

Enabling Rape Shield Procedures Under Crime Victims' Constitutional Privacy Rights

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*“Short of homicide, [rape] is the ‘ultimate violation of self.’”*¹

*“It has been said that the victim of a sexual assault is actually assaulted twice-once by the offender and once by the criminal justice system.”*²

In the context of criminal procedure protections for rape victims, the title of this symposium, *Beyond Prosecution: Sexual Assault Victim's Rights in Theory and Practice*, is merely aspirational. It is aspirational because rape victims have not acquired much in the way of procedural rights with respect to confidentiality protections in sexual assault cases. This is true despite thirty years of rape law reform.

It is time to move beyond aspirations and provide for direct victim enforcement of privacy protections. State constitutional rights of victim privacy can be utilized as a foundation. On this foundation, enabling legislation should provide for direct victim enforcement of various confidentiality laws. In this essay, the current rape shield laws serve as the vehicle for examining why victim privacy protections in general should be accompanied by direct victim enforcement. Ultimately, rape victims' procedural rights to participate in both trial level rape shield hearings and pre-trial appellate court review of adverse rulings are portable to other laws protecting crime victims' privacy.

The focus of rape shield law scholarship has been on the nature of the shield and its exceptions. That scholarship has criticized the weaknesses in substantive provisions of rape shield laws. In contrast, this essay focuses on how rape shield laws operate within flawed enforcement procedures. The procedures are flawed because rape shield laws are not presently enforceable by victims, the only people with a personal interest in privacy. Currently, in all but a handful of jurisdictions, rape victims cannot participate in either the trial

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1. *The Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (White, J., dissenting) (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

2. *State v. Sheline*, 955 S.W.2d 42, 44 (Tenn. 1997).

level rape shield hearing or pre-trial appellate review of an adverse trial court ruling. Moreover, such pre-trial appellate review is almost universally denied to the state.

The promise of rape shield legislation to protect rape victims cannot be kept given this sorry state of procedural affairs. The promise of protection is more likely to be met by providing victims with standing. Standing enables victims to directly enforce their personally held rights in appellate courts.

Unlike the anti-rape movement, the general victims' rights movement has pursued direct victim participation in the criminal process. In all jurisdictions, crime victims directly exercise their general victims' rights in trial courts. In jurisdictions where victims have standing to enforce their rights, victims litigate rights violations in appellate courts. General victims' constitutional privacy rights presently range from a broad right of privacy to a more specific right to refuse a pre-trial interview. Additionally, crime victims typically have standing to enforce these rights in trial and appellate courts. Rape victims should have similar standing to directly enforce rape shield protections. This can be achieved by enabling rape shield procedures under victims' constitutional right to privacy.

Absent pre-trial review, rape shield procedures contain an inherent bias against the confidentiality interests of victims. This bias is present because, absent pre-trial review, the only time a rape shield ruling can be reversed is when defendants appeal their convictions. Thus, the only way for trial courts to be reversed on review is when they uphold the shields and defendants' convictions are reversed as a result. Trial courts have an incentive to err in favor of admitting victims' past sexual history because trial court denials of the rape shield protections can never be reversed on pre-trial review. As a result, despite trial court error, victims' personal information of the most private sort will be made admissible with no hope of correction by appellate courts.

With rare exception, it is left to public prosecutors to enforce rape shield evidentiary rules at the trial level. In the best of circumstances, prosecutors object to defendants' introduction of prior sexual history of the rape victim and seek to exclude it at pre-trial hearings. From the perspective of prioritizing confidentiality there are concerns over such exclusive prosecutorial authority. For example, almost all rape shield laws contemplate that prosecutors may themselves seek to introduce evidence of the victims' prior sexual conduct. While introduction of such evidence by prosecutors may be the exception rather than the rule, it demonstrates that when the state takes a position adverse to victims' interests, no one remains to defend victims' confidentiality. Moreover, the state may simply agree with a defendant that evidence is admissible. In either situation there is no champion defending rape victims' confidentiality.

Even if prosecutors were consistently stalwart defenders of victims' confidentiality at the trial level, they are presently unable to enforce rape shield

laws by pre-trial review in almost all jurisdictions. Only two states have statutes explicitly allowing the state to bring interlocutory appeal from a rape shield ruling that is adverse to the victim.³ Neither of these statutes, however, permit interlocutory appeal by victims, the people whose privacy interests are actually at stake. The absence of pre-trial review means that erroneous rulings adverse to the victim have no hope of correction. In contrast, under Arkansas law, the appellate court in *State v Sheard*⁴ relied on a statute granting the state interlocutory appeal from adverse rape shield rulings.⁵ The trial court ruled that it would admit the rape victim's prior sexual history. In the pre-trial phase, the appellate court reversed the trial court.⁶ This holding prevented the erroneous public disclosure and admissibility of a rape victim's prior sexual history.⁷ Nevertheless, *Sheard* is unlikely to be followed in other jurisdictions, as only one other state has a similar statute providing for pre-trial review.

A lack of express appellate court review provisions does not necessarily foreclose interlocutory appeals brought by victims. Victims' interlocutory appeals might be implied from a combination of rape shield procedures and rules governing interlocutory appeals. In *Doe v. United States*,⁸ the United States Fourth Circuit Court of Appeals implied victims' right of direct interlocutory appeal from the federal rape shield procedures which expressly allow the victim to participate in the trial level hearing. In *Doe*, the Fourth Circuit granted the rape victim direct enforcement of an adverse trial court rape shield ruling. The court granted an interlocutory appeal to a rape victim from the District Court's pre-trial denial of the protections of the federal rape shield law. The defendant had asserted that the court did not have jurisdiction to hear the appeal.⁹

In reaching its holding, the court observed that "[t]he text, purpose, and legislative history of [the rape shield rule] clearly indicate that Congress enacted the rule for the special benefit of victims."¹⁰ The court also noted that the rule made no reference to appeal.¹¹ Nevertheless, the Fourth Circuit held

3. ARK. CODE ANN. § 16-42-101(3) (Michie 2003). In Arkansas, "[i]f the prosecuting Attorney is satisfied that the order substantially prejudices the prosecution of the case, an interlocutory appeal on behalf of the state may be taken . . ." *Id.*; see OR. REV. STAT. § 40.210(4)(c) (2003). The law in Oregon is that "[a]n order admitting evidence under this subsection may be appealed by the government before trial." OR. REV. STAT. § 40.210(4)(c).

4. 870 S.W.2d 212, 214-15 (Ark. 1994) (reversing trial court pretrial ruling admitting rape victims' prior sexual conduct).

5. *Id.* at 213.

6. *Id.* at 214.

7. *Id.* at 213-14.

8. 666 F.2d 43, 45 (4th Cir. 1981) (granting review of victims' review of pretrial order introducing evidence of sexual history), *cited with approval in* *McDaniel & United States v. McKenzie*, 861 F.2d 714 (4th Cir. 1988).

9. *Id.*

10. *Id.* at 46.

11. *Id.*

that the remedy was “implicit as a necessary corollary of the [rape shield] rule explicit protection of the privacy interests Congress sought to safeguard.”¹² The court found significant the fact that “[n]o other party in the evidentiary proceeding shares these interests to the extent that they might be viewed as a champion of victims’ rights.”¹³ The court determined that the congressional intent would be “frustrated” if rape victims “are not allowed to appeal an erroneous evidentiary ruling.”¹⁴

The Fourth Circuit then turned to the law governing review of final decisions from trial courts. The *Doe* court’s analysis included review of the United States Supreme Court precedent holding that the requirement of finality in a statute be given a “practical rather than a technical construction.”¹⁵ Furthermore, Supreme Court precedent instructed that the important considerations for determining finality are “the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.”¹⁶ Following the instructions of the Supreme Court, the Fourth Circuit balanced the factors noting that the “inconvenience and costs associated with permitting the victim to appeal are minimal . . . [and] no greater than those resulting from government appeals of suppression orders”¹⁷ Furthermore, “because the [rape shield] rule provides for pre-trial evidentiary hearings, appeals are unlikely to involve significant postponements of criminal trials.”¹⁸ The court noted that in the instant case the appeal was heard with no delay of the criminal trial.

The court observed that on the other side of the balance was the “manifest . . . injustice to the rape victims in delaying an appeal” until final judgment. Absent immediate appeal, “victims aggrieved by the court’s order . . . have no opportunity to prevent their privacy from invasions prohibited by the rule.”¹⁹ The court opined that appeal following judgment “is no remedy, for the harm that the rule seeks to prevent already will have occurred.” Having concluded that appeal was in keeping with Congressional intent to safeguard rape victims’ privacy interests, that no other party could “champion . . . the victim’s rights” and that the test of practical finality was met, the court granted the victim standing to bring the interlocutory appeal.²⁰

12. *Doe*, 666 F.2d at 46.

13. *Id.*

14. *Id.*

15. *Id.* (citing *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964)).

16. *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Doe*, 666 F.2d at 46. *Doe*, however, does not provide for interlocutory appeal by the state. Where the state is willing to appeal pre-trial it should be allowed to do so. Many victims cannot afford counsel and a state appeal may be the victims only practical hope of preserving privacy. Where the state refuses to appeal an adverse ruling, the victim should be allowed the opportunity to retain a paid or pro bono lawyer to champion

Unlike the federal rape shield law, there is nothing in the rape shield procedures of most jurisdictions that allows for the direct participation of the victim in the trial level hearing. In effect, victims who cannot participate in trial court hearings are barred from making an adequate record for review. In the event of collusion between the parties to defeat the rape shield, or in the event that the state creates an inadequate record, victims are left without an adequate record on review. Without the ability to create an adequate record, the critical foundation of the interlocutory appeal is missing. The Fourth Circuit's observation, that "[n]o other party in the evidentiary proceeding shares these interests to the extent that they might be viewed as a champion of victims' rights,"²¹ applies equally to trial court rape shield hearings. A prerequisite to direct rape victim interlocutory appeal is the direct participation of the victim in the trial level hearing.

Only two states, North Dakota and Utah, clearly provide the same procedural trial level participation to victims as does the federal rule. North Dakota requires notice to the victim and "afford[s] the victim and parties a right to attend and be heard."²² Utah provides that the court must "afford the alleged victim and the parties a right to attend and be heard."²³ In addition, Louisiana, also seems to allow victim participation. Louisiana provides that "the victim has a right to attend the hearing and may be accompanied by counsel."²⁴ There is some reason to believe that these three states would permit victims' interlocutory appeal because, like the federal rape shield procedure, these states allow for victim participation in the trial level rape shield hearing.

In the forty-seven states not providing for victim participation in the trial level hearing it may be difficult to persuade the courts that victims' interlocutory appeals are implicit in rape shield laws. In *Commonwealth v. Yelle*,²⁵ the Massachusetts Supreme Judicial Court refused to imply that the state or the victim could bring an interlocutory appeal from a rape shield ruling adverse to the victim.²⁶ The Massachusetts court opined that the state's argument that interlocutory appeal was necessary to protect the victims' privacy right "prove[d] too much."²⁷ The court held that no implicit interlocutory appeal could be found in the interlocutory appeal statute or the rape shield law.²⁸ Furthermore, the court determined that the victim's right of privacy coupled with the Commonwealth's interest in preserving prosecution

her cause.

21. *Id.*

22. N.D. R. EVID. 412(b)(2).

23. UTAH R. EVID. 412(c)(3).

24. LA. CODE OF EVID. art. 412(E)(2).

25. 459 N.E.2d 461 (Mass. 1984).

26. *Id.* at 466-67.

27. *Id.* at 466.

28. *Id.* at 466-67.

were inadequate reasons to imply interlocutory appeal.²⁹

A search of the case law since the *Doe* opinion issued sixteen years ago reveals no other jurisdictions citing it for the proposition that interlocutory appeal is available. In fact, the *Yelle* case, decided before *Doe*, is the only state appellate court opinion on the issue. To the extent that this lack of reported cases is a useful measure, it reveals that prosecutors have not aggressively tested the availability of interlocutory appeal. A valid reason for this is that a discretionary interlocutory appeal statute is not generally available to the state in a criminal prosecution, absent an express provision allowing for it in specified circumstances.³⁰ For example, in the *Doe* case, the government did not appeal, but supported the victim's efforts to appeal.³¹ Apparently, the government was precluded, absent other express statutory authority, from being able to pursue an interlocutory appeal of an adverse rape shield ruling. Similarly, in the *Yelle* case, discussed above, the Massachusetts court denied the state an interlocutory appeal absent an express provision.³²

The absence of statutory authority allowing direct rape victim enforcement of confidentiality laws identifies the dominance of other values over victims' confidentiality interests. The most dominant value in rape shield procedures is court efficiency. This dominance is exemplified by the denial of victim participation in the rape shield trial level hearing and the inability of the state or victim to seek review. The next strongest value is prosecutorial control, exemplified by the exclusion of the victim from participation in the trial level hearing. The value of victim privacy is suppressed in these procedural choices. *Doe* provides a lonely example of law acknowledging the primary value of victims' privacy interests. More typical are jurisdictions which do not provide for direct victim enforcement of confidentiality laws. These jurisdictions inappropriately minimize victims' interest in confidentiality. For example, even in Arkansas, where prosecutors are allowed to bring interlocutory appeal, the authorizing language is telling: "[i]f the *prosecuting Attorney* is satisfied that the order *substantially prejudices the prosecution of the case*, an interlocutory appeal on behalf of the state may be taken . . ."³³ An equally important standard that appropriately prioritizes rape victims' privacy could be worded: if the *victim* is satisfied that the order *substantially invades her privacy*, an interlocutory appeal on behalf of the victim may be taken.

Victims cannot be heard at the trial level hearing in most jurisdictions. Neither states nor victims can challenge erroneous trial court rulings admitting

29. *Yelle*, 459 N.E.2d at 466-67.

30. Michelle J. Anderson, *From Chastity to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 5, 95 nn.230-32 (2002) (recognizing review rulings typically taken only from defendants' convictions when shield enforced below).

31. *Doe v. United States*, 666 F.2d 43, 45 (4th Cir. 1981).

32. *Commonwealth v. Yelle*, 459 N.E.2d 461, 463 (Mass. 1984).

33. ARK. CODE ANN. § 16-42-101(3) (Michie 2003) (emphasis added).

the prior sexual histories of victims. This reveals that both the values of limiting prejudice and safeguarding victims' privacy are trumped by the courts' interest in efficiency. The traditional efficiency interest of the courts in limiting pre-trial review of relevancy determinations continues to rule the day in spite of the *Doe* court's observation that efficiency concerns are greatly exaggerated in the rape shield context.³⁴ In the context of the *Doe* opinion, court efficiency interests should yield to the more important rape victim confidentiality interests.³⁵ It is true that standing is not typically granted for pre-trial review of relevancy determinations, but the privacy interest of rape victims in rape shields are important and unique enough to warrant different treatment.

The absence of express statutory authority granting rape victims participation in trial and appellate level rape shield procedures may reveal that the anti-rape movement has been asleep at the procedural switch. In contrast, its cousin—the general victims' rights movement—has steamed on down the track by pursuing direct enforcement through constitutional rights. Looking to victims' constitutional rights, no *appellate* court has ever denied victims the ability to exercise participation rights at the trial level. There are many contexts in which rape victims exercise general victims' rights. For example, in Florida, a sexual assault victim, relying upon the state constitution, exercised her right to attend the trial of the offender.³⁶ In California, a sexual assault victim exercised the right to give a sentencing recommendation.³⁷ The Massachusetts Supreme Court affirmed that a sexual assault victim can exercise the general victims' right to a "speedy disposition."³⁸ In a New Mexico case, a rape victim invoked a victim's broad state constitutional right to "privacy" in a failed attempt to prevent disclosure of medical records.³⁹ Rape victims should similarly be allowed to directly enforce rape shield protections.

General crime victims' rights are subject to review through various mechanisms, predominantly writs. In United States House Resolution 5107, recently enacted into law, victims' rights are set forth and provide for review by non-discretionary mandamus. Several states expressly provide victims the ability to directly enforce rights. For example, the constitution of South Carolina provides that enforcement of victims' rights is to be sought through mandamus.⁴⁰ The Nevada constitution provides that an action to compel the

34. *Doe*, 666 F.2d at 46. "The inconvenience and costs of permitting the victim to appeal are minimal." *Id.*

35. *Id.*

36. *Bellamy v. State*, 594 So. 2d 337, 338 (Fla. Dist. Ct. App. 1992) (analyzing Florida's Constitution, article I § 16(b)).

37. *People v. Jones*, 14 Cal. Rptr. 2d 9, 10 (Cal. Ct. App. 1992).

38. *Hagen v. Commonwealth*, 772 N.E.2d 32, 37 (Mass. 2002) (giving victims ability to address trial court, but ruling speedy disposition right inapplicable under facts).

39. *State v. Gonzales*, 912 P.2d 297, 301 (N.M. 1996).

40. S.C. CONST. art I, § 24(B). The Constitution provides "the rights created in this section may be

government to comply with the right is available.⁴¹ Utah law specifically provides that a victim may invoke mandamus to enforce their rights.⁴²

Other states provide different methods of enforcement. Arizona has abolished the old form of writs and in its place created “special actions,” which crime victims may bring to enforce their rights.⁴³ Maryland law provides the right to appeal from an interlocutory or final order that denies or fails to consider victims rights.⁴⁴ In addition to mandamus, Utah statutes provide for declaratory judgment actions, mandamus and appeal.⁴⁵ Michigan statutes allow a victim to appeal to a circuit court judge the decision of the parole board to grant parole.⁴⁶ By granting victims “standing to enforce the rights,” the Texas constitution implicitly provides for some sort of review procedure.⁴⁷ Florida and Indiana statutes grant victims standing.⁴⁸ In the above-mentioned nine state jurisdictions with express review or standing provisions, review of some kind is plainly available to victims. Furthermore, the constitutional status of victims’ rights in many other state jurisdictions implicitly allows victims standing to seek review via writ.⁴⁹ Similarly, standing should be available to rape victims for direct enforcement of confidentiality interests.

Despite healthy differences, the general victims’ rights movement and the anti-rape movement share an interest in effective victim law reforms. The lack of government compliance with, and enforcement of, victim laws has frustrated both movements. Both movements have struggled to achieve consistent law

subject to a writ of mandamus, to be issued by any justice of the Supreme Court or Circuit Court Judge to require compliance” of government officials. *Id.*

41. NEV. CONST. art I, § 8(4) (stating person may compel public officer or employee to carry out any victim right).

42. UTAH CODE ANN. § 77-38-11(2)(a)(i) (2004) (declaring “victim may bring an action for . . . a writ of mandamus”).

43. ARIZ. REV. STAT. § 13-4437 (2004). The statute provides:
the victim has standing to seek an order or to bring a special action mandating that the victim be afforded any right or challenge and order denying any rights guaranteed to victims under the victims’ bill of rights, article II, Sec. 2.1, Constitution of Arizona, any implementing legislation or court rules.

Id.

44. MD. CODE ANN., CRIM. PROC. § 11-103(b) (2004). The statute provides: “[a] victim of violent crime . . . may file an application for leave to appeal . . . from an interlocutory or final order . . .” *Id.*

45. UTAH CODE ANN. § 77-38-11(2)(a)(i). The Code provides that “the victim [may] bring an action for declaratory relief or for a writ of mandamus defining or enforcing the rights of victims and the obligations of government entities under [the Rights of Crime Victims Act].” *Id.*

46. MICH. COMP. LAWS § 791.234(9) (2004). “The action of the parole board in granting a parole is appealable by . . . the victim of the crime for which the prisoner was convicted. The appeal shall be to the circuit court in the county from which the prisoner was committed, by leave of the court.” *Id.*

47. TEX. CONST. art I, § 30(e).

48. FLA. ST. ANN. § 960.001(7) (West 2002). “The victim of a crime ha[s] standing to assert the rights of a crime victim which are provided by law.” *Id.*; see IND. CODE ANN. § 35-40-2-1(1) (2004). “A victim has standing to assert the rights established by this article.” IND. CODE ANN. § 35-40-2-1(1).

49. Douglas E. Beloof, *The Third Wave of Crime Victims’ Rights: Standing, Remedy and Review*, BYU L. REV. (forthcoming 2005).

reform indirectly through prosecutors. Having enacted some initial law reforms, both movements have experienced significant non-compliance with those reforms.⁵⁰ For both movements, the enforcement of victim laws is stymied in similar ways. Government, in the form of police, prosecutors or judges or other executive branch agencies (such as parole authorities), neglects or refuses to comply with victims' laws. Despite different emphases, both movements seek to fundamentally reform a criminal process that has failed to adequately consider and enforce their interests.

The anti-rape and general victims' rights movements have been and continue to be distinct. The anti-rape movement confronts, as it must, the cultural myths that uniquely exist in the context of rape. Manipulation of these myths, along with humiliation and victim blaming, are typical informal defenses to rape charges. Blaming victims in rape cases may be an effective means to secure acquittal. In contrast, blaming a robbery victim is typically ineffective because robbery is unaccompanied by the same pernicious cultural myths. For the anti-rape movement, the focus of criminal law and procedure reform must remain on protecting rape victims and improving access to criminal justice.

There are persuasive reasons why the anti-rape movement needs to keep a separate identity and mission from the more generalized victims' rights movement. The gender issue is foremost in sexual assault issues, and is usually background in general victimization. The unique cultural bias and shaming that accompanies rape cases needs its own focused opposition. The history of rape law is a history of the law used as a tool to protect rapists, rather than the raped. Focused efforts of the anti-rape movement are needed to overcome this despicable legacy. A separate anti-rape movement is needed to battle the myths of rape, to explain rape dynamics, and to focus particular attention on procedural accommodations that protect rape victims.

Despite the importance of separateness, the movements should not be slavish to it. Although the nature of stigma and abuse in rape cases is profound and unique, a criminal process that mistreats and excludes other types of victims also inflicts secondary victimization. Rape victims, as well as victims of other crimes, should all have standing to assert and defend their privacy protections.

As both the general victims' rights movement and the anti-rape movement are involved in establishing privacy rights, the question arises: when should a right be generic to all victims or be particular to rape victims? The choice of whether victims' rights should be specific to sexual assault victims or generic to all victims also involves a pragmatic assessment. To the extent appellate judges wallow in cultural biases against rape victims, rape reform subsumed in

50. CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASS ROOTS REVOLUTION AND ITS IMPACT* (1992); National Victim Center, *Comparison of White and Non-White Victim Responses Regarding Victims Rights*, reprinted in part in DOUGLAS E. BELOOF, *VICTIMS IN CRIMINAL PROCEDURE* 690-93 (1993) (noting in strong legal rights states 63.4% of whites and 42.5% of non-whites given right to notice of plea bargains).

generic reforms might have a greater chance of withstanding legal challenges. For example, one generic victims' right is the right to refuse a pretrial interview. Such a law protects all victims, including rape victims, thus making it more difficult for judicial biases against rape victims to undermine the law.

There are benefits to enacting a broad state constitutional right to privacy for all victims. Under this constitutional authority, legislation could enable the constitution with specific statutes protecting privacy and victim participation in confidentiality procedures. A rape shield procedure that included victim participation would be supported by constitutional authority, as would, for example, victims' defense of evidentiary privileges, such as rape crisis counselor privileges. This constitutional right of victims to privacy currently exists in Idaho, Illinois, Michigan, New Mexico, Texas, and Wisconsin.⁵¹ In these states, victims' constitutional rights of privacy already provide the foundation for future enabling statutes granting rape victims' direct enforcement of rape shield laws.

In conclusion, substantive rape shield protections will not attain their full potential until rape victims are granted direct enforcement in trial level hearings and on pretrial review. If rape victim privacy in prior sexual conduct is worth protecting through rape shield laws, procedures should ensure that trial courts get it right. The structure of a contest of relevance between two parties having no personal interest in confidentiality is inherently flawed. It is flawed because it marginalizes victims' personal interest in rape shield protections. If victim privacy were made a constitutional right and enabling legislation gave victims the right to directly enforce rape shield statutes, victims would be a party for purposes of defending the rape shield in the trial court. Furthermore, if the trial court abridged the shield, the victim would be a party on review directly enforcing the shield.⁵²

As the Fourth Circuit in *Doe* opined: "[N]o other party in the evidentiary proceeding shares these [victim confidentiality] interests to the extent that they might be viewed as a champion of victims rights."⁵³ In the bright illumination of this self-evident truth, the status quo should be abandoned in favor of

51. IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; MICH. CONST. art. I, § 24; N.M. CONST. art. II, § 24; TEX. CONST. art. I, § 30; WIS. CONST. art. I, § 9m. It is possible to provide victims with standing in rape shield procedures even without constitutional privacy provisions. Such codifications would not have the support of a constitutional right. Nevertheless, such reforms are worth pursuing.

52. Furthermore, rape shield rulings, where reviewed, are examined under an abuse of discretion standard. In *State v. Babbs*, in an interlocutory appeal by the state under the rape shield law, the appellate court held that the trial court did not abuse its discretion in determining that evidence of prior sexual conduct was relevant to the issue of consent and therefore admissible. *State v. Babbs*, 971 S.W.2d 774, 775 (Ark. 1998). Thus, confidentiality protections are weakened by a standard of review that corrects error only when judges abuse their discretion. In the context of such important confidentiality protections, the abuse of discretion standard significantly limits the potential for findings of error. Where the possibility of error is so limited, it may make little difference that pre-trial review of adverse rape shield rulings is available.

53. *Supra* note 8 and accompanying text.

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enabling state constitutional provisions by establishing victims' trial level participation and standing on review to directly enforce victim confidentiality laws.