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NOTES

THE CONSTITUTIONALITY OF AN ABSOLUTE PRIVILEGE FOR RAPE CRISIS COUNSELING: A CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHTS VERSUS A RAPE VICTIM'S RIGHT TO CONFIDENTIAL THERAPEUTIC COUNSELING

*"Rapist—
The true nature of your crime—
You left me alive."¹*

Only a rape victim herself will ever know the horror of rape, a horror that never dies, but haunts a victim for life. A total violation of the individual and an intensely personal intrusion into one's privacy, rape leaves physical, psychological and emotional scars on a victim.² Professional counselors and psychiatrists use the term "rape trauma syndrome" to characterize the wide range of emotional and psychological reactions rape victims experience.³ Rape crisis centers have developed rapidly to help victims of rape recover from its severe adverse effects.⁴ Rape crisis centers provide therapeutic counseling to victims through counselors who are specifically trained to help women recover from rape trauma syndrome.⁵

Recognizing the pervasive needs of a rape victim and the important services rape crisis centers perform, several states, either

¹ Excerpt from a poem written by an anonymous rape victim.

² *In re Pittsburgh Action Against Rape*, 494 Pa. 15, 38-39, 428 A.2d 126, 138 (1981) (Larsen, J., dissenting).

³ See *id.* at 38-39, 428 A.2d at 138. For a general discussion of rape trauma syndrome, see A. BURGESS & L. HOLSTROM, *RAPE: CRISIS AND RECOVERY* 33-47 (1979); E. HILBERMAN, *THE RAPE VICTIM* 36-39 (1976).

⁴ See *In re Pittsburgh*, 494 Pa. at 58, 428 A.2d at 148 (Larsen, J., dissenting); HILBERMAN, *supra* note 3, at 29-32.

⁵ HILBERMAN, *supra* note 3, at 29-32, 41-48 (1976).

judicially or statutorily, have extended a testimonial privilege to communications arising from the counseling relationship.⁶ These privileges protect the confidentiality of communications between a rape victim and her counselor. Defendants in rape cases, however, have challenged these privileges as unconstitutional. They have claimed that an absolute denial of relevant information and potential exculpatory evidence violates their right to a fair trial and their rights guaranteed by the confrontation clause and compulsory process clause of the sixth amendment.⁷ Consequently, several courts have confronted the conflict between a testimonial privilege for the rape counseling relationship and a defendant's sixth amendment rights, and have considered the issue of the constitutionality of an absolute privilege for communications between a rape victim and a rape crisis counselor.⁸

Testimonial privileges guarantee the confidentiality of communications arising out of particular relationships by allowing participants to refuse to reveal the contents of communications if called to testify in a court of law.⁹ Unlike most exclusionary rules of evidence which are designed to exclude unreliable or prejudicial evidence, the operation of a testimonial privilege often results in the exclusion of probative evidence from a trial.¹⁰ Testimonial priv-

⁶ For statutorily extended privileges for rape counseling, see CAL. EVID. CODE §§ 1035-1036 (West Supp. 1988); CONN. GEN. STAT. ANN. § 52-146k (West Supp. 1987); ILL. ANN. STAT. ch. 110, para. 8-802.1 (Smith-Hurd 1984); MASS. GEN. LAWS ANN. ch. 233, § 20J (1986); MINN. STAT. ANN. § 595.02(J) (West Supp. 1988); N.J. STAT. ANN. § 2A:84(A)-22.11-22.12 (West Supp. 1984); PA. STAT. ANN. tit. 42, § 5945.1 (Purdon 1982); WASH. REV. CODE ANN. § 70.125.065 (Supp. 1987). For judicially extended protection for rape counseling, see *In re Pittsburgh*, 494 Pa. 15, 428 A.2d 126; *People v. Pena*, 487 N.Y.S.2d 935, 127 Misc. 2d 1057 (1985).

⁷ See *In re Robert H.*, 199 Conn. 693, 706-07, 509 A.2d 475, 483 (1986) (defendant claimed violation of his rights under the confrontation and compulsory process clauses of the sixth amendment and the due process clause of the fourteenth amendment); *People v. Foggy*, 121 Ill.2d 337, 342, 521 N.E.2d 86, 88 (1988) (defendant claimed violation of rights to due process under the fourteenth amendment and his right to confrontation under the sixth amendment); *Commonwealth v. Samuels*, 354 Pa. Super. 128, 139-40, 511 A.2d 221, 226-27 (1986) (defendant claimed violation of his rights under the due process clause of the fourteenth amendment and the compulsory process clauses of the sixth amendment).

⁸ See, e.g., *Robert H.*, 199 Conn. at 706, 509 A.2d at 483; *Commonwealth v. Two Juveniles*, 397 Mass. 261, 262, 491 N.E.2d 234, 235 (1986); *Foggy*, 121 Ill.2d at 339-42, 521 N.E.2d at 87-88.

⁹ See *infra* notes 20 and 21 for examples of testimonial privileges. See also Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, STAN. L. REV. 935, 939 (1978).

¹⁰ C. MCCORMICK, MCCORMICK ON EVIDENCE § 72 (3d ed. 1984); Louissell, *Confidentiality, Conformity and Confusion; Privileges in Federal Courts Today*, 31 TUL. L. REV. 101, 110-11 (1956).

ileges promote relationships that society considers valuable. Accordingly, the continued existence of these valuable relationships justifies the exclusion of even the most relevant and competent evidence.¹¹ Commentators have classified the social objectives that justify the existence of privileges under two theories: the public function theory and the private function theory.¹² The public function theory focuses upon the societal importance of the relationship,¹³ whereas the private function view concentrates upon the individual's private interests in the relationship and in the confidentiality of the communications.¹⁴

The testimonial privilege for communications between a rape victim and a rape crisis counselor assures confidentiality within a therapeutic counseling relationship designed to help victims recover from the trauma rape inflicts.¹⁵ This privilege promotes two social goals: the rehabilitation of rape victims and the prosecution of rapists.¹⁶ The privilege for rape counseling also promotes the victim's private interests in the relationship. A victim possesses a privacy interest in the relationship and an interest in receiving effective and sensitive counseling to enable her to recover from the psychological, emotional and social injuries that rape inflicts.¹⁷

Although two courts have created privileges for the rape counseling relationship by extending the common law,¹⁸ in most states the privilege is codified by statute.¹⁹ The statutes differ in the degree and the extent of confidentiality they afford to such communications. Some statutory privileges are qualified and allow disclosure of communications in court only after the defendant and the court conform with specific procedures.²⁰ A number of statutes, however,

¹¹ C. McCORMICK, *supra* note 10, § 72; Note, *supra* note 9, at 940.

¹² Note, *supra* note 9, at 940-44; see C. McCORMICK, *supra* note 10, § 72.

¹³ C. McCORMICK, *supra* note 10, § 72; Note, *supra* note 9, at 941.

¹⁴ C. McCORMICK, *supra* note 10, § 72; Note, *supra* note 9, at 943; Louissell, *supra* note 10, at 110-11; Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules*, 62 GEO. L.J. 61, 85-94 (1973); also Saltzburg, *Privileges and Professionals*, 66 VA. L. REV. 597 (1980); Black, *The Marital and Physician Privileges—Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 47.

¹⁵ See *infra* notes 79-99 and accompanying text.

¹⁶ *In re Pittsburgh Action Against Rape*, 494 Pa. 15, 24, 428 A.2d 126, 130 (1981); *People v. Foggy*, 121 Ill.2d 337, 348, 521 N.E.2d 86, 91 (1988).

¹⁷ See, e.g., *In re Pittsburgh*, 494 Pa. at 60-62, 428 A.2d at 149-50 (Larsen, J., dissenting); *In re Robert H.*, 199 Conn. 693, 706, 509 A.2d 475, 483 (1976).

¹⁸ See *In re Pittsburgh*, 494 Pa. at 28, 428 A.2d at 132; *People v. Pena*, 487 N.Y.S.2d 935, 939, 127 Misc. 2d 1057, 1061-62 (1985).

¹⁹ See *supra* note 6 for a list of statutory testimonial privileges for rape counseling.

²⁰ See CAL. EVID. CODE §§ 1035-1036 (West Supp. 1988); WASH. REV. CODE ANN.

afford an absolute privilege of confidentiality to the rape crisis counseling relationship. Such statutes protect the confidentiality of communications absolutely, without exception, and do not permit disclosure under any circumstances.²¹ Because absolute privilege

§ 70.125.065 (Supp. 1987). Section 1035.4 of the California Evidence Code provides an example of a statutory qualified privilege and the procedures, such as the in camera review of the communications by the trial judge, employed to allow limited disclosure of confidential communications. Section 1035.4, entitled *Confidential Communications Between the Sexual Assault Counselor and the Victim; Disclosure*, states in part:

The court may compel disclosure of information received by the sexual assault counselor which constitutes relevant evidence of the facts and circumstances involving an alleged sexual assault about which the victim is complaining and which is the subject of a criminal proceeding if the court determines that the probative value outweighs the effect on the victim, the treatment relationship, and the treatment services if disclosure is compelled

When a court is ruling on a claim of privilege under this article, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege If the judge determines that the information is privileged and must not be disclosed, neither he or she . . . may ever disclose . . . without consent . . . what was disclosed in the course of the proceedings in chambers.

If the court determines certain information shall be disclosed, the court shall so order and inform the defendant. If the court finds there is a reasonable likelihood that particular information is subject to disclosure pursuant to the balancing test provided in this section, the following procedure shall be followed:

(1) The court shall inform the defendant of the nature of the information which may be subject to disclosure.

(2) The court shall order a hearing out of the presence of the jury . . . and at the hearing allow the questioning of the sexual assault counselor regarding the information

(3) At the conclusion of the hearing, the court shall rule which items of information, if any, shall be disclosed. The court may make an order stating what evidence may be introduced by the defendant and the nature of questions to be permitted. The defendant may then offer evidence pursuant to the order of the court

Id.

²¹ See CONN. GEN. STAT. ANN. § 52-146k (West Supp. 1987); ILL. ANN. STAT. ch. 110, para. 8-802.1 (Smith-Hurd 1984); MASS. GEN. LAWS ANN. ch. 233, § 20J (1986); MINN. STAT. ANN. § 595.02 (West Supp. 1988); N.J. STAT. ANN. §§ 2A:84(A)-22.11-22.12 (West Supp. 1984); PA. STAT. ANN. tit. 42, § 5945.1 (Purdon 1982). Massachusetts General Laws provide an example of an absolute statutory privilege that precludes even an in camera review. The section entitled *Privileged Communications Between Sexual Assault Victim and Certain Counselors* provides in relevant part:

A sexual assault counselor shall not disclose such confidential communication, without the prior written consent of the victim; provided, however, that nothing in this chapter shall be construed to limit the defendant's right of cross-examination of such counselor in a civil or criminal trial if such counselor testifies with such written consent. Such confidential communications shall not be subject

statutes, unlike qualified privilege statutes, prohibit defense access to privileged communications under all circumstances, defendants have challenged these absolute statutes as unconstitutional.²²

Defendants charged with rape have asserted that an absolute privilege shielding communications between a rape victim and her counselor from the defendants' view, and consequently from potential use as exculpatory evidence, unconstitutionally deprive them of their rights under the confrontation and compulsory process clauses of the sixth amendment.²³ The sixth amendment of the United States Constitution provides that the accused in a criminal prosecution "shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . ." ²⁴ These clauses are referred to respectively as the confrontation clause and the compulsory process clause.

Courts have interpreted the confrontation clause to secure for a criminal defendant the right of cross-examination.²⁵ Defendants who have confronted a testimonial privilege for communications between a victim-complainant and her counselor have alleged that, because the victim may have made inconsistent statements to her counselor, they must be permitted access to such statements in order to cross-examine the victim effectively. Denial of access to the communications because of the absolute privilege, defendants have asserted, is a violation of their right to confront witnesses against them.²⁶ In addition, defendants have maintained that an absolute

to discovery and shall be inadmissible in any criminal or civil proceeding without the prior written consent of the victim to whom the report, record, working paper or memorandum relates.

Id.

²² See, e.g., *In re Robert H.*, 199 Conn. 693, 699-700, 509 A.2d 475, 480 (1986); *People v. Foggy*, 121 Ill.2d 337, 342, 521 N.E.2d 86, 88 (1988). See *infra* notes 252-341 and accompanying text for a discussion of these challenges.

²³ See, e.g., *Robert H.*, 199 Conn. at 706-07, 509 A.2d at 483; *Foggy*, 121 Ill.2d at 342, 521 N.E.2d at 88; *Commonwealth v. Samuels*, 354 Pa. Super. 128, 139-40, 511 A.2d 221, 226-27 (1986).

²⁴ U.S. CONST. amend. VI. The sixth amendment states in full:

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

Id.

²⁵ *Davis v. Alaska*, 415 U.S. 308, 315 (1971). See *infra* notes 132-203 and accompanying text.

²⁶ See, e.g., *Robert H.*, 199 Conn. at 706-07, 509 A.2d at 483; *Foggy*, 121 Ill. 2d at 342,

privilege violates their compulsory process rights because it precludes them from calling the rape crisis counselor, a potentially favorable witness, to the stand and prohibits them from introducing potentially exculpatory evidence contained in the counselor's files.²⁷

The United States Supreme Court decisions regarding the confrontation and compulsory process clauses do not precisely delineate the defendant's rights under these clauses.²⁸ Although the Court ruled that the confrontation clause guaranteed a right of cross-examination, not until 1974, in *Davis v. Alaska*, did the Court address what constituted adequate cross-examination under the confrontation clause.²⁹ Furthermore, the Supreme Court itself is divided as to the meaning of a right of effective cross-examination.³⁰ The plurality opinion in *Pennsylvania v. Ritchie* limited the right of a defendant to effective cross-examination by asserting that this right is only infringed upon where the actual questioning at trial is restricted.³¹ The dissent in *Ritchie*, however, argued that the right of cross-examination should not be limited to a trial right, but should include a right to pre-trial discovery of statements that may increase the effectiveness of cross-examination.³²

Similarly, the Supreme Court has rarely addressed the parameters of the compulsory process clause.³³ In *Ritchie*, where the Court faced an alleged violation of compulsory process involving a statute protecting the confidentiality of the files of an agency organized to investigate child abuse, the Court chose to apply a due process analysis to the conflict.³⁴ Moreover, the Court has only decided cases involving claims of conflict between a defendant's sixth amendment rights and various evidentiary rules of exclusion.³⁵ The Supreme Court has never decided a conflict between a defendant's sixth

521 N.E.2d at 88; *cf. Ritchie*, 107 S. Ct. at 998-99 (confidentiality of child abuse records). See *infra* notes 126-29 and accompanying text.

²⁷ See, e.g., *Robert H.*, 199 Conn. at 706-07, 509 A.2d at 483 (1986); *cf. Ritchie*, 107 S. Ct. at 995; See *infra* notes 130-31 and accompanying text.

²⁸ See *Ritchie*, 107 S. Ct. 989. The Court was unable to reach a majority on the interpretation of the confrontation clause. *Id.* at 994. Moreover, the Court stated that its precedents on the compulsory process clause were "unsettled." *Id.* at 1001.

²⁹ *Davis*, 415 U.S. at 315; see *infra* notes 135-57 and accompanying text.

³⁰ See *Ritchie*, 107 S. Ct. 989 (plurality opinion). See *infra* notes 158-203 and accompanying text.

³¹ *Id.* at 1000.

³² See *id.* at 1009 (Brennan, J., dissenting).

³³ *Id.* at 1001.

³⁴ *Id.*

³⁵ See *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967).

amendment rights and a testimonial privilege,³⁶ which rests upon a different foundation than a rule of exclusion.³⁷ Accordingly, the Supreme Court's jurisprudence regarding the defendant's rights under the confrontation and compulsory process clauses and the proper resolution to a conflict between a defendant's rights and a testimonial privilege for rape crisis counseling is unsettled and confusing.

Several state courts have confronted the issue of the constitutionality of an absolute rape counseling privilege.³⁸ Most of these courts have ruled that an absolute privilege statute unconstitutionally infringes upon a defendant's sixth amendment rights to confrontation and compulsory process.³⁹ Yet, these courts reached the same conclusion applying different reasoning and conflicting interpretations of the same Supreme Court decisions.⁴⁰ Additionally, these court opinions were all decided prior to the decision of *Pennsylvania v. Ritchie*, in which the Court elaborated on the right of confrontation and applied a due process analysis where the defendant claimed a violation of compulsory process.⁴¹ In contrast, one state court held that an absolute privilege for communications between a rape victim and a rape crisis counselor was constitutional.⁴²

This note analyzes the constitutionality of an absolute testimonial privilege for communications between a rape victim and a rape crisis counselor. Part I reviews the law of testimonial privileges, examines the underlying policy interests supporting the existence of such privileges, and focuses on the absolute privilege for the rape crisis counseling relationship and the interests the privilege protects.⁴³ Part II considers the contours and scope of the rights guaranteed by the confrontation and compulsory process clauses of the sixth amendment and Supreme Court decisions resolving conflicts

³⁶ See *Commonwealth v. Two Juveniles*, 397 Mass. 261, 267, 491 N.E.2d 234, 238 (1986).

³⁷ See *Washington*, 388 U.S. at 23 n.21; McCORMICK, *supra* note 10, § 72; Note, *supra* note 9, at 939-44.

³⁸ See *In re Robert H.*, 199 Conn. 693, 706, 509 A.2d 475, 483 (1986); *People v. Foggy*, 121 Ill. 2d 337, 342, 347, 521 N.E.2d 86, 88, 91 (1988); *Two Juveniles*, 397 Mass. at 262, 491 N.E.2d at 235; *Commonwealth v. Samuels*, 354 Pa. Super. 128, 139-40, 511 A.2d 221, 226-27 (1986); *Advisory Opinion to the House of Representatives*, 469 A.2d 1161, 1163 (R.I. 1983).

³⁹ *E.g., Robert H.*, 199 Conn. at 708-09, 509 A.2d at 484. See also the advisory opinions in *Two Juveniles*, 397 Mass. 261, 491 N.E.2d 234 (1986); *Advisory Opinion*, 469 A.2d 1161 (R.I. 1983).

⁴⁰ See *infra* notes 252-341 and accompanying text.

⁴¹ 107 S. Ct. 989 (1987).

⁴² *Foggy*, 121 Ill. 2d at 349-50, 521 N.E.2d at 92.

⁴³ See *infra* notes 47-122 and accompanying text.

with sixth amendment rights.⁴⁴ Part III discusses the origins of the testimonial privilege of confidentiality for the rape crisis counseling relationship and reviews the conflicting decisions of state courts confronted with the issue of the constitutionality of an absolute privilege.⁴⁵ This note concludes that an absolute privilege of confidentiality for communications between rape victims and rape crisis counselors does not violate a defendant's sixth amendment rights because the compelling state interests and the individual private interests of the victim supporting this testimonial privilege justify any infringement on the defendant's rights.⁴⁶

I. TESTIMONIAL PRIVILEGES: A PRIVILEGE FOR THE RAPE CRISIS COUNSELING RELATIONSHIP

A. Testimonial Privileges

The American system of criminal justice—adversarial in nature and emphasizing complete disclosure of all relevant facts—fundamentally operates as a search for truth. The basic belief that disclosure, rather than suppression, promotes the proper administration of criminal justice⁴⁷ led to the emergence of the three century old legal maxim that the public has a claim to every man's evidence.⁴⁸ In contradiction to this fundamental legal maxim demanding disclosure and imposing a testimonial duty on every man, English and American law for centuries have granted testimonial privileges to participants in certain favored private relationships.⁴⁹

Testimonial privileges guarantee the confidentiality of communications in particular relationships by allowing participants not to reveal the contents of their communications when called to testify as witnesses in court.⁵⁰ At common law, privileges of confidentiality

⁴⁴ See *infra* notes 123–251 and accompanying text.

⁴⁵ See *infra* notes 252–341 and accompanying text.

⁴⁶ See *infra* notes 342–445 and accompanying text.

⁴⁷ *In re Pittsburgh Action Against Rape*, 494 Pa. 15, 24, 428 A.2d 126, 130 (1981) (quoting *Dennis v. United States*, 384 U.S. 855, 870 (1966)).

⁴⁸ 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. ed. 1961) (quoting Lord Hardwicke, 12 COBBETT'S PARLIAMENTARY HISTORY 675, 693 (1742)) ("When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional . . .").

⁴⁹ See C. McCORMICK, *supra* note 10, §§ 78, 87; see also Note, *supra* note 9, at 939.

⁵⁰ See C. McCORMICK, *supra* note 10, § 73.

existed for communications between attorneys and their clients⁵¹ and between husbands and wives.⁵² In the 19th century some state legislatures began expanding the law of testimonial privileges by creating privileges for communications between doctors and patients⁵³ and between clergy and penitents.⁵⁴ Most recently, statutes have extended communications privileges to therapeutic and counseling relationships,⁵⁵ as well as to other private relationships.⁵⁶ The confidentiality privilege for communications between rape crisis counselors and rape victims is a recent creation, first created judicially⁵⁷ and subsequently extended statutorily.⁵⁸

Although testimonial privileges exempt certain communications from disclosure in judicial proceedings, communications privileges are not merely exclusionary rules of evidence.⁵⁹ Most exclusionary rules of evidence are designed to promote the truth-seeking

⁵¹ See *Kelway v. Kelway*, 21 Eng. Rep. 47 (ch. 1580); see also C. McCORMICK, *supra* note 10, at 87-97; 8 J. WIGMORE, *supra* note 48, §§ 2290-2329. The attorney-client privilege is now statutory in most states. See, e.g., CAL. EVID. CODE §§ 950-62 (West 1966); WIS. STAT. ANN. § 905.03 (West 1975).

⁵² See *Lady Ivy's Trial*, 10 How. St. Tr. 555, 628 (1684); see also C. McCORMICK, *supra* note 10, §§ 78-86; 8 J. WIGMORE, *supra* note 48, §§ 2332-41 (McNaughton rev. ed. 1961 and Supp. 1977). The marital testimonial privilege is now statutory in most states. For a full description of the privilege and a survey of statutes, see C. McCORMICK, *supra* note 10, §§ 78-86; 8 J. WIGMORE, *supra* note 48, §§ 2332-41.

⁵³ See, e.g., N.Y. REV. STATS. pt. 3, ch. 7, § 73 (1829); CAL. CIV. PROC. CODE § 1881 (1872); see also McCORMICK, *supra* note 10, at 98-105; 8 J. WIGMORE, *supra* note 48, §§ 2380-91.

⁵⁴ See N.Y. REV. STATS. pt. 3, ch. 7, § 72 (1828); see also 8 J. WIGMORE, *supra* note 48, § 2394.

⁵⁵ See CAL. EVID. CODE §§ 1010-27 (West 1966 & Supp. 1988); N.Y. CIV. PRAC. L. & R. §§ 4507-08 (McKinney 1988) (privilege extended to psychologists and social workers); PA. STAT. ANN. tit. 42, §§ 5944-45 (Purdon 1982) (privilege created for licensed psychologists and school personnel). See generally Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609 (1964); Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 CALIF. L. REV. 1050 (1973).

⁵⁶ See 8 J. WIGMORE, *supra* note 48, § 2286 for recent communications privileges statutorily created for such private parties as journalists and their sources, accountants and their clients, and clerks and stenographers and their employers.

⁵⁷ *In re Pittsburgh Action Against Rape*, 494 Pa. 15, 28, 428 A.2d 126, 132 (1981) (although court refused to extend an absolute privilege, the court granted qualified protection to communications between a rape counselor and a victim); see also *People v. Pena*, 487 N.Y.S.2d 935, 937-39, 127 Misc. 2d 1057, 1058-62 (1985) (the court judicially fashioned a qualified privilege on the facts).

⁵⁸ CAL. EVID. CODE §§ 1035-36 (West Supp. 1988); CONN. GEN. STAT. ANN. § 52-146k (West Supp. 1987); ILL. ANN. STAT. ch. 110, para. 8-802.1 (Smith-Hurd 1984); MASS. GEN. LAWS ANN. ch. 233, § 20J (West 1986); MINN. STAT. ANN. § 595.02 (West Supp. 1988); N.J. STAT. ANN. § 2A:84(A)-22.11-22.12 (West Supp. 1984); PA. STAT. ANN. tit. 42, § 5945.1 (Purdon 1982); WASH. REV. CODE ANN. § 70.125.065 (Supp. 1987).

⁵⁹ C. McCORMICK, *supra* note 10, § 72.

function of our judicial system by excluding unreliable or prejudicial evidence. The hearsay rule, the best evidence rule, the opinion rule and the propensity rule exemplify such exclusionary rules.⁶⁰ Unlike such exclusionary rules of evidence, the operation of a testimonial privilege often results in the exclusion of probative evidence from a trial.⁶¹ Thus, by excluding competent evidence, testimonial privileges inhibit, rather than enhance, the ascertainment of truth.⁶² Testimonial privileges should not be viewed solely from the perspective of their exclusionary function in litigation, however.⁶³ Rather, testimonial privileges protect extra-judicial interests and socially important relationships.⁶⁴ They reflect societal values and social policies that justify the exclusion of even the most relevant and competent evidence.⁶⁵ The many social objectives advanced in justification of privileges can be classified under two major theories: the public function theory and the private function theory.⁶⁶

1. The Public Function Theory

Some commentators have proposed a public function theory of communications privileges that focuses on the societal importance of the relationship from which the communications arise.⁶⁷ The theory's justification derives from Wigmore's classical analysis of communications privileges.⁶⁸ Although a privilege extends confidentiality to the communication, the public function analysis focuses on the relationship, the necessity of confidentiality for the promotion of the relationship, the societal value of the relationship and the potential injury to the relationship.⁶⁹ Under the public function

⁶⁰ *Id.*

⁶¹ *Id.*; Louissell, *supra* note 10, at 110-111.

⁶² C. McCORMICK, *supra* note 10, § 72.

⁶³ *Id.*; Louissell, *supra* note 10, at 110-111.

⁶⁴ C. McCORMICK, *supra* note 10, § 72.

⁶⁵ *Id.*; Louissell, *supra* note 10, at 110-111.

⁶⁶ C. McCORMICK, *supra* note 10, § 72; Note, *supra* note 9, at 940.

⁶⁷ See C. McCORMICK, *supra* note 10, § 72; Note, *supra* note 9, at 940-42.

⁶⁸ See C. McCORMICK, *supra* note 10, § 72; Note, *supra* note 9, at 940-41.

⁶⁹ See 8 J. WIGMORE, *supra* note 48, § 2285. To determine whether a communication merits a privilege of confidentiality, Wigmore asserts that four conditions must be satisfied:

- (1) The communication 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 relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Id. (emphasis omitted)

view, the purpose of the privilege, therefore, is the promotion, maintenance and protection of relationships that our society considers valuable.⁷⁰ Thus, according to this theory, privileges are judicial instruments used to achieve important practical social aims.⁷¹

The public function theory rests upon the assumption that, if individuals cannot be certain that their communications within particular relationships will remain confidential, they may choose not to form such relationships or will refrain from communicating in an open and honest manner necessary for the growth and proper function of the relationship.⁷² This theory does not emphasize the individual suffering that failure of the relationship will cause, but focuses instead on the societal harm such failure will cause. If clients cannot freely and honestly consult with lawyers without fear of disclosure, the judicial process itself will suffer. Similarly, if husband and wife cannot share confidences with an assurance of secrecy, family life may ultimately suffer. Likewise, the general health of society may suffer if patients are afraid to communicate their physical or psychological problems to their physicians or psychologists because of potential disclosure.⁷³ Accordingly, a particular privilege's strength depends upon its social utility, which is measured by the social importance of the relationship and the damage that disclosure would inflict upon that relationship and, ultimately, upon society in general.⁷⁴

2. The Private Function Theory

Commentators have also proposed a private function theory of privileges. This theory's justification rests upon the individual's private interests in the relationship and in the communications' confidentiality.⁷⁵ According to the private function theory, communications privileges exist to guard matters of privacy and conscience revealed in such relationships and to protect individuals from per-

⁷⁰ *Id.*; Note, *supra* note 9, at 941.

⁷¹ Note, *supra* note 9, at 941.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 941-42.

⁷⁵ C. McCORMICK, *supra* note 10, § 72; Louissell, *supra* note 10, at 110-11. Professor Louissell stated that "privileges of confidential communications protect significant human values in the interest of the holders of the privileges, and that the fact that the existence of these guarantees sometimes results in the exclusion from a trial of probative evidence is merely a secondary and incidental feature of the privileges' vitality." Louissell, *supra* note 10, at 101.

sonal injuries that disclosure of such confidences might cause them.⁷⁶ The underlying notion is that privilegeholders possess rights to secret communications within certain private relationships and that the legal existence of privileges is in effect recognition of these individual rights.⁷⁷ As one advocate of private function justifications noted, privileges recognize "a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state's coercive or supervisory powers and from the nuisance of its eavesdropping."⁷⁸

B. A Testimonial Privilege For Communications Arising From the Relationship Between a Rape Victim and a Rape Crisis Counselor

The testimonial privilege extended by courts and legislatures to the rape crisis counseling relationship protects the confidentiality of communications arising from that relationship.⁷⁹ Professional psychiatrists and counselors have indicated that rape has devastating effects upon its victim. These devastating effects, they state, create a compelling need for a confidential counseling relationship, based on trust, to enable the victim to cope with the trauma she suffers.⁸⁰

⁷⁶ C. McCORMICK, *supra* note 10, § 72; Louissell, *supra* note 10, at 110-11; Note, *supra* note 9, at 943. For a discussion of the values of privacy underlying communications privileges, see Krattenmaker, *supra* note 14, at 85-94; Saltzburg, *supra* note 14, at 621-22.

⁷⁷ Louissell, *supra* note 10, at 110-11.

⁷⁸ *Id.* In promoting a private function base for privileges, Professor Louissell states that strictly utilitarian bases for the privileges, such as those emphasized by Wigmore, are sometimes "highly conjectural and defy scientific validation." *Id.* Similarly, Professor Krattenmaker states:

[P]erhaps the majority of evidence experts share the . . . perspective that testimonial privileges are mere bothersome exclusionary rules . . . that impede the accuracy of fact finding and serve no other important societal goals. Yet, at least on an intuitive basis, other equally plausible rationales might explain their existence. For in the course of blocking access to the facts, privileges also provide a barrier to officially sponsored penetration of private communications.

Krattenmaker, *supra* note 14, at 85.

Consideration of the private function view of privileges raises the issue of whether the individual private interests and matters of privacy and conscience, recognized and protected by privileges, deserve constitutional status. Courts and commentators have suggested that these individual interests fall within the constitutional right of privacy and demand constitutional protection. See, e.g., *In re Lifschutz*, 2 Cal. 3d 415, 467 P.2d 557 (1975); *Caesar v. Mountanos* 542 F.2d 1064 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977); see also Krattenmaker, *supra* note 14, at 94-98; Black, *supra* note 14, at 47. Courts, however, have not yet clearly affirmed the constitutional status of communications privileges, and therefore, one cannot view privileges as supported by a constitutional right. See Note, *supra* note 9, at 944 n.40.

⁷⁹ See, e.g., MASS. GEN. LAWS ANN. ch. 233, § 20J (1986); *In re Pittsburgh Action Against Rape*, 494 Pa. 15, 428 A.2d 126 (1981).

⁸⁰ HILBERMAN, *supra* note 3, at 41.

Rape traumatizes its victim to a degree beyond that experienced by victims of other crimes.⁸¹ The crime affects its victim physically, psychologically and emotionally. Professional psychiatrists have advanced the term "rape trauma syndrome" to encompass the wide range of emotional and psychological reactions experienced by rape victims.⁸² The emotional and psychological reactions of a traumatized victim range from fear, anger and depression to shame, guilt and disgust.⁸³ In addition to the wounds inflicted by the rape itself, a social stigma attaches to the rape victim, causing her additional suffering.⁸⁴

⁸¹ *In re Pittsburgh*, 494 Pa. at 42-43, 428 A.2d at 140 (Larsen, J., dissenting).

⁸² *Id.* at 38-39, 428 A.2d at 138 (Larsen, J., dissenting). Justice Larsen quoted Dr. George G. Gardiner, Professor of Psychiatry at Hahneman Medical College and Hospital in Philadelphia, for his description of rape trauma syndrome contained in the Joint Brief for Amici Curiae, Women's Law Project and Women Organized Against Rape:

The impact of rape on the victim is manifold. There is, for the victim, threat and actuality of physical harm that may cover the spectrum from bruises to maiming and death. In addition, there is the acute and severe loss of control by the victim over her circumstances. Furthermore, there is intrusion into her privacy in the most intensely personal way imaginable. As a result of the trauma of rape there are many different emotional reactions. Commonly one will find fear and panic based on what has actually happened or based on what might be imagined to happen as the result of a repeated attack. In addition, the individual may well feel shame and guilt over having been unable to prevent or stop the attack. Anger is a very common reaction and in addition there may be confusion. Very frequently the individual will have a period of depression, often occurring after an apparent period of stability. The range of short term and long lasting effects involves a number of mental disorders including, in rare individuals, the onset of psychosis, more commonly recognized as a "nervous breakdown." It is common experience that some of the more severe and long lasting disorders will frequently require long periods of psychiatric care and can be manifested by significant disability for the individual. A common aspect of rape is that the victim often feels isolated and helpless during and immediately after the episode During this phase a frequent phenomenon is that guilt and shame will make it quite difficult for the individual immediately to establish the ability to express herself completely.

Id. at 39, 428 A.2d at 138 (Larsen, J., dissenting); see also BURGESS & HOLSTROM, *supra* note 3, at 33-47; HILBERMAN, *supra* note 3, at 36-39.

⁸³ *In re Pittsburgh*, 494 Pa. at 39, 428 A.2d at 138 (Larsen, J., dissenting); HILBERMAN, *supra* note 3, at 36. As Hilberman notes:

[M]ood swings are common [for the victim of rape] and include feelings of humiliation, degradation, guilt, shame, embarrassment, self-blame, anger, revenge, and fear The primary defense is to block the thoughts from her mind, although they continue to haunt her. The wish to undo the event is reflected in fantasies of how she might have handled the situation differently, thereby avoiding the assault.

HILBERMAN, *supra* note 3, at 36.

⁸⁴ *In re Pittsburgh*, 494 Pa. at 40-43, 428 A.2d at 138-40 (Larsen, J., dissenting). "Rape is the only crime in which the victim is doubly violated, first by the attacker and then by

The needs of rape victims are so pervasive that rape crisis centers have emerged and developed rapidly in an effort to help such victims.⁸⁵ Rape crisis centers are service facilities organized to provide counseling to victims of sexual assault.⁸⁶ The counselors who work with the victims are referred to as rape crisis counselors or sexual assault counselors. Rape crisis counselors are extensively trained in crisis counseling.⁸⁷ They provide victims with necessary physical, psychological, and social support.⁸⁸ Rape crisis centers offer a sanctuary for rape victims where they can receive the understanding and therapeutic counseling.⁸⁹

Promoters of these centers have asserted that confidentiality is essential to the full and satisfactory maintenance of the rape victim/rape counselor relationship.⁹⁰ If confidentiality is not assured, supporters have stated, rape victims may avoid obtaining the treatment that they need, or upon entering a treatment relationship, will refrain from revealing certain feelings and thoughts out of fear of disclosure.⁹¹ Furthermore, supporters of a privilege reason that, in order to receive the maximum therapeutic benefit from the rape counseling relationship, victims must be able to trust and confide freely in their counselor.⁹² Without a guarantee of confidentiality, the development of the necessary trust is almost impossible.⁹³ Accordingly, commentators assert that confidentiality is essential to the proper and effective therapy, treatment and counseling of a traumatized victim.

Courts and legislatures, recognizing the importance of the rape crisis counseling relationship and its therapeutic function, have chosen to promote the continued existence of the relationship by granting a testimonial privilege of confidentiality to communications

society. It is the only crime in which social, religious, and cultural core attitudes of society turn upon the victim. In rape, society tends to blame or accuse the women." *Id.* at 41 (quoting statement of Police Superintendent Robert Colville reprinted in Note, *The Victim in a Forcible Rape case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 351 (1973)).

⁸⁵ *In re Pittsburgh*, 494 Pa. at 58, 428 A.2d at 148 (Larsen, J., dissenting); HILBERMAN, *supra* note 3, at 29-32.

⁸⁶ HILBERMAN, *supra* note 3, at 29.

⁸⁷ *In re Pittsburgh*, 494 Pa. at 20, 428 A.2d at 128.

⁸⁸ *Id.*

⁸⁹ HILBERMAN, *supra* note 3, at 31.

⁹⁰ *In re Pittsburgh*, 494 Pa. at 56-57, 428 A.2d at 146-47 (Larsen, J., dissenting); see also BURGESS & HOLSTROM, *supra* note 3, at 126-127, 150-151.

⁹¹ *In re Pittsburgh*, 494 Pa. at 50, 428 A.2d at 145 (Larsen, J., dissenting).

⁹² *In re Pittsburgh*, 494 Pa. at 54, 428 A.2d at 145 (Larsen, J., dissenting).

⁹³ *In re Pittsburgh*, 494 Pa. at 56 n.2, 428 A.2d at 147 n.2 (Larsen, J., dissenting); BURGESS & HOLSTROM, *supra* note 3, at 127.

between a rape victim and a rape crisis counselor.⁹⁴ According to such courts and legislatures, the rape crisis counseling privilege promotes and protects a socially valuable relationship that furthers important public aims.⁹⁵ For example, the rape counseling relationship serves the public interest of helping victims of rape cope with the inevitable disruption of emotional stability caused by the rape.⁹⁶ Additionally, courts have asserted that an absolute privilege of confidentiality protecting this counseling relationship fosters the public interest in the reporting of rapes and the prosecution of rapists because the rape counseling relationship provides the victim with the psychological and emotional support she may need to report the crime and to aid the police and the prosecution.⁹⁷ Thus, society benefits from the furtherance of this relationship. Additionally, courts and legislatures supporting an absolute privilege for rape counseling intend that the privilege benefit the victim. As a result of the protection the privilege affords, the victim may obtain effective, sensitive and confidential treatment to which she is rightfully entitled.⁹⁸ Moreover, once the relationship is formed, the privilege protects the victim's privacy interests in the relationship and in the communications arising from the relationship.⁹⁹

Although most states extend a testimonial privilege to communications arising from the rape counseling relationship by statute, two states have extended judicial protection to such communications in the absence of a statutory privilege.¹⁰⁰ For example, the Pennsylvania Supreme Court in the 1985 decision of *In re Pittsburgh Action Against Rape* was the first court to address a claim of privilege for communications between rape victims and rape crisis counsel-

⁹⁴ For statutorily extended privileges for rape counseling, see CAL. EVID. CODE §§ 1035-1036 (West Supp. 1988); CONN. GEN. STAT. ANN. § 52-146k (West Supp. 1987); ILL. ANN. STAT. ch. 110, para. 8-802.1 (Smith-Hurd 1984); MASS. GEN. LAWS ANN. ch. 233, § 20J (1986); MINN. STAT. ANN. § 595.02(J) (West Supp. 1988); N.J. STAT. ANN. 2A:84(A)-22.11-22.12 (West Supp. 1984); PA. STAT. ANN. tit. 42, § 5945.1 (Purdon 1982); WASH. REV. CODE ANN. § 70.125.065 (Supp. 1987). For judicially extended protection for rape counseling, see *In re Pittsburgh*, 494 Pa. 15, 428 A.2d 126; *People v. Pena*, 127 Misc. 2d 1057, 487 N.Y.S.2d 935 (1985).

⁹⁵ *In re Pittsburgh*, 494 Pa. at 24, 428 A.2d at 130; *People v. Foggy*, 121 Ill.2d 337, 348, 521 N.E.2d 86, 91.

⁹⁶ *In re Pittsburgh*, 494 Pa. at 24, 428 A.2d at 130.

⁹⁷ *Id.*; *Foggy*, 121 Ill.2d at 348, 521 N.E.2d at 91.

⁹⁸ *In re Pittsburgh*, 494 Pa. at 57-58, 428 A.2d at 147 (Larsen, J., dissenting).

⁹⁹ *Id.* at 60-62, 428 A.2d at 149-50 (Larsen, J., dissenting).

¹⁰⁰ See *In re Pittsburgh*, 494 Pa. at 28, 428 A.2d at 132; *People v. Pena*, 487 N.Y.S.2d 935, 939, 127 Misc. 2d 1057, 1061-62 (1985).

ors.¹⁰¹ The court in *In re Pittsburgh*, although refusing to extend the common law to create an absolute privilege of confidentiality for the rape counseling relationship, judicially fashioned a qualified privilege.¹⁰² The court held that the trial court must permit the defense to inspect those statements of the victim in the file that bear on the facts of the alleged offense, but must prohibit the defense from inspecting the victim's statements that do not bear on the offense and relate only to the counseling services the rape counseling center provides.¹⁰³

In re Pittsburgh involved a contempt citation that arose in connection with a rape trial.¹⁰⁴ During the trial the defense counsel requested production of the files of the rape crisis counseling center, Pittsburgh Action Against Rape (PAAR), at which the victim received counseling.¹⁰⁵ The trial court ordered the director of the center to allow the defendant to examine the victim's statements in such records for prior inconsistencies. When the center's director refused to comply, the trial court held her in contempt.¹⁰⁶

On appeal to the Supreme Court of Pennsylvania, the Director of the center argued that the court should expand the common law to create an absolute privilege of confidentiality for communications between a rape victim and her rape crisis counselor.¹⁰⁷ In considering the request, the court balanced the societal interest in promoting communications between rape victims and rape counselors against the societal interests both in furthering the truth-seeking function of the trial system and in assuring fairness to the accused in his effort to defend himself against criminal charges.¹⁰⁸ The court stated that rape crisis centers foster such vital public interests as helping the victims of rape cope with the trauma and encouraging the victims to come forward.¹⁰⁹ The court, however, emphasized the opposing right of the defendant to examine prior statements of witnesses testifying for the defense and the necessity of compulsory process.¹¹⁰ In addition, the court emphasized the truth-seeking function of the adversarial system and the system's emphasis on

¹⁰¹ *In re Pittsburgh*, 494 Pa. at 19, 428 A.2d at 127.

¹⁰² *Id.*; see *Commonwealth v. Ritchie*, 509 Pa. 357, 360-61, 502 A.2d 148, 150 (1985).

¹⁰³ *In re Pittsburgh*, 494 Pa. at 19, 428 A.2d at 127.

¹⁰⁴ *Id.* at 21, 428 A.2d at 127-28.

¹⁰⁵ *Id.* at 22, 428 A.2d at 129.

¹⁰⁶ *Id.* at 23, 428 A.2d at 129.

¹⁰⁷ *Id.* at 24, 428 A.2d at 130.

¹⁰⁸ *Id.* at 24-27, 428 A.2d at 130-32.

¹⁰⁹ *Id.* at 24, 428 A.2d at 130.

¹¹⁰ *Id.* at 27, 428 A.2d at 132.

disclosure as a means to truth.¹¹¹ The court reasoned that, because privileges are exceptions to the "public's demand for every man's evidence" and in derogation of the search for truth, they should neither be lightly created nor expansively construed.¹¹² Accordingly, the court refused to extend the common law to create an absolute confidentiality privilege for the rape crisis counseling relationship.¹¹³

Although the *In re Pittsburgh* court declined to create an absolute privilege, the court did not order complete disclosure of the file or allow the defendant unlimited access to its contents.¹¹⁴ Instead, recognizing the important functions of rape crisis centers and the need to protect confidentiality within the counseling relationship, the court limited the disclosure.¹¹⁵ Accordingly, the court's resolution of the conflict attempted to harmonize the various interests involved by creating a qualified privilege allowing only limited disclosure of relevant statements after an *in camera* review by the court.¹¹⁶

In the other states that extend a testimonial privilege to the rape counseling relationship, the privilege is statutory.¹¹⁷ The various statutory privileges differ in the degree and the extent of confidentiality afforded to such communications.¹¹⁸ Some statutes grant only a qualified privilege, which allows limited disclosure of the confidential communications upon completion of specified reviewing procedures and satisfaction of established criteria.¹¹⁹ Because a qualified privilege provides access to the privileged information, qualified privileges generally are not the subject of constitutional attack. A number of statutes, however, afford an absolute privilege of confidentiality to the rape crisis counseling relationship. These absolute privilege statutes provide confidentiality for the communications arising from the counseling relationship and afford the counselor an absolute privilege of not testifying as

¹¹¹ *Id.* at 24-25, 428 A.2d at 130-31.

¹¹² *Id.* at 26-27, 428 A.2d at 131 (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

¹¹³ *Id.* at 27, 428 A.2d at 131.

¹¹⁴ *Id.* at 28, 428 A.2d at 132.

¹¹⁵ *Id.* at 28-30, 428 A.2d at 132-33.

¹¹⁶ *Id.* at 19, 428 A.2d at 127.

¹¹⁷ See *supra* note 6 for a list of statutory testimonial privileges for rape counseling.

¹¹⁸ Compare MASS. GEN. LAWS ANN. ch. 293, § 20J (West 1986) (absolute privilege) with CAL. EVID. CODE §§ 1035-1036 (West Supp. 1988) (qualified privilege).

¹¹⁹ See *supra* note 20 for an example of a statutory qualified privilege for rape counseling.

to the contents of such communications under any circumstances.¹²⁰ An absolute privilege statute, on its face, precludes even an *in camera* review.¹²¹ Because an absolute privilege statute prohibits defense access to privileged communications under all circumstances, defense counsel have often attacked absolute privileges as unconstitutional on the ground that they deny the defendant his rights of confrontation and compulsory process under the sixth amendment.¹²²

II. SIXTH AMENDMENT RIGHTS

The sixth amendment of the United States Constitution guarantees certain rights to the accused in a criminal prosecution. Among these constitutional guarantees is the mandate that "the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . ." ¹²³ The first clause of the sixth amendment is termed the confrontation clause and the second clause is referred to as the compulsory process clause. Both the confrontation clause and the compulsory process clause accord with the truth-finding function of our criminal justice system. The confrontation clause assures the defendant both the right to meet witnesses against him or her face-to-face, and the opportunity to challenge the credibility of the witnesses and the truth of their statements.¹²⁴ Similarly, in accord with our system's emphasis on disclosure as a means to truth, the compulsory process clause assures to a criminal defendant a compulsory method by which to obtain witnesses and evidence in his or her favor.¹²⁵

¹²⁰ See *supra* note 21 for a list of absolute statutory privileges and for an example of a statutory absolute privilege for rape counseling.

¹²¹ *Commonwealth v. Two Juveniles*, 397 Mass. 261, 264, 491 N.E.2d 234, 236 (1986).

¹²² See, e.g., *In re Robert H.*, 199 Conn. 693, 705, 509 A.2d 475, 482 (1986); *People v. Foggy*, 121 Ill. 2d 337, 342, 521 N.E.2d 86, 88 (1988).

¹²³ U.S. CONST. amend. VI. For a full statement of the sixth amendment, see *supra* note 24.

¹²⁴ See *Davis v. Alaska*, 415 U.S. 308, 315, 316 (1974). The Court stated that [c]ross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested A more particular attack on the witness's credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.

Id.

¹²⁵ *Washington v. Texas*, 388 U.S. 14, 17 (1967).

Criminal defendants in rape cases have claimed that an absolute privilege shielding statements of a victim-complainant from their view and from potential use as defensive evidence denies them their rights under both the confrontation clause and the compulsory process clause.¹²⁶ Defendants have argued that, because a victim may have made statements to a rape crisis counselor that are inconsistent with her testimony at trial, they must be permitted access to such statements to use in cross-examining the victim.¹²⁷ Because the testimony of a victim is so essential to the prosecution's case, defendants have argued, cross-examination of this witness is of compelling importance to the defense.¹²⁸ Because the defense may use a victim's statements to impeach her testimony or to reveal possible biases, prejudices or ulterior motives, defendants have argued that they should have access to all prior statements relating to the crime to use in their defense.¹²⁹ Defendants have argued that the possibility that they may be deprived of their liberty on the testimony of the victim outweighs all other competing interests and justifications in favor of the privilege.

Additionally, defendants in rape cases have maintained that an absolute privilege violates their compulsory process rights because it precludes them from calling the counselor as a witness and prohibits them from introducing into evidence potentially exculpatory evidence contained in the files of the counselor.¹³⁰ Because the communications of which the counselor has knowledge may benefit their defense, defendants have argued that the counselor is a witness in their favor whose testimony they should obtain pursuant to their right of compulsory process. Similarly, because the records of the communications retained by the counselor may contain exculpatory evidence, defendants have asserted that their right to compulsory process demands that they be given access to such information to use in their defense.¹³¹

¹²⁶ See, e.g., *In re Robert H.*, 199 Conn. 693, 705, 509 A.2d 475, 482 (1986); *People v. Foggy*, 121 Ill. 2d 337, 342, 521 N.E.2d 86, 88 (1988); cf. *Ritchie*, 107 S. Ct. at 998-99 (1987) (confidentiality of child abuse records).

¹²⁷ See, e.g., *Robert H.*, 199 Conn. at 706-07, 509 A.2d at 483; *Foggy*, 121 Ill. 2d at 341-42, 521 N.E.2d at 88 (1988); cf. *Ritchie*, 107 S. Ct. at 998-99 (1987) (confidentiality of child abuse records).

¹²⁸ *Robert H.*, 199 Conn. at 707, 509 A.2d at 483.

¹²⁹ *Id.* at 707, 509 A.2d at 483.

¹³⁰ See, e.g., *Robert H.*, 199 Conn. at 705, 707, 509 A.2d at 482, 483; cf. *Ritchie*, 107 S. Ct. at 995.

¹³¹ *Robert H.*, 199 Conn. at 705, 509 A.2d at 482; cf. *Ritchie*, 107 S. Ct. at 995.

A. *The Confrontation Clause*

The confrontation clause provides two types of protection for a criminal defendant: the right physically to face those who testify against him or her and the right to conduct cross-examination.¹³² Cross-examination is an essential right of a defendant because it is the principle means by which a defendant may test a witness's believability and the truth of his or her testimony.¹³³ Where a defendant has not received an opportunity to confront, challenge and cross-examine persons making statements against him, the Supreme Court has held such statements inadmissible.¹³⁴ Until 1974 and the case of *Davis v. Alaska*, however, the Supreme Court had not addressed what constituted adequate cross-examination for the purpose of satisfying the confrontation clause.

Davis v. Alaska was the first case to reach the Court involving a direct conflict between a defendant's right of confrontation and a state evidentiary rule of exclusion.¹³⁵ In *Davis*, the Supreme Court held that a state evidence rule that declared the records of juvenile offenders inadmissible denied the defendant the right of effective cross-examination guaranteed by the confrontation clause. The Court reasoned that the rule prohibited defense counsel from conducting cross-examination directed at the juvenile witness's possible bias.¹³⁶ The defendant in *Davis* was tried and convicted of burglary and grand larceny.¹³⁷ The primary witness for the state, Richard Greene, was a juvenile on probation, both at the time of the alleged

¹³² *Ritchie*, 107 S. Ct. at 998; *Delaware v. Fensterer*, 474 U.S. 15, 18-19, (1985) (per curiam); *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974).

¹³³ *Davis*, 415 U.S. at 316; see also 5 J. WIGMORE, *supra* note 51, § 1395. Professor Wigmore states that

[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

5 J. WIGMORE, *supra* note 51, § 1395.

¹³⁴ See, e.g., *Barber v. Page*, 390 U.S. 719, 724-25 (1968) (Court prohibited introduction of accusatory statements made at preliminary examinations unless the state makes good faith effort to procure the attendance of the accuser at trial); *Douglas v. Alabama*, 380 U.S. 415, 419 (1965) (Court forbade the reading of a pretrial confession of a separately tried accomplice who asserted the fifth amendment privilege at the defendant's trial); *Pointer v. Texas*, 380 U.S. 400, 407-08 (1965) (Court held that introduction of testimony given at preliminary hearing at which defendant was not represented by counsel and did not cross-examine the witness violated his right of confrontation).

¹³⁵ See *Davis*, 415 U.S. at 315; Note, *supra* note 9, at 954.

¹³⁶ *Davis*, 415 U.S. at 320.

¹³⁷ *Id.* at 308.

robbery and at the time of trial.¹³⁸ Greene testified that he had seen the defendant Davis near his house on the day of the alleged robbery and identified the defendant in court.¹³⁹ The police found the stolen goods at the site at which Greene testified that he encountered the defendant.¹⁴⁰

The prosecution requested and received a protective order to prevent any reference to Greene's juvenile record or probationary status by the defense in the course of cross-examination.¹⁴¹ The state evidentiary rule of exclusion at issue forbade the disclosure of juvenile records in judicial proceedings.¹⁴² Defense counsel sought to introduce Greene's juvenile record and his probationary status during cross-examination in order to probe Greene for bias and prejudice.¹⁴³ Defense counsel wished to argue that Greene acted hastily in identifying the defendant because he feared prosecution himself and was concerned over possible jeopardy to his probation if he did not cooperate with the prosecution.¹⁴⁴ Because the trial court refused to lift its protective order, the defense counsel cross-examined Greene, but could not refer to his juvenile record and probation.¹⁴⁵ The defendant Davis was ultimately convicted, and the Alaska Supreme Court affirmed his conviction.¹⁴⁶

The United States Supreme Court granted certiorari to the question of whether the state's evidentiary exclusionary rule denied

¹³⁸ *Id.* at 311.

¹³⁹ *Id.* at 309-10.

¹⁴⁰ *Id.* at 309.

¹⁴¹ *Id.* at 310-11.

¹⁴² *Id.* at 311 n.1. Alaska Rule of Children's Procedure 23 provides: "No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate." The Alaska statute provides: "The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court . . ." ALASKA STAT. § 47.10.080(g) (1971).

¹⁴³ *Davis*, 415 U.S. at 311.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 313. The Court specifically referred to the trial record and certain answers of the witness Greene to illustrate the tension between the right of confrontation and the state's policy of protecting a witness with a juvenile record. The Court noted that, because "defense counsel was prohibited from making inquiry as to the witness's being on probation[,] . . . Greene's protestations of unconcern over possible police suspicion . . . and his categorical denial of ever having been the subject of any similar law-enforcement questioning went unchallenged." *Id.* at 313-14. The Court further recognized that the truth of this negative answer is questionable when one knows of his juvenile record and thus "[i]t would be difficult to conceive of a situation more clearly illustrating the need for cross-examination." *Id.* at 314.

¹⁴⁶ *Id.* at 314.

the defendant his confrontation clause right to cross-examine Greene adequately.¹⁴⁷ The Supreme Court reversed the Alaska Supreme Court and held that this restriction on the scope of cross-examination questioning denied the defendant his right of effective cross-examination in violation of the confrontation clause of the sixth amendment.¹⁴⁸ Although the Alaska court permitted the defense counsel to confront and cross-examine Greene at trial, the Supreme Court determined that this cross-examination was inadequate and that the defendant's rights under the confrontation clause required more.¹⁴⁹ The Court stated that the confrontation clause guarantees a criminal defendant not merely a right of cross-examination, but a right of effective cross-examination.¹⁵⁰ According to the *Davis* Court, the prohibition against any reference to the witness's juvenile records and probationary status precluded the defense counsel from cross-examining the witness concerning any potential bias arising from his probationary status.¹⁵¹ Although the defense counsel was able to ask Greene if he was biased, the Court reasoned, he could not expose crucial facts from which he could argue that Greene was biased or from which the jury could appropriately draw negative inferences as to Greene's credibility.¹⁵² If the defense counsel had been permitted to pursue this line of inquiry, the Court noted, the defense counsel may have caused serious damage to the state's case.¹⁵³ The Court ruled that this restriction on the actual questioning during cross-examination violated the defendant's right to cross-examine witnesses.¹⁵⁴

The Court recognized the state's policy interest in protecting the confidentiality of juvenile offenders, but concluded that the defendant's right to cross-examine an adverse witness effectively for bias was paramount to the state's policy.¹⁵⁵ The Court reasoned that the defendant's constitutional right and interest in the cross-examination of a crucial identification witness outweighed the temporary embarrassment and blemish to reputation that Greene might suffer from disclosure of his juvenile record.¹⁵⁶ Consequently, the Su-

¹⁴⁷ *Id.* at 315.

¹⁴⁸ *Id.* at 318.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 319.

¹⁵² *Id.* at 318.

¹⁵³ *Id.* at 319.

¹⁵⁴ *Id.* at 318.

¹⁵⁵ *Id.* at 319.

¹⁵⁶ *Id.*

preme Court ruled that the Alaska court's prohibition against reference to the witness's juvenile record and probationary status denied the defendant the right of effective cross-examination.¹⁵⁷

The Supreme Court again addressed the scope of a criminal defendant's right of effective cross-examination under the sixth amendment in the 1987 case of *Pennsylvania v. Ritchie*.¹⁵⁸ *Ritchie* involved a conflict between a defendant's rights under the confrontation clause of the sixth amendment and a state statute declaring confidential the files of a state service agency charged with investigating child abuse.¹⁵⁹ A plurality of the Supreme Court held that denying the defendant access to the agency's files under the statute did not violate the defendant's right to effective cross-examination under the confrontation clause of the sixth amendment.¹⁶⁰

In *Ritchie*, the defendant was charged with rape, involuntary deviate sexual intercourse, incest and corruption of a minor. The victim, his thirteen-year-old daughter, claimed that her father had

¹⁵⁷ *Id.* at 320.

¹⁵⁸ 107 S. Ct. 989 (1987).

¹⁵⁹ *Ritchie*, 107 S. Ct. at 994. *Pennsylvania v. Ritchie* also involved a compulsory process claim. See *infra* notes 249-75 and accompanying text for discussion of *Ritchie's* holding regarding the compulsory process clause.

¹⁶⁰ 107 S. Ct. at 1000. In *Ritchie*, the Supreme Court addressed claims by the defendant under both the confrontation and the compulsory process clauses. *Id.* at 998, 1000. A majority of the Court considered the defendant's claim regarding the compulsory process clause under a due process analysis established by the Courts related fourteenth amendment precedents. *Id.* at 1001. Although the Court considered the claim under a due process analysis, the Court stated that the compulsory process clause granted no greater protection in this area than the due process clause of the fourteenth amendment. *Id.* A majority of the Court held that the defendant's rights to due process required that the trial court conduct an *in camera* review for material evidence. *Id.* at 1002. Justice Stevens, joined by Justices Brennan, Marshall and Scalia, dissented from the Court's judgment on grounds of limited jurisdiction, not on grounds based on due process, compulsory process or confrontation. *Id.* at 1009-13.

Several of the Justices, however, disagreed as to the scope of the right of effective cross-examination guaranteed by the confrontation clause. *Id.* at 994. A plurality of the Court, comprised of Justices Powell, Rehnquist, White and O'Connor, limited the right of cross-examination to a trial right unconstitutionally restricted only by limitations on questioning at trial. *Id.* at 1000. Justice Blackmun issued a concurring opinion in which he disagreed with the plurality and stated that denial of pretrial access to material information might infringe upon the right of effective cross-examination. *Id.* at 1004 (Blackmun, J., concurring). Justice Blackmun, however, concurred in the Court's judgment because he believed that the Court's *in camera* review procedure under the due process analysis solved any confrontation clause problem. *Id.* at 1006 (Blackmun, J., concurring). Justice Brennan, joined by Justice Marshall, dissented and stated that denying the defendant access to information, including prior statements of the witness that might form the basis of cross-examination, violated the defendant's right of confrontation. *Id.* (Brennan, J., Marshall, J., dissenting). Additionally, Justice Brennan disagreed with Justice Blackmun, arguing that an *in camera* materiality inquiry did not solve the confrontation clause violation. *Id.* at 1009 (Brennan, J., Marshall, J., dissenting).

assaulted her approximately twice a week for the past four years.¹⁶¹ After the child reported the incidents to the police, the police referred the matter to Children and Youth Services (CYS), a protective service agency established by the Commonwealth of Pennsylvania and charged with investigating cases of suspected child abuse, neglect and mistreatment.¹⁶²

The statute at issue in *Ritchie* provided that all reports and other information CYS obtained in the course of an investigation must remain confidential, subject to certain enumerated exceptions.¹⁶³ During trial the defendant served CYS with a subpoena seeking access to the records concerning his daughter; CYS refused to comply, claiming that the confidentiality statute protected the records from disclosure.¹⁶⁴ Relying on the statute, the trial court refused to order disclosure and the jury convicted the defendant on all counts.¹⁶⁵ The defendant claimed that failure to disclose the contents of the CYS file violated the confrontation clause and the compulsory process clause because the file might contain exculpatory evidence and the victim's inconsistent statements.¹⁶⁶ The Supreme Court of Pennsylvania reversed the trial court and ruled that the statute violated the confrontation clause of the United States Constitution.¹⁶⁷

¹⁶¹ *Id.* at 994.

¹⁶² *Id.*

¹⁶³ *Id.* at 994 n.2. The statute provides in relevant part:

(a) Except as provided in section 14 [PA. STAT. ANN., tit. 11, § 2214 (Purdon Supp. 1986)], reports made pursuant to this act including but not limited to report summaries of child abuse . . . and written reports . . . as well as any other information obtained, reports written or photographs or x-rays taken concerning alleged instances of child abuse in the possession of the department, a county children and youth social services agency or a child protective services shall be confidential and shall only be made available to: . . . (5) A court of competent jurisdiction pursuant to a court order.

PA. STAT. ANN., tit. 11, § 2215(a) (Purdon Supp. 1986). The Court noted that at the time of trial the statute only provided five exceptions, including an exception for court-ordered disclosure. In 1982, however, the Court observed, the statute was amended to increase the number of exceptions. *Id.*

¹⁶⁴ *Ritchie*, 107 S. Ct. at 994.

¹⁶⁵ *Id.* at 995.

¹⁶⁶ *Id.* at 995, 1000.

¹⁶⁷ *Commonwealth v. Ritchie*, 509 Pa. 357, 367-68, 502 A.2d 148, 153 (1985). The Supreme Court of Pennsylvania did not agree with the lower appellate court that the search for material evidence must be conducted *in camera* by the trial judge and limited to only verbatim statements. *Id.* at 360-61, 502 A.2d at 150. Rather, the court concluded that the defendant was entitled to review the entire file to search for any useful evidence. *Id.* at 367-68, 502 A.2d at 153. The court ruled that non-disclosure violated both the confrontation and the compulsory process clause. *Id.* at 367, 502 A.2d at 153. The constitutional infirmity,

The United States Supreme Court granted certiorari to consider whether and to what extent a state's interest in the confidentiality of its investigative files concerning child abuse must yield to a criminal defendant's sixth and fourteenth amendment rights.¹⁶⁸ A plurality of the Supreme Court held that failure to disclose the CYS files because of the statute's prohibition did not violate the defendant's rights under the confrontation clause.¹⁶⁹ The plurality ruled that the Pennsylvania Supreme Court mistakenly relied on a broad interpretation of *Davis v. Alaska*.¹⁷⁰ The four Justices expressly rejected interpreting *Davis* to mean that a statutory privilege cannot stand when a defendant asserts a need, prior to trial, for protected information that might be used at trial to impeach or otherwise undermine a witness's testimony.¹⁷¹ The plurality rejected such an interpretation as contrary to its decisions regarding the confrontation clause.¹⁷² The plurality reasoned that prior cases limited the confrontation clause to a right to cross-examine at trial.¹⁷³ The four Justices rejected the Pennsylvania Supreme Court's broader interpretation because they determined that such a broad interpretation would transform the confrontation clause into a constitutionally compelled right of pretrial discovery.¹⁷⁴

The plurality specified that the right of confrontation is a trial right designed to prevent improper restrictions on questioning during cross-examination. This right to question without limitation, the Justices stressed, does not include the power to require the pretrial disclosure of any and all information that might be useful in con-

the court reasoned, was that the defendant was denied the opportunity to have the records reviewed by "the eyes and the perspective of an advocate," who may see relevance in facts that a neutral judge would not. *Id.*

¹⁶⁸ *Ritchie*, 107 S. Ct. at 994. The defendant argued that denying him access to the files interfered with his right of cross-examination under the confrontation clause because he could not effectively question his daughter without the CYS material. *Id.* at 998. Had the files been disclosed, the defendant claimed, he might have been able to show that the daughter made statements to the CYS counselor that were inconsistent with her trial statements, or perhaps to reveal that his daughter acted with an improper motive. *Id.* at 998-99.

¹⁶⁹ *Id.* at 1000.

¹⁷⁰ *Id.* at 999. For a discussion of *Davis v. Alaska* see *supra* notes 135-57 and accompanying text.

¹⁷¹ *Ritchie*, 107 S. Ct. at 999.

¹⁷² *Id.*

¹⁷³ *Id.* (citing *California v. Green*, 399 U.S. 149, 157 (1970) ("[I]t is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the confrontation clause.") and *Barber v. Page*, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right.")).

¹⁷⁴ *Ritchie*, 107 S. Ct. at 999.

tradicting unfavorable testimony.¹⁷⁵ As the Justices indicated, the confrontation clause does not guarantee a defendant cross-examination that is effective in whatever manner a defendant wishes, but only guarantees that a defendant receive an opportunity for effective cross-examination.¹⁷⁶ The plurality noted that the Supreme Court has only held that a specific statutory or court-imposed restraint at trial on the scope of questioning violated the confrontation clause.¹⁷⁷ Accordingly, the plurality restated the requirement that only restrictions during trial that inhibit the scope of cross-examination violate the right of confrontation.¹⁷⁸

The plurality relied upon the *Davis* decision to support its view that only restrictions on the scope of questioning at trial constituted violations of confrontation rights.¹⁷⁹ In *Davis*, the *Ritchie* plurality noted, the state court had prohibited defense counsel from questioning the witness at trial about his juvenile record, even though that evidence might have affected the witness's credibility.¹⁸⁰ According to the four Justices, the constitutional problem in *Davis* was restriction on the scope of his cross-examination questioning, not the denial of access to the information.¹⁸¹

Thus, the plurality concluded that the trial court's refusal to disclose the CYS file to the defendant in *Ritchie* did not violate the defendant's rights under the confrontation clause because such a denial did not constitute a restriction on the scope of questioning at trial. In ruling that withholding the CYS file did not violate the confrontation clause, the plurality reasoned that a violation would have occurred only if the judge prevented defense counsel from cross-examining the daughter. Because the defense counsel was able to cross-examine all the witnesses fully, the plurality found no violation of the defendant's right to cross-examination guaranteed by the confrontation clause.¹⁸²

Justice Blackmun in his concurring opinion¹⁸³ and Justice Brennan in his dissenting opinion¹⁸⁴ disagreed with the plurality's narrow interpretation that the confrontation clause applied only to restric-

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (quoting *Delaware v. Fensterer*, 474 U.S. 15, 19-20 (1985)).

¹⁷⁷ *Id.* at 1000.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 999.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1000.

¹⁸² *Id.*

¹⁸³ *Id.* at 1004 (Blackmun, J., concurring).

¹⁸⁴ *Id.* at 1006 (Brennan, J., dissenting).

tions on cross-examination imposed at trial. In his concurring opinion, Justice Blackmun rejected the plurality's conclusion that the confrontation clause has no relevance to pretrial discovery.¹⁸⁵ Instead, Justice Blackmun expressed the view that denying a defendant pretrial access to information that might increase the effectiveness of cross-examination of a crucial prosecution witness may violate a defendant's right to confrontation.¹⁸⁶ Unlike the plurality, Justice Blackmun supported an inquiry into the actual effectiveness of the cross-examination. Divorcing confrontation analysis from an inquiry into the actual effectiveness of cross-examination, Justice Blackmun stated, may transform the right of confrontation into an empty formality.¹⁸⁷

As Justice Blackmun indicated, in some cases simple cross-examination questioning at trial will satisfy a defendant's right of effective cross-examination.¹⁸⁸ Justice Blackmun noted, however, that in other circumstances, such as the situation in *Davis*, simple questioning of the witness at trial does not allow a defendant an effective cross-examination.¹⁸⁹ Consequently, instead of limiting the right of confrontation to a trial right, Justice Blackmun stated that the confrontation clause requires examination of the effectiveness of the cross-examination actually permitted.¹⁹⁰ Thus, Justice Blackmun indicated that depriving the defendant in *Ritchie* of the material in the CYS files may very well have inhibited his cross-examination and rendered it ineffective.¹⁹¹ Justice Blackmun, however, still concurred in the Court's judgment, ruling that the Court's *in camera* procedure, which the court developed to satisfy the defendant's compulsory process rights, adequately resolved any confrontation problem.¹⁹²

The dissent in *Ritchie* also challenged the plurality's narrow reading of the confrontation clause and argued that depriving a defendant of access to the victim's pretrial statements violated the defendant's right of cross-examination under the confrontation

¹⁸⁵ *Id.* at 1004 (Blackmun, J., concurring).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1004-1005 (Blackmun, J., concurring).

¹⁸⁹ *Id.* at 1005 (Blackmun, J., concurring).

¹⁹⁰ *Id.* at 1004 (Blackmun, J., concurring).

¹⁹¹ *Id.*

¹⁹² *Id.* at 1006 (Blackmun, J., concurring). See *infra* notes 232-43 for a discussion of this *in camera* procedure that the *Ritchie* Court authorized to satisfy the defendant's rights to due process and compulsory process, notwithstanding its decision under the confrontation clause.

clause.¹⁹³ The dissent agreed with the plurality that restrictions on cross-examination questioning at trial constituted a violation of the confrontation clause.¹⁹⁴ The dissent disagreed, however, that the confrontation clause prohibits only such at-trial restrictions. Rather, the *Ritchie* dissent stated that defendants may also be deprived of their rights of effective cross-examination where they are denied access to or use of information that might serve as the basis for cross-examination.¹⁹⁵

The *Ritchie* dissent also rejected the plurality's suggestion that the lower court mistakenly relied on *Davis v. Alaska* in holding that denying the defendant access to the CYS's files violated his rights under the confrontation clause.¹⁹⁶ The dissent indicated that nothing in the *Davis* opinion established that only at-trial restrictions on the scope of cross-examination could violate the confrontation clause.¹⁹⁷ Rather, the dissent noted, the prohibition on disclosure of the juvenile records constituted the underlying problem in *Davis*.¹⁹⁸ Accordingly, the *Ritchie* dissent argued that denying the defendant access to his daughter's prior statements contained in the CYS files violated his right to cross-examination guaranteed by the confrontation clause.¹⁹⁹

Furthermore, unlike the concurring Justice, the dissent did not agree that the majority's *in camera* review procedure and materiality inquiry adequately addressed the confrontation clause violation.²⁰⁰ Under the majority's materiality inquiry, the dissent noted, evidence is material only if it will probably affect the outcome of trial.²⁰¹ Because the utility of prior statements lies in their potential for undermining a witness's credibility, such statements on their face may not appear to be "material."²⁰² Additionally, the *Ritchie* dissent indicated that the defense counsel, not the trial judge, should conduct the evaluation of the CYS files because only the defense counsel

¹⁹³ *Ritchie*, 107 S. Ct. at 1006 (Brennan, J., dissenting).

¹⁹⁴ *Id.* at 1007 (Brennan, J., dissenting).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1008 (Brennan, J., dissenting).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1009 (Brennan, J., dissenting).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* See *infra* notes 232-43 for a discussion of this *in camera* procedure that the Court developed to satisfy the defendant's rights under the due process clause.

²⁰¹ *Ritchie*, 107 S. Ct. at 1009 (Brennan, J., dissenting).

²⁰² *Id.*

can adequately identify information that may be used effectively during cross-examination.²⁰³

In summary, the confrontation clause of the sixth amendment guarantees a criminal defendant the right to cross-examine witnesses against him or her. In *Davis v. Alaska*, the first Supreme Court decision involving a conflict between a defendant's right of confrontation and a state rule of evidence, the Court held that the state rule declaring the records of juvenile offenders inadmissible violated the defendant's right to cross-examination. The *Davis* Court emphasized that a defendant possesses a right to "effective" cross-examination. The *Davis* decision, particularly the meaning of "effective" cross-examination, is subject to different interpretations. In the 1987 Supreme Court case of *Pennsylvania v. Ritchie*, the Court divided over the correct interpretation of *Davis* and the proper scope of the right of effective cross-examination. In *Ritchie*, a plurality of the Court held that failure to disclose the CYS agency's files, which the statute protected as confidential, did not infringe upon the defendant's right of cross-examination. Pursuant to the plurality opinion, which is presently the law, the right of effective cross-examination simply requires that the defendant receive the opportunity to question an adverse witness at trial without restriction. The plurality rejected the opinions of the dissent and the concurrence which maintained that the right of effective cross-examination included the right to obtain pretrial access to information that might possibly increase the effectiveness of cross-examination. Thus, under the present state of the law, as established by the *Ritchie* plurality opinion, only restrictions on the scope of cross-examination questioning at trial violate a defendant's right of effective cross-examination.

B. *The Compulsory Process Clause*

The compulsory process clause of the sixth amendment guarantees to a criminal defendant the right "to have compulsory process for obtaining witnesses in his favor"²⁰⁴ Until recently, the Supreme Court rarely addressed a criminal defendant's rights under the compulsory process clause.²⁰⁵ The Supreme Court decisions

²⁰³ *Id.*

²⁰⁴ U.S. CONST. amend. VI.

²⁰⁵ *Ritchie*, 107 S. Ct. at 1000. The first analysis of the compulsory process clause occurred during the treason trial of Aaron Burr in 1807. *Id.* Chief Justice Marshall ruled that because

in which the Court did address a criminal defendant's rights under the compulsory process clause establish that defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury exculpatory evidence.²⁰⁶

The Supreme Court's 1967 decision of *Washington v. Texas* involved a direct conflict between a defendant's rights to compulsory process and a state rule of evidence.²⁰⁷ The *Washington* Court held that two Texas statutes, which prohibited persons charged or convicted as coparticipants of the same crime from testifying for one another, unconstitutionally deprived the defendant of his right to have compulsory process for obtaining witnesses in his favor.²⁰⁸ In *Washington*, the defendant was convicted of murder with malice and sentenced to fifty years in prison.²⁰⁹ At trial, the defendant Washington testified in his own behalf that his coparticipant, Fuller, drunk at the time, had shot the decedent and that he, the defendant, had run before the shots were fired.²¹⁰ In support of his testimony and defense, the defendant offered the testimony of Fuller. The Court indicated that, according to the trial record, Fuller would have testified that the defendant pulled at him, attempted to persuade him to leave and ran before Fuller fired the fatal shot.²¹¹ As the Court noted, because Fuller was the only other person who knew who fired the gun, his testimony was undisputably relevant, material and vital to the defense.²¹² The two Texas statutes, however, prohibited Fuller, a coparticipant previously convicted of the

of Burr's compulsory process rights, the Court must permit Burr to serve a subpoena on President Jefferson, requesting the production of allegedly incriminating evidence. *Id.* For the next 160 years, however, the Supreme Court rarely considered the compulsory process clause. The pre-1967 cases that mention compulsory process do not provide an extensive analysis of the clause. *See, e.g.*, *United States v. Van Duzee*, 140 U.S. 169, 173 (1891); *Ex parte Harding*, 120 U.S. 782, 784 (1887). Yet, in 1967 the Court began articulating some of the specific rights secured by this sixth amendment clause. *See Washington v. Texas*, 388 U.S. 14 (1967).

²⁰⁶ *Ritchie*, 107 S. Ct. at 1001; *see, e.g.*, *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Cool v. United States*, 409 U.S. 100, 104 (1972) (per curiam); *Washington v. Texas*, 388 U.S. 14, 18-19 (1967); cf. *Webb v. Texas*, 409 U.S. 95, 98 (1972) (per curiam) (decision based on due process clause).

²⁰⁷ 388 U.S. at 14-15. The two Texas statutes at issue in *Washington* prohibited persons charged or convicted as coparticipants of the same crime from testifying for one another. *Id.* at 16 n.4.

²⁰⁸ *Id.* at 16.

²⁰⁹ *Id.* at 15.

²¹⁰ *Id.* at 16.

²¹¹ *Id.*

²¹² *Id.*

same crime, from testifying in the defendant's behalf. In light of these statutes the trial judge had refused to allow Fuller to testify.²¹³ The jury convicted the defendant, and the Texas Court of Appeals upheld the conviction.²¹⁴

The Supreme Court of the United States reversed.²¹⁵ Rejecting the state's justification that accomplices are unreliable witnesses because they are likely to be prejudiced in favor of the defense, the Supreme Court held that the statutes violated the defendant's compulsory process rights.²¹⁶ The Court reasoned that the statutes unconstitutionally denied the defendant his right to compulsory process because the state arbitrarily denied the defendant the right to put on the stand an available witness whose testimony was relevant and material to the defense.²¹⁷ Although the Court disapproved of the statutes at issue in *Washington* and their infringement on the defendant's right of compulsory process, the Court expressly stated that its opinion did not disapprove of testimonial privileges that are supported by entirely different policy considerations than the reliability and bias concerns that support disqualifications for interest.²¹⁸

In the 1973 decision of *Chambers v. Mississippi* the Supreme Court again restricted the operation of state rules of evidence where their effect denied a defendant his right of confrontation and his right to a fair trial.²¹⁹ In *Chambers* the defendant, charged with murder, attempted to introduce into evidence out-of-court statements that another man, McDonald, had confessed to the crime.²²⁰ State hearsay rules, however, prevented the admission of such statements.²²¹ Additionally, a state "voucher rule," a variant of the old common law rule that parties vouch for the credibility of their own

²¹³ *Id.* at 17.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 22-23.

²¹⁷ *Id.* at 23. The Supreme Court noted the essential importance of the compulsory process clause to a defense:

The rights to offer the testimony of witnesses, and to compel their attendance, if necessary, in plain terms is the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.

Id. at 19.

²¹⁸ *Id.* at 23 n.21.

²¹⁹ 410 U.S. 284, 298 (1973).

²²⁰ *Id.* at 293-94.

²²¹ *Id.*

witnesses, prevented the defendant from calling McDonald as a witness and impeaching him directly with the confessions.²²²

The Court ruled that the state voucher rule denied the defendant his right to confront and cross-examine witnesses against him.²²³ Yet, because Chambers claimed a denial of due process, the Court did not reverse based on this error alone. Instead, the Court stated that the question of whether a violation of due process occurred depended upon the ultimate impact of both the confrontation clause violation and the trial court's refusal to allow Chambers to call other witness.²²⁴ Thus, the Court applied a general due process analysis in assessing whether the defendant ultimately received a fair trial.²²⁵ The Court held that prohibiting Chambers from calling other witnesses and from cross-examining McDonald, when viewed together, denied Chambers a trial in accord with traditional and fundamental standards of due process.²²⁶

In the case of *Pennsylvania v. Ritchie*, the Supreme Court confronted the claim that a statute disallowing the defendant access to the files of a state investigative agency regarding child abuse violated his rights to compulsory process, as well as his rights of confrontation.²²⁷ Upon considering the defendant's compulsory process claim, a majority of the Court decided that its fourteenth amendment precedents²²⁸ addressing the fundamental fairness of trials established a clear framework for review of the compulsory process claim.²²⁹ Thus, the *Ritchie* Court adopted a due process analysis.²³⁰ Applying a due process analysis, the Court held that the defendant's right to discover exculpatory evidence under the fourteenth amend-

²²² *Id.* at 295-96.

²²³ *Id.* at 297-98.

²²⁴ *Id.* at 298.

²²⁵ *Id.* at 298-302. The Court quoted Justice Black, writing for the Court in *In Re Oliver*, 333 U.S. 257, 273 (1948), to identify the minimum essentials of a fair trial: A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, at a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

Id. at 294.

²²⁶ *Chambers*, 410 U.S. at 302.

²²⁷ 107 S. Ct. 989, 995 (1987). Although the defendant did not assert a compulsory process claim, the Court addressed the defendant's rights under the compulsory process clause. *Id.*

²²⁸ *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976); *Wardius v. Oregon*, 412 U.S. 470 (1973); *Brady v. Maryland*, 373 U.S. 83 (1963).

²²⁹ *Ritchie*, 107 S. Ct. at 1001.

²³⁰ *Id.*

ment's due process clause requires that the court conduct an *in camera* review of the CYS file to determine whether it contained material information that probably would have changed the outcome of trial.²³¹

The *Ritchie* Court determined that it should consider the defendant's claimed right to discover favorable evidence by reference to due process because the applicability of the compulsory process clause of the sixth amendment to this type of case was unsettled.²³² The Court considered the sparse history of its cases addressing the compulsory process clause and indicated that its cases established, at a minimum, that defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put exculpatory evidence before a jury.²³³ The *Ritchie* Court noted, however, that the Court has never squarely held that a defendant's compulsory process rights include the right to discover the identity of witnesses or to require the government to produce exculpatory evidence. Rather, the *Ritchie* Court noted that the Court has addressed such claims under the broader protection of fourteenth amendment precedents.²³⁴ Consequently, the *Ritchie* Court chose to apply a due process analysis to the defendant's claims in *Ritchie*.²³⁵

Applying a due process analysis, the *Ritchie* Court looked to precedents establishing that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment.²³⁶ The Court stated that evidence qualifies as "material" if a reasonable probability exists that the result of the proceeding would have been different if the defense possessed the evidence.²³⁷ A reasonable probability, the Court stated, is "a probability sufficient to undermine confidence in the outcome."²³⁸ Pursuant to this constitutional principle, the Court ruled that the defendant in *Ritchie* was entitled to have the trial court review the CYS file to determine whether it contained material information.²³⁹

²³¹ *Id.* at 1002-03.

²³² *Id.* at 1001.

²³³ *Id.* at 1000-01.

²³⁴ *Id.* at 1001.

²³⁵ *Id.*

²³⁶ *Id.* (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *United States v. Agurs*, 427 U.S. 97, 107-114 (1976)).

²³⁷ *Id.*

²³⁸ *Id.* (quoting *Bagley*, 473 U.S. at 682).

²³⁹ *Id.* at 1002.

The *Ritchie* Court, however, rejected the lower court's holding that the defendant had the right to have his attorney review the entire CYS file.²⁴⁰ As the Supreme Court noted, the lower court held that a defendant has the right to have his attorney view the file because a defense attorney might recognize useful evidence where a neutral judge would not.²⁴¹ Stressing that the right to discover exculpatory evidence does not include the authority to rummage through the Commonwealth's files, and recognizing the adverse effects full disclosure would have on the state's efforts to uncover and treat abuse, the Court ruled that only the court *in camera* should review the files for material exculpatory evidence.²⁴² According to the Court, an *in camera* review served the defendant's interests without destroying the state's need to protect the confidentiality of communications between those involved in child abuse investigations.²⁴³

The *Ritchie* Court rejected the state's argument against any disclosure, even an *in camera* review. The state argued against a materiality inquiry because the contents of the file are privileged under the statute and because disclosure would defeat the state's compelling interest in confidentiality on the defense counsel's mere speculation that the file might contain exculpatory evidence.²⁴⁴ The *Ritchie* Court rejected this argument, ruling that the public interest, although strong, did not prevent disclosure in all circumstances.²⁴⁵ The statute, the Court indicated, provided for disclosure in certain instances, including when a court order directs the CYS to reveal its files.²⁴⁶ Thus, the Court distinguished the statute at issue from a statute that grants the absolute authority to shield its files.²⁴⁷ As an example of such an absolute statute, the Court cited the Pennsylvania unqualified statutory privilege for communications between sexual assault victims and counselors.²⁴⁸ Consequently, the Court ruled that, because the Pennsylvania legislature contemplated some use of the CYS records in judicial proceedings, the statute did not

²⁴⁰ *Id.* at 1003.

²⁴¹ *Commonwealth v. Ritchie*, 509 Pa. 357, 367, 502 A.2d 148, 153 (1985).

²⁴² *Ritchie*, 107 S. Ct. at 1003.

²⁴³ *Id.* at 1004.

²⁴⁴ *Id.* at 1002.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* The Court stated: "[w]e express no opinion on whether the result in this case would have been different if the statute had protected the CYS files from disclosure to anyone, including law-enforcement and judicial personnel." *Id.* at 1002 n.14.

prevent all disclosure in criminal trials.²⁴⁹ Therefore, in the absence of any apparent state policy against some disclosure, the Court found no reason to bar disclosure after a court determined that the information was material to the defense of the accused.²⁵⁰ Accordingly, the Court held that on remand the trial court should conduct an *in camera* review and grant the defendant a new trial if it found material evidence.²⁵¹

In summary, the compulsory process clause of the sixth amendment guarantees a criminal defendant the right to the government's assistance in obtaining witnesses in his favor and the right to place exculpatory evidence before the jury. In the Supreme Court decision of *Washington v. Texas*, the Court held that two state statutes that prohibited coparticipants of the same crime from testifying for one another unconstitutionally infringed upon a defendant's right to compulsory process. The *Washington* Court reasoned that the state interests supporting the rules excluding coparticipant testimony were not compelling enough to justify denial of the defendant's compulsory process rights. In the 1973 decision of *Chambers v. Mississippi*, the Supreme Court chose to address a potential compulsory process violation, in addition to a possible confrontation clause problem, under a due process analysis. Thus, the Court inquired whether the state hearsay rules and the state voucher rule, which prohibited the defendant from both introducing exculpatory evidence and calling witnesses in his favor, denied the defendant the right to a fair trial guaranteed by the due process clause of the fourteenth amendment. After balancing the competing interests, the Court held that the combined effect of these rules violated the defendant's right to a fair trial.

The Supreme Court decision of *Pennsylvania v. Ritchie* is the most recent Supreme Court case involving a defendant's rights under the compulsory process clause. In *Ritchie*, the defendant claimed that a statute declaring confidential a child abuse investigatory agency's files violated his rights to compulsory process because it prohibited him from placing before the jury exculpatory evidence potentially contained in the files. Because the case involved a state agency, the Court determined that its fourteenth amendment precedents, establishing that the government possesses the obligation to reveal evidence in its possession that is favorable to the

²⁴⁹ *Id.* at 1002.

²⁵⁰ *Id.*

²⁵¹ *Id.*

accused and material to guilt or innocence, provided the appropriate framework for review. Applying such a due process analysis under those precedents, the Court held that the trial court should conduct an *in camera* review to determine whether the files contained material evidence. Although the Court did not address the application of the compulsory process guarantees to the *Ritchie* defendant's claims, the Court did state that the compulsory process clause provides no greater protections in this area than those provided by due process. Thus, at a minimum, *Ritchie* establishes that an *in camera* review satisfies the guarantees of the compulsory process clause.

III. STATE COURTS CONFRONT CONSTITUTIONAL CHALLENGES TO ABSOLUTE STATUTORY PRIVILEGES FOR THE RAPE CRISIS COUNSELING RELATIONSHIP

Courts in several states have addressed the conflict between a rape defendant's sixth amendment rights and an absolute confidentiality privilege for the rape crisis counseling relationship.²⁵² In deciding the constitutionality of these absolute statutes, the courts have provided a variety of solutions to resolve the conflict. Most courts have ruled that an absolute privilege unconstitutionally infringes upon a defendant's sixth amendment rights.²⁵³ These courts have fashioned various qualified privileges to accommodate a defendant's rights and to continue to maintain some protection for communications arising from the rape counseling relationship.²⁵⁴ In contrast to these courts, one court has determined that an absolute privilege statute withstands constitutional attack.²⁵⁵ Thus, whether a statute granting an absolute privilege to the rape crisis counseling relationship is constitutional is an unsettled issue.

²⁵² See *In re Robert H.*, 199 Conn. 693, 706-07, 509 A.2d 475, 483 (1986); *People v. Foggy*, 121 Ill. 2d 337, 342, 521 N.E.2d 86, 88 (1988); *Commonwealth v. Two Juveniles*, 397 Mass. 261, 263, 491 N.E.2d 234, 236 (1986); *Commonwealth v. Samuels*, 354 Pa. Super. 128, 134, 511 A.2d 221, 224 (1986); *Advisory Opinion to the House of Representatives*, 469 A.2d 1161, 1163 (R.I. 1983).

²⁵³ See *Robert H.*, 199 Conn. at 706-09, 509 A.2d at 483-84; *Two Juveniles*, 397 Mass. at 266, 491 N.E.2d at 238; *Advisory Opinion*, 469 A.2d at 1166.

²⁵⁴ See, e.g., *Robert H.*, 199 Conn. at 708-09, 509 A.2d at 484 (fashioned qualified privilege allowing detailed *in camera* review); *Advisory Opinion*, 469 A.2d at 1163, 1166 (recommended statutory proposal B embodying qualified privilege providing for an *in camera* review). See *infra* note 271 and note 284.

²⁵⁵ *Foggy*, 121 Ill.2d at 349-50, 521 N.E.2d at 92. See *infra* notes 298-323 and accompanying text.

Several courts have held that an absolute privilege for communications between a rape victim and a rape crisis counselor may deprive a defendant of his constitutional rights under the confrontation and compulsory process clauses of the sixth amendment.²⁵⁶ Both the Connecticut Supreme Court in the 1986 case of *In re Robert H.* and the Rhode Island Supreme Court in a 1983 *Advisory Opinion to the House of Representatives* ruled an absolute statutory privilege for rape crisis counseling unconstitutional.²⁵⁷ These courts relied on the United States Supreme Court decision of *Davis v. Alaska*²⁵⁸ to hold that the absolute privilege infringed on the defendant's right of confrontation.²⁵⁹ These two courts ruled that such an absolute denial of access to potential exculpatory or impeaching evidence could not withstand constitutional attack.²⁶⁰ Consequently, they chose to fashion a qualified privilege allowing disclosure to accommodate the defendant's rights.²⁶¹

In *Robert H.* the Supreme Court of Connecticut held that the absolute privilege embodied in the statute violated the defendants' constitutional rights to confront the victim-witness and cross-examine her about material in her rape counseling records.²⁶² *Robert H.* involved the alleged rape of a fourteen-year-old victim, "T," by three juveniles, Robert, Richard and Blair.²⁶³ At trial, the defendants subpoenaed the files of the Woman's Center of Greater Danbury.²⁶⁴ The Center filed a motion to quash the subpoena, claiming a testimonial privilege under the statute.²⁶⁵ The defendant argued

²⁵⁶ See *Robert H.*, 199 Conn. at 706-09, 509 A.2d at 483-84 (addresses only violation of the confrontation clause); *Two Juveniles*, 397 Mass. at 266-67, 491 N.E.2d at 238 (mentions the defendant's rights under both the confrontation and compulsory process clauses, but does not discuss violation of each clause separately); *Advisory Opinion*, 469 A.2d at 1166 (addresses violation of both the confrontation and compulsory process clauses). Although the defendants in each of these cases alleged a violation of their rights to due process under the fourteenth amendment, not one of these courts addressed the due process claim or applied a due process analysis.

²⁵⁷ *Robert H.*, 199 Conn. at 706-09, 509 A.2d at 483-84; *Advisory Opinion*, 469 A.2d at 1166.

²⁵⁸ 415 U.S. 308 (1974). See *supra* notes 135-57 and accompanying text.

²⁵⁹ *Robert H.*, 199 Conn. at 707-08, 509 A.2d at 483-84; *Advisory Opinion*, 469 A.2d at 1165.

²⁶⁰ *Robert H.*, 199 Conn. at 706-09, 509 A.2d at 483-84; *Advisory Opinion*, 469 A.2d at 1166.

²⁶¹ *Robert H.*, 199 Conn. at 708-09, 509 A.2d at 484; *Advisory Opinion*, 469 A.2d at 1166. See *infra* note 271 and note 284 and accompanying text.

²⁶² *Robert H.*, 199 Conn. at 706-09, 509 A.2d at 483-84.

²⁶³ *Id.* at 695-96, 509 A.2d at 477-78.

²⁶⁴ The Women's Center of Greater Danbury is a rape crisis center.

²⁶⁵ *Robert H.*, 199 Conn. at 698, 509 A.2d at 479. The Connecticut statute at issue provides in relevant part:

that the absolute rape counseling privilege embodied in the Connecticut statute violated the federal and state constitutions.²⁶⁶ Without considering the constitutional claim, the trial court ruled that the records fell within the statutory privilege and quashed the defendants' subpoena.²⁶⁷

On appeal to the Supreme Court of Connecticut, the defendants argued that the court's denial of access to the records of the rape crisis center deprived them of their constitutional rights of confrontation, compulsory process and due process.²⁶⁸ The defendants argued that, because the outcome of the case turned upon the credibility of the victim-witness, the records were clearly relevant and material.²⁶⁹ The Connecticut Supreme Court agreed with the defendants and held that the statute's absolute privilege violated the defendants' confrontation rights.²⁷⁰ Despite the constitutional violation, the court did not completely override the privilege and allow full disclosure. Rather, the *Robert H.* court fashioned a procedure to resolve the conflict between the competing interests.²⁷¹

(b) A battered woman's counselor or a sexual assault counselor shall not disclose any confidential communications made to such counselor by a victim in any civil or criminal case or proceeding . . . unless the victim making the confidential communications waives the privilege

(c) The privilege established by this section shall not apply . . . (3) where . . . the counselor has knowledge that the victim has given perjured testimony and the defendant or the state has made an offer of proof that perjury may have been committed.

Id. at 698-99 n.5, 509 A.2d at 479 n.5 (quoting CONN. GEN. STAT. ANN. § 52-146k).

²⁶⁶ *Robert H.*, 199 Conn. at 699-700, 509 A.2d at 480.

²⁶⁷ *Id.* at 701, 509 A.2d at 480.

²⁶⁸ *Id.* at 705, 509 A.2d at 482.

²⁶⁹ *Id.* at 705, 509 A.2d at 482. The defendants argued that

because the court chose to disbelieve the victim's testimony as to her unwillingness to engage in the first instance of vaginal penetration and yet chose to believe her testimony as to the circumstances surrounding the second instance of vaginal penetration involving the broomstick, it demonstrates how 'central and crucial the credibility issue was to the adjudication.'

Id. at 707, 509 A.2d at 483. The *Robert H.* court recognized that the victim's credibility was important because the victim's testimony was crucial to the state's case. *Id.* As in many sexual assault cases, the court noted, the victim is the only witness to the crime. *Id.* The victim's statements to her counselor, the court recognized, may or may not have had a great impact on her credibility. *Id.*

²⁷⁰ *Robert H.*, 199 Conn. at 708-09, 509 A.2d at 484. The court appeared influenced by the circumstances surrounding the incident and the victim's questionable credibility in its decision to alter the absolute privilege to accommodate the defendant's rights. As the court's focus on the victim's credibility throughout the decision indicates, the victim's questionable credibility appeared to influence the court's decision. *See id.* at 707, 509 A.2d at 483.

²⁷¹ *Id.* at 708-09, 509 A.2d at 484. In *Robert H.* the Connecticut Supreme Court adopted

The court recognized that all rape victims are traumatized and that rape crisis centers aid the victim in her emotional and psychological recovery.²⁷² Thus, the court cautioned that "indiscriminate disclosure of a rape counselor's records by a trial court to defense counsel will surely destroy the effectiveness of a counselor-victim relationship if the need for confidentiality is not exacted."²⁷³

The *Robert H.* court relied on the Supreme Court decision of *Davis v. Alaska* to support its holding.²⁷⁴ The *Robert H.* court viewed the conflicts in both *Robert H.* and *Davis* as between a defendant's right to cross-examine an important witness and an absolute statutory privilege designed to protect that same witness.²⁷⁵ The *Robert H.* court stated that it was following *Davis* in striking down a statutory privilege that limited the defendants' ability to cross-examine prosecution witnesses.²⁷⁶ The *Robert H.* court determined that the state's policy interest in protecting the confidentiality of communications between a rape victim and her counselor must yield to the defendants' rights.²⁷⁷ Consequently, the *Robert H.* court adopted a procedure that, according to the court, would protect the witness's statutory right to confidentiality while simultaneously safeguarding the defendants' right to cross-examine the witness effectively.²⁷⁸

Following reasoning similar to the Connecticut Supreme Court's reasoning in *Robert H.*, the Supreme Court of Rhode Island

a balancing procedure that it had enunciated in prior decisions to resolve conflicts between a statutory psychiatrist-patient privilege and defendants' rights of confrontation. *Id.* The court modified the procedure to accommodate the sexual assault counselor privilege. *Id.* at 709, 509 A.2d at 484. In summary, the developed procedure requires the defendant to make a preliminary showing of impairment of his rights, the court to conduct an *in camera* review to determine the information to be disclosed, and the victim to give her consent, prior to the *in camera* review and prior to disclosure. *Id.* at 708-09, 509 A.2d at 484. If the victim's consent is not obtained and if disclosure is determined necessary after review, the procedure requires the court to strike the victim's testimony. *Id.* The *Robert H.* court's modifications of the procedure concerned the *in camera* review and specified that the court should determine whether the records, when compared to the victim's direct testimony, contain inconsistent and relevant statements. *Id.* at 709, 509 A.2d at 484. The court defined "inconsistent statements" as "verbatim accounts by the victim given to the counselor and which are directly related to a certain element of the crime for which the defendant is standing trial." *Id.* at 709-10, 509 A.2d at 484. The court cautioned, however, that interpretations, recollections and counseling notations of the counselor do not qualify as statements and that the court cannot disclose such information to the defendant. *Id.* at 709, 509 A.2d at 484.

²⁷² *Id.* at 710, 509 A.2d at 485.

²⁷³ *Id.*

²⁷⁴ *Id.* at 707-08, 509 A.2d at 483-84.

²⁷⁵ *Id.* at 707, 509 A.2d at 483.

²⁷⁶ *Id.* at 707-09, 509 A.2d at 483-84.

²⁷⁷ *Id.* at 708-09, 509 A.2d at 484.

²⁷⁸ *Id.*

in a 1983 *Advisory Opinion to the House of Representatives* advised the legislature that a statutory proposal conferring an absolute confidentiality privilege to communications between a rape victim and a rape crisis counselor, if enacted, would violate the federal and state constitutions.²⁷⁹ The Rhode Island Supreme Court stated that the proposed statute would abrogate a criminal defendant's rights to confront his accusers, to obtain compulsory process and to offer testimony of favorable witnesses.²⁸⁰ The court issued its opinion in response to a request from the state legislature.²⁸¹ The Rhode Island Legislature presented the court with two bills. Both bills granted privileges to the rape counseling relationship, but differed in the degree of confidentiality established for communications between the victim and the counselor.²⁸² Proposal A contained an absolute privilege²⁸³ whereas Proposal B set forth a qualified privilege.²⁸⁴ Although the court advised that Proposal A's absolute privilege

²⁷⁹ *Advisory Opinion to the House of Representatives*, 469 A.2d 1161, 1166 (R.I. 1983).

²⁸⁰ *Id.*

²⁸¹ *Id.* at 1162.

²⁸² *Id.* at 1162-63.

²⁸³ *Id.* at 1163. In the relevant section entitled *Privileged Communications*, Proposal A stated:

In the trial of every case, both civil and criminal, no sexual assault counselor shall be competent to testify concerning any confidential communication without the prior written consent of the sexual assault victim, nor shall a sexual assault counselor or rape crisis center be required to disclose to the court any records, notes, memoranda, or documents containing confidential communications without the prior written consent of the sexual assault victim.

Id.

²⁸⁴ *Id.* Proposal B contained the same language as Proposal A, but added an additional section creating an exception:

Right of defendant to seek exception to confidentiality.— . . . A defendant in a criminal proceeding may petition the trial justice to issue a subpoena and/or a subpoena duces tecum requiring the appearance of a sexual assault counselor or other representative of a rape crisis center and/or the production of records, notes, memoranda or documents in their possession. Prior to the issuance of said subpoena or subpoena duces tecum, the trial justice shall require the defense to show that there is reason to believe that the witness knows and/or the material sought contains information which is relevant to a material issue in the case. A witness responding to such a subpoena shall be interviewed, and/or material produced in response to such a subpoena duces tecum shall be reviewed *in camera* by the trial justice without counsel present. If the trial justice determines that the witness knows and/or the material contains evidence which would be clearly exculpatory in nature, then the trial justice shall make it known to counsel who shall be permitted to present such evidence at trial through the appropriate witnesses. If the trial justice finds that no such evidence is possessed by the witness or contained in the material, then the trial justice shall quash the subpoena or subpoena duces tecum.

Id.

would violate a defendant's rights under the confrontation and compulsory process clauses, the court stated that it approved of Proposal B because it appropriately balanced an accused's constitutional rights and a sexual assault victim's need for confidentiality in conversations with her counselor.²⁸⁵

In advising the legislature that Proposal A would deprive a criminal defendant of his sixth amendment rights, the Rhode Island court relied on the United States Supreme Court decisions of *Davis v. Alaska* and *Washington v. Texas*.²⁸⁶ The court interpreted these decisions, dealing with conflicts between sixth amendment rights and exclusionary rules, as establishing that a complete ban on certain types of evidence must always fail because such a ban improperly derogates completely a defendant's interests.²⁸⁷ Thus, the Rhode Island court reasoned that, because an absolute privilege constitutes a "complete ban" on a defendant's right to raise issues or to call witnesses at trial, such an absolute privilege statute would violate the sixth amendment by depriving a defendant of his rights to confrontation and compulsory process.²⁸⁸

Similarly, in *Commonwealth v. Two Juveniles*, the Supreme Judicial Court of Massachusetts advised a trial court judge that under certain circumstances the absolute privilege for rape crisis counselors contained in the Massachusetts statute must yield to the constitutional rights of a defendant under the confrontation and compulsory process clauses of the sixth amendment.²⁸⁹ Although the

²⁸⁵ *Id.* at 1166.

²⁸⁶ *Id.* at 1164-65. See *supra* notes 135-57 and accompanying text for discussion of *Davis*. See *supra* notes 207-18 and accompanying text for a discussion of *Washington*. Unlike the *Robert H.* court, the Rhode Island court addressed the absolute privilege's potential violation of the defendant's constitutional right to compulsory process as well as his right to confrontation. *Id.*

²⁸⁷ *Id.* at 1165.

²⁸⁸ *Id.* at 1166.

²⁸⁹ *Commonwealth v. Two Juveniles*, 397 Mass. 261, 266, 491 N.E.2d 234, 238 (1986). A trial judge issued two questions of law pursuant to Massachusetts Rule of Criminal Procedure 34 which permits trial judges to seek answers to unsettled questions of law from the appellate court. The trial judge sought an interpretation of the Massachusetts absolute privilege statute for rape counseling and a ruling on its constitutionality. *Id.* at 263, 491 N.E.2d at 236. The Massachusetts Supreme Judicial Court transferred the questions on its own motion. *Id.* The Supreme Judicial Court determined that the statute precluded any inspection of the confidential communications. *Id.* at 264, 491 N.E.2d at 236. Although the court declined to rule on the statute's constitutionality in the abstract, it stated that it perceived circumstances under which the statute would be unconstitutional. *Id.* at 266-67, 491 N.E.2d at 238. The court "outlined certain principles" to help trial judges rule on constitutional challenges to the absolute privilege statute. *Id.* at 256, 491 N.E.2d at 237. The court's "principles" are non-binding, but do indicate the Supreme Judicial Court's position. See MASS.

trial court's constitutional question only referred to the confrontation clause, the *Two Juveniles* court indicated that the constitutional right to compulsory process is likely to be involved in a case where a defendant seeks the testimony of a person who has received a confidential communication.²⁹⁰ The *Two Juveniles* court directed that, if the defendant can demonstrate a legitimate need for access to the communications and show that the protected information is likely to be useful to his defense, the judge should review the communications *in camera*.²⁹¹ Therefore, according to the *Two Juveniles* court, to obtain an *in camera* review the defendant must make a preliminary showing that he needs the evidence and that the evidence will probably prove useful to his defense.²⁹²

The *Two Juveniles* court also relied on *Davis v. Alaska* to support its holding.²⁹³ Yet, unlike the *Robert H.* court and the Rhode Island court, the Supreme Judicial Court emphasized the distinction between the evidentiary rules of exclusion involved in *Davis*, *Washington* and *Chambers* and the testimonial privilege for rape crisis counseling created by the statute.²⁹⁴ The *Two Juveniles* court echoed the *Washington* Court in noting that cases involving evidentiary rules of exclusion could not be construed as automatically disapproving testimonial privileges, which are based on entirely different considerations than rules of exclusion.²⁹⁵ Thus, the *Two Juveniles* court interpreted *Davis* narrowly as requiring that the defense demonstrate a witness's specific motive to lie or bias before a court can override an absolute statute excluding potentially relevant evidence.²⁹⁶ Accordingly, the court instructed the lower courts that, where a defendant has made a preliminary showing of need, they should review the communications *in camera*, looking specifically for evidence of the victim's bias, motive to lie or statements indicating misidentification or an inability to describe the assailant.²⁹⁷

R. CRIM. P. 34. The Massachusetts Appeals Court subsequently adopted the principles enunciated by the Supreme Judicial Court in an unrelated case. See *Commonwealth v. Giacalone*, 24 Mass. App. Ct. 166, 170-71, 507 N.E.2d 769, 772 (1987).

²⁹⁰ *Id.* at 266 n.5, 491 N.E.2d at 238 n.5.

²⁹¹ *Id.* at 269, 491 N.E.2d at 239-40.

²⁹² *Id.*

²⁹³ *Id.* at 266-67, 491 N.E.2d at 238.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 267 n.6, 491 N.E.2d at 238 n.6. Significantly, the court noted that not one of the Supreme Court cases involving a conflict between a rule of exclusion and a defendant's sixth amendment rights involved a testimonial privilege. *Id.*

²⁹⁶ *Id.* at 266-67, 491 N.E.2d at 238.

²⁹⁷ *Id.* at 269, 491 N.E.2d at 239. The *Two Juveniles* court did not base its directions to

In contrast to courts in Connecticut, Rhode Island and Massachusetts, the Supreme Court of Illinois in the 1988 case of *People v. Foggy* held constitutional an absolute privilege statute granting confidentiality to communications between a rape victim and a rape counselor.²⁹⁸ The defendant in *Foggy* abducted the victim, a twenty-six-year-old woman, from in front of her home at approximately three o'clock in the morning.²⁹⁹ The defendant forced the victim into a car and drove to a nearby park where he raped her.³⁰⁰ After being released, the victim received medical care at a local hospital.³⁰¹ She later identified the defendant as her assailant from photographs shown to her by the police.³⁰² Because of the trauma induced by the rape, the victim obtained counseling from the Quad City Rape/Sexual Assault Counseling Program (Quad City Program).³⁰³ During discovery, the defendant subpoenaed the Quad City Program, seeking production of all communications between the victim and her personal rape crisis counselor.³⁰⁴ Both the prosecutor and the victim's personal rape crisis counselor filed motions to quash the subpoena on the ground that the Illinois absolute privilege statute protected these confidential communications and that the statute was constitutional.³⁰⁵ The trial court quashed the subpoena, ruling that the statutory privilege prohibiting disclosure of the communications was constitutional.³⁰⁶ The trial court thereby denied the defendant access to the communications, and the defendant appealed.³⁰⁷ The Appellate Court of Illinois affirmed the trial court's holding.³⁰⁸

On appeal to the Supreme Court of Illinois, the defendant again challenged the constitutionality of the absolute privilege

the lower courts solely on its interpretation of *Davis*. See *id.* at 267-68, 491 N.E.2d at 238-39. Rather, the court also examined the decisions of other jurisdictions dealing with assertions of a constitutional right to an *in camera* inspection of information protected by a statutory news reporter privilege. *Id.* at 267-68, 491 N.E.2d at 238-39. These decisions, the court noted, although expressing the defendant's burden differently, all require the defendant to make some preliminary showing that the privilege must be overridden. *Id.* at 267, 491 N.E.2d at 238.

²⁹⁸ *People v. Foggy*, 121 Ill.2d 337, 349-50, 521 N.E.2d 86, 92 (1988).

²⁹⁹ *Id.* at 339, 521 N.E.2d at 87.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at 340, 521 N.E.2d at 88.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 341, 521 N.E.2d at 88.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 341-42, 521 N.E.2d at 88.

³⁰⁸ *Id.* at 342, 521 N.E.2d at 88.

granted by the Illinois statute, arguing that the privilege violated his sixth amendment right of confrontation and his fourteenth amendment right to due process.³⁰⁹ The defendant requested an *in camera* review of the Quad City Program's records regarding the victim and disclosure to the defense of the victim's statements recalling the occurrence.³¹⁰ Rejecting the defendant's arguments, the Supreme Court of Illinois held that the absolute statutory privilege for rape counseling was constitutional.³¹¹

The *Foggy* court ruled that the trial court's refusal to conduct an *in camera* inspection of the victim's counseling files did not violate the defendant's right of confrontation under the sixth amendment nor his right to due process under the fourteenth amendment.³¹² The court reasoned that the defendant's constitutional rights did not require the abrogation of the privilege both because of the strong public policy supporting the privilege and expressed in the statute and because the defendant failed to provide any showing that the files contained relevant information that the defendant might use to exculpate himself or to impeach the victim's testimony.³¹³ The court declined to abrogate the privilege under the circumstances present in *Foggy* because breaching the privilege in this case would require abrogations of the privilege in every case.³¹⁴

The court in *Foggy* relied on the Supreme Court decision of *Davis v. Alaska* to support its holding.³¹⁵ In *Davis*, the *Foggy* court stated, the Supreme Court held that a trial court's order, prohibiting defense counsel from cross-examining one of the state's principle witnesses regarding his juvenile record because a statute declared the records confidential, violated the defendant's right of confrontation.³¹⁶ According to the *Foggy* court, the Court in *Davis* reasoned that the cross-examination was inadequate because the defense counsel had been unable to explore possible sources of bias by reference to the witness's juvenile record.³¹⁷ The *Foggy* court em-

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.* at 349-50, 521 N.E.2d at 92. The *Foggy* court analyzed the constitutionality of the statute under the sixth amendment confrontation clause and the fourteenth amendment due process clause. *Id.* at 342, 350, 521 N.E.2d at 88, 92. The court did not address the defendant's right to compulsory process under the sixth amendment.

³¹² *Id.* at 350, 521 N.E.2d at 92.

³¹³ *Id.*

³¹⁴ *Id.* at 349, 521 N.E.2d at 92.

³¹⁵ *Id.* at 343-44, 521 N.E.2d at 89.

³¹⁶ *Id.* at 343, 521 N.E.2d at 89.

³¹⁷ *Id.* at 343-44, 521 N.E.2d at 89.

phasized that the Supreme Court in *Davis* concluded that the state's policy interest in protecting the confidentiality of a juvenile offender's record was not strong enough to justify infringement on the defendant's sixth amendment right of cross-examination.³¹⁸

Ruling that the absolute privilege protecting rape crisis counseling communications was constitutional, the *Foggy* court distinguished the absolute privilege for rape counseling from the statute in *Davis* protecting a juvenile offender's records.³¹⁹ Unlike the Supreme Court's determination regarding the statute in *Davis*, the court in *Foggy* ruled that the absolute privilege statute evinced a strong public policy supporting the confidentiality of communications arising from the rape crisis counseling relationship.³²⁰ As the *Foggy* court noted, the statutory privilege's expressed purpose is to enable rape victims to obtain necessary medical care and emergency counseling and to promote the prosecution of sex offenders.³²¹ Further distinguishing *Foggy* from *Davis*, the *Foggy* court stated that unlike the defendant in *Davis* who showed that the protected information was relevant to show the witness's possible bias and who had no other means to reveal such bias, the defendant in *Foggy* showed no indication that the victim's communications would provide a source of impeachment unavailable from other sources.³²² Thus, because of the strong public policy supporting the confidentiality of rape crisis counseling communications and the absence of a showing by the defense that these communications represented significant and irreplaceable information, the *Foggy* court ruled that the defendant's rights of confrontation and due process did not require abrogation of the privilege.³²³

To support its holding that the absolute privilege was constitutional and that the defendant's constitutional rights did not re-

³¹⁸ *Id.* at 344, 521 N.E.2d at 89.

³¹⁹ *Id.* at 344, 350, 521 N.E.2d at 89, 92.

³²⁰ *Id.* at 350, 521 N.E.2d at 92.

³²¹ *Id.* at 348, 521 N.E.2d at 91. The *Foggy* court quoted the stated purpose of the statute:

(a) Purpose. This section is intended to protect victims of rape, deviate sexual assault, and incest from public disclosure of statements they make in confidence to counselors of organizations established to help them. Because of the fear and stigma that often results from those crimes, many victims hesitate to seek help even where it is available at no cost to them. As a result they not only fail to receive needed medical care and emergency counseling, but may lack the psychological support necessary to report the crime and aid the police in preventing future crimes.

Id. at 339-40, 521 N.E.2d at 87 (citing statute).

³²² *Id.* at 350, 521 N.E.2d at 92.

³²³ *Id.* at 348-50, 521 N.E.2d at 91-92.

quire an *in camera* review of the rape crisis counseling communications, the *Foggy* court also relied on the Supreme Court decision of *Pennsylvania v. Ritchie*.³²⁴ In *Ritchie*, the *Foggy* court stated, the Supreme Court considered whether a statute, declaring confidential the files of a child abuse investigatory agency, violated the defendant's constitutional rights under both the confrontation and compulsory process clauses.³²⁵ The *Foggy* court noted that a plurality of the *Ritchie* court, characterizing the right of confrontation as a trial right, concluded that failure to disclose the agency's records did not violate the defendant's confrontation right because the defendant physically faced the witnesses against him and the defense counsel was able to cross-examine all the trial witnesses fully.³²⁶

The *Foggy* court discussed the Supreme Court's consideration of the compulsory process claim in *Ritchie*, noting that the Court addressed this claim in terms of due process.³²⁷ The *Foggy* court stated that a majority of the Supreme Court in *Ritchie* concluded that the defendant's rights to due process entitled him to have the trial court conduct an *in camera* review of the agency files, despite the statutory privilege.³²⁸ The *Foggy* court emphasized that the stat-

³²⁴ *Id.* at 344-47, 521 N.E.2d at 89-91.

³²⁵ *Id.* at 345, 521 N.E.2d at 90.

³²⁶ *Id.*

³²⁷ *Id.* at 346, 521 N.E.2d at 90. Receiving this direction from the Supreme Court, the *Foggy* court may have decided to address the substance of the compulsory process guarantees under a due process analysis, particularly because the defendant did not claim a violation of his compulsory process rights. *See Id.* at 346-50, 521 N.E.2d at 90-92. Indeed, the *Foggy* court did rely on the Supreme Court's due process discussion in *Ritchie* to hold that the defendant's constitutional rights did not require an *in camera* review. *See id.* Nevertheless, although the *Foggy* court purported to analyze the statute's constitutionality under the due process clause, the court never mentioned the defendant's right to place exculpatory evidence before the jury, or the argument that the privilege denied the defendant due process because it shielded statements of the victim that may have been exculpatory. Rather, the court only considered the impeachment value of the statements. According to the court, the defendant's constitutional claims merely amounted to his right of confrontation. *Id.* at 347, 521 N.E.2d at 91. As the court stated, "we are therefore met with an issue unresolved by *Ritchie*: whether an absolute privilege must yield to a criminal defendant's pretrial discovery request for otherwise privileged information that may provide material for use in cross-examining witnesses." *Id.* Although the court discussed the *Ritchie* plurality's definition of the right of confrontation as a trial right satisfied if defense counsel is able to cross-examine all the witnesses fully, the court still proceeded to consider whether the defendant possessed a right to obtain information during pretrial discovery to use in cross-examination. *Id.* at 345-47, 521 N.E.2d at 90-91. Consequently, although the court stated its holding in terms of both the due process clause and the confrontation clause, the court really only decided the issue of whether the privilege infringed on the defendant's right of cross-examination under the confrontation clause. *Id.* at 347, 349, 521 N.E.2d 91, 92.

³²⁸ *Id.* at 90.

ute in *Ritchie* was not absolute, but permitted disclosure to a court of competent jurisdiction.³²⁹ The *Foggy* court also emphasized that the Supreme Court in *Ritchie* stated that it expressed no opinion on whether an *in camera* review would have been required if the statute absolutely prohibited disclosure.³³⁰

Distinguishing the Illinois statute protecting rape counseling communications from the statute at issue in *Ritchie*, the *Foggy* court ruled that the defendant's constitutional rights did not require an *in camera* review of the communications.³³¹ Unlike the qualified privilege in *Ritchie*, the *Foggy* court confronted an absolute privilege statute, prohibiting disclosure under all circumstances.³³² In deciding whether the absolute privilege must yield, as did the qualified privilege in *Ritchie*, the *Foggy* court found significant the legislature's commitment to an absolute privilege, designed to protect rape victims from public disclosure of statements they made in confidence to personal counselors.³³³ As the *Foggy* court noted, the statute originally allowed only a qualified privilege permitting an *in camera* disclosure.³³⁴ The legislature, however, decided to strengthen the privilege and amended the statute, making it absolute and adding a penalty provision declaring an unauthorized disclosure a misdemeanor.³³⁵ Accordingly, the *Foggy* court ruled that, unlike the qualified privilege in *Ritchie*, the absolute privilege prohibited disclosure of the files even for an *in camera* review.³³⁶

Holding that the defendant's constitutional rights did not require an *in camera* review, the *Foggy* court emphasized the damage to the counseling relationship that an *in camera* review would inflict.³³⁷ If an *in camera* review was permissible, the *Foggy* court stated, a rape crisis counselor could not guarantee confidentiality to a victim.³³⁸ Rather, a counselor would have to include a special admonition to notify the victim of the very real possibility that a judge would review the records.³³⁹ The *Foggy* court concluded that this possibility of disclosure would seriously undermine the valuable and

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.* at 347, 521 N.E.2d at 91.

³³² *Id.*

³³³ *Id.* at 347-49, 521 N.E.2d at 91.

³³⁴ *Id.* at 348, 521 N.E.2d at 91.

³³⁵ *Id.*

³³⁶ *Id.* at 347, 521 N.E.2d at 91.

³³⁷ *Id.* at 347-50, 521 N.E.2d at 91-92.

³³⁸ *Id.* at 349-50, 521 N.E.2d at 92.

³³⁹ *Id.* at 350, 521 N.E.2d at 92.

beneficial services performed by rape crisis centers and protected by the statute.³⁴⁰ In sum, because of the strong public policy supporting the absolute privilege and the defendant's failure to demonstrate that the files would provide a source of impeaching information, the *Foggy* court held that the trial court's refusal to conduct an *in camera* examination of the victim's counseling files did not violate the defendant's rights of confrontation or due process.³⁴¹

In summary, state courts that have addressed the constitutionality of an absolute privilege for rape crisis counseling have reached different conclusions. The Rhode Island court in its *Advisory Opinion*, the Connecticut court in *Robert H.* and the Massachusetts court in *Two Juveniles* all determined that an absolute privilege providing no accommodation for the defendant's sixth amendment rights was unconstitutional. Each of these courts, however, recognized the important interests supporting an absolute privilege for communications between a rape victim and her rape crisis counselor. Thus, these courts refused to completely abrogate the privilege. To rectify the constitutional infirmity, each of these courts recommended different procedures to ensure the defendant satisfaction of his rights. In contrast, the Illinois Supreme Court in *Foggy* determined that the interests supporting an absolute privilege for rape counseling were sufficiently compelling so as to justify any infringement on a defendant's sixth amendment rights. Thus, the *Foggy* court held that the absolute privilege was constitutional.

IV. ANALYSIS OF THE CONSTITUTIONALITY OF AN ABSOLUTE TESTIMONIAL PRIVILEGE FOR THE RAPE CRISIS COUNSELING RELATIONSHIP

Several state courts have addressed the constitutionality of an absolute testimonial privilege for the rape crisis counseling relationship.³⁴² Most of these courts determined that an absolute privilege unconstitutionally deprives a rape defendant of his rights under the confrontation and compulsory process clauses.³⁴³ One court,

³⁴⁰ *Id.*

³⁴¹ *Id.* at 349-50, 521 N.E.2d at 92.

³⁴² *In re Robert H.*, 199 Conn. 693, 706, 509 A.2d 475, 483 (1986); *Foggy*, 121 Ill. 2d at 342, 521 N.E.2d at 88; *Commonwealth v. Two Juveniles*, 397 Mass. 261, 263, 491 N.E.2d 234, 236 (1986); *Commonwealth v. Samuels*, 354 Pa. Super. 128, 134, 511 A.2d 221, 224 (1986); *Advisory Opinion to the House of Representatives*, 469 A.2d 1161, 1163 (R.I. 1983). See *supra* notes 252-341 and accompanying text for a discussion of these decisions.

³⁴³ See *Robert H.*, 199 Conn. at 706-09, 509 A.2d at 483-84; *Two Juveniles*, 397 Mass. at 266, 491 N.E.2d at 238; *Advisory Opinion*, 469 A.2d at 1166.

however, held that an absolute privilege is constitutional.³⁴⁴ Those courts holding an absolute privilege unconstitutional have used inconsistent reasoning. Although they relied on the same Supreme Court decisions to support a holding of unconstitutionality,³⁴⁵ the courts' interpretations of these Supreme Court decisions and their overall reasoning differ significantly.³⁴⁶ Moreover, all of these decisions were issued prior to the Supreme Court decision of *Pennsylvania v. Ritchie*, in which the Court elaborated upon the rights of cross-examination guaranteed by the confrontation clause and chose to deal with the defendant's compulsory process clause claim by applying a due process analysis.³⁴⁷ In contrast, the one court holding an absolute rape counseling privilege constitutional reached this conclusion relying on the Supreme Court decision in *Ritchie*.³⁴⁸

The *Ritchie* decision provides a new view of the conflict. The *Ritchie* decision supports the conclusion that an absolute privilege for communications between rape victims and rape crisis counselors is constitutional. The compelling state interests and the individual privacy interests of the victim that support this testimonial privilege justify any speculative infringement on the defendant's sixth amendment rights.

A. *The Confrontation Clause Challenge*

Criminal rape defendants have challenged an absolute privilege for the rape crisis counseling relationship as a violation of their rights to confrontation under the sixth amendment.³⁴⁹ Because the victim's statements to her counselor may be inconsistent with her statements at trial, defendants have asserted that they should have access to all such prior statements for use during cross-examination of the victim to impeach her testimony or reveal possible biases or ulterior motives.³⁵⁰ An absolute privilege prohibiting disclosure of

³⁴⁴ *Foggy*, 121 Ill. 2d at 349-50, 521 N.E.2d at 92.

³⁴⁵ See *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967). See *supra* notes 135-57 and accompanying text for a discussion of *Davis* and notes 207-26 and accompanying text for a discussion of *Washington* and *Chambers*.

³⁴⁶ Compare *Advisory Opinion*, 469 A.2d 1161 with *Two Juveniles*, 397 Mass. 261, 491 N.E.2d 234.

³⁴⁷ See *Ritchie*, 107 S. Ct. 989, 994, 1001. See *supra* notes 158-203 and accompanying text.

³⁴⁸ *Foggy*, 121 Ill. 2d at 344-47, 521 N.E.2d at 90-91.

³⁴⁹ See *Robert H.*, 199 Conn. at 705, 509 A.2d at 482. See *supra* notes 252-341 and accompanying text.

³⁵⁰ *Robert H.*, 199 Conn. at 705, 509 A.2d at 482. See *supra* notes 127-29 and accompanying text for a discussion of a defendant's arguments under the confrontation clause.

these statements, defendants have alleged, impermissibly shields these statements and violates their rights to effective cross-examination under the confrontation clause.³⁵¹

Addressing the constitutionality of an absolute privilege for the rape crisis counseling relationship in light of a defendant's confrontation clause challenge, the state courts in the cases of *In re Robert H.*, *Commonwealth v. Two Juveniles*, and *People v. Foggy* and the Rhode Island court in its *Advisory Opinion to the House of Representatives* all relied upon *Davis v. Alaska*.³⁵² In *Davis*, the Supreme Court held that a state evidence rule that forbade the disclosure of juvenile records in judicial proceedings denied a defendant his right of effective cross-examination under the confrontation clause because the rule restricted the scope of a defendant's cross-examination questioning of a key witness against the defendant.³⁵³ Although these state courts all relied on *Davis*, each court interpreted *Davis*' holding differently.

The Connecticut court in *Robert H.* and the Rhode Island court in its *Advisory Opinion to the House of Representatives* both relied upon *Davis* to hold that an absolute privilege for rape crisis counseling violates a criminal defendant's right to effective cross-examination.³⁵⁴ These two courts interpreted *Davis* as establishing that the right of confrontation requires defense access to all information that may possibly improve the effectiveness of cross-examination at trial.³⁵⁵ Both courts viewed *Davis* as authorizing the abrogation of an absolute privilege statute because, like the statute protecting juvenile offenders in *Davis*, the privilege completely banned the introduction of certain evidence and possibly inhibited the defense from conducting an effective cross-examination.³⁵⁶ These two courts further interpreted *Davis* as mandating that, where a conflict with a defendant's confrontation rights arises, the right of a defendant

³⁵¹ See *id.* at 705, 509 A.2d at 482.

³⁵² *Robert H.*, 199 Conn. at 707-08, 509 A.2d at 483-84; *Two Juveniles*, 397 Mass. at 266-67, 491 N.E.2d at 238; *Foggy*, 121 Ill. 2d at 343-44, 521 N.E.2d at 89; *Advisory Opinion*, 469 A.2d at 1165.

³⁵³ *Davis*, 415 U.S. at 318. See *supra* notes 135-57 and accompanying text.

³⁵⁴ *Robert H.*, 199 Conn. at 707-09, 509 A.2d at 483-84; *Advisory Opinion*, 469 A.2d at 1165.

³⁵⁵ See *Robert H.*, 199 Conn. at 707-09, 509 A.2d at 483-84; *Advisory Opinion*, 469 A.2d at 1165.

³⁵⁶ *Robert H.*, 199 Conn. at 707-09, 509 A.2d at 483-84; *Advisory Opinion*, 469 A.2d at 1165.

to effective cross-examination takes precedence regardless of the opposing interests supporting the exclusion of evidence.³⁵⁷

In contrast, the *Two Juveniles* court and the *Foggy* court, although reaching different conclusions regarding the constitutionality of the absolute privilege, both distinguished the situation before the Court in *Davis* from the conflict between an absolute privilege for rape counseling and a defendant's rights to effective cross-examination.³⁵⁸ The *Two Juveniles* court, interpreting *Davis* as defining the right of confrontation to include access to information for possible use during cross-examination, ultimately concluded that the absolute privilege for rape counseling must yield to a defendant's right of confrontation under certain circumstances.³⁵⁹ The court, however, recognized a distinction between the evidentiary rules of exclusion at issue in *Davis* and testimonial privileges.³⁶⁰ The *Two Juveniles* court indicated that, because testimonial privileges are based on entirely different considerations than rules of exclusion, cases involving evidentiary rules of exclusion, such as *Davis*, do not automatically require abrogation of testimonial privileges upon establishment of a confrontation right violation.³⁶¹ The *Two Juveniles* court further noted that the United States Supreme Court had never decided a conflict between a defendant's sixth amendment rights and a testimonial privilege.³⁶² According to the *Two Juveniles* court, therefore, the interests underlying the privilege must be considered before a court, relying on *Davis*, may override an absolute privilege for rape counseling.³⁶³

Similarly, the court in *Foggy* distinguished the rape counseling privilege from the exclusionary rule in *Davis* prohibiting the introduction of juvenile offender's records by emphasizing that the privilege was supported by a strong public policy in favor of confidentiality.³⁶⁴ Unlike the rule in *Davis*, which merely protected a juvenile offender from embarrassment or a blemished reputation, the ab-

³⁵⁷ *Id.*

³⁵⁸ *Two Juveniles*, 397 Mass. at 266-67, 491 N.E.2d at 238; *Foggy*, 121 Ill. 2d at 344, 350, 521 N.E.2d at 89, 92.

³⁵⁹ *Two Juveniles*, 397 Mass. at 266-67, 491 N.E.2d at 238. See *supra* notes 289-297 and accompanying text for a discussion of *Two Juveniles*.

³⁶⁰ *Two Juveniles*, 397 Mass. at 266-67, 491 N.E.2d at 238.

³⁶¹ See *id.*

³⁶² *Id.*

³⁶³ See *id.*

³⁶⁴ *Foggy*, 121 Ill. 2d at 348, 349-50, 521 N.E.2d at 91, 92. See *supra* notes 298-341 and accompanying text for a discussion of *Foggy*.

solute privilege, the *Foggy* court emphasized, promotes the prosecution of sex offenders, encourages the rehabilitation of rape victims, and protects victims from the suffering that disclosure of such confidences would inflict.³⁶⁵ Furthermore, the *Foggy* court stated that, unlike the defendant in *Davis*, the defendant in *Foggy* offered no reason to believe that the victim's counseling files might include specific information to show the victim's bias or motive to fabricate.³⁶⁶ Thus, distinguishing *Davis*, the *Foggy* court held that the defendant's right of confrontation did not require abrogation of the privilege.³⁶⁷

Unlike the other state courts addressing the constitutionality of an absolute privilege, the *Foggy* court decided the issue after the Supreme Court decision of *Pennsylvania v. Ritchie* and relied on the *Ritchie* plurality's opinion in holding an absolute privilege constitutional under the confrontation clause.³⁶⁸ Relying on the *Ritchie* plurality's opinion, the *Foggy* court recognized the right of confrontation as a trial right, violated only by restrictions on cross-examination operating at trial.³⁶⁹ The *Foggy* court relied on the *Ritchie* plurality's statement that *Davis* should not be interpreted broadly to transform the confrontation clause into a constitutionally compelled right to pretrial discovery.³⁷⁰ The *Foggy* court ultimately ruled that the absolute privilege did not violate the defendant's right of confrontation.³⁷¹

In *Pennsylvania v. Ritchie*, issued after the state court decisions holding an absolute privilege unconstitutional, the United States Supreme Court also divided over the proper interpretation of *Davis* and the scope of a defendant's right of effective cross-examination guaranteed under the confrontation clause.³⁷² In analyzing a statute protecting child abuse investigatory files, a plurality of the *Ritchie* Court narrowly interpreted *Davis* as establishing that the right of effective cross-examination is a trial right and demands only that no improper restrictions inhibit a defendant's actual questioning at trial of an adverse witness.³⁷³ According to the plurality, the right

³⁶⁵ *Foggy*, 121 Ill. 2d at 348, 521 N.E.2d at 91.

³⁶⁶ *Id.* at 350, 521 N.E.2d at 92.

³⁶⁷ *Id.* at 349-50, 521 N.E.2d at 92.

³⁶⁸ *Id.* at 344-46, 521 N.E.2d at 89-90.

³⁶⁹ *Id.* at 345, 521 N.E.2d at 90.

³⁷⁰ *Id.*

³⁷¹ *Id.* at 350, 521 N.E.2d at 92.

³⁷² 107 S. Ct. 989 (plurality opinion). See *supra* notes 158-203 and accompanying text.

³⁷³ *Ritchie*, 107 S. Ct. at 999.

to effective cross-examination is not a right of pretrial discovery to obtain statements prior to trial for use during cross-examination.³⁷⁴ In contrast, the dissent in *Ritchie* indicated that denying a defendant pretrial access to statements of a victim that might form the basis of cross-examination violated a defendant's right to confrontation.³⁷⁵

The *Ritchie* plurality also rejected interpreting the confrontation clause and the *Davis* decision as requiring a court to inquire into the actual effectiveness of the cross-examination.³⁷⁶ According to the plurality, cross-examination is effective if a defendant is permitted the opportunity to question an adverse witness at trial without substantial restriction.³⁷⁷ The right of effective cross-examination, the *Ritchie* plurality emphasized, does not include a guarantee to a defendant of all possible opportunities, such as pretrial discovery of privileged statements, that might increase the effectiveness of cross-examination.³⁷⁸ Thus, the *Ritchie* plurality held that denying the defendant access to the information contained in the Children and Youth Services' files did not violate the defendant's right of confrontation.³⁷⁹ Because the defendant in *Ritchie* was able to question the victim on cross-examination without restriction, the statute did not inhibit the defendant's constitutional right of cross-examination established by *Davis*.³⁸⁰ From the *Ritchie* plurality's perspective, the problem in *Davis* was that the defendant could not question the juvenile about his criminal record because the statute protected the confidentiality of juvenile offenders' records.³⁸¹ The statute restricted the cross-examination questioning at trial and prohibited the defense from inquiring into a subject of evident impeachment value.³⁸² The constitutional problem in *Davis* was not that the statute denied the defendant access to information contained in the juvenile records, but that the defense could not question the juvenile witness about his record or probationary status.³⁸³

Pursuant to the *Ritchie* plurality opinion, the absolute privilege for rape crisis counseling, which shields statements of the victim-

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 1009 (Brennan, J., dissenting).

³⁷⁶ *See* 107 S. Ct. at 999.

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 1000.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 999.

³⁸² *Id.*

³⁸³ *Id.* at 1000.

complainant communicated during counseling, does not deny a defendant his right to effective cross-examination. Disallowing the defense access to counseling communications does not restrict the questioning of a victim-complainant during cross-examination. The privilege does not preclude the defense from inquiring into any subject; it simply prohibits the defense from obtaining the counseling communications. Despite the existence of the privilege, the defendant may confront this witness against him—the victim—and may cross-examine her without limitation to undermine her testimony. Accordingly, an absolute privilege for communications between rape victims and rape crisis counselors does not violate the *Ritchie* plurality's view of defendants' rights to an effective cross-examination under the confrontation clause.³⁸⁴

Because the plurality's interpretation of *Davis* is not the ruling of the Court, the view of the dissent in *Ritchie* may ultimately prevail.³⁸⁵ The dissent asserted that the right of effective cross-examination may indeed require the production of potentially relevant statements of the victim prior to trial to ensure that cross-examination is as effective as possible.³⁸⁶ Under this view that the confrontation clause guarantees a right to pretrial discovery, an absolute privilege for the rape crisis counseling relationship may infringe on a defendant's rights.³⁸⁷ The state courts that decided an absolute privilege infringed upon a defendant's right of confrontation also interpreted the right as including a right to obtain access to information that might improve the effectiveness of cross-examination.³⁸⁸

Nevertheless, even if the dissent's view of *Davis* prevails, *Davis* should not be read as the Rhode Island court in its *Advisory Opinion* and the Connecticut court in *Robert H.* advocated.³⁸⁹ *Davis* does not require the automatic overruling of an absolute privilege simply because the privilege infringes on a defendant's rights by absolutely prohibiting disclosure.³⁹⁰ Instead, courts should recognize, as did the court in *Two Juveniles*, that *Davis* does not automatically require

³⁸⁴ See *id.*

³⁸⁵ See *supra* notes 183–203 for a discussion of the dissenting and concurring opinions in *Ritchie*.

³⁸⁶ 107 S. Ct. at 1009 (Brennan, J., dissenting).

³⁸⁷ See *id.*

³⁸⁸ See *supra* notes 256–297 and accompanying text.

³⁸⁹ See *supra* notes 262–78 and accompanying text for a case discussion of *Robert H.* See *supra* notes 279–88 and accompanying text for a case discussion of the Rhode Island court's *Advisory Opinion*.

³⁹⁰ See *Davis*, 415 U.S. at 319. See *supra* notes 135–57 and accompanying text.

abrogation of a testimonial privilege because testimonial privileges protect different interests than rules of exclusion.³⁹¹ Thus, courts should consider the interests underlying the privilege when addressing a confrontation clause challenge.³⁹² In *Davis*, the Supreme Court discussed at length the interests that supported the statute protecting the confidentiality of juvenile offenders before concluding that the defendant's right to confrontation was paramount to the state's interest.³⁹³ The Court ruled that the state interest was not compelling enough to justify the infringement on the defendant's rights.³⁹⁴ Accordingly, the *Davis* decision indicates that courts should consider the underlying public and private interests supporting an absolute privilege for rape counseling when confronted with a rape defendant's confrontation clause challenge to the privilege. Subsection C discusses these interests and concludes that, if the right of confrontation ultimately does include pretrial access to privileged information, the important private and public interests supporting an absolute rape counseling privilege justify any potential infringement on a defendant's sixth amendment right of confrontation.³⁹⁵

B. *The Compulsory Process Challenge*

Criminal rape defendants have also challenged an absolute privilege for communications between a rape victim and a rape crisis counselor as a violation of their rights to compulsory process under the sixth amendment.³⁹⁶ They have claimed that, because the records of a counselor may contain potentially exculpatory evidence and because a counselor may possess relevant knowledge transmitted to her by the victim, their rights to compulsory process demand that the court compel the testimony of the counselor and the production of the records.³⁹⁷ In the state case of *In re Robert H.* in which the court addressed the constitutionality of the absolute privilege, the defendants alleged a compulsory process violation.³⁹⁸ The

³⁹¹ See *Two Juveniles*, 397 Mass. at 267, 491 N.E.2d at 238.

³⁹² See *Davis*, 415 U.S. at 319.

³⁹³ *Id.*

³⁹⁴ *Id.* at 315.

³⁹⁵ See *infra* notes 423-445 and accompanying text.

³⁹⁶ See *Robert H.*, 199 Conn. at 705, 509 A.2d at 482. See *supra* notes 252-341 and accompanying text.

³⁹⁷ See *supra* notes 130-31 and accompanying text for a discussion of the defendant's arguments under the compulsory process clause.

³⁹⁸ *Robert H.*, 199 Conn. at 705, 509 A.2d at 482.

Rhode Island Supreme Court in its *Advisory Opinion to the House of Representatives* and the Massachusetts Supreme Judicial Court in its *Commonwealth v. Two Juveniles* decision also mentioned the absolute privilege's potential compulsory process violation.³⁹⁹ Because the *Ritchie* plurality opinion undermines a defendant's constitutional challenge to the absolute privilege under the confrontation clause by limiting the right of cross-examination to a trial right, only a defendant's compulsory process challenge survives if the plurality opinion remains the law.⁴⁰⁰

Although the state courts in *Robert H.* and *Foggy* noted that an absolute privilege implicates a defendant's compulsory process rights, these courts grounded their decisions in the confrontation clause, with little or no discussion of the defendant's compulsory process rights.⁴⁰¹ Thus, these decisions offer little assistance in deciding whether the absolute privilege for rape counseling violates a rape defendant's rights to compulsory process. The Rhode Island Supreme Court in its *Advisory Opinion* and the Massachusetts Supreme Judicial Court in *Two Juveniles*, however, did consider Supreme Court cases addressing the defendants' rights under the compulsory process clause.⁴⁰² The Rhode Island court considered the conflict between an absolute privilege and a rape defendant's compulsory process rights to be identical to the situation in *Washington v. Texas*, which involved an evidentiary rule prohibiting co-participants of the same crime from testifying for one another.⁴⁰³ Consequently, the Rhode Island court interpreted *Washington* as requiring the abrogation of the absolute privilege because, similar to the rule at issue in *Washington*, it constituted a complete ban on potential evidence.⁴⁰⁴

In contrast, the Supreme Judicial Court in *Two Juveniles* distinguished the rules in the Supreme Court cases of *Washington* and *Chambers v. Mississippi* from a testimonial privilege for rape counseling.⁴⁰⁵ Quoting the *Washington* Court, the *Two Juveniles* court emphasized that testimonial privileges are based on entirely differ-

³⁹⁹ *Advisory Opinion*, 469 A.2d at 1163; *Two Juveniles*, 397 Mass. at 266 n.5, 491 N.E.2d at 238 n.5.

⁴⁰⁰ See *Ritchie*, 107 S. Ct. at 989. See *supra* notes 158-203 and accompanying text.

⁴⁰¹ See *Robert H.*, 199 Conn. at 705-08, 509 A.2d at 482-83; *Foggy*, 121 Ill. 2d at 347, 350, 521 N.E.2d at 91, 92.

⁴⁰² *Advisory Opinion*, 469 A.2d at 1165; *Two Juveniles*, 397 Mass. at 266-67, 491 N.E.2d at 238.

⁴⁰³ *Advisory Opinion*, 469 A.2d at 1165.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Two Juveniles*, 397 Mass. at 266-67, 491 N.E.2d at 238.

ent considerations than evidentiary rules, such as the disqualification for interest rule in *Washington*.⁴⁰⁶ Thus, in contrast to the Rhode Island court's view, the *Two Juveniles* court recognized that *Washington* could not be interpreted as automatically demanding the abrogation of the absolute privilege for rape counseling.⁴⁰⁷ Thus, the *Two Juveniles* court ruled that the defense must demonstrate a witness's specific motive to lie or bias before a court can override the absolute privilege.⁴⁰⁸

Analysis of the Supreme Court decisions of *Washington v. Texas* and *Chambers v. Mississippi* reveals that the Rhode Island Supreme Court's view that the compulsory process clause demands the yielding of an absolute privilege is unfounded.⁴⁰⁹ The Massachusetts Supreme Judicial Court's interpretation of these cases in *Two Juveniles* is more plausible. In *Washington*, the Supreme Court expressly stated that its decision should not be interpreted as disapproving of testimonial privileges because they are supported by considerations different than those which support typical exclusionary rules of evidence.⁴¹⁰

Courts, therefore, should closely examine the interests underlying an absolute privilege for rape counseling in deciding whether to abrogate the privilege. In addition to recognizing the special interests underlying privileges, the *Washington* Court considered the interests supporting the evidentiary rules disqualifying coparticipants.⁴¹¹ In *Washington*, the Court discussed the state interests supporting the evidentiary rule in depth before it rejected the state's justifications for the rule and ruled that the state arbitrarily denied the defendant the right to introduce a witness whose testimony was relevant and material to his defense.⁴¹² Accordingly, the *Washington* decision indicates that when addressing a defendant's compulsory process claim, courts should evaluate the opposing interests underlying the evidentiary rule or privilege to determine if such interests justify infringement on the defendant's right of compulsory process; the *Washington* decision does not state that the compulsory process clause absolutely prohibits all complete restrictions on the defendant's ability to obtain witnesses and/or evidence in his favor.

⁴⁰⁶ *Id.* at 267, 491 N.E.2d at 238.

⁴⁰⁷ *See id.*

⁴⁰⁸ *Id.* at 269, 491 N.E.2d at 239.

⁴⁰⁹ *See supra* notes 207-226 and accompanying text for a discussion of *Washington* and *Chambers*.

⁴¹⁰ *Washington*, 388 U.S. at 23 n.21.

⁴¹¹ *Id.* at 20-21.

⁴¹² *Id.* at 22-23.

Similarly, in the case of *Chambers v. Mississippi*, the Supreme Court indicated that courts should examine the interests underlying the rule of exclusion or privilege in deciding whether an infringement on the defendant's right to compulsory process is justified. In *Chambers*, the Court faced the defendant's claim that the operation of state hearsay rules violated his right to call witnesses in his favor.⁴¹³ The Court applied a due process analysis to assess whether the defendant received a fair trial.⁴¹⁴ The Court's choice of a due process analysis and its discussion of the interests underlying the hearsay rules indicate that where a defendant asserts a violation of his right to compulsory process, courts should weigh the interests that justify infringement on a defendant's rights before overriding an evidentiary rule restricting a defendant's compulsory process rights.

The Supreme Court decision of *Pennsylvania v. Ritchie* also supports the conclusion that an analysis under the compulsory process clause involves considering competing interests and balancing these interests against a defendant's rights. In response to the defendant's claimed denial of compulsory process in *Ritchie*, the Supreme Court chose to apply a due process analysis under its fourteenth amendment precedents establishing that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or innocence.⁴¹⁵ Because the Children and Youth Services agency in *Ritchie* was a government agency, the fourteenth amendment precedents that required the government to disclose exculpatory evidence in its possession applied.⁴¹⁶

In contrast, the majority of rape crisis centers are private institutions, not government agencies. Thus, the due process analysis that the Supreme Court applied in *Ritchie* may not govern the conflict involving an absolute privilege for communications between a rape victim and a rape crisis counselor. Although courts may decide not to rely on the fourteenth amendment precedents dealing with the government's obligation to reveal exculpatory evidence, however, courts may choose to address a defendant's argument that the constitution guarantees a right to obtain exculpatory evidence under the more general protections of the due process clause of the fourteenth amendment.⁴¹⁷ Finally, courts will probably return

⁴¹³ *Chambers*, 410 U.S. at 298.

⁴¹⁴ *Id.*

⁴¹⁵ *Ritchie*, 107 S. Ct. at 1001.

⁴¹⁶ *See id.*

⁴¹⁷ *See Foggy*, 121 Ill. 2d at 342, 521 N.E.2d at 88.

to the compulsory process clause to assess the constitutionality of an absolute privilege where a defendant claims that the privilege unconstitutionally restricts his access to exculpatory evidence.

Although not directly on point, the *Ritchie* decision nevertheless offers some guidance for courts addressing a compulsory process challenge to an absolute privilege for rape counseling. The Supreme Court in *Ritchie* stated that although it addressed the defendant's claim by reference to due process, the compulsory process clause provided no greater protection.⁴¹⁸ Therefore, a defendant's rights under the compulsory process clause must be satisfied by less than complete disclosure. An *in camera* review, such as the procedure fashioned by the Court in *Ritchie*, will satisfy a defendant's rights to compulsory process. Accordingly, the *Ritchie* decision establishes at a minimum that a rape defendant is not entitled to complete disclosure of rape counseling files by virtue of his right to compulsory process.

Furthermore, the *Ritchie* Court's indication that an *in camera* review will satisfy a criminal defendant's compulsory process rights also supports the conclusion that a compulsory process analysis involves consideration of the interests underlying any restriction on the defendant's ability to call witnesses or to obtain evidence. By choosing an *in camera* review, a court recognizes that important interests oppose a defendant's rights. An *in camera* review is an accommodation to allow a defendant his constitutional rights and to avoid disregarding the opposing interests. In *Ritchie*, the state's interests supporting confidentiality of the CYS's files were the public's interests in the investigation, discovery, prosecution and treatment of child abuse.⁴¹⁹ Recognizing the strength of such interests, the Court ruled that on remand the trial court should review the files *in camera* to determine if they contained material information.⁴²⁰ Accordingly, *Ritchie* supports a balancing of interests approach in addressing a rape defendant's compulsory process challenge to an absolute privilege statute for rape counseling.

In summary, as the Supreme Court decisions of *Washington*, *Chambers* and *Ritchie* indicate, the compulsory process clause does not automatically require the abrogation of a rule that restricts a defendant's compulsory process rights. These decisions establish that a compulsory process analysis should involve consideration of

⁴¹⁸ *Ritchie*, 107 S. Ct. at 1001.

⁴¹⁹ *Id.* at 1003.

⁴²⁰ *Id.* at 1002.

the interests underlying a testimonial privilege for the rape counseling relationship. As the Supreme Court in *Washington* stated, testimonial privileges are based on unique considerations different from other rules of evidence.⁴²¹ Weightier considerations support testimonial privileges, particularly the absolute privilege for rape crisis counseling. Accordingly, when determining the constitutionality of an absolute privilege for rape counseling under a due process analysis, a court must weigh the private and public interests supporting the absolute privilege against the defendant's right to compulsory process. Subsection C discusses this balancing of interests analysis and concludes that the compelling private and public interests underlying the absolute rape counseling privilege justify any potential infringement on a defendant's compulsory process rights.⁴²²

C. The Compelling Public and Private Interests Supporting an Absolute Privilege for Rape Counseling Justify any Potential Infringement on a Defendant's Sixth Amendment Rights

An absolute privilege for rape counseling potentially may infringe upon a rape defendant's compulsory process right to call witnesses in his favor and to place exculpatory evidence before the jury. A compulsory process analysis thus requires evaluation of the interests underlying a testimonial privilege to determine whether the privilege unconstitutionally infringes upon a defendant's sixth amendment rights. Under the *Ritchie* plurality's interpretation of the confrontation clause, an absolute privilege for rape counseling does not violate a rape defendant's right of confrontation.⁴²³ If the views of the dissent and the concurring Justice in *Ritchie* prevail, however, an absolute privilege may indeed infringe upon a defendant's right of cross-examination guaranteed by the confrontation clause of the sixth amendment.⁴²⁴ If the *Ritchie* dissent's opinion of the right of confrontation becomes law, a confrontation clause analysis will require consideration of the interests supporting an absolute privilege to address a constitutional challenge to the privilege. Applying such a sixth amendment analysis, the compelling public

⁴²¹ *Washington*, 388 U.S. at 23 n.21.

⁴²² See *infra* notes 423-445 and accompanying text.

⁴²³ See *Ritchie*, 107 S. Ct. at 998-1000. See *supra* notes 168-82 and accompanying text.

⁴²⁴ See *Ritchie*, 107 S. Ct. at 1004 (Blackmun, J., concurring), 1006 (Brennan, J., Marshall, J., dissenting). See *supra* notes 183-203 and accompanying text.

and private interests supporting the absolute privilege for rape counseling justify any infringement on the defendant's rights.

Compelling public and private interests support an absolute testimonial privilege for communications between a rape victim and her counselor. Pursuant to the public function theory of testimonial privileges, the privilege for rape counseling promotes, maintains and protects a socially valuable relationship.⁴²⁵ The rape counseling relationship clearly furthers several important public interests. First, the rape counseling relationship assists rape victims in their recovery from the trauma that rape inflicts.⁴²⁶ The relationship enables victims to recover from the disruption of emotional stability caused by the rape and to return to their lives as professionals, wives and mothers.⁴²⁷ Clearly, society possesses a compelling interest in the rehabilitation of rape victims. Additionally, the rape counseling relationship promotes the judicial process itself because the relationship provides a victim with the necessary psychological and emotional support necessary to report the crime and to aid the police and the prosecution.⁴²⁸

Confidentiality is essential to the continued existence and effectiveness of the rape counseling relationship.⁴²⁹ Without an assurance of confidentiality, a victim may avoid treatment altogether or may withhold certain personal feelings and thoughts because she fears disclosure.⁴³⁰ The communications are so extremely personal that the mere possibility of exposure to just one individual other than a personal counselor may inhibit a victim. Without confidentiality, victims will not be able to develop the trust within the counseling relationship that is essential for effective therapy.⁴³¹

Without the protection of a privilege of confidentiality, rape crisis centers will be forced to reveal the contents of communications exchanged between a victim and a counselor when the defense demands disclosure. Rape crisis counselors will be unable to assure confidentiality to rape victims seeking their help. Thus, rape victims may choose not to form such relationships or will refrain from

⁴²⁵ See *In re Pittsburgh*, 494 Pa. at 58, 428 A.2d at 147 (Larsen, J., dissenting). See *supra* notes 67-74 and accompanying text for a discussion of the public function theory of privileges.

⁴²⁶ *In re Pittsburgh*, 494 Pa. at 58, 428 A.2d at 147 (Larsen, J., dissenting); *Foggy*, 121 Ill. 2d at 348, 521 N.E.2d at 91; *Robert H.*, 199 Conn. at 706, 710, 509 A.2d at 483, 485.

⁴²⁷ *In re Pittsburgh*, 494 Pa. at 58, 428 A.2d at 147 (Larsen, J., dissenting).

⁴²⁸ *Foggy*, 121 Ill. 2d at 348, 521 N.E.2d at 91.

⁴²⁹ *In re Pittsburgh*, 494 Pa. at 55, 428 A.2d at 146 (Larsen, J., dissenting).

⁴³⁰ *Id.* at 53, 428 A.2d at 145 (Larsen, J., dissenting).

⁴³¹ *Id.* at 54, 428 A.2d at 145 (Larsen, J., dissenting).

communication in an open and honest manner necessary to the growth and proper function of the relationship. Unable to perform their services effectively, rape crisis centers may be forced to shut their doors and rape victims will no longer have a sanctuary where they can receive the help, support, and counseling they need. Permitting disclosure may thus inflict severe damage on the relationship and destroy the public interests that the privilege promotes and protects.

The private function theory of testimonial privileges also supports an absolute privilege for rape counseling.⁴³² The privilege protects the victim's privacy interests in the communications exchanged between the victim and the counselor.⁴³³ Because of the nature of a rape violation and the emotional and psychological reactions all victims experience in the rape's aftermath, these communications involve private matters of an extremely sensitive nature.⁴³⁴ Such communications contain not only the details of the rape, but also the victim's expressions of guilt, self-blame, shame, degradation, embarrassment, anger and fear.⁴³⁵ The absolute privilege guards the victim's privacy interests in these communications and protects the victim from the personal injury that disclosure of these confidences would cause her. Furthermore, by assuring confidentiality, the privilege enables the victim to obtain the necessary therapeutic treatment to help her recover from rape trauma syndrome.⁴³⁶ Accordingly, the rape counseling privilege serves vital private interests of the victim.

The public interests and the privacy interests of the victim that support an absolute privilege for rape counseling justify any potential infringement on the defendant's rights to confrontation and compulsory process. Any potential infringement is justified because of the speculative nature of a rape defendant's claims. Regarding potential violation of his right to confrontation, a defendant speculates that the counseling records contain statements of the victim which the defendant might use to impeach her testimony at trial. Regarding his rights under the compulsory process clause, a defendant speculates that the files contain exculpatory evidence or that

⁴³² See *supra* notes 75-78 and accompanying text for a discussion of the private function theory of testimonial privileges.

⁴³³ *In re Pittsburgh*, 494 Pa. at 60-62, 428 A.2d at 149-50 (Larsen, J., dissenting).

⁴³⁴ *Id.* at 55-56, 428 A.2d at 146-47 (Larsen, J., dissenting).

⁴³⁵ *Id.* at 38, 428 A.2d at 138. (Larsen, J., dissenting); HILBERMAN, *supra* note 3, at 36. See *supra* notes 80-84 and accompanying text.

⁴³⁶ See *In re Pittsburgh*, 494 Pa. at 53, 428 A.2d at 145 (Larsen, J., dissenting).

the counselor knows facts relating to the defendant's guilt or innocence. The compelling public and private interests supporting an absolute privilege should not be destroyed by the defendant's mere conjecture.

The Supreme Court decision of *Pennsylvania v. Ritchie* also supports the conclusion that an absolute privilege is constitutional. An absolute statute protecting the rape crisis counseling relationship is also distinguishable from the statute at issue in *Ritchie* because the statute in *Ritchie* provided several exceptions that would allow some disclosure in criminal trials.⁴³⁷ The *Ritchie* court itself noted this distinction, citing Pennsylvania's unqualified privilege for communications between sexual assault counselors and victims as an example of an absolute privilege.⁴³⁸ As the Court recognized, the absolute statute prevents disclosure under all circumstances.⁴³⁹ Thus, an absolute statute reflects a state policy and commitment against disclosure that is more compelling than the policy displayed by the qualified statute protecting the CYS files in *Ritchie*.⁴⁴⁰ Accordingly, the expressed legislative intent against disclosure and the private interests underlying the privilege distinguish the absolute privilege for rape counseling from the situation in *Ritchie*.

Although *Ritchie* involved only a qualified privilege, the Supreme Court still concluded that the state's interests in the confidentiality of the CYS files required an *in camera* review, rather than complete disclosure.⁴⁴¹ The Court found that only public interests—investigation and prosecution of child abuse—supported the statute protecting the CYS's files.⁴⁴² Nevertheless, the Court determined that an *in camera* review, rather than complete disclosure, was necessary to accommodate these interests.⁴⁴³ In contrast to the statute protecting the CYS's files, a testimonial privilege is supported by both public and private interests. Consequently, more protection than an *in camera* review is necessary to adequately guard the interests supporting an absolute privilege for rape crisis counseling.

Although a qualified privilege providing for an *in camera* review may appear to be an adequate resolution of the competing interests,

⁴³⁷ *Pennsylvania v. Ritchie*, 107 S. Ct. at 1002; *Foggy*, 121 Ill. 2d at 347, 521 N.E.2d at 91.

⁴³⁸ *Ritchie*, 107 S. Ct. at 1002.

⁴³⁹ *Id.*

⁴⁴⁰ *See id.*

⁴⁴¹ *Id.* at 1003.

⁴⁴² *Id.*

⁴⁴³ *Id.*

a qualified privilege is ineffective in the rape counseling situation and does not adequately protect the victim's privacy interests.⁴⁴⁴ Even the minor threat that one judge may review her private communications may inhibit the victim either from obtaining treatment or from continuing with the prosecution of the defendant. Neither result is desirable. Moreover, this threat of disclosure is increased by the possibility that additional judges will review the file on appeal.⁴⁴⁵

A victim will be unable to trust a judge to determine if the communications include exculpatory evidence or statements that the defense might use for impeachment. Because the common emotions experienced by a rape victim include guilt, self-blame and shame, the counselor's files will undoubtedly contain a victim's expressions of such emotions. A trial judge, uneducated as to the common reactions of rape victims, might easily identify such statements as exculpatory evidence or impeaching statements. Consequently, a qualified privilege providing for an *in camera* review proves ineffective in protecting the public and private interests supporting a privilege for rape counseling. Nothing less than an absolute privilege will adequately protect a victim's privacy interests and promote the social goals that the relationship serves. Accordingly, an absolute privilege for communications between a rape victim and a rape crisis counselor is constitutional; the public and private interests supporting the privilege justify any speculative infringement on the defendant's rights to confrontation and compulsory process under the sixth amendment.

CONCLUSION

Rape scars a victim for life, wounding her physically, emotionally and psychologically. To enable rape victims to recover from the trauma they suffer, rape crisis centers provide confidential therapeutic counseling to victims through personal counselors specifically trained in rape counseling. Several state legislatures have enacted testimonial privileges to protect the confidentiality of communications arising from the rape counseling relationship. An absolute privilege protects a victim's privacy interests in the relationship and in the confidences she shares with her counselor. The privilege also

⁴⁴⁴ *In re Pittsburgh*, 494 Pa. at 61, 428 A.2d at 149-50 (Larsen, J., dissenting); *Foggy*, 121 Ill. 2d at 349-50, 521 N.E.2d at 92.

⁴⁴⁵ *In re Pittsburgh*, 494 Pa. at 61, 428 A.2d at 149-50 (Larsen, J., dissenting).

fosters society's interests in the rehabilitation of rape victims and the prosecution of rapists. Criminal defendants charged with rape, however, have alleged that an absolute privilege protecting rape counseling communications violates their constitutional rights to confrontation and compulsory process under the sixth amendment.

This note has analyzed the constitutionality of an absolute privilege for rape counseling. To date, the Supreme Court has not addressed whether an absolute testimonial privilege for rape counseling violates a criminal defendant's constitutional rights. In the Supreme Court decision of *Pennsylvania v. Ritchie*, the Court did analyze the constitutionality of a qualified statute, protecting the files of a child abuse agency. The Court concluded that the statute did not violate a defendant's confrontation rights, but that a defendant's due process rights required an *in camera* review of the files. In other Supreme Court decisions, the Court has considered conflicts between evidentiary rules of exclusion and a defendant's sixth amendment rights. Addressing these conflicts, the Court has outlined the parameters of a defendant's rights of confrontation and compulsory process under the sixth amendment.

In contrast to the Supreme Court, various state courts have analyzed the constitutionality of an absolute privilege for rape crisis counseling. Although these courts relied on the same Supreme Court decisions involving the confrontation and compulsory process clauses, their interpretations of these decisions and their ultimate conclusions differ. Most of these state courts decided the issue before the *Ritchie* decision and held an absolute statute unconstitutional. The one state court deciding the issue after *Ritchie*, however, ruled that the absolute privilege for rape counseling did not violate a defendant's constitutional rights.

This note similarly concludes that an absolute privilege for the rape crisis counseling relationship does not violate a defendant's right to confrontation and compulsory process under the sixth amendment. The right of confrontation, as outlined by a plurality of the Supreme Court in *Ritchie*, is a trial right that requires only that a defendant receive an unrestricted opportunity to cross-examine a witness at trial. Because the absolute privilege does not restrict cross-examination questioning at trial, the privilege does not infringe upon a defendant's right of confrontation. If the confrontation clause ultimately requires defense access to a victim's statements to use in cross-examination, as the dissent in *Ritchie* argued, an absolute privilege would still survive constitutional scrutiny because, under a balancing analysis, the private and public interests

supporting the privilege justify any speculative infringement on a defendant's right of confrontation. Similarly, an absolute privilege for rape counseling is constitutional under the sixth amendment compulsory process clause. Upon weighing the competing considerations, an absolute privilege's potential infringement on a defendant's compulsory process rights is warranted by the private and public interests which the privilege protects. In sum, an absolute privilege for rape crisis counseling is constitutional.

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