Privacy Rights in Mental Health Counseling: Constitutional Confusion and the Voicelessness of Third Parties in Criminal Cases

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The past 20 years of criminal law and practice have produced much heat but little light on the issue of when, if ever, the accused in a criminal case can legitimately seek disclosure of a victim's privileged files that exist exclusively in the custody of a private third party. In many jurisdictions, forced disclosure is routine, and victims must choose between justice and privacy, resulting in either the dismissal or underprosecution of serious violence or the victim's opting to forego necessary treatment. This dilemma is disproportionately imposed on women and child victims of sexual violence, and it threatens to prevent healing for a significant percentage of victimized persons. This article outlines the legal and policy interests of third parties in this debate and offers a model set of procedures to protect against needless harm to third parties, while respecting the important rights of the criminally accused.

J Am Acad Psychiatry Law 39:387–95, 2011

Statistics reveal that sexual violence causes profound harm to the individual, as 80 percent of victims experience posttraumatic stress disorder (PTSD) compared with 39 percent of victims of nonsexual aggravated assault.[1]

Untreated PTSD leads to myriad social and economic costs. Victims are more likely to become dependent on drugs or alcohol, have difficulty maintaining steady employment, and develop medical and psychological problems, increasing their need for medical services.[2]

Prompt therapeutic care following psychological trauma is just as important as prompt medical attention to physical trauma. As the United States Supreme Court noted in the landmark *Jaffee v. Redmond* decision, "the psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem" (Ref. 3, p 12). Allowing access to any privileged files is a threat to effective treatment, but when access is granted to postincident counseling records, especially when legal action may follow, the harm is worse because it effectively forces crime victims to participate in meaningless nonconfidential therapy or to decline treatment until the conclusion of legal action. These concerns were explicitly recognized by the *Jaffee* Court which wrote that, ". . . If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation" (Ref. 3, p 12). This unfair choice undermines the "transcendent importance" of mental health for all people (Ref. 3, p 11).

Some states provide absolute protection against disclosure,[4–14] whereas others allow nearly automatic access, upon simple request of the defendant.[15–18] Several factors explain this disparity and seeming confusion among the states: the lack of clar-

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Disclosures of financial or other potential conflicts of interest: None.

ity regarding important limitations of the accused's right to obtain discovery from third parties; the failure of nearly every appellate court that has considered the issue to recognize that the due process rights of the accused, as applied to third parties, exist only during trial, not during the pretrial period; the fact that a victim is not a party to the criminal case, which has allowed court orders for privileged files to be issued and whole bodies of law to evolve, without the voice of those most affected by doctrinal developments[19]; and the problem that holders of privileged files typically cannot afford legal counsel to resist even plainly illegal subpoenas and court orders. This final point deserves emphasis. Although *The New York Times* can afford a team of lawyers to oppose a defense subpoena for files that might reveal a confidential source, most therapists lack funds to take the same legal action. Thus, they opt to turn over their files, not because they have little concern for the privacy rights at stake for their patients, but simply because it is the only option they can afford.

Why Is the Law Such a Mess?

The confusion in this area of law began with the United States Supreme Court's decisions in *Davis v. Alaska*[20] and *Pennsylvania v. Ritchie*,[21] seminal rulings on the due process right of an accused to seek access to certain confidential files. *Davis* involved a defense request for the confidential juvenile delinquency files related to a prosecution witness. In *Ritchie*, the material at issue was an investigative file of a child protective services agency that directly related to the crimes for which the accused was facing prosecution. In both cases, the files were in the custody of the state, and in both, the Court ruled that despite statutory protection granting confidentiality to those files, the accused had a right to seek access to information that was relevant and material to guilt or punishment. These cases did not, however, establish a right of access to all privileged material, no matter its location or source. On the contrary, in *Ritchie*, the Court was clear about three important limitations on its ruling: the records at issue were subject to the defendant's due process demands because they were already in the prosecutor's file and were not created and maintained by a private third party; the accused had a right during but not before trial, to request the information; and defense access was permissible because the records were protected by a confidentiality statute but not an absolute privilege.

The rulings never so much as suggested that defendants may obtain material directly from a private third party. In fact, the Court expressly left open the question of whether access would be granted at all, even if the material were in the custody of the prosecution, if it were protected by an absolute statutory privilege, as opposed to a "qualified" privilege. In a subsequent case raising this last point, the Supreme Court denied *certiorari* review, indicating its opinion that the accused has no right to absolutely privileged material, irrespective of its source or location and regardless of whether the material is requested during the pretrial or trial period.[22]

Despite these explicit limitations, some courts have misread *Davis* and *Ritchie* as allowing defendants to obtain discovery of all privileged third-party files. Other courts are still struggling. For example, the Supreme Judicial Court of Massachusetts has issued a stunning array of inconsistent rulings. One decision held that the accused has a right to demand virtually automatic access to all third-party material, simply for the asking.[23] This ruling led to routine disclosure of privileged information without so much as a notice to the victim.[24] A subsequent decision announced a new, strict requirement that the defense must first make a showing of need-based materiality, and even then, the information would be reviewed in the first instance by the judge alone, during an *in camera* review.[25] In another case, the court expressed a desire to adopt a less strict standard and, in a surprisingly tense and divided ruling, created a special panel to study the matter (a panel that could not reach a consensus) (Ref. 26, p 258, n 1). In the next relevant case, the court solicited *amicus* briefs from interested third parties in the hope of crafting a new standard.[27] But in November 2007, the court ultimately embraced a process that, as in a handful of other jurisdictions, seems fair as written, because it disallows automatic access,[28] yet in practice allows for the needless disclosure of whole files of privileged material. The Massachusetts rule is a particularly unfair model; thus it is generally not followed by other states, because it overturned an earlier requirement of private judicial screening as a first step in the process. Whole files are routinely turned over to defense attorneys, causing injury to victims, harming therapeutic relationships, and producing no benefit whatsoever to the accused.

Elements of a Legitimate Model

This article sets forth fair guidelines for courts to utilize when considering defense requests for third-party material. It proposes absolute protection for privileged material, while allowing access to non-privileged information pursuant to standards that are neither over- nor underinclusive. Thus, privileged files will be maximally protected, and all other third-party information will be disclosed in circumstances in which specifically identified evidence must be revealed at trial to protect the rights of the accused.

This proposal is built on several premises:

> Privileged information can never be obtained from a third party under any circumstances, and a court has no authority to "balance" the rights of the accused against a valid claim of privilege (Ref. 3, pp 17–18).
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> There is a critical difference between production and discovery. Discovery refers to the process by which information is shared between parties to the litigation. Victims and holders of records, as nonparties, are not subject to rules of discovery. Production, by contrast, refers to the legal obligation of the prosecutor to produce evidence to the defense. Nonparties, such as victims and holders of third-party files, can be ordered to produce information only if it is nonprivileged and only during the trial period when the accused enjoys constitutional rights as against private persons. Such rights have no force against third parties during the pretrial period.
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> Even *in camera* judicial screenings of privileged files are unacceptable, because the judge is an agent of the state. Courts have recognized that judicial intrusion into a victim's personal file is a substantial invasion of privacy.[25,29]
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> Defense requests directed at third parties to uncover unknown information, as opposed to requests to produce known information, whether privileged or not, are always improper.
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> Some discovery and/or production of privileged information from the prosecutor may be proper, but only if such information is already lawfully in the custody, possession, or control of the prosecution and is otherwise subject to disclosure.
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> Some production, but never discovery, of nonprivileged material is appropriate during the trial period, but only after a hearing conducted in compliance with the third party's due process rights.
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> Any request for production of privileged material during the trial period should be summarily denied. If the request is for nonprivileged material during the trial period, the third party has a due process right to be heard before the issuance of a subpoena or court order. During such hearings, the court must balance the constitutional and other interests at stake for the third party against factors of relevancy, need, cumulativeness, materiality, specificity of request, and admissibility. In certain circumstances, the accused's right to obtain production of known, nonprivileged evidence for trial can be enforced during the pretrial period, but only where production at midtrial would prove impracticable.

With these premises in place, state courts are then encouraged to follow the lead of most federal courts, which have significant experience in this area and have recognized the need to limit the ability of the accused to use his status as a criminal defendant to impose the power of the government, in the form of a subpoena or court order, into the constitutionally protected private space of third parties.

Roughly reflective of Federal Rule of Criminal Procedure 17, as modified by the Supreme Court's decision in *United States v. Nixon*,[30] the proposal set forth in this article is both efficient and fair because it imposes only minimal burdens on the system, ensures protection for the constitutional interests of third parties and maintains full regard for the rights of accused criminals.

Baseline Principles

There Is No Constitutional Right to Discovery

It is well settled that the accused enjoys no federal constitutional right of discovery, even against his opponent, the state.[31,32] When the accused obtains what is labeled discovery, it occurs under procedural rules that impose on the prosecution an affirmative constitutional obligation to produce information, rather than from a right of the defendant to demand discovery.[33]

It follows that where defendants have no constitutional right of discovery against the government, there can be no such right, as a constitutional matter,

against third parties. Even if there were a right of discovery against the government, it would have no force against private information in the exclusive custody of a third party as third parties are not agents of the state.[34,35]

Without a constitutional foundation, there can be no requirement of a balancing test such that a judge must weigh the rights of the accused against the rights of the third party to determine whether disclosure is necessary. Balancing tests are appropriate only when the accused can assert a legitimate constitutional claim.[3,36] When he cannot do so, the constitutionally protected interests of the third party automatically prevail without need for judicial consideration or analysis.[37] Although defense attorneys often argue that simply being charged with a crime gives an accused constitutional authority to at least file a motion seeking discovery, so long as he frames it as a due process request, this is only true of information in the custody of the accused's opponent, the state. He enjoys no similar constitutional relationship with private third parties during the pretrial period. His rights in regard to third parties exist only during the trial period.[21]

Despite settled law in this area, several courts have erroneously engaged in balancing test analyses to resolve defense requests for discovery of third-party material, in utter disregard of the underlying constitutional imperative.[15–18,27]

Rules Committees Are Powerless to Create Discovery Rights

To justify the application of a balancing test, some states have adopted court rules that ostensibly create rights of discovery for the accused.[38] However, rule-making bodies lack authority to create substantive rights as "the function of rules is to regulate the practice of the court and to facilitate the transaction of its business. . . . [N]o rule of court can . . . abrogate or modify the substantive law" (Ref. 39, p 635). As one court noted, "though one statute may override another, a court rule generally may not override a statute" (Ref. 40, p 421) nor can a court rule override the Constitution.[41]

Thus, to the extent that a rule, as opposed to a statute or constitutional provision, provides the basis for an order requiring discovery of privileged treatment files, the order should be seen as unlawful because such files are protected by statutory privileges[42] and constitutional rights,[43–49] including the Fourth Amendment,[50] over which court rules have no power. Only the legislature can create rights and "no legislative or executive power can be constitutionally conferred upon the courts" (Ref. 51, p 4). The creation or abrogation of rights cannot lawfully occur through the rule-making process because "[s]ubstantive law . . . 'creates, defines, and regulates rights' while court rules may only prescribe a method or procedure for 'enforcing rights or obtaining redress for their invasion' " (Ref. 52, p 226).

Even if a court order or subpoena authorizes discovery of only nonprivileged third-party material, if it is issued exclusively pursuant to a court rule, it should be presumed unlawful under the separation of powers doctrine,[53,54] simply because the legislature's exclusive authority to make laws authorizing any discovery against third parties cannot be usurped by the other branches of government.[55]

Where a legislature rather than a rules committee has enacted a law creating a statutory right of discovery for criminal defendants, any attempt to enforce this right against the federal constitutional rights of a third party should fail, as should any claim that such a right exists under the state constitution. This is because the Supreme Court has held it unconstitutional under the supremacy clause for a state law, whether statutory or constitutional, to be construed so as to encroach on the federal constitutional rights of others.[37]

Court Orders Compelling Production, but Not Discovery, of Even Nonprivileged Material From Third Parties Must Comply With Due Process

When the information sought from a third party is not privileged or protected by a federal constitutional right and a defendant properly seeks production during the trial period, disclosure may be ordered, but only after a hearing has been held, in a manner consistent with the due process rights of the third party. A hearing is required, even when mere common law or statutory third party rights are threatened or violated by a judge, because a subpoena or court order constitutes state action.[36] Although the legal concept is not well developed in this context, the United States Supreme Court established long ago that actions of state courts and judicial officers in their official capacities constitute state action, even if such actions are taken on behalf of defendants.[56–61] Thus, any person who faces a subpoena or court order is

entitled to a meaningful hearing before any infringement on rights occurs.[36]

A court's failure to abide due process could lead to a challenge in federal court as a third party may file a federal action in equity against a state court criminal judge to redress a violation of due process rights.[62] Such a lawsuit would not run afoul of limitations on federalism and federal jurisdiction, because third parties have no alternative means of redress, an important consideration when federal courts determine whether they have jurisdiction over a state court ruling.[63–66]

Nor would a suit to enjoin enforcement of an unconstitutional court order be barred by judicial or other immunity, as an unconstitutional act of a state official is always subject to the "supreme authority" of federal law.[67]

Proper Balance of Competing Interests

With the foregoing baseline principles established, I propose the following fair and efficient protocol to protect the rights of all stakeholders.

All Defense Requests for Either Discovery or Production of Privileged Material in the Exclusive Custody of a Private Third Party Should Be Summarily Denied

As many states have held, when a defendant seeks confidential or privileged material in the exclusive custody of a private third party, whether during the pretrial or trial period, the request should be summarily denied without consideration, because defendants enjoy no constitutional legal relationship with third parties as to privileged material, irrespective of the timing of the request or the defendant's need for the information.[4]

Defense Requests for Discovery of Nonprivileged Material in the Possession of Third Parties Should Be Summarily Denied

Although defendants have limited trial rights of production as to certain nonprivileged evidence, it bears repeating that this is not the same as a right of discovery to obtain unknown information.[31–33]

Thus, whether a defense motion is characterized as one seeking discovery, production, access, or disclosure and whether it is filed during the pretrial or trial period, it should be summarily denied if it in fact seeks to discover unknown information.

Determining whether a request seeks discovery of unknown information as opposed to production of known information is easy. If the defendant cannot identify with specificity the information he seeks, he is necessarily asking for discovery.

Federal Rule of Criminal Procedure 17 and analogous provisions under state law that regulate the issuance of subpoenas for production of evidence in criminal trials, as well as the United States Supreme Court all forbid the use of subpoenas in criminal trials as a means of discovery (Ref. 30, p 698). One effective way to protect against this misuse of Rule 17 as a discovery tool is to require the defendant to demonstrate credibly that specific exculpatory evidence is present in a certain location. If such a specific showing cannot be made, the request must be denied.[68]

This specificity requirement is an essential aspect of Fourth Amendment jurisprudence, without which, unjustified abrogations of protected privacy would regularly occur.[69] Thus, in the absence of such a showing, a judge should conclude that the defendant is seeking improper discovery, and the request should be summarily denied.[68]

Defense Motions That Properly Seek Production of Known, Nonprivileged Third-Party Material Must Also Establish That the Information Sought Is Relevant, Material, and of Distinct Evidentiary Value

While much material held by a mental health care provider will be privileged, not all information is entitled to such protection. For example, some jurisdictions apply privilege only to confidential communications and have held other aspects of treatment to be nonprivileged. Likewise, for caregivers whose status may not be recognized by a formal privilege, an entire file may be nonprivileged.

A defense motion seeking production of nonprivileged information during the trial period must demonstrate that the information sought is relevant, material, and of evidentiary value to an issue legitimately in dispute because the accused's compulsory and due process rights, when asserted at trial against third parties, extend only to evidence that is material and favorable to the defense.[70] Evidence is considered material, only when it cannot be obtained elsewhere and is noncumulative, which means the accused cannot make the same point with otherwise available evidence. He must also establish that there is a "reasonable likelihood that the [evidence] could . . . affect the judgment of the trier of fact" (Ref. 70, p 874). A reasonable likelihood is "a probability suffi-

cient to undermine confidence in the outcome" (Ref. 71, p 682).

If it is clear that the accused cannot meet these standards, his request should be summarily denied. If, however, the accused has identified materially relevant nonprivileged information, a hearing should be scheduled at which the third party's due process rights can be protected. The third party should be notified by the court of the hearing date and of the specific nature of the defendant's request. This notice should clearly state that the court is not requiring the third party to bring files or any other evidence to court, but rather, that a hearing has been scheduled to determine whether production of certain evidence will be ordered as a result of the hearing. Such notice should inform the holder of the information, as well as the victim and all other data subjects whose private information may be contained in the requested file, of their right to due process and to appointed counsel.

During the hearing, the third party should be represented by counsel, irrespective of indigency. If a third party is unrepresented, the court should appoint counsel at no cost to the third party. This approach recognizes that, while most mental health professionals are not indigent, which would entitle them to a free court-appointed lawyer based on income, they are rarely wealthy enough to afford private counsel with sufficient experience to handle complex constitutional matters. It is fair and appropriate for the court to provide counsel given that, unlike private litigation, crime victims and other third parties are compelled by the state to participate in criminal proceedings.

If a file also contains personal information pertaining to another fourth party, the court's notice should be sent to the holder as well as to the individual(s) whose personal information may be contained therein. For example, if a crime victim has revealed to a care provider that her mother is dying of AIDS, the mother should also receive notice of the hearing so that she can argue against disclosure of this sensitive information.

At the conclusion of the hearing, if the judge rules that the defendant has met his burden of showing that materially relevant, nonprivileged information exists in the custody of the third party, the judge should, before ordering disclosure, inquire in the first instance of counsel for the third party as to whether the desired evidence in fact exists in the third party's file. If counsel for the third party, as an officer of the court, responds that no such evidence exists, disclosure is unwarranted, and there should be no further action.

If counsel indicates that such information does exist, then only that specifically identified evidence, nothing more, should be produced. If the information consists of or relates to sensitive material, the judge should issue appropriate protective orders to prevent needless further release of the information to experts or in court pleadings.

If the third party has a good faith disagreement with the court's decision to order disclosure of information, the third party must be afforded an opportunity for expedited judicial review. An appeal to a higher court is an essential component of due process, but is often procedurally forbidden, or the rules are silent as to whether a third party in a criminal case can file an appeal. Some courts have held that a third party must be subjected to contempt proceedings as a prerequisite to appeal, noting that contempt is a "crude but serviceable method" of determining which court orders are burdensome enough to merit judicial review (Ref. 72, pp 492–3). Contempt is too onerous a burden to impose on a third party. Due process alone should justify unmitigated access to judicial review of any court order that imposes on the constitutional rights of a third party, where the objection is made in good faith.

Motions for Pretrial Inspection Should Be Subject to All the Above Requirements and More

In exceedingly rare circumstances, a defendant may be granted pretrial inspection of materially relevant, nonprivileged, third-party evidence, provided he satisfies the standards for production as described above and then demonstrates, separately, that pretrial inspection is necessary under the factors set forth in *Nixon*, including most typically that inspection during trial will cause a substantial delay in the proceedings.[30] An assessment of whether pretrial inspection is appropriate may not require advocacy on the part of the private third party, as the prosecutor and defense can ordinarily provide the court with information as to the likely volume of target evidence and the potential impact on the proceedings if inspection occurs during the trial period.

If the judge determines that pretrial inspection is appropriate, a subpoena or court order should be issued to the holder of such information, notifying

him that only the identified evidence must be made available for inspection at a convenient date and time.

The notice regarding an order on pretrial inspection should state that it is a trial-based court order, being issued during the pretrial period due to the volume of evidence requested (or other *Nixon*-based reason). This language will ensure that the third party's objections, if any, will not erroneously be based on the grounds that it was issued during the pretrial period. It will also alert the third party of the alleged special circumstances that justify pretrial inspection such that if those circumstances are not applicable, the third party can so inform the court.

The right to conduct an inspection under *Nixon* does not include a right to conduct discovery or demand inspection of whole files, even through a private judicial screening, because, as noted above, even an *in camera* review by the judge is a substantial invasion of privacy.[25,29] Nor does *Nixon* require that the inspection take place at a particular location, such as the courthouse. Thus, a judge has the discretion to allow an attorney for the third party to maintain primary control over the evidence and take responsibility for making the evidence available for inspection at his or her office. Requiring inspection to take place under the watchful eye of counsel for the third party, in his or her capacity as an officer of the court, is a reliable and efficient way to facilitate inspection without burdening the court, while safeguarding the integrity of third-party evidence.

Motions for Production of Nonprivileged Statements Must Meet the Additional Definition of Statements, as Set Forth in Rule or Statute

Defense requests for treatment files often claim to be seeking statements of victims. In such circumstances, in addition to the requirements set forth above, the accused must demonstrate that the requested evidence fits the technical legal definition of statements.

For example, under Massachusetts Rule of Criminal Procedure 23, which roughly mirrors the federal rule and the rules in most states, a statement is defined as: a "writing made by a witness or another signed or otherwise adopted or approved by such witness"; "a stenographic, mechanical, electrical, or other recording or a transcription thereof, which is a substantially verbatim recital or an oral declaration made by a witness and which is recorded contemporaneously with the making of the oral declaration"; or "those portions of a written report which consist of the verbatim declarations of a witness in matters relating to the case on trial."

If a third-party's file contains only reflections or opinions of the writer, equivocal phrases, nonverbatim comments, observations or other writings that do not reliably reflect actual statements of a witness as defined by the rule, the defendant's request should be denied.

Thus, before any request for statements is considered, the judge should inquire in the first instance of counsel for the third party as to whether such statements even exist. If not, the request can be summarily denied. This proposal should work particularly well to insulate from disclosure such things as files that contain only reflections and process notes. On this point, caregivers should take note that using quotation marks and recording actual statements can increase the risk of court-ordered disclosure.

Conclusions

Effective mental health treatment is essential to a healthy society, and confidentiality is the cornerstone of effective treatment. At the same time, ensuring that the accused receives a fair trial is a noble goal and in some (very rare) cases, important evidence may be found in a treatment file.

Proper consideration for both concerns must recognize the profound risk of harm to civility itself when the criminally accused are allowed to utilize the power of the state in the form of subpoenas and court orders, power they would not have had they not been charged with a crime, to compel innocent victims and their treatment providers to reveal privileged files on the off chance that they might uncover something useful.

A cohesive doctrine has yet to evolve, as some states provide more protection against disclosure than others, which means that victims in some jurisdictions obtain both treatment and justice without concern that privileged files will be released to their assailants, while other victims are forced to choose between prosecution and privacy. With such important constitutional rights at stake for victims, there should be a baseline of absolute protection against disclosure for all privileged treatment files in every jurisdiction.

The mere possibility that a defendant can ask for access to a victim's mental health treatment files en-

ables the use of intimidation tactics and chills the healing process because, as the Supreme Court noted in the landmark *Jaffee* decision, "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege" (Ref. 3, p 17).

Every criminal case involves the risk that some evidence known only to third parties may never be uncovered. For example, a friend or relative of a victim or defendant may have access to information about which police and prosecutors are unaware, despite their best efforts to obtain all relevant evidence. Unlike in a civil case where the victim chooses to file suit to recover money and accepts the burdens of litigation, which can include disclosure of privileged treatment information, the victim is but a witness for the government in a criminal trial and has no control over the case. In such a capacity, the victim should suffer no forced breaches of privacy, even to allow the inspection of mundane materials such as grocery receipts, much less compelled violations of deeply private, constitutionally protected mental health records. It is enough that the accused may, in certain circumstances, intrude on the private space of third parties during trial by obtaining access to nonprivileged material.

Therapy records are particularly unlikely to contain important evidence, as they are not intended as a transcript of communications, but rather as support for the treatment process.[24] That a piece of relevant information might go undiscovered under a rule of absolute protection is a fair price to pay to prevent widespread gratuitous constitutional harm to a whole class of individuals who have done nothing wrong, have suffered criminal violence, and have a right to heal in peace and safety.

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59. Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926)
60. New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
61. Hale v. Henkel, 201 U.S. 43 (1906)
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63. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923)
64. D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983)
65. Younger v. Harris, 401 U.S. 37 (1971)
66. Samuels v. Mackell, 401 U.S. 66 (1971)
67. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984)
68. United States v. Sawinski, 2000 U.S. Dist LEXIS 16536 (S.D.N.Y. 2000)
69. Groh v. Ramirez, 540 U.S. 551 (2004)
70. United States v. Valenzuela-Bernal, 458 U.S. 858 (1982)
71. United States v. Bagley, 473 U.S. 667 (1985)
72. Matter of a Grand Jury Subpoena, 583 N.E.2d 241 (Mass. 1992)