#2017-009

NHCADSV Statement in Support of NH Supreme Court Proposed Rule Protecting Victims' Identities

The New Hampshire Coalition Against Domestic and Sexual Violence strongly supports adoption of a proposed Supreme Court rule that would allow crime victims to be referenced in pleadings by an alias, pseudonym, or other designation. Crime victims suffer tremendous losses to their physical safety, their property, their privacy, and even their dignity. For many victims, the decision regarding whether to report to police and whether to participate in the criminal justice process hinges on one key factor: will this invasion into their private life be made worse if their case is prosecuted? Research and our everyday experience with over 15,000 domestic violence and sexual assault victims every single year in New Hampshire have proven that for some victims, interacting with the criminal justice system causes secondary traumatization. When a victim is required to disclose their identity, this disclosure is yet another loss of control over their everyday life, added on to the many losses experienced at the hands of their offender. When victims are named without their consent, in conjunction with a description of the horrible things done to them, victims are often shamed and embarrassed, experience greater self-blame, and encounter negative consequences at school and at work. Victims are often faced with the near impossible choice of pursuing justice in the courts at the expense of their own privacy, or forgo seeking accountability for the offender to preserve their privacy.

The need for victims to participate anonymously in criminal justice proceedings is greater today than ever. Historically, when the victim's identity was protected by the bricks and mortar courthouse, that information was only readily available to those people who came to a courthouse or a clerk's office. Today, with a few keyboard strokes, the identity of someone who has been mercilessly raped, brutally beaten, or even murdered, can be shared around the world in an instant. Sadly, we know of instasnces around the country where the pain of the disclosure of a victim's identity, particularly for crimes like teen bullying, has been so severe that the victim decided that the only way out was to end his or her young life.

The court system has many laudable goals: offender accountability, community safety, as well as public access to information about crimes. However, none of these goals is absolute, and all should be balanced against the rights of victims. In the case of crime victims' identity, the victims' federal constitutional and state statutory rights to privacy should outweigh the need to publicize an individual's name.

We can provide a fair criminal proceeding and not further harm victims all at the same time.

Victims should never have to choose between seeking justice and protecting their privacy. Disclosing a victim's name in this day and age of instant online sharing of information re-victimizes people who have lost so much.

Attached you will find two publications put out by the National Crime Victim Law Institute on the importance of allowing victims to be identified pseudonymously. We are very happy to conduct any additional research or put the Court in touch with any of our national experts from the victims' rights communities who have been working on this issue nationwide.

Respectfully,

Lyn M. Schollett, J.D.
Executive Director
New Hampshire Coalition Against Domestic and Sexual Violence

NCVLI

NATIONAL CRIME VICTIM LAW INSTITUTE

PROTECTING, ENFORCING & ADVANCING VICTIMS' RIGHTS

Protecting Victims' Privacy Rights: The Use of Pseudonyms in Criminal Cases[i]

Some victims may welcome being publically identified as a part of criminal proceedings, but for those victims who may want or need to protect their privacy, the use of pseudonyms can be a powerful tool.[ii] The availability of such a tool is important because the loss of privacy can have serious consequences for victims. Unwanted publicity can subject victims to public scorn and harassment and to other forms of revictimization at the hands of the justice system—often referred to as "secondary trauma" or "secondary victimization."[iii] Compelling disclosure of a victim's identity may also
weaken confidence in the criminal justice system as a means to protect and serve the public. Thus, allowing victims to proceed by pseudonym in criminal proceedings not only helps prevent "secondary victimization," but also assists with the proper functioning of the system.

Use of Pseudonyms in Criminal Cases: Why It Matters

"In the aftermath of crime, participation in the criminal justice system can be beneficial for crime victims."[iv] But for some victims, interactions with justice system personnel and processes can cause secondary victimization, which has been associated with increased posttraumatic stress symptoms and other physical and mental distress.[v] One source of such harms can be the unwanted publicity and loss of control experienced when victims' identities are revealed as part of the criminal justice process without their consent.[vi] The use of pseudonyms by victims may reduce the risk of this revictimization at the hands of the justice system.

The consequences associated with a crime victim's loss of anonymity in justice proceedings may be particularly severe now that public access to criminal proceedings has been radically transformed by widespread use of the Internet. As more jurisdictions make public records available online, the reality of court records existing in "practical obscurity," available only to those individuals willing and able to seek them out at the local courthouse, is becoming a thing of the past.[vii] Today, anyone can retrieve a variety of records simply by typing a name into a

search engine, and the existence of e-mail, social networking websites like Facebook and Twitter, as well as blogs, means this information can then be shared with thousands all over the world in an instant. Even accidental disclosure of information can become permanent in the public sphere once it enters the Internet.[viii]

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[i] This *Victim Law Article* discusses the use of pseudonyms to protect a victim's identity in criminal proceedings. For more information about the use of pseudonyms by victims in civil proceedings, see *Protecting Victims' Privacy Rights: The Use of Pseudonyms in Civil Law Suits*, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), July 2011, *available at* http://law.lclark.edu/live/files/11778-protecting-victims-privacy-rights-the-use-of. For more information or to submit a request for technical assistance regarding these or other strategies to protect victim privacy, please visit NCVLI's website, www.ncvli.org.

[ii] Depending upon the nature of the crime charged and the size of the community in which the crime occurred, the victim may be readily identifiable even when referred to only by initials. For example, with intra-familial or other crimes that require or imply a particular relationship between the defendant and the victim—such as domestic violence or incest—knowledge of the defendant's name and the victim's initials may be enough to identify the victim. For this reason, it is a best practice to request that the victim proceed by pseudonym. In cases where the victim and defendant are members of the same family, it may be necessary to ask the court to also permit the defendant and other family members to be identified by pseudonym. *See Commonwealth v. Hartnett*, 892 N.E.2d 805, 808 (Mass. App. Ct. 2008) (explaining that "we employ a pseudonym for the victim. To further insulate his identity, pseudonyms also have been assigned to the family members discussed in this opinion."). Also, although motions to seal and for protective orders may serve as alternative procedures to help protect victim privacy, these procedures—alone—do not provide the same level of protection for the victim. For example, seals can be lifted and in some jurisdictions they are routinely lifted at the end of the case.

[iii] People are "harmed in a significant, cognizable way when their personal information is distributed against their will." Ann Bartow, *A Feeling of Unease About Privacy Law*, 155 U. Pa. L. Rev. PENNumbra 52, 61 (2007) (critiquing a recent article on privacy and arguing that it fails to adequately label and categorize the very real harms of privacy invasions). *See also generally*, *Polyvictims: Victims' Rights Enforcement as a Tool to Mitigate "Secondary Victimization" in the Criminal Justice System*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), March 2013, at 1 & 4 n.6, *available at* http://law.lclark.edu/live/files/13798-polyvictims-victims-rights-enforcement-as-a-tool (describing some of the deleterious effects of secondary victimization on victims and the proper administration of justice); Suzanne M. Leone, *Protecting Rape Victims' Identities: Balance Between the Right to Privacy and the First Amendment*, 27 New Eng. L. Rev. 883, 909-10 (1993) (A victim's right to control information about him or herself "constitutes a central part of the right to shape the 'self' that any individual presents to the world. It is breached most seriously when intimate facts about one's personal identity are made public against one's will . . . in defiance of one's most conscientious efforts to share those facts only with close relatives or friends.") (quoting Laurence H. Tribe, *American Constitutional Law* § 12-14, at 650 (1st ed. 1978)); *Commonwealth ex rel. Platt v. Platt*, 404 A.2d 410, 429 (Pa. Super. Ct. 1979) ("The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, and behavior and opinions are to be shared with or withheld from others.") (internal citation omitted).

[iv] Nat'l Crime Victim Law Inst., *supra* note 3, at 1 & 4 n.6 (explaining that "[f]or those victims, participation in the justice system may assist with the healing process, empower them, and provide them with greater safety and protection, public validation of the harm caused by the offenders, and financial compensation through restitution" and citing sources). *See also* Margaret E. Bell et al., *Battered Women's Perceptions of Civil and Criminal Court Helpfulness: The Role of Court Outcomes and Process*, 17 Violence Against Women 71, 72 (2011) (noting that some studies "have in fact found that positive experiences in the justice system are associated with less physical and psychological distress and better posttraumatic adjustment").

[v] Nat'l Crime Victim Law Inst., *supra* note 3, at 1 & 4 nn.5-8 (citing sources).

[vi] *See* Leone, *supra* note 3, at 909-10.

[vii] Elbert Lin, *Prioritizing Privacy: A Constitutional Response to the Internet*, 17 Berkeley Tech. L.J. 1085, 1100 (2002) ("Previously, the physical restraints of time and space prevented gross violations of informational privacy. For instance, paper records are often filed in numerous locations, are easy to misplace or permanently destroy, and require a great deal of effort to gather and sort.").

[viii] *See* Kellie Wingate Campbell, *Victim Confidentiality Laws Promote Safety and Dignity*, 69 J. Mo. B. 76, 82 (2013) ("The permanency of information posted to the Internet either legitimately or maliciously makes it even more important to safeguard confidential victim information. . . .").

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NCVLI
NATIONAL CRIME VICTIM LAW INSTITUTE
Protecting, Enforcing, & Advancing Victims' Rights

Violence Against Women
Bulletin

July 2011

LEGAL PUBLICATIONS PROJECT OF THE NATIONAL CRIME VICTIM LAW INSTITUTE AT LEWIS & CLARK LAW SCHOOL

Protecting Victims' Privacy Rights: The Use of Pseudonyms in Civil Law Suits

A minor is included in a sexually explicit commercial video that is widely available across the country. A young boy is molested by his teacher. A wife is raped by her husband. If these victims file a civil lawsuit against their perpetrators using their real names the most intimate details of the crimes and their lives, as recounted in court documents, would be available to the public at large, including through a simple Google search. The availability of this information could not only embarrass the victim, but also cause emotional harm, affect job and educational prospects, and more. Too often, victims are put to this Hobson's choice: seek justice but open one's life to public scrutiny or let injustices stand while preserving one's privacy. While it is well-recognized that there is a presumption in favor of naming parties to a lawsuit stemming from the common law doctrine of open courtrooms, this presumption is not absolute. This paper discusses the propriety of victims using pseudonyms in civil litigation and the importance of victim privacy, while alerting the reader to potential arguments that may be raised when moving to proceed by pseudonym or anonymously in a civil suit. Although this paper relates to civil suits, much of this analysis is also applicable to criminal law. Please contact NCVLI for resources in the criminal context.

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I. Use of Pseudonyms: Why It Matters

A crime victim may need to bring a civil suit in order to, among other reasons, recover damages for emotional distress; gain public acknowledgment of the seriousness of defendant's conduct that is not reflected in the crime of conviction or in a prosecutor's discretionary decision not to spend resources on prosecution; and reveal facts not allowed into evidence in a criminal trial. Requiring victims to disclose their identities when pursuing this avenue of justice inflicts two harms.

First, social scientists have long recognized that victims can experience harm at the hands of the justice system.[1] Refusing victims the opportunity to access justice without sacrificing privacy is one form of re-victimization at the hands of the justice process. "The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which,

his attitudes, beliefs, behavior and opinions are to be shared with or withheld from others."[2] As one Connecticut court summarized, "[t]o force the plaintiff to proceed without the protection of the pseudonym Jane Doe could only subject the plaintiff to additional psychological harm and emotional distress."[3] Re-victimization and harm is particularly acute, and extends beyond mere embarrassment and humiliation, when victims of sex crimes have their identities or other private information revealed when they want it to remain private.[4] As one court stated, "for many victims of sexual abuse . . . public revelation of the abuse, if not sought by them, victimizes them yet again."[5]

Second, putting victims to the Hobson's choice may dissuade many victims from filing meritorious civil claims involving sexual activity.[6] This could impinge on victims' fundamental right to access the courts,[7] and the public's interest in seeing cases decided on the merits.[8]

II. Courts will Allow the Use of Pseudonyms if the Victim's Privacy Considerations Outweigh the Presumption of Openness

The right to privacy is a constitutionally protected interest under the federal Constitution[9] and, in many jurisdictions, state constitutions.[10] This right to privacy encompasses a victim's interest in the non-disclosure of personal information relating to a crime of a sexual nature.[11] A corollary to the right of non-disclosure of personal information is the right to non-disclosure of identifying information when disclosure of private facts is necessary, such as in the prosecution of a civil suit.[12]

Despite the right to privacy, and the merits of proceeding by pseudonym, there are still hurdles to clear. The most important hurdle is the presumption of open courts.[13] Although the Supreme Court has not explicitly held that there is a constitutional right to public access to court proceedings in civil proceedings, it has implied that it attaches.[14] Other courts have similarly found.[15] Regardless of a First Amendment right to open proceedings, there is a common law presumption of openness.[16] The Federal Rules of Civil Procedure, which many states have used as a model in drafting their own procedural rules, also contemplate open judicial proceedings.[17]

The rationales for open proceedings are four-fold. First, open proceedings help ensure fairness in proceedings and discourage "perjury, the misconduct of participants, and decisions based on secret bias or partiality."[18] Second, open proceedings aid administrative convenience.[19] Third, the public has a legitimate interest in knowing "which disputes involving which parties are before the federal courts that are supported with tax payments and that exist ultimately to serve the American public."[20] Fourth, courts express concerns with "basic fairness" if plaintiffs are permitted to proceed by pseudonym but defendants are not.[21]

Be sure to determine whether your jurisdiction has statutory authority or court rules expressly allowing the use of pseudonyms in civil suits. States that statutorily allow pseudonyms include Alaska, Connecticut, Delaware, Florida, Illinois, New Jersey, and Texas.[26]

The presumption of openness is not absolute, however. "[A] trial judge, in the interest of the fair administration of justice, [may] impose reasonable limitations on access to a trial."[22] As one court stated, the presumption of openness "operates only as a presumption, and not as an absolute, unreviewable license to deny."[23] The presumption can be overturned if the court finds that privacy considerations outweigh the interest in open proceedings.

Nearly every Circuit and several state courts have decided the issue of whether civil plaintiffs may proceed anonymously or by pseudonym.[24] In nearly all instances, the courts apply a balancing

test, whereby the court considers the need for anonymity against the presumption of public openness.[25] In other words, a pseudonym may be used if the victim's privacy rights outweigh the presumption of openness.

In conducting the balancing test, a number of factors are considered. These factors vary by jurisdiction but often include whether plaintiffs are required to disclose information of the "utmost intimacy" or that is "highly sensitive and of a personal nature."[27] Courts are most likely to find information is of the "utmost intimacy" in cases involving abortion,[28] the well-being of children,[29] and religion.[30] In some circumstances, courts also find that cases involving the plaintiff's sexual history,[31] claims of sexual harassment or discrimination,[32] and discussions of the plaintiff's medical conditions[33] allow for the use of pseudonyms. Generally, the mere threat of embarrassment is insufficient to allow a plaintiff to proceed anonymously.[34] However, disclosure rarely results in "mere" embarrassment: commentators have recognized that disclosure of information, without the victim's consent, in sexual assault cases can "slow the victim's healing process . . . ."[35] Given the victims' right to privacy and the importance of it, courts may validly exercise their discretion in finding that victims' privacy rights outweigh the presumption of openness.

Practice Pointers

If you are representing a victim in a civil suit that involves a sensitive matter, always consider the use of pseudonyms.

- Determine whether your jurisdiction has a state constitutional right to privacy.
- Determine whether your jurisdiction has statutory authority allowing the use of pseudonyms. (If it does not, contact NCVLI for help crafting model legislation to propose.)
- Remember that the presumption of openness is not absolute!
- Put into evidence that disclosure is not "merely" embarrassment.
- Contact NCVLI for further resources on how best to litigate the issue in civil and criminal courts.

[1] *See, e.g.*, Dean J. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 25 (1987) (describing victims' further victimization by the justice system); *see also* Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Social Justice Research 313, 314 (2002) (noting that "secondary victimization" by the justice system can negatively influence victims' "self-esteem, faith in the future, trust in the legal system, and faith in a just world").

[2] *See Commonwealth ex rel. Platt v. Platt*, 404 A.2d 410, 429 (Pa. Super. Ct. 1979) (internal citation omitted).

[3] *Doe v. Firn*, No. CV065001087S, 2006 WL 2847885, at *5 (Conn. Super. Ct. Sept. 22, 2006).

[4] *See, e.g., id.*; *United States ex. rel. Latimore v. Sielaff*, 561 F.2d 691, 694-95 (7th Cir. 1977) ("The ordeal of describing an unwanted sexual encounter before persons with no more than a prurient interest in it aggravates the original injury."); Andrea A. Curcio, *Rule 412 Laid Bare: A Procedural Rule that Cannot Adequately Protect Sexual Harassment Plaintiffs from Embarrassing Exposure*, 67 U. Cin. L. Rev. 125, 155-56 (1998)) ("There is nothing more intimate than childhood sexual abuse, and nothing as

potentially devastating to a plaintiff than to have that abuse publicly exposed.").

[5] *Globe Newspaper Co. Inc. v. Clerk of Suffolk County Superior Court*, No. 01-5588*F, 2002 WL 202464, at *6 (Mass. Super. Feb. 4, 2002).

[6] *See EW v. N.Y. Blood Center*, 213 F.R.D. 108, 113 (E.D.N.Y. 2003) (granting plaintiff's motion to proceed anonymously because the facts of the case provided no basis for "imposing [the] invasion of privacy as the price for litigating a legitimate private complaint").

[7] *See Chappell v. Rich*, 340 F.3d 1279, 1282 (11th Cir. 2003) ("Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment."); *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (noting access to courts is a fundamental right). Courts and legal scholars alike have recognized that violations of privacy rights implicate an individual's Constitutional right to access courts. *See, e.g., Globe Newspaper Co. Inc.*, 2002 WL 202464, at *6 (noting "[i]f the identit[ies] of these victims are not protected by the courts, then their access to the courts will be severely diminished, because they will not be able to turn to the courts for relief from or compensation of their emotional injuries without aggravating those same injuries."). In essence, as Law Professor Jayne Ressler noted, the result of involuntary loss of privacy is a loss of access to the courts. Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. Kan. L. Rev. 195, 219 (2004) (noting that potential plaintiffs may forfeit the opportunity to seek justice out of fear of disclosure and other would-be plaintiffs may not even initiate litigation).

[8] *See, e.g., Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1073 (9th Cir. 2000) (finding district court abused its discretion in collective FLSA action in denying permission to proceed anonymously to Chinese employees working in garment industry in Mariana Island). This is because victims are more likely to proceed to the merits if they may do so without threat of exposure. *See, e.g., Roe v. Providence Health System-Oregon*, Civil No. 06-1680-HU, 2007 WL 1876520 at *4 (D. Or. June 26, 2007) (noting that the public had an interest in seeing a case decided on the merits, which might be undermined if plaintiffs were mandated to provide their true identity and were thereby deterred from continuing the lawsuit); *L.H. A.Z., K.K, & D.R. v. Schwarzenegger*, No. CIV. S-06-2042 LKK/GGH, 2007 WL 662463, at *18 (E.D. Cal. Feb. 28, 2007) (noting that "[w]hen the willingness to file suit is chilled by fear of retaliatory action, the public interest in seeing the suit move forward on its merits outweighs the public interest in knowing the plaintiffs' names").

[9] *See Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (recognizing that "a right of personal privacy . . . does exist under the Constitution"); *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (noting cases finding protected privacy interests include an "individual interest in avoiding disclosure of personal matters").

[10] *See, e.g.*, Alaska Const. art. I, § 24 ("the right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process"); Conn. Const. art. I, § 8(b)(1) ("the right to be treated with fairness and respect throughout the criminal justice process"); Idaho Const. art. I, § 22 ("the following rights: (1) to be treated with fairness, respect, dignity and privacy"); Ill. Const. art. I, § 8.1(a)(1) ("[t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process"); Ind. Const. art. I, § 13(b) ("the right to be treated with fairness, dignity, and respect throughout the criminal justice process"); La. Const. art. I, § 25 ("shall be treated with fairness, dignity, and respect"); Md. Const. art. 47(a) ("shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process."); Mich. Const. art. I, § 24(1) ("the right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process."); Miss. Const. art. III, § 26A ("shall have the right to be treated with fairness, dignity and respect throughout the criminal justice process"); N.J. Const. art. I, P 22 ("A victim of crime shall be treated with fairness, compassion and respect by the criminal justice system."); N.M. Const. art.

II, § 24(A)(1) ("the right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process"); Ohio Const. art. I, § 10a ("Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process...."); Okla. Const. art. II, § 34 ("To preserve and protect the rights of victims to justice and due process, and ensure that victims are treated with fairness, respect and dignity, and are free from intimidation, harassment or abuse, throughout the criminal justice process, any victim or family member of a victim of a crime has the right to know ....") (listing information rights); Or. Const. art. I, § 42(1) ("[T]o accord crime victims due dignity and respect... the following rights are hereby granted....") (listing rights); R.I. Const. art. I, § 23 ("A victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process."); S.C. Const. art. I, § 24(A) ("To preserve and protect victims' rights to justice and due process..., victims of crime have the right to: (1) be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal and juvenile justice process."); Tenn. Const. art. I, § 35 ("To preserve and protect the rights of victims of crime to justice and due process, victims shall be entitled to the following basic rights.... 2. the right to be free from intimidation, harassment and abuse."); Tex. Const. art. I, § 30(a) ("A crime victim has the following rights: (1) the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process."); Utah Const. art. I, § 28(1) ("To preserve and protect victims' rights to justice and due process, victims of crime have these rights, as defined by law: (a) to be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process."); Va. Const. art. I, § 8-A ("[I]n criminal prosecutions, the victim shall be accorded fairness, dignity and respect by the officers, employees and agents of the Commonwealth...."); Wash. Const. art. I, § 35 ("To ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect, victims of crime are hereby granted the following basic and fundamental rights.") (listing rights); Wis. Const. art. I, § 9m ("This state shall treat crime victims ... with fairness, dignity and respect for their privacy.") (taken from Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. Rev. 255, 262 n.19).

[11] *See, e.g., Michigan v. Lucas*, 500 U.S. 145, 149 (recognizing a state's legitimate interest in protecting rape victims' privacy may outweigh defendant's constitutional right to confrontation); *Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998) (concluding that "a rape victim has a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of rape where no penalogical purpose is being served"); *Anderson v. Blake*, 469 F.3d 910, 914 (10th Cir. 2006) (holding that rape victim has a constitutionally protected privacy interest in videotape depicting her rape).

[12] *See generally Plaintiff B. v. Francis*, 631 F.3d 1310, 1316-18 (11th Cir. 2011) (finding trial court's order mandating disclosure of victims' names in civil lawsuit involving their participation in the *Girls Gone Wild* videos to be in error given the sensitive and highly personal nature of the issues in the suit).

[13] The use of pseudonyms is seen as contrary to the doctrine of open proceedings. *See Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir. 1997) ("Identifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is using their courts."); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067 (9th Cir. 2000) (noting that the use of fictitious names "runs afoul of the public's common law right of access to judicial proceedings").

[14] *Richmond Newspapers, Inc., et al. v. Virginia et al.*, 448 U.S. 555, 580 n.17 (1980) ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.").

[15] *See Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981) ("First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings."); *Luckett v. Beaudet*, 21 F.

Supp. 2d 1029, 1029 (D. Minn. 1998) ("There is a First Amendment interest in public proceedings and identifying the parties to an action is an important part of making it truly public.").

[16] *See, e.g., Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979) (discussing the common law rule of open civil and criminal proceedings); *Doe v. Diocese Corp. et al.*, 647 A.2d 1067, 1070 (Conn. Super. Ct. 1994) (noting the common law right of public access to the courts).

[17] *See* Fed. R. Civ. P. 10(a) ("The title of the complaint must name all the parties . . . ."); *Id.* at Rule 17(a)(1) ("An action must be prosecuted in the name of the real party in interest . . . ."). *But see* Ressler, *supra* note 16, at 215 ("The Rule calls for 'the names of all the parties' but it does not state that the names must be the true and correct legal names of all parties. If that is what the Rule intended, the drafters could have said so specifically.").

[18] *Richmond*, 448 U.S. at 569.

[19] *See Doe v. Indiana Black Expo, Inc.*, 923 F. Supp. 137, 139 (S.D. Ind. 1996) (noting that the interest in public proceedings, in part, stems from considerations of administrative convenience); *A.B.C. Plaintiff-Appellant v. XYZ Corp.*, 600 A.2d 1199, 1201 (N.J. Super. Ct. 1995) (stating that open proceedings aid in aspects of the judicial process such as discovery and the enforcement of money judgments and protects against misidentification of some other party as being involved).

[20] *Black Expo*, 923 F. Supp. at 139; *see also Doe v. Doe*, 668 N.E.2d 1160, 1164 (Ill. App. Ct. 1996) (requiring parties to identify themselves "protects the public's legitimate interest in knowing all of the facts involved in the case, including the identities of the parties").

[21] *See, e.g., Southern Methodist Univ. Assoc. of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979) ("Defendant law firms stand publicly accused of serious violations of federal law. Basic fairness dictates that those among the defendants' accusers who wish to participate in this suit as individual party plaintiffs must do so under their real names."); *Black Expo*, 923 F. Supp. at 141-42 ("Basic fairness requires that where a plaintiff makes [accusations going to defendant's integrity and deliberate wrongdoing] publicly, he should stand behind those accusations, and the defendants should be able to defend themselves publicly.").

[22] *Richmond*, 448 U.S. at 581 n.18. *See also James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993) (stating that openness "operates only as a presumption and not as an absolute, unreviewable license to deny"); *Plaintiff B. v. Francis*, 631 F.3d 1310, 1315 (11th Cir. 2011) (noting the presumption of openness is "not absolute" and vacating and remanding district court's decision refusing to allow victims who engaged in sexually explicit acts as minors in the *Girls Gone Wild* films to proceed anonymously).

[23] *Jacobson*, 6 F.3d at 238.

[24] The Supreme Court has not yet ruled on whether civil plaintiffs may proceed anonymously or by pseudonym. However, it has implicitly approved the practice in a number of cases. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Poe v. Ullman*, 367 U.S. 497 (1961).

[25] *See, e.g., Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185, 189 (2d Cir. 2008) (balancing the plaintiff's interest in anonymity against public interest and disclosure and prejudice to defendant); *Schuldiner v. K Mart Corp.*, 284 Fed. Appx. 918, 921 n.2 (3d Cir. 2008) (discussing need for balancing test in determining whether a plaintiff may proceed by pseudonym); *James v. Jacobson*, 6 F.3d 233, 238-39 (4th Cir. 1993) (same); *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981) (same); *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004) (same); *Coe v. Cook County*, 162 F.3d 491, 498 (7th Cir. 1998) (noting that a justified interest in privacy may overcome the public's right to openness); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067-68 (9th Cir. 2000) (employing a balancing test to determine if the need for anonymity outweighs the presumption of public openness and unfairness to the other party); *Femedeer v. Haun*, 227 F.3d 1244, 1246-47 (10th Cir. 2000) (employing a balancing test to determine if the plaintiff's interest in using a pseudonym outweighed the public's interest in openness, among other factors); *Doe v. Frank*, 951 F.3d 320, 323 (11th Cir. 1992)

(using a balancing test to determine if the plaintiff's privacy interests outweighed the presumption of openness). *See also, e.g., Unwitting Victim v. C.S.*, 47 P.3d 392, 398 (Kan. 2002) (conducting balancing test to determine that victim could proceed anonymously); *Doe v. Howe*, 607 S.E.2d 354 (S.C. Ct. App. 2004) (same); *Doe v. Shady Grove Adventist Hospital*, 598 A.2d 507, 512 (Md. Ct. Spec. App. 1991) (same).

[26] Alaska R. of Admin. 40(b); Conn. Practice Book § 11-20(c); Del. Sup. Ct. Rule 7(d); Fla. Stat. § 92.56(3); 735 Ill. Comp. Stat. 5/2-401(e); N.J.S.A. 2A:61B-1(f); Tex. Civ. Prac. & Rem. Code § 30.013(c)(1)-(4). Hawaii is also in the process of making Jane Doe legislation law. *See* S.B. 288, 26th Leg. (Haw. 2011).

[27] *See, e.g., Sealed Plaintiff*, 537 F.3d at 190; *Jacobson*, 6 F.3d at 238; *Stegall*, 653 F.3d at 185; *Porter*, 370 F.3d at 560; *Advanced Textiles*, 214 F.3d at 1068; *Frank*, 951 F.3d at 323. Other factors include: (1) whether plaintiffs are challenging governmental activity (*see, e.g., Sealed Plaintiff*, 537 F.3d at 190; *Jacobson*, 6 F.3d at 238; *Stegall*, 653 F.3d at 185; *Porter*, 370 F.3d at 560; *Frank*, 951 F.3d at 323); (2) whether plaintiffs are compelled to admit their intention to engage in illegal activity (*see, e.g., Porter*, 370 F.3d at 560; *Advanced Textiles*, 214 F.3d at 1068; *Frank*, 951 F.3d at 323); (3) whether plaintiffs are particularly vulnerable to harm, and especially whether they are children (*see, e.g., Sealed Plaintiff*, 537 F.3d at 190; *Jacobson*, 6 F.3d at 238; *Stegall*, 653 F.3d at 185; *Porter*, 370 F.3d at 560; *Blue Cross & Blue Shield*, 112 F.3d at 872); (4) whether identification poses a risk of retaliation or mental or physical harm (*see, e.g., Sealed Plaintiff*, 537 F.3d at 190; *Jacobson*, 6 F.3d at 238; *Stegall*, 653 F.3d at 185; *Porter*, 370 F.3d at 560; *Blue Cross & Blue Shield*, 112 F.3d at 872); (5) whether identification presents other harms including whether the injury litigated against would be incurred as a result of disclosure (*see, e.g., Sealed Plaintiff*, 537 F.3d at 190; *Advanced Textiles*, 214 F.3d at 1068); (6) whether the defendant is prejudiced by allowing plaintiffs to proceed anonymously, and whether any prejudice can be mitigated by the court (*see, e.g., Sealed Plaintiff*, 537 F.3d at 190; *Jacobson*, 6 F.3d at 238); (7) whether the plaintiffs' identities have been kept confidential thus far (*Sealed Plaintiff*, 537 F.3d at 190); (8) the strength of the public interest in disclosure (*see, e.g., Sealed Plaintiff*, 537 F.3d at 190; *Advanced Textiles*, 214 F.3d at 1068); and (9) whether there are alternative mechanisms for protecting the plaintiff's identity (*see, e.g., Sealed Plaintiff*, 537 F.3d at 190; *Advanced Textiles*, 214 F.3d at 1068).

[28] *See Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. 1974) (stating that the "intensely personal" nature of pregnancy justified the use of a pseudonym); *see generally Roe v. Wade*, 410 U.S. 113 (1973) (allowing plaintiff to proceed by pseudonym in action challenging validity of anti-abortion law without discussion).

[29] For instance, in *Jacobson*, 6 F.3d at 238, a couple sought to proceed anonymously in a case in which the mother was artificially inseminated with her doctor's sperm, rather than her husband's, in order to protect their children's well-being. In *Stegall*, plaintiffs who challenged the constitutionality of prayer and bible readings at a public school in Texas were allowed to proceed anonymously out of fear of retaliation and violence against their children. *Stegall*, 653 F.2d at 185. *But see Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 596 F.3d 1036 (9th Cir. 2010) (noting the need for a balancing test in determining whether plaintiffs may proceed anonymously, but finding district court did not abuse its discretion in finding minor plaintiffs did not have a reasonable fear of harm, despite the many threats made against them as a result of their suit alleging race discrimination in the admission process of a school).

[30] In *Porter*, plaintiffs brought an action seeking to enjoin the board of education at a local college from permitting the teaching of the bible as a religious truth, in violation of the First Amendment. The Sixth Circuit affirmed the lower court's determination that plaintiffs could proceed by pseudonym, noting that religion is a "quintessentially private matter." *Porter*, 370 F.3d at 560 (citing *Stegall*, 653 F.3d at 186).

[31] In *New York Blood Center*, 213 F.R.D. at 113, the court allowed a plaintiff to proceed by pseudonym after having contracted Hepatitis B as a result of a blood transfusion, since the case would likely delve into the plaintiff's sexual history given that Hepatitis B is a sexually transmitted disease. *See also Diocese Corp.*, 647 A.2d at 1071-72 (allowing plaintiff, who was abused by a priest as a child, to

proceed anonymously, and noting that "[o]ne's sexual history and practices are among the most intimate aspects of a person's life"); *Howe*, 607 S.E.2d at 357 (allowing plaintiff, who was sexually abused by a school employee, to proceed anonymously); *Doe v. Bodwin*, 326 N.W.2d 473, 476 (Mich. Ct. App. 1982) (finding trial court was in error in denying plaintiff's request to proceed anonymously in civil action arising out of the plaintiff's therapist having a sexual relationship with her during therapy). However, in a Kansas case, the court refused to allow plaintiff to proceed anonymously who sued for money damages after allegedly contracting herpes from defendant. *Unwitting Victim*, 47 P.3d at 398.

[32] *See, e.g., E.E.O.C. v. ABM Indus., Inc.*, 249 F.R.D. 588, 593-94 (E.D. Cal. 2008) (allowing plaintiffs to proceed anonymously in sexual harassment case because plaintiffs faced a greater fear of retaliation than the typical plaintiff); *Advanced Textiles*, 214 F.3d at 1073 (overturning lower court's determination that plaintiffs could not proceed by pseudonym in FLSA action in which plaintiffs faced harm including termination, deportation, and imprisonment). However, unless additional factors, such as retaliation, are shown, courts typically do not allow plaintiffs to proceed anonymously in these types of cases. *See, e.g., Southern Methodist*, 599 F.2d at 713 (not allowing law students to proceed anonymously in case alleging illegal sex discrimination in hiring practices of summer law clerks); *Luckett*, 21 F. Supp. 2d at 1030 (not allowing plaintiff to proceed by pseudonym in sexual discrimination and coercion case against former landlord).

[33] In *Shady Grove*, a Maryland court found that a plaintiff could proceed anonymously in a case arising out of breach of confidentiality in medical records relating to the plaintiff's status as having AIDS. 598 A.2d at 512. In *Doe v. Blue Cross & Blue Shield*, 794 F. Supp. 72, 75 (D. R.I. 1992), the court allowed a plaintiff to proceed under pseudonym who was attempting to recoup medical expenses from an insurance company relating to a sex change operation. However, in *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d at 872, the Seventh Circuit did not allow a plaintiff to proceed anonymously in a case in which the plaintiff, who had a psychiatric disorder, was denied benefits allegedly due to him under his medical plan, noting "[t]he fact that a case involves a medical issue is not a sufficient reason for allowing the use of a fictitious name, even though many people are understandably secretive about their medical problems." *See also Frank*, 951 F.2d at 322-23 (not allowing plaintiff to proceed anonymously in employment discrimination case relating to his alcoholism); *Black Expo*, 923 F. Supp. at 141-42 (not allowing plaintiff to proceed anonymously in employment discrimination suit in which plaintiff alleged he was fired for taking time off to receive mental health treatment).

[34] *See, e.g., Frank*, 951 F.3d at 324 ("[T]he fact that Doe may suffer some personal embarrassment, standing alone, does not require the granting of his request to proceed under a pseudonym. . . . The risk that a plaintiff may suffer some embarrassment is not enough."); *Black Expo*, 923 F. Supp. at 142 (noting that economic well-being and possible embarrassment or humiliation are insufficient bases to proceed by pseudonym); *Doe v. Doe*, 668 N.E.2d at 1088 (same). *But see ABM Indus.*, 249 F.R.D. at 592 (stating, in overruling defendants' objections to plaintiffs' motion to proceed anonymously, that the "[u]se of pseudonyms by plaintiffs is uncommon, but nevertheless allowed in the unusual case where nondisclosure of a party's identity is necessary to protect a person from harassment, injury, ridicule, or personal embarrassment").

[35] Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. Cal. L. Rev. 1020, 1049 (1991). *See also* Suzanne M. Leone, *Protecting Rape Victims' Identities: Balance Between the Right to Privacy and the First Amendment*, 27 New Eng. L. Rev. 883, 910-11 (1993) ("Each victim has a unique healing process and the public disclosure of her identity could disrupt that process before the victim is ready.").

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