification for the court's unique handling of the privilege in criminal cases. On the contrary, it appears that the legislature intended the privilege to apply broadly in

43. See ILL. REV. STATS. ch. 51, § 5.1 (1979).

44. *Osterman v. Ehrenworth*, 106 N.J. Super. 515, 518, 256 A.2d 123, 126-27 (1969). Thus the *Osterman* court upheld application of the privilege to prevent disclosure of names and addresses of third persons not participating in the litigation, as well as other information regarding the nature of their treatment.

45. 89 Ill. 2d 1, 431 N.E.2d 365 (1982).

46. *Id.* at 4, 431 N.E.2d at 368. Once the legislature has spoken and established a policy regarding a particular issue, judges should defer to that legislative determination rather than proceed with an independent analysis. Thus, in another recent decision, the Illinois Supreme Court recognized that the policy supporting legislative creation of the privilege may serve to restrict investigation in a criminal as well as civil case:

In *Bickman* we held that the statute providing for the physician-patient privilege in Illinois shielded a doctor's records from the State's demand for production in connection with a criminal investigation. In reaching that conclusion we regarded the public policy recognized by the legislature in adopting the statute, which assured patients of confidentiality in relationships with their physician, as superior to the requirements of the investigation.

People v. Calvo, 89 Ill. 2d 130, 137, 432 N.E.2d 223, 226 (1982).

47. *People v. Florendo*, 92 Ill. 2d 155, 158, 447 N.E.2d 282, 284 (1983).

all cases to encourage and protect free disclosure in the physician-patient relationship.

3. Disclosure of Patient Names Violates Privacy Rights

In reaching its decision, the Illinois Supreme Court disregarded the defendant's argument that disclosure of the information sought would infringe impermissibly on the women's constitutional right to privacy and concluded that any resulting intrusion would be minimal.⁴⁸ This conclusion was based on the secrecy attendant to grand jury proceedings and the fact that once contacted, the women could refuse to disclose any further information. However, in his dissent, Judge Simon convincingly rebutted the majority's analysis, noting that: "[T]he women involved may be apprehensive that members of the grand jury or court personnel serving the grand jury and having access to their names in that capacity may be their neighbors, acquaintances or prospective employers."⁴⁹ Judge Simon therefore disagreed with the majority's contention that the resulting intrusion on the privacy of the women involved would be minimal. He argued that:

Obviously the only reason the grand jury would need the names is so that the women could be contacted. There is no way of knowing where the grand jury investigation might lead and what impact it may have on the lives of the women whose names are furnished and their families The consequences of the majority opinion can be catastrophic, uprooting lifestyles and shattering relationships.⁵⁰

48. *Id.*

49. *Id.* at 159, 447 N.E.2d at 286 (Simon, J., dissenting). Similarly, in *People ex rel Dept. of Pub. Health v. Calvo*, 89 Ill. 2d 130, 133, 432 N.E.2d 223, 225 (1982), the Illinois Supreme Court recognized that there is no "guarantee that some of the personnel in the State's Attorney's office or the grand jurors may not be acquainted with persons whose names might be exposed, thus causing embarrassment to those persons." In *Calvo*, the grand jury requested documents disclosing names and other information regarding patients who had been treated for venereal disease. The court held that the documents could not be released based on a statute specifically protecting the confidentiality of records regarding venereal disease. ILL. REV. STATS. ch. 126, § 21 (1979).

50. *People v. Florendo*, 95 Ill. 2d 155, 159, 447 N.E.2d 282, 286 (1983) (Simon, J., dissenting). Judge Simon provided the following illustrations of how the majority's decision might affect individual women:

Consider the trauma a young, unmarried woman would suffer when she is called upon at her parents' or relatives' home by process servers seeking to subpoena her appearance before the grand jury for the purpose of asking her if she would be willing to waive her physician-patient privilege? Or, consider the case of a married woman whose husband does not know she had an abortion, but finds out when the process server appears at their home to summon her before the grand jury only for the purpose of inquiring whether she would be willing to waive her privilege This is a strange way of investigating whether there have been criminal violations and in fact smacks more of harassment than an investigation carefully and professionally conducted and which the prosecuting authorities have reason to believe is likely to be productive.

It is generally accepted that courts have the power (and perhaps duty) to supervise the use of grand jury subpoenas to gain testimony and evidence in the course of investigations.⁵¹ This power is said to be derived "from the penumbras of the Fourth Amendment's proscription against unreasonable searches and seizures . . . as well as from the court's inherent ability to supervise the use of process to compel the presence of witnesses, and to oversee the grand jury which it empanels."⁵² In *Florendo*, there was no showing of why the grand jury needed the ordered names or even of the general nature of the criminal charges involved.⁵³ This defect was recognized by the appellate court, which indicated its concern regarding "the confusion caused in this and possibly other cases by the failure of the grand jury to specify the object of its investigation on the face of the subpoenas"⁵⁴ However, both the appellate court and the Illinois Supreme Court on review failed to question the grand jury's need for the information sought. Instead, the majority granted broad deference to the investigatory function of the grand jury without judicial supervision.

Such unchecked deference to the grand jury seems unjust and improper in the present case. The court justified its position by applying a balancing test whereby the state's general interest in "maintaining the breadth of the grand jury's power to conduct investigations necessary to ferret out criminal activity" is weighed against the patient's interest in "maintaining confidentiality in his or her medical dealings with a physician."⁵⁵ Here, the scales were deemed to tip in favor of the state's criminal investigatory interest. It is, however, submitted that the court's conclusion was faulty since it underestimated the weight of the patient's privacy interest in light of recent case law.

Once again, it is important to consider that the underlying legislative purpose of the privilege is to protect patients from the embarrassment and invasion of privacy that disclosure may entail.⁵⁶ Furthermore, in addition to the statutory basis for protecting such information, there is a general constitutionally protected privacy right that should be considered. Accordingly, the United States Supreme Court has held that although the Constitution does not explicitly mention any right of privacy, "a right of personal privacy, or a guarantee of

Id.

51. *In re Seiffert*, 446 F. Supp. 1153, 1155 (N.D.N.Y. 1978).

52. *Id.* In a footnote, the majority noted that "[t]he Third Circuit Court of Appeals has taken the position that the court must, in every case, *whether or not a motion to quash has been filed*, satisfy itself of the propriety of a grand jury subpoena." *Id.* at 1155 n.5.

53. *People v. Florendo*, 95 Ill. 2d 155, 447 N.E.2d 282 (1983).

54. *People v. Florendo*, 95 Ill. App. 3d 601, 603 n.2, 420 N.E.2d 506, 507-08 n.2 (1981).

55. *People v. Florendo*, 95 Ill. 2d 155, 158, 447 N.E.2d 282, 286 (1983).

56. *See supra* note 34. *See also* MCCORMICK, *supra* note 1, at § 98, at 213.

certain areas or zones of privacy does exist under the Constitution."⁵⁷ The roots of this right have been found in the first, fourth, fifth, and ninth amendments, in the penumbras of the Bill of Rights, and in the concept of liberty guaranteed by the fourteenth amendment.⁵⁸

In particular, as regards compelled disclosure of confidential personal information or documents, courts have looked to the privacy protections of the first and fourth amendments. For example, in *N.A.A.C.P. v. Alabama*,⁵⁹ the Supreme Court protected "the freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral first amendment right.⁶⁰ In that case, the Court held that disclosure of membership lists of a constitutionally valid association was impermissible "as entailing the likelihood of a substantial restraint upon the exercise of petitioner's members of their right to freedom of association."⁶¹ Similarly, the Court has protected other forms of "association" that are less political in nature, and pertain to the social, legal and economic benefit of the members.⁶² The right of "association" has been interpreted broadly to mean more than a right to attend a meeting; it includes the right of individuals to express their "attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means . . . [or by a] form of expression of opinion"⁶³ Furthermore, the Court recognized that compelled disclosure of an organization's membership lists "may induce members to withdraw from the association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure."⁶⁴ Thus, the Court has expressly determined that "the First Amendment has a penumbra where privacy is protected from governmental intrusion."⁶⁵

Such reasoning is equally applicable to the facts in *Florendo*. Here, as in *N.A.A.C.P. v. Alabama*,⁶⁶ compelled disclosure is likely to substantially restrain individuals from "associating" with the group, here, an abortion clinic. Since affiliation with such an organization is lawful and has been impliedly protected by the Supreme Court,⁶⁷ it seems a violation of the women's privacy to reveal their identities. Unless wo-

57. *Roe v. Wade*, 410 U.S. 113 (1973).

58. *Id.*

59. 357 U.S. 449 (1958).

60. *Id.*

61. *Id.*

62. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

63. *Id.*

64. *Id.*

65. *Id.*

66. 357 U.S. 449, 463 (1958).

67. See *Roe v. Wade*, 410 U.S. 113 (1973). The Court noted that the privacy right encompassed a woman's decision whether or not to terminate her pregnancy. A logical extension of this reasoning requires that women feel free to seek physi-

men seeking abortion services or advice are assured that their affiliation or relationship with an abortion clinic or specialist will be kept in the utmost confidence, they are likely to avoid such facilities. Accordingly, the dissent in *Florendo* concluded:

[T]he majority opinion will chill the exercise of the constitutional right recognized in *Roe v. Wade* . . . to seek abortions. Women may in many instances decide to forego an abortion rather than risk the possibility that their names will be exposed to a grand jury in connection with seeking an abortion.⁶⁸

Such reasoning is strikingly similar to that applied by the Supreme Court to quash the production order for membership lists in *N.A.A.C.P. v. Alabama*:

[W]e think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of the petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.⁶⁹

In addition to the first amendment privacy right discussed above, the Court has determined that compulsory production of documents may constitute an invasion of the right to privacy protected by the fourth amendment. Under this rule, government investigative activities may violate fourth amendment privacy rights when there is an intrusion into a constitutionally protected "zone of privacy."⁷⁰ In such constitutionally protected areas, the Court has recognized a "reasonable expectation of privacy" as a sufficient foundation for assertion of fourth amendment protection against an unreasonable search and seizure by the government.⁷¹ Only a compelling state interest will justify such intrusion into an individual's privacy rights.⁷²

The present case does involve intrusion into a constitutionally protected "zone of privacy" as determined by the Court: "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁷³ Furthermore, it is safe to presume that a majority of women seeking treatment or advice at abor-

cians' advice in making this decision; indeed, such a policy seems desirable to insure that a competent and informed decision is made.

68. *People v. Florendo*, 95 Ill. 2d 155, 166, 447 N.E.2d 282, 287-88 (1983) (citations omitted).

69. *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 462-63 (1958).

70. *United States v. Miller*, 425 U.S. 435 (1976).

71. *Id.* See also *Katz v. United States*, 389 U.S. 347 (1967). In his concurring opinion, Justice Harlan formulated a useful two-pronged test: "First that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 353 (Harlan, J., concurring).

72. *Roe v. Wade*, 410 U.S. 113, 155 (1973) (citing *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969)).

73. *Id.* at 153.

tion clinics have a "reasonable expectation of privacy" regarding this relationship. Thus, the state is required to demonstrate a compelling need for the information before the women's privacy will be impeached. This is not the case here. The state did not demonstrate a compelling need for the names of women treated by the defendant physician. Indeed, the court was not even cognizant of the nature of the grand jury's investigation—much less their reasons for needing the information sought. It is presumed that the grand jury intended to individually contact the women thus identified in the hopes that they might obtain waivers of their physician-patient privilege so as to uncover evidence relating to a criminal investigation of an unspecified nature.⁷⁴ However, such a purpose would not seem to satisfy the compelling need standard necessary to justify such an intrusion into the women's privacy.⁷⁵

Whether one derives the applicable privacy right from the protections of the first, fourth, or any relevant constitutional amendment, it is clear that information relating to a woman's abortion decision falls under a judicially recognized "zone of privacy."⁷⁶ Thus, at the very least, it would be fair to require the state to present proof of a compelling need to intrude into such a sensitive area of these women's lives. This requirement of showing a compelling state interest is especially prudent given the very real chilling effect such a decision may have on women's exercise of their legally protected and personally important abortion decisions. In reaching its decision, the majority in *Florendo* neglected to undertake a full analysis of the women's applicable privacy rights; rather they summarily disposed of the issue based in large part on "the secrecy attendant to grand jury proceedings."⁷⁷ However, only a year previous to this decision, the same court conceded that it was possible that grand jurors would be "acquainted with persons

74. The dissent in *Florendo* noted that "[t]his is a strange way of investigating whether there have been criminal violations and in fact smacks more of harassment than an investigation carefully and professionally conducted and which the prosecuting authorities have reason to believe is likely to be productive." *People v. Florendo*, 95 Ill. 2d 155, 163, 447 N.E.2d 282, 286 (1983) (Simon, J., dissenting).

75. In an earlier case, the Illinois Supreme Court rejected similar evidence as insufficient to justify overriding the privilege:

Here the information is not sought by a criminal defendant to negate his guilt, but rather the prosecutor seeks the information hoping that it will lead to further evidence of guilt. While *Hartel* [*People ex rel. Illinois Judicial Inquiry Board v. Hartel*, 72 Ill. 2d 225, 380 N.E.2d 801 (1978)] may hold that confidentiality can be breached where due process rights required disclosure, the decision cannot be read as holding that the privilege of confidentiality must give way because the State's Attorney seeks protected information in the hopes it will lead him to other evidence.

People ex rel. Dept. of Pub. Health v. Calvo, 89 Ill. 2d 130, 134, 432 N.E.2d 223, 226 (1982).

76. See *Roe v. Wade*, 410 U.S. 113 (1973).

77. *People v. Florendo*, 95 Ill. 2d 155, 161, 447 N.E.2d 282, 285 (1983).

whose names might be exposed, thus causing embarrassment to those persons."⁷⁸ Furthermore, the dissent noted that the grand jury obviously wanted the names in order to personally contact the women and that such contact might prove very intrusive to the women.⁷⁹

Therefore, even if the court did not consider patients' names protected under the statutory physician-patient privilege, such compelled disclosure necessarily revealing the women's abortion-related activities was prohibited by the constitutionally based right of privacy. Thus, the court should have required a finding of compelling state interest before overriding the women's privacy rights and demanding disclosure of their identities.

4. Public-Aid Recipients Do Not Waive Their Rights to Confidentiality

A final justification the *Florendo* majority offered in support of its decision was based on the patients' status as public-aid recipients. The majority noted that since the women used funds from the Department of Public Aid to help pay for their treatment, their names must have already been revealed to that agency.⁸⁰ Thus the court implied that in some sense the women had less reason to expect that their records would be confidential. There is, however, no authority offered to support this conclusion. Accordingly, in his dissent, Judge Simon asserted that:

It is highly discriminatory, in my judgment [sic], to sanction production of the names on the ground that the women were public aid recipients. . . . How one standard of waiver for private patients and another standard for public aid recipients would be appropriate or justifiable I do not understand. The physician-patient privilege contemplates no such dichotomy.⁸¹

IV. CONCLUSION

Since there is no common law physician-patient privilege, a court considering application of the privilege in a particular situation must look to the statutory provisions creating the privilege in that state. In addition, the court should rely on the legislative policies underlying the privilege in interpreting the statute in specific cases. In the present case, however, the Illinois Supreme Court appeared to disregard the legislative purpose of the privilege in establishing a new conditional privilege for disclosure of patients' names. In so doing, the court gave great deference to the alleged fact-finding needs of the grand jury in criminal cases. Thus, it appears that in any future criminal cases a grand jury need only request disclosure of patient names

78. *People ex rel. Dept. of Pub. Health v. Calvo*, 89 Ill. 2d 130, 134, 432 N.E.2d 223, 225 (1982).

79. *See supra* note 50 and accompanying text.

80. *People v. Florendo*, 95 Ill. 2d 155, 158, 447 N.E.2d 282, 285 (1983).

81. *Id.* at 159, 447 N.E.2d at 286-87 (Simon, J., dissenting).

for the court to deny application of physician-patient privilege on the basis of a supervening public interest. Such a result goes against the avowed purpose underlying the legislative establishment of the privilege. It is, therefore, proposed that a better approach is to recognize that in certain contexts (such as in the present case) release of a patient's name may be protected under the statutory physician-patient privilege without initial judicial application of a balancing test.

Furthermore, there is a constitutionally based right of privacy that must be considered. If the desired information relates to a constitutionally protected zone of privacy, the court should not intrude without a showing of compelling state interest. Since there was no such showing in the present case and there was no waiver of the statutorily and constitutionally protected privacy rights attendant to the women's abortion-related activities, the defendant should not have been required to disclose the requested information to the grand jury.

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