

# Rape Victim-Crisis Counselor Communications: An Argument for an Absolute Privilege

*In most jurisdictions, only a limited evidentiary privilege protects the rape victim-rape counselor relationship. As a result, defense attorneys can subpoena counselors to obtain victim's statements and the counselor's impressions. This Comment analyzes the justification for protection, the appropriate scope of the privilege, and the defendant's competing concerns. This Comment concludes that an absolute privilege is essential to prevent erosion of societal interest in protecting the rape victim.*

## INTRODUCTION

Rape<sup>1</sup> is a violent and devastating attack on a woman's<sup>2</sup> physical and emotional well-being.<sup>3</sup> Although the notion that rape is sexually moti-

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<sup>1</sup> The legal definition of rape traditionally has been nonconsensual sexual intercourse with a female not the wife of the perpetrator. *See* Bienen, *Rape III — National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170, 174 (1980). Almost all states have rewritten their rape laws in the past decade. Some have removed gender distinctions, *see, e.g.*, CAL. PENAL CODE § 261 (West Supp. 1984), others broaden the definition of sexual penetration to include conduct other than intercourse, *see, e.g.*, MICH. COMP. LAWS ANN. § 750.520a(1) (Supp. 1984).

<sup>2</sup> Women are overwhelmingly the victims of nonprison rape. Indeed, the historical understanding of rape has focused on women being victimized by dominant males. *See* S. BROWN MILLER, *AGAINST OUR WILL* 7 (1975). Thus, this Comment will use the feminine gender when referring to rape victims and the masculine gender when referring to rapists.

<sup>3</sup> The incidence of rape has reached a staggering level: "[R]ates of forcible rape have more than doubled in this country since 1965. The increase has become even more rapid after 1967, and in the early 1970's the rise in reported rape outstripped that for all other major categories of violent crime." NAT'L INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, 1 FORCIBLE RAPE: A NATIONAL SURVEY OF THE RESPONSES BY POLICE 9 (1977).

The FBI's *Uniform Crime Reports* documents that over 80,000 rapes and attempted rapes occur each year, but all commentators agree that this figure greatly understates the crime. U.S. DEP'T OF JUSTICE, FBI, *CRIME IN THE UNITED STATES* 13 (1981). The FBI's total of 81,536 included attempted rapes reported to the police. However, the FBI recognizes that rape is "one of the most underreported of all Index crimes." *Id.*

vated pervades society, in reality, rape is a vicious act of power and control.<sup>4</sup> Rapists use threats, violence, and brutality to dominate their victims.<sup>5</sup> The immediate physical manifestations of the rape, however,

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at 14. Various commentators and criminologists have calculated that official figures underestimate the true incidence of rape by factors of two to twenty. See Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 5 (1977); Quenneville, *Will Rape Ever Be a Crime of the Past?: A Feminist View of Societal Factors & Rape Law Reforms*, 9 GOLDEN GATE L. REV. 581, 582-83 (1978-1979). One recent rape victimization study found that only 1 in 13 rapes was reported to the police. Russell, *The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females*, 7 VICTIMOLOGY 81, 91 (1983). If this estimate is correct, almost one million rapes occur every year.

<sup>4</sup> Rapists do not seek sexual gratification. Rather, their motivation is primarily domination and humiliation. Much of the sexual gratification achieved results from the use of force and not from sexual intercourse itself. See Kates & Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873, 886 n.52 (1982). Rape should be viewed as a violent act performed in a sexual setting. See M. AMIR, PATTERNS IN FORCIBLE RAPE 150 (1971) ("Rape is a deviant act, not because of the sexual act per se, but rather in the mode of the act, which implies aggression, whereby the sexual factor supplies the motive."); S. BROWNMILLER, *supra* note 2, at 191-97 (contrary to earlier psychological views of deviant sexual behavior, rape research reveals violence-prone individual); C. HURSCHE, THE TROUBLE WITH RAPE 78 (1977) (sexual attractiveness plays no role in attack; violence is primary motivation); D. RUSSELL, THE POLITICS OF RAPE 257-65 (1975) (rape manifests concepts of masculinity and virility); J. SCHWENDINGER & H. SCHWENDINGER, RAPE AND INEQUALITY 21 (1983) (rapist's sexual motives reflect aggression, sadism, and contempt); Abel, Blanchard & Becker, *Psychological Treatment of Rapists*, in SEXUAL ASSAULT 106 (M. Walker & S. Brodsky eds. 1976) (studies show that although rapists do not find intercourse with consenting females erotic, forced sexual contact is highly erotic); Geis, *Forcible Rape: An Introduction*, in FORCIBLE RAPE 28-30 (D. Chappell, R. Geis & G. Geis eds. 1977) (rape symbolic demonstration of masculinity); Holmstrom & Burgess, *Rape and Everyday Life*, SOC'Y, July-Aug. 1983, at 33, 35 (sexuality not rapist's dominant motivation); Krulewitz, *Reactions to Rape Victims: Effect of Rape Circumstances, Victim's Emotional Response, and Sex of Helper*, 29 J. COUNSELING PSYCHOLOGY 645, 645 (1982) (sexual motivation myth has led to blaming victim for rape); Quenneville, *supra* note 3, at 586-87 (rape expresses men's attitude of women as sexual objects); Ross, *The Overlooked Expert in Rape Prosecutions*, 14 U. TOL. L. REV. 707, 708 (1983) (special corroboration requirements for rape convictions product of myth); Note, *Elimination of the Resistance Requirement and Other Rape Law Reforms: The New York Experience*, 47 ALB. L. REV. 871, 873 (1983) (resistance requirement reinforces belief that rape is a sexual act) [hereafter Note, *Resistance Requirement*].

<sup>5</sup> The majority of rapists use some form of force on their victims. One study found that 85% of rapes involved actual violence and that 32% of victims were choked or brutally beaten. M. AMIR, *supra* note 4, at 155-56; see also S. KATZ & M. MAZUR, UNDERSTANDING THE RAPE VICTIM 158-59 (1979) (noting studies indicating that rapists use weapons 21% to 59% of the time). For a discussion of the physical harm caused by rapists, see Kates & Engberg, *supra* note 4, at 885-89, 895-98.

only begin the woman's ordeal.

Rape preys upon the psyche of the individual long after the crime.<sup>6</sup>

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<sup>6</sup> The mental anguish begins when the victim becomes conscious of the impending rape. Most victims perceive the attack as a life-threatening situation. Some may attempt to resist, either with verbal tactics or physical action. Others may become physically or psychologically paralyzed, and thus incapable of warding off the attacker. When rape is unavoidable, the victim often adopts some behavioral strategy designed to cope with the trauma of the attack. Coping strategies include cognitive responses — calmness, thinking of other situations, concentrating on the rapist, verbal tactics — physical action and physiological responses, and psychological defenses such as denial or suppression. See Burgess & Holmstrom, *Coping Behavior of the Rape Victim*, in *THE RAPE VICTIM* 140-50 (D. Nass ed. 1977); see also Ross, *supra* note 4, at 719 (submission is victim's typical coping behavior); Symonds, *The Rape Victim: Psychological Patterns of Response*, 36 *AM. J. PSYCHOANALYSIS* 27, 29-32 (1976) (documenting prevalence of traumatic psychological infantilism — frozen fright — as coping mechanism); Weis & Borges, *Victimology and Rape: The Case of the Legitimate Victim*, in *THE RAPE VICTIM*, *supra*, at 55 (shock, betrayal, and humiliation common emotions experienced during rape).

Researchers have discovered that emotional difficulties stemming from the rape continue for months or even years. See Becker, Skinner, Abel, Howell & Bruce, *The Effects of Sexual Assault on Rape and Attempted Rape Victims*, 7 *VICTIMOLOGY* 106, 111 (1982) (85% of rape victims continued to experience emotional problems one year after assault) [hereafter Becker]; Calhoun, Atkeson & Resick, *A Longitudinal Examination of Fear Reactions in Victims of Rape*, 29 *J. COUNSELING PSYCHOLOGY* 655, 660 (1982) (38% of rape victims experience severe fear reactions one year later) [hereafter Calhoun]; Kilpatrick, Resick & Veronen, *Effects of a Rape Experience: A Longitudinal Study*, 37 *J. SOC. ISSUES* 105, 118 (1981) (fear and anxiety problems continued one year after rape) [hereafter Kilpatrick]; Price, *Rape Victims — The Invisible Patients*, in *THE RAPE VICTIM*, *supra*, at 165 (long term disruptive effects on victim's life). Other studies have found psychological difficulties continuing many years after the rape. See King & Webb, *Rape Crisis Centers: Progress and Problems*, 37 *J. SOC. ISSUES*, 93, 98 (1981) (noting one study reporting 26% of victims felt unrecovered four to six years after rape).

Women experience diverse emotional reactions ranging from "shock, fear, distrust, and anger to guilt, shame, and disgust." *In re Pittsburgh Action Against Rape*, 494 Pa. 15, 38, 428 A.2d 126, 138 (1981) (Larsen, J., dissenting). Recognizing similar emotions in all rape victims, experts view these symptoms as part of the rape trauma syndrome.

Professors Ann Burgess and Lynda Holmstrom first recognized the rape trauma syndrome after extensive interviews with rape victims in Boston. See Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 *AM. J. PSYCHIATRY* 981 (1974) [hereafter Burgess & Holmstrom, *Rape Trauma Syndrome*]; see also Abarbanel, *The Roles of the Clinical Social Worker: Hospital-Based Management*, in *RAPE AND SEXUAL ASSAULT* 145-49 (C. Warner ed. 1980); Notman & Nadelson, *The Rape Victim: Psychodynamic Considerations*, in *THE RAPE VICTIM*, *supra*, at 130-39; Sutherland & Scherl, *Crisis Intervention with Victims of Rape*, in *FORCIBLE RAPE*, *supra* note 4, at 329-38; Weis & Borges, *supra*, at 59-63; Note, *Resistance Requirement*, *supra* note 4, at 904-05 & nn.205 & 208. Emotional reactions to the rape surface in distinct stages. First, in the

Although victims' reactions differ,<sup>7</sup> most experience fear, shame, and self-blame<sup>8</sup> caused by society's misconceptions of rape.<sup>9</sup> Victims frequently consider themselves responsible for the rape, and may wonder

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acute phase, the victim's immediate responses to the attack appear. See Burgess & Holmstrom, *Rape Trauma Syndrome*, *supra*, at 982-83; Kates & Engberg, *supra* note 4, at 899-900; Lenox & Gannon, *Psychological Consequences of Rape and Variables Influencing Recovery: A Review*, *WOMEN & THERAPY*, Spring 1983, at 37, 38-39. Common reactions include disorganization, fear, and shock. See Burgess & Holmstrom, *Rape Trauma Syndrome*, *supra*, at 982-83. Burgess and Holmstrom also note a number of physical reactions in victims, including physical trauma (soreness and bruising), skeletal muscle tension, gastrointestinal irritability, and genitourinary disturbance (vaginal discharge, itching, and infections). *Id.* Victims' emotional reactions may include denial of the attack or a disbelief of the encounter. The outward appearance of these various emotions fluctuates greatly: at times the victim appears calm, and at other times the victim approaches hysteria. See Abarbanel, *supra*, at 145-46; Lenox & Gannon, *supra*, at 39.

After the acute phase subsides, usually within a few days or weeks, see Lenox & Gannon, *supra*, at 39 (normally lasting 24 to 48 hours after the rape), a reorganization phase begins, see Abarbanel, *supra*, at 147-49; Burgess & Holmstrom, *Rape Trauma Syndrome*, *supra*, at 983-84; Calhoun, *supra*, at 660; Kates & Engberg, *supra* note 4, at 899-900; Kilpatrick, *supra*, at 118-19; Lenox & Gannon, *supra*, at 39-40. In this period, the victim attempts to cope with the disruptions brought by the attack. See T. McCAHILL, L. MEYER & A. FISCHMAN, *THE AFTERMATH OF RAPE* 24 (1979) (society prolongs recovery stage by expecting victim to quickly put rape behind her). Depression and "traumatophobia" — a phobic reaction to a traumatic situation — appear in almost all victims. Some of the more common reactions of rape victims are fear of indoors (if the rape occurred inside), fear of outdoors (if the rape occurred outside), fear of being alone, fear of crowds, fear of people behind oneself, and fear of sexual relations. See Burgess & Holmstrom, *Rape Trauma Syndrome*, *supra* at 984.

<sup>7</sup> See Ruch & Chandler, *Sexual Assault Trauma During the Acute Phase: An Exploratory Model and Multivariate Analysis*, *J. HEALTH & SOC. BEHAV.*, June 1983, at 174 (variables included nature and manner of rape, pre-existing stress of victim, and victim's social support system); Ruch & Hennessy, *Sexual Assault: Victim and Attack Dimensions*, 7 *VICTIMOLOGY* 94 (1983) (variables included use of violence, physical injury, forced entry into victim's home, unknown assailants, multiple assailants, prior sexual victimization, and other life crises of victim).

<sup>8</sup> One survey found that 70% of the rape victims surveyed experienced feelings of embarrassment or self-blame, even though "none of the victims engaged in any behavior which could be interpreted as rape-precipitating behavior." Becker, *supra* note 6, at 111; see also Notman & Nadelson, *supra* note 6, at 133 (feelings of guilt and shame are virtually universal).

<sup>9</sup> Society's notion that a good, virtuous woman cannot be raped comes from the view that rape is a sexual act. See *supra* note 4. This traditional view maintains that rape victims were either in a place where they did not belong, such as a bar or on a street at night, or that the victim precipitated the attack by giving off the impression of availability. See Notman & Nadelson, *supra* note 6, at 133-34; Weis & Borges, *supra* note 6, at 47-48. For the historical development of society's perceptions of rape and rape victims, see Berger, *supra* note 3, at 12-32.

if they did something to attract the attacker, or failed to offer sufficient resistance.<sup>10</sup>

The criminal justice system's procedures for rape prosecution exacerbate the victim's confusion. A victim who reports the rape to the police is traumatized by the criminal system, the countless interrogations and by having her veracity tested and her lifestyle scrutinized.<sup>11</sup> The victim's initial contact with the criminal system is with the police, whose treatment has been traditionally characterized as unsympathetic, cold,

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<sup>10</sup> See S. KATZ & M. MAZER, *supra* note 5, at 314 ("Rape is the only violent crime in which the surviving victim is thought to be responsible for what happened to her."); Burgess & Holmstrom, *Rape Trauma Syndrome*, *supra* note 6, at 983 (although brutally beaten, one victim wondered if the rape was her fault because her father "always said whatever a man did to a woman, she provoked it"); Hartwig & Sandler, *Rape Victims: Reasons, Responses and Reforms*, in THE RAPE VICTIM, *supra* note 6, at 16 (social conditioning causes guilt feelings); King & Webb, *supra* note 6, at 96 (feelings of guilt and shame experienced regardless of rape circumstances); Weis & Borges, *supra* note 6, at 47-48 (victims think they should have prevented the act). A victim who internalizes the rape by believing that she caused it slows her recovery because of her low self-esteem and guilt feelings. However, if the victim externalizes the rape, she may feel that others control her life and may lapse into reactive depression. Lenox & Gannon, *supra* note 6, at 42-44.

A victim often chastises herself for not repulsing the rapist. Her guilt derives from the popular myth that rape of a healthy adult woman is impossible. Different metaphors are used to express this view, but all ignore the life-threatening realities of rape situations. One author described her encounter with a police officer who claimed that if a woman struggled hard enough it would be impossible to be raped:

To back up his claim, the policeman handed her a large glass. He suggested that she move it rapidly about while he would attempt to insert his billie club in it. After demonstrating how hard this task could be, he suggested that she try it and gave her the club. She picked up the club and rapped him sharply across the arm; he released the glass and drew back in surprise. *She then placed the club into the glass effortlessly.* The reversal, which now made the glass accessible, more nearly approximated the power relations involved in many rape situations.

J. SCHWENDINGER & H. SCHWENDINGER, *supra* note 4, at 23 (emphasis in original); see also C. HURSCH, *supra* note 4, at 76-77 (discussing the common myth that a woman can escape).

<sup>11</sup> See L. HOLMSTROM & A. BURGESS, THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS 58 (1978) (main reason victims refuse to press charges is the desire to avoid further persecution by the criminal system); W. SANDERS, RAPE & WOMEN'S IDENTITY 82 (1980) (victim's honesty always in question); Schwartz, *An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape*, 16 LOY. L.A.L. REV. 567, 587 (1983) ("[U]nlike other crimes of violence, such as robbery, the onus of proving that a rape has been committed is placed on the victim of the crime.").

and even cruel.<sup>12</sup> Recent increased awareness and sensitivity has led to reforms, and even establishment of special sexual assault units.<sup>13</sup> Given the victim's emotional state, however, and the type of questioning required, the ordeal is traumatic even with understanding investigators. If the state decides to proceed with the case,<sup>14</sup> the victim's credibility, rather than the defendant's culpability, may become the focus at trial. To a rape victim unfamiliar with the judicial process, seeing her attacker again and being subjected to a fierce cross-examination can be both degrading and humiliating.<sup>15</sup>

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<sup>12</sup> See S. BROWNMILLER, *supra* note 2, at 408-12 (police mentality mirrors societal stereotypes of rape); E. HILBERMAN, *THE RAPE VICTIM* 11 (1976) ("victim can expect questions about how many orgasms she had during the rape, what fantasies she had while doing it, and allusions to past sexual 'misconduct.'"); C. HURSCH, *supra* note 4, at 115-25 (police training stressing awareness of dangers leads to disbelief of victim's claim that she was unaware of the impending rape); S. KATZ & M. MAZUR, *supra* note 5, at 192-94 (recounting major criticisms of police behavior); T. MCCAHERILL, L. MEYER & A. FISCHMAN, *supra* note 6, at 105 (police have been accused of "unfounding" rape reports for several objectionable grounds: when officer "did not like the victim or the subclass to which she belongs"; when officer believed that she asked for it; and when officer believed the case to be a poor trial risk); Hartwig & Sandler, *supra* note 10, at 13-14 (rape myths permeate criminal justice system). *But see* Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 579-80 (1980) (61% of victims surveyed indicated police treated them well).

<sup>13</sup> See C. HURSCH, *supra* note 4, at 116 (most large cities employ specially trained detectives); T. MCCAHERILL, L. MEYER & A. FISCHMAN, *supra* note 6, at 150-54 (noting police surveys indicating increased training in a number of departments). One survey of police departments conducted in the middle of the 1970's found that 18% of responding departments used a special rape unit to respond to initial rape complaints. NAT'L INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, *supra* note 3, at 29. These improvements undoubtedly have been instrumental in furthering reporting and prosecution of rape cases. See Keefe & O'Reilly, *Changing Perspectives in Sex Crimes Investigations*, in *SEXUAL ASSAULT*, *supra* note 4, at 161-68 (noting an 8% increase in reporting and a 26% increase in arrests after New York instituted the Sex Crimes Analysis Unit); Loh, *supra* note 12, at 573 (more supportive climate has led to greater reporting).

<sup>14</sup> This assumes that the police have apprehended a suspect and that the state presents sufficient evidence to bind the defendant over for trial. One study in Philadelphia found that only 234 of 1198 rape complaints filed (19.5%) resulted in cases completing a preliminary hearing. T. MCCAHERILL, L. MEYER & A. FISCHMAN, *supra* note 6, at 228 Table 19-1.

<sup>15</sup> To many rape victims, the trial may be as traumatic as the rape. Victims must publicly relive their nightmare and again see the rapist. On cross-examination, defense attorneys attempt to prove that the victim consented or has misidentified the rapist. The victim might feel herself on trial and often she reacts with anger or confusion as her anxiety heightens. See E. HILBERMAN, *supra* note 12, at 13 (defense must make victim

Fortunately, most women no longer need to endure this nightmare alone. Family and friends have generally become more understanding and can offer vital emotional support for the rape victim.<sup>16</sup> In addition, rape crisis centers, an outgrowth of the women's movement, have organized across the country to attend to the emotional needs of victims.<sup>17</sup>

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unbelievable); L. HOLMSTROM & A. BURGESS, *supra* note 11, at 221-36, 276-77 (study found cross-examination, confrontation between accused and accuser, and public setting most upsetting features of trial); S. KATZ & M. MAZUR, *supra* note 5, at 199 (noting studies finding devastating psychological effects of trial); T. MCCAHERILL, L. MEYER & A. FISCHMAN, *supra* note 6, at 211-26 (anxiety from public trial, testifying about incident, and defense tactics); Berger, *supra* note 3, at 12-15 (defense questioning particularly grueling); Calhoun, *supra* note 6, at 659 (highly traumatic for victim to relive rape and to have veracity and integrity attacked); Hardgrove, *An Interagency Service Network to Meet Needs of Rape Victims*, 57 SOC. CASEWORK 245, 248 (1976) (victim treated like criminal); Note, *Resistance Requirement*, *supra* note 4, at 873 (trial focuses on victim's conduct).

<sup>16</sup> Although rape was once a taboo subject, in the last 20 years a wealth of literature on the crime, its dimensions and horrors has appeared. For an extensive survey of this literature, see Chappell, Geis & Fogerty, *Forcible Rape: Bibliography*, 65 J. CRIM. L. & CRIMINOLOGY 248 (1974); Field & Barnett, *Forcible Rape: An Updated Bibliography*, 68 J. CRIM. L. & CRIMINOLOGY 146 (1977); Pawlosky, *Forcible Rape: An Updated Bibliography*, 74 J. CRIM. L. & CRIMINOLOGY 601 (1983). Changing attitudes and greater sensitivity provide a more supportive atmosphere in which rape victims can confront, rather than suppress, their emotional reactions. See Berger, *supra* note 3, at 3 (women's movement fostered support for victims); Largen, *History of Women's Movement in Changing Attitudes, Laws, and Treatment Toward Rape Victims*, in SEXUAL ASSAULT, *supra* note 4, at 70-71 (1976); Loh, *supra* note 12, at 569. As information increased, the efforts to reform archaic rape laws also gained support. Since 1974, more than 40 states have revised or amended their rape statutes. See Bienen, *supra* note 1, at 172. For an analysis of the effect of these reforms on the enforcement against rape, see J. MARSH, A. GEIST & N. CAPLAN, RAPE AND THE LIMITS OF LAW REFORM 25-39, 41-66 (1982); Loh, *supra* note 12, at 543.

<sup>17</sup> See Geis, *Foreword* to W. SANDERS, *supra* note 11, at 7. For the history of the rape crisis center movement, see Largen, *supra* note 16, at 69-73; Loh, *supra* note 12, at 569-70; Comment, *Rape Victim-Rape Crisis Counselor Communications: A New Testimonial Privilege*, 86 DICK. L. REV. 539, 541-42 (1983) [hereafter Comment, *Crisis Counselor Communications*].

Centers provide a multitude of services for rape victims, from 24-hour hotlines to extensive counseling and support. Hotlines allow immediate and, if necessary, anonymous counseling. One survey found that 80-90% of counseling contacts were made by telephone. P. MILLS, RAPE INTERVENTION RESOURCE MANUAL 23 (1977). Counseling may be separated into two types: crisis intervention and long-term counseling. Crisis intervention counseling gives assistance to victims immediately following the rape and continues through the acute stage of the rape trauma syndrome. See Hardgrove, *supra* note 15, at 248 (positive intervention prevents denial reactions); King & Webb, *supra* note 6, at 97 (assists victim to respond to recent environmental trauma by giving opportunity to ventilate emotions); Warner, *Aftercare: A Lifetime Follow-Up*, in RAPE

Counselors assist the victim to regain control of her life by helping her understand the crime of rape and her emotional reactions.<sup>18</sup>

As rape crisis centers have become an integral part of the rehabilitation process, they have also attracted the attention of defense attorneys seeking information about the victims. Defense tactics, such as subpoenaing rape crisis counselors and their files,<sup>19</sup> threaten the victim-counselor relationship by forcing disclosure of confidences. Continued widespread use of this defense tactic will destroy the crisis centers' effectiveness and curtail their appeal as a sanctuary for victims.<sup>20</sup> A communications privilege, similar to the psychotherapist-patient privilege, would protect the crisis counselor-victim relationship from these developments.

In 1980, California became the first state to enact a communications privilege for rape crisis counselors.<sup>21</sup> Since then, a number of states have enacted similar protective statutes. California and Maine provide a limited privilege that protects rape crisis counselor-victim communications unless disclosure is necessary to further the ends of justice.<sup>22</sup> Six states — Florida,<sup>23</sup> Illinois,<sup>24</sup> Minnesota,<sup>25</sup> New Jersey,<sup>26</sup> Pennsylvania,<sup>27</sup> and Utah<sup>28</sup> — provide absolute privileges that bar disclosure of communications without the victim's consent.

This Comment contends that California's limited privilege insufficiently protects the rape crisis counselor-victim relationship and the victim's privacy rights. Only an absolute privilege suitably protects these interests. First, this Comment discusses the doctrinal foundations for

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AND SEXUAL ASSAULT, *supra* note 6, at 224 (focuses on specific subject identification of rape assault, rape crisis, including interpsychic and interpersonal concerns, and transitional assistance). Long-term counseling manages the depression and disruption occurring in the reorganization stage. *See* Spaulding, *The Role of the Victim Advocate*, in RAPE AND SEXUAL ASSAULT, *supra* note 6, at 210-11 (periodic assistance during especially difficult times); Warner, *supra*, at 224 (compound intervention allows transition to recovery/adjustment).

<sup>18</sup> *See infra* notes 37-39 and accompanying text.

<sup>19</sup> *See infra* note 41.

<sup>20</sup> *See infra* notes 40-45 and accompanying text.

<sup>21</sup> *See* CAL. EVID. CODE §§ 1035-1036.2 (West Supp. 1984).

<sup>22</sup> *Id.*; ME. REV. STAT. ANN. tit. 16, § 53-A (Supp. 1983). *See infra* notes 90-101 and accompanying text.

<sup>23</sup> *See* FLA. STAT. ANN. § 90.5035 (West Supp. 1984).

<sup>24</sup> *See* ILL. REV. STAT. ch. 110, § 8-802.1 (1984).

<sup>25</sup> *See* MINN. STAT. ANN. § 595.02(10) (West Supp. 1984).

<sup>26</sup> *See* N.J. STAT. ANN. §§ 2A:84A-22.11, 2A:84A-22.12 (West Supp. 1984).

<sup>27</sup> *See* 42 PA. CONS. STAT. ANN. § 5945.1 (Purdon 1982).

<sup>28</sup> *See* UTAH CODE ANN. § 78-24-8(6) (Supp. 1983).

the privilege and its appropriate scope. Next, this Comment explores the competing constitutional rights of the defendant. Finally, this Comment concludes that an absolute privilege adequately respects the defendant's rights while assuring the continuation of the essential rape crisis counselor-victim relationship.

## I. DOCTRINAL FOUNDATIONS FOR THE RAPE CRISIS COUNSELOR-VICTIM PRIVILEGE

A basic premise of the Anglo-American judicial system is that a person must testify when summoned by a court.<sup>29</sup> Exceptions to this general rule occur when society recognizes sufficient justification to create a communications or testimonial privilege. The traditional justification is that a privilege is necessary to preserve a valuable relationship. A second justification is that the constitutional right of privacy protects the contents of highly personal communications. Both justifications support an absolute rape crisis counselor privilege.

### A. Justification for the Privilege

#### 1. Preservation of an Important Counseling Relationship

Since a privilege excludes information from judicial proceedings, many commentators believe that one should be created only if confidentiality is essential to foster a relationship that society recognizes as desirable.<sup>30</sup> Psychotherapists and their patients, who have a therapeutic

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<sup>29</sup> See, e.g., *United States v. Nixon*, 418 U.S. 683, 709 (1974) ("integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence"); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (public "has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege") (citations omitted); *Dennis v. United States*, 384 U.S. 855, 870 (1966) ("[D]isclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.").

<sup>30</sup> The Wigmore test has four conditions before a communications privilege is justified:

- (1) The communications must originate in a *confidence* that they will not be disclosed;
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*;
- (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the

relationship similar to the rape crisis counselor-victim relationship, meet the traditional test for privileges.<sup>31</sup> Psychotherapy enjoys a communications privilege<sup>32</sup> because society fears that a lack of confidentiality will disrupt the counseling relationship.<sup>33</sup> The value of the psycho-

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correct disposal of litigation.

8 J. WIGMORE, EVIDENCE § 2285, at 527 (McNaughton rev. ed. 1961) (emphasis in original).

<sup>31</sup> For support of the psychotherapist privilege on these utilitarian grounds, see GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REP. NO. 45, CONFIDENTIALITY AND PRIVILEGED COMMUNICATION IN THE PRACTICE OF PSYCHIATRY 94-95 (1960); Guttmacher & Weihofen, *Privileged Communications Between Psychiatrist and Patient*, 28 IND. L.J. 32 (1952); Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope*, 23 CATH. U.L. REV. 649, 649 (1974) [hereafter Slovenko, *Misguided Hope*]; Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175 (1960) [hereafter Slovenko, *Second Look*]; Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1, 39-41 (1980); Note, *Confidential Communications to a Psychotherapist: A New Testimonial Privilege*, 47 NW. U.L. REV. 384 (1952).

<sup>32</sup> Each jurisdiction takes a different approach to the psychotherapist privilege. Forty states and the District of Columbia have enacted physician-patient privileges, some of which protect psychotherapists who fit within the statute's definition of physician — usually a licensed psychiatrist or psychologist. In addition, 41 jurisdictions have enacted either a psychiatrist-patient privilege or a psychologist-patient privilege. Twelve states expressly recognize a psychotherapist-patient privilege. Only South Carolina and West Virginia fail to provide for some form of communications privilege. Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. REV. 893, 907 n.100 (1982).

<sup>33</sup> A number of courts have recognized the deterrent effects of a lack of confidentiality. *E.g.*, Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955) (confidentiality essential for psychiatric treatment, though not crucial for doctor-patient relationship); Hawaii Psychiatric Soc. v. Ariyoshi, 481 F. Supp. 1028, 1039 (D. Hawaii 1979) (state prevented from reviewing mental health records of Medicaid patients); *In re Lifschutz*, 2 Cal. 3d 415, 431, 467 P.2d 557, 567, 85 Cal. Rptr. 829, 839 (1970) (constitutionally based privilege recognized but limited when patient places issue into litigation); *In re B*, 482 Pa. 471, 485, 394 A.2d 419, 425-26 (1978) (constitutional privilege recognized given highly personal nature of disclosed communications).

Commentators have identified at least three consequences from a lack of confidentiality: a deterrent to seeking therapy, a deterrent to full disclosure, and an impairment to successful treatment. Since psychotherapy requires the disclosure of very private information, patients may refuse to seek treatment without the assurance of confidentiality. See GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 31, at 93; Dubney, *Confidentiality as a Requirement of the Therapist: Technical Necessities for Absolute Privilege in Psychotherapy*, 131 AM. J. PSYCHIATRY 1093, 1093 (1974); Slovenko, *Second Look*, *supra* note 31, at 187-88; Smith, *supra* note 31, at 24-25. One survey found that over 81% of responding college juniors would not enter therapy or would be less open in group therapy without assurances of confidentiality. Meyer & Smith, *A Crisis in Group Therapy*, 32 AM. PSYCHOLOGIST 638, 638-40 (1977).

therapist-patient relationship to society outweighs the possible loss of relevant information at trial caused by the privilege.<sup>34</sup>

Like psychotherapy, rape crisis counseling satisfies the traditional test for privileges. Effective communication between the rape crisis counselor and the victim occurs only when confidentiality is assured. Society should encourage this relationship because of the importance of counseling for rape victims. Finally, the injury to the relationship caused by disclosure outweighs the benefit to the defendant in discovering the contents of the communications.

Confidentiality is the crucial component of rape crisis counseling. When a rape victim enters a crisis center, she has already suffered severe trauma. Insecurity, fear, and hesitance to confide in anyone are symptomatic of this condition. The extent of the trauma varies with each individual, depending upon the circumstances of the attack and whether she perceives herself as blameworthy. To assist the victim, the rape crisis counselor must convince her to express her emotions

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Even assuming that individuals will continue to seek treatment without the assurance of confidentiality, there is a greater inclination to withhold information. See Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1255 (1962) (survey found that 71% of those interviewed would be less candid without confidentiality); Project, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165, 183 (1978) (25% of responding therapists observed less openness in patients informed of possible disclosures).

Finally, the lack of confidentiality threatens the effectiveness of treatment by the loss of trust in the relationship. See *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 460-61, 551 P.2d 334, 359-60, 131 Cal. Rptr. 14, 39-40 (1976) (Clark, J., dissenting); Everstine, Everstine, Heymann, True, Frey, Johnson & Seiden, *Privacy and Confidentiality in Psychotherapy*, 35 AM. PSYCHOLOGIST 828, 836 (1980); Janssen, *Disclosure of Psychiatric Records (Part II): A Psychiatric Perspective*, 50 J. KAN. B.A. 27, 30-31 (1981); Merluzzi & Brischetto, *Breach of Confidentiality and Perceived Trustworthiness of Counselors*, 30 J. COUNSELING PSYCHOLOGY 245, 250 (1983) (“[C]ounselors who breached confidentiality in cases involving highly serious problems were perceived as less trustworthy.”); Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 620-21 (1980) (patients might not disclose important but embarrassing information). But see Shuman & Weiner, *supra* note 32, at 893.

<sup>34</sup> See GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 31, at 93. The United States Supreme Court believed that the relationship was sufficiently important to include a psychotherapist privilege in the proposed Federal Rules of Evidence, even though no similar provision was made for physicians and their patients. See C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 98, at 244-45 (E. Cleary 3d ed. 1984). Congress deleted the psychotherapist privilege because of the political controversy surrounding the news media privilege and President Nixon’s claim of a presidential privilege. See Slovenko, *Misguided Hope*, *supra* note 31, at 655.

openly.<sup>35</sup> Complete candor is especially important if feelings of guilt and self-blame are to be overcome. To facilitate this vital dialogue, rape crisis centers frequently include assurances in their literature that any information revealed during counseling will be strictly confidential.<sup>36</sup> Without these promises, the opportunity for effective therapy vanishes.

Rape crisis counselors provide essential support for rape victims. Crisis counselors aid in the victim's recovery by discussing the attack, dealing with ensuing medical and emotional problems, and explaining the criminal justice process.<sup>37</sup> The knowledge that her reactions are similar to those experienced by other rape victims may help the victim to return to her normal lifestyle.<sup>38</sup> Rape crisis counseling has been successful in accomplishing this result when confidentiality is maintained.<sup>39</sup>

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<sup>35</sup> See T. McCahill, L. Meyer & A. Fischman, *supra* note 6, at 75 (counseling must be particularized to each victim); P. Mills, *supra* note 17, at 70 (counselor must discuss rape and victim's reactions); Abarbanel, *supra* note 6, at 162 (victim's feelings must be expressed); Calhoun, *supra* note 6, at 661 (discussion necessary to reduce guilt and self-blame); Hardgrove, *supra* note 15, at 248 (must discuss rape and feelings with counselor since unable to discuss with friends or family); King & Webb, *supra* note 6, at 97 (victim must ventilate trauma to cope with it); Ruch & Hennessy, *supra* note 7, at 103 (must be aware of prior life changes and victimization history).

<sup>36</sup> See SACRAMENTO WOMEN'S CENTER, RAPE CRISIS 4 ("This service is TOTALLY confidential") (emphasis in original) (copy on file at the U.C. Davis Law Review office); Meisel, *Confidentiality and Rape Counseling*, 11 HASTINGS CENTER REP., Aug. 1981, at 5, 5 (all rape crisis centers promise confidentiality); Comment, *Crisis Counselor Communications*, *supra* note 17, at 550-51 (some centers require counselors to sign confidentiality statements).

<sup>37</sup> See Abarbanel, *supra* note 6, at 162 (counselors describe the crime of rape and victims' potential reactions and provide information about legal rights and options); Hardgrove, *supra* note 15, at 248-49 (counselors discuss societal attitudes, victim's reactions and criminal justice system); Holmes, *Services for Victims of Rape: A Dualistic Practice Model*, 62 SOC. CASEWORK, Jan. 1981, at 30, 35-37 (centers provide information about medical problems and procedures, criminal process, psychological reactions, and societal attitudes); King & Webb, *supra* note 6, at 97 (counselors identify social support system and psychological reactions); Ruch & Hennessy, *supra* note 7, at 103 (counseling involves describing societal perceptions and their effect on victim, establishing support system by maximizing dialogue, and providing information to victim); Spaulding, *supra* note 17, at 206-11 (counselors assist with dealing with medical personnel, police and criminal process, and victim reactions).

<sup>38</sup> See P. Mills, *supra* note 17, at 70 (victim needs to realize others share similar reactions); Calhoun, *supra* note 6, at 661 (discussing myths and beliefs reduces guilt and self-blame); Hardgrove, *supra* note 15, at 249 (failure to understand feelings intensifies difficulty); Holmes, *supra* note 37, at 36 (imperative for victim to realize fears typical among rape victims); King & Webb, *supra* note 6, at 97 (victim needs reassurance that rape not her fault).

<sup>39</sup> See E. Hilberman, *supra* note 12, at 41 (noting consensus that counseling diminishes trauma and likelihood of long-term psychological difficulties); P. Mills, *supra*

Although important to all counseling relationships, confidentiality is essential if the crisis counselor is to assist the rape victim. Rape victims may forego counseling rather than risk disclosure of highly personal information. Many victims will avoid any contact with a center or will terminate counseling prematurely if they fear their confidences will be breached.<sup>40</sup> Even if the relationship continues, the rape victim's trust and confidence in her counselor will lessen.

The confidential relationship — the cornerstone of effective counseling — is jeopardized when defense attorneys attempt to subpoena counselors' records. Many counselors have refused to honor the subpoenas, and, as a result, have been cited for contempt and even jailed,<sup>41</sup> while

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note 17, at 71-72 (helps victims anticipate reactions and reduce their intensity); Abarbanel, *supra* note 6, at 164 ("The therapeutic management of the sexual assault patient reduces the long term psychological morbidity of rape trauma, for both the victim and the victim's family."); Brown, *An Editor's Afterword*, 24 N.H.B.J. 93, 94 (1983) (treatment alleviates psychological problems); Calhoun, *supra* note 6, at 661 (may prevent or moderate psychological reactions); Holmes, *supra* note 37, at 36 (important role in victim's regaining control of her life); Krulewitz, *supra* note 4, at 652-53 (recovery affected by support); Ruch & Hennessy, *supra* note 7, at 103 (assists in dealing with crisis and reduces risk of long-term traumatization); Spaulding, *supra* note 17, at 210 ("The majority of rape victims who receive early crisis intervention and support eventually resume normal routines.").

<sup>40</sup> After the Pennsylvania Supreme Court refused to provide an absolute privilege in *In re Pittsburgh Action Against Rape*, 494 Pa. 15, 428 A.2d 126 (1981), the percentage of callers who wished to remain anonymous on the crisis center's telephone hotline rose from 32% to 61%. See *News Briefs*, AEGIS, Autumn 1982, at 36, 37; see also King & Webb, *supra* note 6, at 100 (survey found that rape crisis centers believed that greatest hindrance to follow-up counseling was victims' fear of counseling stigma); Meisel, *supra* note 36, at 6 (rape victims more deterred from seeking counseling than psychotherapist patients without privilege); Comment, *Crisis Counselor Communications*, *supra* note 17, at 551 (victim might not enter into treatment); *News Briefs*, *supra*, at 37 (clients of rape crisis centers were concerned about confidentiality after counselor subpoenaed).

<sup>41</sup> A well-known incident involved Ann Pride, director of the Pittsburgh Action Against Rape. In June 1980, a state superior court held her in contempt for refusing to disclose portions of counseling records to a defense attorney in a rape trial. The case reached the Pennsylvania Supreme Court, which recognized a limited privilege. *In re Pittsburgh Action Against Rape*, 494 Pa. 15, 19, 428 A.2d 126, 127 (1981).

In Rhode Island, Margaret Langhammer, executive director of the Rhode Island Rape Crisis Center, was jailed on January 13, 1983, for refusing to surrender transcripts of conversations with a rape victim to the superior court. See *OFF OUR BACKS*, Feb. 1983, at 13, col. 1. Ms. Langhammer was released only after the victim agreed to supply the subpoenaed files. *Id.* at 13, col. 2.

Similar attempts to discover the contents of counselor-victim communications have occurred in New Mexico, see C. LEGRAND, *LEGAL HANDBOOK FOR RAPE CRISIS CENTERS* 31 (1983), and California, interview with Shaila Rao, Crisis Line Coordina-

others have taken preventive measures to ensure confidentiality in the face of threatened subpoenas. One setback for the privilege occurred in *In re Pittsburgh Action Against Rape*,<sup>42</sup> when the Pennsylvania Supreme Court extended only a limited privilege to rape counselors. In the aftermath of the decision, rape crisis counselors curtailed their notetaking and record keeping.<sup>43</sup> In other instances, crisis centers have destroyed their records to prevent possible harassment by defense attorneys.<sup>44</sup> Faced with the possibility of defense subpoenas, counselors have become wary of eliciting information which may later be used by defense attorneys.<sup>45</sup> These reactions naturally impair effective counseling.

## 2. The Victim's Privacy Rights

The right of privacy provides additional justification for a privilege protecting confidential communications between a counselor and rape victim. Although the constitutional right to privacy is a relatively new doctrine,<sup>46</sup> commentators have concluded that it supports a privilege for many counseling relationships.<sup>47</sup> While uncertain of the ultimate scope

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tor, Sacramento Rape Crisis Center, in Sacramento (Oct. 6, 1983).

<sup>42</sup> *In re Pittsburgh Action Against Rape*, 494 Pa. 15, 428 A.2d 126 (1981). The Pennsylvania Supreme Court refused to recognize an absolute privilege, noting the competing concerns of the defendant. *Id.* at 27, 428 A.2d at 131. As a result, in many circumstances, rape crisis centers could be required to turn over records of victims to defendants. *See infra* notes 69-71 and accompanying text.

<sup>43</sup> *See Comment, Crisis Counselor Communications, supra* note 17, at 551 & n.109 (counselor avoided impact of the *In re Pittsburgh Action Against Rape* decision by not taking direct statements from victims).

<sup>44</sup> After the jailing of Margaret Langhammer, the Rhode Island Rape Crisis Center burned all of its records. *See OFF OUR BACKS*, Feb. 1983, at 13, col. 3; *see also News Briefs, supra* note 40, at 37 (burning of records in response to *In re Pittsburgh Action Against Rape*).

<sup>45</sup> Interview, *supra* note 41 (victim's emotions discussed rather than factual information of attack).

<sup>46</sup> Before 1965, the right to privacy was confined to the law of torts. Originating in 1890 with the publication of Samuel Warren and Justice Louis Brandeis' seminal essay, Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), the right to privacy allows a tort cause of action for the wrongful exposure of private information, misappropriation of name or likeness, or placing the plaintiff in a false light. *See Zimmerman, Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 292-93 (1983). In 1965, the United States Supreme Court, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), recognized a constitutional right of privacy by striking down a Connecticut ban on contraceptive use. The Court held that the penumbras of the Bill of Rights created zones of privacy and that the law infringed on those zones. *Id.* at 484.

<sup>47</sup> For commentaries urging a psychotherapist-patient privilege on privacy grounds,

of the right to privacy, judicial and scholarly authorities have identified two branches of protection: the right of personal autonomy in areas of fundamental concern, and the right to withhold private information. Both of these interests are affected when a court compels a rape crisis counselor to divulge the contents of confidential communications with her client.

*a. The right of personal autonomy*

The Supreme Court has declared that certain areas are fundamental personal concerns in which the state may override personal decisions only when society's interests are compelling.<sup>48</sup> The fundamental concerns include decisions to use contraceptives,<sup>49</sup> decisions to have an

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see R. SLOVENKO, *PSYCHOTHERAPY, CONFIDENTIALITY, AND PRIVILEGED COMMUNICATIONS* 40 (1960); Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731 (1957); Smith, *supra* note 31, at 1; Note, *Psychotherapy and Griswold: Is Confidence a Privilege or Right?*, 3 CONN. L. REV. 599 (1971). Other commentators have advanced privacy rationales for a number of different privileges. See Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 85-100 (1973); Saltzburg, *supra* note 33, at 597 (lawyers and psychiatrists); Note, *From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?*, 1978 B.Y.U. L. REV. 1002; Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 CALIF. L. REV. 1050 (1973) [hereafter Comment, *Underprivileged Communications*]; Comment, *The Child-Parent Privilege: A Proposal*, 42 FORDHAM L. REV. 771 (1979); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464 (1977).

<sup>48</sup> Justice Brandeis described the Framers' intent to protect personal decisionmaking as one of the foundations of our constitutional system: "They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

For a discussion of the autonomy branch of the privacy right, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 15-1 to -21 (1978); Bazelon, *Probing Privacy*, 12 GONZ. L. REV. 587 (1977); Craven, *Personhood: The Right to be Let Alone*, 1976 DUKE L.J. 699; Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977); Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Huff, *Thinking Clearly About Privacy*, 55 WASH. L. REV. 777 (1980); Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CALIF. L. REV. 1447 (1976); Note, *Personhood and the Contraceptive Right*, 57 IND. L.J. 579 (1982).

<sup>49</sup> See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (restrictions on distribution and advertising); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (distribution to

abortion,<sup>50</sup> and decisions involving family relationships and living arrangements.<sup>51</sup> Although the Supreme Court has left unaddressed whether mental health decisions are fundamental concerns, the Court's reasoning in other privacy decisions supports this conclusion.

Mental health must be considered as important as physical well-being. In *Roe v. Wade*,<sup>52</sup> the Supreme Court acknowledged the psychological repercussions of denying an abortion in determining that the right to privacy protected the woman's decision.<sup>53</sup> An individual's decision to seek counseling involves matters as stressful and often more serious than the dangers associated with pregnancy.<sup>54</sup> Recognizing the importance of the counseling relationship to mental health, several courts have established a psychotherapist-patient privilege on privacy grounds.<sup>55</sup>

California first recognized the constitutionally based psychotherapist privilege in *In re Lifschutz*.<sup>56</sup> Relying on his patient's right to privacy, Dr. Lifschutz refused to comply with the defendant's discovery efforts.<sup>57</sup>

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unmarried individuals); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (prohibition on use).

<sup>50</sup> See *Akron v. Akron Center for Reproductive Health*, 103 S. Ct. 2481 (1983) (hospitalization requirement, informed consent and waiting period); *H.L. v. Matheson*, 450 U.S. 398 (1981) (parental notification); *Bellotti v. Baird*, 443 U.S. 622 (1979) (access for unmarried minors); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (spousal consent); *Roe v. Wade*, 410 U.S. 113 (1973) (restrictions during first trimester).

<sup>51</sup> See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (zoning law's restrictive definition of family); cf. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state could not force parents of Amish children to comply with compulsory education laws); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (parents' right to send children to private school); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (parents' right to have children taught a foreign language).

<sup>52</sup> 410 U.S. 113 (1973).

<sup>53</sup> *Id.* at 153 (noting the distress and psychological harm of having an unwanted child).

<sup>54</sup> See *Smith*, *supra* note 31, at 22 ("In fact, some level of mental health is a *sine qua non* for the exercise of many of the basic freedoms and civil rights.").

<sup>55</sup> See, e.g., *Caesar v. Mountanos*, 542 F.2d 1064, 1067 (9th Cir. 1976) (limited privilege recognized in civil proceedings); *In re Lifschutz*, 2 Cal. 3d 415, 431-32, 467 P.2d 557, 567-68, 85 Cal. Rptr. 829, 839-40 (1970) (limited privilege except when patient places issue into litigation); *In re B*, 482 Pa. 471, 481-86, 394 A.2d 419, 423-26 (1978) (privilege except when patient submits to court-appointed psychiatric examination). *But see* *Bremer v. State*, 18 Md. App. 291, 307 A.2d 503 (1973) (no constitutionally based psychiatrist privilege).

<sup>56</sup> 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

<sup>57</sup> The case began as a tort suit between Joseph Housek and John Arabian. After learning that the plaintiff had received psychiatric treatment from Dr. Lifschutz two years earlier, Mr. Arabian subpoenaed Dr. Lifschutz and Housek's treatment records.

The California Supreme Court, following *Griswold v. Connecticut*,<sup>58</sup> held that confidences imparted to a psychotherapist are protected by constitutional zones of privacy.<sup>59</sup> The privilege is not absolute; it will not protect confidences when the patient initiates the public exposure by putting her mental health at issue in the litigation.<sup>60</sup>

In *Caesar v. Mountanos*,<sup>61</sup> the Ninth Circuit also recognized a constitutionally based psychotherapist-patient privilege.<sup>62</sup> The court announced a limited psychotherapist privilege stemming from the right to privacy as expressed by *Griswold, Roe, and Doe v. Bolton*.<sup>63</sup> The state could override this privacy interest only by showing a compelling state interest.<sup>64</sup>

The Pennsylvania Supreme Court in *In re B*<sup>65</sup> also found that the patient's right to privacy necessitated a psychotherapist privilege.<sup>66</sup> A doctor was held in contempt for refusing to disclose treatment information about his patient, *B*'s mother. The initial proceeding involved the custody of *B*, and the juvenile court attempted to obtain the mother's psychiatric records to determine her ability to care for her son.<sup>67</sup> Without a majority opinion, the Pennsylvania Supreme Court reversed the

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When Dr. Lifschutz refused to disclose any information about the treatment of his patient, the superior court held him in contempt. *Id.* at 420-21, 467 P.2d at 559-60, 85 Cal. Rptr. at 831-32.

<sup>58</sup> 381 U.S. 479 (1965).

<sup>59</sup> *In re Lifschutz*, 2 Cal. 3d 415, 431-32, 467 P.2d 557, 567-68, 85 Cal. Rptr. 829, 839-40 (1970).

<sup>60</sup> *Id.* at 433, 467 P.2d at 568, 85 Cal. Rptr. at 840. The California Supreme Court later recognized an additional exception to the privilege in *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). *Tarasoff* held that a psychotherapist with knowledge that a patient poses a serious danger to an identifiable third party must use reasonable care to protect the potential victim. In reaching this conclusion, the court observed that the public interest in safety outweighed the patient's privacy rights. *Id.* at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27.

<sup>61</sup> 542 F.2d 1064 (1976).

<sup>62</sup> *Id.* at 1067. Dr. Caesar was held in contempt for refusing to answer questions about one of his patients during a deposition. The patient, a plaintiff in a lawsuit, claimed that she suffered from emotional problems caused by the defendant. The district court denied Dr. Caesar's writ of habeas corpus and the court of appeals affirmed, claiming that the psychotherapist-patient privilege does not apply when the patient proffers her mental condition as an issue in litigation. *Id.* at 1065-66, 1070.

<sup>63</sup> *Id.* at 1067 & n.9.

<sup>64</sup> In this case, the limitation on the privilege did not apply since the patient voluntarily waived the right to confidentiality. *Id.* at 1069.

<sup>65</sup> 482 Pa. 471, 394 A.2d 419 (1978).

<sup>66</sup> *Id.* at 481-86, 394 A.2d at 423-26.

<sup>67</sup> *Id.* at 474-75, 394 A.2d at 420-21.

contempt citation, holding that "an individual's interest in preventing the disclosure of information revealed in the context of a psychotherapist-patient relationship has deeper roots than the Pennsylvania doctor-patient privilege."<sup>68</sup>

In *In re Pittsburgh Action Against Rape*,<sup>69</sup> however, the Pennsylvania Supreme Court refused to recognize similar privacy interests of the rape victim when it declined to extend the psychotherapist privilege to rape crisis counselors. Although the court purported to use a balancing test, it did not discuss the privacy rights of the victim in weighing the competing interests.<sup>70</sup> Justice Larsen, in a forceful dissent, pointed out the similarities between patients of psychotherapists and of rape crisis counselors. He noted that both types of clients have interests that should be protected by the constitutional right of privacy.<sup>71</sup>

Given the severity of the disruption in the victim's life, her relationship with her crisis counselor may be even more important than the typical psychotherapist-patient relationship.<sup>72</sup> For a rape victim, the decision to forego counseling entails a risk of psychological damage and trauma which may last her lifetime. The state significantly interferes with the victim's decision to seek counseling when defendants use the state's subpoena power to compel disclosure of confidential communications between the victim and her rape crisis counselor.<sup>73</sup> Lack of a privilege forces the victim to choose between obtaining counseling or reporting the rape to the police. If she leaves the crime unreported, she would be assured some added measure of confidentiality with her counselor. However, the public would suffer from decreased enforcement against rape and from the loss of faith in the criminal justice system.

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<sup>68</sup> *Id.* at 484, 394 A.2d at 425. The court noted that both the United States and the Pennsylvania Constitutions protected the confidential nature of the relationship.

<sup>69</sup> 494 Pa. 15, 428 A.2d 126 (1981).

<sup>70</sup> *Id.* at 24, 27, 428 A.2d at 130, 131-32. The court weighed the defendant's sixth amendment rights to confront witnesses against the harm to the counseling relationship. Unfortunately, the court never addressed the effects of disclosure on the relationship, nor did it weigh the constitutional rights of the victim.

<sup>71</sup> *Id.* at 60-61, 428 A.2d at 149 (Larsen, J., dissenting).

<sup>72</sup> See *In re Pittsburgh Action Against Rape*, 494 Pa. 15, 60, 428 A.2d 126, 149 (Larsen, J., dissenting) ("[N]owhere does there exist a more pressing need for privacy than in the rape victim/crisis counselor relationship."); see also *supra* notes 6-15 and accompanying text.

<sup>73</sup> Without assurances of confidentiality, the rape crisis counseling relationship ceases to function in a practical sense. For the effects of subpoenas on the relationship, see *supra* notes 40-45 and accompanying text.

*b. The right to withhold personal information*

The second branch of privacy recognizes society's desire to allow individuals to decide whether certain personal information will be made public.<sup>74</sup> By regulating the disclosure of private information, the individual is able to shape society's image of her.<sup>75</sup> Taken to its extreme, this right would frustrate all government efforts to gather information.<sup>76</sup> To strike a balance, the right only shields highly confidential information that the individual has kept private.<sup>77</sup>

The Supreme Court recognized this autonomy branch of privacy in *Whalen v. Roe*.<sup>78</sup> *Whalen* resolved the constitutionality of a New York law requiring the names of users of certain prescription drugs to be disclosed and retained by the state. The Court noted that the right of privacy incorporates more than the right of personal decisionmaking; it also includes a general "individual interest in avoiding disclosure of personal matters."<sup>79</sup> Two types of disclosures were involved: disclosure of the prescription information to the government, and any subsequent disclosures made by the state to the public. The Court concluded that the disclosure to the government could not "be meaningfully distinguished from a host of other unpleasant invasions of privacy that are

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<sup>74</sup> For discussions of this branch of the privacy right, see L. TRIBE, *supra* note 48, §§ 15-1 to -2, -17; Leigh, *Informational Privacy: Constitutional Challenges to the Collection and Dissemination of Personal Information by Government Agencies*, 3 HASTINGS CONST. L.Q. 229 (1976); Smith, *supra* note 31, at 27-28; Case Comment, *A Constitutional Right to Avoid Disclosure of Personal Matters: Perfecting Privacy Analysis in J.P. v. DeSanti*, 71 GEO. L.J. 219 (1982); Note, *The Constitutional Right to Confidentiality*, 51 GEO. WASH. L. REV. 133 (1982); Comment, *Public Health Protection and the Privacy of Medical Records*, 16 HARV. C.R.-C.L. L. REV. 265 (1981); Note, *The Constitutional Right to Withhold Private Information*, 77 NW. U.L. REV. 536 (1982); Note, *The Interest in Limiting the Disclosure of Personal Information: A Constitutional Analysis*, 36 VAND. L. REV. 139 (1983).

<sup>75</sup> See L. TRIBE, *supra* note 48, § 15-17, at 966 (control over information is the essence of one's public identity).

<sup>76</sup> The right to control information and the right to withhold personal information from the government must be viewed as distinct concepts. If the Constitution grants individuals an absolute right to control information, then the government must cease its record-keeping functions, its vast publication operation, and its judicial process, since all of these involve disclosure of information.

<sup>77</sup> Authors use differing criteria to determine whether information is sufficiently personal to warrant protection. See Leigh, *supra* note 74, at 251 (if disclosure would "cause substantial concern, anxiety, or embarrassment to a reasonable person"); Smith, *supra* note 31, at 28 (protects information generally regarded as highly confidential).

<sup>78</sup> 429 U.S. 589 (1977).

<sup>79</sup> *Id.* at 599.

associated with many facets of health care."<sup>80</sup> The Court then examined the risk of unwarranted disclosure to third parties<sup>81</sup> and concluded that the state's interest was sufficiently compelling to overcome the slight risk.<sup>82</sup>

Communications between a rape crisis counselor and a victim are distinguishable from the information collected by the state in *Whalen* and qualify for protection under the privacy right to withhold personal information. More than many other facets of health care, the rape crisis counselor-victim relationship depends upon an expectation of confidentiality.<sup>83</sup> The victim enters the relationship and discloses sensitive information only with the assurance of confidentiality.

Although some information is so sensitive that it may never be acquired by the government, a state is normally allowed to collect private information if it sufficiently safeguards against unwarranted disclosure to third parties.<sup>84</sup> A state fails to provide these safeguards when defense attorneys are given the power to subpoena rape crisis counselors. Trials are public events and transcripts and records are available to all.<sup>85</sup> In the absence of a communications privilege, enforcement of a defendant's

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<sup>80</sup> The Court noted a number of statutory reporting requirements that interfered with a patient's expectation of privacy: venereal disease, child abuse, fetal death, and weapons injuries. *Id.* at 602. The Court also emphasized that disclosure of private medical information was a common and necessary health care practice. *Id.* (citing *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (state record-keeping law did not significantly impair woman's abortion decision)).

<sup>81</sup> The Court went to great lengths to examine the security measures required by the New York law. The installation where the information was kept was protected by a fence and an alarm system. The computer tapes containing the information were stored in a locked cabinet and were inaccessible to unauthorized individuals. In addition, the statute prohibited public disclosure of the information and imposed a \$2000 fine and up to one year imprisonment for violations. *Id.* at 594-95.

<sup>82</sup> *Id.* at 601-02.

<sup>83</sup> Many commentators criticize the physician-patient privilege because they believe that confidentiality is not essential to preserve the relationship. Although patients may desire and even assume confidentiality, an ailing patient probably would not refrain from seeking medical treatment because of a lack of a communications privilege. *See, e.g.*, C. McCORMICK, *supra* note 34, § 98, at 244; J. WIGMORE, *supra* note 30, § 2380a, at 830.

<sup>84</sup> *See Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977) (federal statute had sufficient safeguards to protect ex-President's privacy); *Whalen v. Roe*, 429 U.S. 589 (1977) (state law included sufficient safeguards to protect prescription drug users); *cf. Lora v. Board of Educ.*, 74 F.R.D. 565 (E.D.N.Y. 1977) (court required identification removed from handicapped children's files before allowing discovery).

<sup>85</sup> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. CONST. amend. VI.

subpoena results in public disclosure of a victim's innermost thoughts and feelings.<sup>86</sup>

The rape crisis counselor-victim relationship deserves the protection of a communications privilege under the traditional criteria. A privilege is essential for the preservation of the counseling relationship. In addition, the victim's right to personal autonomy and her right to withhold personal information necessitate some protection from defendant's subpoenas. The next section examines the type of privilege needed to protect these interests.

*B. Choosing the Proper Privilege for the Rape Crisis Counselor-Victim Relationship: Limited v. Absolute Privilege*

Policy and constitutional concerns justify some type of communications privilege for the rape crisis counselor-victim relationship. The difficulty lies in discerning the scope of the privilege to be accorded. Should the protection be incorporated into an existing privilege such as the psychotherapist-patient privilege? Should the relationship be accorded a limited privilege, as in California? Or should the communications be protected by an absolute privilege similar to the attorney-client privilege? While some protection for the counseling relationship is needed, the advantages and disadvantages of the various types of privileges must be considered.

Although rape counseling closely resembles psychotherapy, incorporating rape crisis counselors into the definition of psychotherapist would be untenable for most counselors.<sup>87</sup> Most rape crisis counselors

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<sup>86</sup> An *in camera* hearing to determine the relevancy of the information requested by the defendant may limit the injury to the victim. The California rape crisis counselor privilege requires this procedure before information may be subject to subpoena. See CAL. EVID. CODE § 1035.4 (West Supp. 1984); see also *infra* notes 90-96 and accompanying text. Although the *in camera* hearing reduces the possibility of unwarranted disclosure, confidential information is disclosed when the judge reviews the victim's entire file to determine relevancy. Since the information contained in the rape crisis center's records is highly personal, any disclosure forced by the state, even to a judge *in camera*, must be justified by a compelling state interest.

<sup>87</sup> Jurisdictions differ on the definition of psychotherapist. Some jurisdictions confer the privilege only on a licensed psychiatrist or psychologist. See Shuman & Weiner, *supra* note 32, at 907 n.100 (only 12 states expressly provide psychotherapist privilege; most have either psychiatrist or psychologist privilege or both). Other states, using a functional approach, have extended protection to less traditional counselors. See, e.g., CAL. EVID. CODE § 1010 (West Supp. 1984) (definition includes clinical social workers). Commentators support this approach. See Meisel, *supra* note 36, at 6 (should use functional approach to protect drug therapists, school guidance counselors, and rape crisis counselors); Comment, *Underprivileged Communications*, *supra* note 47, at

fail to qualify under the traditional definitions of psychotherapist.<sup>88</sup> Furthermore, the protection offered by many psychotherapist privileges is limited, primarily because of concerns inapplicable to rape crisis counselors.<sup>89</sup>

A limited privilege expressly for rape crisis counselors avoids some of the problems associated with extending the psychotherapist privilege, but fails to protect adequately the counseling relationship. California's rape crisis counselor privilege illustrates the shortcomings of a limited privilege.<sup>90</sup> The statute defines confidential communications as any "information transmitted between the victim and the sexual assault counselor in the course of their relationship and in confidence."<sup>91</sup> A court may compel disclosure of the contents of these communications if the probative value of the information outweighs the effect of disclosure on the victim and the counseling relationship.<sup>92</sup> The procedure used in this balancing is similar to that employed by statutes limiting the use of evidence of the victim's past sexual activity.<sup>93</sup> If the court believes that

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1058-60 (should use functional approach to protect psychiatric social workers).

<sup>88</sup> Rape crisis counselors have received extensive training, *see* P. MILLS, *supra* note 17, at 31, 252 Table VI (68% of responding centers screen their counselors, 20% have 31 or more hours of training), although most do not have the credentials to fulfill statutory psychotherapist requirements. *See, e.g.,* CAL. EVID. CODE § 1010 (West Supp. 1984) (psychotherapists defined as licensed psychiatrist, psychologist, or social worker); *see also* C. LEGRAND, *supra* note 41, at 32 (centers would need to develop relationship with qualified psychotherapist to fit under privilege). A state granting a privilege could adopt minimum training requirements to protect against malpractice.

Although not defining the rape crisis counselor as a psychotherapist, one court extended the protection of the privilege to a counselor who was working under the direction of a psychotherapist. *See* *New Mexico v. Deporto*, No. CR-77-58 (Dist. Ct., Eddy County 1977) (copy on file at the U.C. Davis Law Review office). *Deporto* quashed a defendant's subpoena of a rape crisis counselor because of the working relationship between the counselor and a supervisory psychotherapist. *See* C. LEGRAND, *supra* note 41, at 31.

<sup>89</sup> Many states refuse to extend an absolute privilege to psychotherapists because of fears that dangerous individuals will not be reported to the proper authorities, *see, e.g.,* *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); CAL. EVID. CODE § 1024 (West 1966), or that patients will use the privilege to prevent the discovery of their true mental condition when that issue is litigated, *see* CAL. EVID. CODE § 1016 (West 1966). These limitations are inapplicable in the rape crisis counselor-victim relationship.

<sup>90</sup> *See* CAL. EVID. CODE §§ 1035-1036.2 (West Supp. 1984).

<sup>91</sup> *Id.* § 1035.4.

<sup>92</sup> *Id.*

<sup>93</sup> *See, e.g.,* MD. ANN. CODE art. 27, § 461A (Cum. Supp. 1983) (*in camera* hearing); *see also* Bienen, *supra* note 1, at 201 (most shield laws require relevance hearing before admitting evidence of past sexual conduct).

the communications include evidence relevant to the rape, it may conduct an *in camera* proceeding with the counselor. After hearing the contents of the communications, if the court decides that the information is reasonably likely to be disclosed under the balancing test, another *in camera* proceeding is held. At this second proceeding, the defendant is present and may question the counselor concerning the information that the court believed might be disclosed. If the court finds that the evidence's probative value outweighs the victim's interests, the defendant is permitted to introduce it at trial.<sup>94</sup>

California's privilege, though well-intentioned,<sup>95</sup> fails to protect sufficiently the rape crisis counselor-victim relationship. Although the advantage of a limited privilege is flexibility, too much discretion defeats the privilege's purpose. The California statute allows the court to raise the evidence issue *sua sponte*.<sup>96</sup> Conceivably, every rape victim may have her crisis counselor called into chambers to reveal her private communications to the judge. This may occur before a defendant attempts to subpoena the counselor. Even if this occurs at the defendant's motion, the statute provides no guidelines to limit the judge's discretion.

In similar situations, judges deciding the admissibility of victims' past sexual activity have frustrated the protection intended by the rape shield laws. The judiciary is not immune from societal misconceptions about rape.<sup>97</sup> As a result, judges with discretion over the admissibility of prior sexual conduct of the victim persist in admitting the evidence although legislatures intended otherwise.<sup>98</sup> In addition, judges tend to admit evidence because they fear reversal on appeal.<sup>99</sup> If judicial biases are typical, removing as much of the court's discretion from the privi-

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<sup>94</sup> See CAL. EVID. CODE § 1035.4 (West Supp. 1984).

<sup>95</sup> The 1983 amendments to the privilege were presumably designed to strengthen the privilege by expanding the definition of a sexual assault victim counselor and by including all communications between the counselor and the victim within the privilege.

<sup>96</sup> The statute as enacted in 1980 required the defendant to make a written motion with an affidavit that made an offer of proof of the relevancy of the communications. CAL. EVID. CODE § 1035.4 (West Supp. 1983). The 1983 amendment removed this procedure. See CAL. EVID. CODE § 1035.4 (West Supp. 1984).

<sup>97</sup> See Berger, *supra* note 3, at 71 (judges tend to distrust the rape victim); Bienen, *supra* note 1, at 201 (judges may think evidence of prior sexual conduct probative); Quenneville, *supra* note 3, at 605 (judge may reflect biases of society).

<sup>98</sup> See Bienen, *supra* note 1, at 203-04 (citing evidence that Florida judges have admitted all evidence of prior sexual conduct regardless of Florida statute limiting admissibility to issue of consent).

<sup>99</sup> See Berger, *supra* note 3, at 14 n.91 (judges over-admit evidence to avoid reversal); Bienen, *supra* note 1, at 202-03 (judge more likely to be reversed if evidence is excluded).

lege as possible would best protect the victim. Finally, even if nothing is eventually admitted, the confidential communications have been disclosed to the judge, the defendant, and his attorney.

In practice, the limited privilege has proven inadequate protection for the counseling relationship. Some of the most severe counselor reactions to subpoenas<sup>100</sup> appeared after the Pennsylvania Supreme Court provided only a limited privilege in *In re Pittsburgh Action Against Rape*.<sup>101</sup> Defense attorneys, sensing a new tactic for undermining the prosecution, have reacted by increasing demands for counseling files.<sup>102</sup> A limited privilege must be narrowly drawn if it is to prevent damage to the counseling relationship and the victim's privacy rights.

Recognizing the inherent limitations of the California and Pennsylvania approaches, several states have enacted absolute rape crisis counselor privileges.<sup>103</sup> An absolute privilege is the only means of adequately protecting the counseling relationship and the victim's privacy rights. However, such a privilege might infringe on the rape defendant's interests. Part II of the Comment explores these conflicting concerns.

## II. ASSESSING THE EFFECTS OF THE PRIVILEGE ON THE JUDICIAL SYSTEM: COMPETING DEFENDANT CONCERNS

The rape crisis counselor privilege protects the victim's privacy rights and the counseling relationship by excluding evidence from the trial. Defense attorneys contend that the privilege prevents the discovery of possible exculpatory evidence and infringes on the defendant's right to a fair trial.<sup>104</sup> This Part will discuss the defendant's interests and balance them against the importance of confidentiality in the rape crisis counselor-victim relationship.

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<sup>100</sup> See *supra* notes 41-45 and accompanying text.

<sup>101</sup> 494 Pa. 15, 428 A.2d 126 (1981).

<sup>102</sup> See *News Briefs, supra* note 40, at 37 (crisis center flooded by subpoenas after *Pittsburgh* decision).

<sup>103</sup> See FLA. STAT. ANN. § 90.5035 (West Supp. 1984); ILL. REV. STAT. ch. 110, § 8-802.1 (1984); MINN. STAT. ANN. § 595.02(10) (West Supp. 1984); N.J. STAT. ANN. §§ 2A:84A-22.11, 2A:84A-22.12 (West Supp. 1984); 42 PA. CONS. STAT. ANN. § 5945.1 (Purdon 1982); UTAH CODE ANN. § 78-24-8(6) (Supp. 1983).

<sup>104</sup> Defense attorneys seek the contents of the rape crisis counselor-victim communications to discredit and impeach the credibility of the victim. They hope to find information that would qualify as an inconsistent statement. Although there is as yet no evidence that defense attorneys seeking rape crisis counselor files have done so to harass the victim, harassment has been a motivation for the subpoenaing of psychotherapists. See *Slovenko, Misguided Hope, supra* note 31, at 658-59.

### A. Defendant's Confrontation and Compulsory Process Rights

The sixth amendment guarantees defendants the right to confront witnesses against them and the right to compel the testimony of favorable witnesses.<sup>105</sup> These protections serve two functions: they enable the defendant to present exculpatory evidence at trial<sup>106</sup> and to impeach the credibility of prosecution witnesses.<sup>107</sup>

The Supreme Court began to address the scope of the confrontation and compulsory process clauses in the 1960's. In *Washington v. Texas*,<sup>108</sup> the Court held that the sixth amendment applied to state proceedings<sup>109</sup> and was violated by a Texas statute that prevented the ad-

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<sup>105</sup> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI. For the history of these provisions and a theoretical framework for analyzing them, see Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711 (1976); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978) [hereafter Westen, *Unified Theory*]; Westen, *The Compulsory Process Clause*, 30 MICH. L. REV. 711 (1974) [hereafter Westen, *Compulsory Process*].

<sup>106</sup> See Clinton, *supra* note 105, at 803-15 (defendant's evidence must still conform to other rules of evidence); Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 556-60 (1980) (right to present testimony of probative value); Westen, *Unified Theory*, *supra* note 105, at 586-601 (noting lack of extensive discussion of defendant's compulsory process right by Supreme Court); Westen, *Compulsory Process*, *supra* note 105, at 117-82 (compulsory process includes right to discover exculpatory witnesses, to have defense witnesses on the stand, to have defense witness believed, to introduce exculpatory evidence, and to have witnesses disclose certain privileged information); Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, 30 STAN. L. REV. 935, 950-54 (1978) (defendant's right to present evidence should not override some testimonial privileges) [hereafter Note, *Defendant v. Witness*].

<sup>107</sup> See Austin, *The Use of Privileged Communications for Impeachment Purposes: Part 2*, 49 N.Y. ST. B.J. 657, 664 (1977) (defendant should be able to overcome privilege); Tanford & Bocchino, *supra* note 106, at 558-60 (right to cross-examine includes right to impeach); Westen, *Unified Theory*, *supra* note 105, at 569-86 (compulsory process and confrontation rights include right to be present at trial, right to compel state to produce available prosecution witnesses, right to cross-examine witnesses, right to compel production of unavailable witnesses); Note, *Defendant v. Witness*, *supra* note 106, at 948-54 (right to cross-examine should not override some testimonial privileges).

<sup>108</sup> 388 U.S. 14 (1967). The defendant, Jackie Washington, was convicted of first degree murder. At his trial, he attempted to introduce testimony from Charles Fuller, who had already been convicted of the killing. The Texas statute prevented Washington from introducing evidence from persons charged or convicted as co-participants in the same crime. *Id.* at 15-16.

<sup>109</sup> *Id.* at 17-19 (right to present witnesses to establish a defense "fundamental element of due process").

mission of exculpatory evidence from a co-indicted accomplice. After noting that the state's rule did not prohibit the prosecution from introducing evidence from a co-indicted accomplice, the Court found the rule to be an arbitrary denial of the defendant's rights.<sup>110</sup> In closing, the Court expressly stated that the opinion did not affect testimonial privileges.<sup>111</sup>

In *Chambers v. Mississippi*,<sup>112</sup> the Supreme Court confronted a state rule preventing the impeachment of one's own witness.<sup>113</sup> In striking down the application of this rule to the defendant, the Court balanced the interests of the state — reliability and trustworthiness of the evidence — against the interests of the defendant in a fair trial. Noting that the evidence in question was reliable and trustworthy, the Court held that the state's evidence rules could “not be applied mechanistically to defeat the ends of justice.”<sup>114</sup>

*Washington* and *Chambers* both recognized the need to evaluate the competing interests involved in evidence decisions.<sup>115</sup> In both cases, the defendant's interests outweighed the state's justification for the evidence rules. However, the state's only interest was the reliability of the evidence, and the Court noted that the state's rules were not necessary to ensure reliability.<sup>116</sup> The balancing test should have different results

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<sup>110</sup> *Id.* at 16-17, 22-23. The Court noted the absurdity of the state rule, which allowed the state but not the defendant to use the testimony of the accused accomplice. The Court believed that the exception made no sense if the rule was designed to prevent perjured testimony.

<sup>111</sup> “Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges, which are based on entirely different considerations from those underlying the common-law disqualifications for interest.” *Id.* at 23 n.21.

<sup>112</sup> 410 U.S. 284 (1973).

<sup>113</sup> Two rules — the hearsay rule preventing the introduction of out of court statements and the rule against impeaching one's own witness — prevented the defendant from introducing evidence to show that another person had committed the crime of which he was accused. The trial court prevented Chambers from introducing evidence showing that a third party, McDonald, had actually confessed to the crime. Chambers was also prevented from directly calling McDonald as a witness and then impeaching his credibility. *Id.* at 294.

<sup>114</sup> *Id.* at 302.

<sup>115</sup> Although the Court has yet to articulate the test clearly, commentators have developed balancing tests that explain the various decisions. *See, e.g.*, Clinton, *supra* note 105, at 800 (compelling state interest must outweigh defendant's interest in presenting a defense for rule to be upheld).

<sup>116</sup> In *Washington*, the Court went to great lengths to establish the reliability of the excluded evidence. 388 U.S. at 22-23. The *Chambers* Court was similarly impressed with the veracity of the excluded testimony. 410 U.S. at 301-02.

when the evidence rule is more closely tailored to accomplish a stronger state interest.<sup>117</sup>

The Supreme Court addressed the defendant's right to impeach the prosecution witnesses' credibility in *Davis v. Alaska*.<sup>118</sup> There the defendant was prevented from cross-examining a key prosecution witness because a state statute made juvenile court records inadmissible in judicial proceedings.<sup>119</sup> Davis contended that the state's chief witness, a juvenile, was primarily motivated to testify out of fear of probation revocation.<sup>120</sup> The Supreme Court reversed the conviction, holding that the confrontation clause interests outweighed the state's interest in protecting the confidentiality of juvenile records. The defendant's interest was to discover "possible bias in the testimony of a crucial identification witness."<sup>121</sup> On the other hand, the Court viewed the state's interest as merely the prevention of temporary embarrassment.<sup>122</sup>

*Davis* did not fundamentally challenge the role of privileges in judicial proceedings.<sup>123</sup> It was not a novel interpretation of sixth amend-

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<sup>117</sup> See Clinton, *supra* note 105, at 809-10 (court must examine the substantive government interest before ruling); Hill, *Testimonial Privilege and Fair Trial*, 80 COLUM. L. REV. 1173, 1176 (privileges should not automatically give way to defendant's claims); Note, *Defendant v. Witness*, *supra* note 106, at 952-53 (defendant's search for exculpatory evidence should not override testimonial privileges).

<sup>118</sup> 415 U.S. 308 (1974).

<sup>119</sup> Davis was convicted of grand larceny and burglary. At trial, he was prevented from introducing any evidence relating to the juvenile records of one of the prosecution's witnesses. *Id.* at 310-11.

<sup>120</sup> Davis, in opposing the prosecution's request for the protective order, claimed that evidence demonstrating that the witness was on probation was essential to show possible motive or bias. Davis argued that the witness might have made a hasty and faulty identification to shift suspicion away from himself, or that the witness might have been under undue pressure from the police when he was asked to identify the defendant. *Id.* at 311.

<sup>121</sup> *Id.* at 319. The Court noted that this line of questioning might have seriously damaged the state's case against the defendant.

<sup>122</sup> *Id.*

<sup>123</sup> Justice Stewart, in his concurrence, noted that "the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions." *Id.* at 321 (Stewart, J., concurring). The majority opinion emphasized its reliance upon the facts of the case saying, "In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender." *Id.* at 319.

Challenges to testimonial privileges after *Davis* have had mixed results in the lower courts. Courts striking down the application of the privileges have done so primarily in cases of disfavored privileges. See, e.g., *Salazar v. State*, 559 P.2d 66 (Alaska 1976) (spousal immunity); *State v. Hembd*, 305 Minn. 120, 232 N.W.2d 872 (1975) (physi-

ment rights. Rather, the Court simply applied the balancing test used in *Washington* and *Chambers*, and found that the defendant's confrontation rights outweighed the state's interest in protecting the juvenile. The confidentiality interest which the *Davis* evidence rule protected was slight<sup>124</sup> compared to the important social interests served by communications privileges.<sup>125</sup>

Although the current scope of the sixth amendment confrontation and compulsory process protections is ambiguous, the Supreme Court decisions focus on balancing the defendant's interests in discovering the evidence with the state's interest in excluding the evidence. Thus far, the Court has confronted instances in which the defendant's interests were substantial<sup>126</sup> and the state's interests were minimal. In a conflict between the defendant's rights and a communications privilege protecting the privacy rights of the holder, the privilege should yield only when the injury to the defendant would be greater than the injury caused by disclosure.

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cian-patient); *State v. Roma*, 140 N.J. Super. 582, 357 A.2d 45 (marriage counselor), *aff'd on rehearing*, 143 N.J. Super. 504, 363 A.2d 923 (1976); *cf.* *State v. Gardner*, 50 Ohio St. 2d 14, 391 N.E.2d 337 (1979) (shield law severely limiting inquiry into rape victim's prior sexual conduct did not violate sixth amendment). Furthermore, courts using the *Davis* balancing test require the defendant to show specific bias or prejudice before the privilege may be questioned. *See, e.g.*, *Mills v. Estelle*, 552 F.2d 119 (use of prior convictions for impeachment), *cert. denied*, 434 U.S. 871 (1977).

<sup>124</sup> *See Note, Defendant v. Witness, supra* note 106, at 957 (communications privileges protect innermost thoughts; Alaska juvenile statute protected only records of illegal acts).

<sup>125</sup> Dictum in another Supreme Court decision, *United States v. Nixon*, 418 U.S. 683 (1974), may be useful in assessing the scope of privileges in criminal proceedings. *Nixon* stated that the presidential communications privilege was not absolute and "must yield to the demonstrated, specific need for evidence in a pending criminal trial." *Id.* at 713. The Court again used the balancing test to determine that the scope of the President's privilege infringed on the specific needs of the criminal justice system. *Id.* at 711-12. Despite the Court's sweeping language, the *Nixon* decision did not hold that the privilege must yield, but rather that the President had overclaimed the scope of the privilege.

<sup>126</sup> Not only was the evidence in these cases crucial, the defendants in each case proved its reliability. In *Washington v. Texas*, 388 U.S. 14, 22-23 (1967) and *Chambers v. Mississippi*, 410 U.S. 284, 301-02 (1973), the Court emphasized the trustworthiness of the evidence sought to be introduced. In addition, the defendants provided sufficient assurances of the existence of the evidence to warrant a reversal. As a rule, the defendant seeking to subpoena rape crisis counselor files can assure neither the existence of any relevant evidence nor the reliability of any information in these files.

*B. Privacy and Counseling Interests Outweigh Sixth Amendment Concerns*

As a general rule, the defendant's need to secure all relevant information should override competing societal interests. However, the rape crisis counselor-victim relationship is one of the few interests that prevail over these important defendant concerns. For the most part, information revealed in this relationship is irrelevant, inaccurate, and highly prejudicial. What little information might be legitimately useful to the defense can be obtained through other nonprivileged sources. Thus, a balancing of the competing interests strongly favors an absolute privilege.

Information communicated to a rape crisis counselor, for the most part, is irrelevant to any defense. How a victim emotionally responds to a traumatic experience has no bearing on whether a rape occurred or whether the defendant was the rapist.<sup>127</sup> The defendant's sixth amendment rights are not diminished by limiting his subpoena power to relevant inquiries.<sup>128</sup> Only if the victim made statements to the rape crisis counselor concerning whether she consented to the act or as to the identity of the rapist might the communications be relevant to the defense,

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<sup>127</sup> The victim's emotional responses would be relevant only if the prosecution were allowed to introduce expert testimony indicating that the victim experienced emotional reactions that were consistent with rape trauma syndrome to prove that a rape did occur, leaving only the issue of the attacker's identity to be proved. Minnesota, a state with an absolute privilege for rape crisis counselors, has refused to allow the introduction of rape trauma syndrome evidence. *See State v. McGee*, 324 N.W.2d 232 (Minn. 1982); *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982). California, with a limited privilege, has similarly excluded evidence of rape trauma syndrome to prove that a rape occurred. *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984). *But see State v. Marks*, 647 P.2d 1292 (Kan. 1982) (admitting rape trauma syndrome evidence).

<sup>128</sup> The sixth amendment only guarantees the defendant the right to produce *relevant* information. *See, e.g., Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983) (no right to make frivolous or annoying requests). In other contexts, defendants have been required to show relevance before broad subpoena powers will be granted. *See, e.g., United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-74 (1982) (deportation of illegal aliens held not to violate right to compulsory process since defendant failed to show relevancy and harm); *Rubio v. Estelle*, 689 F.2d 533, 536 (5th Cir. 1982) (defendant failed to show informant's testimony would have been favorable); *People v. Hasson*, 86 Misc. 2d 781, 783, 383 N.Y.S. 2d 846, 848 (Sup. Ct. Crim. 1976) (denial of subpoena for medical records upheld since defendant was only "fishing" for impeachment evidence). In this case, which involves a privilege, the rape defendant should be required to make some showing of relevancy before a subpoena is enforced. Unfortunately, California's limited privilege does not require any showing of relevancy. *See supra* note 96 and accompanying text.

and then only if those statements were inconsistent with the victim's testimony. Most of the information contained in a counselor's files is irrelevant,<sup>129</sup> and should be beyond the scope of the defendant's subpoena power.

Information communicated to a rape crisis counselor should also be excluded because of its possible inaccuracy. Courts refuse to admit evidence tending to be inaccurate. For example, some courts refuse to admit polygraph results because of the significant margin of error in the results.<sup>130</sup> Similarly, information communicated to rape crisis counselors is often inaccurate. A victim's statements during counseling are reliable only if viewed in the context in which they were made. A counselor's task is to elicit emotions and feelings that are disrupting the victim's life. For most rape victims, these feelings are caused by society's perception of rape. Thus, when a rape victim wonders if she caused the rape, she is actually thinking that society believes she is responsible for the rape.<sup>131</sup> Correspondingly, when people are mugged late at night, they may later think that it was their fault. What this thought means is that they believe they could have avoided the incident had they not taken risks.<sup>132</sup> No one would expect evidence of these thoughts to be introduced at the mugger's trial. Forty-two states, however, are willing to allow rape defendants to seek similar statements made by rape victims to their counselors.<sup>133</sup>

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<sup>129</sup> Records usually describe recurring fears and distress. Counselors do not ask questions that would elicit information about the identity of the attacker or details of the event. Interview, *supra* note 41; *see also* *People v. Bledsoe*, 36 Cal. 3d 236, 250, 681 P.2d 291, 300, 203 Cal. Rptr. 451, 459 (1984) ("[R]ape counselors do not probe inconsistencies in their clients' descriptions of the facts of the incident, nor do they conduct independent investigations to determine whether other evidence corroborates or contradicts their clients' renditions."). Indeed, "because in the past women who have brought charges of rape have traditionally had their credibility or motives questioned by the police and others, rape counselors are taught to make a conscious effort to avoid judging the credibility of their clients." *Id.* at 250, 681 P.2d at 300, 203 Cal. Rptr. at 459.

<sup>130</sup> *See, e.g.*, *United States v. Sockell*, 478 F.2d 1134 (8th Cir. 1973) (trial court correctly refused to allow defendant to introduce polygraph evidence); *People v. Anderson*, 102 Colo. 67, 637 P.2d 354 (1981) (polygraph technology not sufficiently advanced to allow introduction by defendant); *State v. Conner*, 241 N.W.2d 447 (Iowa 1976) (no sixth amendment violation for refusing to admit defendant's polygraph evidence).

<sup>131</sup> *See supra* notes 4, 8 & 10.

<sup>132</sup> For a review of the literature and a general discussion of self-blame theories, see Miller & Porter, *Self-Blame in Victims of Violence*, 39 J. SOC. ISSUES 139 (1983).

<sup>133</sup> Only California, Florida, Illinois, Maine, Minnesota, New Jersey, Pennsylvania, and Utah provide a rape crisis counselor privilege. *See supra* notes 21-28 and accompanying text.

Information communicated to rape crisis counselors should also be excluded because of its prejudicial effect on the proceedings. This information is highly susceptible to misinterpretation by jurors. Courts exclude evidence if its prejudicial impact would outweigh its probative value.<sup>134</sup> For example, evidence of a victim's prior sexual activity has influenced juries to acquit defendants.<sup>135</sup> Rape shield laws were designed to eliminate this type of prejudice.<sup>136</sup> Juries represent a cross-section of the same society that has traditionally blamed the victim for the rape. Evidence that the victim thought she caused the rape, skillfully extracted from her crisis counselor by defense attorneys, will only reinforce those traditional misconceptions.<sup>137</sup>

Finally, all of the relevant information contained in the files or known by the rape crisis counselor is available to the defendant from other sources.<sup>138</sup> Police reports and line-up results provide details about the victim's recollection of the attacker's identity.<sup>139</sup> The victim herself

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<sup>134</sup> See FED. R. EVID. 403; C. MCCORMICK, *supra* note 34, § 185, at 544-48.

<sup>135</sup> See Berger, *supra* note 3, at 30-31 (citing Kalven & Zeisel jury study revealing that juries convict rapists one seventh as often as a judge would); Burt & Albin, *Rape Myths, Rape Definitions and Probability of Conviction*, 11 J. APPLIED SOC. PSYCHOLOGY 212, 225 (1981) (study found higher rape myth acceptance and belief that victim precipitated attack reduced conviction rate); Ross, *supra* note 4, at 710 (presented with evidence of some pre-rape association between victim and defendant, "juries tend to apply an assumption-of-the-risk philosophy in judging the pre-rape conduct of the victim and to acquit the defendant"); Note, *The Constitutionality of North Carolina's Rape Shield Law — State v. Fortney*, 17 WAKE FOREST L. REV. 781, 787 n.55 (1981) (noting studies showing juries acquit when they believed victim *deserved* rape).

<sup>136</sup> See Berger, *supra* note 3, at 54 (shield laws also intended "to bar evidence that may distract and inflame jurors and is of only arguable probative worth"); Note, *Resistance Requirement*, *supra* note 4, at 887 n.97 (commentary on New York statute stated that one reason for new law was to keep confusing or prejudicial matters that have no bearing on guilt from jury).

<sup>137</sup> Although the prosecutors might be able to put the counselor's answers into context during cross-examination, such efforts are unlikely to rectify the jury's strong impressions. For the effect that evidence of the victim's past sexual activity has on juries, see *supra* note 135.

<sup>138</sup> Rape crisis counselors are rarely the first recipients of rape reports. See NAT'L INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, *supra* note 3, at 22 (few victims first report rape to crisis center). Rather, victims usually make statements to the police, families, and friends. See L. HOLMSTROM & A. BURGESS, *supra* note 11, at 31-32. Since those witnesses are all available to the defendant, the subpoenaing of rape crisis counselors will only produce cumulative evidence.

<sup>139</sup> Courts have granted defendants access to a wide range of police materials, see, e.g., *Goldberg v. United States*, 425 U.S. 94 (1976) (handwritten notes of witness interview); *United States v. Sherwood*, 527 F. Supp. 1001 (W.D.N.Y. 1981) (tape recording of victim's statement); *People v. Riser*, 47 Cal. 2d 566, 305 P.2d 1 (1956) (right to have

is subject to cross-examination by the defense attorney about her prior statements, and witnesses may be introduced to impeach her credibility. Given the opportunities available for protecting the defendant's rights, subpoenas of rape crisis counselors should not be enforced.<sup>140</sup>

Use of the Supreme Court's balancing test leads to the conclusion that an absolute privilege for rape crisis counselors is justified. Although the defendant has the right to a fair trial,<sup>141</sup> the subpoenaing of rape crisis counselors advances that interest very little. The small amount of relevant information the rape victim might convey to the rape crisis counselor is almost certainly obtainable from other sources and, in any event, would be highly prejudicial. By comparison, the subpoena power will harm and perhaps destroy the rape crisis counselor-victim relationship.

### CONCLUSION

This Comment has explored the justifications for communications privileges and found those justifications applicable to the rape crisis counselor-victim relationship. Although rape crisis counselors provide essential support to rape victims, the confidentiality of their relationship remains unprotected in forty-two states and is afforded only limited protection in two states. Confidentiality is the key to this relationship; without protection of that confidentiality, society forfeits a valuable relationship. In addition, the victim's rights to personal autonomy and to withhold private information are denied when defendants are allowed to subpoena rape crisis counselors. If defense attorneys' subpoenas continue to be enforced, rape crisis counseling will have become another means by which society victimizes the rape victim. The

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access to witness' prior statements).

<sup>140</sup> In cases involving other privileges, courts have required that the defendant show that the desired information was not obtainable elsewhere before enforcing a subpoena. See, e.g., *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974) (journalist privilege).

<sup>141</sup> Defendants claim that any information is relevant since the risk and consequences of convicting the innocent is so high. The criminal justice system has perpetuated the myth that rape is an accusation "easily to be made and to be proved, and harder to be defended by the party accused, tho never so innocent." Berger, *supra* note 3, at 22 (quoting Sir Matthew Hale). Fortunately this dire portrayal of our criminal justice system has not been borne out by the evidence. Studies indicate that only 2% of reported rapes prove false and few of these reach the trial stage. See S. KATZ & M. MAZUR, *supra* note 5, at 214. Prosecutors screen cases and, given the difficulty of obtaining a conviction, proceed only when the victim's credibility is high. See Comment, *Psychiatric Examinations of Sexual Assault Victims: A Reevaluation*, 15 U.C. DAVIS L. REV. 973, 995 n.112 (1982).

defendant's interests, though deserving of protection, pale in contrast to the effect that a lack of confidentiality has on the victim's privacy rights. The defendant's right to a fair trial, already protected, is not affected by limiting discovery of information in rape crisis counselor files. A limited privilege proves incapable of protecting the victim's interests. An absolute privilege for rape crisis counselors is not only desirable, but essential if society is to stop victimizing the rape victim.

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