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The Sexual Assault Counselor-Victim Privilege:

Jurisdictional Delay into an Unclaimed Sanctuary

Armand Arabian*

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*He must have patience who to law will go.*¹

I. INTRODUCTION

Over twenty-five years ago, a judicial call of duty thrust me into the arena of alleviating the pain of victims from the brutality of sexual assault. I chronicle here the birth and path of an unprecedented procedure, and urge those jurisdictions who have not yet adopted it to take notice.²

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1. FRANCIS MCNAMARA, 2000 FAMOUS LEGAL QUOTATIONS 156 (Aqueduct Books 1967).

2. In 1978, I published the first portion of this tale in *Southwestern University Law Review*. Armand Arabian, *The Cautionary Instruction in Sex Cases: A Lingering Insult*, 10 SW. U. L. REV. 585, 588-90 (1978). Out of a desire to tell the rest of the story, and to encourage those jurisdictions who have not heeded that prior call to legislate in this arena, I reproduce it here with some changes and additions. The untold part of the story begins at page nine. This article has benefited through the years from the excellent research of student externs: Christopher M. Adishian and Michael Murphy in 1993; Alyson Leichtner in 2002; Lori Brogin in 2004; and Sevana Zetlian in 2005.

II. THE RENAISSANCE OF RAPE

In late 1973, as a Superior Court judge in Van Nuys, California I was assigned a criminal case captioned *People v. Leonardo Rincon-Pineda*.³ The defendant was charged with forcible rape, oral copulation, attempted sodomy, and burglary. In his first trial, which had resulted in a mistrial, the standard and mandatory cautionary jury instruction for rape cases had been given by the trial judge:

A charge such as that made against the defendant in this case, is one which is easily made, and once made, difficult to defend against, even if the person accused is innocent Therefore the law requires that you examine the testimony of the female person named in the information with caution.⁴

This instruction had been in effect since 1856, when Chief Justice Murray authored the opinion in *People v. Benson*.⁵ In that case, the trial court found the defendant guilty of a rape on a thirteen year old girl, based on her testimony.⁶ The California Supreme Court reversed the guilty verdict, holding that both general evidence of reputation and specific evidence of lewd acts with men other than the defendant were admissible to cast doubt on the victim's claimed lack of consent.⁷ The court went on to

3. There were two California Superior Court trials in this case. The case I was assigned and is described here was the second case, Superior Court of Los Angeles County, Van Nuys, No. A-126773 (1973) (Arabian, J.) (on file with author). The two trials are described in the California Superior Court opinion *People v. Leonardo Rincon-Pineda*, 14 Cal. 3d. 864, 869–872 (1975).

4. *Id.* at 871. The opinion noted that, “The first trial court also read to the jury the text of CALJIC No. 10.22, the cautionary instruction which though originally required only in cases involving charges of forcible rape has since been held mandatory, *sua sponte*, in all sex offense cases.” *Id.* at 870–71. The opinion later stated that “we think the instruction as it has customarily been worded (i.e., CALJIC No. 10.22) is inappropriate in any context, and the further use of such language is hereby disapproved.” *Id.* at 882.

5. *People v. Benson*, 6 Cal. 221, 222–224 (1856).

6. *Id.*

7. The court went on to review the current rule that general evidence of reputation was admissible, while evidence of specific acts was not, and its rationale for overturning that rule:

In this class of cases, when the prosecutrix is the sole witness, and the accused is compelled to rely upon circumstantial evidence for his defense, any fact tending to the inference that there was not the utmost reluctance and resistance, is always received. That there was not an immediate disclosure; that there was no outcry, though aid was at hand and the prosecutrix knew it; that there was no indication of violence to the person; that the act was committed at a time, and under circumstances calculated to raise a doubt as to the employment of force, are put as strong circumstances of defense, not as conclusive, but as throwing doubt upon the assumption, that there was a real absence of assent. In 3 Greenleaf on Evidence, section 214, the rule is thus laid down; “The character of the prosecutrix for chastity may also be impeached, but this may be done by general evidence of her reputation in that respect, and not by particular instances of her unchastity; nor can she be interrogated as to criminal connection with any other person except as to the previous intercourse with the prisoner himself, nor is such evidence of her previous intercourse admissible It is contended in this case, that evidence of

address the propriety and necessity of warning the jury of the danger of convictions based solely on the victim's testimony:

. . . There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance. In such cases the accused is almost defenseless, and Courts, in view of the facility with which charges of this character may be invented and maintained, have been strict in laying down the rule which should govern the jury in their finding.

From the days of Lord Hale to the present time, no case has ever gone to the jury, upon the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the Court warning them of the danger of a conviction on such testimony.

The case before us is supported alone by evidence of the prosecutrix, a young ignorant girl, thirteen years of age, and is so improbable of itself as to warrant us in the belief that the verdict was more the result of prejudice or popular excitement, than the calm and dispassionate conclusion upon the facts by twelve men sworn to discharge their duty faithfully. In fact, this is evinced by the Opinion of the Court in passing upon the motion for a new trial, in which the presiding Judge cannot refrain from the expression of grave doubts as to the correctness of the verdict; and we are led to

general reputation is admissible, but not of particular acts, and even if the evidence had been admissible, the questions should have been first up to the prosecutrix. I cannot understand why, upon any sound rule, general reputation should be preferred to particular facts. It is true, that it is said the party comes prepared to prove her general character, and her attention is not directed to the special facts. It appears to me that proof of particular acts of lewdness should be admitted in preference to general reputation, which may be good or bad, either deservedly or undeservedly. Facts tend to make up the sum of reputation, and the cause, and not the result, would be safer testimony to rely on. If these facts of instances of lewdness are admitted, then I conceive that it is immaterial by whom they were proved, and that it was not necessary to inquire of the prosecutrix concerning them. They were not introduced so much for the purpose of impeaching her evidence directly, as for the purpose of doing away with the presumption that there was a total absence of assent on her part. But admitting the full force of the rule in *Rex v. Hodgson*, still we are of the opinion that the circumstances of this case modify the rule. The prosecutrix was young and ignorant; had lived on a farm with the accused in the country, where she had no intercourse with the world; her character was not formed, by reason of her youth and inexperience, and her proclivities could only be ascertained by reference to individual instances of lewdness, and that precocious immodesty which sometimes displays itself in girlhood and marks the character of the woman.

Id. at 222–23 (internal citations omitted).

the belief, had it not been for some misapprehension of the rule established by this Court regulating the granting of new trials in the Court below, the verdict would never have been allowed to stand. A conviction upon such evidence would be a blot upon the jurisprudence of the country, and a libel upon jury trials.⁸

It is to be remembered that in earlier days, the fundamentals of due process, relative to the presumption of innocence and proof beyond a reasonable doubt, had not yet crystallized into rights.⁹ The right to testify under oath and the right to counsel, discovery, and subpoena were not available to the accused.¹⁰ Thus, in a period of history when people believed in witchcraft and in the use of the chastity belt, such a caution was warranted, especially when the rapist suffered death by hanging as a result of his conviction.

On retrial of the *Rincon-Pineda* case, I refused to so instruct the jury. I asked that in the event of a conviction, there might be a review of this 300-year old English sacred cow. For the benefit of the reviewing courts, I made the following statement:

Yet we, as judges of the criminal court, on the brink of 1974, in enlightened times, and as ministers in the administration of justice, are asked to kneel in a blind obedience to this rule, and are commanded to instruct twelve lay persons that the testimony of these victims must be examined with a special caution I find that the giving of such an instruction in this case is unwarranted either by law or reason, that it arbitrarily discriminates against women, denies them equal protection of the law, and assists in the brutalization of rape victims by providing an unequal balance between their rights and the rights of the accused in court.¹¹

Upon deliberation, the jury convicted the defendant of felony rape.¹² I had hoped that in the event Rincon-Pineda was convicted that the defendant would appeal, giving the reviewing courts a chance to make the cautionary

8. *Id.* at 223–24.

9. *See Rincon-Pineda, supra* note 3, at 876–79.

10. *See id.*

11. Trial Transcript 397–98, Superior Court of Los Angeles County, Van Nuys, No. A-126773 (1973) (Arabian, J.) (on file with author). *See also Rincon-Pineda, supra* note 3, at 871–72 (“Although the jury was given CALJIC No. 10.06 in modified form, the court refused over defense objection to give the cautionary instruction, CALJIC No. 10.22. The court acknowledged that the instruction was mandatory in sex cases, but noted that its compulsory use had not been authoritatively reexamined for decades.”)

12. *See Rincon-Pineda, supra* note 3, at 870. The public defender sought a new trial on behalf of defendant, which I declined to grant. He also proposed that since the Mexican national defendant had no criminal background, he be deported to Mexico to be reunited with his family, in lieu of a prison term. This I also denied.

instruction discretionary rather than mandatory. Indeed, the defendant appealed, and the District Court of Appeal reversed the conviction due to my failure to so instruct.¹³ The prosecutor then filed a Petition for Review with the California Supreme Court, which was granted, thereby vacating the reversal.¹⁴

On July 31, 1975, in an incredible event, the justices unanimously agreed that the court-created mandate to read the cautionary instruction was indeed a rule without reason.¹⁵ They affirmed the conviction, and struck the cautionary instruction from the law of California in all sex cases.¹⁶

Chief Justice Donald R. Wright, authoring the opinion, concluded that the refusal to give the instruction had not prejudiced the defendant.¹⁷ He wrote:

Defendant was accorded a full measure of modern due process; he stood before the jury represented by counsel, clothed in the presumption of innocence, and shielded by the need for his guilt to be established beyond reasonable doubt ere he could be convicted. Conviction necessarily entailed according credence to the victim's identification, but that identification was premised upon ample opportunity for perception of the perpetrator of the rape, was corroborated to some extent . . . , and was free of even a hint of the taint of racial or sexual prejudice or of a blind urge for retribution.¹⁸

The court used two approaches in its review of the case. The first was a historical review of this area of the law, which resulted in finding this form

13. *People v. Rincon-Pineda*, Crim. No. 25299 (Cal. Ct. App., 2d Dist., Dec. 1, 1974) (unpublished) (noting that in reversing the conviction, they did not consider the propriety of the instruction since it had been a part of the law of California for so long).

14. The Petition for Review was granted on March 10, 1975.

15. See *Rincon-Pineda*, *supra* note 3, at 877 (concluding that “[i]n light of . . . the evolution of the cautionary instruction, and with the benefit of contemporary empirical and theoretical analyses of the prosecution of sex offenses in general and rape in particular, we are of the opinion that the instruction omitted below has outworn its usefulness and in modern circumstances is no longer to be given mandatory application.”).

16. *Id.* at 866, 882 (“[H]aving dispensed with the notion that those accused of sex offenses suffer any special prejudice today, we think the instruction as it has customarily been worded (i.e., CALJIC No. 10.22) is inappropriate in any context, and the further use of such language is hereby disapproved.”).

17. *Id.* at 873 (“Under the circumstances here present we cannot say that there is a substantial probability that a jury which had properly been given the cautionary instruction would have been any more aware than was the jury which convicted defendant that the key issue in the case was the credibility of the complaining witness. It follows that the trial court’s error was not prejudicial, and did not result ‘in a miscarriage of justice.’”).

18. *Id.* at 873.

of counterbalance no longer necessary.¹⁹ The other was an evaluation of empirical studies pointing out the low rate of convictions for rape, which the court felt undermined any present-day promulgation of the language.²⁰ Their decision was instrumental in the advancement of civil rights, civil liberties, and of fairness and impartiality in our courts of law.²¹

On August 6, 1975, the Los Angeles Times published an editorial about the outcome of the case.²² The author called the California Supreme Court's holding "the next logical step" in changing laws pertaining to rape.²³

19. See Rincon-Pineda, *supra* note 3, at 873–79. The court reviewed the writings of Sir Matthew Hale, who dealt extensively with rape and the evidence which should be allowed to prove or disprove the charge. The court quoted Hale's assessment of the problem of false accusations of rape as follows:

I only mention these instances, that we may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony sometimes of malicious and false witnesses.

Id. at 874–75 (citing 1 HALE, HISTORY OF THE PLEAS OF THE CROWN 636 (1st Am. ed. 1847)). The court then reviewed the reasoning in *Benson*, *supra* note 5, and stated that subsequent to that ruling, "it became the rule in California that upon request cautionary instructions reflecting the *Benson* reading of HALE were to be given in rape cases 'either when the prosecutrix is a child of tender years or when her testimony is uncorroborated.'" *Id.* at 975 (citing *People v. Rangod*, 112 Cal. 669, 672 (1896); *People v. Caldwell*, 55 Cal. App. 280, 298 (1921)). Finally, the court concluded that the concerns that had led to this cautionary instruction in sex offenses and rape cases were alleviated by "changes in criminal procedure wrought in the intervening" years since Hale's writings, as well as "dramatic differences in the position of the criminally accused in the United States today from one so accused in 17th century England." Rincon-Pineda, *supra* note 3, at 877–78. These differences and changes include the presumption of innocence and fundamental due process rights, including "the rights of an accused to present witnesses in his defense and to compel their attendance," and the "right . . . to the assistance of counsel . . . regardless of his personal means." *Id.* at 878. Finally, the court noted that the "justification for the compulsory nature of the instruction is . . . that sex offense cases involve what 'must be conceded [to be] the kind of act [which] is so thoroughly repugnant to the average person that it can breed that righteous outrage which is the enemy of objective fact finding. In addition, the shocking nature of the act might well lead a complaining witness to hasty identification of the alleged perpetrator.'" *Id.* at 879 (quoting *People v. Merriam*, 66 Cal.2d 390, 395 (1967)).

20. Rincon-Pineda, *supra* note 3, at 879–882. In this portion of the opinion the court reviewed a variety of studies, surveys, and other types of empirical evidence tending to strongly refute the conception "that the accused perpetrators of sex offenses in general and rape in particular are subject to capricious conviction by inflamed tribunals of justice[.]" *Id.* at 882 (citing Note, *The Rape Corroboration Requirement: Repeal Not Reform* 81 YALE L.J. 1365, 1378–84 (1972); Federal Bureau of Investigation, *Uniform Crime Reports* 1973, at 15 (1974); HARRY KALVEN AND HANS ZEISEL, *THE AMERICAN JURY* 249–80 (Little, Brown & Co. 1966); LeGrand, *Rape and Rape Laws: Sexism in Society and Law*, 61 CAL. L. REV. 919, 921 (1973); MENACHEM AMIR, *PATTERNS IN FORCIBLE RAPE* 27–28 (University of Chicago Press 1971)).

21. After reaching its holding, the court took the time to "reaffirm and reinforce the existing instructions as to the credibility of witnesses which must presently be given." *Id.* at 883. These instructions, as well as instructions which were later created, do not discriminate against women and rape victims by applying only to rape cases.

22. *The Rape Victim and the Law*, L.A. TIMES, Aug. 6, 1975, at A6 (reprinted with permission).

23. *Id.* The author characterized the "steps" prior to this one as follows:

California law was changed last year to provide that testimony in a rape trial about a

In the past, because of the attitudes of society, the woman rape victim who reported the assault became almost as much an object of suspicion as the suspect she named. She was subjected in court to intensive interrogation about her personal life, and judges were required to instruct juries that her testimony should be considered 'with caution'. . . . Superior Court Judge Armand Arabian had refused to issue the old instruction because he considered it demeaning to the woman. It was demeaning, but, more than that, it was a denial of equal justice.²⁴

A new instruction was created and now is given *sua sponte* in every criminal case where proof of a fact does not depend upon the testimony of a single witness and corroborating evidence is not required.²⁵ Known as the *Rincon-Pineda* instruction, it states:

You should give the [uncorroborated] testimony of a single witness whatever weight you think it deserves. Testimony concerning any fact by one witness, which you believe, [whose testimony about that fact does not require corroboration] is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends.²⁶

Today, defendants throughout the state who are accused of any one-on-one confrontation—which can range from purse-snatching to the sale of narcotics to an undercover officer—enjoy the benefit of that instruction.

Emboldened by the court's ruling, several years later I authored and published an article entitled *The Cautionary Instruction in Sex Cases: A*

woman's sex life can be introduced only after a special hearing outside the presence of a jury, and then only if a judge finds it relevant to the woman's credibility as a witness. Evidence as to prior sexual conduct may not be heard if offered to show that the woman consented.

Id.

24. *Id.*

25. C.A.L.J.I.C. § 2.27 (known as the "Rincon-Pineda" instruction). In the *Rincon-Pineda* case, the court stated that "[i]t has been suggested by amicus curiae for defendant that the potential for an erroneous verdict of guilt upon the uncorroborated testimony of a complaining witness may be minimized by our propounding, in lieu of CALJIC No. 10.22, some sort of cautionary instruction to be given in any prosecution in which the case against the defendant 'substantially rests upon the testimony of the complaining witness' uncorroborated by 'substantial evidence.'" *Rincon-Pineda*, 14 Cal. 3d, at 883. This instruction met that need.

26. *Id.*

*Lingering Insult.*²⁷ The article provided a survey of each state with regard to such cautionary instructions, and rang a death knell for their future.²⁸

My refusal to instruct the jury according to California law invited comment, some intellectual, some unkind. However, years later, Ronald A. Cass, former dean of Boston University School of Law, analyzed it this way:

Other, less famous decisions make an even stronger case for seeing judges as “legislators in robes.” Consider, for example, a decision by Judge (later California Supreme Court Justice) Armand Arabian during the trial of Leonardo Rincon-Pineda on rape charges. Judge Arabian refused to give a legally required jury instruction cautioning jurors against accepting the testimony of the prosecutrix. Judge Arabian decided that, though the law in California clearly required him to give the requested instruction, the instruction was morally indefensible. It rested on factual assumptions that Arabian thought untrue, and it was the residue of prejudices born of social circumstances long since changed. Arabian declared that because the required instruction was judicially mandated—not statutorily required—judges could alter the rule. The court of appeals said, in effect, “Maybe so, but not a trial judge.” The rule had been confirmed repeatedly by the state supreme court, and judges of the intermediate appellate court did not believe that any lower court could change the rule. The Supreme Court of California (long before Judge Arabian’s elevation) reversed the appellate court along with its own prior decisions.

Judge Arabian’s decision was the product of his own sense of fairness and justice, not of his construction of external governing authority. We can speculate about the source of his sense of the injustice that adhering to the law would have wrought—did it come from his Armenian heritage (encompassing both personal exposure to discrimination and familiarity with stories of the “Armenian genocide” at the turn of the century), from his education or other sources? Whatever the answer to that question, the answer cannot be that it came from a simple reading of legal authority. Judge Arabian saw his role in *Rincon-Pineda* as helping to *correct* the law, not simply to *apply* it. In his own words:

The legislative process offers an appropriate vehicle for abolishing the cautionary instruction. An overwhelming

27. Armand Arabian, *The Cautionary Instruction in Sex Cases: A Lingering Insult*, 10 SW. U. L. REV. 585 (1978).

28. *Id.*

majority of states have not had legislative involvement on this issue, however, and the task of educating these jurisdictions in order to obtain an enlightened response looms as an immediate stumbling block A viable alternative to the legislative process is judicial refusal to give the instruction. By this method, on appeal of a conviction, the appellate court would be afforded an opportunity to render a present-day view.

That evinces the same sense of judicial role as the statement by another thoughtful judge that it is better for the legislature and agencies to make the law right, “but when they don’t, we have to.” Undoubtedly, that statement and Judge Arabian’s are not proclamations that judges are not – or should not be – limited by external command. Judge Arabian might well have acted differently if the rule he disputed was legislated or had been recently adopted by the state supreme court or had been specifically reconsidered in the recent past. Such comments are, however, at the least evidence that some judges consciously allow considerations outside the immediate ambit of external authority to affect some decisions.²⁹

III. THE SEXUAL ASSAULT COUNSELOR-VICTIM PRIVILEGE

Partly as a result of my efforts in this case, I became in demand as a speaker, and began appearing regularly before various groups. In 1976, I traveled to Kansas City, Missouri to attend a National District Attorneys’ Conference to discuss sexual assault. My remarks were entitled, “The Renaissance of Rape.” After my remarks, I was approached by a woman who was the director of a Rape Crises Center in Pueblo, Colorado. She related the following story. Two young men were accused of sexually assaulting two young females. At the Center, she and her assistant each conferred with an alleged victim and took notes. Thereafter, the defense counsel filed a motion for discovery seeking the counselor’s records pertaining to the victims’ accusations against their clients. The trial court granted the motion and a *subpoena duces tecum* was issued.³⁰

29. RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 58–59 (The Johns Hopkins University Press 2003) (citing *Rincon-Pineda*, *supra* note 3).

30. A *subpoena duces tecum* is “A subpoena ordering the witness to appear and to bring

The counselors were in a quandary. On the one hand, the crisis center was funded by a contractual state grant and any disclosure of gathered information would result in a loss of funds. On the other hand, failure to respond to the subpoena would land them in hot water. They decided to appear in court without the subpoenaed documents, believing that because three psychologists and a psychiatrist sat on the Center's board of directors, they were acting under the umbrella of a medical privilege. The judge disagreed and incarcerated them for an indeterminate stay. The counselors then requested that other members of the center locate the female victims and obtain their consent. The female victims consented, and the files containing their statements were surrendered to the judge and given to the defense. The counselors were upset and did not know how to proceed in the future. They looked to me for guidance.

I was disturbed by their quandary and returned to California intent on addressing such a predicament through legislation. I knew its resolution would pose a tremendous challenge, but began drafting appropriate language.

On November 8, 1976, I appeared before the California Senate Judiciary sub-committee on violent crime, chaired by then Senator Alan Robbins (D-Van Nuys). In 1974, he had created the Robbins Rape Evidence Law which protects invasion of the alleged victim's background.³¹

At that hearing I introduced a new concept in the jurisprudence of America and of the world. My proposal was designated the "Sexual Assault Counselor-Victim Privilege." Intended to be added to the evidence code, the privilege was designed to protect the privacy of rape victims and counselors in rape crisis centers. Also, it would grant a protection against disclosure without the prior express consent of a victim as to any confidential communication.

I decided to go public. On the morning of February 21, 1977, the Los Angeles Times published my article entitled *Rape Centers Need Rights of Their Own*, which read in part:

"I've been raped! Will you help me?"

"Of course. We're here to do anything we can."

Does that sound like something you saw on television or read in a novel? No, it's a typical exchange of the sort that takes place daily across the country between sexual-assault counselors and women who have been victimized. Rape-crisis centers and their telephone hotlines are playing an increasing role in the guidance and referral of women after they have been sexually, physically and

specified documents, records, or things." BLACK'S LAW DICTIONARY 1467 (8th ed. 2004).

31. CAL. EVID. CODE § 782 (West 2009).

mentally abused They refer women to medical, legal and psychological services, put them in touch with law enforcement agencies when necessary, sponsor self-defense courses and other educational programs, and disseminate information. The center, their counselors and their clients, however, have been operating under a serious misapprehension. They have assumed that their activities and records were private: that the relationship between a rape victim and counselor was included in the same legal privilege that applies to women consulting with their doctors, lawyers or ministers. Unfortunately, that confidence is misplaced. There is nothing to prevent a defense attorney from issuing a subpoena for a rape center's records or from requiring counselors and other staff members to testify in court This is improper. Rape counselors are supportive personnel whose primary role is to advise the victim. The idea that they should be subjected to cross-examination while the defense probes for inconsistencies in the victim's statements, is repellent. There also is the danger that the atmosphere in rape-crisis center, instead of being comforting and reassuring, will become strained as staff members wonder whether their conversations and records will later become evidence in court To solve this problem, I have drafted a new provision to the evidence code, which has been introduced as Senate Bill 174. Sponsored by State Sen. George Deukmejian (R-Long Beach), it sets forth a simple addition to the law, specifying that a sexual-assault counselor and his or her records are privileged unless the victim expressly consents either to let the counselor testify or to release the records.³²

In 1977, after several drafts of language and the assistance of two state senators,³³ the bill was introduced into the California state senate. The bill met with initial resistance, but made steady progress in various forms through 1977 and 1978.

As time passed, rape reform moved forward. On September 27, 1978, the Los Angeles Times published my article entitled, *Rapists Find the Judicial Odds Changing*.³⁴

32. Armand Arabian, *Rape Centers Need Rights of Their Own*, L.A. TIMES, Feb. 21, 1977 (morning ed.), at 6-Part II.

33. I credit then state senators George Deukmejian and Alan Robbins with providing valuable counsel and assistance in the drafting and ultimate approval of the legislation.

34. Armand Arabian, *Rapists Find the Judicial Odds Changing*, L.A. TIMES, Sept. 27, 1978 (morning ed.), at 6-Part II:

If you do report it to anyone, it will be embarrassing for you only," said Danny

Caudillo to his victim, Maria, after he repeatedly and brutally raped her. Unquestionably, the arrogance of this remark is typical of the state of mind of many rapists who believe that the odds are low that they will ever be caught—or, if caught, convicted—or, if convicted, punished in any significant way. But such confidence is no longer justified now that the Legislature has given California a package of laws that treat rape as the vicious crime that it is. An attitude of curative action in the area of rape was indicated early in the 1978 legislative session with the repeal of an archaic requirement that there be independent proof of physical ability to accomplish rape if the accused is under age 14. The passage of AB 2075 by Assemblyman Daniel E. Boatwright (D-Cor.cord) means that the victim's testimony alone will legally suffice to sustain a conviction. Sen. Alan Robbins (D-Van Nuys) presented a package of rape bills that covered areas such as the privilege of confidence between the victim and the sexual-assault counselor (SB 1713), a study concerning psychiatric counseling of convicted rapists in state prison (SB 1716), attendance at the preliminary hearing of supportive person of the victim's choice (SB 1717) and the extension of rape-evidence protections to victims of forcible sodomy and oral copulation (SB 1718). Sen. H. L. Richardson (R-Arcadia) presented SB 1840, which attempted, among other things, to lengthen sentences of multiple rapists, and to give law-enforcement officials better knowledge of the whereabouts of known sex offenders. Having passed the Senate, these and other bills were heard by the Assembly Criminal Justice Committee, which has long been considered a graveyard for "law-and-order" legislation. However, the committee approved Sen. George Deukmejian's (R-Long Beach) SB 1479, which prohibits the granting of probation or suspension of sentence to anyone convicted of rape by force or violence—in other words, mandatory sentencing to state prison. SB 1479 passed through the full Assembly on a 71-0 vote, and rests now on the desk of Gov. Brown. If signed into law, it will represent a milestone in rape reform, and may well set a precedent for other states to emulate. A companion bill awaiting Brown's signature, Deukmejian's SB 1640, covers the neglected areas of "artificial rape," such as rape by use of foreign objects. It addresses such crimes the so-called "Born Innocent" case in which a San Francisco 9 year old was raped by four children using a beer bottle—an assault similar to one they had seen in a television movie. SB 709, already signed into law, increases the penalties for rape from three, four or five years to higher base terms of three, six or eight years. On the other hand, the Assembly Criminal Justice Committee displayed great callousness in refusing to extend rape-evidence protections to other categories of sexual assault. If a defendant is charged with rape, the alleged victim's prior background and social history generally cannot be explored in the trial. At least 35 states have followed California's lead in this regard. But if the assailant chooses forms of sexual assault other than conventional rape, the protection does not apply. Victims do not choose how they are assaulted, and the legislators' refusal to give them equal protection was inexcusable. Robbins' bills on victim/counselor privilege and attendance of supportive person at the preliminary hearing met with a similar fate in the committee. After considerable struggle, Richardson's bill calling for longer sentences was also defeated. A controversial aspect in the mosaic of rape-law reform developed in June when the California Supreme Court announced its decision in *People v. Daniel Caudillo*. There, in a 5-2 decision, the court refused to interpret the language "great bodily injury" to include a rape victim's psychological and emotional trauma. In my view, the position taken by the majority was entirely correct as an interpretation of the existing law, and Chief Justice Rose Elizabeth Bird has suffered unwarranted attacks for her unemotional concurring opinion. Before that decision, Assemblyman Eugene T. Gualco (D-Sacramento) had sponsored a bill to take such mental trauma into account at the time of sentencing. It called for an additional three years in prison after the base term was served. That bill also died in the Assembly Criminal Justice Committee. The Caudillo case has now passed the quill back to the Legislature. The outcry after the Supreme Court decision indicates that the violence suffered by this category of victim will no longer go unnoticed or unattended. The problem is a major one. Last year, in Los Angeles alone, there were 2,360 reported rapes, an increase of 13.3% over the previous year. But a recent Justice Department report indicates that only one complaint

After some further political battles, the bill cleared both houses of the California legislature. On September 17, 1980, Governor Edmund G. Brown, Jr., signed the bill into law.³⁵ Thus after four years of persistent effort, California became the first and only state in the nation to provide a confidential privilege to rape victims communicating with their counselors.

The California statute is contained in sections 1035 through 1036.2 of the Evidence Code.³⁶ Somewhere in its legislative drafting, it became entitled the Sexual Assault *Victim-Counselor Privilege*, rather than my proposed *Counselor-Victim Privilege*. Many other states labeled it correctly. My efforts to change it met at long last with success in 2006.³⁷

As of the publication of this article, twenty nine states have adopted whole or some form of similar protection for counselors of rape victims. They include Alabama, Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Utah, Vermont, Washington, Wisconsin, and Wyoming.³⁸ Twenty one states lack coverage to date, including Arizona, Arkansas, Delaware, Georgia, Idaho, Kansas, Maryland, Mississippi, Missouri, North Dakota, Nebraska, Ohio, Oklahoma,

in four results in an arrest, and only one in 60 results in a conviction. Thus, while 56,000 rapes are reported nationally to the police each year, the actual number of victims appears to be closer to 250,000. Nevertheless, as the trend toward reporting the crime of rape increase, victims should be heartened by lawmakers' efforts that herald a heightened awareness of, and realistic response to, the reality of rape. It will always be embarrassing for the Marias to report their rapes. But, then, the convicted Dannys will be paying a heavier price. The odds are changing.

Id.

35. CAL. EVID. CODE §§ 1035-1036.2 (West 2009) ("Sexual Assault Counselor-Victim Privilege").

36. *Id.*

37. *Id.* I credit state senator Sheila James Kuehl for her assistance along with the Senate Judiciary Committee.

38. ALA. R. EVID. 503a; ALASKA. STAT. §§ 09.25.400, 12.45.049, 18.66.200, 18.66.250 (2007); CAL. EVID. CODE § 1035.8 (West 2009); COL. REV. STAT. §13-90-107(1)(k)(i) (2007); CONN. GEN. STAT. § 52-146k (2007); D.C. CODE §§ 14-307, 7-1201.01(11)(e) (2007); FLA. STAT. § 90.5035 (2007); HAW. REV. STAT. § 505.5 (2007); 735 ILL. COMP. STAT. 5/8-802.1 (2007); IND. CODE § 35-37-6-9 (2007); IOWA CODE § 915.20a (2007); KY. R. EVID. 506; LA. CODE EVID. ANN. art. 510; 16 (2007); ME. REV. STAT. ANN. § 53-a (2007); MASS. GEN. LAWS ch. 233, § 20j (2007); MICH. COMP. LAWS § 600.2157(a) (2007); MINN. STAT. § 595.02 (2007); MONT. CODE ANN. § 37-23-301, 46-14-217 (2007); NEV. REV. STAT. §§ 49-2542 to 49.2549 (2007); N.H. REV. STAT. ANN. § 173-c:1-2 (2007); N.J. STAT. ANN. 2a:84a-22.15 (West 2007); N.J. R. EVID. 517; N.M. STAT. § 31-25-3 (2007); N.Y. C.P.L.R. 4510 (McKinney 2007); N.C. GEN. STAT. §§ 8-53.8, 8-53.12; 42 (2007); 42 PA. CONS. STAT. § 5945.1 (2007); UTAH CODE ANN. §78.3(c)(3)-(4) (2007); VT. STAT. ANN. tit. 12, § 1614 (2007); WASH. REV. CODE. § 70.125.065 (2007); WIS. STAT. § 905.045 (2007); WYO. STAT. ANN. § 1-12-116 (2007).

Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, and West Virginia.

Having reviewed the efforts of those jurisdictions which have enacted this type of protection, I am of the view that the California statutes embody the model language, and should be followed by other enacting jurisdictions.

Article 8.5 of California's Evidence Code, now known as the Sexual Assault Counselor-Victim Privilege, contains Evidence Code sections 1035 through 1036.2. The first several sections define the terms "victim," "sexual assault counselor," and "confidential communication" between the two.³⁹ The victim holds the privilege with some exceptions, including that if the victim has a guardian or conservator, that individual holds the privilege.⁴⁰ The heart of the privilege is found in two sections, which in their entirety read as follows:

§ 1035.8. Sexual assault counselor privilege

A victim of a sexual assault, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a sexual assault counselor if the privilege is claimed by any of the following:

- (a) The holder of the privilege;
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the sexual assault counselor at the time of the confidential communication, but that person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.⁴¹

§ 1036. Claim of privilege by sexual assault counselor

The sexual assault counselor who received or made a communication subject to the privilege under this article shall claim the privilege if he or she is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1035.8.⁴²

39. CAL. EVID. CODE § 1035 (West 2009) defines the term "victim," CAL. EVID. CODE § 1035.2 (West 2009) defines the term "sexual assault counselor," and CAL. EVID. CODE § 1035.4 (West 2009) defines what constitutes confidential communication between the sexual assault counselor and the victim.

40. § 1035.6.

41. § 1035.8.

42. § 1036.

There is no corresponding provision in the Federal Rules of Evidence, nor is one currently proposed. In addition, to date no federal court has recognized such a privilege under Federal Rule of Evidence 501.⁴³ However, given the magnitude of the social interest at stake, a party could reasonably ask a federal court to exercise its common-law power under 501 to create such a privilege.

IV. CONCLUSION

*Ignorantia Legis Neminem Excusat.*⁴⁴ This article is intended to review the historical path of this privilege, as well as to stimulate those jurisdictions that have yet to adopt any such privilege into action. It is unconscionable for the legislatures of the absent jurisdictions to deny their citizens this valuable protection and procedure.

Tomorrow is two days late for yesterday's job. There can be no excuse for further delay in implementing national coverage.

43. FED. R. EVID. 501.

44. Ignorance of law excuses no one.
