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Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age

Jayne S. Ressler*

I. INTRODUCTION

Plaintiffs who enter the litigation process expect to incur certain costs—primarily time and money. Rule 10(a) of the Federal Rules of Civil Procedure, promulgated in 1938, requires that “[i]n the complaint the title of the action shall include the names of all the parties.”¹ This imposes an additional burden upon plaintiffs—accountability for the allegations that they bring forth. In this era of widespread electronic dissemination of information, however, Rule 10(a) imposes a cost that could not have been foreseen in 1938—an invasion of privacy. The burden of this new expense is shared by both plaintiffs and society alike, as a result of a judicial system that often appears to value openness at any price. The time has come, therefore, for a more liberal approach to pseudonymous plaintiffs.²

The need to provide claimant anonymity has been recognized in the criminal context in the form of rape shield laws, but plaintiff privacy concerns play a role in civil cases as well. For example, many relatives of victims of the September 11, 2001 terrorist attacks³ brought suit against several airlines, claiming that the negligence of those airlines

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1. FED. R. CIV. P. 10(a).

2. I use the words “pseudonymous,” “anonymous,” “fictitious,” and their grammatical variations interchangeably.

3. For a description of the “worst international terrorist attack ever,” see United States Dep't of State, Patterns of Global Terrorism—2001, <http://www.state.gov/documents/organization/10288.pdf> (last visited Dec. 16, 2004).

contributed to the deaths of their loved ones.⁴ Many of the victims' relatives, grieving and wary of publicity, sought to pursue their claims anonymously.⁵ Judge Hellerstein of the Southern District of New York denied their request, stating that the societal interest in the openness of the judicial system outweighed any privacy interests that the plaintiffs had in remaining anonymous.⁶ Anguished families were forced to bear not only the loss of a loved one, but also an invasion of privacy in order to vindicate their rights.⁷

Concerns about privacy are not a new social phenomenon. Brandeis and Warren's unease at the turn of the century regarding loss of privacy was prompted by the technological and media developments of their time.⁸ First, the development of a new form of sensationalist journalism, known as yellow journalism, made newspapers wildly successful and led to dramatically increased circulation.⁹ Second, technological developments, specifically photography, caused "great alarm for privacy."¹⁰ Brandeis and Warren "astutely recognized the potential for the new technology of cameras to be used by the sensationalistic press."¹¹ Their concern resulted in the 1890 publication of their seminal article, *The Right to Privacy*, in which they argued that then-existing law did not "afford[] a principle which [could] properly be invoked to protect the privacy of the individual; and, if it [did], what the nature and extent of such protection [was]."¹² Concluding that available legal principles were inadequate, Brandeis and Warren argued for the creation of a new right of privacy.¹³

The Internet and related technological advancements may very well constitute the yellow journalism of the new millennium. Information can be circulated and accessed rapidly and inexpensively on the Internet. Both the common law and statutory privacy law of the present era, as in

4. See, e.g., Mark Hamblett, *9/11 Victims' Suits Flood Court to Meet One-Year Time Limit: Uncertainty Over Compensation Fund Leads Hundreds to File Claims*, 228 N.Y.L.J. 1 (Sept. 11, 2002).

5. See *9/11 Families Cannot Be Anonymous in Suits*, 228 N.Y.L.J. 1 (Sept. 20, 2002).

6. *Id.*

7. In the recent Kobe Bryant civil trial, Byrant's accuser sought to remain anonymous, claiming that she had been the subject of death threats and sordid publicity. Judge Matsch of the United States District Court of Colorado denied the accuser's request, saying that to permit her "to remain anonymous could be misconstrued as a prejudgment in her favor." *Bryant Accuser's Name to Be Public*, WASH. POST, Oct. 7, 2004, at A2.

8. DANIEL J. SOLOVE & MARC ROTENBERG, *INFORMATION PRIVACY LAW 3* (2003) [hereinafter SOLOVE & ROTENBERG].

9. *Id.*

10. *Id.*

11. *Id.* at 4.

12. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890).

13. *Id.* at 214-20.

Brandeis and Warren's day, provide little or no recourse against the disseminators of private information collected from various sources. The danger of the Internet is compounded because new techniques for data aggregation can be combined with electronic court records to form a massive assault on information privacy that the emphasis on judicial openness does not recognize and which privacy law does little to remedy. There is a growing clash between the loss of personal privacy and court procedures that are antiquated in dealing with plaintiff pseudonymity requests.

Indeed, efforts by would-be plaintiffs to pursue their claims pseudonymously have grown significantly.¹⁴ Furthermore, as of July 1, 2003, Virginia's legislature codified the current ineffective methods that have been followed by the federal courts in deciding to whom permission to proceed anonymously should be granted.¹⁵

This Article explores the current tension between modern-day privacy concerns and the traditional emphasis on judicial openness, as it relates to plaintiffs wishing to pursue their claims pseudonymously. I suggest that an increase in the use of pseudonymity for plaintiffs with particular privacy concerns is the appropriate means to counteract modern technological privacy invasions. In Part II of the article, I examine the impact of technology on privacy and explore its role in the changing face of modern litigation. Part III considers the nature of privacy and assesses the constitutional and statutory basis for modern privacy rights. Part IV reviews the historical basis of judicial openness and challenges much of the reasoning behind it. Part V examines and criticizes the often outdated and non-technologically-aware, non-Internet-responsive justifications for the denial of plaintiff pseudonymity. In Part VI, I trace the development of the five-factor test employed by most courts today when

14. A Westlaw search, run in the allcases database on December 16, 2004, of Doe plaintiffs (ti(doe +3 "v")) for the year 1973 yielded thirty-six results; for 1983 yielded sixty-two results; and for 2003 yielded 155 results. These figures do not include pseudonymous plaintiffs labeled as "Roe" or "Poe" or any other variation thereof, nor do they include plaintiffs who brought actions using initials. Of course, however, the number of reported cases grew during that time as well.

15. VA. CODE ANN. § 8.01-15.1 (Michie 2004). This legislation permits a party to move for an order to participate anonymously in a proceeding and lists the factors that the court is to consider in determining whether anonymity can be maintained. *Id.* These factors are:

[W]hether the requested anonymity is intended merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a sensitive and highly personal matter; whether identification poses a risk of retaliatory physical or mental harm to the requesting party or to innocent nonparties; the ages of the persons whose privacy interests are sought to be protected; whether the action is against a governmental or private party; and the risk of unfairness to other parties if anonymity is maintained.

Id. Illinois has a similar provision. See 735 ILL. COMP. STAT. 5/2-401(e) (2003) ("Upon application and for good cause shown the parties may appear under fictitious names").

evaluating whether plaintiffs' privacy concerns warrant pseudonymity. I propose changes to the existing criteria courts use to determine which plaintiffs should be permitted to bring their actions pseudonymously, and I recommend additional criteria that should be examined when evaluating such requests.

I conclude the Article with a pair of recommendations: (1) that, when evaluating plaintiffs' pseudonymity requests, courts respond to the role that technology plays in diminishing privacy in modern society; and (2) that the responsibility for considering plaintiffs' privacy concerns and requests for pseudonymity be delegated to specialized judges or magistrates. The goal of these changes is to protect against a chilling effect on the administration of justice by providing plaintiffs with freer access to pseudonymity protection in the face of technological encroachment upon their privacy.

II. MODERN TECHNOLOGY AND LOSS OF PRIVACY

Fears of identity theft, bans on photograph-taking cell phones, and the promulgation of laws intended to promote privacy, such as the privacy provisions in the Health Insurance Portability and Accountability Act of 1996 (HIPAA), reflect the growing awareness that technology has great potential to infringe upon what we consider to be private spheres.¹⁶ Indeed, recent surveys show that Americans feel that the government has too much access to personal information.¹⁷ More than three-quarters of survey participants stated they believe that it is important both to be in control of who can get personal information and to trust those with whom they share confidential information.¹⁸ Another survey, by the Annenberg School of Communications at the University of Pennsylvania, revealed that only thirteen percent of American adults who use the Internet at home trust that the government will help them protect private in-

16. See, e.g., Jeffrey Rosen, *Security Check*, THE NEW REPUBLIC, Dec. 16, 2002, at 11.

17. For the results of an August 2002 telephone survey of 1,000 adults conducted by the Center for Survey Research & Analysis at the University of Connecticut in which eighty-one percent of the respondents reported that the right to privacy was "essential," see Electronic Privacy Information Center Public Opinion and Privacy Page (reporting the results of various public opinion polls on the issue of privacy rights in America), at <http://www.epic.org/privacy/survey/#polls> (last visited Dec. 16, 2004).

18. Humphrey Taylor, *Most People Are "Privacy Pragmatists" Who, While Concerned About Privacy, Will Sometimes Trade It Off For Other Benefits*, HARRIS INTERACTIVE (Mar. 19, 2003) (reporting the results of a February 2003 Harris telephone survey of 1,010 adults on the public's concern of an erosion of privacy), at http://www.harrisinteractive.com/harris_poll/index.asp?PID=365 (last visited Dec. 16, 2004).

formation online while not disclosing personal information without permission.¹⁹

Court records are one form of information that can now be collected easily and inexpensively from virtually anywhere, due to electronic filing in the federal courts.²⁰ This information is also easily accessible in state courts.²¹ Not only are complaints and answers filed and stored electronically and therefore accessible to anyone with an Internet connection, so are the motions and briefs that follow. In addition, the exhibits that accompany those filings frequently are scanned into the court's database and made available to the public for electronic retrieval.²² These documents contain averments, some true, some not, some supported, some unsupported, some rational, some hyperbolic, but almost all are protected by the wide swath of judicial protection that allows a litigant to say almost anything in the pursuit of what she perceives to be justice.²³

19. Joseph Turow, *Americans and Online Privacy: The System Is Broken* 5 (June 2003), at http://www.annenbergpublicpolicycenter.org/04_info_society/2003_online_privacy_version_09.pdf (last visited Dec. 16, 2004).

20. See, e.g., PACER Service Center Homepage ("The PACER Service Center is the Federal Judiciary's centralized registration, billing, and technical support center for electronic access to U.S. District, Bankruptcy, and Appellate court records."), at <http://pacer.psc.uscourts.gov> (last visited Dec. 16, 2004).

21. "Those who are curious about the rape case against Kobe Bryant ... need only click on a couple of links on the web site of the Colorado court system to see hundred [sic] of legal filings." Adam Liptak, *Kobe's Accuser, Internet Victim*, N.Y. TIMES, Aug. 15, 2004, § 4, at 5.

22. One popular website, <http://thesmokinggun.com>, is dedicated to publicizing the legal affairs of celebrities and other notables. The site provides images of court documents and mug shots. There is even a prize contest in which viewers compete by examining an image of a legal document and guessing what is written beneath the "red box" that the proprietors of the website have placed over a portion of the document. The contest that ran at the end of February 2004, which has since been replaced by other contests, included an affidavit from what appeared to be an investigator who had inventoried the contents of the Unabomber's Montana shack. Readers were asked to guess what the Unabomber had left there in a jar. The prizes offered included "The Simpsons Hit and Run video game" and a deck of "nifty celebrity mug shot playing cards." <http://thesmokinggun.com> (last visited Dec. 16, 2004).

23. The doctrine of judicial privilege holds that communications pertinent to any stage of judicial proceedings are afforded an absolute privilege that cannot be destroyed by abuse. See, e.g., *Hagendorf v. Brown*, 699 F.2d 478, 480 (9th Cir. 1983) ("[California law] makes privileged those publications made in a judicial proceeding. The privilege is absolute and unaffected by the presence of malice.") (footnote omitted); *O'Brien v. Alexander*, 898 F. Supp. 162, 171 (S.D.N.Y. 1995) ("[I]n the context of a legal proceeding, statements by parties and their attorneys are absolutely privileged if, by any view or under any circumstances, they are pertinent to the litigation.") (quoting *Grasso v. Mathew*, 564 N.Y.S.2d 576, 578 (App. Div. 1991)); *Binder v. Triangle Publ'ns, Inc.*, 275 A.2d 53, 56 (Pa. 1971) ("All communications pertinent to any stage of a judicial proceeding are accorded an absolute privilege which cannot be destroyed by abuse.").

Thus, all statements made and all conduct occurring within the course and scope of judicial proceedings—and any and all conduct or communications occurring prior to the judicial proceedings, provided that this conduct has some relation to the proceedings—are absolutely privileged, and attorneys, judges, parties and witnesses are not subject to tort liability for such statements or conduct. See, e.g., *Hagendorf*, 699 F.2d at 480; *O'Brien*, 898 F. Supp. at 171; *Post v. Mendel*, 507 A.2d 351,

These records can be combined with information that is easily obtained by even the most casual Internet sleuth. An enormous wealth of data on an individual can be collected in a matter of minutes.²⁴ Information drawn from public records often consists of fairly innocuous details, including one's height, weight, birth date, address, and telephone number.²⁵ If one has access to special databases—and this access is fairly easy to get, in most instances—an interested party can ascertain a litigant's credit history, occupation, debt burden, and income.²⁶ By "Googling" an individual's name,²⁷ much more can often be learned, including educational background, civic involvement, and anything that has been deemed newsworthy by some editor at some point.²⁸ This information creates what one scholar refers to as a "digital biography," which is "an unauthorized biography, only partially true and very reductive."²⁹

To the digital biography one can now add the information available in a lawsuit. The digital biography of a litigant may or may not square with reality.³⁰ Moreover, the subject of the digital biography may not

355 (Pa. 1986); *Brown v. Del. Valley Transplant Program*, 539 A.2d 1372, 1374–75 (Pa. Super. Ct. 1988).

24. See, e.g., *Forfeiting Privacy Will Destroy the Essence of America*, DETROIT NEWS, Editorial, June 22, 2003, at A18.

25. See Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1184 (2002) [hereinafter Solove, *Access and Aggregation*].

26. See, e.g., Catherine Brennan, *Credit Reports Not So Secret*, DAILY RECORD (Baltimore, Md.), Dec. 29, 1995, at 1; Shelley Emling, *Electronic Break-Ins Open Up Private Files*, ATLANTA J. & CONST., Nov. 5, 1994, at B6; Brue Mohl, *Firm Barred from Selling, Collecting Financial Data*, BOSTON GLOBE, Feb. 6, 2004, at C2.

27. "Googling" is defined as "[t]o search for information on the Web, particularly by using the Google search engine; to search the Web for information related to a new or potential girlfriend or boyfriend." The Word Spy, ("The Word Spy" is described as a website "devoted to *lexpionage*, the sleuthing of new words and phrases."), at <http://www.wordspy.com/words/google.asp> (last visited Dec. 16, 2004).

28. In February 2004, a New York woman made international news for "Googling" the name of a potential date only to discover that there was an FBI warrant out for his arrest in connection with his activities in Cincinnati. Her Google search led the police to his capture and arrest. *Google Arrest*, CHRISTCHURCH PRESS (New Zealand), Feb. 2, 2004. And recently a detective with the Washington State Patrol searched Google to successfully determine the identity of a victim of a hit-and-run accident found more than 1,600 miles from the victim's home eleven years earlier. Mike Barber, *1993 Hit-Run Victim is Finally Identified*, SEATTLE POST-INTELLIGENCER, Oct. 9, 2004, at B1.

29. Solove, *Access and Aggregation*, *supra* note 25, at 1188.

30. SOLOVE & ROTENBERG, *supra* note 8, at 19. At least one scholar would argue that a digital biography can never be entirely accurate.

True knowledge of another person is the culmination of a slow process of mutual revelation. . . . When intimate personal information circulates among a small group of people who know us well, its significance can be weighed against other aspects of our personality and character. By contrast, when intimate information is removed from its original context and revealed to strangers, we are vulnerable to being misjudged on the basis of our most em-

wish to share all such information with the public, especially when, in the aggregate, it is misleading, or even outright false, or deleterious to one's reputation.³¹ The contents of a digital biography could easily go well beyond the contours of a plaintiff's complaint to illuminate aspects of a plaintiff's life that are not at issue in her action.

In addition, few would dispute that modern technology has changed the face of litigation. Only a few years ago the IBM Selectric typewriter was the state-of-the-art drafting device for all pleadings and discovery.³² Although the process of legal drafting³³ became fairly standardized with respect to format³⁴—and to a lesser extent substance—a well-drafted legal document was often the result of an exhaustive process.³⁵ Even with the increased usage of pre-printed forms, the electric typewriter was not conducive to the efficient drafting of legal documents that invariably in-

barrassing, and therefore most memorable, tastes and preferences. . . . In a world in which citizens are bombarded with information, people form impressions quickly, based on sound bites, and these impressions are likely to oversimplify and misrepresent our complicated and often contradictory characters.

JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 8–9 (2000).

31. Similarly, Lessig sees modern data collection creating problems of manipulation. LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 154 (1999). Manipulation of individuals through data collection occurs because “profiles will begin to normalize the population from which the norm is drawn.” *Id.* As Lessig writes, “[t]he system watches what you do; it fits you into a pattern; the pattern is then fed back to you in the form of options set by the pattern; the options reinforce the pattern; the cycle begins again.” *Id.* As one scholar explains this concept, “[i]n other words, initial examples of our behavior will be used to press us into a mold.” Paul M. Schwartz, *Beyond Lessig's Code for Internet Privacy: Cyberspace Filters, Privacy Control, and Fair Information Practices*, 2000 WIS. L. REV. 743, 747 (2000). According to Schwartz, Lessig describes a risk to autonomy. *Id.* This point is similar to the one made herein regarding data aggregation and digital biography that create a misleading profile of an individual, thereby robbing him of his individuality and autonomy.

32. See IBM ARCHIVES: DOCUMENTS, IBM HIGHLIGHTS, 1885–1969 (describing the IBM Selectric as “an electric typewriter which uses a golf-ball shaped typing element rather than type bars or moveable carriages”), at <http://www-1.ibm.com/ibm/history/documents/pdf/1885-1969.pdf> (last visited Dec. 16, 2004).

33. Legal drafting has been defined as “the crystallization and expression in definitive form of a legal right, privilege, function, duty, or status.” REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 4 (1965). Further distinguishing legal drafting from “ordinary composition” a commentator has stated that legal drafting “is free from all colour, from all emotion, from all rhetoric. . . . It says in the plainest language, with the simplest, fewest, and fittest words, precisely what it means.” J.G. MacKay, *Introduction to an Essay on the Art of Legal Composition Commonly Called Drafting*, 3 L. Q. REV. 326 (1887), reprinted in *LEGAL DRAFTING* 16 (Robert N. Cook ed., 1951).

34. See BARBARA CHILD, *DRAFTING LEGAL DOCUMENTS: MATERIALS AND PROBLEMS* 13 (1988) (predicting that “[a]s states begin to operate more fully on the theory that the purpose of pleadings is merely to give notice to the opposing party, pleadings become more fully reduced to a matter of filling out a form”).

35. See, e.g., DICKERSON, *supra* note 33, at 36–54 (enumerating and describing the many steps involved in legal drafting); THOMAS R. HAGGARD, *LEGAL DRAFTING IN A NUTSHELL* 21–35 (1996) (providing an overview of the legal drafting process).

involved revisions, sometimes five or six times over.³⁶ One can imagine the countless frustrations and prolonged hours often exerted in drafting, with an electric typewriter, a single legal document.

Computerized word-processing technology replaced manual typing and all its tedium and frustration,³⁷ but the documents generated on a computer still had to be photocopied, then filed with the court and served on opposing counsel. Anyone who wished access to the pleadings would have to visit the courthouse; anyone who wanted to see other unfiled documents, such as discovery materials, would have to ask one of the parties.

Modern litigation changed dramatically, however, with the introduction of electronic filing and the systemic use of the Internet by the federal courts. By the year 2000, the federal judiciary had undertaken an initiative to modernize and expand the capabilities of its electronic case management systems.³⁸ According to the Judicial Conference of the United States, modernization and expansion of electronic case management was intended to “improve access to court dockets and case files for judges, court employees, litigants, and the public by allowing remote, instantaneous, and simultaneous around-the-clock electronic access to records, resulting in fast and reliable service.”³⁹ By mail ballot distributed on September 13, 2001,⁴⁰ the twenty-seven members of the conference adopted policies that govern the electronic availability of federal court case-file information.⁴¹ Among other things, the conference agreed that

36. DICKERSON, *supra* note 33, at 45 (“The number of drafts required is a function of the difficulties of the immediate problem and the skill and experience of the draftsman”).

37. For example, the website of the LawOfficeSuperStore states that “[t]he word processor is the most important software application that a law firm can have.” LawOfficeSuperStore.com, *Law Office Software 101*, at <http://www.lawofficesuperstore.com/images/pdf/lawoffice101.pdf> (last visited Dec. 16, 2004).

38. LEONADIS RALPH MEACHAM, DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS—THE FEDERAL JUDICIARY, REPORT TO CONGRESS ON THE OPTIMAL UTILIZATION OF JUDICIAL RESOURCES 10 (Feb. 2001), available at <http://www.uscourts.gov/optimal2001.pdf> (last visited Dec. 16, 2004).

39. *Id.* The report also stated that “[t]he systems also will enhance the collection and retrieval of statistics.” *Id.*

40. On the morning of September 11, 2001, the Chief Justice of the United States had convened the 141st session of the Judicial Conference when, as the Court became aware of the terrorist attacks on Washington and New York, the Court was evacuated and the Conference session was suspended. When it became apparent that it would be difficult to reschedule the meeting, the Chief Justice sent a memo to the members of the Conference advising them that the best course as to resolve obviously time-sensitive matters by mail ballot and put off until March 2002 other, less-timely issues. The ballot was sent to Conference members on September 13, 2001. Press Release, Administrative Office of the U.S. Courts, Judicial Conference Approves Recommendations on Electronic Case File Availability and Internet Use (Sept. 19, 2001), http://www.uscourts.gov/Press_Releases/jc901a.pdf (last visited Dec. 16, 2004).

41. *Id.*

documents should be made available electronically to the same extent that they are available at the courthouse, with the exception of Social Security cases. The members of the conference also required that “personal identifiers,” i.e. Social Security numbers, dates of birth, financial account numbers, and the names of minor children, be modified or redacted.⁴²

Electronic accessing of federal court files has been enthusiastically received by all constituencies, including the judiciary, law firms, libraries, government agencies, corporations and individuals.⁴³ In 1995, PACER⁴⁴ accounts—held “by law firms, libraries, government agencies, corporations, and individuals—totaled 20,028.”⁴⁵ “By the end of 1998, the total had grown to 29,408.”⁴⁶ But by September 2003, there were more than 270,000 PACER accounts.⁴⁷ In the October 2003 edition of a website geared toward “journalists, future journalists, and teachers of journalists,”⁴⁸ readers were encouraged to sign up for PACER and use it

42. See News Release, U.S. Courts—the Federal Judiciary, Federal Judiciary Newsroom, *Funding and Electronic Access Top Judicial Conference Agenda* (stating that PACER allows the public to access electronic dockets and court documents), http://www.uscourts.gov/Press_Releases/judconf031604.pdf (last visited Dec. 16, 2004); see also *Few Negatives Reported on Electronic Access to Criminal Files*, THE THIRD BRANCH-NEWSLETTER OF THE FED. COURTS (U.S. Courts—The Fed. Judiciary, Washington, D.C.), Oct. 2003 (requiring reduction of certain material from documents before the public can view them), <http://www.uscourts.gov/ttb/oct03ttb/negatives/index.html> (last visited Dec. 16, 2004).

43. See generally *Service Center Ensures PACER Reliability During “Unbelievable” Growth in Public’s Use*, THE THIRD BRANCH-NEWSLETTER OF THE FED. COURTS (U.S. Courts—The Fed. Judiciary, Washington, D.C.), Sept. 2003, <http://www.uscourts.gov/ttb/sep03ttb/pacer/index.html> (last visited Dec. 16, 2004) [hereinafter *PACER, Unbelievable Growth*].

44. PACER is the acronym for Public Access to Court Electronic Records. Press Release, Administrative Office of the U.S. Courts, Available Soon: Instant Registration for PACER System (Nov. 25, 2003), http://www.uscourts.gov/Press_Releases/instantpacer112503.pdf (last visited Dec. 16, 2004).

45. *PACER, Unbelievable Growth*, *supra* note 43. About seventy percent of all PACER usage—16 million pages of usage per month in 2001—is generated by the bankruptcy courts. *Electronic Access to Bankruptcy Courts Boon to Public*, THE THIRD BRANCH-NEWSLETTER OF THE FED. JUDICIARY (U.S. Courts—The Fed. Judiciary), Sept. 2002, <http://www.uscourts.gov/ttb/sep02ttb/electronic.html> (last visited Dec. 16, 2004).

46. *PACER, Unbelievable Growth*, *supra* note 43. PACER initially offered public access to court docket sheets only, “but the advent of a new case management system that allows courts to manage electronic dockets has provided access to actual court documents as well.” *Id.* PACER now “offers electronic access to case file documents, listings of all case parties, reports of case-related information, chronologies of events entered in the case record, claims registries, listings of new bankruptcy cases, judgments or case status, and a nationwide party/case index.” *Id.*

47. *Id.*

48. The Poynter Institute bills itself as “a school for journalists, future journalists, and teachers of journalists.” See Poynteronline—About Poynter, Poynter Institute Mission Statement (July 8, 2004) (describing the purpose of the Poynter Institute as well as the services and personnel associated with Poynter) at <http://www.poynter.org/column.asp?id=62> (last visited Dec. 16, 2004).

as part of their reporting.⁴⁹ State courts are sure to follow suit—indeed, the New York state court system recently announced that it plans “to begin making criminal and civil legal records available on the Internet.”⁵⁰

Electronic access to court documents is part of a larger phenomenon of records that federal, state, and local governments keep about their citizens. These records can easily be searched and obtained from almost any location and touch upon just about every aspect of citizens’ lives. As Daniel Solove describes the phenomenon:

Until recently, public records were difficult to access. For a long time, public records were only available locally. Finding information about a person often involved a treasure hunt around the country to a series of local offices to dig up records. But with the Internet revolution, public records can be easily obtained and searched from anywhere. Once scattered about the country, now public records are consolidated by private sector entities into gigantic databases.⁵¹

Court records are thus just one type of record easily available to computer users. By simply “Googling” an individual, or by employing one of the many private companies that collect and sell data on individuals,⁵² one can discover a wealth of information.

The types of data available are mind-boggling: credit files, work history, driving records, health reports, bank balances, nonpublished phone numbers, phone records, criminal convictions, Social Security earnings, family makeup, personal tastes and buying habits.

Enterprising marketers, and most anyone with a computer and the required fee, can purchase general information from original sources, such as credit or government agencies. And though they won’t sell the most sensitive information to just anyone, there are dozens of information resellers, known as superbureaus, that often will.

The worst thing about this information blitzkrieg is that—even though errors abound—what’s said about us by computers is usually

49. See Jonathan Dube, Poynteronline, *Court Data Online* (Oct. 16, 2003) (discussing the benefits and accessibility of PACER), at <http://www.poynter.org/column.asp?id=32&aid=51371> (last visited Dec. 16, 2004).

50. Susan Saulny, *Court Records a Click Away? Yes, With Some Safeguards*, N.Y. TIMES, Feb. 26, 2004, at B4.

51. Solove, *Access and Aggregation*, *supra* note 25, at 1139.

52. See, e.g., US SEARCH, *About US SEARCH* (branding itself the “Leader in Public Information Since 1994,” US SEARCH uses its “patented Darwin technology and access to billions of records . . . [to] provide[] the best results to both consumers and Fortune 1000 companies.”), at http://www.ussearch.com/consumer/commerce/about/about_us.jsp (last visited Dec. 16, 2004).

considered accurate, and significant decisions are made based on this information. Often those affected are unaware of the process and are given no chance to offer explanations.⁵³

In spite of the threat to privacy presented by the Internet, electronic technology and increased media publicity of court proceedings,⁵⁴ and despite rising and well-founded fears of eroding privacy, courts have been reluctant to permit plaintiffs to sue under pseudonyms, stating that to do so hampers the societal interest in open judicial proceedings. These courts presume, often without explanation, that pseudonymous plaintiffs and open judicial proceedings are by definition mutually exclusive.⁵⁵ These courts also implicitly assume that open judicial proceedings are a per se good, without exception or qualification. This is not necessarily true. Reluctance to permit pseudonymous plaintiffs stifles the judicial process, forcing some plaintiffs to choose to forgo their claims in the name of protecting their privacy. Conversely, recognition by the courts of the erosion of personal privacy caused by electronic technology and by the media, resulting in the freer use of plaintiff pseudonymity, will resolve this problem without any significant downside. As one author aptly noted, "the law must structure the use of personal information so that individuals will be free from state or community intimidation that would destroy their involvement in the democratic life of the community."⁵⁶

53. Jeffrey Rothfeder, *Dangerous Things Strangers Know About You*, MCCALL'S, Jan. 1994, at 88.

54. See, e.g., Yvonne Barlow, *Poll Shows Concerns About Simpson Trial: Texans Suggest Judge Should Ban TV Cameras from LA Courtroom*, DALLAS MORNING NEWS, Oct. 30, 1994, at 12A (reporting that "[s]eventy-three percent of Texans surveyed said they thought the intense media coverage of the trial would affect the jury's verdict"); Jon Brusckhe & Erin Powers, *Muddying the Jury Pool*, 25 NAT'L L.J. 26, May 19, 2003 (inquiring into the effect of pretrial publicity on the outcomes of civil proceedings); Donna De La Cruz, *Judge Rejects Delay in Diallo Case; 3 Officers Cited Fear of Publicity*, THE RECORD (N.J.), Mar. 3, 1999, at A7 (refusing to postpone the grand jury proceedings, the judge sought instead to interview the jurors to inquire into any possible influence created by media publicity); Patty Machelor, *Pizza Hut Slaying Trial Moved Outside County*, TUCSON CITIZEN (Ariz.), May 20, 2000, at 1A (citing the effects of "extensive media coverage" as the reason for allowing a change of venue).

55. *But see* Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. 1981) (noting that these interests are not necessarily mutually exclusive).

56. Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 561 (1995).

III. INFORMATIONAL PRIVACY

It is important to examine the subset of privacy that this article addresses: informational privacy.⁵⁷ As one scholar articulated, such privacy “is the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”⁵⁸ Another scholar reasoned that such privacy

is control over knowledge about oneself. But it is not simply control over the quantity of information abroad; there are modulations in the quality of the knowledge as well. We may not mind that a person knows a general fact about us, and yet feel our privacy invaded if he knows the details.⁵⁹

Judge Posner has spoken of an interest he calls “the face we present to the world.”⁶⁰ Distinguishing certain privacy interests from the desire to

57. Five distinct privacy interests are generally recognized by scholars: (1) informational privacy, through which access to personal information is limited; (2) spatial privacy, through which access to certain places, such as the home, is limited; (3) personal privacy, through which access to the person, including the physical body and its image, is limited; (4) decisional privacy, through which interference with personal decisions, including abortion and contraception, is limited; and (5) relational privacy, through which interference with intimate relationships, including the family, is limited. See generally Radhika Rao, *The Origins and Growth of U.S. Privacy Law*, in *FOURTH ANNUAL INSTITUTE ON PRIVACY LAW: PROTECTING YOUR CLIENT IN A SECURITY-CONSCIOUS WORLD* 18 (Practising Law Institute, 2003) (showing presentation slides on topics in privacy law); see also RICHARD A. POSNER, *OVERCOMING LAW* 532–33 (1995) [hereinafter POSNER, *OVERCOMING LAW*] (discussing types of privacy interests); SOLOVE & ROTENBERG, *supra* note 8, at 1 (“Informational privacy is often contrasted with ‘decisional privacy,’ which concerns the freedom to make decisions about one’s body and family. . . . [I]nformational privacy increasingly incorporates elements of decisional privacy as the use of data both expands and limits individual autonomy.”).

58. SOLOVE & ROTENBERG, *supra* note 8, at 28, (quoting ALAN WESTIN, *PRIVACY AND FREEDOM* (1967)).

59. Charles Fried, *Privacy*, 77 *YALE L.J.* 475, 483 (1968), quoted in SOLOVE & ROTENBERG, *supra* note 8, at 31; see also ANITA ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 3 (1988) (“Privacy denotes a degree of inaccessibility of persons, their mental states, and of information about them to the senses and surveillance devices of others.”); Ruth Gavison, *Privacy and the Limits of Law*, 89 *YALE L.J.* 421, 423 (1980) (“Our interest in privacy . . . is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others’ attention.”). See generally Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 *STAN. L. REV.* 1373 (2000).

60. POSNER, *OVERCOMING LAW*, *supra* note 57, at 531.

control one's image so that it can be marketed and sold, Judge Posner wrote that

[we] "sell" our constructed public self in the figurative sense of using it to make advantageous transactions in employment and marriage markets and, more generally, in the market for human relationships whether of a personal or of a commercial character.⁶¹

A person seeking to bring an action anonymously is seeking a degree of informational privacy, in that he is seeking to control both the quantity and quality of knowledge about himself that is known to others. The constitutional basis of a right to informational privacy must be assessed so that it can be measured against the societal call for disclosure of the person's identity.

A. Constitutional Basis for Privacy Rights

The United States Constitution does not explicitly mention privacy.⁶² However, the idea that a right to privacy exists in the Constitution has been developed in a series of cases over the past fifty years that turn on the concept of "substantive due process." The seminal case is *Griswold v. Connecticut*,⁶³ in which the Supreme Court held that a Connecticut law criminalizing contraceptives and counseling about contraceptives to mar-

61. *Id.* at 532.

62. A number of state constitutions, however, directly provide for the protection of privacy. *See, e.g.*, ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed."); ARIZ. CONST. art. II, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."); FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."); HAW. CONST. art. I, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."); ILL. CONST. art. I, § 6 ("The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means."); *id.* § 12 ("Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation."); LA. CONST. art. I, § 5 ("Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy."); MONT. CONST. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."); S.C. CONST. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . ."); WASH. CONST. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.").

63. 381 U.S. 479 (1965).

ried couples was unconstitutional because it infringed upon the “zone of privacy” created by the “penumbras” of the First, Third, Fourth, Fifth, and Ninth amendments.⁶⁴ The Court reasoned that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.”⁶⁵ The Connecticut law, the Court held, had a “destructive impact” upon the relationship of marriage, a relationship that fell “within the zone of privacy created by several fundamental constitutional guarantees.”⁶⁶

Several other cases followed, each expanding on the notion of privacy that has come to be called “decisional privacy.”⁶⁷ The Supreme Court soon tackled the matter of informational privacy, however, in *Whalen v. Roe*⁶⁸ and in *Nixon v. Administrator of General Services*.⁶⁹ In *Whalen*, the Supreme Court for the first time explicitly recognized that “[t]he cases sometimes characterized as protecting ‘privacy’ have in fact involved at least two different kinds of interests. One is the individual

64. *Id.* at 484–85. Generally speaking, the First Amendment protects privacy of thought, speech, and political association; the Fourth Amendment protects “reasonable expectations of privacy” in one’s person, house, papers, and effects; and the Fourteenth Amendment protects the right to prevent conception or terminate an unwanted pregnancy, the right to marry, rear children, and reside with one’s family, and may also protect the right to withhold medical information and the right to refuse life-saving treatment. Rao, *supra* note 57, at 21.

65. *Griswold*, 381 U.S. at 484 (citation omitted).

66. *Id.* at 485.

67. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (finding Texas criminal abortion statute unconstitutional); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (concluding that Massachusetts statute prohibiting distribution of contraceptives to unmarried persons is unconstitutional). An earlier case, *Pierce v. Society of Sisters*, concluded that a Massachusetts statute that prohibited the distribution of contraceptives to unmarried people was unconstitutional. 268 U.S. 510 (1925). “Decisional privacy” has been construed by the Supreme Court, in the context of the Fourteenth Amendment, as protection of one’s autonomy to decide upon “matters . . . involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . .” *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992). Thus, “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” *Id.* The Court’s recognition of decisional privacy in *Casey* was recently affirmed in *Lawrence v. Texas*. 539 U.S. 558, 572–76 (2003).

68. 429 U.S. 589 (1977). In *Whalen*, the Court considered a New York state statute that collected information related to prescriptions issued for “the most dangerous of the legitimate drugs,” the so-called “Schedule II” drugs. *Id.* at 592–93. Pursuant to the statute, the New York State Department of Health collected a form each time a Schedule II drug was prescribed. *Id.* at 593. The form “identifie[d] the prescribing physician; the dispensing pharmacy; the drug and dosage; and the name, address, and age of the patient.” *Id.* The data was kept on tape, but tapes were kept in a locked cabinet, and when the tapes were run on a computer, it was run off-line so that “no terminal outside of the computer room [could] read or record any information.” *Id.* at 593–94. An action was brought by a group of patients who regularly received prescriptions for Schedule II drugs and by two physicians’ associations, contending that the statute invaded a constitutionally protected “zone of privacy.” *Id.* at 595–98.

69. 433 U.S. 425 (1977).

interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."⁷⁰ The Court affirmed this notion of informational privacy in *Nixon* when it concluded that President Nixon had a constitutional privacy interest in records of his private communications with his family but not in records involving his official duties.⁷¹

The Supreme Court has done "little to develop the right of informational privacy" since *Whalen* and *Nixon*.⁷² As one court observed, the right "has been infrequently examined; as a result, its contours remain less than clear."⁷³ Because "the constitutional right to informational privacy has yet to develop a distinctive identity, courts . . . often draw from other types of privacy law."⁷⁴ According to one court, the constitutional right to informational privacy "closely resembles—and may be identical to—the interest protected by the common law prohibition against unreasonable publicity given to one's private life."⁷⁵ Another court looked to the "reasonable expectations" of privacy (or confidentiality) test to determine whether information is entitled to protection under the constitutional right to information privacy.⁷⁶ Still other courts have refused to accept the constitutional right to information privacy,⁷⁷ and one has expressed doubts as to whether it exists at all.⁷⁸

Absent any clear direction from the Supreme Court, and given the confusion apparent in the lower courts, an assessment of the status of the right of information privacy is difficult. Nevertheless, recognition of the concept is appropriate when a court is evaluating a plaintiff's request for

70. 429 U.S. at 598–600. In *Whalen*, the patients and physicians also argued that "even if unwarranted disclosures do not actually occur, the knowledge that the information is readily available in a computerized file creates a genuine concern that causes some persons to decline needed medication." *Id.* at 602–03. Similarly, persons who are denied leave to proceed pseudonymously may decline to bring suit at all, an aspect of decisional privacy, or more particularly, the infringement thereof.

71. 433 U.S. at 455–65.

72. SOLOVE & ROTENBERG, *supra* note 8, at 189.

73. *Davis v. Bucher*, 853 F.2d 718, 719 (9th Cir. 1988) (citations omitted).

74. SOLOVE & ROTENBERG, *supra* note 8, at 189.

75. *Smith v. City of Artesia*, 772 P.2d 373, 376 (N.M. Ct. App. 1989), *cited in* SOLOVE & ROTENBERG, *supra* note 8, at 189.

76. *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 112 (3d Cir. 1987), *cited in* SOLOVE & ROTENBERG, *supra* note 8, at 189.

77. *See Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1998) (recognizing that the Supreme Court has construed the right to informational privacy only when a fundamental liberty interest is implicated), *cited in* SOLOVE & ROTENBERG, *supra* note 8, at 189; *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981) (holding that there is no constitutional right to the nondisclosure of private information), *cited in* SOLOVE & ROTENBERG, *supra* note 8, at 189.

78. *Am. Fed'n of Gov't Employees v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 791 (D.C. Cir. 1997), *cited in* SOLOVE & ROTENBERG, *supra* note 8, at 189.

pseudonymity, given the realities of modern litigation and the invasive nature of modern technology.

B. Statutory Developments in Privacy Law

The federal government has recognized the threat that technology represents to privacy and has responded with a series of initiatives designed to protect privacy interests. These initiatives are all premised on the same awareness that is the foundation of this article: technological advances are challenging privacy in ways never before seen, such that prompt and effective responses are necessary before a valuable right is irretrievably lost.

Starting in about 1973, in response to growing fears about the ability of computers to store and search personal information, the United States Department of Health, Education and Welfare undertook an extensive review of data processing in the United States.⁷⁹ Among its recommendations, the Department "proposed that a Code of Fair Information Practices be established."⁸⁰ The Code of Fair Information Practices consists of basic information privacy principles that allocate rights and responsibilities in the collection and use of personal information:

- There must be no personal-data record-keeping systems whose very existence is secret.
- There must be a way for an individual to find out what information about him is recorded and how it is used.
- There must be a way for an individual to prevent information about him obtained for one purpose from being used or made available for other purposes without his consent.
- There must be a way for an individual to correct or amend a record of identifiable information about him.
- Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for its intended use and must take reasonable precautions to prevent misuse of the data.⁸¹

79. SOLOVE & ROTENBERG, *supra* note 8, at 22.

80. *Id.*

81. *Id.* at 23 (citing U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, SECRETARY'S ADVISORY COMMITTEE ON AUTOMATED PERSONAL DATA SYSTEMS (1973) (stated in "Summary and Recommendations" section), <http://aspe.os.dhhs.gov/datacncl/1973privacy/tocpreface/members.htm>).

As Daniel Solove observed, the Code of Fair Information Practices has “played a significant role in framing privacy laws in the United States.”⁸²

Both the constitutional basis for informational privacy law and the recent formation of a multitude of statutory initiatives to protect privacy support the idea that privacy interests should be given greater recognition and consideration in the context of evaluating plaintiffs’ requests for pseudonymity.

82. *Id.* at 23 (citing Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy (What Larry Doesn't Get)*, 2001 STAN. TECH. L. REV. 1, 44 (2001)). Beginning in the 1970s, Congress passed a number of laws protecting privacy in various sectors of the information economy. *Id.* (citing PRIVACY LAW SOURCEBOOK (Marc Rotenberg ed., 2001)). *See, e.g.*, Consumer Credit Protection Act, Pub. L. No. 90-321 (1968) (codified as amended at 15 U.S.C. §§ 1681–1681t (2003)) (providing citizens with rights regarding the use and disclosure of their personal information by credit reporting agencies); Privacy Act of 1974, Pub. L. No. 93-579, § 3 (1974) (codified as amended at 5 U.S.C. § 552a (2003)) (providing individuals with a number of rights concerning their personal information maintained in government record systems, including the right to see one’s records and to ensure that information in them is accurate); Family Educational Rights and Privacy Act of 1974, Pub. L. No. 93-380 (1974) (codified as amended at 20 U.S.C. §§ 1221, 1232g (2003)) (protecting the privacy of school records); Right to Financial Privacy Act of 1978, Pub. L. No. 95-630 (1978) (codified as amended at 12 U.S.C. §§ 3401–3422 (2003)) (requiring a subpoena or search warrant for law enforcement officials to obtain financial records), *amended* by Intelligence Authorization Act for Fiscal Year 2004, Pub. L. No. 108-177 (2003); Privacy Protection Act of 1978, Pub. L. No. 96-440, § 101 (1980) (codified as amended at 42 U.S.C. § 2000aa (2003)) (restricting the government’s ability to search and seize the work product of the press and the media); Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2 (1984) (codified as amended at 47 U.S.C. § 551 (2003)) (mandating privacy protection for records maintained by cable companies); Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508 (1986), 103-414 (1994) (codified as amended at 18 U.S.C. §§ 2510–2522, 2701–2709 (2003)) (updating Federal Wiretap Law to respond to the new developments in technology); Computer Matching and Privacy Protection Act of 1988, Pub. L. No. 100-503, §§ 2–6(a), 7, 8 (1988) (codified as amended at 5 U.S.C. § 552a (2003)) (regulating automated investigations conducted by government agencies comparing computer files); Employee Polygraph Protection Act of 1988, Pub. L. No. 100-347 (1988) (codified as amended at 29 U.S.C. §§ 2001–2009 (2003)) (governing the use of polygraphs by private sector employers); Video Privacy Protection Act of 1988, Pub. L. No. 100-618 (1988) (codified as amended at 18 U.S.C. §§ 2710–2711 (2003)) (protecting the privacy of videotape rental information); Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 3(a) (1991) (codified as amended at 47 U.S.C. § 227 (2003)) (providing certain remedies from repeat telephone calls by telemarketers); Driver’s Privacy Protection Act of 1994, Pub. L. No. 103-322 (1994) (codified as amended at 18 U.S.C. §§ 2721–2725 (2003)) (restricting the states from disclosing or selling personal information in their motor vehicle records); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat (1996) (codified in scattered sections of 18, 26, 29, and 42 U.S.C. (2003)) (giving the Department of Health and Human Services the authority to promulgate regulations governing the privacy of medical records); Children’s Online Privacy Protection Act of 1998, Pub. L. No. 105-277 (1998) (codified as amended at 15 U.S.C. §§ 6501–6506 (2003)) (restricting the use of information gathered from children under age 13 by Internet websites); Gramm-Leach Bliley Act of 1999, Pub. L. No. 106-102 (1999) (codified as amended at 15 U.S.C. §§ 6801–6809 (2003)) (requiring privacy notices and providing opt-out rights when financial institutes seek to disclose personal data to other companies).

IV. HISTORICAL BASIS OF JUDICIAL OPENNESS

Many courts base their reluctance to permit plaintiffs pseudonymously to bring their actions on the long-standing tradition of "open trials." One of the bedrocks of American jurisprudence is the openness of judicial proceedings. The United States Supreme Court has stated that "historically both civil and criminal trials have been presumptively open."⁸³ This openness can be traced to the earliest judicial systems of colonial America.⁸⁴ For example, a Seventeenth Century agreement provided

[t]hat in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner⁸⁵

This tradition continues to the present day, and although numerous federal courts have recognized a public right of access to proceedings and documents in civil cases, they have differed on the scope of the right. In *Publicker Industries v. Cohen*, for example, the Third Circuit held that the public has the right of access to a preliminary injunction hearing.⁸⁶ And in *In re Iowa Freedom of Information Council*, the Eighth Circuit allowed public access to a contempt hearing.⁸⁷ Similarly, in *Brown & Williamson Tobacco Corp. v. FTC*, the Sixth Circuit held that the First Amendment limits judicial discretion to seal documents in civil litigation.⁸⁸ In *Newman v. Graddick*, the Eleventh Circuit found a First Amendment right of access to proceedings and a common law right of access to documents in a lawsuit about prison overcrowding.⁸⁹

Notwithstanding the professed sanctity and long-standing tradition of open trials, the Supreme Court has nevertheless implicitly recognized the

83. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980).

84. *Id.* at 567.

85. 1677 Concessions and Agreement of West New Jersey, reprinted in *SOURCES OF OUR LIBERTIES* 188 (Richard L. Perry ed., 1959).

86. 733 F.2d 1059, 1074 (3d Cir. 1984).

87. 724 F.2d 658, 661 (8th Cir. 1984).

88. 710 F.2d 1165, 1177 (6th Cir. 1983).

89. 696 F.2d 796, 802-03 (11th Cir. 1983). See also *Doe v. Santa Fe Indep. Sch. Dist.*, 933 F. Supp. 647, 650 (S.D. Tex. 1996) (stating that the right to attend civil trials is grounded in both First Amendment and common law).

propriety of permitting certain plaintiffs to proceed pseudonymously.⁹⁰ The first pseudonymous case before the Court, *Poe v. Ullman*, involved plaintiffs who sought a declaratory judgment invalidating Connecticut statutes that prohibited the use of contraceptives.⁹¹ The Supreme Court permitted the case to be heard with the plaintiffs using the pseudonym “Poe” without discussion of the matter, stating only that “[p]laintiffs . . . sue under fictitious names. The Supreme Court of Errors of Connecticut approved this procedure in the special circumstances of the cases.”⁹² Twelve years later, in *Roe v. Wade*, the plaintiff sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face. The Supreme Court, in referring to *Roe*, stated merely “[t]he name is a pseudonym.”⁹³

V. JUSTIFICATION FOR THE DENIAL OF PLAINTIFF PSEUDONYMITY

Despite the tacit approval of pseudonymous plaintiffs by the Supreme Court, most state and federal courts are reluctant to permit plaintiffs to proceed pseudonymously. They adhere to the tradition of open trials, without examining the modern influences suggesting that this tradition is no longer viable in a technological age. Typically these courts state only “[i]n rare instances will we allow parties to proceed under false names because the public has a right to know who is using the courts.”⁹⁴ They generally premise denials of leave to proceed anonymously on one or more of several grounds:

- (1) the absence of any express provision in the Federal Rules of Civil Procedure (and the equivalent state rules) permitting such a procedure;
- (2) the notion that public scrutiny protects against judicial abuse;

90. State courts have permitted plaintiffs to bring pseudonymous actions as early as 1941. *See, e.g., Doe v. Doe*, 30 N.Y.S.2d 141 (Fam. Ct. 1941) (permitting, without discussion, a mother seeking child support on behalf of her minor children to bring her action under a pseudonym).

91. 367 U.S. 497 (1961).

92. *Id.* at 498 n.1.

93. 410 U.S. 113, 120 n.4 (1973); *see also Doe v. Bolton*, 410 U.S. 179, 184 n.6 (1973) (noting that appellants alleged that Doe was a pseudonym).

94. *Dotson v. Bravo*, 321 F.3d 663, 668 n.4 (7th Cir. 2003) (citing *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 872 (7th Cir. 1997)). *See also Roe v. New York*, 49 F.R.D. 279, 281 (S.D.N.Y. 1970) (ruling, prior to the Supreme Court’s decisions in *Roe v. Wade* and *Doe v. Bolton*, that “if a complaint does not identify any plaintiff in the title or otherwise, then its filing is ineffective to commence an action.”).

- (3) the belief in increased respect and confidence in the judicial system when trials are open;
- (4) the idea that open trials induce witnesses to come forward; and
- (5) the theory that openness in the system provides a therapeutic effect on the community.⁹⁵

A closer examination of ideas and concerns reveals that judicial reluctance to permit plaintiff pseudonymity is not warranted in many cases, and can often defeat the very values that courts seek to protect.

A. *Federal Rule of Civil Procedure 10(a)*

Neither the Federal Rules of Civil Procedure (“Rules”) nor the advisory notes specifically address the issue of pseudonymous filing. Instead, Rule 10(a) requires simply that the title of the action in the complaint include “the names of all the parties.”⁹⁶ Rule 10(a) provides in pertinent part:

Caption; Names of parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a).⁹⁷ In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.⁹⁸

One court has interpreted this to mean that there is “no legal right in parties either to be allowed anonymity or to avoid it, and that trial courts correspondingly have no unreviewable license either to grant or deny anonymity on general principles, but power only to grant or deny it on the basis of an ‘informed’ discretion.”⁹⁹

95. See generally Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1, 13–17 (1985) (discussing the tension between pseudonymous litigation and the right to access).

96. FED. R. CIV. P. 10(a).

97. Federal Rule of Civil Procedure 7 provides instructions regarding necessary pleadings and delineates various forms of motions. See FED. R. CIV. P. 7(a).

98. FED. R. CIV. P. 10(a).

99. *James v. Jacobson*, 6 F.3d 233, 242 (4th Cir. 1993). See also *Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004) (“The presumption that parties’ identities are public information, and the possible prejudice to the opposing party from concealment, can be rebutted by showing that the harm to the plaintiff . . . exceeds the likely harm from concealment.”).

Other courts have taken a harder line, holding that the Rules provide a general ban on filing suits under fictitious names to “protect the public’s 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.”¹⁰⁰ Taking a more rule-based, formalistic approach, the Tenth Circuit has held that the district court lacked jurisdiction over unnamed plaintiffs who had not sought permission to proceed anonymously, “as a case ha[d] not been commenced with respect to them.”¹⁰¹ Similarly, in *Estate of Rodriquez v. Drummond Co.*,¹⁰² the Northern District of Alabama held that it did not have jurisdiction over the pseudonymous plaintiffs because they used pseudonyms without first obtaining the permission of the court, and that the procedural defect could not be cured by an order granting permission to proceed anonymously *nunc pro tunc*; the defect was jurisdictional and could not be cured after the fact.¹⁰³

Most courts, however, even those that consider captions with pseudonymous plaintiffs a failure to comply with Rule 10(a), have recognized that there are circumstances in which plaintiff pseudonymity is appropriate.¹⁰⁴ In *Doe v. U. S. Department of Justice*,¹⁰⁵ for example, a judge brought suit under the Freedom of Information Act to discover what information and documents the Drug Enforcement Administration possessed relating to him, and sought to do so pseudonymously in order to avoid the attendant bad publicity.¹⁰⁶ The federal court held that his action would not be considered to have commenced unless and until it was filed in what it considered to be full compliance with Rule 10(a).¹⁰⁷ But even so, the court recognized that in some instances a plaintiff may pro-

100. *Doe v. Ind. Black Expo, Inc.*, 923 F. Supp. 137, 139 (S.D. Ind. 1996). Other courts have recognized a similar concern of allowing public access to information associated with litigation. “Although the Federal Rules of Civil Procedure do not expressly prohibit use of pseudonyms for purposes of litigation, courts have recognized that ‘lawsuits are public events and the public has a legitimate interest in knowing the facts involved in them. Among those facts is the identity of the parties.’” *Heather K. v. City of Mallard*, 887 F. Supp. 1249, 1255 (N.D. Iowa 1995) (quoting *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. 1974)). See also *Roe v. City of New York*, 49 F.R.D. 279, 282 (S.D.N.Y. 1970) (“The privilege of using fictitious names in actions should be granted only in the rare case where the nature of the issue litigated and the interest of the parties demand it and no harm can be done to the public interest.” (quoting *Buxton v. Ullman*, 156 A.2d 508, 515 (Conn. 1959))).

101. *Nat’l Commodity & Barter Ass’n v. Gibbs*, 886 F.2d 1240, 1245 (10th Cir. 1989).

102. 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

103. *Id.* at 1255–57.

104. See, e.g., *id.* at 1256–57 (citing *Doe v. Frank*, 951 F.2d 320, 323–24 (11th Cir. 1992)) (listing circumstances in which plaintiffs were allowed to proceed pseudonymously).

105. 93 F.R.D. 483 (D. Colo. 1982).

106. *Id.* at 483–84.

107. *Id.* at 484.

ceed anonymously.¹⁰⁸ The court refused to issue a protective order in the case, however, finding that the public interest in the proceeding—a judge seeking to learn what the DEA “had on him”—outweighed the privacy interests of the plaintiff judge.¹⁰⁹

Many state rules of civil procedure mirror Federal Rule 10.¹¹⁰ Not surprisingly, therefore, many state courts have opted to follow the factor test used by the federal courts in determining which plaintiffs should be permitted to bring their actions pseudonymously.¹¹¹ One state, Virginia, has gone so far as to recently codify these factors in its code of civil procedure.¹¹² The inefficiency and ineffectiveness inherent in the federal courts’ methods for evaluating plaintiff pseudonymity requests is only magnified at the state level,¹¹³ because state courts are left with conflicting and inconsistent federal court rulings for guidance in making their own decisions regarding plaintiff pseudonymity.

Denying pseudonymity based on the language of Rule 10(a) seems excessively formalistic. The Rule calls for “the names of all the parties”¹¹⁴ 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. Thus, precluding anonymity based solely on Rule 10(a) does not appear to be justified.

B. Promoting Confidence in the Integrity of the Judicial System

Some courts justify their reluctance to permit plaintiffs to proceed pseudonymously on the theory that open trials lead to increased confidence in the judicial system.¹¹⁵ The right of access to the courts is generally founded on First Amendment concerns that mandate that certain government proceedings be open to the public “to protect the free discus-

108. *Id.*

109. *Id.*

110. *See, e.g.*, ALASKA R. CIV. P. 10(a); ARK. R. CIV. P. 10(a); OHIO R. CIV. P. 10(a); S.C. R. CIV. P. 10(a).

111. *See, e.g.*, King v. State Farm Mut. Auto. Ins., 850 A.2d 428, 432–35 (Md. Ct. Spec. App. 2004) (reviewing the holdings in several federal plaintiff pseudonym cases in the context of defendant wishing to proceed anonymously).

112. VA. CODE ANN. § 8.01-15.1 (2003).

113. *See* discussion *infra* at Part VII.A.

114. FED. R. CIV. P. 10(a).

115. *See, e.g.*, Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. 1981) (stating that, with respect to plaintiffs’ anonymity, there is a keen First Amendment interest in ensuring that what occurs in the courtroom is public property); Doe v. Rostker, 89 F.R.D. 158, 160–61 (N.D. Cal. 1981) (holding that the public has a legitimate interest in knowing all the facts and events surrounding court proceedings).

sion of governmental affairs.”¹¹⁶ Thus, the intent is to promote trust in the integrity and honesty of the judicial system. More than a century ago, Justice Oliver Wendell Holmes expressed this sentiment when he stated:

It is desirable that the trial of [civil] causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.¹¹⁷

More recently, the Second Circuit continued this theme, reasoning that openness has the salutary effect of protecting against judicial abuse and promoting increased respect and confidence in the judicial system.

The presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice. Federal courts exercise powers under Article III that impact upon virtually all citizens, but judges, once nominated and confirmed, serve for life unless impeached through a process that is politically and practically inconvenient to invoke. Although courts have a number of internal checks, such as appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control. Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.¹¹⁸

116. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (citation omitted); see also Solove, *Access and Aggregation*, *supra* note 25, at 1201 (“Understood broadly, the First Amendment protects openness in information flow. [Thus,] the Court and lower courts have held that the First Amendment provides certain rights of access to at least some government proceedings and records.”).

117. *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

118. *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); see also *Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004) (“[W]e express our concern about the plaintiff’s litigating under a pseudonym. Judicial proceedings are supposed to be open . . . in order to enable the proceedings to be monitored by the public.”).

Those observers who subscribe to the belief that “[o]penness . . . enhances both the basic fairness . . . and the appearance of fairness so essential to public confidence in the system”¹¹⁹ tend to focus on whether the *verdict* was just, *i.e.* the appropriateness of a decision regarding the underlying merits of the claim, not fairness in terms of equal access to the courts and the ramifications of disclosing personal information.¹²⁰ In order to uphold the values underlying the “openness doctrine,” however, courts must focus not only on reaching a just result regarding the merits of a claim, but on fairness regarding the ramifications to those seeking to vindicate their rights and the value to society of having these claims brought forth.

It is the rare case today in which the public cannot realize the full benefits of an open trial without knowing the plaintiff’s name, so long as the pertinent characteristics of the plaintiff are freely available to all observers. When this is the case, the public is able to view the workings of the judicial system and scrutinize the results that are reached. The Fourth Circuit spoke to this point in *James v. Jacobson*.¹²¹ In that case, the plaintiffs were a husband and wife who sued the doctor whom the couple had hired to perform artificial insemination of Mrs. James with Mr. James’s sperm. As a result of the procedure Mrs. James became pregnant and had two children. Several years later the couple discovered that Jacobson, and not Mr. James, was the biological father of the two children. The distraught couple sought to commence a civil action using pseudonyms against Jacobson, concerned about the effect that the suit would have on their children if the children learned that Mr. James was not their biological father.¹²² Reversing the trial court’s denial of leave to proceed pseudonymously, the Fourth Circuit noted that the plaintiffs disavowed any request to be protected at trial against the risk of their *indirect* identification, and that

anonymity in this case would be limited to the pseudonym that they use, not to who they are in every other respect. That is, their profession, where they come from, what they do, what they stand for; and all

119. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984).

120. Furthermore, openness was originally touted in a time when someone interested in an action had to expend time and effort going to a courthouse to watch the proceedings or manually search through courthouse files to find information about a particular case. Today, the Internet and electronic legal databases have changed all of that. One can simply type the word “AIDS” into an “all-cases” database and retrieve hundreds of cases involving parties with AIDS and intimate details about those parties.

121. 6 F.3d 233 (4th Cir. 1993).

122. *Id.* at 235.

of the other portions of cross examination would be there. The only thing that would be absent would be their true name to protect the identity of their children.

....

.... Demeanor is demeanor, however the witness is identified, and it would seem to make no difference to a jury in assessing whether such things as the particular occupation or place of residence of a witness might bear upon his credibility, whether the witness bore the name John Smith or Henry Williams.¹²³

Thus, as the Fourth Circuit so succinctly explained, the public loses nothing when a plaintiff is allowed to proceed pseudonymously but all the other facts and circumstances of the case remain in view.¹²⁴ As a result, public confidence in the judicial system need not suffer by the use of plaintiff pseudonymity.

Conversely, mandatory open judicial proceedings may not be in the best interests of society. When the plaintiff's identity is disclosed to the court and to the defendant only, little is lost from society's perspective, because the allegations, defenses, and evidence—albeit redacted or otherwise altered to protect the plaintiff's identity—are still in full view. By contrast, some potential plaintiffs may forfeit their opportunity to seek justice, out of fear of having their private information become known. Other would-be plaintiffs may choose not to bring suits because they fear the consequences of being known as litigious.¹²⁵ This results in costs to the public as well as to the plaintiffs—courtrooms with wide open doors but with empty seats and no litigants, and lost opportunities for the creation of invaluable precedent.

Even the purported confidence-building benefits of open trials are not borne out by supporting data. Although it has been argued that public scrutiny protects against judicial abuse, even in the current atmos-

123. *Id.* at 241, 242.

124. *See also* *Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981). In *Stegall*, the Fifth Circuit stated: Party anonymity does not obstruct the public's view of the issues joined or the court's performance in resolving them. The assurance of fairness preserved by public presence at a trial is not lost when one party's cause is pursued under a fictitious name. These crucial interests served by open trials . . . are not inevitably compromised by allowing a party to proceed anonymously.

Id. at 185.

125. The Tenth Circuit has held that it is not racial discrimination to refuse to hire a black applicant on the basis of fear that he is litigious and might embarrass the employer by filing racial discrimination lawsuits against businesses in the local community. *See Drake v. Colo. State Univ.*, Nos. 97-1076, 97-1077, 1998 WL 614474, at *5 (10th Cir. Sept. 8, 1998).

phere that promotes open trials, judicial abuse is nonetheless present in our system.¹²⁶ Furthermore, access to documents pertaining to a judge's potential conflict of interest is not easy to obtain.¹²⁷ Additionally, there is undoubtedly a countervailing decrease in confidence in the judicial system among plaintiffs forced to choose to abandon their meritorious claims for fear of being required to disclose private matters.

When plaintiffs choose not to pursue their claims, rather than suffer the embarrassment of the public accessing their private facts or unseemly encounters,¹²⁸ society as a whole loses an opportunity to participate in the judicial system and to be a part of actions that often create valuable precedent. Thus, openness needs to be weighed against plaintiffs' legitimate interests in privacy. The public can scrutinize the judicial process without knowing the plaintiff's name, as long as the pertinent characteristics of the plaintiff are available to all.¹²⁹ When this is the case, the goals behind the desire for open trials are met, even though the plaintiff's name is kept from the public, because the public still is able to view the workings of the judicial system and evaluate the results that are reached.¹³⁰

To the extent that open trials do enhance confidence in the judicial system, this goal is much more likely to be achieved in the criminal arena rather than in the civil arena. Indeed, much of the tradition of judicial

126. For example, in California alone, twenty judges were removed from the bench for disciplinary reasons from 1973 to 2003, thirty-five judges were censured from 1970 to 2003, and twenty-nine were issued public admonishments between 1995 and 2003. STATE OF CALIFORNIA COMMISSION ON JUDICIAL PERFORMANCE, PUBLIC DISCIPLINE/DISMISSALS—1960 TO PRESENT, <http://cjp.ca.gov/pubdisc.htm> (last visited Dec. 16, 2004).

127. Liptak, *supra* note 21. "According to a new report by the Government Accounting Office, [litigants questioning whether a judge has a conflict of interest] must submit a request in writing; swear under oath that they will not use the information unlawfully or for a commercial purpose; pay a copying fee; and wait an average of 90 days before the documents are mailed to them." *Id.*

128. In a recent example, a woman working for Middle Tennessee State University withdrew a complaint of sexual harassment against the president of the university one week after filing it, upon being advised by the Board of Regents that the media would report on the event. REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, RESTRAINING ORDER CUTS OFF ACCESS TO SEXUAL HARASSMENT COMPLAINT, <http://www.rcfp.org/news/2003/1104janedo.html> (Nov. 4, 2003). Even though the complaint had been withdrawn, however, the Board of Regents continued to investigate the complaint, and the media sought to obtain a copy of the complaint. *Id.* The university obtained a restraining order barring the release of the complaint pending a hearing to decide if it should be released under the Tennessee Public Records Act. *Id.* The state attorney general later issued a brief stating that the complaint was a public record and therefore subject to release. *MTSU Sexual Harassment Complaint May be Released* (News Channel 5 broadcast, Nov. 14, 2003), at <http://www.newschannel5.com/content/news/2784.asp>.

129. *Stegall*, 653 F.2d at 185.

130. *See id.* (stating that the "crucial interests" addressed by open trials "are not inevitably compromised by allowing a party to proceed anonymously").

openness has developed in the criminal sphere.¹³¹ The Supreme Court has noted that the right to a public trial is “a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every *criminal* trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”¹³² As one writer expressed it, criminal trials are “secular rituals through which people hope that the mystery of evil will be explained.”¹³³ As the Supreme Court expressed, “[c]ivilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people’s consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution.”¹³⁴

The trials of the now-convicted Washington-area snipers are pertinent examples. John Allen Muhammad and Lee Boyd Malvo were arrested and charged with homicides in multiple jurisdictions after they terrorized the Washington, D.C., area for several weeks in the fall of 2002.¹³⁵ After their arrests, there seemed to be little doubt about their guilt: the murder weapon was found in their car, their DNA was reportedly present at several of the crime scenes, and the shootings stopped after they were apprehended.¹³⁶ Furthermore, the two defendants’ respective defense strategies seemed to confirm their guilt: each planned to blame the crimes on the other.¹³⁷ Even so, public interest in the trial was tremendous, but not as “searches for truth, at least not in the factual sense of who committed the crimes.”¹³⁸ Instead, the trials seemed to take on a

131. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 593 (1980) (Brennan, J., concurring) (“Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence.”).

132. *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979) (emphasis added) (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)). The Supreme Court has noted further that “it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which *criminal* trials are conducted.” *Richmond Newspapers*, 448 U.S. at 575 (emphasis added).

133. Paul Butler, *We Want the Trial as Much as the Verdict*, WASH. POST, Oct. 19, 2003, at B1.

134. *Richmond Newspapers*, 448 U.S. at 571.

135. See, e.g., Francis X. Clines & Christopher Drew, *With 2 Held, Police Tie Rifle in Car to Sniper Killings*, N.Y. TIMES, Oct. 25, 2002, at A1; Rob Granatstein, *Suspects Caught Napping; 2 Men Arrested Early This Morning Sleeping at Maryland Rest Stop*, TORONTO SUN, Oct. 24, 2002, at B2; *Who Will Punish Them? Jurisdictions Jockey for Right to Prosecute Sniper Suspects*, NEWSDAY, Oct. 28, 2002, at A5.

136. Butler, *supra* note 133. See also Stephen Braun, *Virginia Judge: Malvo Confession Can Be Used at Sniper Trial*, CHI. TRIB., May 7, 2003, at 18 (“The decision by [the judge] strengthens a prosecution case already braced by a wealth of physical evidence.”); Adam Liptak, *At Sniper Trial, a Chilling Tape Is Heard by Jury*, N.Y. TIMES, Nov. 19, 2003, at A1.

137. Butler, *supra* note 133.

138. *Id.*

significance independent of the eventual conviction and punishment of the defendants by helping the community cope with evil.¹³⁹

Few civil trials fit this bill, and the impetus for open judicial proceedings in the civil context is thus far less compelling. Instead, civil trials are more typically battles between two or more parties about a matter of purely private interest—very often, which party will pay what amount to the other party. To the extent that there is any public interest in the proceedings, it is often voyeuristic, or for entertainment value—hardly the kind of ideals judicial openness was designed to further.¹⁴⁰ In the event that there is any legitimate public interest in a civil battle, perhaps because it illuminates an area of public concern or a changing ethos,¹⁴¹ plaintiff pseudonymity would not hamper the trial, because the public and the press can easily deal with a “John Doe” or “Jane Doe,” particularly when the pertinent characteristics of the plaintiffs are revealed.

Applying the rationale from criminal cases to civil proceedings also fails to recognize that civil litigation and criminal proceedings implicate different concerns of different weight.¹⁴² In the words of one federal court, there is an important distinction between the “civil context, where the importance of confrontation [of one’s accuser] is not as great” and the “criminal context, where the more carefully guarded rights of the defendant are involved.”¹⁴³ In criminal proceedings, all of society is one of the litigants, as the prosecution seeks to enforce the interests of the community. Thus, all of society has an interest in the resolution of uncertainty regarding a defendant’s guilt.¹⁴⁴ Civil litigation, in contrast, generally involves purely private interests where the litigants sort out the allocation of disputed resources.¹⁴⁵ Finally, the respective outcomes of

139. *Id.*

140. *See, e.g.,* Gest v. Minelli, No. 03/118332 (N.Y. Sup. Ct., filed Oct. 21, 2003) (David Gest sued soon-to-be ex-wife Liza Minelli for \$10 million alleging assault and battery; Minelli counter-claimed alleging, *inter alia*, breach of contract), <http://www.thesmokinggun.com/archive/lizaabuse1.html> (last visited Dec. 16, 2004).

141. *See, e.g.,* Gannet Co. v. DePasquale, 443 U.S. 368, 386–87 n.15 (1979) (citing *Dred Scott v. Sandford*, *Plessy v. Ferguson*, *Brown v. Board of Education*, and *University of California v. Bakke* as civil cases that may be of substantial public concern equaling, and perhaps surpassing, that which exists in criminal cases).

142. *But see id.* at 387 (“[I]n some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.”).

143. *United States v. Bateman*, 805 F. Supp. 1058, 1061 (D.N.H. 1992).

144. *See* Butler, *supra* note 133 (describing the public’s interest in criminal adjudications).

145. *But see* Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983) (holding, in a suit concerning penal administration in Alabama, that the public’s constitutional right of access extends to civil cases relating to the incarceration of prisoners, and stating that “[i]f it is beneficial to have public scrutiny of criminal proceedings that may result in conviction and punishment, then it is also

the proceedings demand a different level of solicitude for judicial openness. In the criminal context, a public proceeding seems to make the punishment—which indeed may include death—more respectable.¹⁴⁶ In civil litigation, no deprivation of life or liberty is implicated, so there is less need to protect the integrity of the process with public scrutiny.

Thus, justifications for open trials that have evolved from the criminal arena are less than useful when weighing the appropriateness of pseudonymity in the civil context. Moreover, many of the purported “benefits” of open trials either do not preclude plaintiff pseudonymity, or are not borne out by experience or common sense.

C. *Causing Other Witnesses to Come Forward*

Some courts have based their opposition to pseudonymous plaintiffs on the notion that open proceedings might cause other members of the community to come forward as additional witnesses.¹⁴⁷ This idea provides scant justification for denying leave to proceed pseudonymously in the modern era. At least in civil litigation, the notion seems rather archaic, even quaint, in this era of wide-ranging discovery. Federal Rule of Civil Procedure 26(a)(1)(A) imposes on all parties the duty to provide, at the outset of the litigation, “the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information.”¹⁴⁸ With the net cast so wide from the very start of the litigation, it seems unlikely that any potential witness would have escaped it, only to appear voluntarily and spontaneously upon reading press accounts of the case. Indeed, even scholars who advocate for open judicial civil proceedings acknowledge that

[i]n these days of wide ranging discovery, when litigants are entitled to demand of each other the identity and location of all persons having

helpful to allow public access to civil proceedings that modify the earlier trials by freeing prisoners before their sentences are completed or parole has been granted”).

146. *Id.*

147. In *Richmond Newspapers, Inc. v. Virginia*, Justice Brennan suggested that unknown witnesses might step forward if the trial, with all the parties’ names known, was publicized. 448 U.S. 555, 596–97 (1980) (Brennan, J., concurring) (“Public trials come to the attention of key witnesses unknown to the parties.”). See also *San Bernardino County Dep’t of Pub. Soc. Servs. v. Superior Court*, 283 Cal. Rptr. 332, 341 (Cal. Ct. App. 1991) (reasoning that “open proceedings discourage perjury and might encourage other witnesses to come forward which in turn leads to more accurate fact-finding”).

148. FED. R. CIV. P. 26(a)(1)(A).

knowledge of any matter relevant to the subject of the pending action, . . . it is rather unlikely that there will be unknown witnesses whom open judicial proceedings will induce to come forward. The historical view to the contrary consequently has lost much of its validity, even when names are not hidden.¹⁴⁹

Modern litigation has changed considerably during the past few decades.¹⁵⁰ Adopted in 1938 and expanded in ensuing decades,¹⁵¹ the Federal Rules of Civil Procedure regarding discovery were broadened in 1983 so that the scope of discovery widened even further.¹⁵² Moreover, the 1983 amendments imposed restrictions directed chiefly at the use of, rather than the acquisition of, the information discovered, notwithstanding concerns about the costs that greatly expanded discovery has incurred.¹⁵³ At the same time that the Rules were evolving to allow wider inquiry, new causes of action that require inquiry into private behavior were being created, including, most notably, sexual harassment lawsuits.¹⁵⁴

Yet while the claims against the defendant are merely "allegations" and a plaintiff can be sanctioned for bringing a frivolous claim, often it is the plaintiff's reputation that ultimately suffers irreversible harm. A plaintiff who alleges sexual harassment can be sure that her sexual history, interpersonal relationships, mental health, and medical history will

149. Steinman, *supra* note 95, at 19 n.88.

150. See generally 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2001 (2d ed. 1994).

151. Prior to the enactment of the Federal Rules of Civil Procedure in 1938, discovery in federal courts was "extremely limited." Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 698 (1998). The only discovery available to parties involved in litigation "was provided for in two federal statutes dealing with depositions." *Id.* The 1946 amendments to Rule 26, however, have since eliminated the judicially crafted admissibility requirements that had arisen over the preceding years. *Id.* at 736. Rule 26 was amended again in 1983 to reign in overly broad discovery by adding provisions allowing the court to limit discovery otherwise permitted by the rules if the discovery was unreasonably cumulative or duplicative or if the burden or expense of the proposed discovery outweighed its likely benefit. See FED. R. CIV. P. 26(b)(2).

152. See WRIGHT & MILLER, *supra* note 150, § 2001.

153. *Id.*

154. See, e.g., Equal Employment Opportunity Act, Pub. L. 88-352, § 703, (1964) (codified as amended at 42 U.S.C. § 2000e-2 (2000)); ARIZ. REV. STAT. § 41-1463 (2004) (prohibiting employment discrimination based on sex); DEL. CODE ANN. tit. 19, § 711 (Supp. 2002) (same); N.Y. EXECUTIVE LAW § 296 (McKinney Supp. 2004) (proscribing various forms of unlawful discriminatory practices, including sexual discrimination); see also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986) (holding that "a claim of 'hostile environment' sex discrimination . . . is actionable under Title VII" and affirming the district court's decision to admit testimony regarding the "respondent's sexually provocative speech and dress").

be dissected.¹⁵⁵ Moreover, wide-ranging discovery means that witnesses may be called from far and wide and documents sought from all manner of sources, however tangentially related to the case. A plaintiff might choose not to bring a meritorious action, fearing both the onslaught of scrutiny into her private affairs coupled with the stigma of being labeled litigious.¹⁵⁶

Any analysis of requests for pseudonymity that is not mindful of these new realities is myopic and should be corrected.

VI. THE FIVE FACTORS

Despite judicial reluctance to endorse plaintiff pseudonymity, several courts have recognized that the ideals behind judicial openness must give way when justice warrants and society benefits. For example, the Sixth Circuit, which has emphasized the importance of open civil proceedings,¹⁵⁷ noted that “[t]he right of access is not absolute, however, despite . . . justifications for the open courtroom. Courts have carved out several distinct but limited common law exceptions to the strong presumption in favor of openness [One of] these interests include[s] certain privacy rights of participants”¹⁵⁸

In the absence of any guidance from the Federal Rules of Civil Procedure,¹⁵⁹ and with only implicit recognition of the practice of permitting plaintiff anonymity by the Supreme Court,¹⁶⁰ federal courts have developed a factor-based approach that attempts to weigh the parties’ privacy

155. See, e.g., Tamar Stieber, *The “Nuts and Sluts” Strategy*, GLAMOUR, Aug. 1996, at 138 (describing the writer’s harrowing experience, after filing a sex discrimination suit against her employer, in which her sex life and medical records came under scrutiny and she became the subject of a ferocious campaign of intimidation).

156. Recently, a friend went on a second employment interview with a large national bank. As she handed the manager her resume, she explained to him that her name had changed since the last time she had interviewed with the company (which was about six weeks earlier) because she had married in the interim. Hoping to ensure that there would be no confusion within the bank as her two resumes—one with her maiden name and one with her married name—circulated through the firm, she politely started to explain the change from her former name to her current name. The manager interrupted her and said, “Quite frankly, I don’t care *what* your former name was as long as it wasn’t ‘Plaintiff.’”

157. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983) (“Throughout our history, the open courtroom has been a fundamental feature of the American judicial system.”).

158. *Id.* at 1179.

159. See *supra* Part V.A.

160. See *supra* Part IV.

interests against the perceived desirability of judicial openness. The majority of courts examine five basic factors in order to determine which plaintiffs to permit to proceed pseudonymously:

- (1) whether the plaintiff would risk suffering injury if publicly identified;
- (2) whether the plaintiff is challenging governmental activity;
- (3) whether the plaintiff would be compelled to admit her intention to engage in illegal conduct, thereby risking criminal prosecution;
- (4) whether the plaintiff would be required to disclose information of the utmost intimacy; and
- (5) whether the party defending against a suit brought under a pseudonym would be prejudiced.¹⁶¹

It is the thesis of this Article that these factors bear re-evaluation in light of the changing nature of modern litigation and technology. But first, it is helpful to review their genesis and modern application.

A. *The First Three Factors*

The first three factors were developed by the Fifth Circuit in 1979, in *Southern Methodist University Ass'n of Women Law Students v. Wynne & Jaffe*.¹⁶² That case involved several female lawyers who sought to bring anonymous actions against two Dallas law firms for allegedly engaging in illegal sexual discrimination in the hiring of summer clerks and associates, in violation of Title VII.¹⁶³ The Fifth Circuit first noted that there were no prior decisions that recognized or even discussed “the right of Title VII plaintiffs to proceed anonymously,” and that “[n]either the Federal Rules of Civil Procedure nor Title VII itself” provided for anonymous plaintiffs.¹⁶⁴ Nevertheless, the court noted, “[u]nder certain special circumstances . . . courts have allowed plaintiffs to use fictitious

161. See, e.g., *EW v. New York Blood Ctr.*, 213 F.R.D. 108, 111 (E.D.N.Y. 2003); see also *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993); *Doe v. Hartz*, 52 F. Supp. 2d 1027, 1046–47 (N.D. Iowa 1999); *Doe v. Provident Life and Accident Ins. Co.*, 176 F.R.D. 464, 467–68 (E.D. Pa. 1997). Other factors are sometimes cited as well, including the extent to which the identity of the litigant has been kept confidential; whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigants’ identities; and whether the interests of children are at stake. See *Hartz*, 52 F. Supp. 2d at 1046–47.

162. 599 F.2d 707, 713 (5th Cir. 1979).

163. *Id.* at 708–09 (citing 42 U.S.C. §§ 2000e–2000e-17 (2004)).

164. *Id.* at 712.

names.”¹⁶⁵ The court observed that “‘where the issues involved are matters of a sensitive and highly personal nature,’ such as birth control, abortion, homosexuality or the welfare rights of illegitimate children or abandoned families, the normal practice of disclosing the parties’ identities yields ‘to a policy of protecting privacy in a very private matter.’”¹⁶⁶

The Fifth Circuit in *Wynne & Jaffe* articulated what would become the first three of the five factors used by courts to determine the merits of a plaintiff’s request to bring a pseudonymous action. In order to be entitled to bring their claims, the Fifth Circuit reasoned that the plaintiffs in those actions in which plaintiffs’ pseudonymity would be granted: (1) would have to divulge personal information of the utmost intimacy; (2) would have to be challenging the constitutional, statutory, or regulatory validity of governmental activity; or (3) would have to admit that they had either violated or intended to violate state laws or government regulations, or that they wished to engage in prohibited conduct.¹⁶⁷ In contrast, the plaintiffs in *Wynne & Jaffe* ran none of the risks associated with such filings. To the contrary, they publicly accused the defendant law firms of serious violations of federal law, and “[b]asic 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.”¹⁶⁸ The court therefore affirmed the trial court’s order mandating disclosure of the plaintiffs’ identities by proper pleadings.¹⁶⁹

165. *Id.*

166. *Id.* at 712–13 (citations omitted). *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Poe v. Ullman*, 367 U.S. 497 (1961) (birth control); *Doe v. FAA*, 412 F.2d 674 (8th Cir. 1969) (homosexuality); *Doe v. Carleson*, 356 F. Supp. 753 (N.D. Cal. 1973) (welfare).

167. 599 F.2d at 713.

168. *Id.* The suit had been brought by the Southern Methodist University Association of Women Law Students (the “Association”) as well as four individual female lawyers. *Id.* at 708–09. The defendants had also sought the Association’s current membership list as well as the identities of women who plaintiff “claimed were hesitant to join ‘or labor for the Association in the public eye’ and who were afraid ‘that, if they associated with the Association, they will be singled out for discrimination by Defendants and other law firms.’” *Id.* at 713–14 (quoting the trial court’s order). The trial court had granted the defendant law firm’s motion to compel production of this information but placed restrictions on to whom it could be divulged. *Id.* at 714. The Fifth Circuit concluded that the trial court had struck “a sensible balance” between the defendant law firm’s “need to defend this lawsuit and the Association’s desire to avoid the purportedly adverse consequences of revealing information with respect to its membership.” *Id.*

169. *Id.* at 713.

B. The Fourth Factor

The factors first articulated in *Wynne & Jaffe* were expanded upon two years later by the Fifth Circuit in *Doe v. Stegall*, where the court added a fourth factor, relating to plaintiffs' possible physical injury.¹⁷⁰ In *Stegall*, a mother brought an action on behalf of her two minor children challenging the constitutionality of prayer and Bible reading exercises in Mississippi public schools.¹⁷¹ The mother sought to shield her identity from the public for fear of hostile public reaction to her lawsuit. The court first observed that "it would be a mistake to distill a rigid, three-step test for the propriety of party anonymity from the fact-sensitive holding in [*Wynne & Jaffe*]." ¹⁷² Nevertheless, the court stated, the three factors identified in that case "deserve considerable weight in the balance pitting privacy concerns against the presumption of openness of judicial proceedings."¹⁷³

In *Stegall*, the plaintiffs were threatened with "extensive harassment—and perhaps even violent reprisals—if their identities are disclosed to a . . . community hostile to the viewpoint reflected in plaintiffs' complaint."¹⁷⁴ Standing alone, according to the court, the threat of hostile public reaction to a lawsuit "will only with great rarity warrant public anonymity," but in *Stegall* the plaintiffs had already been threatened with violence.¹⁷⁵ Thus, the Fifth Circuit found that pseudonymity was warranted.

Similar concerns and a heavy reliance on *Stegall* motivated the District Court for the Northern District of Georgia to permit plaintiff pseudonymity in *Doe v. Barrow County*.¹⁷⁶ In that case, the plaintiff sued the county, challenging a Ten Commandments display at the county courthouse as a violation of the separation of church and state.¹⁷⁷ The *Barrow County* court observed that

courts in this circuit have considered numerous factors when determining whether a plaintiff should be permitted to proceed anonymously.

170. 653 F.2d 180 (5th Cir. Aug. 1981).

171. *Id.* at 181.

172. *Id.* at 185.

173. *Id.* at 186.

174. *Id.*

175. *Id.* The plaintiffs offered several documentary exhibits to bolster their assertions that they might be subject to retaliatory harassment or violence if their identities were revealed, including local newspaper reports of public reaction to the lawsuit that betrayed visceral anti-Semitism. *Id.* at 183 n.6.

176. 219 F.R.D. 189 (N.D. Ga. 2003).

177. *Id.* at 190.

For example, the *Stegall* court catalogued previous cases where plaintiffs had been allowed to prosecute under a fictitious name and found that most involved suits challenging government activity, suits where a plaintiff would have to disclose information “of the utmost intimacy,” and suits where plaintiffs were compelled to admit their intention to engage in illegal conduct, thereby risking criminal prosecution.¹⁷⁸

The court first acknowledged the plaintiff’s privacy concerns, noting that “it hears cases against the government, sometimes involving very private concerns, on a regular basis” but that “religion is perhaps the quintessentially private matter.”¹⁷⁹ Although the defendants argued that the plaintiff would “not need to reveal his religious beliefs” over the course of bringing an action, the court reasoned that he would need to show that he had been injured by the courthouse display in order to have standing, and that although he might not need to directly state his religious affiliation, or lack thereof, he would need to explain why he was injured by the presentation.¹⁸⁰

The court then noted that the plaintiff had presented evidence of threats and intimidation directed to him and his family.¹⁸¹ Moreover, the court said,

[a]t least one member of the community has attempted to intimidate several of the judges of this court . . . by leaving angry and inappropriate voice messages. Although the court will not be affected by attempts at intimidation, they are relevant to show the tenor being displayed by some members of the public.¹⁸²

Thus, the court concluded that “this is one of those rare cases in which the plaintiff should be permitted to proceed anonymously.”¹⁸³

178. *Id.* at 193 (citing *Stegall*, 653 F.2d at 185).

179. *Id.* (quoting *Stegall*, 653 F.2d at 186).

180. *Id.*

181. *Id.* at 193–94.

182. *Id.* In attempting to assure the public’s right to express thoughts on the sensitive issues involved in the case without fear of threats or intimidation, the *Barrow County* court stated that it would “not tolerate, nor condone through inaction, any threatening or intimidating acts against anyone involved in this litigation” and referred the matter to the United States Attorney pursuant to a federal statute “which makes it a federal crime to, amongst other things, knowingly use intimidation or threats with the intent to influence, delay, or prevent the testimony of any person in an official proceeding.” *Id.* at 194 (citing 18 U.S.C. § 1512(b)(1) (2003)).

183. *Id.* The court also ordered the plaintiff to “make himself known to the court and counsel for the defense” and ruled that “[a]ny proceedings necessary to determine standing, or other issues defendants wish to pursue with the plaintiff, will be conducted in a closed setting.” It considered any possible inconvenience to the defendant, by allowing the plaintiff to proceed pseudonymously, to be “relatively low.” *Id.* In particular, the court reasoned:

C. *The Fifth Factor*

The fifth factor, whether the plaintiff's pseudonymity will prejudice the defendant in defending against the suit, has been viewed as having two facets: (1) whether plaintiff pseudonymity will prejudice the defendant's case by jeopardizing access to information necessary to the defense;¹⁸⁴ and (2) whether plaintiff pseudonymity is fair to the defendant, who is "required to defend himself publicly while the plaintiff could make her accusations from behind a cloak of anonymity."¹⁸⁵

Some courts emphasize any prejudice that the plaintiff's pseudonymity may visit on the defendant. In *Doe v. Indiana Black Expo, Inc.*, for example, the plaintiff sought "an order that would prohibit the defendants from using his real name in defending themselves publicly against his public accusations" of discrimination.¹⁸⁶ The court found that even though the defendants knew the plaintiff's identity—he was a former employee—"the anonymity plaintiff seeks would significantly hamper

This is not a case that will be determined by plaintiff's credibility or recitation of facts. Rather, as long as plaintiff has standing to sue, this case will depend on the resolution of a legal question: Does the display of the Ten Commandments in the county courthouse violate the Constitution? The relevant facts, including who placed the display, what is included in the display, how long it has been presented, etc., will likely come from witnesses other than the plaintiff. The legal issues, while possibly the subject of expert testimony, will be determined by the arguments of counsel. At the end of the day, plaintiff plays a relatively minor role in this litigation, and the constitutionality of the Ten Commandments display will be determined in proceedings open and accessible to all. In light of the response these issues have generated from some in the community, the court feels it appropriate to allow plaintiff to proceed under a pseudonym.

Id.

In Nebraska, a federal magistrate permitted a plaintiff to pseudonymously sue a city about a Ten Commandments monument. See Todd Cooper, *ACLU Requests Restraint on Press*, OMAHA WORLD-HERALD, Sept. 21, 2004, at A1. Interestingly, however, a federal district court judge in Nebraska stated he would not consider potential threats to the plaintiff when it came to a request to order that his name be withheld from publication by the press, or alternatively be hidden through the use of a pseudonym. *Id.* The judge noted that to order the use of a pseudonym by the press would be a prior restraint and a violation of the First Amendment. *Id.* A commentator on the case noted that the Supreme Court has never upheld an order preventing the press from publishing. *Id.*

184. *Doe v. Hartz*, 52 F. Supp. 2d 1027, 1048 (N.D. Iowa 1999) ("Doe's use of a pseudonym . . . seems unlikely to provide any bar . . . to the defendants' access to information necessary to defend the suit . . .").

185. *Doe v. Shakur*, 164 F.R.D. 359, 361 (S.D.N.Y. 1996) (citations omitted); see also *Hartz*, 52 F. Supp. 2d at 1048 (finding "considerable appeal to the defendants' argument that they should not be held up to public ridicule while their accuser remains anonymous, when it is their accuser who has focused public attention on the circumstances she finds embarrassing") (citing *Shakur*, 164 F.R.D. at 361).

186. 923 F. Supp. 137, 141 (S.D. Ind. 1996).

their ability to defend themselves from adverse publicity and other collateral, but often inevitable, effects of civil litigation.”¹⁸⁷

Most courts, however, emphasize fairness considerations. For example, in *Doe v. Shakur* the plaintiff alleged that the rap singer Tupac Shakur had sexually assaulted her.¹⁸⁸ Before filing her complaint, the plaintiff had obtained an order ex parte from the trial judge, sealing the complaint and permitting her to file a substitute complaint using a pseudonym.¹⁸⁹ Shakur failed to file a timely answer, and a default was entered against him.¹⁹⁰ Shakur then moved to vacate the entry of default, and in so doing used the plaintiff’s real name, arguing that the trial court’s order merely sealed the complaint and did not provide that the entire proceeding was to be conducted under seal.¹⁹¹ Agreeing with that assessment of the trial court’s order, the district court then evaluated the fairness to Shakur of permitting the plaintiff to proceed anonymously.

First, plaintiff has chosen to bring this lawsuit. She has made serious charges and has put her credibility in issue. Fairness requires that she be prepared to stand behind her charges publicly.

. . . .

Third, Shakur has been publicly accused. If plaintiff were permitted to prosecute this case anonymously, Shakur would be placed at a serious disadvantage, for he would be required to defend himself publicly while plaintiff could make her accusations from behind a cloak of anonymity.¹⁹²

The court rejected the plaintiff’s claims that she would be “publicly humiliated and embarrassed” if her name was revealed, finding that such claims “are not sufficient grounds for allowing a plaintiff in a civil suit to proceed anonymously”¹⁹³ Death threats, in contrast, would provide a legitimate basis for allowing her to proceed anonymously, but the

187. *Id.*; see also *Doe v. Wolowitz*, No. 01-73907, 2002 WL 1310614, at *5 (E.D. Mich. May 28, 2002) (stating that “Defendant complains that he would be prejudiced defending against a suit brought under a pseudonym because he would be unable to issue subpoenas using Plaintiff’s name.”).

188. 164 F.R.D. 359, 360 (S.D.N.Y. 1996); see also Archive, New York State Department of Correctional Services Photograph of Shakur, The Smoking Gun, at <http://www.thesmokinggun.com/archive/newmugs2.html> (last visited Dec. 16, 2004).

189. 164 F.R.D. at 360.

190. *Id.*

191. *Id.*

192. *Id.* at 361 (citations omitted).

193. *Id.* at 362.

plaintiff had not "provided any details, nor has she explained how or why the use of her real name in court papers would lead to harm, since those who presumably would have any animosity toward her already know her true identity."¹⁹⁴ Finally, the court conceded that "[i]t may be, as plaintiff suggests, that victims of sexual assault will be deterred from seeking relief through civil suits if they are not permitted to proceed under a pseudonym."¹⁹⁵ But the court was untroubled by this prospect, deeming it an "unfortunate result" but reasoning that "[f]or the reasons discussed above . . . plaintiff and others like her must seek vindication of their rights publicly."¹⁹⁶

Some courts evenly weigh the prejudice and fairness aspects of the fifth factor when determining whether to allow a plaintiff to proceed pseudonymously. In *Doe v. Hartz*, for example, the District Court for the Northern District of Iowa considered whether the plaintiff's use of a pseudonym would prejudice defense of a suit involving a female parishioner who alleged that her parish priest had touched her inappropriately.¹⁹⁷ The court reasoned that the defendants had

not articulated how defending against a suit brought under a pseudonym would prejudice their defense of the suit. Doe's use of a pseudonym in this litigation seems unlikely to provide any bar, for example, to the defendants' access to information necessary to defend the suit: The defendants are already intimately familiar not only with the incidents alleged but with the actual identity of the plaintiff.¹⁹⁸

The *Hartz* court then weighed the other fairness aspect of the fifth factor, and found that "there is considerable appeal to the defendants' argument that they should not be held up to public ridicule while their accuser remains anonymous, when it is their accuser who has focused public attention on the circumstances she finds embarrassing."¹⁹⁹ The court then determined that it was "appropriate" to "weigh the speculative nature of the potential harm to Doe from revealing her identity against the very real embarrassment her accusations have already caused the defen-

194. *Id.* (citing *Doe v. Hallock*, 119 F.R.D. 640, 644 (S.D. Miss. 1987)). Apparently the court was unfamiliar with the phenomenon of the crazed fan who seeks to vindicate any slur on his idol, and apparently the court hadn't considered the possibility that not all such fans were already aware of the plaintiff's name and address.

195. *Id.*

196. *Id.*

197. 52 F. Supp. 2d 1027, 1035 (N.D. Iowa 1999).

198. *Id.* at 1047-48 (citations omitted).

199. *Id.* at 1048 (citing *Doe v. Shakur*, 164 F.R.D. 359, 361 (S.D.N.Y. 1996)).

dants.”²⁰⁰ After considering all the factors, the *Hartz* court determined that “prosecution of this litigation under a pseudonym is not appropriate, because Doe does not have a substantial privacy right that outweighs the customary and constitutionally embedded presumption of openness in judicial proceedings.”²⁰¹

The issue of fairness to the defendant sometimes brings into play a subsidiary consideration: the nature of the plaintiff’s allegations. To some courts, pseudonymity is inappropriate in a “case involving direct and personal attacks upon the reputation and integrity of the defendant and in which personal credibility will play a large role in the issues in the case.”²⁰² According to one court:

[M]any of the cases in which courts have allowed plaintiffs to proceed under fictitious names have involved claims that did not include direct and personal attacks upon the reputation and integrity of the defendants, and where personal credibility played little if any role in the issues in the case. In challenges to statutes and regulations affecting, for example, abortion or birth control, or the plaintiffs’ challenge to school prayer practices in *Doe v. Stegall*, the anonymous plaintiffs were merely a few of many potential plaintiffs who could have challenged the constitutionality of the defendants’ statutes or practices. There were no significant issues in which the plaintiffs’ personal credibility played an important role. The constitutional claims asserted raised no personal challenge to the defendants’ integrity or reputations.²⁰³

D. Other Factors

Utilization by various courts of the five-factor balancing test has led to inconsistent results. One district court, for example, noted that the fact that the suit was against a governmental entity boded in favor of permitting the plaintiff to proceed anonymously,²⁰⁴ while another district court stated that because the plaintiff was suing the government, this “cut against her position.”²⁰⁵ Other courts have reached conflicting decisions when similar fact patterns were present.²⁰⁶ Courts have not specified

200. *Id.*

201. *Id.* (internal quotations and citations omitted).

202. *Doe v. Wolowitz*, No. 01-73907, 2002 WL 1310614, at *2 (E.D. Mich. May 28, 2002).

203. *Doe v. Ind. Black Expo, Inc.*, 923 F. Supp. 137, 142 (S.D. Ind. 1996).

204. *EW v. N.Y. Blood Ctr.*, 213 F.R.D. 108, 111 (E.D.N.Y. 2003).

205. *Doe v. City of New York*, 201 F.R.D. 100, 102 (S.D.N.Y. 2001).

206. *Compare Doe v. Evans*, 202 F.R.D. 173, 176 (E.D. Pa. 2001) (allowing pseudonymous litigation for plaintiff suing various law enforcement personnel for sexual harassment after finding in favor of plaintiff under a balancing test) *with Doe v. N.C. Cent. Univ.*, 1:98CV01095, 1999 WL 1939248, at *1, *6 (M.D.N.C. Apr. 15, 1999) (mem.) (denying, after conducting a balancing test,

which, if any, of the factors should be given more weight than others, and often courts go through the motions of examining all of the factors when really only one factor is dispositive.²⁰⁷ The inadequate nature of these five factors to provide satisfactory guidance to courts faced with plaintiff anonymity decisions has forced several courts to create and examine additional criteria. These supplementary factors include a review of whether the interests of children are involved,²⁰⁸ whether the identity of the litigants has already been exposed²⁰⁹ and whether there is an atypically weak public interest in knowing the litigants' identities.²¹⁰

Furthermore, courts have not determined whether any of the factors should be treated as a threshold matter. A review of the application of several of these factors in noteworthy cases exemplifies the shortcomings in the current procedures used by courts when deciding which plaintiffs should be permitted to proceed pseudonymously. It also highlights the need for revision of the balancing test. Presently, each of these factors is applied in an ad hoc manner that provides no consistency to plaintiffs looking for guidance on how best to pursue their interest in remaining anonymous. Moreover, these criteria do not recognize the two aforementioned monumental changes that have occurred in the legal landscape in the past few years: (1) dramatic changes in both the procedural and substantive nature of civil litigation; and (2) the astounding growth of the Internet and information technology, including electronic filing.

VII. RECOMMENDATIONS

I propose that courts recognize a right to privacy and acknowledge that right when considering plaintiffs' requests for pseudonymity. I further recommend that courts revise the factors currently used to make decisions regarding such requests, and I suggest new criteria to aid with the

plaintiff's pseudonymity motion where plaintiff claimed that she was sexually assaulted and raped by her supervisor).

207. For example, in *Doe v. Blue Cross & Blue Shield of Rhode Island*, the court treated as one of the primary factors (if not the dispositive factor) weighing in favor the plaintiff's pseudonymity his status as a transsexual, which the court viewed as a matter of an "exceedingly personal" nature. 794 F. Supp. 72, 73 (D.R.I. 1992).

208. See *Heather K. v. City of Mallard*, 887 F. Supp. 1249, 1256 (N.D. Iowa 1995) (granting child's request for pseudonymity to avoid risk of harassment and permanency of lawsuit's record).

209. See *Doe v. Bell Atl. Bus. Sys. Servs.*, 162 F.R.D. 418, 422 (D. Mass. 1995) (denying plaintiff's motion to proceed pseudonymously, in part, "because plaintiff's true identity was revealed in administrative proceedings[,] [rendering] the request for anonymity . . . effectively moot").

210. See *Evans*, 202 F.R.D. at 175 (stating, as one of several factors to be considered in allowing litigation to proceed pseudonymously, "whether, because of the purely legal nature of the issues presented . . . there is an atypically weak public interest in knowing the litigant's identities.") (citation omitted).

evaluation process. I also propose that plaintiffs' motions to proceed pseudonymously be handled by a specialized judge or magistrate who can develop an expertise in ruling on these types of motions.

A. A New Procedure for Evaluating Plaintiff Pseudonymity Requests

Aside from failure by courts to recognize the erosion of personal privacy, another significant problem facing would-be pseudonymous plaintiffs is a lack of procedural guidelines and consistency.²¹¹ Courts and the legislature have not developed a uniform procedure to which plaintiffs should conform when seeking to pursue a matter pseudonymously.²¹² The current lack of procedural uniformity diminishes public confidence in the judicial system. Lawyers are left guessing as to how to properly advise their clients, and court decisions appear inconsistent and unpredictable. Some courts, recognizing the need to protect plaintiff privacy but lacking an effective means to do so, have resorted to extraordinary measures—"super sealing documents."²¹³

211. See, e.g., *Unwitting Victim v. C.S.*, 273 Kan. 937, 945, 47 P.3d 392, 399 (2002) (indicating the lack of judicial or statutory guidance in determining when a plaintiff could proceed pseudonymously).

212. Almost twenty years ago, Joan Steinman wrote a comprehensive review of pseudonymous parties, urging the adoption of better procedural guidelines regarding anonymous plaintiffs. See generally Steinman, *supra* note 95. More than ten years after that, Professor Carol Rice proposed changes to the federal and state rules to ease the problems associated with pseudonymous parties. See generally Carol M. Rice, *Meet John Doe: It Is Time For Federal Civil Procedure To Recognize John Doe Parties*, 57 U. PITT. L. REV. 883 (1996). To date these calls largely have gone unanswered.

213. In December 2002, Connecticut courts were found to have engaged in a process of secretly sealing cases. This process sometimes entailed concealing the very existence of the case, including its docket number. See generally Paul von Zielbauer, *Connecticut Judges Plan to Drop Secrecy Option*, N.Y. TIMES, May 22, 2003, at B1 (reporting that the practice of "supersealing court records" had existed since 1980); Thomas J. Scheffey, *State Divorce Courts Quick to Cloak Cases: UConn President Philip Austin Alias Is Now "Level 1-10"*, CONN. L. TRIB., Dec. 2, 2002, at 1 (discussing secrecy options in divorce cases) [hereinafter *Divorce Courts Cloak Cases*]. Courts gave sealed cases a classification of Level One, Two, or Three depending on the level of secrecy deemed appropriate by the judge. A Level One classification required the highest level of secrecy. See generally Lynne Tuohy, *No Docket, No Names; Cases Move in Secrecy*, HARTFORD COURANT, Jan. 5, 2003, at A1 (statement of Melissa Farelly, executive director of external affairs for the Judicial Branch, saying "Level 1 means we can't even say the case exists"); *Divorce Courts Cloak Cases*, *supra* (quoting F. Herbert Gruendel, chief administrative judge of the family division, saying "[a] level two sealing means the name and docket number are public but the contents are sealed" and a "'level three' sealing is generally public, with individual motions and documents sealed").

Although judges were required to explain their reasons for sealing a case, these justifications often were withheld from the public along with the contents of the case. *Divorce Courts Cloak Cases*, *supra*. Under the pre-amended Rule 11-20 of the Connecticut Rules for the Superior Court: Procedure in Civil Matters, regardless of whether a party has filed a motion, the judge may order that the public be excluded or documents be sealed if he finds that "such order is necessary to preserve an interest which is determined to override the public's interest in attending such proceeding or viewing

One state court in New York, lacking concrete guidance from the federal courts regarding how to handle a request by a plaintiff to proceed pseudonymously, examined the underlying merits and likelihood of success of a plaintiff's claim to determine whether to permit the plaintiff to proceed anonymously,²¹⁴ while another state court presumed that the plaintiff's allegations were true for purposes of deciding her motion to proceed under a pseudonym.²¹⁵ More than thirty years ago, the Southern District of New York suggested three different procedures for plaintiffs to follow when seeking to proceed anonymously, yet none of these procedures has formally been adopted.²¹⁶ Furthermore, some courts that have denied plaintiffs' attempts to proceed anonymously have permitted

such materials." *Id.* (quoting Connecticut Rules for the Superior Court: Procedure in Civil Matters § 11-20 (portions regarding sealing of documents in § Rule 11-20 amended and transferred to Connecticut Rules for Superior Court: Procedure in Civil Matters § 11-20A (adopted May 14, 2003))).

Thus, there appears to be explicit authorization for the practice of sealing court records. But the above provision must be read in light of Rule 11-20(a), which creates a "presumption that courtroom proceedings shall be open to the public." 1 CONN. PRAC., PRAC. BK. ANN. SUPER. CT. CIV. RULES § 11-20(a) (2004); *see also Divorce Courts Cloak Cases, supra* (stating that "[b]y the very language of [Rule 11-20], the basic assumption is that adult civil matters are public. . ."). Moreover, most of the justifications for sealing the court records were never disclosed. *See Divorce Courts Cloak Cases, supra*. Such a privilege was often accorded to the more notable figures in Connecticut. *See Dave Altimari & Eric Rich, Elite Enjoy "Secret File" Lawsuits, HARTFORD COURANT*, Feb. 9, 2003, at A1 (reporting that "interviews and court records reveal that the influential and connected are well represented among the beneficiaries [of the sealing of court records]"). Thus, the practice of "super-sealing" cases resulted in a loss of the fundamental requirements of public accountability and judicial integrity. Lynne Tuohy, *Testimony Heard on Secrecy; Judges' Rules Panel Proposing Changes, HARTFORD COURANT*, May 1, 2003, at B1 (statement of Richard Blumenthal, Connecticut State Attorney General, saying, "[t]he public, which pays for the court system that the parties have invoked to resolve their dispute, has a right to know whether these cases are decided fairly and consistently, knowing all the facts in each case").

Recognizing the impropriety of its practice, the Rules Committee of the Superior Court swiftly ended the practice by amending the rules in May 2003. Thomas Scheffey, *Secret Files Abolished by Judges: Financial Affidavit Protections Also Adopted After Lengthy Debate, CONN. L. TRIB.*, May 19, 2003, at 1.

The amended rule allows for the sealing of an entire court file only "upon a finding that there is not available a more narrowly tailored method of protecting the overriding interest, such as redaction, sealing a portion of the file or authorizing the use of pseudonyms." 1 CONN. PRAC., PRAC. BK. ANN. SUPER. CT. CIV. RULES § 11-20A(f)(2) (2004). In addition, the newly adopted Rule 11-20A also requires that the public take part in and have access to the court's findings regarding the sealing of court files. § 11-20(e)-(f)(1) (2004). In June 2004, the Second Circuit ruled in *Hartford Courant Co. v. Pellegrino*, a case challenging the sealing of dockets in Connecticut, that "the press and public possess a qualified First Amendment right of access to docket sheets." 380 F.3d 83, 86 (2nd Cir. 2004).

214. *Anonymous v. Anonymous*, 744 N.Y.S.2d 659, 660 (N.Y. Sup. Ct. 2002).

215. *Doe v. City of New York*, 201 F.R.D. 100, 101 (S.D.N.Y. 2001).

216. *See Roe v. New York*, 49 F.R.D. 279, 281 (S.D.N.Y. 1970) (proposing that plaintiffs should (i) file a complaint using their real names and then request a protective or confidentiality order to shield the plaintiff's identity; (ii) use a pseudonym in the complaint and reveal their true identity to the court in an attached affidavit; or (iii) use a pseudonym in the complaint but sign the complaint using their real names).

plaintiffs to amend their complaints to include their true names,²¹⁷ while others have simply dismissed the action outright.²¹⁸ Some judges within the same court have conflicting opinions regarding the appealability of requests to proceed anonymously, with some stating that an appeal of the denial of such a motion is premature because it is not based on the merits of the claim. Still other judges note that to deny such an appeal is to irreparably prevent a plaintiff from being put back in its former position.²¹⁹

Protection of personal privacy in the information age requires that plaintiff pseudonymity become an integral aspect of civil procedure. By using pseudonyms, courts can achieve protection for plaintiffs while maintaining public access to the issues involved in the proceedings. I suggest that a specialized judge or magistrate be responsible in the first instance for determining whether a particular plaintiff should be permitted to proceed pseudonymously. Designating a judicial officer who can focus her attention on the often intricate and intimate investigative work necessary to properly review a plaintiff's pseudonymity request will help standardize and streamline the process of evaluating such requests. In this way, a degree of uniformity can be attained in what heretofore has been an ad hoc process.

Hearing plaintiffs' motions to proceed pseudonymously is an ideal use of a federal magistrate's authority under 28 U.S.C. § 636,²²⁰ and

217. See, e.g., *Doe v. Rostker*, 89 F.R.D. 158, 163 (N.D. Cal. 1981) (recognizing that, although the court had authority to dismiss a complaint sua sponte under Federal Rule of Civil Procedure 41(b) for noncompliance with proper pleading procedures, such a result was deemed to be "drastic"). Thus, the court dismissed the complaint without prejudice and with leave to amend. *Id.* at 164.

218. See, e.g., *M.M. v. Zavaras*, 139 F.3d 798, 803-04 (10th Cir. 1998) (affirming the lower court's decision to dismiss the complaint for failure to comply with Federal Rule of Civil Procedure 10(a) because it did not include the names of all parties).

219. In *Doe v. Union Pacific Railroad*, a woman sought to anonymously file a claim against her physician for sexual assault. 914 S.W.2d 312 (Ark. 1996). The trial court denied the plaintiff's request to proceed pseudonymously, and the plaintiff appealed that decision. *Id.* at 313. The Supreme Court of Arkansas held that the plaintiff's appeal was premature because it was not based on the merits of the claim. *Id.* at 315. Three members of the Arkansas Supreme Court dissented, arguing that "this is one of the comparatively rare instances, foreseen by some of our earlier opinions, in which an order must be regarded as appealable because otherwise the order would divest a substantial right in such a way as to put it beyond the power of the court to put the party in its former condition." *Id.* at 315 (citing *Omni Farms, Inc. v. Ark. Power & Light Co.*, 607 S.W.2d 363, 364 (Ark. 1980)). The dissent emphasized that the plaintiff had furnished her name to the defendant, was available for discovery, and would appear at trial to testify. *Id.* The dissent argued that the court should "determine whether a right of utmost privacy would be lost by going to trial rather than merely dismissing the matter for lack of a final order." *Id.* at 316.

220. 28 U.S.C. § 636(b)(1)(A) provides:

Notwithstanding any provision of law to the contrary—(A) a judge may designate a [magistrate judge] to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss

would be appropriate for state magistrates as well. Congress created the judicial position of the magistrate with the Federal Magistrates Act of 1968.²²¹ The primary purpose of the federal magistrate judge is to improve the efficiency of the federal judicial system and reduce the increasing workload of the Article III district court judges.²²² In particular, magistrate judges are intended to handle the many “pretrial and preliminary matters” that arise in a case, thus allowing the district court judges to preside over actual trial-related matters.²²³ Although the states do not have a uniform magistrate structure, it is not uncommon for state courts to assign certain judges to handle such pretrial or preliminary matters on a regular basis.²²⁴ Thus, the duty of hearing motions to proceed pseudonymously may be delegated to state judicial officers who handle the preliminary matters of a case, similar to the federal magistrate judge.

The power of the magistrate judge to handle “pretrial matters” is statutorily authorized under 28 U.S.C. § 636(b)(1) and implemented by

for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge’s order is clearly erroneous or contrary to law.

§ 636(b)(1)(A) (2000).

221. Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified at 28 U.S.C. §§ 631–639 (2000)). Due to the increasing importance of the magistrate, Congress changed the title of this position to magistrate judge. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5112, 5117 (1990) (codified as amended at 28 U.S.C. § 631 (2000)).

222. See S. REP. NO. 96-74, at 3 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1469, 1471–72 (expressing the purpose of the Federal Magistrates Act as “facilitat[ing] a rational division of labor among judicial officers in the district court, as the magistrate would relieve the judge from personally hearing each and every pretrial motion or proceeding in the preparation of a case for trial.”); S. REP. NO. 92-1065, at 3 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3350, 3351 (stating that magistrates “render valuable assistance to the judges of the district courts, thereby freeing the time of those judges for the actual trial of cases.”). The Supreme Court has also affirmed the intentions of Congress in establishing the position of the federal magistrate. See, e.g., *Peretz v. United States*, 501 U.S. 923, 934 (1991); *McCarthy v. Bronson*, 500 U.S. 136, 142 (1991); *Mathews v. Weber*, 423 U.S. 261, 268 (1976); *Wingo v. Wedding*, 418 U.S. 461, 463 (1974).

223. H.R. REP. NO. 94-1609, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6167 (stating that the “use of a magistrate [under the Federal Magistrates Act] will further the congressional intent that the magistrate assist the district judge in a variety of pretrial and preliminary matters thereby facilitating the ultimate and final exercise of the adjudicatory function at the trial of the case” and that “[w]ithout the assistance furnished by magistrates in hearing matters of this kind, . . . the [trial] judges of the district courts would have to devote a substantial portion of their available time to various procedural steps rather than to the trial itself”).

224. See, e.g., CAL. CONST. art. VI, § 22 (“The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform *subordinate judicial duties*.”) (emphasis added); NEW YORK SUPREME COURT—CIVIL BRANCH, COUNTY CLERK LITIGATION FUNCTIONS, COMMENCING ACTIONS CLAIMED TO BE CONFIDENTIAL (stating that applications for proceeding anonymously should be submitted to the ex parte office in which an ex parte justice will consider the application), at http://www.nycourts.gov/supctmanh/litigation_functions.htm (last visited Dec. 16, 2004).

Rule 72 of the Federal Rules of Civil Procedure.²²⁵ Although no definition of the term “pretrial” exists in either the statute or the rule, the legislative history of § 636 and the purpose of the magistrate judge in easing the workload of the district court judges suggests a liberal interpretation.²²⁶ Thus, the range of pretrial matters decided by magistrate judges is broad, including “discovery motions, motions to amend pleadings, motions to intervene, motions to extend discovery deadlines, and motions to disqualify counsel.”²²⁷ Aside from pretrial matters, district courts may also assign “additional duties [to the magistrate judges that] are not inconsistent with the Constitution and the laws of the United States.”²²⁸ As evidenced by the legislative history and the enabling statute itself, the magistrate judge has become an indispensable figure in the federal judiciary. The determination of whether a plaintiff should be allowed to proceed pseudonymously fits squarely within the duties of the magistrate judge.²²⁹

225. 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3068 (2d ed. 1987) [hereinafter WRIGHT & MILLER, PRETRIAL]. See generally 28 U.S.C. § 636(b)(1) (2000); FED. R. CIV. P. 72.

226. See H.R. REP. NO. 94-1609, at 9 (1976), reprinted in 1970 U.S.C.C.A.N. 6162, 6169 (“Under [§ 636(b)(1)(A)] a judge, in his discretion, may assign any pretrial matter to be heard and determined by a magistrate . . . [including] motions and matters which can arise in the preliminary processing of either a criminal or a civil case.” (emphasis added)).

227. WRIGHT & MILLER, PRETRIAL, *supra* note 225, § 3068.1, notes 5-9 (collecting cases). It should be noted that section 636(b)(1)(A) lists eight motions, often referred to as dispositive motions, which the magistrate judge is excepted from hearing and determining. These include motions (1) for injunctive relief; (2) for judgment on the pleadings; (3) for summary judgment; (4) to dismiss or quash an indictment or information made by the defendant; (5) to suppress evidence in a criminal case; (6) to dismiss or permit maintenance of a class action; (7) to dismiss for failure to state a claim upon which relief can be granted; and (8) to dismiss an action involuntarily. § 636(b)(1)(A). A magistrate judge may, however, upon request by a district court judge, issue “findings of fact and recommendations for [a] disposition” with reference to any of the eight motions enumerated above. § 636(b)(1)(B). This distinction is significant for purposes of determining the standard of review accorded by the district judge in the event an objection is made to the magistrate’s findings. WRIGHT & MILLER, PRETRIAL, *supra* note 225, § 3068.2. Pretrial matters decided by the magistrate under section 636(b)(1)(A) are reconsidered only if “clearly erroneous or contrary to law.” § 636(b)(1)(A). Motions decided under section 636(b)(1)(B) are reconsidered by the district court judge *de novo*. § 636(b)(1)(C).

228. § 636(b)(3). The main purpose of this “catchall” provision is to allow the district courts to freely experiment with “the assignment of other duties to magistrate judges which may not necessarily be included in the broad category of ‘pretrial matters.’” H.R. REP. NO. 94-1609, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6162, 6172.

229. Generally, seeking leave to sue pseudonymously occurs pretrial. See 67A C.J.S. *Parties* § 170 (2003). It thus falls under the class of pretrial matters that a magistrate judge may hear and determine. 28 U.S.C. § 636(b)(1)(A). Cases may exist where the plaintiff seeks leave to amend the pleadings for purposes of proceeding pseudonymously. See, e.g., *Unwitting Victim v. C.S.*, 273 Kan. 937, 950, 47 P.3d 392, 402 (2002) (finding no abuse of discretion by the trial court in refusing to allow the plaintiff to amend its petition to proceed pseudonymously after the case had been dismissed). Thus, depending upon the time of the filing, the magistrate may decide the matter under section 636(b)(1)(A) as a “pretrial matter” or under section 636(b)(3) as an “additional dut[y].”

The specialized judge or magistrate would have numerous functions. Primarily, she would make a thorough evaluation of the particular plaintiff's pseudonymity request. After doing so, the specialized judge or magistrate would recommend to the court whether or not to permit the plaintiff to proceed pseudonymously. Over time, specialized judges or magistrates would develop an expertise and efficiency in dealing with plaintiffs seeking to proceed anonymously, and they could continue their involvement with the parties should problems develop throughout the course of the litigation. This would increase judicial efficiency by freeing the courts from the often time-consuming efforts necessary to determine the veracity of the plaintiffs' claims regarding the need for anonymity. Courts would be able to review the recommendations and make a more fair determination of who should be permitted to proceed pseudonymously. Furthermore, specialized judges or magistrates can make recommendations regarding the procedural intricacies of defendants counterclaiming against pseudonymous plaintiffs and can recommend that the court award sanctions against plaintiffs who bring frivolous motions to proceed anonymously. Although some might argue that it would be appropriate for the court trying the merits of the action to be exposed at the outset to plaintiffs who may be acting in bad faith, having a specialized judge or magistrate handle these cases in the first instance will reduce the number and types of problems inherent with the current system.

B. Revision of the Five Factors Currently Used to Determine Plaintiff Pseudonymity in Light of Privacy Concerns

Given the changing landscape regarding personal privacy, it is necessary to reexamine and revise the current factors used to evaluate who may proceed pseudonymously. In order to make these criteria more pertinent and applicable to modern society, I propose both changes to the existing factors and the addition of new factors. The following is a summary of these proposals.

1. Whether the Plaintiff Would Risk Injury if Publicly Identified

Most courts that have evaluated this factor have focused on whether the plaintiff would suffer physical harm if required to bring her action publicly. But those courts that insist that only physical safety or retali-

tion can justify pseudonymity²³⁰ are ignoring the well-established wisdom that “modern enterprise and invention have, through invasions upon [an individual’s] privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.”²³¹

For example, some courts refuse to consider potential economic harm as a reason for granting pseudonymity.²³² In *Southern Methodist University Ass’n of Women Law Students v. Wynne & Jaffe*, discussed above in Part VI.A, several female lawyers sought to sue two Dallas law firms for sex discrimination but feared that, if their identities were revealed, the legal community would retaliate by refusing to hire them.²³³ The Fifth Circuit denied their pseudonymity request, overlooking the very real danger to the plaintiffs that bringing the lawsuit in Dallas would do to their future employment options in the Dallas area. Undoubtedly, when the plaintiffs’ names hit the media, they risked permanent unemployment in metropolitan Dallas or even beyond, as everyone would know their names and that they were trouble. Today it would be a very simple matter for a potential employer to go online and research applicants, discovering all manner of information, including their participation

230. See, e.g., *Doe v. N.C. Cent. Univ.*, No. 1:98CV01095, 1999 WL 1939248, at *2, *3 (M.D.N.C. Apr. 15, 1999) (mem.) (denying pseudonymity, despite plaintiff’s allegations of sexual assault and rape by a supervisor and consequent concerns about a negative reaction from her “traditional Chinese family,” and concluding that “concerns of embarrassment do not weigh as heavily as in some other circumstances involving more serious risk of social stigma or disclosure of more intimate personal information”); *Doe v. Bell Atl. Bus. Sys. Serv.*, 162 F.R.D. 418, 422 (D. Mass. 1995) (denying pseudonymity in a case involving alleged sexual harassment and discrimination, holding that “[p]laintiff’s fundamental concern seems to be embarrassment, which is not, in itself, grounds for proceedings under a pseudonym”).

231. *Warren & Brandeis*, *supra* note 12, at 196.

232. Other courts have held that mere embarrassment is not sufficient injury to warrant plaintiff pseudonymity. In *Doe v. Indiana Black Expo, Inc.*, the plaintiff alleged that while he was employed by the defendant, Indiana Black Expo, he was the subject of unlawful harassment and was eventually fired in violation of various federal and state statutes. 923 F. Supp. 137, 140 (S.D. Ind. 1992). In particular, he claimed that the defendant violated the Americans with Disabilities Act by terminating his employment when he took time off to receive mental health treatment. *Id.* The plaintiff sought to proceed anonymously against his employer, claiming that he had a history of substance abuse and mental health hospitalization and that “[i]tigation of his claims on their merits [would] require detailed consideration of his medical history and condition. [Consequently] his . . . employment and other business interests would be adversely affected if his medical history were known by those with whom he ha[d] ‘current business and personal interests.’” *Id.* at 140–41. The Southern District of Indiana denied the plaintiff’s request, stating that “[t]he plaintiff’s asserted needs for proceeding under a fictitious name are understandable but are not sufficient to overcome the strong presumption in favor of requiring parties to sue using their true names.” *Id.* at 142. In support of its decision the court reasoned that “[t]here is no issue here of physical safety or retaliation. Plaintiff’s concerns in this case are centered upon his economic well-being and possible embarrassment or humiliation, but courts have generally rejected attempts to proceed under fictitious names based solely on such concerns.” *Id.* at 142 (citations omitted).

233. 599 F.2d 707, 710–11 (5th Cir. 1979).

in a discrimination suit many years before.²³⁴ A potential employer may perceive that applicant as litigious, and she'll never know—although she may suspect—that her participation in earlier litigation is the basis for her rejection today. Courts should strive to prevent physical harm to potential plaintiffs, but in today's technological age courts must recognize the very real non-physical harms that can result from publicity. It is important for courts to consider such scenarios when evaluating requests for pseudonymity.

Recently, the Southern District of New York recognized that economic harm is often concomitant with, and often inseparable from, physical harm, and both can result when the plaintiff's privacy is not protected.²³⁵ In *OSRecovery, Inc. v. One Groupe International, Inc.*,²³⁶ shareholders brought suit alleging that a corporation committed securities fraud and violated RICO²³⁷ by inducing investors to participate in a Ponzi scheme. The court permitted the plaintiffs to proceed anonymously after they demonstrated that they could be in danger should their identities become known.²³⁸ It concluded that there existed "a genuine risk of retaliation involving economic and physical harm to plaintiffs who are identified."²³⁹

Even plaintiffs whose very livelihood is at the mercy of their employer have had their hopes for pseudonymity dashed.²⁴⁰ In *Does I Through XXIII v. Advanced Textile Corp.*, a group of migrant farm workers moved to sue their employer pseudonymously for violations of the Fair Labor Standards Act (the "FLSA") because they feared that if their identities were disclosed they would be fired, arrested, and deported.²⁴¹ The trial court denied their motion, stating that "[m]any of the fears revolve around economic retaliation which is not sufficient to support anonymous proceedings."²⁴² Apparently unaware of the small comfort this remedy would offer a migrant farm worker who had been deported,

234. See *Drake v. Colo. State Univ.*, Nos. 97-1076, 97-1077, 1998 WL 614474 (10th Cir. Sept. 8, 1998) (involving a plaintiff who claimed he was denied employment based on his previous acts of filing discrimination suits).

235. *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, No. 02 Civ. 8993, 2003 WL 23313, at *2 (S.D.N.Y. Jan. 3, 2003).

236. *Id.* at *1.

237. 18 U.S.C. §§ 1961-1968 (2003).

238. 2003 WL 23313, at *2.

239. *Id.*

240. However, one district court allowed plaintiffs to proceed pseudonymously to protect them "from possible reprisal actions" but stated that, "[s]hould it appear at any time that defendants are prejudiced by this order in obtaining any necessary discovery, the Court will re-examine its ruling." *Gomez v. Buckeye Sugars*, 60 F.R.D. 106, 107 (N.D. Ohio 1973).

241. 214 F.3d 1058, 1062 (9th Cir. 2000).

242. *Id.* at 1064.

the trial court contended that pseudonymity was unnecessary because the plaintiffs had other protections against retaliation, including the “FLSA’s prohibition on employer retaliation against employees who file labor complaints.”²⁴³ The Ninth Circuit, however, reversed the trial court, noting that permitting the employees to bring their action under fictitious names would “serve the public’s interest in [the action] by enabling it to go forward.”²⁴⁴ In light of the extensive damage that can result from erosions of personal privacy, a broader interpretation of what constitutes “injury” is now necessary. Not only should physical harm be considered when determining whether to permit a particular plaintiff to bring his claim anonymously, but financial and emotional harm ought to be considered as well. Specialized judges and magistrates should recognize that loss of privacy can inflict devastating non-physical injuries and should consider this when making decisions regarding plaintiff pseudonymity.

2. Whether the Plaintiff is Challenging Governmental Activity

The incomparable power of the government, its ability to share private information with other government entities, the costs of litigation, and the fear of retribution that can come with suing the government are all deterrents to would-be plaintiffs. As one scholar of privacy rights noted, in describing his personal experience of being under the surveillance of and investigated by the police, “[w]e are all watched, we are all

243. *Id.* (citing 29 U.S.C. § 215(a)(3) (2003)).

244. *Id.* at 1073. Additionally, the district court in the Western District of New York permitted migrant farm workers to sue their employer for violations of the FLSA, the Migrant and Seasonal Agriculture Worker Protection Act (“MSAWPA”), RICO, and various New York state statutes. *Javier H. v. Garcia-Botello*, 211 F.R.D. 194 (W.D.N.Y. 2002). The plaintiffs in that case were afraid of threats of violence against them previously made by the defendants. Specifically, the plaintiffs noted that a grand jury had charged the defendants with serious crimes arising out of the same facts underlying the defendants’ civil suit and argued that revealing their true identities would “adversely affect their ability to aid the Government” in its prosecution of the criminal charges. *Id.* at 196. The district court analyzed the five primary factors and concluded that, given the threats of violence in the past and the clear willingness of the defendants to carry through with those threats, the plaintiffs’ privacy interests were “substantial” and “outweigh[ed] the customary and constitutionally-embedded presumption of openness in judicial proceedings.” *Id.* (citing *Doe v. Shakur*, 164 F.R.D. 359, 361 (N.D.N.Y. 1998)). The court acknowledged that the public would remain “substantially informed” about the relevant facts of the case “through [the] prosecution of the criminal charges.” *Id.* The court then noted that, were there to come a point in the proceedings that in the interests of fairness the plaintiffs would be “called upon to publicly stand behind their claims” the court would be “open to motions by Defendants” to revisit the issue of anonymity. *Id.*

angry, and we are all afraid. And we are increasingly without a language to speak about it."²⁴⁵

In *EW v. New York Blood Center*, a woman sought anonymously to bring a tort action against the blood bank from which she contracted hepatitis B.²⁴⁶ Chief Judge Korman of the Eastern District of New York analogized the public function of the New York Blood Center to that of a government entity and stated that in such actions "personal anonymity is more readily granted because of the existence of a public interest in the action."²⁴⁷ He noted that when a plaintiff seeks to pursue an action against governmental activity, she will probably represent a minority interest and there is likely a public interest in the vindication of her rights.²⁴⁸ Likewise, in *Yacovelli v. Moeser*,²⁴⁹ freshmen at the University of North Carolina Chapel Hill ("UNC") challenged the school's assignment of a portion of a book entitled "Approaching the Qur'an, The Early Revelations." The students alleged that the inclusion of the book in UNC's curriculum intruded upon the Free Exercise Clause and constituted an endorsement of Islam.²⁵⁰ The court reviewed the five factors and permitted the students to proceed pseudonymously, stating, inter alia, "[w]hen a plaintiff challenges the government or government activity, courts are more like[ly] to permit plaintiffs to proceed under a pseudonym."²⁵¹

In contrast, in *Doe v. Beaumont Independent School District*, students and their parents brought an action challenging the constitutionality of the school district's program "Clergy in Schools."²⁵² While the court acknowledged that the plaintiffs were indeed challenging governmental action, the court denied the plaintiffs' motion to proceed pseudonymously, stating that "'in only a very few cases challenging governmental

245. JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE AND THE LIMITS OF PRIVACY* 150 (2001).

246. 213 F.R.D. 108, 109 (E.D.N.Y. 2003).

247. *Id.* at 112.

248. *Id.* In *Free Speech v. Reno*, the plaintiffs, in addition to contending that proceeding under their true identities would expose them to criminal prosecution, argued that by suing a governmental agency (the FCC) they should be permitted to sue anonymously. No. 98 Civ. 2680, 1999 WL 47310, at *2 (S.D.N.Y. Feb. 1, 1999). The government countered that the plaintiffs were not challenging "a governmental activity per se because they [were seeking] to vindicate their own interests and not those of the public." *Id.* at *2. The court noted that the government's argument was "immaterial," because "[t]he fact that the defendants are government entities rather than private defendants is significant because governmental bodies do not share the concerns about 'reputation' that private persons have when they are publicly charged with wrongdoing." *Id.* at *2.

249. No. 1:02CV596, 2004 WL 1144183 (M.D.N.C. May 20, 2004).

250. *Id.* at *2.

251. *Id.* at *8.

252. 172 F.R.D. 215 (E.D. Tex. 1997).

activity can anonymity be justified.”²⁵³ This sentiment was echoed by the District Court of the District of Columbia, which denied a Nigerian citizen’s motion pseudonymously to sue the Immigration and Naturalization Service’s denial of her application for authorization to work in the United States.²⁵⁴

Recognition of the importance of ensuring all citizens a voice with which to challenge governmental actions, and the reluctance of many to do so for fear of reprisal, warrants liberal permission by the courts to permit plaintiffs to proceed pseudonymously when suing governmental agencies.

3. Whether the Plaintiff Would Be Compelled to Admit Her Intention to Engage in Illegal Conduct, Thereby Risking Criminal Prosecution

Although it has not been explicitly labeled as such, this factor appears to be connected to the Fifth Amendment privilege against self-incrimination, because, in essence, it protects a would-be plaintiff from incriminating himself. As such, most courts have properly held that a plaintiff forced to admit her intention to engage in illegal conduct should be permitted to proceed anonymously. In *Free Speech v. Reno*, the plaintiffs sought permission to proceed under a pseudonym because they feared that disclosure of their identities would subject them to criminal prosecution.²⁵⁵ Judge Mukasy of the Southern District of New York agreed, stating that “such exposure [to criminal prosecution] is not required by Rule 10(a).”²⁵⁶ In *Doe v. Miller*, illegal aliens sought a preliminary injunction to prevent the Illinois Department of Public Aid from implementing a policy that would force them either to withdraw applications for food stamps for their children or disclose their illegal alien status to the INS, thereby risking deportation.²⁵⁷ The court, without dis-

253. *Id.* at 216 (quoting *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. Unit A Aug. 1981)).

254. *O-J-R v. Ashcroft*, 216 F.R.D. 150, 151 (D.D.C. 2003). In *Doe v. City of New York*, the plaintiff brought a civil rights action against the city and sought to remain anonymous. 201 F.R.D. 100 (S.D.N.Y. 2001). The plaintiff had disputed with a taxicab driver, who claimed that she did not pay her fare and who therefore called the police. The Southern District stated that the fact that the plaintiff was challenging a governmental activity “appear[ed] to cut against her position” because the governmental activity indicated “a public interest in the facts of the incident at issue as opposed merely to a public interest in the knowledge of the manner in which the courts function in resolving issues.” *Id.* at 102.

See also Judge Gee’s dissent in *Doe v. Stegall*, 653 F.2d at 189, in which he states that when the defendant is the government, “there is something to be said . . . for the notion that one who strikes the king should do so unmasked or not at all.”

255. No. 98 Civ. 2680, 1999 WL 47310, at *2 (S.D.N.Y. Feb. 1, 1999).

256. *Id.* at *3.

257. 573 F. Supp. 461 (N.D. Ill. 1983).

cussion, permitted the plaintiffs to proceed pseudonymously, noting that doing so would protect their “rights under the Fifth Amendment.”²⁵⁸ Thus, this factor appears to need little attention.

4. Whether the Plaintiff Would Be Required to Disclose Information of the Utmost Intimacy

This factor is the most complex but also the most directly related to privacy concerns. A wide constellation of issues now exist, including, but certainly not limited to, plaintiffs with HIV and hepatitis infections, plaintiffs who have been raped, homosexual or transgender plaintiffs, plaintiffs with mental illness, and plaintiffs with an intimate physical injury or deformity.²⁵⁹ Frequently plaintiffs dealing with these issues face long, difficult, and arbitrary decisions regarding their requests to bring their actions anonymously. These claimants may hesitate to pursue their actions at all for fear of having their private matters made public. A more just and efficient manner by which specialized judges or magistrates should evaluate pseudonymity requests by these plaintiffs is to follow a rule-based approach. For example, plaintiffs whose privacy concerns fall into certain objectively intimate categories (such as HIV status or rape) would automatically be permitted to proceed pseudonymously. Those with more subjective privacy concerns, such as fear of general embarrassment or employer reprisal, would be evaluated against the standards in the community.²⁶⁰

258. *Id.* at 464 n.1.

259. *See, e.g.,* Roe v. Johnson, 334 F. Supp. 2d 415, 419 (S.D.N.Y. Sept. 1, 2004) (permitting plaintiff to sue anonymously because, “the plaintiff’s privacy concerns related to her mental health outweighed the presumption of openness.”); Doe v. Provident Life & Accident Ins. Co., 176 F.R.D. 464, 468 (E.D. Pa. 1997) (allowing plaintiff with psychiatric and mental disorders to proceed pseudonymously due to potential for stigmatization); Doe v. Alexian Bros. Med. Ctr., No. 96 C 2042, 1996 WL 210074, at *1 (N.D. Ill. Apr. 25, 1996) (granting plaintiff’s motion to proceed under a pseudonym because of plaintiff’s claim that “he would face harassment and stigmatization if it was made public that he had been tested for HIV out of a belief that he was HIV infected.”); Doe v. Bell Atl. Bus. Sys. Serv., 162 F.R.D. 418 (D. Mass. 1995) (denying plaintiff’s motion to proceed pseudonymously in Title VII claim of hostile work environment); Heather K. v. City of Mallard, 887 F. Supp. 1249, 1256 (N.D. Iowa 1995) (allowing child plaintiff with severe cardiac and respiratory conditions to sue pseudonymously to enjoy various state activities which would aggravate her conditions); Doe v. Blue Cross & Blue Shield of R.I., 794 F. Supp. 72, 73 (D.R.I. 1992) (allowing plaintiff to sue under a pseudonym because of his transsexuality).

260. Much scholarly discussion about the benefits of legal rules versus legal standards exists. *E.g.,* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 28 (2000); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL’Y 645 (1991); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

Rules require a particular legal result that arises from one or more eliciting events, while standards, in contrast, involve the application by adjudicators of certain principles to specific facts in

Because some areas of one's personal life are intrinsically intimate, it benefits both individuals and society for courts automatically to shield these areas under the protection of plaintiff anonymity. Proceeding this way offers a more consistent and fair method by which cases involving intimate and personal issues, and the variations and complexities they often entail, should be evaluated. This will protect plaintiffs with legitimate claims from being forced to choose between bringing their actions and forgoing their rights for fear of losing their privacy.

5. Whether the Party Defending Against a Suit Brought Under a Pseudonym Would Be Prejudiced

While weighing fairness considerations and determining whether the defendant will be prejudiced if the plaintiff is permitted to bring her action pseudonymously, several courts have examined whether the defendant "would be placed at a serious disadvantage [if] he would be required to defend himself publicly while plaintiff could make her accusations from behind a cloak of anonymity."²⁶¹ In publishing detailed particulars about their decisions regarding motions by plaintiffs to proceed pseudonymously, these courts may actually exacerbate or even cause injury to the defendant. In *Doe v. Wolowitz*,²⁶² for example, the plaintiff claimed she was sexually abused by the defendant, her treating psychologist.²⁶³ The court published the defendant's full name (Howard Wolowitz),²⁶⁴ his occupation (psychologist),²⁶⁵ his employer (the University of Michi-

order to reach a legal determination. Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992). Scholars have often debated "which legal form is substantively more desirable in different circumstances, usually by comparing the costs and benefits of the competing forms." Korobkin at 23-24. Supreme Court Justice Antonin Scalia has argued in favor of a rule-based approach to the law, because, he argues, "the trouble with the discretion-conferring approach to judicial law making is that it does not satisfy [the] sense of justice very well." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989). It is much better, Scalia adds, "to have a clear, previously enunciated rule that one can point to in explanation of the decision." *Id.* If the opposite were true, Justice Scalia opines, then a judge would be engaged in deciding issues based on "the totality of the circumstances" or "balancing" tests in which "he begins to resemble a finder of fact more than a determiner of law." *Id.* at 1182. Thus, "[t]o reach such a stage is, in a way, a regrettable concession of defeat—an acknowledgment that we have passed the point where 'law,' properly speaking, has any further application." *Id.* at 1182.

261. See, e.g., *Doe v. Shakur*, 164 F.R.D. 359, 361 (S.D.N.Y. 1996); see also *Doe v. Hartz*, 52 F. Supp. 2d 1027, 1048 (N.D. Iowa 1999) (finding "considerable appeal to the defendants' argument that they should not be held up to public ridicule while their accuser remains anonymous, when it is the accuser who has focused public attention on the circumstances she finds embarrassing").

262. No. 01-73907, 2002 WL 1310614 (E.D. Mich. May 28, 2002).

263. *Id.* at *1.

264. *Id.*

265. *Id.*

gan),²⁶⁶ and the charges brought against him (sexual abuse),²⁶⁷ and then denied the plaintiff's motion to bring the action anonymously. Ultimately, this left the allegations about Mr. Wolowitz out in the open for all who cared to know without Mr. Wolowitz having a chance to defend himself publicly. When courts publish these types of allegations in the course of evaluating whether to permit the action to be brought by a pseudonymous plaintiff, the defendant's name often becomes intertwined with serious allegations.²⁶⁸ If the court decides that the prejudice to the defendant would be too great if the plaintiff were permitted to proceed anonymously, the court will dismiss the plaintiff's request for anonymity. However, the allegations against the defendant (such as those against Howard Wolowitz) remain public in perpetuity and can cast a shadow over a defendant's reputation. Ironically, the defendant may hope the plaintiff pursues the case even though not permitted to do so anonymously, giving the defendant the opportunity to publicly defend himself and clear his name.

In light of the above, courts concerned about fairness to defendants should be more liberal in permitting plaintiffs to bring their actions pseudonymously. Doing so will enable defendants to defend the charges brought against them and avoid the publication of unsubstantiated allegations.²⁶⁹ Concerns about prejudice to the defendant should not be a part of the initial calculation to determine plaintiff pseudonymity. Instead, after deciding that a particular plaintiff is permitted to proceed anonymously, courts should examine potential prejudices against the defendant. Options should then be explored to prevent such prejudices from occurring.²⁷⁰

266. *Id.* at *2.

267. *Id.* at *1

268. *See, e.g., id.* (sexual abuse); *Doe v. Shakur*, 164 F.R.D. 359 (S.D.N.Y. 1996) (sexual assault); *Doe v. Ind. Black Expo, Inc.*, 923 F. Supp. 137 (S.D. Ind. 1996) (employment discrimination); *United States v. Bateman*, 805 F. Supp. 1058 (D.N.H. 1992) (possession of child pornography); *Doe v. Hallock*, 119 F.R.D. 640 (S.D. Miss. 1987) (sexual harassment).

269. Of course, one way for courts to avoid this problem is simply to not publish sensitive opinions. This can lead to a slippery slope, however, in that more and more of these cases become secret. Society loses the benefit of having access to the proceedings in the action, and the result is a chilling effect on the public's access to the workings of the judicial system.

270. One way to do this might be to instruct the jury that plaintiff's use of a pseudonym should not be construed as a reflection of the validity of the plaintiff's case. *See, e.g., Doe v. N.C. Cent. Univ.*, No. 1:98CV01095, 1999 WL 1939248, at *4 (M.D.N.C. Apr. 15, 1999) (mem) (holding that the jury should be instructed not to make any assumptions regarding the court's decision to permit the plaintiff to use a fictitious name). Another mechanism to avoid prejudice to the defendant is to permit the defendant also to proceed pseudonymously. After plaintiffs are permitted to proceed anonymously, preventing prejudice to the defendant is an important consideration that requires additional research.

C. *Additional Factors that Courts Should Examine When Analyzing Whether to Grant Plaintiff Anonymity*

As demonstrated, the original five factors, in their current form, are no longer adequate tools to determine which plaintiffs should be entitled to proceed pseudonymously. In addition to the changes to the existing factors that I have recommended, I propose that several factors be considered when a plaintiff wishes to bring an action anonymously. These include: (1) whether the plaintiff has already been identified publicly regarding the matter at issue in the underlying case; (2) whether the plaintiff will bring the suit if not permitted to be anonymous; and (3) the precedential value of the action.

1. *Whether the Plaintiff Has Already Been Identified Publicly Regarding the Matter at Issue in the Underlying Case*

Plaintiffs seeking to have their claims heard pseudonymously should be required, as a threshold matter, to attest to the fact that their identity has not publicly been disclosed regarding the issues involved in the matter in which they seek to remain anonymous. Having this threshold rule will save judicial resources and discourage disingenuous plaintiffs from trying to proceed pseudonymously. If the plaintiff already has been identified publicly, privacy concerns regarding the plaintiff's identity are no longer relevant. Concerns about the publication of other intimate information about the plaintiff not relevant to the litigation, however, such as her gambling habits when the action is for breach of contract, might still be warranted. Although beyond the scope of this Article, the propriety of the disclosure of such information if the plaintiff is not granted pseudonymity is also an important concern.

Some courts have recognized the importance of determining whether the plaintiff has already been identified publicly. Not all of these courts, however, have treated this as a threshold issue. For example, Judge Chin of the Southern District of New York stressed that the *Shakur* case was "a difficult one" in which to decide whether the plaintiff should be permitted to proceed anonymously.²⁷¹ He reviewed the five basic factors, discussed above in Part VI, and ultimately denied the plaintiff's motion to proceed anonymously.²⁷² Even a cursory review of the *Shakur* opinion, however, reveals that Judge Chin considered the fact that the plain-

271. *Doe v. Shakur*, 164 F.R.D. 359, 361 (S.D.N.Y. 1996).

272. *See id.* (finding that plaintiff should "be prepared to stand behind her charges publicly").

tiff was already known to the press to be the definitive reason to deny her motion for pseudonymity. "Indeed, plaintiff makes it clear that the press has been aware of both her residence and her place of employment. Hence, her identity is not unknown."²⁷³

In another case, *Doe v. Bell Atlantic Business Systems Services*,²⁷⁴ the plaintiff alleged that she was sexually assaulted by her employer and later fired as a result of her allegation.²⁷⁵ The court discussed many factors that weighed in favor of permitting the plaintiff to proceed using a pseudonym, noting that she was concerned that as a result of the assault she might have been infected with HIV, that she was often despondent and unable to work, and that if her identity was revealed she would "suffer intense embarrassment and shame within her community."²⁷⁶ However, notwithstanding all of the elements which militated toward granting the plaintiff her anonymity request, the court ultimately denied her request, stating that "because plaintiff's true identity was revealed in administrative proceedings, the request for anonymity is effectively moot."²⁷⁷

Judicial resources should not be wasted in conducting a balancing test when the plaintiff has been previously publicly identified. Making this issue a threshold matter will eliminate lengthy and inefficient judicial examinations in situations where privacy concerns no longer apply,

273. *Id.* at 362.

274. 162 F.R.D. 418 (D. Mass. 1995).

275. *Id.* at 419-20.

276. *Id.* at 421.

277. *Id.* at 422.

In Rhode Island, a man sought anonymously to sue his former domestic partner to stop his alleged harassment and threats. *Doe v. Burkland*, 808 A.2d 1090 (R.I. 2002). The Rhode Island Supreme Court reversed the lower court's decision to permit the plaintiff to proceed under a pseudonym, pointing to the fact that the plaintiff had initially brought the action using his real name and did not seek to proceed anonymously until he was forced to defend counterclaims that his former partner brought against him. *Id.* at 1092, 1097-98. The court noted that, "[r]egardless of whether one or both parties may have been entitled to proceed under a pseudonym *ab initio*, plaintiff should not have been allowed to unring the bell that he had been tolling for approximately nine months after he began this lawsuit in his own name." *Id.* at 1095. Although the court acknowledged that one's status as a homosexual could be deemed to be a matter of the utmost intimacy that might warrant proceeding under a pseudonym, the court concluded that the plaintiff had waived any claim to such anonymity by disclosing his homosexual status in prior pleadings. *Id.* at 1097.

Likewise, in *M.M. v. Zavaras*, the court denied the plaintiff's motion to proceed anonymously, noting that "it is readily apparent . . . that in fact the plaintiff's identity is already known." 139 F.3d 798, 803 (10th Cir. 1998). In *Mateer v. Ross, Suchoff, Egert, Hankin Maidenbaum & Mazel, P.C.*, the court denied the plaintiff's request to proceed pseudonymously, stating:

The defendants in the present action sued Gary C. in the state court case under his full name Any shield of privacy provided by allowing Gary C. to proceed anonymously in the present case would therefore be a flimsy one, because any interested person could learn his identity by investigating documents available in the state court public files.

No. 96 Civ. 1756(LAP), 1997 WL 171011, at *7 (S.D.N.Y. Apr. 10, 1997).

and preserve those instances in which plaintiff pseudonymity is appropriate.

2. Whether the Plaintiff Will Bring the Suit if not Permitted to Be Pseudonymous

I suggest that all courts acknowledge, and incorporate into the method by which they determine who should be permitted to proceed anonymously, that to deny certain plaintiffs the right to proceed under a pseudonym will prevent those plaintiffs from receiving justice. This should be the next consideration that the specialized judge or magistrate examines in making her recommendation to the court hearing the merits of the underlying case. Some courts already have recognized the stifling effect on the pursuit of justice that the modern erosion of privacy has manifested. For example, in *Doe v. Smith* the plaintiff sought pseudonymously to sue her psychiatrist, alleging that the psychiatrist assaulted, molested, and sexually abused her in the course of providing psychiatric treatment.²⁷⁸ The court examined “the public interest in guaranteeing open access to proceedings without denying litigants access to the justice system.”²⁷⁹ Although the trial court initially declined to permit the plaintiff to proceed anonymously,²⁸⁰ upon rehearing the court reversed its position, stating that

plaintiff’s doctor has predicted that she will be unable to pursue this action should she not be allowed to proceed anonymously. . . . [T]he plaintiff has presented particularized and undisputed evidence that proceeding publicly would seriously threaten her mental health, requiring her to choose between dropping her action and placing her life in jeopardy.²⁸¹

The Fourth Circuit emphasized this concern in *James v. Jacobson*²⁸² as well, stating that “in view of plaintiffs’ entirely reasonable position that they will not proceed except under pseudonyms—[the result] is effec-

278. 189 F.R.D. 239, 241 (E.D.N.Y. 1998), *vacated upon reconsideration*, 105 F. Supp. 2d 40 (E.D.N.Y. 1999), *dismissed on other grounds*, No. 98-CV-6600, 2001 U.S. Dist. LEXIS 24974 (E.D.N.Y. Jan. 12, 2001).

279. *Id.* at 242, 244.

280. *Id.* at 245.

281. 105 F. Supp. 2d at 45 (citations omitted).

282. 6 F.3d 233 (4th Cir. 1993).

tively to cut off a claim that, if proven, is obviously one of great civil wrong."²⁸³

Likewise, specialized judges and magistrates should pay particular attention to those plaintiffs who claim that publicity would inflict the very injury they seek to avoid.²⁸⁴ These types of plaintiffs are particularly vulnerable to choosing to forgo their quests for justice in order to protect their privacy. In *Doe v. Alaska*,²⁸⁵ the plaintiffs sought to challenge Alaska's Sex Offender Registration provisions, which required convicted sex offenders to register in the community in which they live. The court reversed the lower court's denial of the plaintiffs' motion, stating that "disclosure [of their names] will deny [plaintiffs] the very relief they seek."²⁸⁶ The court noted that

[t]he issues raised are purely legal and do not depend on identifying the specific plaintiffs. None of the values protected by public access will be hindered by the use of pseudonyms. The public, as well as the plaintiffs, will benefit when the case proceeds to a resolution on the merits.²⁸⁷

283. *Id.* at 242.

284. In *Doe v. Fellows*, the Ninth Circuit vacated and remanded the lower court's denial of plaintiff's motion to pursue his claim using a pseudonym, No. 89-15869, 1991 WL 27453, at *1 (9th Cir. Mar. 5, 1991) (unpublished disposition). In that case, the plaintiff was stopped by police because his car matched the description of a vehicle that had been involved in a hit and run. He alleged that he was unlawfully "detained without probable cause or reasonable suspicion because he refused to identify himself." *Id.* The plaintiff further claimed that the police officers illegally searched his car and other belongings and placed him in custody for psychiatric evaluation. After the police released him the plaintiff contended that they refused to return his car and other belongings based on his continued refusal to identify himself. *Id.*

The court quoted Judge Sneed, who, in his dissent in *United States v. Doe*, noted that "[t]here is some logic in cooperating to provide anonymity when publicity would inflict the very injury the litigant seeks to avoid by resort to the courts." *Id.* at *2 (quoting *Doe*, 655 F.2d 920, 930 n.1 (9th Cir. 1980) (Sneed, J., dissenting)).

See also *Roe v. Ingraham*, 364 F. Supp. 536 (S.D.N.Y. 1973). In *Ingraham*, patients and their physicians brought an action challenging the constitutionality of certain provisions of the New York State Controlled Substances Act, which required physicians who prescribed certain medications deemed to be "Schedule II drugs" to file with the state a form containing, inter alia, the patient's name address and age. *Id.* at 538-39. The plaintiffs objected to the recording of their names and prescribed medications, alleging that such disclosure violated their rights of privacy and confidentiality. *Id.* at 540. The court permitted the patients to bring their claims under a pseudonym, acknowledging that "if plaintiffs are required to reveal their identity prior to the adjudication on the merits of their privacy claim, they will already have sustained the injury which by this litigation they seek to avoid." *Id.* at 541 n.7.

285. 1997 WL 547941, at *1 (9th Cir. 1997) (unpublished disposition), *appeal upon remand sub nom.*, *Doe I v. Otte*, 259 F.3d 979 (9th Cir. 2001), *rev'd on other grounds sub nom.*, *Smith v. Doe*, 538 U.S. 84 (2003).

286. *Id.*

287. *Id.* See also *Doe v. State*, 92 P.3d 398 (Alaska 2004) (permitting sex offender to challenge, under pseudonym, Alaska's sex offender statute, stating merely "John Doe is a pseudonym.").

This is in stark contrast to the sex offender plaintiff in *Femedeer v. Haun*,²⁸⁸ where the court denied the plaintiff's request to proceed anonymously because his identity was already publicly known.²⁸⁹

An essential goal of the judicial system should be to remain an accessible institution for the public. In light of this, courts must recognize that plaintiffs might be compelled to choose to forgo their actions for fear of having their privacy violated. It should be the specialized judge or magistrate's duty to determine whether denial of a plaintiff's motion to bring her action pseudonymously will in effect constitute denial of access to the judicial system. The ever-increasing loss of privacy in today's society, due to modern technology, should be offset by permitting more plaintiffs with meritorious privacy concerns to proceed anonymously.

3. The Precedential Value of the Action

In conjunction with examining whether the plaintiff will bring the action if not permitted to be pseudonymous, a specialized judge or magistrate should evaluate the precedential value of having the case heard. Once she finds that the plaintiff will not bring the suit if not permitted to do so anonymously, she should then examine the precedential value of the merits of the suit, taking into account the jurisdiction in which the case has been brought and the likelihood of similar cases being brought in that jurisdiction in the future.

The Kansas Supreme Court recently was called upon to decide whether a plaintiff with herpes could pseudonymously bring suit against his former fiancée who infected him with the disease.²⁹⁰ The court looked to Kansas statutes, which, like the federal rules, state that the caption of a complaint "shall include the names of all the parties."²⁹¹ In reviewing decisions that have interpreted the rules, the Kansas Supreme Court noted that section 60-210(a) "should not act as an absolute bar to suits identifying a plaintiff by a pseudonym."²⁹² The court, however, determined that "basic fairness" dictated that the plaintiff was required to proceed using his real name.²⁹³ Although the court indicated that the plaintiff did not specify that he would not pursue the action if not permit-

288. 227 F.3d 1244 (10th Cir. 2000).

289. *Id.* at 1246.

290. *Unwitting Victim v. C.S.*, 273 Kan. 937, 47 P.3d 392 (2002).

291. *Id.* at 940, 396 (citing KAN. STAT. ANN. § 60-210(a) (2002)).

292. *Id.* at 944, 398.

293. *Id.* at 949, 401 (quoting *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979)).

ted to proceed pseudonymously,²⁹⁴ there is no indication in the opinion that the court considered the jurisprudential value of having the merits of the case decided.

As a result, the Kansas Supreme Court missed an opportunity to decide a socially valuable precedent for the state.²⁹⁵ To date there is no case in Kansas that indicates whether a person in a consensual sexual relationship has a right to recover in a civil action against another who transmits to him or her a sexually transmitted disease when the transmitter (i) knew that she was a carrier of the disease and (ii) chose not to disclose it to her partner. Thus, by being concerned with the importance of having “an open judicial system,” the court in fact did a disservice to the

294. *Id.* at 948, 401.

295. Another example of a case with important precedential impact is *Free Speech v. Reno*, No. 98 Civ. 2680, 1999 WL 147743 (S.D.N.Y. Mar. 18, 1999), *aff'd*, 200 F.3d 63 (2d Cir. 1999). The court permitted the plaintiffs to proceed pseudonymously in a previous proceeding, and as a result, the case went to trial. *See* *Free Speech v. Reno*, No. 98 Civ. 2680, 1999 WL 47310, at *2 (S.D.N.Y. Feb. 1, 1999). *Free Speech* involved producers of a low-power radio station in New York City who were operating without an FCC license. *Free Speech*, 1999 WL 147743, at *1.

Application to the FCC for a license would have been futile, according to the plaintiffs, because the FCC does not issue licenses for stations that broadcast at less than 100 watts of power. *Id.* The plaintiffs challenged the constitutionality of the Federal Communications Act of 1934, 47 U.S.C. § 301 *et seq.*, claiming, *inter alia*, that the Act was overbroad, created a system of formal and informal prior restraints, and violated the First, Fourth and Fifth Amendments. *Free Speech*, 1999 WL 147743, at *1. The government moved to dismiss the plaintiffs' claims for failure to state a claim. *Id.* Judge Mukasy of the Southern District of New York granted the government's motion to dismiss, holding that the plaintiffs lacked standing, the action was not ripe, and the plaintiff sustained no injury in fact. *Id.* at *4-5, *11. The Second Circuit affirmed in *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63 (2d Cir. 1999). Although the plaintiffs ultimately lost their case, this was an important decision that might not have come about had Judge Mukasy not permitted the plaintiffs to proceed pseudonymously in the first place.

To date, seven decisions have cited to the District Court's opinion in the *Free Speech* case. *See, e.g.,* *Ruggiero v. F.C.C.*, 317 F.3d 239, 249 (D.C. Cir. 2003); *Tsabar v. Booth*, 293 F. Supp. 2d 328, 336 (S.D.N.Y. 2003); *United States v. Cuevas*, No. 3:99CV1261, 2000 WL 852308, at *3 (D. Conn. Mar. 31, 2000); *United States v. Girona*, No. 3:99CV1262, 2000 WL 565496, at *3 (D. Conn. Mar. 27, 2000); *Conboy v. AT&T Corp.*, 84 F. Supp. 2d 492, 502 (S.D.N.Y. 2000); *United States v. Waterbury Hispanic Communications, Inc.*, 109 F. Supp. 2d 80, 82 (D. Conn. 1999); *In re Jerry Szoka Cleveland, Ohio*, 14 F.C.C.R. 9857, 9863 (1999).

Thirteen decisions have cited to the Second Circuit's affirmation. *See, e.g.,* *Ruggiero*, 317 F.3d at 249; *United States v. Neset*, 235 F.3d 415, 421 (8th Cir. 2000); *Prayze FM v. F.C.C.*, 214 F.3d 245, 250 (2d Cir. 2000); *United States v. Any and All Radio Station Equip.*, 204 F.3d 658, 666 (6th Cir. 2000); *United States v. Any and All Radio Station Transmission Equip.*, No. 00 Civ. 893, 2004 WL 2848532, at *4 (S.D.N.Y. Dec. 9, 2004); *Tsabar*, 293 F. Supp. 2d at 336; *Prayze FM v. United States*, No. 3:98CV375, 2001 WL 34118028, at *3 (D. Conn. Jun. 13, 2001); *United States v. Any and All Radio Station Equip.*, 93 F. Supp. 2d 414, 420 (S.D.N.Y. 2000); *Cuevas*, 2000 WL 852308, at *3; *Girona*, 2000 WL 565496, at *3; *United States v. Any and All Radio Station Equip.*, No. 3:00CV245, 2000 WL 488491, at *2 (D. Conn. Feb. 29, 2000); *Conboy*, 84 F. Supp. 2d at 502; *In re* Valentin, 15 F.C.C.R. 5355 (2000).

legal community by failing to take an opportunity to address and resolve an important legal issue.²⁹⁶

In contrast, due in part to the testimony of the James family in the *Jacobson* case,²⁹⁷ Jacobson was convicted of fifty-two counts of fraud and perjury following a trial by jury.²⁹⁸ Additionally, at least six civil suits have been filed against Jacobson by the parents of children Jacobson allegedly fathered.²⁹⁹ The civil suits alleged various wrongs on the part of Jacobson, including fraud, battery, negligence, negligent infliction of emotional distress and medical malpractice. Had the Fourth Circuit not permitted the James family to bring its action anonymously, the plaintiffs in these subsequent suits may have chosen not to come forward.

The value to society in having cases with significant precedential merit heard should not be overlooked. Permitting certain plaintiffs in these cases to proceed pseudonymously will provide an opportunity for these important matters to be examined. In this way, plaintiffs who previously may not have brought their claims because of privacy concerns now will have their day in court.

VIII. CONCLUSION

The Internet and current technology have had a profound effect upon modern society. Their impact on the judicial system should no longer be ignored. Before Google, courts were reluctant to permit plaintiffs to bring their actions pseudonymously. Judicial openness trumped most privacy concerns. Now, because the electronic age has made personal

296. Conversely, in *Heather K. v. City of Mallard*, the district court held that an ordinance regulating open burning constituted a program, service or activity under the ADA, and that the city could be liable under the ADA if the ordinance negatively affected persons with disabilities from taking advantage of city services. 887 F. Supp. 1249, 1261–63 (N.D. Iowa 1995). To date, this case has been cited as precedent by six other cases regarding alleged ADA violations and might not have been heard on the merits at all had the plaintiffs been denied permission to bring the case pseudonymously. See, e.g., *Hahn ex rel. Barta v. Linn County*, 130 F. Supp. 2d 1036, 1045 (N.D. Iowa 2001); *Powers v. MJB Acquisition Corp.*, 993 F. Supp. 861, 868 (D. Wyo. 1998); *Coonley v. Fortis Ben. Ins. Co.*, 956 F. Supp. 841, 844 n.2 (N.D. Iowa 1997); *Kane v. Iowa Dep't of Human Serv.*, 955 F. Supp. 1117, 1122 n.3 (N.D. Iowa 1997); *Randolph v. Rodgers*, 980 F. Supp. 1051, 1061 (E.D. Mo. 1997), *rev'd in part, vacated in part*, 170 F.3d 850 (8th Cir. 1999); *Wahpeton Canvas Co. v. Bremer*, 958 F. Supp. 1347, 1362 n.10 (N.D. Iowa 1997).

297. See *supra* Part V.B.

298. *United States v. Jacobson*, No. 92-5406, 1993 WL 343172, at *1 (4th Cir. Sept. 3, 1993) (unpublished disposition); see also *Fertility Doctor Found Guilty of Fraud, Perjury*, CHI. TRIB., Mar. 5, 1992, at 4; Robert F. Howe, *DNA and Blood Tests Link Children, Fertility Doctor; Genetic Expert Testifies at Jacobson Trial*, WASH. POST, Feb. 20, 1992, at B4; Robert F. Howe, *Jacobson Portrayed as Liar, Pioneer as Fraud Trial Ends*, WASH. POST, Feb. 28, 1992, at D1.

299. E.g., *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 826 F. Supp. 155 (E.D. Va. 1993).

information easily accessible, this calculus must be revised. Public access to private information may have great personal impact, and hence a chilling effect on public participation in the judicial system. A more liberal approach to evaluating requests for plaintiff pseudonymity is therefore needed. The five traditional factors used to weigh plaintiffs' privacy concerns must be examined and updated to reflect current technological change. Likewise, new criteria—whether the plaintiff has already been publicly identified, whether the plaintiff is likely to bring the claim if not permitted to be pseudonymous, and the precedential value of the action—should be introduced to reinforce and supplement those criteria presently in use. Also, a specialized judge or magistrate should oversee the process of evaluating such requests. This will standardize a practice which is currently *ad hoc* and unpredictable. Increased plaintiff pseudonymity, within the parameters discussed in this Article, will counterbalance the advancement of information technologies' increasing intrusion on privacy rights and will protect against a chilling effect on the administration of justice.