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STATE V. WORTHEN: DEMONSTRATING UTAH'S NEED FOR AN EXPANDED, ABSOLUTE VICTIM-COUNSELOR TESTIMONIAL PRIVILEGE

Barry G. Stratford*

I. INTRODUCTION

Evidentiary privileges have generated disagreement since they were first recognized in the law.[1] These privileges exist to prevent a witness from being compelled to disclose certain information. Such protections acknowledge that certain relationships[2] or communications[3] are so important in society that they warrant heightened confidentiality. A number of privileges are designed to protect communications made during professional relationships. These include the relationship between attorney and client,[4] physician and patient,[5] psychotherapist and patient,[6] and clergyman and penitent.[7] In practice, these privileges require "some sacrifice of availability of evidence relevant to the administration of justice."[8] When parties seek communications and records arising from these relationships, the search for truth must occasionally yield to the protection of

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[1] *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1456–58 (1985).

[2] For a utilitarian justification arguing that testimonial privileges are judicial instruments used to effect important practical social aims, see 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (John T. McNaughton, rev. ed. 1961). *See also* Jaffee v. Redmond, 518 U.S. 1, 9–11 (1996) (outlining one justification for evidentiary privileges in a discussion on the importance of the relationship that exists between psychotherapists or social workers and their patients).

[3] For a nonutilitarian justification for privileges based on the privacy protections they provide, see Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 86 (1973).

[4] Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998) (recognizing attorney-client privilege as "one of the oldest recognized privileges for confidential communications").

[5] The Federal Rules of Evidence do not recognize a doctor-patient privilege at the federal level. However, almost every state has recognized the privilege to some degree either through statute or case law. *See, e.g.*, UTAH CODE ANN. § 78B-1-137(4) (LexisNexis 2008) (establishing the Utah physician-patient privilege).

[6] *Jaffee*, 518 U.S. at 9–13.

[7] *In re* Grand Jury Investigation, 918 F.2d 374, 387 (3d Cir. 1990) (recognizing clergy-communicant privilege).

[8] 1 MCCORMICK ON EVIDENCE § 72, at 339 (Kenneth S. Broun ed., 6th ed. 2006).

individual and societal interests. Such a balance preserves the integrity of these valued relationships.

In recent decades, one evidentiary privilege has gained increased legal recognition: the victim-counselor privilege.[9] Similar to the protections found under the psychotherapist-patient privilege, the victim-counselor privilege seeks to protect communications between victims of crimes—almost exclusively child abuse and sexual assaults such as rape and incest—and their crisis counselors.[10] Unlike the psychotherapist privilege, the victim-counselor privilege is necessary to protect communications with crisis counselors who may be unlicensed or volunteers with training requirements much lower than those of licensed psychotherapists.[11]

A number of public policy concerns support this privilege, including the understanding that the confidential communications between victims and their therapists are critical to effective treatment and recovery.[12] Similarly, the victims' rights movement has made significant progress in gaining legal protections for victims through federal legislation, state legislation, and state constitutional amendments.[13]

Occasionally, a conflict may develop in criminal cases between the victim-counselor privilege and a criminal defendant's right to due process,[14] compulsory process,[15] and confrontation.[16] Professor Paul Cassell, a prominent crime victim scholar, framed this issue by noting, "When defense attorneys obtain ex parte subpoenas for a victim's confidential information, they may very well violate the

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[9] *See, e.g.*, People v. Turner, 109 P.3d 639, 643 (Colo. 2005) (noting justifications for victim-counselor privilege); Euphemia B. Warren, *She's Gotta Have it Now: A Qualified Rape Crisis Counselor-Victim Privilege*, 17 CARDOZO L. REV. 141, 146–48 (1995).

[10] For a general discussion regarding the historical development of the victim-counselor privilege, see Anne W. Robinson, *Evidentiary Privileges and the Exclusionary Rule: Dual Justifications for an Absolute Rape Victim Counselor Privilege*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 331, 337–41 (2005).

[11] *See, e.g.*, UTAH CODE ANN. § 77-38-203(3) (LexisNexis 2008).

[12] *See, e.g.*, Louis Everstine et al., *Privacy and Confidentiality in Psychotherapy*, 35 AM. PSYCHOLOGIST 828, 836 (1980); Ryan D. Jagim et al., *Mental Health Professionals' Attitudes Toward Confidentiality, Privilege, and Third-Party Disclosure*, 9 PROF. PSYCHOLOGY 458, 459–60 (1978); Anna Y. Joo, Note, *Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor*, 32 HARV. J. ON LEGIS. 255, 264 (1995).

[13] DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 28–31 (3d ed. 2010).

[14] U.S. CONST. amend. XIV, § 1.

[15] U.S. CONST. amend. VI. The Compulsory Process Clause was later made obligatory on the states by passage of the Fourteenth Amendment. *See* Washington v. Texas, 388 U.S. 14, 17–19 (1967).

[16] U.S. CONST. amend VI. *See* Pointer v. Texas, 380 U.S. 400, 403–06 (1965).

rights of the victim, such as the right to confidentiality preserved in the doctor-patient privilege or psychotherapist privilege."[17]

The United States Supreme Court confronted the convergence of these rights in *Pennsylvania v. Ritchie*,[18] weighing a criminal defendant's constitutional rights against a victim's right to the psychotherapist-patient privilege.[19] The success of the crime victims' rights movement may create a presumption that there is strong support for a victim's confidentiality privilege. However, far from resolving the conflict of rights, the Court's less-than-clear analysis has been accorded various interpretations by state and federal courts.[20] Because the conflict between a victim and a criminal defendant surfaces in a variety of contexts relating to the evidentiary privileges, the patchwork of approaches provides inconsistent guidance for how courts should handle a victim's privileged communications when it is pitted against the rights of a criminal defendant.[21]

The Utah Supreme Court recently faced this convergence of rights in *State v. Worthen*.[22] The court evaluated whether a child victim's privileged psychological records should remain confidential despite defendant's claim that the records were necessary to his defense.[23] While the court indicated that a broader victims' rights issue—whether Utah's victims' statutory and constitutional protections should influence a criminal defendant's ability to overcome a victim's right to privilege—was open for judicial review, the court declined to make such a determination because appellant failed to properly raise it on appeal.[24]

This case demonstrates the need for the Utah Legislature to act and remove any doubt that crime victims deserve an expanded, absolute victim-counselor testimonial privilege. The underlying policy rationales of privileges in general and concerns about the victims of crime in particular support an absolute privilege. Victims' rights recognized by legislation and state constitutional amendments also call for such a privilege. Lastly, the United States Supreme Court's recognition that an individual has a constitutional right to privacy underscores the need to protect confidential communications made during counseling.[25] In short, the rights

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[17] Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure,* 2007 UTAH L. REV. 861, 907.

[18] 480 U.S. 39 (1987).

[19] *See id.* at 56–60.

[20] *See* 1 MCCORMICK ON EVIDENCE, *supra* note 8, § 136, at 569–73; *see infra* text accompanying notes 117–157.

[21] *See, e.g.*, United States v. Shrader, 716 F. Supp. 2d 464, 470–72 (S.D. W. Va. 2010).

[22] 222 P.3d 1144 (Utah 2009).

[23] *Id.* at 1147.

[24] *Id.* at 1158.

[25] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (reaffirming constitutional protection for privacy and applying it to private, consensual homosexual sexual activity); Roe v. Wade, 410 U.S. 113, 152 (1973) (recognizing "that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution"); Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (finding that a law prohibiting the

afforded to all crime victims should be no less important than the rights afforded to criminal defendants.

Part II of this Article explores the victim-counselor privilege. This section identifies the states that recognize the privilege and discusses the three common versions of the privilege: qualified, semi-absolute, and absolute. Part III explores the decisions of the United States Supreme Court that address a criminal defendant's constitutional rights to access privileged information. This section also discusses the approaches that other courts, both state and federal, have taken when addressing the balance between a victim's privileged, confidential communications and a criminal defendant's constitutional rights. Part IV discusses Utah's statutory law and case law that underlie victims' rights to privileged communication. This section also includes an analysis of the Utah Supreme Court's recent decision in *State v. Worthen*. In Part V, this Article uses *State v. Worthen* to advocate for an absolute victim-counselor confidentiality privilege for all crime victims that seek counseling, not just the traditional protections offered to victims of child abuse and sexual assault. The underlying public policy interests of privileges in general, the policy interests regarding victims of crime in particular, and crime victims' statutory and constitutional rights, all support establishing an absolute victim-counselor testimonial privilege. Part VI concludes.

II. THE VICTIM-COUNSELOR EVIDENTIARY PRIVILEGE

Communication between a counselor and the victim of a crime may qualify as confidential under several evidentiary privileges. For example, the federal government and all fifty states recognize some iteration of the privilege between psychotherapists[26] and their patients.[27] Thus, crime victims who seek counseling from a psychotherapist can expect that their communications and reports—and sometimes their doctor's reports—will remain confidential in certain

distribution of contraceptives to unmarried persons impaired the exercise of personal rights); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (striking down a Connecticut law prohibiting the use of contraceptives as violating an individual's right to privacy).

[26] Note, however, that state psychotherapist-patient privileges vary from state to state regarding the exact qualifications required of a psychologist, therapist, counselor, social worker, or other professional, and which of these professions actually create a privilege. *Compare* UTAH R. EVID. 506 (recognizing Utah's qualified privilege between patients and mental health therapists such as physicians, psychologists, and clinical or certified social workers), *with* UTAH CODE ANN. §§ 77-38-201 to -204 (LexisNexis 2008) (recognizing Utah's absolute victim-counselor privilege between victims and a "sexual assault counselor" that "has a minimum of [forty] hours of training in counseling and assisting victims of sexual assault").

[27] *See* Jaffee v. Redmond, 518 U.S. 1, 12 n.11, 15 (1996) (recognizing a federal evidentiary privilege between psychotherapists and their patients and listing statutes from all fifty states and the District of Columbia that recognize the privilege).

circumstances.[28] While the doctor-patient privilege does not exist on the federal level, most states have adopted some version of this privilege.[29] Likewise, this privilege may protect crime victims in some instances.

As of 2012, forty states have enacted some protections of confidentiality for communications between victims of sexual assault and their counselors.[30] This privilege mirrors other advancements in the expansion of the rights of rape victims, such as rape shield laws, which serve to limit the introduction of evidence regarding a victim's past sexual conduct, history, or reputation.[31]

But even in states that have enacted a specific victim-counselor privilege, the protections vary considerably.[32] For example, in some jurisdictions, the victim-counselor privilege encompasses the written records of rape crisis counselors and centers,[33] while other jurisdictions protect oral testimony of victims and their counselors in addition to written records.[34] The broad enactment of these privileges "demonstrates a recognition by a majority of state legislatures that the sexual assault counseling relationship services a valuable societal function in helping victims recover from the traumatic experience of a sexual assault."[35] Nonetheless, no federal victim-counselor privilege exists, as neither the Supreme Court nor Congress has formulated this particular privilege.

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[28] For an exploration of the argument that "[t]hough the [*Jaffee*] Court purported to create an absolute privilege, in actuality it recognized a privilege without defining its contours," see Molly Rebecca Bryson, Note, *Protecting Confidential Communications Between a Psychotherapist and Patient:* Jaffee v. Redmond, 46 CATH. U. L. REV. 963, 1004 (1997).

[29] *See* John Jennings, Note, *The Physician-Patient Relationship: The Permissibility of Ex Parte Communications Between Plaintiff's Treating Physicians and Defense Counsel*, 59 MO. L. REV. 441, 451 (1994).

[30] *Confidentiality Laws*, RAPE, ABUSE & INCEST NATIONAL NETWORK, http://rainn.org/public-policy/laws-in-your-state/ (click on a state; then click on "Confidentiality Protections" hyperlink) (last visited Sept. 25, 2012). The following states and territories do not have a statutory privilege for communications between a rape counselor and victims of sexual assault: Arkansas, Delaware, Georgia, Guam, Idaho, Maryland, Mississippi, Ohio, Rhode Island, and South Dakota. *Id*. (citing, e.g., Supreme Court of Rhode Island Advisory Opinion to the House of Representatives, 469 A.2d 1161 (R.I. 1983) (determining that an absolute privilege protecting communications would be unconstitutional and that, if enacted, a victim-counselor privilege must include the possibility of in camera review)).

[31] *See, e.g.*, FED. R. EVID. 412(a) (barring most evidence offered to prove "that any alleged victim engaged in other sexual behavior" or "any alleged victim's sexual predisposition").

[32] *See* Major Paul M. Schimpf, *Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military*, 185 MIL. L. REV. 149, 183 (2005).

[33] *See, e.g.*, TENN. CODE ANN. § 36-3-623 (2005).

[34] *See, e.g.*, FLA. STAT. § 90.5035(2) (2000).

[35] RAPE, ABUSE & INCEST NATIONAL NETWORK, PRIVILEGE AND CONFIDENTIALITY BETWEEN SEXUAL ASSAULT VICTIMS AND COUNSELORS 5 (2011).

The victim-counselor privilege exists within three general categories of varying force and application: qualified, semi-absolute, or absolute.[36] A qualified privilege typically affords a defendant some opportunity to access the records for developing a defense.[37] Eighteen states and the District of Columbia have a victim-counselor privilege that is qualified by statute.[38] This qualified privilege is accomplished by giving a judge or administrator the discretion to hold an in camera review of privileged records when a defendant satisfies an initial threshold of relevance by showing, through a preponderance of the evidence, that the probative value of the records will outweigh the prejudicial effect on a victim's recovery.[39] The judge then balances the interests, "reviewing the policy reasons for the privilege and weighing any harm that the victim may suffer as a result of revealing information contained in the confidence with any potential probative or exculpatory value the evidence may contain."[40] The exact procedures vary from state to state. For example, some states even go so far as to allow for a defense attorney to access a victim's records directly.[41] As a result, this qualified privilege may give no actual notice to victims as to whether their communications would be protected as privileged.

The semi-absolute privilege offers more protections for victims of crime. While the privilege may seem absolute, court decisions have concluded that an in camera review or outright waiver of the privileged information may be necessary when a defendant's constitutional rights of due process, confrontation, and compulsory process are implicated. Eight states have a semi-absolute victim-counselor privilege that is, in some manner, qualified by judicial decision.[42]

The Michigan victim-counselor privilege is one such example.[43] The Michigan statute articulates the privilege as: any "confidential communication, or any report, working paper, or statement . . . between a victim and a sexual assault

[36] *See id.* at 8–10.

[37] *See, e.g.*, N.H. REV. STAT. ANN. §§ 173-C:1–10 (LexisNexis 2001).

[38] D.C. CODE §§ 7-1201.01–.04 (LexisNexis 2008); *see Confidentiality Laws*, *supra* note 30. Those states with a privilege qualified by statute include Arizona, California, Iowa, Kentucky, Louisiana (limiting privilege to civil proceedings only pursuant to LA. CODE EVID. art. 510(b)(1)), Maine, Minnesota, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon (providing no privilege for communications; however, all information maintained by a sexual assault crisis center or crisis line relating to clients is confidential pursuant to OR. REV. STAT. § 409.273(2)(b) (2011)), Tennessee, Texas, Virginia, West Virginia, and Wyoming. *Confidentiality Laws*, *supra* note 30.

[39] *See, e.g.*, N.H. REV. STAT. ANN. § 173-C:5. The statute also requires that the information be unavailable from another source and that nondisclosure would inhibit a defendant's right to a fair trial. *Id.*

[40] JESSICA MINDLIN & LIANI JEAN HEH REEVES, THE NAT'L CRIME VICTIM LAW INST., CONFIDENTIALITY AND SEXUAL VIOLENCE SURVIVORS 14 (2005).

[41] *See* Joo, *supra* note 12, at 283.

[42] *See Confidentiality Laws*, *supra* note 30. Those states with a semiabsolute privilege qualified by judicial decision include Alabama, Alaska, Connecticut, Florida, Hawaii, Massachusetts, Michigan, and Minnesota. *Id.*

[43] MICH. COMP. LAWS. § 600.2157a (LexisNexis 2004).

or domestic violence counselor, shall not be admissible as evidence in any civil or criminal proceeding without the prior written consent of the victim."[44] However, when interpreting this statute, the Michigan Supreme Court determined that the privilege must yield to a defendant's constitutional rights.[45] Thus, trial judges are required to conduct an in camera review of the privileged records once the defendant has shown a reasonable probability that the records contain information material to the defendant's case.[46] As a result, a court modifies the absolute nature of the privilege and, without giving choice to the victim whether to waive the privilege, the privilege shifts away from the victim entirely to the discretion of the courts.

Other states provide for an absolute victim-counselor privilege, under which the victim is the *only* individual who can decide whether to waive this right.[47] Seven states and Puerto Rico have an absolute privilege that is not qualified by statute or diluted through judicial review.[48] These statutes do not contain language suggesting that judicial review of the confidential communication or records is necessary or appropriate.[49] Because a defendant is "denied access to an entire class of potentially useful evidence," these types of absolute privileges are often challenged as excessively restrictive to a defendant's constitutional rights.[50]

III. SUPREME COURT PRECEDENT AND JURISDICTIONAL APPROACHES TO THE CONFLICT BETWEEN THE VICTIM-COUNSELOR PRIVILEGE AND A DEFENDANT'S CONSTITUTIONAL RIGHTS

The United States Supreme Court has been unclear regarding the extent to which a criminal defendant's constitutional rights must limit evidentiary privileges, if at all. As a result, while most states afford victims some protections under the victim-counselor privilege, their force and application vary by jurisdiction. Five cases provide much of the Court's analysis in this area: *Brady v. Maryland*,[51] *Washington v. Texas*,[52] *Davis v. Alaska*,[53] *United States v. Nixon*,[54] and

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[44] *Id.* § 600.2157a(2).

[45] People v. Stanaway, 521 N.W.2d 557, 575 (Mich. 1994).

[46] *Id.*

[47] *See, e.g.*, COLO. REV. STAT. § 13-90-107(k)(I) (2011).

[48] P.R. LAWS ANN. tit. 8, § 652 (2006); P.R. LAWS ANN. tit. 32 App. 4, Rule 26-A(B) (2000); *see Confidentiality Laws*, *supra* note 30. Those states with an absolute victim-counselor privilege include: Colorado, Indiana, Missouri, Montana, New Jersey, South Carolina, and Vermont. *Id.* South Carolina's privilege was established through judicial decision rather than statute when the South Carolina Supreme Court determined in *State v. Trotter*, 473 S.E.2d 452, 454–55 (S.C. 1996), that rape crisis counselor records are not subject to disclosure under S.C. R. CRIM. P. 5(a)(1)(D).

[49] *See, e.g.*, COLO. REV. STAT. § 13-90-107(k)(I).

[50] RAPE, ABUSE & INCEST NAT'L NETWORK, PRIVILEGE AND CONFIDENTIALITY BETWEEN SEXUAL ASSAULT VICTIMS AND COUNSELORS 9 (2011).

[51] 373 U.S. 83 (1963).

[52] 388 U.S. 14 (1967).

Pennsylvania v. Ritchie. This Article explores the Supreme Court's approach in each of these cases. Because the Court's precedent does not fully provide an answer to the conflict between victims' rights and a criminal defendant's rights, this Article also explores the approaches that other jurisdictions have used to address this conflict.

A. Constitutional Limitations on Privilege

Due process, compulsory process, and confrontation issues may create limits on evidentiary privileges in criminal cases. As an initial matter, defendants have "no general constitutional right to discovery in a criminal case."[55] In *Brady v. Maryland*, the Court recognized that prosecutors are required to disclose evidence that is favorable to the accused or material to the accused's guilt or punishment.[56] The Court clarified that this evidence is the kind that would deprive defendants of their right to a fair trial if not disclosed.[57] However, the Court has consistently held that *Brady* has limits: "An interpretation of *Brady* to create a broad, constitutionally required right of discovery 'would entirely alter the character and balance of our present systems of criminal justice.'"[58]

Crime victims and the counselors holding their records "will only rarely—if ever—have information a defendant is constitutionally entitled to examine."[59] The decision in *Brady* requires only that state actors, namely prosecutors, have a constitutional duty to turn over exculpatory evidence.[60] Because victims and their counselors are not state actors, they are not subject to *Brady* restrictions on state action.[61]

In *United States v. Hatch*,[62] the Seventh Circuit Court of Appeals determined that "a failure to show that the records a defendant seeks are in the government's possession is fatal to [a *Brady*] claim."[63] Other courts have agreed. In *State ex rel. Romley v. Superior Court*,[64] the Arizona Court of Appeals noted "*Brady* emphasizes suppression of evidence *by the prosecution*, but does not require the victim to cooperate with the defense [to produce medical records held by the victim]."[65]

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[53] 415 U.S. 308 (1974).
[54] 418 U.S. 683 (1974).
[55] Weatherford v. Bursey, 429 U.S. 545, 559 (1977).
[56] *Brady*, 373 U.S. at 87.
[57] United States v. Bagley, 473 U.S. 667, 675 (1985).
[58] *Id.* at 675 n.7 (citation omitted).
[59] Cassell, *supra* note 17, at 915.
[60] *See* Villasana v. Wilhoit, 368 F.3d 976, 979 (8th Cir. 2004).
[61] *See* Cassell, *supra* note 17, at 914.
[62] 162 F.3d 937 (7th Cir. 1998).
[63] *Id.* at 947 (citing United States v. Skorniak, 59 F.3d 750, 755 (8th Cir. 1995)).
[64] 836 P.2d 445 (Ariz. Ct. App. 1992).
[65] *Id.* at 452.

In the Eighth Circuit, a defendant cannot subpoena medical records of a witness[66] or compel disclosure of witnesses' medical and psychiatric records where "the government has no obligation to obtain for a defendant records that it does not already have in its possession or control."[67] In *Goldsmith v. State*,[68] a Maryland court likewise found "no common law, court rule, statutory or constitutional requirement that a defendant be permitted pre-trial discovery of privileged records held by a third party."[69]

In *Washington v. Texas*, the U.S. Supreme Court determined that a criminal defendant's rights under the Compulsory Process Clause apply to the states through the Fourteenth Amendment.[70] In doing so, the Court struck down a Texas statute that designated persons charged or convicted in the same crime as incompetent to testify on one another's behalf.[71] The Court noted, "Nothing in this opinion should be construed as disapproving testimonial privileges . . . which are based on entirely different considerations from those [considered in the current case]."[72]

The Court held in *Davis v. Alaska* that a defendant's right to cross-examine a witness under the Confrontation Clause outweighed Alaska's statutory privilege for juvenile records.[73] The Court found that the Alaskan statute denied the defendant the opportunity to introduce a witness's probationary status during cross-examination.[74] "The State's policy interest in protecting the confidentiality of a juvenile offender's record," the Court said, "cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."[75] The Court did not, however, require disclosure of the record.[76] Instead, it remanded the case with the suggestion that Alaska could protect their witness's record "by refraining from using him to make out its case."[77]

Lastly, in *United States v. Nixon*, the Court held that a claim of absolute privilege between the President and those who advise and assist him would not prevail "over the fundamental demands of due process of law in the fair administration of criminal justice."[78] The Court noted that a "generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."[79]

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[66] *See Skorniak*, 59 F.3d at 755–56.
[67] United States v. Hall, 171 F.3d 1133, 1145 (8th Cir. 1999).
[68] 651 A.2d 866 (Md. 1995).
[69] *Id.* at 873.
[70] 388 U.S. 14, 17–19 (1967).
[71] *Id.* at 19–23.
[72] *Id.* at 23 n.21.
[73] 415 U.S. 308, 319–20 (1974).
[74] *Id.* at 315–18.
[75] *Id.* at 320.
[76] *Id.* at 320–21.
[77] *Id.*
[78] 418 U.S. 683, 713 (1974).
[79] *Id.*

Together, these cases establish the historical framework for the Court's analysis in determining the scope of an evidentiary privilege in the face of a defendant's constitutional rights. The convergence of these rights was exactly what the Court faced in *Pennsylvania v. Ritchie*, where it weighed a criminal defendant's constitutional rights against a victim's rights under Pennsylvania's psychotherapist-patient privilege.[80]

B. Pennsylvania v. Ritchie

In *Pennsylvania v. Ritchie*, the United States Supreme Court balanced a state's interests in protecting victims' privileged communications against a defendant's rights.[81] Defendant George Ritchie was charged with numerous sexual offenses for raping his thirteen-year-old daughter.[82] The daughter reported the rape to the police, who referred the matter to Pennsylvania's Children and Youth Services agency.[83] The defendant subpoenaed the agency during pretrial discovery, seeking access to the records related to his daughter's allegations and other records from a separate investigation stemming from a report by an unidentified source that claimed the defendant's children were being abused.[84]

Asserting privilege under Pennsylvania law, Children and Youth Services refused to comply with the subpoena.[85] The statute required that all reports and information obtained during the agency's investigation must be kept confidential, subject to certain exceptions.[86] The defendant argued he was entitled to the information "because the file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence."[87] The trial judge denied the defendant's motion and refused to order Children and Youth Services to disclose the files.[88] The prosecution's main witness against the defendant was his daughter, who was cross-examined at length at trial.[89] The defendant was ultimately convicted on all counts and sentenced to three to ten years in prison.[90]

On appeal, the Pennsylvania Supreme Court held that denying access to the records violated the defendant's constitutional right to confrontation and compulsory process.[91] The court held that the defendant's lawyer should have been permitted to review the files "to search for any useful evidence" from "the eyes

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[80] 480 U.S. 39, 60 (1987).
[81] *Id.*
[82] *Id.* at 43.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*; 23 PA. CONS. STAT. ANN., § 6339(a) (West 2010).
[87] *Ritchie*, 480 U.S. at 44.
[88] *Id.*
[89] *Id.* at 44–45.
[90] *Id.* at 45.
[91] *Id.* at 46.

and the perspective of an advocate."[92] Pennsylvania appealed and the Supreme Court granted certiorari.[93]

First, a plurality of the Court addressed the defendant's Confrontation Clause claim.[94] Chief Justice Rehnquist, along with Justices Powell, White, and O'Connor, disagreed with the defendant that, by being denied access to the privileged records, his right to cross-examination had been violated.[95] The plurality noted, "The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."[96]

If the Clause were construed as the defendant had argued, it would "transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery."[97] The right to confrontation "is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination."[98] Since the defendant had the opportunity to cross-examine his daughter, his confrontation right had not been violated.[99]

In concluding that the Compulsory Process Clause "provides no *greater* protections . . . than those afforded by due process," a majority of the Court declined to determine how and whether the two clauses differ, and chose instead to decide the issue under the Due Process clause.[100] Justice Blackmun joined the plurality to find 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."[101] Thus:

> Although we recognize that the public interest in protecting this type of sensitive information is strong, we do not agree that this interest necessarily prevents disclosure in all circumstances. This is not a case where a state statute grants [Children and Youth Services] the absolute authority to shield its files from all eyes. Rather, the Pennsylvania law provides that the information shall be disclosed in certain circumstances, including when [Children and Youth Services] is directed to do so by court order.[102]

Where "the Pennsylvania Legislature contemplated *some* use of [Children and Youth Services] records in judicial proceedings," the court reasoned, "we cannot

[92] *Id.* (citations omitted).
[93] *Id.*
[94] *Id.* at 51–54.
[95] *Id.*
[96] *Id.* at 51.
[97] *Id.* at 52.
[98] *Id.*
[99] *Id.* at 54.
[100] *Id.* at 56.
[101] *Id.* at 57.
[102] *Id.* at 57–58 (citations omitted).

conclude that the statute prevents all disclosure in criminal prosecutions."[103] Therefore, given the absence of Pennsylvania's state policy to the contrary, the Court reasoned that there could not be any belief "that relevant information would not be disclosed when a court of competent jurisdiction determines that the information is 'material' to the defense of the accused."[104]According to the plurality, the defendant did have a constitutional right to access material information contained within the agency's files.[105]

The defendant himself did not have a right to make determinations as to the materiality of the information.[106] However, the defendant's rights would be sufficiently protected through the trial court conducting an in camera review.[107] Furthermore, if a defendant is aware of specific information contained within the privileged material, "he is free to request it directly from the court, and argue in favor of its materiality."[108]

The Court stated that it had "no opinion on whether the result in this case would have been different if the statute had protected the [Children and Youth Services] files from disclosure to *anyone*, including law-enforcement and judicial personnel."[109] Thus, while the Court suggested that a due process analysis might apply differently to an absolute privilege, it did not explicitly endorse the idea.[110] The total and full disclosure of the confidential information, however, "would sacrifice unnecessarily" the State's "compelling interest in protecting its child-abuse information."[111]

Next, the Court proceeded to outline and recognize some of the justifications underlying the victim's privilege. Release of the records, even through defendant's counsel, would have "seriously adverse effect[s]" on a state's efforts to "uncover and treat abuse."[112] As an example, the Court said that because child victims are often the only witnesses to the crime and the child may endure overwhelming "feelings of vulnerability and guilt" when the abuser is a parent, it "is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality."[113] Additionally, neighbors and relatives who suspect abuse may be more likely to report their suspicions if they are assured that their identities will be protected.[114]

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[103] *Id.* at 58.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 59.
[107] *Id.* at 60.
[108] *Id.*
[109] *Id.* at 57 n.14.
[110] *Id.*
[111] *Id.* at 60.
[112] *Id.*
[113] *Id.*
[114] *Id.*

The Court even went so far as to applaud Pennsylvania's efforts to guarantee a victim's confidentiality—calling the efforts "commendable."[115] The Court concluded by noting that this laudable purpose would be undermined, however, if disclosure of confidential material was required "upon demand to a defendant charged with criminal child abuse, simply because a trial court may not recognize exculpatory evidence."[116]

The Court's determination in *Ritchie* has left unclear how a defendant's constitutional rights analysis would apply to an absolute evidentiary privilege. As a result, many jurisdictions have reached divergent conclusions under nearly identical fact patterns.

C. Other Jurisdictional Approaches

Several jurisdictions have addressed the conflict between a defendant's rights and evidentiary privileges, including the victim-counselor privilege. These arguments can be recast as "implicating a victim's federal privacy and due process rights [creating] a scenario where a constitutional right is being balanced against another constitutional right."[117] This very concern has caused the victim-counselor evidentiary privilege to vary in force and applicability from jurisdiction to jurisdiction. The decisions of both state and federal courts are discussed below.

Several state courts have held that an absolute victim-counselor privilege outweighs a defendant's constitutional challenge. In *Commonwealth v. Wilson*,[118] the Pennsylvania Supreme Court once again weighed the statutory victim-counselor privilege against a defendant's Sixth Amendment challenge. This time, the court upheld the absolute nature of the privilege.[119] The court distinguished the circumstances in *Wilson* from *Ritchie*, noting that the privilege at issue in *Wilson* had been modified to be an absolute privilege.[120] Likewise, in *Commonwealth v. Kennedy*,[121] a defendant charged with sexually abusing his stepdaughter sought disclosure of the victim's psychotherapy records.[122] The Pennsylvania Superior Court found that the Commonwealth's absolute victim-counselor privilege was not "subject to balancing against a defendant's right of confrontation" where "such a balancing would, in effect, destroy the right which the privilege sought to protect."[123]

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[115] *Id.* at 60–61.
[116] *Id*. at 61.
[117] NAT'L CRIME VICTIM LAW INST. AT LEWIS & CLARK LAW SCH., CONFIDENTIALITY AND SEXUAL VIOLENCE SURVIVORS: A TOOLKIT FOR STATE COALITIONS 43 (2005).
[118] 602 A.2d 1290 (Pa. 1992).
[119] *Id.* at 1296.
[120] *Id.* at 1297.
[121] 604 A.2d 1036 (Pa. Super. Ct. 1992), *appeal denied*, 611 A.2d 711 (Pa. 1992).
[122] *Id.* at 1038.
[123] *Id.* at 1045.

In *People v. Turner*,[124] the Colorado Supreme Court found that Colorado's victim-advocate privilege was absolute and could only be waived by the victim.[125] In rejecting the defendant's due process claim, the court relied on the *Ritchie* decision and other cases relating to its psychotherapist-patient privilege.[126] The *Turner* court distinguished *Ritchie* on the grounds that Colorado's victim-counselor privilege was absolute.[127] In like manner, the New Jersey Superior Court, in *State v. J.G.*,[128] also distinguished the *Ritchie* decision and rejected a due process challenge to New Jersey's victim-counselor privilege.[129] The New Jersey Superior Court did, however, leave open the possibility that privileged records may be accessed in certain "compelling circumstances."[130]

Many state courts have upheld the privilege, but have alluded to circumstances under which the privilege would give way to some level of judicial review. In *People v. Foggy*,[131] the Illinois Supreme Court upheld its victim-counselor privilege in the face of defendant's vague assertions that counseling records may possibly contain material information.[132] This court recognized that *Ritchie* did not resolve "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."[133] The court left open the consideration that certain circumstances would undercut the absolute nature of the privilege.[134] Likewise, in *State v. Pinder*,[135] a Florida court found that "a defendant must first establish a reasonable probability that the privileged matters contain material information necessary to his defense" before an in camera review would be conducted.[136]

Other state courts reached the opposite conclusion, determining that when defendants make a sufficient showing that their constitutional rights may be harmed, the victim-counselor privilege must yield, regardless of its scope. In

[124] 109 P.3d 639 (Colo. 2005).
[125] *Id.* at 644–47.
[126] *Id.* at 646–47.
[127] *Id.* at 647.
[128] 619 A.2d 232 (N.J. Super. Ct. App. Div. 1993).
[129] *See id.* at 237.
[130] *Id*. The Superior Court does not list what these "compelling circumstances" might be, but states "that there are situations in which the defendant's constitutional rights are paramount and override the State's policy of protecting records and documents from disclosure," citing to *Pennsylvania v. Ritchie* and *Davis v. Alaska* as examples. *Id*. However, the Superior Court's judgment is misplaced in suggesting that New Jersey's statutory privilege may be susceptible to challenge under "compelling circumstances" like in *Ritchie* or *Davis*, as neither case dealt with an absolute privilege. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 57 n.14 (1987); Davis v. Alaska, 415 U.S. 308, 311 (1974).
[131] 521 N.E.2d 86 (Ill.), *cert. denied*, 486 U.S. 1047 (1988).
[132] *Id.* at 92.
[133] *Id.* at 91.
[134] *Id.* at 92.
[135] 678 So. 2d 410 (Fla. Dist. Ct. App. 1996).
[136] *Id.* at 417.

People v. Stanaway,[137] the Michigan Supreme Court considered the scope of the state's victim-counselor privilege, concluding the right was not absolute.[138] The court found that the "prudent need to resolve doubts in favor of constitutionality" requires a trial court to conduct an in camera review of privileged information when a defendant "has a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense."[139] Alabama,[140] Connecticut,[141] Hawaii,[142] Indiana,[143] Massachusetts,[144] Montana,[145] and Rhode Island[146] have all advanced similar arguments that support a judicial in camera review of confidential communications to weigh the victim's privacy interests against a defendant's constitutional rights.

Federal courts have also reached strikingly divergent results. In *United States v. Shrader*,[147] a federal district court in West Virginia evaluated the issue, paying special attention to the considerations of victims' rights. The court found that "the psychotherapist-patient privilege is not subordinate to the Sixth Amendment rights

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[137] 521 N.W.2d 557 (Mich. 1994).

[138] *See id.* at 574.

[139] *Id.*

[140] Schaefer v. State, 676 So. 2d 947, 949 (Ala. Crim. App. 1995) (holding that information subject to the victim-counselor privilege should be reviewed in camera).

[141] *In re* Robert H., 509 A.2d 475, 484 (Conn. 1986) (noting that when a defendant can show reasonable grounds that failure to produce privileged information will impair defendant's right to confrontation, the victim's testimony will be struck unless the victim consents to an in camera review for material information).

[142] State v. Peseti, 65 P.3d 119, 128, 134 (Haw. 2003) (determining that an in camera review, where the trial court weighed defendant's need for privileged information against a victim's statutory privilege, satisfied defendant's right to due process).

[143] *In re* Subpoena to Crisis Connection, Inc., 930 N.E.2d 1169, 1190 (Ind. Ct. App. 2010) (noting that requiring a defendant to meet a three-step test before conducting an in camera review creates a "proper balance between a criminal defendant's constitutional rights and an alleged victim's need for privacy").

[144] Commonwealth v. Dwyer, 859 N.E.2d 400, 415, 417–19 (Mass. 2006) (noting that subpoena for confidential information from a third party may be obtained if it is relevant, not otherwise available, where the party seeking the information cannot properly prepare for trial, and where the information is sought in good faith; after notice and a hearing for the custodian of the records and the subject of the records, the records may be reviewed by defense counsel under a protective order, which may be modified for a specific, need-based reason).

[145] State v. Duffy, 6 P.3d 453, 458–59 (Mont. 2000) (holding that a trial court's in camera review to "balance the defendant's need for exculpatory evidence against the privacy interest of the victim" was sufficient to protect the defendant's rights).

[146] Advisory Opinion to the House of Representatives, 469 A.2d 1161, 1166 (R.I. 1983) (reviewing two proposed victim-counselor privilege proposals—including one absolute and one with an in camera review—and suggesting the in camera model "strikes the requisite balance between an accused's constitutional right at trial and the sexual-assault victim's need for confidentiality").

[147] 716 F. Supp. 2d 464 (S.D. W. Va. 2010).

of Defendant" who sought a subpoena to produce the counseling records of the victim of stalking.[148] It recognized that if "victims . . . have to choose whether to obtain counseling knowing [the defendant] can subpoena the records thereof there would be no choice at all."[149] Other federal courts have rejected the argument that privilege is secondary to defendant's rights,[150] even refusing to conduct an in camera review, finding it "a breach of the privilege."[151]

Still, other federal courts have reached the contrary conclusion. In *Bassine v. Hill*,[152] the district court found the habeas petitioner's right to cross-examine, confront, and due process outweighed psychotherapist-patient privilege.[153] Likewise, in *United States v. Mazzola*,[154] a district court found the criminal defendant's constitutional right to effectively prepare and cross-examine a witness outweighed societal interests in guarding the confidentiality of communications between therapist and client.[155] In *United States v. Hansen*,[156] the court similarly found the defendant's need for privileged information outweighed interests of the deceased victim and the public in preventing disclosure.[157]

Due process, compulsory process, and confrontation issues may create limits on evidentiary privileges in criminal cases. The decision in *Brady* requires only that prosecutors or other state actors, not the victims of the crime, have a constitutional duty to turn over exculpatory evidence. The United States Supreme Court's decision in *Ritchie* has left it unclear to what extent a criminal defendant's constitutional rights must limit evidentiary privileges. In addressing these conflicting rights, state and federal courts have arrived at vastly different results from similar fact patterns. These antithetical conclusions demonstrate the need to look to Utah's case law and underlying statutory provisions to better determine how Utah should apply its victim-counselor evidentiary privilege.

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[148] *Id.* at 472–73.

[149] *Id.* at 473.

[150] *See, e.g.*, Johnson v. Norris, 537 F.3d 840, 845–47 (8th Cir. 2008) (rejecting a state habeas petitioner's argument that Confrontation Clause right was violated when trial court denied him access to psychiatric records of a witness); Newton v. Kemna, 354 F.3d 776, 783–85 (8th Cir. 2004) (holding that district court did not abuse its discretion in denying defendant's request that it authorize discovery or conduct an in camera review of victim's psychiatric records); Petersen v. United States, 352 F. Supp. 2d 1016, 1023–24 (D.S.D. 2005) (rejecting an ineffective assistance of counsel argument claiming psychotherapist-patient privilege is secondary to a defendant's rights); United States v. Haworth, 168 F.R.D. 660, 661–62 (D.N.M. 1996) (rejecting defendants' argument and noting defendants had "mistakenly equate[d] their confrontation rights with a right to discover information that is clearly privileged").

[151] *See, e.g.*, United States v. Doyle, 1 F. Supp. 2d 1187, 1191 (D. Or. 1998).

[152] 450 F. Supp. 2d 1182 (D. Or. 2006).

[153] *Id.* at 1185–86.

[154] 217 F.R.D. 84 (D. Mass. 2003).

[155] *Id.* at 88.

[156] 955 F. Supp. 1225 (D. Mont. 1997).

[157] *Id.* at 1226.

IV. *STATE V. WORTHEN*: DEMONSTRATING UTAH'S NEED FOR AN EXPANDED, ABSOLUTE VICTIM-COUNSELOR PRIVILEGE

In addition to the privileges promulgated in the Utah Rules of Evidence,[158] the Utah Legislature has established an absolute, though narrow, victim-counselor privilege by statute. The legislature passed the Confidential Communications for Sexual Assault Act[159] "to enhance and promote the mental, physical and emotional recovery of victims of sexual assault and to protect the information given by victims to sexual assault counselors from being disclosed."[160]

This privilege is limited to those victims who have "experienced a sexual assault of whatever nature including incest and rape and requests counseling or assistance regarding the mental, physical, and emotional consequences of the sexual assault."[161] Any information that a victim gives to a sexual assault counselor is deemed confidential, including reports and working papers created in the course of the relationship.[162] A sexual assault counselor is defined as "a person who is employed by or volunteers at a rape crisis center who has a minimum of [forty] hours of training in counseling and assisting victims of sexual assault."[163] Generally, the victim is the only one who can permit disclosure. However, if the victim is a minor, the victim's counselor may disclose the confidential communication.[164] As none of the disclosure exceptions reference a defendant's rights, Utah's privilege can be categorized as absolute.[165]

Victims of crimes other than sexual assault do not qualify under this privilege. Therefore, although a victim may be kidnapped and brutally beaten, if the defendant does not rape or sexually assault the victim, the victim cannot seek

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[158] *See, e.g.*, UTAH R. EVID. 502 (recognizing a privilege between husband and wife); UTAH R. EVID. 503 (recognizing a privilege in communications to clergy); UTAH R. EVID. 504 (recognizing a privilege between lawyer and client); UTAH R. EVID. 505 (recognizing a privilege in instances with government informers); UTAH R. EVID. 506 (recognizing a privilege between physicians or mental health therapists and their patients); UTAH R. EVID. 508 (recognizing an environmental self-evaluation privilege); UTAH R. EVID. 509 (recognizing a privilege for news reporters).

[159] UTAH CODE ANN. § 77-38-201 (LexisNexis 2008).

[160] *Id.* § 77-38-202.

[161] *Id.* § 77-38-203(4).

[162] *See id.* § 77-38-203(1).

[163] *Id.* § 77-38-203(3).

[164] *See id.* § 77-38-204 (allowing disclosure when: "(1) the victim is a minor and the counselor believes it is in the best interest of the victim to disclose the confidential communication to the victim's parents; (2) the victim is a minor and the minor's parents or guardian have consented to disclosure of the confidential communication to a third party based upon representations made by the counselor that it is in the best interest of the minor victim to make such disclosure; (3) the victim is not a minor, has given consent, and the counselor believes the disclosure is necessary to accomplish the desired result of counseling; or (4) the counselor has an obligation under Title 62A, Chapter 4a, Child and Family Services, to report information transmitted in the confidential communication").

[165] *See supra* notes 47–50 and accompanying text.

protection under this privilege. Even where a victim is sexually assaulted but chooses to seek counseling from someone other than a sexual assault counselor—such as a family doctor, psychologist, or school counselor—communications with those counselors also fall beyond this statutorily enabled privilege.[166]

Utah's psychotherapist-patient privilege may offer victims some protection. Communications made between a mental health therapist and a patient or victim are privileged if made "in confidence . . . for the purpose of diagnosing or treating the patient."[167] Under Utah law, a mental health therapist is defined as a licensed or certified "physician, psychologist, clinical or certified social worker, marriage and family therapist, advanced practice registered nurse designated as a registered psychiatric mental health nurse specialist, or professional counselor; and . . . is engaged in the diagnosis or treatment of a mental or emotional condition . . . ."[168]

While all victims receiving counseling can qualify for protection under Utah's psychotherapist-patient privilege, it does not offer the absolute protections available under the Confidential Communications for Sexual Assault Act.[169] Utah's psychotherapist-patient privilege is not absolute; it does not apply when a defendant asserts that the privileged communication is relevant to "the physical, mental, or emotional condition of the patient . . . in any proceeding in which that condition is an element of any claim or defense."[170] This has created a disparity in the rights of Utah victims.

A. *Utah Case Law Foundations of the Victim-Counselor Privilege*

Several cases provide the underlying support and rationale for analyzing a victim's privilege in Utah courts. In *State v. Cardall*,[171] Richard Cardall was charged with raping his girlfriend's eleven-year-old daughter, S.F.[172] Following the assault, a school counselor administered an anxiety exam on S.F., during which she became "extremely upset" and began "crying out of control" during school.[173] Before trial, defendant requested an in camera review of S.F.'s school psychological records seeking review of the anxiety exam and information regarding another allegation the victim made regarding inappropriate touching by a school janitor.[174] The trial court refused, noting that the records were privileged, and a jury ultimately convicted the defendant.[175] Cardall appealed, alleging his due

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[166] *See* UTAH CODE ANN. §§ 77-38-203 to -204.
[167] UTAH R. EVID. 506(b).
[168] UTAH R. EVID. 506(a)(3).
[169] *See infra* Part IV.B.
[170] UTAH R. EVID 506(d)(1).
[171] 982 P.2d 79 (Utah 1999).
[172] *Id.* at 81.
[173] *Id.* at 82.
[174] *Id.*
[175] *Id.*

process rights were violated for refusal to conduct an in camera review of the confidential school counseling records.[176]

The Utah Supreme Court determined that the school counselor records were protected under the qualified psychotherapist-patient privilege—rather than absolute victim-counselor privilege.[177] Following the analysis of *Ritchie*, the court determined that "if a defendant can show with reasonable certainty that exculpatory evidence exists which would be favorable to his defense," an in camera review should be conducted to review the materiality of the evidence.[178]

The court then examined whether the defendant had made a "general" or "specific" request for information in the privileged records.[179] Rather than relying on a materiality standard, this "general" and "specific" analysis problematically "permits a defendant direct access to information he specifically requests and requires an in camera review for materiality when the defendant makes a general request for specific materials."[180] Here, the defendant was entitled to review the records and the court remanded with instructions to determine if the counseling records contained material information that would have changed the outcome of the trial.[181]

Separately, in *State v. Blake*,[182] the court denied defendant access to a victim's confidential material for failure to show "with reasonable certainty that exculpatory evidence exists which would be favorable to [his] defense."[183] There, the Utah Supreme Court addressed the defendant's argument that "the pendulum has swung too far from the historically poor treatment of victims and reached the other end, treating defendants unjustly."[184] The court then fully explored the historical treatment that victims of rape have received in the law.[185]

The court also recognized the expansion of victims' rights, including the addition of privilege in rape crisis counseling and Utah's rape shield law.[186] The court also recognized that the victims' rights amendment to Utah's Constitution "provide[s] useful context for [the court's] review of past and current treatment of rape and sexual assault victims."[187] The court was clear, however, that it did "not decide this case by resorting to Utah's victims' rights amendment."[188]

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[176] *Id.* at 85.
[177] *Id.*
[178] *Id.*
[179] *Id.* at 86.
[180] Tera Jckowski Peterson, *Distrust and Discovery: The Impending Debacle in Discovery of Rape Victims' Counseling Records in Utah*, 2001 UTAH L. REV. 695, 725.
[181] *Cardall*, 982 P.2d at 86.
[182] 63 P.3d 56 (Utah 2002).
[183] *Id.* at 62 (quoting *Cardall*, 982 P.2d at 85).
[184] *Id.* at 58–59.
[185] *Id.* at 59–60.
[186] *Id.* (citing UTAH CODE ANN. §§78-3c-1-4 (1996), and UTAH R. EVID. 412 (preventing most uses of evidence of victim's sexual behavior)).
[187] *Id.* at 60.
[188] *Id.*

Here, the statutory absolute privilege did not apply because the type of counseling the victim received was different from the "rape-crisis" counseling under Utah's victim-counselor privilege.[189] Thus, the court clarified the standard discussed in *Cardall*.[190] Because the psychotherapist privilege is not absolute, certain circumstances exist where "a crime victim and her therapist might be subject to *in camera* review and disclosure."[191]

For example, the privilege might be limited if the defendant can show "with reasonable certainty that exculpatory evidence exists which would be favorable to [the] defense."[192] After an in camera review, the trial judge will find evidence material where "there is a reasonable probability that, if the evidence is disclosed to the defense, the result of the proceeding will be different."[193]

In *State v. Gomez*,[194] the Utah Supreme Court determined whether the defendant had a right to a victim's records from a rape crisis center.[195] Though the defendant argued that due process required disclosure of the records, the court held that *Ritchie* was not controlling where the victim-counselor privilege as implicated here, rather than the psychotherapist-patient privilege, affords an absolute privilege.[196] Because the defendant did not adequately brief these constitutional arguments, however, the Utah Supreme Court did not address these claims further.[197]

The Utah Supreme Court has still not reached the issue of whether an absolute privilege must yield to a defendant's constitutional rights. As the court's decisions illustrate, the scope and breadth of Utah's victim-counselor privilege begs for additional analysis in the face of a defendant's Sixth Amendment claims.

B. The Utah Case: State v. Worthen

In July of 2005, Mr. and Mrs. Worthen's adopted thirteen-year-old daughter, B.W., "attempted suicide and was admitted to the inpatient program at the University of Utah Neuropsychiatric Institute."[198] After weeks of counseling and therapy, B.W. was released into her parents' care and "began outpatient counseling with Dr. Carolyn Henry . . . . During this time, B.W. kept a journal in which she expressed her . . . general hatred of her adoptive parents and her desire to be with a new family."[199]

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[189] *Id.*
[190] *See id.* at 60–61.
[191] *Id.* at 61 (citing State v. Cardall, 982 P.2d 79, 85–86 (Utah 1999)).
[192] *Id.* at 62 (quoting *Cardall*, 982 P.2d at 85).
[193] *Id.*
[194] 63 P.3d 72 (Utah 2002).
[195] *Id.* at 75.
[196] *Id.* at 76.
[197] *Id.* at 78.
[198] State v. Worthen, 222 P.3d 1144, 1147 (Utah 2009).
[199] *Id.*

In October of 2005, B.W. told Dr. Henry that her adoptive father "had repeatedly sexually abused her."[200] In turn, Dr. Henry "reported the allegation to authorities" as required by Utah law.[201] As a result of these allegations, the state charged Mr. Worthen with ten counts of aggravated sexual abuse of a child.[202]

Mr. Worthen filed a motion seeking an in camera review of B.W.'s medical and therapy records from July through October of 2005.[203] Specifically, Mr. Worthen sought review to search for "B.W.'s denial of abuse by Mr. Worthen, . . . 'cognitive problems and major misinterpretation problems,' and . . . a motive to fabricate the allegations stemming from her hatred of her parents."[204]

Conceding that the records were within Utah's doctor-patient privilege and psychotherapist-patient privilege, Mr. Worthen argued that the records fell under an exception to these evidentiary privileges.[205] Under the Utah Rules of Evidence, a communication is exempt from the psychotherapist privilege if it is "relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which that condition is an element of any claim or defense."[206]

The trial court ruled in favor of Mr. Worthen.[207] After the State petitioned for interlocutory review, the Utah Court of Appeals affirmed the district court's order granting in camera review.[208] The State and the Office of Guardian ad Litem—appointed to represent B.W.'s interest—successfully petitioned the Utah Supreme Court for review.[209]

One question certified for review, among others, was "whether the court of appeals erred by failing to consider constitutional and statutory provisions relating to a victim's rights."[210] The Utah Crime Victims Legal Clinic, in conjunction with the National Crime Victim Law Institute, filed an amicus brief addressing this issue. They argued that the court of appeals had erred in affirming the trial court because it had failed to "meet its general obligation to ensure the fair administration of justice and its specific obligations to victims under state law."[211]

Furthermore, the amicus curiae argued that a victim has a constitutional right to fair and sensitive treatment, that the vigorous protection of the victim's rights were violated, and that any properly raised issue of victims' rights must be

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[200] *Id.* at 1148.
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] UTAH R. EVID. 506(d)(1).
[207] *Worthen*, 222 P.3d at 1148.
[208] *Id.*
[209] *Id.* at 1149.
[210] *Id.*
[211] *What Ever Happened with That Case I Worked On at NCVLI?*, NAT'L CRIME VICTIM L. INST., http://law.lclark.edu/centers/national_crime_victim_law_institute/news/story/?id=5531/ (last visited Dec. 30, 2012).

considered on appeal.[212] These rights, the amici argued, were particularly important given the "extra consideration for her interests as a child."[213] Most notably, however, the amici highlighted the fact that "[t]his case brings into stark relief the need for courts to explicitly consider the independent constitutional and statutory rights of crime victims when ruling on requests for their privileged counseling records."[214]

The Utah Supreme Court, however, did not share this view. While the court recognized that the court of appeals did not address the relevance of the Utah Constitution's victims' rights amendment or state victims' rights statutes to a trial court's examination of these evidentiary decisions, it held the failure to address was not erroneous.[215] The court reasoned that these issues had not been properly presented on appeal, and therefore need not be addressed because the trial court did not make an adverse ruling on victims' rights grounds.[216] The court found the reliance on Utah's Rights of Crime Victims Act[217] as grounds for appellate court review of any victims' rights issue was misplaced.[218] The court also noted that it could not decide the issue, as it had not been properly preserved.[219]

But even though the court declined to rule on the crime victims' issue, it hinted that victims' rights "support considerable policy-based arguments" justifying a victim's evidentiary privilege.[220] Perhaps forecasting future decisions, the Utah Supreme Court further referenced its decisions in *State v. Gonzales*[221] and *State v. Blake* as possible underlying support for an increased deference to victims' rights.

The court also upheld the "reasonable certainty test," which requires only that a defendant establish that records exist and show with reasonable certainty—that is, "more likely than not"[222]—that the records may have exculpatory evidence favorable to his defense.[223] Once proven, the records are subject to judicial in camera review.[224] The defense will obtain access to the records if there is a

[212] Brief for National Crime Victim Law Institute and Utah Crime Victims Legal Clinic as Amici Curiae Supporting Petitioner at 2–3, State v. Worthen, 222 P.3d 1144 (Utah 2008) (No. 20080128).

[213] *Id.* at 10.

[214] *Id.* at 16.

[215] *Worthen*, 222 P.3d at 1157.

[216] *Id.*

[217] UTAH CODE ANN. § 77-38-11 (LexisNexis 2008). Specifically, section 77-38-11(2)(c) states, "An appellate court shall review all such properly presented issues, including issues that are capable of repetition but would otherwise evade review." *Id.*

[218] *Worthen*, 222 P.3d at 1157.

[219] *Id.* at 1157–58.

[220] *Id.* at 1158.

[221] 125 P.3d 878, 885 (Utah 2005) (highlighting that a victim's right of privacy is implicated if a victim does not receive proper notice that her counseling records had been subpoenaed).

[222] *Worthen*, 222 P.3d at 1154.

[223] *Id.* at 1155.

[224] *Id.* at 1155–56.

"reasonable probability that, if the evidence is disclosed to the defense, the result of the proceeding will be different."[225]

As many states have done, the Utah Legislature provided some limited groundwork for a victim-counselor privilege. Utah's case law also recognizes the absolute nature of Utah's limited privilege between crime victims and rape-crisis counselors in addition to the underlying policy reasons supporting this evidentiary privilege.

As *Worthen* demonstrates, there is still need for states to refine their privilege by expanding its scope. State legislatures, including the Utah Legislature, should recognize the legitimate interests underlying an absolute, expanded privilege, the constitutional and statutory protections offered to all crime victims, and the constitutional rights of privacy.

V. PUBLIC POLICY, VICTIMS' RIGHTS, AND PRIVACY INTERESTS SUPPORT AN ABSOLUTE VICTIM-COUNSELOR EVIDENTIARY PRIVILEGE

The argument that the victim-counselor privilege is applicable only when a criminal defendant's constitutional rights are not implicated is perverse. Holding this privilege as secondary to the Sixth Amendment is contrary to other similar privileges—if not, would not the attorney-client privilege often yield to a criminal defendant's cross-examination needs? Exceptions to the victim-counselor privilege, even in the Sixth Amendment context, would "eviscerate the effectiveness of the privilege."[226]

The justifications for the victim-counselor privilege mirror the rationales for the psychotherapist-patient privilege. All relationship-oriented evidentiary privileges, including the victim-counselor privilege, are "rooted in the imperative need for confidence and trust."[227] Courts have also recognized the importance that these confidential communications have on the effectiveness of counseling.[228] In addition to the policy considerations supporting privileges in general, state constitutional amendments[229] and state and federal legislation granting rights to crime victims also support an absolute victim-counselor privilege. Lastly, constitutional privacy rights help ensure the confidentiality of victims' communications and records made during counseling. State legislatures should guarantee, and state supreme courts should likewise recognize, that all crime victims have an absolute right to communicate confidentially with their counselors during the course of their treatment.

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[225] *Id.* at 1156.

[226] Jaffee v. Redmond, 518 U.S. 1, 17 (1996).

[227] *Id.* at 10 (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).

[228] *See, e.g.*, Albuquerque Rape Crisis Ctr. v. Blackmer, 120 P.3d 820, 825 (N.M. 2005); People v. Turner, 109 P.3d 639, 643 (Colo. 2005).

[229] While several federal constitutional amendments have been proposed, none have received sufficient congressional support, but this may be so for reasons other than their merits. *See* Robert P. Mosteller & H. Jefferson Powell, *With Disdain for the Constitutional Craft: The Proposed Victims' Rights Amendment*, 78 N.C. L. REV. 371, 372–73 (2000).

A. *States' Compelling Interests in an Absolute Victim-Counselor Privilege*

There are considerable policy interests for adopting an absolute victim-counselor testimonial privilege for the victim of *any* crime, beyond the traditional protections offered to child abuse and sexual assault victims, who seeks counseling as a result of their injury. As the Pennsylvania Superior Court so aptly noted, even the balancing of a privilege against a defendant's rights "would, in effect, destroy the right which the privilege sought to protect."[230]

The underlying policy rationales for the victim-counselor privilege are largely an extension of rationales offered for the well-established psychotherapist-patient privilege, as recognized by many courts. In *Albuquerque Rape Crisis Center v. Blackmer*,[231] the New Mexico Supreme Court noted, "The rationales underlying the statutory victim-counselor privilege echo those underlying the psychotherapist-patient privilege."[232] Likewise, in *United States v. Lowe*,[233] a federal district court analyzed Massachusetts's victim-counselor privilege as an expansion of the psychotherapist privilege.[234]

This argument is often couched in terms of economic ability, with the victim-counselor privilege providing an extension of the psychotherapist-patient privilege to nonlicensed social workers that provide for victims who cannot otherwise afford the services of a licensed psychotherapist.[235] For example, victims may receive counseling from social workers employed at free or low cost rape crisis centers or domestic violence shelters.[236]

Although these service centers are often publicly funded, they typically do not require personnel to undergo the same professional licensing or credentialing as traditional psychotherapists.[237] As one court noted, "It would make little sense for victims of rape to be deprived of the privilege because they seek help from victim counselors at a rape crisis center, while victims with the resources to seek help from a licensed psychologist would benefit from the privilege."[238]

Utah courts have found that privileges are designed to encourage "a full and complete disclosure . . . in order to receive effective medical treatment."[239] When discussing the federal psychotherapist-patient privilege, the United States Supreme Court noted that successful psychological treatment

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[230] Commonwealth v. Kennedy, 604 A.2d 1036, 1045 (Pa. Super. Ct. 1992), *appeal denied*, 611 A.2d 711 (Pa. 1992).
[231] 120 P.3d 820 (N.M. 2005).
[232] *See id.* at 826.
[233] 948 F. Supp. 97 (D. Mass. 1996).
[234] *Id.* at 99.
[235] *See* Bridget M. McCafferty, *The Existing Confidentiality Privileges as Applied to Rape Victims*, 5 J.L. & HEALTH 101, 118 (1991).
[236] *See id.*
[237] Robinson, *supra* note 10, at 339.
[238] Albuquerque Rape Crisis Ctr. v. Blackmer, 120 P.3d 820, 826 (N.M. 2005).
[239] State v. Anderson, 972 P.2d 86, 89 (Utah Ct. App. 1998).

> depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.[240]

Likewise, other courts have recognized the adverse effects that disclosing a patient's communications has on the patient's recovery. In *Kalenevitch v. Finger*,[241] the court noted, "Patient confidence is essential for effective treatment."[242] Additionally, "because the information revealed by the patient is extremely personal, the threat of disclosure to outsiders may cause the patient to hesitate or even refrain from seeking treatment."[243] Therefore, "without the confidentiality which the privilege provides, many people would simply forego therapeutic treatment."[244]

The victim-counselor privilege, for example, would help remedy the "extreme underreporting" of rape.[245] Sexual assault victims often suffer a wide range of emotional and psychological trauma.[246] As one court recognized, victims of sexual assault and rape suffer a degree of trauma "far beyond that experienced by victims of other crimes."[247] Crisis centers assist individuals in recovery by providing crisis intervention services, initial and follow-up counseling, and medical and legal advice.[248]

Proponents of the privilege argue, "Without assurances of confidentiality, sexual assault and domestic violence victims will be reluctant to contact rape crisis centers and battered women's shelters."[249] Without the counseling services these centers provide, such victims "may be hesitant to report crimes and aid in their

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[240] Jaffee v. Redmond, 518 U.S. 1, 2 (1996).

[241] 595 A.2d 1224 (Pa. Super. Ct. 1991).

[242] *Id.* at 1227 (internal quotations and citations omitted).

[243] *Id.*

[244] *Id.*

[245] *See* Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape*, 4 WM. & MARY J. WOMEN & L. 203, 225–26 (1997); *see also* Robinson, *supra* note 10, at 359.

[246] U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS: THE CONFIDENTIALITY OF COMMUNICATIONS BETWEEN SEXUAL ASSAULT OR DOMESTIC VIOLENCE VICTIMS AND THEIR COUNSELORS: FINDINGS AND MODEL LEGISLATION 12 (1995), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/169588.pdf [hereinafter REPORT TO CONGRESS].

[247] Commonwealth v. Wilson, 602 A.2d 1290, 1295 (Pa. 1992).

[248] *Id.*; REPORT TO CONGRESS, *supra* note 246, at 13.

[249] REPORT TO CONGRESS, *supra* note 246, prefatory note.

prosecution. The effects will likely be felt by the victim's children, resulting in a cycle of abuse that will harm society for decades to come."[250]

As the Utah Supreme Court recognized in *Blake*, there are strong policy considerations that lend support to an absolute victim-counselor privilege.[251] An absolute privilege seeks to prevent "victims from being needlessly embarrassed or harassed during the trial process."[252] This includes the prohibition of introducing evidence about the victim that shifts attention "of a criminal trial from an inquiry into the conduct of the offender to that of the moral worth of the complainant."[253] As one scholar noted specific to the sexual assault context, "Allowing defendants to use a victim's psychiatric history when they are unable to use her sexual history will ensure that rape victims continue to possess 'a significantly higher chance than did victims of any other major felony of seeing their accusations deemed unfounded.'"[254]

Notably in *Worthen*, if the victim had gone to a domestic abuse shelter and sought counseling from someone who was arguably *less* qualified than a licensed psychotherapist, she would have come under the protections of Utah's victim-counselor privilege. This would have qualified the victim for an absolute privilege and, under current law, would have precluded Mr. Worthen from accessing the victim's confidential records.

The absurdity that victims of the same crime could receive full confidential protection under one privilege and be exposed under another privilege by ignoring victims' statutory and constitutional rights underscores the need for Utah to address the scope and extent of a victim's right to confidential communication.

Additionally, though crimes of sexual assault, child abuse, and rape are particularly heinous, if the results of an assault, an attempted murder, or other crimes are so serious as to result in the need for a victim's counseling, much of the same logic that supports the rape-counselor privilege applies equally to these other crimes.

If fully adopted in practice, an absolute victim-counselor privilege still protects a defendant's rights. Defendants maintain the ability both to cross-examine and introduce other witnesses to impeach credibility.[255] This right "does not include the power to require the pretrial disclosure of" counseling records merely because the records "*might* be useful in contradicting unfavorable testimony."[256]

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[250] *Id.*

[251] *See supra* text accompanying notes 182–193.

[252] Robinson, *supra* note 10, at 359. Additionally, this interest is a victim's guaranteed constitutional right. *See infra* text accompanying notes 272–286.

[253] Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 795 (1986).

[254] Robinson, *supra* note 10, at 359 (citation omitted).

[255] *Id.* at 362.

[256] Pennsylvania v. Ritchie, 480 U.S. 39, 53 (1987).

Defendants retain the ability to confront the victim at trial, and that is sufficient under the Confrontation Clause.[257] Furthermore, "[h]ow a victim emotionally responds to traumatic experience has no bearing on whether a [crime] occurred or whether the defendant was the [criminal]. The defendant's [S]ixth [A]mendment rights are not diminished by limiting his subpoena power."[258] And even if there were relevant information protected by the privilege, "[t]he small amount of relevant information the [crime] victim might convey to the [therapist] is almost certainly obtainable from other sources and, in any event, would be highly prejudicial."[259]

B. Victims Have (Constitutional) Rights Too

Beyond the state's compelling policy considerations for evidentiary privileges and the protections for defendants, Utah courts should consider the rights that victims have under broader state constitutional amendments and crime victims' rights legislation. As an initial matter, crime victims' rights should be viewed together with or against a defendant's constitutional rights to seek the information, not subordinate to them.

As an example of the more broad victims' rights legislation, Congress enacted the Crime Victims Rights Act of 2004.[260] This legislation codified protections for victims' rights in federal prosecutions.[261] It mandates that victims be "reasonably protected from the accused,"[262] and treated with "fairness and with respect for the victim's dignity and privacy."[263] Thirty-two states have added some form of crime victims' rights to their state constitutions.[264]

These constitutional rights can be classified as providing either broad or specific rights and protections.[265] The more broadly defined rights include "victims' rights to fairness, respect, dignity, privacy, freedom from abuse, due process and [a right to] reasonable protection."[266] The more specific rights exist in

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[257] *Id.* (citing Delaware v. Fensterer, 474 U.S. 15, 20 (1985))*; see also* United States v. Nixon, 418 U.S. 683, 701 (1974) (stating that the need for impeachment evidence is insufficient to require the production of materials under federal criminal procedure subpoena rules in advance of trial).

[258] Michael Laurence, Comment, *Rape Victim-Crisis Counselor Communications: An Argument for an Absolute Privilege*, 17 U.C. DAVIS L. REV. 1213, 1241 (1984).

[259] *Id.* at 1244.

[260] 18 U.S.C. § 3771 (2006).

[261] BELOOF, CASSELL & TWIST, *supra* note 13, at 29.

[262] 18 U.S.C. § 3771(a)(1).

[263] *Id*. § 3771(a)(8).

[264] *Issues: Constitutional Amendments*, NAT'L CTR. FOR VICTIMS OF CRIME, http://www.victimsofcrime.org/our-programs/public-policy/amendments/ (last visited Oct. 1, 2012).

[265] Douglas E. Beloof, *The Third Wave of Victim's Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 262.

[266] *Id.*

the areas of due process, protection, and privacy.[267] For example, a crime victim's due process rights may require notice and the opportunity to be heard when privileged records are to be subjected to a subpoena. When the government's decision deprives "property" or "liberty" interests, the "'[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified' . . . 'at a meaningful time and in a meaningful manner.'"[268]

The Utah Legislature intended "to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity, and *that the rights [of victims] . . . are honored and protected by law in a manner no less vigorous than protections afforded criminal defendants*."[269] Accordingly, courts may not, "in the administration of criminal justice . . . ignore the concerns of victims."[270] The Utah Supreme Court recognized this principle, noting that "prosecutors must defend and uphold the State's interest in procuring justice, [and] they have an obligation to ensure that the constitutional rights of crime victims are honored and protected."[271]

Crime victims deserve fairness, respect, dignity, due process, and freedom from abuse.[272] Unnecessary exposure of a victim's private communications made during the course of treatment allows the defendant to further victimize the injured party, this time with the tacit approval of the criminal justice system. Equal consideration should be given to victims' constitutional rights. Allowing a defendant to access victims' counseling records "would only open the door to further victimization."[273] The United States Supreme Court has recognized that disclosure of confidential communications "may cause embarrassment or disgrace."[274] Courts in Utah have found that privileges are designed to encourage "a full and complete disclosure . . . free from the embarrassment [of disclosure]."[275] This revictimization is an injury to the victims, impermissible under Utah's Rights of Crime Victims Act.[276] Many other states have similar provisions.[277]

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[267] *Id.*

[268] Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting Baldwin v. Hale, 68 U.S. 223, 233 (1863), and Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

[269] UTAH CODE ANN. § 77-37-1(1) (LexisNexis 2008) (emphasis added).

[270] Morris v. Slappy, 461 U.S. 1, 14 (1983); *see also* Douglas E. Beloof, *Weighing Crime Victims' Interest in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135, 1149 (2007) ("Victims' interest in justice is a basis of modern victims' rights.").

[271] State v. Casey, 44 P.3d 756, 764 (Utah 2002).

[272] *See* Beloof, *supra* note 265, at 262.

[273] *See* State v. Wengreen, 167 P.3d 516, 521 (Utah 2007).

[274] Jaffee v. Redmond, 518 U.S. 1, 10 (1996).

[275] State v. Anderson, 972 P.2d 86, 89 (Utah Ct. App. 1998).

[276] Utah's Rights of Crime Victims Act defines "abuse" of a victim as "treating the crime victim in a manner so as to injure, damage, or disparage." UTAH CODE ANN. § 77-38-2(1) (LexisNexis 2008).

[277] *See supra* text accompanying note 264.

Forced disclosure of privileged records and conversations violates a victim's right to be treated with dignity, respect, courtesy, and sensitivity. Attempts to shift attention from the conduct of the defendant to the moral worth of the victim should not be permissible under any circumstance. Requiring victims to relive the crime by disclosing the records and communications of their counseling where a defendant makes only the low requisite showing of reasonable evidence, and even a less intrusive in camera review at trial, cuts against these considerations.

The ability to obtain records through the use of a reasonable certainty test, as used in Utah and other jurisdictions, fails to adequately incorporate the constitutional interests of an individual victim in its analysis. This test only gives an interest to the victim *after* granting a defendant the primary interest in showing, with a reasonable degree of certainty, that the records may be exculpatory.[278]

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C. *Constitutional Privacy Interests*

Constitutional privacy interests are also a consideration in the victim-counselor confidentiality privilege. Six states have chosen to amend their constitutions to expressly grant crime victims the right to privacy.[279] The United States Supreme Court has recognized that the federal Constitution ensures an individual's right to privacy.[280] Other courts have recognized an individual's privacy right in a variety of contexts related to counseling and mental health treatment. For example, in *N.O. v. Callahan*,[281] a district court identified privacy interests in the treatment and care of mentally ill patients.[282]

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[278] *See, e.g.*, State v. Worthen, 222 P.3d 1144, 1155–56 (Utah 2009).

[279] Beloof, *supra* note 265, at 255. For a broader discussion regarding the sources of a victim's right to privacy, see Marijo A. Ford & Paul A. Nembach, Note, *The Victim's Right to Privacy: Imperfect Protection from the Criminal Justice System*, 8 ST. JOHN'S J. LEGAL COMMENT. 205, 207–12 (1992).

[280] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003) (reaffirming constitutional protection for privacy and applying it to private, consensual homosexual sexual activity); Roe v. Wade, 410 U.S. 113, 152 (1973) (recognizing "that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution"); Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (finding that a law prohibiting the distribution of contraceptives to unmarried persons impaired the exercise of personal rights); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (striking down a Connecticut law prohibiting the use of contraceptives as violating an individual's right to privacy).

[281] 110 F.R.D. 637 (D. Mass. 1986).

[282] *Id.* at 641; *see also* Borucki v. Ryan, 827 F.2d 836, 845 (1st Cir. 1987) (recognizing a right to privacy arising from communications made to a mental health worker); Caeser v. Mountanos, 542 F.2d 1064, 1072 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977) (holding psychotherapist-patient communications fall within the federal right to privacy); Haw. Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028, 1038 (D. Haw. 1979)

Not only are the communications and records themselves recognized within this privacy right, a victim also has privacy interests in "avoiding disclosure of personal matters."[283] Many crime victims' statutes and state constitutional amendments endow victims with a right to privacy.[284] For example, Utah has recognized "the general proposition that there is and should be such a [privacy] right which protects against any wrongful or unseemly intrusion into what should properly be regarded as one's personal affairs."[285] Moreover, Utah courts have recognized that a right to privacy protects a victim's medical records.[286]

This liberty interest, recognized in both federal and state constitutional guarantees of a right to privacy, must weigh against the unwanted mandatory disclosure of therapy records. If defendants can request a victim's mental health or psychological records, the victim's "constitutional privacy right . . . would be gutted."[287] At least one scholar has argued that where the privilege is based on victims' constitutional privacy rights, it is "less vulnerable to [S]ixth [A]mendment challenges than a similar statutory privilege."[288]

VI. UTAH SHOULD RECOGNIZE A VICTIM'S RIGHT TO CONFIDENTIAL COMMUNICATIONS

While victims' rights have made considerable advances in recent decades, challenges still exist before a crime victim is fully respected within the criminal justice system. The victim-counselor privilege, however, is one area where victims' rights must improve. This privilege is necessary to protect communications and records between the victims of crimes and their crisis counselors and therapists.

A criminal defendant's right to due process, compulsory process, and confrontation are, at times, in conflict with this privilege. Federal courts have failed to address the issue and provide uniformity, as the United States Supreme

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(finding a zone of autonomy protects an individual's decision to communicate personal information to a psychiatrist); McKenna v. Fargo, 451 F. Supp. 1355, 1380–81. (D.N.J. 1978) (determining that the right to privacy protected an individual's psychological evaluations of emotional and mental conditions).

[283] Whalen v. Roe, 429 U.S. 589, 598–99 (1977). For an extensive and in-depth discussion of a victim's right to privacy, see Wendy J. Murphy, *"Federalizing" Victims' Rights to Hold State Courts Accountable*, 9 LEWIS & CLARK L. REV. 647 (2005).

[284] *See* State v. Gotfrey, 598 P.2d 1325, 1329 (Utah 1979) (Stewart, J., concurring and dissenting) (observing that the psychotherapist-patient privilege "may have some constitutional foundation").

[285] Redding v. Brady, 606 P.2d 1193, 1195 (Utah 1980).

[286] *See, e.g.*, State v. Gonzales, 125 P.3d 878, 886 (Utah 2005) (denying access to confidential medical records based on an improper subpoena as violating victim's right to privacy); State v. Cramer, 44 P.3d 690, 695 (Utah 2002) (recognizing "a victim's privacy interests in privileged mental health records").

[287] Cassell, *supra* note 17, at 919.

[288] Steven R. Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1, 56 (1980).

Court's controlling decision in *Ritchie* leaves the scope of the privilege vague. Additionally, at the state level, a patchwork of approaches exists addressing victims' confidential communications, ranging from states offering no protections at all, to states providing an absolute privilege. The Utah Supreme Court recently faced this issue in *State v. Worthen*. Although the court declined to rule on the issue, it hinted that the ultimate determination of whether Utah's victims' rights protections should outweigh a criminal defendant's rights was ripe for judicial review.

The Utah example provides a powerful illustration of the need for an expanded privilege. The Utah Legislature should broaden the privilege in Utah's Confidential Communications for Sexual Assault Act. This change would ensure that the victims of crimes, especially child abuse and sexual assault, are given the absolute protections the Utah Legislature intended to give them, regardless of their circumstantial or economic ability to acquire treatment. While Utah recognizes the need to protect victims of sexual assault and child abuse, victims of other crimes that seek treatment by mental health professionals or therapists warrant similar protections, regardless of the perceived heinousness of the crime they endured.

The privilege should encompass any crime victim's confidential communications made during treatment with any counselor—whether it is a mental health professional, psychotherapist, social worker, or a rape crisis counselor. As one scholar warned, "[W]ithout a bright-line rule barring admissibility of these records, victims' rights will not exist in practice."[289] Thus, "[a]n absolute bar against admitting this evidence . . . establishes a clear rule that protects all victims."[290]

Considerable policy reasons exist supporting victims' rights to confidential communications. The underlying policy rationales of privileges generally—and the rationales for the victims of crimes specifically—combined with broader victims' statutory rights, constitutional rights, and constitutional privacy interests, all provide substantial justification for adopting an absolute victims' privilege. While the rights granted to victims may vary from state to state, a state's policy interests in privileges and underlying statutory and constitutional victims' rights all support an absolute victim-counselor privilege. These victims' rights should be viewed together with or against a defendant's constitutional rights, not subordinate to them. In states where the court has, through judicial fiat, limited an absolute privilege, state legislatures should move to expand a victim's protections wherever possible, whether it is done through legislation or constitutional amendment.

While this expansion of the victim-counselor privilege may not answer all problems associated with a crime victim's privilege, it would be an encouraging and principled step in protecting crime victims from revictimization in our judicial system and recognizing a victim's constitutional rights. Utahans deserve a privilege that guarantees victims of crime are treated with dignity, respect, courtesy, and sensitivity and finally ensures that crime victims are honored and

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[289] Robinson, *supra* note 10, at 362.

[290] *Id.* at 363.

protected by law in a manner no less vigorous than the protections afforded to criminal defendants.