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#Worstplaintiffever: Popular Public Shaming and Pseudonymous Plaintiffs

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#WORSTPLAINTIFFEVER: POPULAR PUBLIC SHAMING AND PSEUDONYMOUS PLAINTIFFS

JAYNE S. RESSLER*

*Ridicule is man's most potent weapon.*¹

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1. SAUL D. ALINSKY, RULES FOR RADICALS: A PRAGMATIC PRIMER FOR REALISTIC RADICALS 75 (1971).

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Being publicly shamed is, for some, a fate worse than death. This article addresses a tension at the heart of the practice of “popular public shaming” as a social regulatory mechanism. While shaming can be an effective and inexpensive tool to reflect and impart current collective values, it also can deter victims of wrongs from vindicating their rights in court, thereby inhibiting the pursuit of justice. Some legislatures and courts, including the United States Supreme Court, have sought to address this problem by permitting certain rightsholders to bring lawsuits pseudonymously. However, as this article shows, the standards and procedures in place for doing so are ad hoc, inefficient, and, ultimately, ineffective. Furthermore, current legislative opposition to plaintiffs’ use of pseudonyms, on the grounds that plaintiff anonymity undermines longstanding ideals of judicial openness, is misguided. As this article demonstrates, the normative and historical foundations of the concern for judicial openness in fact favor a limited option for plaintiffs to bring lawsuits without revealing their identities. When rightsholders demonstrate a likelihood of “public shaming” that reasonably will deter them from bringing a lawsuit, I propose that they should be presumptively permitted to proceed under a pseudonym. The burden then should shift to the defendant—and to the public—to show why the pseudonym should not be allowed. This article shows how adopting such a rule would address the risk that public shaming poses to access to justice, while simultaneously protecting the legitimate interests of defendants’ and society’s interest in monitoring the judicial process.

INTRODUCTION

Imagine you are a guest in someone’s home. An accident occurs in which you fall and suffer a serious injury. As a result, you are required to have multiple expensive surgeries. As is common in cases such as this, you seek compensation from your host’s homeowner’s insurance policy. Doing so requires you to sue your host and name as a defendant—for *pro forma* purposes only—the specific individual who caused your fall. You file the routine suit in the local court in the Connecticut town where the incident took place. The catch? The named defendant in your lawsuit is your twelve-year-old nephew. In his exuberance to greet you at his eighth

birthday party, he jumped forcefully into your arms and caused you to fall and shatter your wrist. The media, which regularly scans court filings in search of “juicy” cases, finds out about your lawsuit and publicizes it. The story quickly goes viral, and you are vilified around the globe. Even journalists themselves weigh in, with one television reporter stating on the air that you should “use your good hand to wave goodbye to that family relationship.”²

The above is the true story of Jennifer Connell, whose lawsuit³ against her nephew made international headlines.⁴ It is an example of extrajudicial, or popular, public shaming⁵ directed at a plaintiff in a lawsuit. Connell was pilloried in the media and online. Trending hashtags on Twitter dubbed her the “worst aunt ever,” “the #auntfromhell,” and the most hated woman in America.⁶ The *New*

2. Ree Hines, *‘Worst aunt ever’ speaks out: ‘I was never comfortable’ suing nephew*, TODAY.COM (Oct. 15, 2015), <http://www.today.com/parents/worst-aunt-ever-speaks-out-i-was-never-comfortable-suing-t50351>.

3. See generally *Connell v. Minor Defendant*, No. CV-13-6033608-S (Conn. Super. Ct. Oct. 15, 2015).

4. See Matthew Murphy, *Brekkie Wrap: Nephew of ‘world’s worst aunt’ who unsuccessfully sued him speaks out*, NEWS.COM.AU (Oct. 16, 2015), <http://www.news.com.au/world/brekkie-wrap-nephew-of-worlds-worst-aunt-who-unsuccessfully-sued-him-speaks-out/news-story/e11a8e1677ba865e240e109a42b2a223>; *Nephew of ‘world’s worst aunt’ defends her: ‘She loves us’*, NEW ZEALAND HERALD (Oct. 16, 2015), http://www.nzherald.co.nz/lifestyle/news/article.cfm?c_id=6&objectid=11530090; *Schoolboy Sued by His Aunt for Breaking Her Wrist ‘Still Loves Her’*, THE JOURNAL.IE (Oct. 15, 2015), <http://www.thejournal.ie/boy-sued-by-aunt-2391096-Oct2015>; Darren Boyle, *Nephew of ‘worst aunt ever’ who sued him for hugging her too hard and breaking her wrist speaks for the first time: ‘She would never do anything to hurt me’*, DAILY MAIL (Oct. 14, 2015), <http://www.dailymail.co.uk/news/article-3272025/Jury-rejects-New-York-aunt-s-127-000-bid-sue-nephew-breaking-wrist-welcoming-EIGHTH-birthday.html>; Darren Boyle, *‘I love you...but you owe me \$127,000’: New York aunt sues nephew, 12, who broke her wrist at his eighth birthday party - because she can no longer hold a plate of hor d’oeuvres*, DAILY MAIL (Oct. 13, 2015), <http://www.dailymail.co.uk/news/article-3270400/I-love-owe-127-000-New-York-aunt-sues-nephew-12-broke-wrist-greeting-eighth-birthday-party.html>.

5. When I use the terms “public shaming” or “popular public shaming” or any of their grammatical variations, I refer to disparagement, by ordinary members of society, the purpose of which is to embarrass, annoy, humiliate, threaten, intimidate, silence, or bring about any sort of degradation or diminution of an individual, group of individuals, or entity.

6. See, e.g., Jenna Greene, *Aunt Who Sued Nephew Not Actually the Worst Person in the World*, THE AMERICAN LAWYER (Oct. 14, 2015); Nicky Woolf, *Insurance system may be to blame for aunt’s lawsuit against 12-year-old*, THE GUARDIAN (Oct. 14, 2015), <http://www.theguardian.com/us-news/2015/oct/14/aunt-nephew-broken-wrist-lawsuit-homeowners-insurance>.

York Daily News labeled her “the Auntie Christ,”⁷ and the online comments around the world about the story were quick and mostly harsh.⁸ They included:

- “AUNT JEN—Just replace the A with a C.”⁹
- “I bet she is a burden on the company she works for, her coworkers hate her, and she’s had several failed marriages.”¹⁰
- “I want her face on my toilet paper. We all know why.”¹¹
- “Maybe she’s a Manhattan escort and can’t give hand jibbers anymore.”¹²
- “There is a special place in hell for her. I hope she rots.”¹³
- “This woman is scum. Pure human garbage.”¹⁴
- “She deserves to be publicly shamed.”¹⁵

As a result of the public uproar, Connell appeared with her nephew on the Today show in an attempt to clear her name.¹⁶ She emphasized that naming her nephew as a defendant was a mere

7. Chelsia R. Marcus & Corky Siemaszko, *NYC aunt loses lawsuit against 12-year old nephew over birthday hug that broke her wrist*, N.Y. DAILY NEWS (Oct. 13, 2015), <http://www.nydailynews.com/new-york/boy-12-trial-conn-breaking-aunt-wrist-article-1.2395756>.

8. Some posters espoused the idea that the lawsuit was indeed a legal technicality. Stated one, “[m]ore likely . . . that there is a homeowners’ insurance policy that has liability coverage that would apply to the aunt’s medical bills, and the only way to collect against that insurance policy is to file a legal claim against the party who caused the injury.” Another said, “[t]his is probably more to do with insurance companies . . . than it has to do anyone suing a child.” *Woman sues 8 year old nephew for injuring her wrist during his birthday party*, REDDIT, http://www.reddit.com/r/news/comments/3ol3vl/woman_sues_8_year_old_nephew_for_injuring_her/#bottom-comments (last visited Sept. 6, 2017) (comment by TheDigitalRuler).

9. Reddit, *Woman sues 8 year old nephew for injuring her wrist during his birthday party*, REDDIT, http://www.reddit.com/r/news/comments/3ol3vl/woman_sues_8_year_old_nephew_for_injuring_her/#bottom-comments (last visited Sept. 6, 2017).

10. *Id.*

11. *Id.*

12. *Id.*

13. Darren Boyle, *‘I love you...but you owe me \$127,000’: New York aunt sues nephew, 12, who broke her wrist at his eighth birthday party - because she can no longer hold a plate of hor d’oeuvres*, DAILY MAIL (Oct. 13, 2015), <http://www.dailymail.co.uk/news/article-3270400/I-love-owe-127-000-New-York-aunt-sues-nephew-12-broke-wrist-greeting-eighth-birthday-party.html#comments>.

14. REDDIT, *supra* note 8 (comment by Cheerful_Pessimist).

15. *Id.*

16. Ree Hines, *‘Worst aunt ever’ speaks out: ‘I was never comfortable’ suing nephew*, TODAY.COM (Oct. 15, 2015), <http://www.today.com/parents/worst-aunt-ever-speaks-out-i-was-never-comfortable-suing-t50351>.

legal formality.¹⁷ Her nephew insisted that “[Connell] would never do anything to hurt the family . . . She loves us.”¹⁸

As recently observed in the *New York Times*:

[L]awsuits involving well-known figures and sensitive issues have always drawn publicity, of course. But now that more courts are using electronic filing systems, judges and lawyers say they worry that the public is consuming lawsuits without any context. The most serious consequences: that some victims, fearing that the potential adverse aspects of online attention will outweigh the benefits, will decide not to file complaints at all. . . . In interviews, several plaintiffs’ lawyers said the current online environment was already deterring potential clients from filing suit.¹⁹

The United States Supreme Court itself has acknowledged the threat to our legal system resulting from rightsholders wary of bringing their cases in light of the public ramifications of doing so.²⁰ In affirming a holding of the Washington Supreme Court, the United States Supreme Court stated:

The Supreme Court of Washington properly emphasized the importance of ensuring that potential litigants have unimpeded access to the courts: “[A]s the trial court rightly observed, rather than expose themselves to unwanted publicity, individuals may well forgo the pursuit of their just claims. The judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use it, resulting in frustration of a right as valuable as that of speech itself.”²¹

17. *Id.*

18. See Lisa Green, *Nothing personal: Why Jennifer Connell sued her nephew — and why it was a lost cause*, TODAY.COM (Oct. 16, 2015), <http://www.today.com/parents/nothing-personal-why-jennifer-connell-sued-her-nephew-why-it-t50686>.

19. Jodi Kantor, *Lawsuits’ Lurid Details Draw an Online Crowd*, N.Y. TIMES, (Feb. 23, 2015), http://www.nytimes.com/2015/02/23/us/lawsuits-lurid-details-draw-an-online-crowd.html?_r=1. Maryland law professor Leigh Goodmark noted that the online boom of gender-related court documents was a harbinger of a future in which virtually no legal document—an eviction notice, a divorce pleading with embarrassing details—would be safe from public consumption. “Things people never bargained on getting out will get out,” she said. *Id.*

20. *Seattle Times v. Rhinehart*, 467 U.S. 20, 36 (1984).

21. *Id.* (quoting *Rhinehart v. Seattle Times*, 654 P.2d 673, 689 (Wash. 1982)).

Several lower courts have recognized the deterrent effect that failure to permit rightsholders to proceed pseudonymously can have on meritorious claims.²² Scholars have weighed in on the issue as well. Lior Strahilevitz has opined that “the nonavailability of pseudonymity may discourage some parties from bringing suits in the first place.”²³ Daniel Solove stated simply, “[m]ore people should be allowed to sue without having their real names appear in the record.”²⁴

The justifications for the denial of plaintiff pseudonymity—most commonly a concern with judicial openness—do not recognize that the threat that modern technology presents to our judicial system is beyond the capacity of privacy law to remedy.²⁵ Moreover, requests by rightsholders to proceed anonymously are greeted with antiquated court procedures that are ill-suited to responding to the impact of the internet and social media. Indeed, the internet has been growing exponentially—both in terms of technology and

22. See *Doe v. Oshrin*, 299 F.R.D. 100, 104 (D.N.J. 2014) (“the Court finds that denying Plaintiff’s motion [to proceed pseudonymously] may inhibit Plaintiff’s willingness to pursue her claims”); *D.M. v. Cty. of Berks*, 929 F. Supp. 2d 390, 402 (E.D. Pa. 2013) (“disallowing anonymity would likely deter those [in these types of cases] . . . from vindicating their rights”); *Doe v. Hartford Life & Acc. Ins. Co.*, 237 F.R.D. 545, 550 (D.N.J. 2006) (“if this Court denies Plaintiff’s motion, there exists the possibility that he might not pursue his claim due to the stigmatization that may result in his community and to his professional career”); *Doe v. Provident Life & Acc. Ins. Co.*, 176 F.R.D. 464, 467 (E.D. Pa. 1997) (“the public may have a strong interest in protecting the privacy of plaintiffs in controversial cases so that these plaintiffs are not discouraged from asserting their claims”); *Doe v. Szul Jewelry, Inc.*, No. 0604277, 2008 WL 2157893 (Sup. Ct. N.Y. May 13, 2008) (“[t]he only purpose revelation of plaintiff’s name could have would be to further discomfit plaintiff and perhaps deter her from litigating the matter.”); *Roe v. Providence Health Sys.-Or.*, No. 06-1680-HU, 2007 WL 1876520, at *4 (D. Or. June 26, 2007) (“the public has an interest in seeing this case decided on the merits. Jane Roe’s allegations center on disability discrimination, an issue which carries important implications for disabled persons and for society as a whole. Should Jane Roe or her husband be mandated to provide their true identities, they may be deterred from continuing the lawsuit. Therefore, the public’s interest in an open trial will not be impaired, and may actually be better served if plaintiffs’ identities remain sealed.”).

23. Lior J. Strahilevitz, *Pseudonymous Litigation*, CHIC. L. & ECON. SERIES 1247 (2010) (“[r]equiring Doe to forego her lawsuit [because she could not do] pseudonymously would have deprived her of meaningful relief and cost us a helpful clarification of precedent and statutory text”).

24. DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 121 (2007), http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2081&context=faculty_publications.

25. See, e.g., Jayne S. Ressler, *Privacy, Plaintiffs and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 KAN. L. REV. 195, 197 (2004).

substance.²⁶ Speeds have increased dramatically, and “smart phones” make the internet available during every moment of our lives.²⁷ Access to court documents is often as simple as a click or a few keystrokes.²⁸ Noted one journalist, “[l]awsuit papers are generally public, but before the advent of electronic filing, most of them remained stuffed inside folders and filing cabinets at courthouses.”²⁹ In addition, social media has become a mainstay of everyday life. Studies show that over 60% of Americans obtain their news from social media,³⁰ over two-thirds of which comes from Facebook.³¹ Perhaps the most concerning of all developments, however, is the use of the internet, by vast numbers of mostly anonymous “ordinary” people, to publicly shame those (almost always strangers) with whom the “shamer” disagrees.³² When this popular shaming is connected to plaintiffs in a lawsuit, its effects can be far-reaching and profound. The *New York Times* observed that:

[i]ntimate, often painful allegations in lawsuits—intended for the scrutiny of judges and juries—are increasingly drawing in mass online audiences far from the courthouses where they are filed. . . . [E]lectronic case databases, blogs and

26. It is estimated that in 2004 there were 51,611,646 websites and 910,060,180 users; in 2013, there were 672,985,183 websites and 2,756,198,420 users. *Total Number of Websites*, INTERNET LIVE STATS, <http://www.internetlivestats.com/total-number-of-websites/#trend> (last visited Oct. 10, 2016).

27. For example, in 2002, it took twelve and a half minutes to download a song on a 56K modem; by 2012, a song could be downloaded in eighteen seconds. See Pam Dyer, *How the Internet has Changed in the Last 10 Years*, PAMORAMA, <http://pamorama.net/2012/10/06/how-the-internet-has-changed-in-the-last-10-years-infographic/> (last visited Oct. 1, 2016); see also John Aziz, *Why is American Internet so Slow?*, THE WEEK (March 5, 2014), <http://theweek.com/articles/449919/why-american-internet-slow>.

28. Kantor, *supra* note 19.

29. *Id.*

30. See Jordan Crook, *62 Percent of U.S. adults get their news from social media, says report*, TECHCRUNCH, (May 26, 2016), <http://techcrunch.com/2016/05/26/most-people-get-their-news-from-social-media-says-report>.

31. See Paul Fletcher, *Two-Thirds Of Adults Get News From Social Media*, FORBES (May 28, 2016), <http://www.forbes.com/sites/paulfletcher/2016/05/28/two-thirds-of-adults-get-news-from-social-media/#159c2c2f2211>; Joseph Lichterman, *Nearly half of U.S. adults get news on Facebook, Pew says*, NIEMAN LAB (May 26, 2016), <http://www.niemanlab.org/2016/05/pew-report-44-percent-of-u-s-adults-get-news-on-facebook>.

32. See JON RONSON, *SO YOU'VE BEEN PUBLICLY SHAMED* (2015).

social media propel a case into the spotlight even when the parties are not public figures.³³

Danielle Citron noted that a Google search can forever portray even a successful litigant as “the complainer, or the slut who allegedly slept with the boss.”³⁴ The power of public shaming—including the fear of being publicly shamed—should not be underestimated.³⁵ Even Shakespeare penned in *Othello* “I have lost my reputation! I have lost the immortal part of myself and what remains is bestial.”³⁶

The time is ripe for legislatures and the judiciary to refocus their attitudes and practices toward pseudonymous plaintiffs. I propose that lawmakers directly acknowledge the impact that the threat of public shaming can have on rightsholders—a threat that affects not just individuals, but the entire legal system. It is essential in doing so that lawmakers and scholars alike recognize that permitting pseudonymous plaintiffs does not undermine, but rather supports, the values behind the ideals of judicial openness—whatever its meaning.³⁷

This article is the first to discuss popular public shaming in the context of its impact on a prospective or actual plaintiff. Much of today’s public shaming occurs online, so the focus of this paper, although not exclusively, is on online shaming. While several

33. Jodi Kantor, *Lawsuits’ Lurid Details Draw an Online Crowd*, N.Y. TIMES, (Feb. 23, 2015), http://www.nytimes.com/2015/02/23/us/lawsuits-lurid-details-draw-an-online-crowd.html?_r=1.

34. *Id.*

35. The fear of being publically shamed is alive and well in the law professor community. In an email exchange that occurred on the CivPro list-serve, <CIV-PRO@LISTSERV.ND.EDU>, a professor wrote that she was “doing some consulting work on a piece of litigation that raises some very interesting procedural issues, and I am sharing them here to see what insights you might offer.” She then provided somewhat extensive details about the case upon which she had been asked to opine. One member of the list-serve responded “this is an issue that may not have come up before, but I view the purpose of this list to be facilitating each other’s scholarly work. . . . I think this kind of request may be a bit ultra vires,” while another stated “I am vaguely uncomfortable with using the list as a research tool for paid outside consulting work.” These comments prompted the poster who had initially posed the query to respond “for the decade-plus that I have been a member of this listserv, I have repeatedly and continually shied away from sending any group-wide messages, precisely because I feared saying something inadvertently that would expose me to public ridicule. Alas, the moment has arrived[.]” Postings of [names withheld] to CIV-PRO@LISTSERV.ND.EDU (May 18 and 19, 2016) (on file with author).

36. RONSON, *supra* note 32, at 143–44 (quoting WILLIAM SHAKESPEARE, *OTHELLO* act 2, sc. 3).

37. See discussion *infra* Part III B.

scholars have written about the damage that various forms of online shaming or “cyber harassment”³⁸ can impose on individuals and society,³⁹ my focus is on the intersection between the threat of being publicly shamed and potential litigation. Specifically, I suggest that when public shaming deters certain rightsholders from bringing litigation, or negatively affects those that already have initiated a lawsuit, there is a chilling effect that should be protected against. In other words, if the law provides for recovery for a plaintiff’s claim, the potential for being publicly shamed should have no part in deterring a rightsholder from bringing a lawsuit. This is particularly true with respect to individual rightsholders, as scholars have deemed individual plaintiffs “of vital importance to our legal system.”⁴⁰

I therefore propose that when a lawsuit is likely to be met with public shaming that reasonably would deter a rightsholder from proceeding, that the rightsholder be permitted to litigate pseudonymously. Unlike scholarship which proposes various means to punish cyber harassment when it occurs,⁴¹ my proposal is a prophylactic designed to prevent the deterrent effect public shaming can have on potential plaintiffs. Under the right circumstances, plaintiff pseudonymity could neutralize the dangers of public shaming, while maintaining society’s ability to access the judicial process, enable individual rightsholders to obtain justice, and maintain the law’s effectiveness in promoting desired social policy.

In Part I of this article, I briefly examine the practice of public shaming. First, I consider the function of public shaming as a societal behavioral regulatory mechanism. Next, I assess how public shaming has affected plaintiffs—both actual and potential—as reported in the popular press. I then analyze the judicial response, via case law, to the role that public shaming has played in the context of rightsholders seeking to proceed pseudonymously. I

38. Danielle Citron has defined cyber harassment to be “threats of violence, privacy invasions, reputation-harming lies, calls for strangers to physically harm victims, and technological attacks.” DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 3 (2014).

39. See, e.g., *id.*

40. Alex Stein & Gideon Parchomovsky, *Empowering Individual Plaintiffs*, 102 CORNELL L. REV. 1319, 1325 (2017) (stating that “[l]awsuits by individual victims are unique in that they constitute the only litigation form that simultaneously advances the twin goal of deterring wrongdoers and compensating victims.”).

41. See, e.g., Derek Bambauer, *Exposed*, 98 MINN. L. REV. 2025 (2014) (regarding copyright violation); Danielle K. Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009) (regarding civil rights violation); Mary A. Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655 (2012) (regarding sexual harassment).

conclude Part I by reviewing the powerful role that technology and social media currently plays in today's popular-shaming-rich culture.

In Part II, I present the current state of the law regarding plaintiff pseudonymity. I examine federal and state legislation and case law in this area. I highlight the varied, often *ad hoc*, methods courts currently use in evaluating rightsholders' requests to litigate anonymously. I expose the substantive and procedural inconsistencies, often within the same jurisdiction, when plaintiff anonymity is at issue.

Part III discusses the strongest impediment to the practice of plaintiff pseudonymity—the ideology of judicial openness. I explain that most lawmakers assume that judicial openness refers to the notion that the judicial process not be carried out in secret, concluding therefore that plaintiff pseudonymity should not be permitted; however, the origin of the ideal of judicial openness is unclear. Thus, I explore scholarly disagreement about its meaning. I suggest that regardless of the historical definition of judicial openness, it is not necessarily lost when plaintiffs proceed using a pseudonym. I argue that paradoxically, our judicial system's functionality is best preserved when certain rightsholders are permitted to bring their actions anonymously.

In Part IV, I conclude with a recommendation that legislatures and courts incorporate concern for the potential deterrent threat of public shaming into their jurisprudence regarding pseudonymous plaintiffs. Specifically, I suggest that if a rightsholder can show that public shaming will be a likely result of bringing a lawsuit, and that threat reasonably will deter the rightsholder from proceeding, plaintiff pseudonymity be presumptively permitted. My proposal shifts the burden to an objecting party—and to the public—to show why the plaintiff should not be permitted to proceed pseudonymously. To support my proposal, I provide guidelines for the contents of a protective order that I suggest courts use in furtherance of the pseudonymous plaintiff process.

My proposal encourages federal and state legislatures and courts to recognize the potential for popular public shaming inherent with modern technology and the extraordinary damage that shaming can inflict—both on rightsholders and the judicial system as a whole. With respect to cases where rightsholders are at risk of being deterred from bringing their claims out of fear of being publicly shamed, a change in the approach to, and procedure involved in, deciding whether they may proceed anonymously is imperative.

I. PUBLIC SHAMING

A. *Public Shaming as an Indicator and Regulator of Normative Values*

Scholars have long debated the benefits and drawbacks of public shaming as both a behavioral regulatory mechanism and a means of punishment for criminal behavior.⁴² Dan Kahan has stated that “it should be politically acceptable to punish a wide array of offenses with shaming alone.”⁴³ Many opine that shaming can be low-cost, flexible, and sometimes more effective at regulating behavior than more traditional methods.⁴⁴ Shaming also can level the playing field between Davids and Goliaths and give the shamer a sense of satisfaction that traditional regulatory means do not impart.⁴⁵ Shaming also provides an insight into collective normative values.

Perhaps one of the most successful examples of public shaming as a barometer and enforcer of social norms occurred with the 2013 broadcast of CNN’s documentary *Blackfish*.⁴⁶ The film told the story of Tilikum, a 12,000 pound orca whale kept in captivity by SeaWorld and used in its popular shows.⁴⁷ The documentary highlighted the dangers that trainers face while working with orcas, and revealed Tilikum’s role in the deaths of three handlers.⁴⁸ CNN exposed the heartless methods used to capture orca whales from the wild and made the case that keeping these whales in captivity for entertainment purposes is cruel and inhumane.⁴⁹ After the documentary aired, Consumerist branded SeaWorld as one of the

42. See, e.g., Leah Griswald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625 (2011); Dan Kahan, *What’s Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075 (2006); Elizabeth Rosenblatt, *Fear and Loathing: Shame, Shaming, and Intellectual Property*, 63 DEPAUL L. REV. 1 (2013); David Skeel Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001). The details of these complex and nuanced debates are beyond the scope of this article.

43. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 637 (1996). But see Dan M. Kahan, *What’s Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2075 (2006) (stating that the author has “concluded that [he] was wrong” to defend shaming as an alternative sanction).

44. See Rosenblatt, *supra* note 42, at 31–32.

45. *Id.* at 32–33.

46. BLACKFISH (CNN Films 2013).

47. *Id.*

48. *Id.*

49. *Id.*

“Four Worst Companies in America.”⁵⁰ Attendance dropped at SeaWorld theme parks, and various celebrities and corporations severed ties with the company.⁵¹ Its stock price plummeted,⁵² the chief executive resigned,⁵³ and SeaWorld announced that it will officially end its orca breeding program—a decision labeled “a huge concession to critics and animal welfare groups.”⁵⁴

On the other hand, scholar Toni Massaro has concluded, “[w]e . . . cannot ignore the profound harm that effective shaming, where it can be achieved, may cause.”⁵⁵ Indeed, some critics of shaming punishments argue that they are inhumane and degrading.⁵⁶ Others call them “lynch justice,”⁵⁷ which violate the offender’s “transactional dignity.”⁵⁸

To be sure, attention has been paid to those found guilty, shamed, and later exonerated, who then remain unable to escape the ignominy. My focus goes one step further, as my concern is with those who have done nothing wrong, but rather are innocent

50. See *Worst Company in America*, WORDPRESS, <http://consumermediallc.files.wordpress.com/2014/04/2014wciabacketqfinal.png> (last visited Sept. 6, 2017).

51. See Jordan Zakarin, *The Documentary “Blackfish” is Causing More Major Problems for SeaWorld*, BUZZFEED (Jan. 3, 2014), http://www.buzzfeed.com/jordanzakarin/the-documentary-blackfish-problems-for-seaworld?utm_term=.nrR1wWWYJ#.jbJMX00LP. See also Greg Allen, January 15, 2014, *Months After ‘Blackfish’ Release, Controversy Over SeaWorld Grows*, NPR (Jan. 15, 2014), <http://www.npr.org/2014/01/15/262767226/months-after-blackfish-release-controversy-for-seaworld-grows>; Melissa Cronin, *SeaWorld Loses 1 Million Visitors As It Clings To Orca Captivity*, THE DODO (Feb. 26, 2015), <https://www.thedodo.com/seaworld-stock-quarter-four-1012275533.html>; Hannah Samson, *SeaWorld Is Still Tanking as Public Perception Problems Return*, SKIFT (Aug. 8, 2017), <https://skift.com/2017/08/08/seaworld-is-still-tanking-as-public-perception-problems-return/>.

52. Roberto Ferdman, *Chart: What the documentary ‘Blackfish’ has done to SeaWorld*, WASH. POST (Dec. 12, 2014), http://www.washingtonpost.com/news/wonk/wp/2014/12/12/chart-what-the-documentary-blackfish-has-done-to-seaworld/?utm_term=.9616e661cbef.

53. *Id.*

54. See Greg Allen, *SeaWorld Agrees To End Captive Breeding Of Killer Whales*, NPR (Mar. 17, 2016), <http://www.npr.org/sections/thetwo-way/2016/03/17/470720804/seaworld-agrees-to-end-captive-breeding-of-killer-whales>.

55. Toni Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1943 (1991).

56. Lauren M. Goldman, *Trending Now: The Use of Social Media Websites on Public Shaming Punishments*, 52 AM. CRIM. L. REV. 415, 432 (2014).

57. *Id.* at 436 (quoting James Whitman, *What is Wrong with Inflicting Shame Sanctions?* 107 YALE L.J. 1055, 1059 (1998)).

58. James Whitman, *What is Wrong with Inflicting Shame Sanctions?* 107 YALE L.J. 1055, 1090 (1998).

rightsholders whose vulnerability to shaming impacts their ability to seek justice.

Because collective ideals are included in the substantive law as a result of the legislative process, rightsholders should be free to pursue their rights under those ideals. Shaming should have no role in influencing whether certain rightsholders will pursue their actions. To be clear, shaming can still play an important function in demonstrating societal reaction to specific litigation. However, its part should be in the form of a response to an anonymous plaintiff's lawsuit instead of as potential deterrent to a named plaintiff. That way the public would be free to express its views on lawsuits, thereby imparting normative societal values and potentially inspiring change, while simultaneously permitting rightsholders to vindicate their rights.

B. Public Shaming's Deterrent Effect on Potential Plaintiffs

In *Privacy, Plaintiffs and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*,⁵⁹ I suggested that reluctance to permit certain rightsholders to proceed pseudonymously would stifle the judicial process and force some rightsholders to choose to forgo their claims in the name of protecting their privacy.⁶⁰ Recent events bear out my hypothesis. For example, in 2015, hackers known as “The Impact Team” broke into Ashley Madison, a website with over 30 million users who are married—or otherwise in a committed relationship—seeking to have an affair.⁶¹ The hackers posted personal information online about many Ashley Madison users, who, as a result of the disclosure of their private information, then sued Avid Life Media, Ashley Madison's parent company.⁶² Many of the purported plaintiffs sought to proceed as “John Doe,” concerned about the privacy violations that would ensue if their names were available to the public.⁶³ Although psychologists opined that

59. Ressler, *supra* note 25.

60. *Id.*

61. See Rory Bahadur, *Individual Sovereignty, Freer Sex, and Diminished Privacy: How an Informed and Realistic Modern Sexual Morality Provides Salvation from Unjustified Shame*, 8 ELON L. REV. 245, 274 (2016).

62. *In re Ashley Madison Customer Data Sec. Breach Litig.*, 148 F. Supp. 3d 1378 (J.P.M.L. 2015).

63. *In re Ashley Madison Customer Data Sec. Breach Litig.*, No. 2669, 2016 WL 1366616, at *2 (E.D. Mo. Apr. 6, 2016) (“Forty-two Plaintiffs seeking to represent a class of users of the Ashley Madison website have filed under pseudonym ‘to reduce the risk of potentially catastrophic personal and professional consequences that could befall them and their families’ should they be publicly identified as someone

“[d]ealing with an affair in a very public way makes the embarrassment greater and the hurt for the spouse and kids even more devastating,”⁶⁴ the judge nonetheless denied the plaintiffs the ability to proceed under a pseudonym.⁶⁵ As a result, several plaintiffs declined to proceed with the action.⁶⁶ It was reported that at least one victim of the hacking and resulting publication of personal information committed suicide.⁶⁷

In 2014, harsh backlash on social media forced former Miami Dolphins’ quarterback Dan Marino to withdraw his participation as a plaintiff in a suit regarding concussions against the NFL.⁶⁸ There was speculation regarding whether Marino would be employable by the Dolphins if he continued his involvement in the lawsuit.⁶⁹ Commentators were quick to point out that, unlike Marino, “Troy Aikman, Steve Young and Boomer Esiason have declined to join the thousands of plaintiffs in any concussion suit against the NFL while they have continued to work with various NFL broadcast partners.”⁷⁰ Accordingly, Marino issued a statement, noting:

I authorized a claim to be filed on my behalf In so doing I did not realize I would be automatically listed as a plaintiff in a lawsuit against the NFL. I have made the decision it is not necessary for me to be part of . . . this lawsuit.⁷¹

Plaintiffs’ lawyers are not immune from public vitriol for representing clients with unpopular claims. After the horrific

whose sensitive personal information, i.e., names, email addresses, credit card information, and sexual preferences and habits, was contained in Avid’s ‘cheating website’ database.”).

64. Carolyn Gregoire, *Ashley Madison Hack Could Have a Devastating Psychological Fallout*, HUFFINGTON POST, Aug. 20, 2015, http://www.huffingtonpost.com/entry/ashley-madison-hack-psychological-fallout_us_55d4afcee4b07addcb44f5d4.

65. *In re Ashley Madison*, 2016 WL 1366616, at *1.

66. *Id.*

67. Dominique Mosbergen, *Pastor Outed In Ashley Madison Hack Commits Suicide*, HUFFINGTON POST (Sept. 8, 2015), http://www.huffingtonpost.com/entry/pastor-ashley-madison-suicide_us_55efe1dbe4b03784e2771e5d.

68. Armando Salguero, *Miami Dolphins legend Dan Marino withdraws name from concussion lawsuit*, MIAMI HERALD (June 3, 2014), <http://www.miamiherald.com/sports/nfl/miami-dolphins/article1965425.html>.

69. *Id.*

70. *Id.*

71. Peter King, *Dan Marino: ‘I Am Withdrawing as a Plaintiff Effective Immediately’*, SPORTS ILLUSTRATED (June 3, 2014), <http://mmqb.si.com/2014/06/03/dan-marino-nfl-concussion-lawsuit-statement>.

shootings at Sandy Hook Elementary School in Newtown, Connecticut, a lawyer sued the Connecticut Department of Education on behalf of a Sandy Hook Elementary School first-grader who suffered emotional trauma from the ordeal.⁷² The internet and mass media responded to the lawsuit “with outrage—calling it ‘completely inappropriate’ and ‘wrong on every level.’”⁷³ As a result, the lawyer withdrew the case.⁷⁴

C. Public Shaming of Named Plaintiffs

In other cases, plaintiffs who sued using their real names were met with public scorn, threats, and ridicule. Abigail Fisher, a white student who was denied admission to the University of Texas, sued the school in 2008.⁷⁵ She claimed that UT’s decision on her application was a violation of the Equal Protection clause, since, according to Fisher, the school admitted minority students with qualifications lower than hers.⁷⁶ The Twittersphere exploded with supporters of UT’s position, and the hashtag #StayMadAbby was created.⁷⁷ People from all walks of life used the hashtag to publicly express disdain for Fisher and her lawsuit.⁷⁸ After Fisher lost before the United States Supreme Court,⁷⁹ a new hashtag was born: #BeckywiththeBadGrades.⁸⁰

In 2011, an atheist high school student, Jessica Ahlquist, sued the City of Cranston, Rhode Island, seeking removal of a large prayer mural posted on the wall of her high school’s auditorium.⁸¹ After she filed the lawsuit, Ahlquist was “subject to frequent taunting and threats at school, as well as a virtual on-line hate

72. Chelsea Kelly, *Mass Shooting Lawsuits Can Serve Purpose*, HARTFORD COURANT (Feb. 4, 2014), <http://www.courant.com/opinion/hc-op-fresh-talk-kelly-mass-shooting-lawsuits-usef-20140204-story.html>.

73. *Id.*

74. *Id.*

75. *Fisher v. Texas*, 556 F. Supp. 2d 603 (W.D. Tex. 2008), *aff’d* *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016).

76. *Id.*

77. Robert Bernstein, *U. of Texas Supreme Court Fight Gets Hashtag: #StayMadAbby*, USA TODAY (Dec. 13, 2015), <http://college.usatoday.com/2015/12/13/u-of-texas-supreme-court-fight-gets-hashtag-staymadabby>.

78. *Id.*

79. *Fisher v. Univ. of Texas*, 136 S. Ct. 2198 (2016).

80. Alfred Ng, *Abigail Fisher is now Becky with the Bad Grades*, N.Y. DAILY NEWS (June 23, 2016), <http://www.nydailynews.com/news/national/abigail-fisher-becky-bad-grades-article-1.2685865>.

81. *See Ahlquist v. Cranston*, 840 F. Supp. 2d 507 (D.R.I. 2012).

campaign via Facebook.”⁸² She received death threats, many on Twitter, and required police escorts to and from classes.⁸³ Some of the hateful social media comments included:

- “everyone’s harassing her but who’s she going to report it to? [The school?] The administrators probably hate her.”⁸⁴
- “I’m sabotaging her site on Facebook. Let’s just say it’s going to be nuts.”⁸⁵
- “Jessica Ahlquist, your home address posted [sic] online. I can’t wait to hear about you getting curb-stomped, you fucking worthless cunt.”⁸⁶
- “But for real, somebody should jump the girl. LMAO— let’s do it.” “I’ve decided I’m going to eat her family.”⁸⁷

Finally, on a popular radio show, a state representative from Ahlquist’s town called her “an evil little thing.”⁸⁸ Ahlquist was forced to take time off from school.⁸⁹

While this paper’s focus is on individual rightsholders, it is worth noting that corporate rightsholders have not been spared from being publicly shamed for bringing unpopular lawsuits. In 2015, a customer in Texas wrote a negative *Yelp* review about Prestigious Pets, a pet-sitting company located in Dallas.⁹⁰ The reviewer claimed that the pet sitter the company provided “potentially harmed” her

82. *Id.* at 516.

83. See Abby Goodnough, *Student Faces Town’s Wrath in Protest Against a Prayer*, N.Y. TIMES (Jan. 26, 2012), http://www.nytimes.com/2012/01/27/us/rhode-island-city-enraged-over-school-prayer-lawsuit.html?_r=0; see also Elisabeth Harrison, *R.I. Student Draws Ire Over School Prayer Challenge*, NPR (Feb. 7, 2012), <http://www.npr.org/2012/02/14/146538958/rhode-island-district-weighs-students-prayer-lawsuit>; Christina Ng, *Rhode Island Teen’s Battle Against Prayer Banner Has Gone ‘Too Far,’ Mayor Says*, ABC NEWS (Jan. 18, 2012), <http://abcnews.go.com/US/rhode-island-teens-battle-prayer-banner-mayor/story?id=15386786>.

84. HyperHam, *Love the Sinner, Hate the Sin*, FAMILY V2.1 (Feb. 23, 2012, 5:54 AM), <http://www.geekfamily.co.uk/tag/religion>.

85. *Id.*

86. *Id.*

87. *Id.*

88. Goodnough, *supra* note 83.

89. See Ileana Llorens, *Jessica Ahlquist, Atheist, Receives Threats Over Prayer Banner Ruling; School Board May Appeal*, HUFFINGTON POST (Jan. 31, 2012), http://www.huffingtonpost.com/2012/01/27/jessica-ahlquist-prayer-banner-rhode-island-school_n_1237199.html.

90. Paul Alan Levy, *Texas Court Strikes Down Prestigious Pets’ Nondisparagement Clause Lawsuit*, PUB. CITIZEN: CONSUMER LAW & POL’Y BLOG (Aug. 30, 2016), <http://pubcit.typepad.com/clpblog/2016/08/texas-court-strikes-down-prestigious-pets-nondisparagement-clause-lawsuit.html#more>.

fish by overfeeding it while she and her husband were away on vacation.⁹¹ Prestigious Pets sued the customer in small claims court, alleging that her *Yelp* post violated a non-disparagement clause in their contract.⁹² After a Dallas journalist reported on the story, it:

[W]ent viral, because the fact that a pet-sitting company would not only have a non-disparagement clause but would go so far as to sue its customers for mild criticism touched a nerve. Criticism rained down on the company for its lawsuit, and, according to the company's affidavits, its new business fell off sharply.⁹³

Some of the web comments to CBS's online story included:

- “What spiteful business owners - not sure why anyone would ever use them. I know I never would.”⁹⁴
- “By suing these folks Prestigious Pets is itself providing even more bad advertising that some of its clients think it does a poor job. Never heard of them before but because of this I'd be wary of hiring them. And who would want to drop off a pet with Prestigious Pets (yet more advertising) knowing that it sues its clients? Dumb move!”⁹⁵

Even *Yelp* itself has weighed in on the controversy.⁹⁶ When searching for reviews of Prestigious Pets of Dallas on *Yelp*, a disclaimer appears, which states the following:

Consumer Alert: Questionable Legal Threats

This business may be trying to abuse the legal system in an effort to stifle free speech, including issuing questionable

91. *Id.*

92. *Id.* (citing *McWhorter v. Duchouquette*, No. DC-16-03561, 2016 WL 3157322 (Tex. Dist. Mar. 28, 2016)).

93. Levy, *supra* note 90; See *Pet sitting business bites back after getting bad Yelp review*, CBS NEWS (Feb. 19, 2016, 8:11 AM), <http://www.cbsnews.com/news/yelp-negative-online-review-texas-couple-sued-jeremy-stoppelman/>.

94. Sewilliams4822, Comment to *Pet sitting business bites back after getting bad Yelp review*, CBS NEWS (Feb. 19, 2016, 8:11 AM), <http://www.cbsnews.com/news/yelp-negative-online-review-texas-couple-sued-jeremy-stoppelman/>.

95. Rational_1, Comment to *Pet sitting business bites back after getting bad Yelp review*, CBS NEWS (Feb. 19, 2016, 8:11 AM), <http://www.cbsnews.com/news/yelp-negative-online-review-texas-couple-sued-jeremy-stoppelman/>.

96. See *Prestigious Pets*, YELP, <https://www.yelp.com/biz/prestigious-pets-dallas?osq=prestigious+pets+of+dallas> (last visited Feb. 13, 2017).

legal threats against reviewers. As a reminder, reviewers who share their experiences have a First Amendment right to express their opinions on Yelp.⁹⁷

While the plaintiff, in this case, is certainly unsympathetic, it should nonetheless have the right to pursue its action without the threat of being shamed out of business. The judicial system can and should be the arena in which the enforceability of such a non-disparagement clause is determined.

D. Judicial Response to Public Shaming of Plaintiffs

In *Doe v. Jackson City School District*, a group of citizens sued a local school district for displaying a portrait of Jesus in a local middle school.⁹⁸ The plaintiffs moved for permission to proceed anonymously, emphasizing the “bombardment of internet-based speech against [them]”⁹⁹ and that “[s]ocial media sites appear to be the hotbed of this threatening and harassing activity.”¹⁰⁰ On Facebook, users had made threats of physical violence and even veiled threats of using guns to commit acts of physical violence.¹⁰¹ Some of the Facebook posts included:

- “Hunt down whoever complained and get them.”¹⁰²
- “if they remove the picture I think it might get a little ugly in this small town & [sic] it will turn so quickly they won’t have a chance 2 [sic] get away! I can’t stand people like this.”¹⁰³
- “Find out who complained about it and settle this out in the parking lot.”¹⁰⁴
- “But, alas, I believe in freedom of speech unconditionally unless it lessons [sic] or severs my Liberties and Freedoms . . . in which case I must invoke my 2nd

97. *Id.*

98. *Doe v. Jackson City Sch. Dist.*, No. 2:13-cv-112, 2013 WL 452918, at*1 (S.D. Ohio Feb. 7, 2013).

99. Memorandum in Support of Plaintiff’s Motion for Leave to Proceed Using Pseudonyms at 7–8, *Doe v. Jackson City Sch. Dist.*, No. 2:13-cv-112, 2013 WL 9123171 (S.D. Ohio Feb. 7, 2013).

100. *Jackson City Sch. Dist.*, 2013 WL 9123171, at 8.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

Ammendment [sic] Rights upon you and your unjust endeavors.”¹⁰⁵

Some suggested that the plaintiffs should kill themselves while others wished eternal damnation upon them.¹⁰⁶ More resorted to insults and name calling, characterizing the plaintiffs as Satan worshippers.¹⁰⁷ Others suggested that whoever the plaintiffs were that opposed the hanging of the picture of Jesus should leave the country or find another school.¹⁰⁸ The court agreed that the social media activity in the case gave the plaintiffs good reason to fear social ostracism, harassment, intimidation, and violence, and granted the plaintiffs’ motion allowing them to proceed anonymously.¹⁰⁹

In contrast, in *Doe v. Kamehameha Schools*,¹¹⁰ the plaintiffs were four students who sued certain Hawaiian private schools and their trustees for their allegedly race-based admissions policy which granted admission to any applicant with any amount of Native Hawaiian blood before admitting other applicants.¹¹¹ In fact, the

105. *Id.*

106. One commenter wrote: “It’s about time someone stood up and told the anti-Christ nut cases to take a flying leap off a tall building!” Memorandum in Support of Plaintiff’s Motion for Leave to Proceed Using Pseudonyms at 9, *Jackson City Sch. Dist.*, 2013 WL 9123171. Another commenter wrote, “To those who want it down, when you die I hope God sends you ‘down’. You wacko, sicko liberals are denying others their constitutional rights! Go find a deserted island and start a Liberal Colony. You are as much wanted in GOD’S COUNTRY as the lepers!” *Id.* at 10.

107. A commenter stated, “What a shame, This group That wants It taken Down is Of Satan.” *Id.* at 9.

108. A commenter wrote, “I am not even a huge Christian and believe the complainer and this so called 19,000 member cult are Fucking crazy. If they don’t like it, go to school somewhere else.” *Id.* Another commenter wrote: “No one told you that you had to look at it. If you have a problem with it then don’t go into the middle school.” *Id.* Another posted: “Pardon my French, but these assholes need to get away from our schools PERIOD . . . get the hell out of our states, our region and our schools.” *Id.*

109. *Doe v. Jackson City Sch. Dist.*, No. 2:13-cv-112, 2013 WL 452918 (S.D. Ohio Feb. 7, 2013).

110. *Doe v. Kamehameha Schs.*, 596 F.3d 1036 (9th Cir. Haw. 2010). For a brief review of this case, see Julie Hilden, *Should Juvenile Plaintiffs Who Fear Reprisals Be Able to Keep Their Identities Secret? The Question Divides the U.S. Court of Appeals for the Ninth Circuit*, FINDLAW (November 23, 2010), <http://writ.news.findlaw.com/hilden/20101123.html>.

111. *Kamehameha Schs.*, 596 F.3d at 1038.

schools only had admitted two students of non-Hawaiian descent from 1966–2002.¹¹²

After news broke in local newspapers that the magistrate judge denied the plaintiffs’ motion to proceed anonymously, numerous vitriolic comments were posted to the newspapers’ online forums.¹¹³ The plaintiffs moved to reargue the motion to proceed anonymously, citing a number of the threatening online comments as evidence that the plaintiffs reasonably feared retaliatory physical harm should their identities be made public.¹¹⁴ The comments included:

- “Good that the judge ordered them to make these little brats [sic] names known to the public, so they can be tormented by their fellow students and general public.”¹¹⁵
- The “4 kids . . . will need 10 bodyguards lol.”¹¹⁶
- “Sacrifice them!!!!!!!!!!!!”¹¹⁷
- “Now stringing up those scum lawyers is not such a bad idea. (Don’t be scared, it’s in the Halloween spirit).”¹¹⁸

One commenter noted that if the plaintiffs’ identities became known, they “would have to watch their backs for the rest of their lives!”¹¹⁹ Even the plaintiffs’ attorney received threatening emails.¹²⁰ The district court was not persuaded that either these comments or those presented in the initial motion provided reasonable grounds for the plaintiffs to fear retaliatory physical harm.¹²¹ On appeal, the Ninth Circuit emphasized that it was constrained by the “abuse of discretion standard of review” and stated, “were we permitted to

112. *Id.* at 1039; See also David M. Forman, *The Hawaiian Usage Exception to the Common Law: An Inoculation Against the Effects of Western Influence*, 30 U. HAW. L. REV. 319, 331 (2008).

113. *Kamehameha Schs.*, 596 F.3d at 1041.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. The sender of one email wrote: “*You are a son of a bitch . . . I know so many kids that did not get into Kamehameha schools with Hawaiian blood and you are trying to take that away . . . I am tired of haoles [a Hawaiian pejorative for “white person”] like you. yOU JEWISH SHITHEAD!!!! if i see you ever in public.. no worries . . . I will SPIT on you ... and YOU will throw the first punch . . . and believe me . . . it will be my pleasure to beat the crap out of you . . . by the way . . . i am a NON Hawaiian. . .*” *Id.* (emphasis added).

121. *Doe v. Kamehameha Schs.*, No. 08–00359, 2009 WL 308351, at *6 (D. Haw. Feb. 6, 2009).

make findings and weigh the facts anew, we might have held that anonymity was appropriate.”¹²² With that caveat, the Ninth Circuit affirmed the district court decision to deny the plaintiffs anonymity.¹²³

In a 2012 case, *Doe v. Pittsylvania County*, the plaintiff sued the County and the local Board of Supervisors challenging, as unconstitutional, the Board’s practice of opening meetings with a Christian prayer.¹²⁴ Locals took to the internet to voice their displeasure.¹²⁵ Some posted alarming and arguably threatening, comments in response to the litigation.¹²⁶ One such post stated “people will do anything for money . . . just hope this person that was soooo offended is smart enough not to make himself known . . . it would not be a good thing I’m sure . . . just saying karma don’t know God either.”¹²⁷ The district court, however, denied the plaintiff’s request to proceed anonymously, holding that the comments directed at the plaintiff did not specifically threaten violence and the ones that did were directed at the American Civil Liberties Union, the entity bringing the lawsuit on the plaintiff’s behalf.¹²⁸ The court blithely noted that “[l]awsuits about religion frequently have a tendency to inflame unreasonably some individuals,” and “[w]hile it cannot be denied that the record, in this case, contains some indications of disapproval and frustration by some local citizens for bringing this suit . . . , this evidence does not establish the need for anonymity.”¹²⁹ The Court found that lack of specific evidence of retaliatory physical harm militated against granting the plaintiff leave to proceed anonymously.¹³⁰

In the 2007 case of *Doe v. Pleasant Valley School District*, the plaintiffs, a group of adults who complained about a high school history teacher, alleged the teacher “showed his history class ‘photographs of naked and dismembered’ women, made inappropriate sexual comments to students and provided a sexually explicit book to his class of sixteen- and seventeen-year-olds.”¹³¹ The

122. *Kamehameha Schs.*, 596 F.3d at 1046.

123. *Id.*

124. *Doe v. Pittsylvania Cty.*, 844 F. Supp.2d 724, 727 (W.D. Va. 2012).

125. *Id.* at 736.

126. *Id.*

127. *Id.* at 737.

128. *Id.* at 735.

129. *Id.* at 738 (internal citations omitted).

130. *Id.* at 742.

131. *Doe v. Pleasant Valley Sch. Dist.*, No. 3:07cv854, 2007 WL 2234514, at *1 (M.D. Pa. Aug. 1, 2007).

plaintiffs moved to proceed anonymously, arguing that exposing their identities would put them and their families at risk.¹³² The plaintiffs cited statements an unidentified student made on a blog, claiming that the plaintiffs “were not releasing their names because they know about a hundred people will go chase them down with torches and pitchforks as soon as their names come out.”¹³³ The district court denied the plaintiffs’ motion to proceed pseudonymously, reasoning that the statement was not “a direct threat to the plaintiffs or their family, but more likely idle chatter about public attitudes towards the plaintiffs’ claim.”¹³⁴ The court instructed the plaintiffs to file an amended complaint that stated their real names within ten days or else the court would dismiss the complaint.¹³⁵

Recently, the court in the Central District of California denied the plaintiff’s motion to proceed anonymously in the civil case involving accusations of rape by basketball star Derrick Rose.¹³⁶ The judge reasoned that allowing the plaintiff to proceed anonymously “would communicate ‘a subliminal comment on the harm the alleged encounter with the defendant has caused the plaintiff.’”¹³⁷ When the *Washington Post* published a story about the judge’s decision to deny the plaintiff anonymity,¹³⁸ some of the online comments included:

- “REAL Rape victims feel a strong sense of shame and need for privacy. Not the need to go on a world tour. The

132. *Id.*

133. *Id.* at *3.

134. *Id.* See also, *Publius v. Boyer-Vine*, No. 1:16-CV-1152-LJO-SKO, 2017 WL 1881463, at *2 (E.D. Cal. May 9, 2017) (stating “the reasonableness of [plaintiffs] fear of physical and economic harm is not sufficient reason to grant him anonymity . . . [Plaintiff] has received ‘only a small number of even arguably threatening online comments, with no indication that anyone actually had the intention to carry them out.’”).

135. *Pleasant Valley Sch. Dist.*, 2007 WL 2234514, at *4.

136. See Order Case 2:15-cv-07503-MWF-JC Document 264 Filed 09/22/16 Page 4 of 6 Page ID #:9794; See also Joel Rubin, *A rape lawsuit against NBA star Derrick Rose raises key question: Should an accuser be allowed to stay anonymous?* L.A. TIMES (Oct. 3, 2016), <http://www.latimes.com/local/california/la-me-rose-rape-lawsuit-anonymous-20161003-snap-story.html>.

137. See Order Case 2:15-cv-07503-MWF-JC Document 264, Page ID #:9794, 6 (September 22, 2016) (quoting *Doe v. Cabrera*, 307 F.R.D. 1, 10 (D.D.C. 2014) (internal citation omitted)).

138. Katie Mettler, *Gang-rape accuser of NBA’s Derrick Rose must reveal her name at civil trial, judge rules*, WASH. POST (Sept. 21, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/09/21/derrick-rose-gang-rape-accuser-must-reveal-her-name-at-upcoming-civil-trial-judge-rules/#comments>.

rule was created to protect REAL VICTIMS, but as usual, there are those who will abuse it.”¹³⁹

- “Interesting: No criminal charges were filed, and the woman is suing them, yet wants to maintain her anonymity? I smell a greedy groupie who did not get what she thought she was gonna get for a night of partying and is seeking vengeance.”¹⁴⁰

E. Public Shaming and Social Media

Rapid technological advances are making the need for plaintiff pseudonymity even more compelling. Both computers and the internet are getting faster,¹⁴¹ so individuals are consuming more content than ever at unprecedented speeds.¹⁴² Additionally, the number of people using the internet and the amount of time they spend on it each day have increased dramatically.¹⁴³ Young people,

139. Scoeman Scoen, Comment to *Gang-rape accuser of NBA's Derrick Rose must reveal her name at civil trial, judge rules*, WASH. POST (Sept. 9, 2016, 1:50 PM), <https://www.washingtonpost.com/news/morning-mix/wp/2016/09/21/derrick-rose-gang-rape-accuser-must-reveal-her-name-at-upcoming-civil-trial-judge-rules/#comments>.

140. Realilty Check 2013, Comment to *Gang-rape accuser of NBA's Derrick Rose must reveal her name at civil trial, judge rules*, WASH. POST (Sept. 9, 2016, 8:55 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2016/09/21/derrick-rose-gang-rape-accuser-must-reveal-her-name-at-upcoming-civil-trial-judge-rules/#comments>.

141. For example, in 2002, it took twelve and a half minutes to download a song on a 56K modem; by 2012, a song could be downloaded in eighteen seconds. See Pam Dyer, *How the Internet has Changed in the Last 10 Years*, PAMORAMA, <http://pamorama.net/2012/10/06/how-the-internet-has-changed-in-the-last-10-years-infographic/> (last visited Oct. 1, 2016); see also John Aziz, *Why is American Internet so Slow?*, THE WEEK (March 5, 2014), <http://theweek.com/articles/449919/why-american-internet-slow>.

142. See Eric Griffith, *How Fast Is Your Internet Connection – Really?*, PCMAG.COM, <http://www.pcmag.com/speedtest> (last updated Aug. 31, 2016).

143. In 2005, there were an estimated 1 billion internet users world-wide. In 2010, that number rose to 2 billion, and in 2014, it rose to 3 billion. See Internet Users, INTERNET LIVE STATS, <http://www.internetlivestats.com/internet-users/> (last visited Sept. 10, 2017); see also H.O. Maycotte, *A Gift for the World Wide Web on its 25th Birthday: A Bill of Rights*, FORBES (Aug. 19, 2014), <http://www.forbes.com/sites/homaycotte/2014/08/19/a-gift-for-the-world-wide-web-on-its-25th-birthday-a-bill-of-rights/#733da95f31f8> (stating that “[i]n 2000, 5% of the world population used the World Wide Web. [In 2014] that number [was] 40%, and rapidly growing as mobile technologies find their way to the more remote areas of the globe”). In 2002, the average internet user spent approximately forty-six (46) minutes per day on the internet. By 2012, this average increased to approximately four (4) hours per day. See Pam Dyer, *How the Internet has Changed in the Last 10 Years*, PAMORAMA,

including children, are particularly proficient in using technology and spend worrisome amounts of time “plugged-in” on the internet.¹⁴⁴ Even the number of websites one can visit today is considerably greater than it was in 2004.¹⁴⁵ Facebook, which was in its infancy in 2004, has grown to over 1 billion accounts.¹⁴⁶

These technological advances serve to heighten the concerns of rightsholders who want to remain anonymous. Via social media, information spreads faster than ever. Moreover, because Americans are increasingly abandoning traditional news sources in favor of getting their news from social media applications with push notifications like Twitter, consumers no longer have to seek out their news—it comes directly to them.¹⁴⁷ Therefore, when a plaintiff files a

<http://pamorama.net/2012/10/06/how-the-internet-has-changed-in-the-last-10-years-infographic/> (last visited Oct. 1, 2016). For further statistical information pertaining to the dramatic growth of the internet, see *Global Internet Population Grows an Average of Four Percent Year-Over-Year*, NEILSEN-NETRATINGS (Feb. 20, 2003), http://nielsen-online.com/pr/pr_030220.pdf; SASI Group & Mark Newman, *Internet Users 2002*, WORLD MAPPER (2006), http://worldmapper.org/posters/worldmapper_map336_ver5.pdf.

144. Teens spend almost 9 hours a day using media. See Kelly Wallace, *Teens spend a 'mind-boggling' 9 hours a day using media, report says*, CNN (Nov. 3, 2015, 9:07 PM), <http://www.cnn.com/2015/11/03/health/teens-tweens-media-screen-use-report/>; see also Hayley Tsukayama, *Teens spend nearly nine hours every day consuming media*, WASH. POST (Nov. 3, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/11/03/teens-spend-nearly-nine-hours-every-day-consuming-media/>. “Research by the Kaiser Family Foundation suggests that the average youth between the ages of eight and eighteen spends every permissible waking moment using electronic devices, many of which (like smart phones and computers) are connected to the Internet.” Jay P. Kesan, Carol M. Hayes, & Masooda N. Bashir, *A Comprehensive Empirical Study of Data Privacy, Trust, and Consumer Autonomy*, 91 IND. L.J. 267, 285 (2016).

145. It is estimated that in 2004 there were 51,611,646 websites and 910,060,180 users; in 2013, there were 672,985,183 websites and 2,756,198,420 users. *Total Number of Websites*, INTERNET LIVE STATS, <http://www.internetlivestats.com/total-number-of-websites/#trend> (last visited Oct. 10, 2016). “It must be noted that around 75% of websites today are not active, but parked domains or similar.” *Id.* (citing *How Many Active Sites Are There?*, NETCRAFT (Oct. 10, 2014), <http://www.netcraft.com/active-sites/>).

146. See *Facebook – Statistics and Facts*, STATISTA, <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> (last visited Sept. 10, 2017).

147. See generally Paul Sawers, *Breaking News For Android Now Delivers Alerts Based On Your Proximity To The Breaking News*, THE NEXT WEB (Aug. 22, 2014), <http://thenextweb.com/apps/2014/08/22/breaking-news-proximity-alerts-android/>; *The Personal News Cycle: How Americans Choose to get their News*, THE AM. PRESS INST. (Mar. 17, 2014), <https://www.americanpressinstitute.org/publications/reports/survey-research/personal-news-cycle/> (“Nearly half of Americans with internet access have signed up for news alerts.”); John Sutter, *Theater Shooting Unfolds In Real Time On*

suit using her real name, that plaintiff's identity and her claim can swiftly be revealed to millions of people.

Conversely, under the veil of anonymity that posting on the internet provides, internet users are willing to say things that they otherwise would not.¹⁴⁸ Additionally, due to groupthink—or “hive mind” in internet parlance—an insult a single commenter lobs can result in a never-ending cascade of threats, name-calling, ridicule, and vitriolic harassment.¹⁴⁹ Danielle Citron noted that “the Internet magnifies the dangerousness of group behavior Online groups affirm each other's negative views, which become even more extreme and destructive.”¹⁵⁰ If the plaintiff has a social media account of her own with even the smallest amount of personal information, unease about harassment may become exponentially more visceral if a vindictive internet user retrieves and posts that information for others with similar disdain for the plaintiff. Concerns about harassment may transform into a reasonable fear of real-life, retaliatory physical violence.¹⁵¹ Thus, if denied the ability to pursue a legitimate claim pseudonymously, many rightsholders are forced to

Social Media, CNN (July 20, 2012), <http://www.cnn.com/2012/07/20/tech/social-media/colorado-shooting-social-media/> (reporting that news of the Aurora, Colorado movie theatre shooting broke via first-hand accounts on Twitter, for example, before news outlets could even report the story).

148. See *Cyberspace Complainers Counteract Stress And Command Power*, U. OF ROCKIES (Oct. 25, 2011), <http://rockies.mediaroom.com/index.php?s=15659&item=73653> (reporting on Dr. David C. Solly's conclusion that “[w]e feel we are reaching more people when we use social media as a vehicle. . . . Complaining via social media gives the person a feeling of commanding great power and control over their situation.”). See also Joe Greenhill, *From the Playground to Cyberspace: The history of Cyberbullying*, 5 CHARLESTON L. REV. 4 (2011) (discussing internet anonymity and the exacerbation of bullying).

149. Tim Adams, *How The Internet Created An Age of Rage*, THE GUARDIAN (July 23, 2011), <http://www.theguardian.com/technology/2011/jul/24/internet-anonymity-trolling-tim-adams> (“The big problem [a Los Angeles Times reporter] finds running the blog is that his anonymous commenters get a kind of pack mentality. And the comments quickly become a one-note invective.”); MARY CROSS, *BLOGGERATI, TWITTERATI: HOW BLOGS AND TWITTER ARE TRANSFORMING POPULAR CULTURE* 62 (“critics of twitter point to the predominance of the hive mind in such social media, the kind of groupthink that submerges independent thinking in favor of conformity to the group, the collective.”). Recently, comedian Leslie Jones deleted her twitter account as a result of throngs of repulsive, hateful comments. See Kristen V. Brown, *How a Racist, Sexist Hate Mob Forced Leslie Jones off Twitter*, FUSION (July 19, 2016, 12:52 PM), Fusion.net/story/327103/leslie-jones-twitter-racism/.

150. Citron, *supra* note 41 at 83 (citing Patricia Wallace, *The Psychology of the Internet* 79 (1999)).

151. See discussion of cases *supra* Part I. D.

assess whether vindicating their rights is worth suffering the public response that will result from doing so.

Indeed, public shaming has become so powerful that it can, in a matter of seconds, ruin lives. Daniel Solove noted that “[a] plethora of websites now serve as forums for people to shame others.”¹⁵² Jon Ronson, author of *So You’ve been Publicly Shamed*, cautioned that “we are destroying people, routinely, daily . . . with the thing we are most terrified would happen to us.”¹⁵³ “The great thing about social media was that it gave a voice to voiceless people. But we are now creating a surveillance society where the smartest way to survive is to go back to being voiceless.”¹⁵⁴ Ronson observed, “[o]n Twitter we make our own decisions about who deserves obliteration.”¹⁵⁵

One example of the power of social media is the case of Justine Sacco.¹⁵⁶ Sacco sent one short tweet, allegedly made in jest,¹⁵⁷ that destroyed her life.¹⁵⁸ In December 2013, Ms. Sacco was traveling by air from New York to Cape Town.¹⁵⁹ During a layover in Heathrow, Ms. Sacco tweeted to her 170 followers: “Going to Africa. Hope I don’t get AIDS. Just kidding. I’m white!”¹⁶⁰ By the time Ms. Sacco had boarded the plane in London, someone sent her tweet to a journalist at Gawker, who subsequently retweeted it to his 15,000 followers.¹⁶¹ And then, before Sacco landed in Cape Town eleven

152. SOLOVE, *supra* note 24, at 86.

153. *How social media led to a renaissance of public shaming*, PBS NEWSHOUR (May 18, 2015, 6:15 PM), <http://www.pbs.org/newshour/bb/social-media-led-renaissance-public-shaming/> (last visited Oct. 17, 2016).

154. Jon Ronson, *When online shaming spirals out of control*, TED TALKS (July 2015), https://www.ted.com/talks/jon_ronson_what_happens_when_online_shaming_spirals_out_of_control/transcript?language=en.

155. RONSON, *supra* note 32, at 187.

156. *Id.* at 68.

157. Sacco said, “[O]nly an insane person would think that white people don’t get AIDS. To me, it was so insane . . . I thought there was no way that anyone could possibly think it was a literal statement.” *Id.* at 68. “It was a joke about a dire situation . . . that we don’t pay attention to.” *Id.* at 73. Noted Ronson, “[i]t seemed obvious that her tweet, whilst not a great joke, wasn’t racist, but a reflexive comment on white privilege.” *Id.*

158. RONSON, *supra* note 32, at 68.

159. *Id.*

160. *Id.* “What the world didn’t know, is that she had been tweeting ‘little acerbic jokes’ to her Twitter followers about her holiday travels. One such tweet read “Weird German Dude [a fellow passenger on her airplane flight]: You’re in first class. It’s 2014 Get some deodorant. – Inner monolog as I inhale BO. Thank god for pharmaceuticals.” *Id.* Following that tweet, Sacco wrote about her layover in London “Chili—cucumber sandwiches—bad teeth. Back in London!” *Id.*

161. *Id.* at 78.

hours later,¹⁶² her tweet was “the number one world-wide trend on Twitter.”¹⁶³ As a result of the tweet, Ms. Sacco was fired from her job.¹⁶⁴ Her extended family in South Africa, strong supporters of the end of apartheid, told her that she “almost tarnished the family.”¹⁶⁵ Sacco went to live in Ethiopia after the scandal hit.¹⁶⁶ Said Sacco, “I cried out my body weight.”¹⁶⁷ According to Ronson, social media “annihilated” her.¹⁶⁸

Another well-known example of the power of social media involves the killing of Cecil the lion.¹⁶⁹ In the summer of 2015, while on a hunting trip in Zimbabwe, American dentist Walter Palmer

162. While Sacco was mid-air, her employer became aware of the tweet. It responded with the statement: “This is an outrageous, offensive comment. Employee in question currently unreachable on an into [sic] flight.” Soon, “[t]he hashtag #HasJustineLandedYet’ began trending worldwide as people were desperate to see how she would react to the thousands of angry tweets and the fact her job was now under threat.” See Lucy Waterlow, *I lost my job, my reputation and I’m not able to date anymore’: Former PR worker reveals how she destroyed her life one year after sending ‘racist’ tweet before trip to Africa*, DAILY MAIL (Feb. 16, 2015, 5:49 PM), <http://www.dailymail.co.uk/femail/article-2955322/Justine-Sacco-reveals-destroyed-life-racist-tweet-trip-Africa.html#ixzz4F00BEopl>.

163. RONSON, *supra* note 32, at 69. See also Jon Ronson, *How One Stupid Tweet Blew Up Justine Sacco’s Life*, N.Y. TIMES (Feb. 12, 2015), http://www.nytimes.com/2015/02/15/magazine/how-one-stupid-tweet-ruined-justine-saccos-life.html?_r=0 (“By the time Sacco had touched down, tens of thousands of angry tweets had been sent in response to her joke. [Sacco’s friend] meanwhile, frantically deleted her friend’s tweet and her account—Sacco didn’t want to look—but it was far too late. “Sorry @JustineSacco,” wrote one Twitter user, “your tweet lives on forever.”).

164. Will Heilpern, *A writer who spent years following people whose lives were ruined by Twitter says online abuse is why the site is shrinking*, BUSINESS INSIDER (April 20, 2016), <http://www.dailymail.co.uk/femail/article-2955322/Justine-Sacco-reveals-destroyed-life-racist-tweet-trip-Africa.html>; Lucy Waterlow, *I lost my job, my reputation and I’m not able to date anymore’: Former PR worker reveals how she destroyed her life one year after sending ‘racist’ tweet before trip to Africa*, DAILY MAIL (Feb. 16, 2015, 5:49 PM), <http://www.dailymail.co.uk/femail/article-2955322/Justine-Sacco-reveals-destroyed-life-racist-tweet-trip-Africa.html#ixzz4F00BEopl>.

165. RONSON, *supra* note 32, at 77.

166. Ronson, *supra* note 163.

167. Dustin Rowles, *What Happened To Justine Sacco, The Woman Whose Life Was Ruined By An AIDS Joke She Made on Twitter*, UPROXX (Feb. 2, 2015), <http://uproxx.com/webculture/what-happened-to-justine-sacco-the-woman-whose-life-was-ruined-by-an-aids-joke-she-made-on-twitter/>.

168. RONSON, *supra* note 32, at 276.

169. Author’s full disclosure: in the summer of 2015 when Walter Palmer shot Cecil the lion, I posted on my personal Facebook page a meme that had been circulating on social media. The meme contained a picture of a trophy, a lion, and Palmer. The caption under the trophy read “trophy,” the caption under the lion read “king,” and the caption under Palmer read “asshole.” Jayne S. Ressler, FACEBOOK (July 28, 2015), <https://www.facebook.com/jayne.ressler/posts/10207406452458327>.

legally shot and killed Cecil the lion.¹⁷⁰ After news of his kill became public, the internet went into a frenzy.¹⁷¹ Social media users from around the globe “called him a ‘scumbag’ and a ‘disgrace to humankind, and a detriment to our species as a whole.’ The address, website and phone number of his practice were plastered everywhere, with the practice’s website going down shortly thereafter.”¹⁷² Palmer’s private address and phone numbers were posted on Twitter.¹⁷³ One British Twitter user tweeted, “I genuinely wouldn’t care if Walter Palmer was found by a lynch mob and strung up,”¹⁷⁴ while a Canadian user posted, “Walt Palmer – Cecil the beloved lion’s murderer. Have at him.”¹⁷⁵

In August, 2015, *Yelp* chose to remove over 7,000 reviews on Walter Palmer’s dental practice page, stating that they violated *Yelp’s* “terms of service.”¹⁷⁶ One such review had read, “[b]rought my lion here for dentistry and was horrified by the result. All kidding aside, I hope you die painfully.”¹⁷⁷ Another said:

I wasn’t sure if I was getting my tooth fixed or setting out on an African jungle safari—there were lion pelt chairs, lion heads hanging from the walls and elephant tusk umbrella stands. Inside his work space was even weirder—his chair (he informed me) was made out of the skin of a 1000 [sic] innocent baby seals he had so bravely clubbed to death.¹⁷⁸

170. See *Cecil the lion: No Charges for Walter Palmer, says Zimbabwe*, BBC NEWS (Oct. 12, 2015), <http://www.bbc.com/news/world-africa-34508269> (“Mr. Palmer broke no laws when he killed the lion using a bow and arrow.”).

171. See *The hunting of Walter Palmer: Internet goes after ‘lion killer’ US dentist*, RT QUESTION MORE (July 28, 2015), <https://www.rt.com/usa/311002-dentist-lion-internet-hunt/>.

172. *Id.*

173. *Id.*

174. Adam Heath (@adamheath), TWITTER (July 28, 2015, 11:10 AM), <https://twitter.com/adamheath/status/626062083512225792>.

175. Diane Fraleigh (@Casey_Pup), (July 28, 2015, 9:56 AM), https://twitter.com/Casey_Pup/status/626043544071835648.

176. Dale Lately, *A One-Star Human Being*, SLATE (Aug. 21, 2015), http://www.slate.com/articles/technology/future_tense/2015/08/lion_killing_dentist_walter_palmer_s_yelp_page_and_the_business_of_internet.html. Ironically, *Yelp* itself was shamed for removing the posts. A petition was created with the slogan, “*Yelp: Post the Reviews!*” *Id.*

177. harmoleon, *10 “Best” Yelp Reviews For That Dentist That Killed Cecil The Lion*, BREAK, <http://www.break.com/article/10-best-yelp-reviews-for-dentist-walter-palmer-lion-2876455>.

178. *Id.*

Indeed, there is currently a Facebook group page called “Arrest Walter James Palmer.” As of last check, there are 21,484 members of that Facebook group.¹⁷⁹

Recognizing the tremendous damaging power of the internet, the European Commission has proposed a regulation to give all European citizens the “right to be forgotten online.”¹⁸⁰ The basic premise of the law is that it “will give all European Union citizens a right . . . for the individual user to have his or her personal online data removed from the web.”¹⁸¹ The Court of Justice of the European Union has already ruled in favor of a citizen’s right to be forgotten online, under a precursor to the current proposed regulation.¹⁸² That court ordered Google to remove links to newspaper articles about a Spanish citizen, which “although truthful, injured his reputation and invaded his privacy.”¹⁸³

Permitting certain rightsholders to proceed pseudonymously is especially important in the United States where there is no legal “right to be forgotten.” Indeed, Daniel Solove has dubbed the Internet “a cruel historian.”¹⁸⁴ He observed:

179. Arrest Walter James Palmer, FACEBOOK (last visited Aug. 18, 2017), <https://www.facebook.com/saveafricanwildlife/>.

180. See EUROPEAN COMMISSION, FACTSHEET ON THE ‘RIGHT TO BE FORGOTTEN’ RULING (C-131/12), http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf; see also Patricia S. Abril & Jacqueline D. Lipton, *The Right to be Forgotten: Who Decides what the World Forgets?*, 103 KY. L.J. 363 (2014-15); Jeffrey Rosen, *The Right to be Forgotten*, 64 STAN. L. REV. ONLINE 88 (2012); Michael L. Rustad & Sanna Kulevska, *Reconceptualizing the Right to Be Forgotten to Enable Transatlantic Data Flow*, 28 HARV. J.L. & TECH. 349, 352 (2015). The details of this law and the rights it implicates are beyond the scope of this paper.

181. Rustad *supra* note 180, at 353 (citing Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos* (May 13, 2013), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=EN>).

182. *Id.* at 363 n. 81.

183. *Id.* The plaintiff in *Google Spain SL v. Agencia Española de Protección de Datos* alleged that a Google search of his name generated a link to a newspaper article in which it was revealed that he had failed to pay debts many years earlier. Recently an Italian woman committed suicide after sexually explicit videos of her went viral on the internet. See James Masters & Livia Borghese, *Tiziana Canton’s family Calls for Justice after Suicide over Sex Tape*, CNN (Sept. 16, 2016), <http://www.cnn.com/2016/09/16/europe/tiziana-cantone-sex-tape-suicide/index.html>. Although she won the right to be forgotten online, and had even moved and changed her name, she was unable to escape the public shaming that resulted from the viral video. *Id.* See also Rachel Krishna, *This Woman Killed Herself After Her Leaked Sex Tape Became A Meme*, BUZZFEED (Sept. 15, 2016), https://www.buzzfeed.com/krishrach/this-woman-reportedly-killed-herself-after-an-explicit-video?utm_term=.qhe3p1xpra#lixa8z28wA.

184. SOLOVE, *supra* note 24, at 11 (quoting a post on a blogger’s page regarding South Korea’s “internet-made famous” “dog-poop girl”).

One of the chief drawbacks of Internet shaming is the permanence of its effects. Internet shaming creates an indelible blemish on a person's identity. Being shamed in cyberspace is akin to being marked for life. It's similar to being forced to wear a digital scarlet letter or being branded or tattooed. People acquire permanent digital baggage. They are unable to escape their past, which is forever etched into Google's memory.¹⁸⁵

II. CURRENT STATE OF PSEUDONYMOUS PLAINTIFFS

A. LEGISLATION ADDRESSING PSEUDONYMOUS PLAINTIFFS

The Federal Rules of Civil Procedure do not provide for the use of a pseudonym by a plaintiff.¹⁸⁶ While many state statutes specifically provide for plaintiff anonymity in cases involving minors, sexual abuse, domestic relations, or sensitive medical issues,¹⁸⁷ most state statutes mirror the federal rules, which require that "[t]he title of the complaint must name all the parties."¹⁸⁸

Several states, however, have codified legislation directly addressing anonymous plaintiffs in a broader context. Alaska Rules of Court—Rules of Administration 40(b) provide:

The presiding judge of a judicial district may direct the clerk of the court to substitute the pseudonym "Jane Doe" or "John Doe" or initials for a party's true name on the public index if the presiding judge finds that the issues in the case involve matters of a sensitive and highly personal nature, that publication of the name could expose a person to harassment, injury, ridicule, or personal embarrassment, and that

185. *Id.* at 94. A noted philosopher wrote that "[s]hame punishments . . . are ways of marking a person . . . with a degraded identity. . . . Shame punishments make the statement '[y]ou are a defective type of person.'" *Id.* at 95 (quoting MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 230, 235 (2004)).

186. FED. R. CIV. P. 10; *see also* FED. R. CIV. P. 5.2(a) (permitting minors to proceed using their initials).

187. *See Filing Pseudonymously By State*, WITHOUTMYCONSENT.ORG, <http://www.withoutmyconsent.org/50state/filing-pseudonymously/state>.

188. FED. R. CIV. PRO. 10(a); *see also* FED. R. CIV. PRO. 17(a)(1) ("[a]n action must be prosecuted in the name of the real party in interest"). For a compilation of state statutes' filing requirements regarding parties' names, *see Filing Pseudonymously By State*, WITHOUTMYCONSENT.ORG, <http://www.withoutmyconsent.org/50state/filing-pseudonymously/state>.

protection of the party's name outweighs the public's interest in disclosure and any prejudice to the opposing party.¹⁸⁹

A provision of the Connecticut Civil Practice Rules states that:

[p]seudonyms may be used in place of the name of a party or parties only with the prior approval of the judicial authority and only if the judicial authority concludes that such order is necessary to preserve an interest which is determined to override the public's interest in knowing the name of the party or parties.¹⁹⁰

In Illinois, a provision in the Code of Civil Procedure states that “[u]pon application and for good cause shown the parties may appear under fictitious names.”¹⁹¹ A section of the Virginia Civil Practice Code, entitled “Anonymous plaintiff; motion for identification; factors to be considered by court” provides detailed procedures for a plaintiff to follow when seeking to proceed under a pseudonym.¹⁹²

189. ALASKA R. OF ADMIN. 40(b).

190. CONN. PRACTICE BOOK § 11–20A(h)(1).

191. ILL. CODE OF CIV. PRACTICE 735 ILCS 5/2–401(e).

192. VA. CODE ANN. § 8.01–15.1. The text provides: “A. In any legal proceeding commenced anonymously, any party may move for an order concerning the propriety of anonymous participation in the proceeding. The trial court may allow maintenance of the proceeding under a pseudonym if the anonymous litigant discharges the burden of showing special circumstances such that the need for anonymity outweighs the public's interest in knowing the party's identity and outweighs any prejudice to any other party. The court may consider whether 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. B. If the court initially permits a party to proceed anonymously, the issue of the propriety of continued anonymous participation in the proceedings may be raised at any stage of the litigation when circumstances warrant a reconsideration of the issue. In all cases, all parties have the right to know the true identities of all other parties under such provisions of confidentiality as the court may deem appropriate. C. If the court orders that the anonymous litigant be identified, the pleadings and any relevant dockets shall be reformed to reflect the party's true name, and the identification shall be deemed to relate back to the date of filing of the proceeding by the anonymous party. D. In any legal proceeding in which a party is proceeding anonymously, the court shall enter appropriate orders to afford all parties the rights, procedures and discovery to which they are otherwise entitled.”

In one case from Arkansas, the state's highest court urged the state legislature to consider legislation addressing pseudonymous plaintiffs.¹⁹³ The Supreme Court of Arkansas noted that "appellants' counsel urged this court to consider adopting rules to provide guidance on this issue in future litigation. We agree that some rules in this area are essential, and therefore, we refer this matter to the Civil Practice Committee."¹⁹⁴

B. Case Law Addressing Pseudonymous Plaintiffs

1. Federal Cases

The legal landscape regarding pseudonymous plaintiffs has changed little, despite the explosive growth of modern technology and cyberspace.¹⁹⁵ The United States Supreme Court has implicitly condoned the practice of pseudonymous plaintiffs in several cases, most recently in 2013.¹⁹⁶ In most of these cases the Supreme Court did not address the plaintiff's use of a pseudonym, simply permitting its use without reference. In other cases, the Supreme Court briefly

193. See *Doe v. Weiss*, No. 09-1071, 2010 WL 1253216 (Ark. Apr. 1, 2010).

194. *Id.* at *3.

195. It is likely impossible to thoroughly research the prevalence of the use of anonymous plaintiffs, since the propriety of their use "is frequently resolved in oral or written orders that do not end up in published reporters or searchable legal databases like Westlaw or Lexis, making the precedent harder to find." Tom Isler, *White Paper: Anonymous Civil Litigants*, RCFP.ORG, https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2015/white-paper-anonymous-civil-l#_ftn10. Additionally, courts often permit plaintiffs to use a pseudonym without analyzing the issue. See *infra* Part II.B. Furthermore, plaintiffs have used several different monikers, including Doe such as "Boe, Coe, Foe, Hoe, Koe, Loe, Moe, Noe, Poe, Soe, Voe, Woe, and Zoe. Some pseudonyms are descriptive ('Pseudonym Taxpayer,' 'Patient A'), while others are more evocative ('Jane Endangered,' 'Unwitting Victim'). Still others fail to announce their fiction: 'Alfred Little,' 'David Becker.' And then there are litigants who proceed only by their initials." Tom Isler, *White Paper: Anonymous Civil Litigants*, RCFP.ORG, https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2015/white-paper-anonymous-civil-l#_ftn10.

196. See, e.g., *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013); *Doe v. Reed*, 561 U.S. 186 (2010); *City of San Diego v. Roe*, 543 U.S. 77 (2004) (pseudonymous police officer's challenge to termination of employment); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (pseudonymous students' challenge to public high school's "football prayer policy"); *Honig v. Doe*, 484 U.S. 305 (1988) (pseudonymous student's challenge to district's policy of excluding disabled children from classroom for dangerous or disruptive conduct); *Plyler v. Doe*, 457 U.S. 202 (1982) (pseudonymous children's challenge to exclusion of illegal aliens from public schools); *Roe v. Wade*, 410 U.S. 113 (1973) (pseudonymous woman's challenge to criminal abortion statute).

mentioned the plaintiff's anonymity with a subtext of approval.¹⁹⁷ Although the Supreme Court has had occasion to rule on the propriety of, and standards for, the use of pseudonyms by plaintiffs, it has to date declined to do so.¹⁹⁸

The First, Third, Eighth, D.C., and Federal Circuits¹⁹⁹ do not appear to have addressed the issue of plaintiff anonymity at all.²⁰⁰ When analyzing whether to permit a plaintiff to proceed pseudonymously, the Fourth Circuit continues to rely on the five-factor test articulated in *James v. Jacobson* in 1993,²⁰¹ while the

197. See, e.g., *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000) (noting with evident approval that the district court “permitted respondents (Doe) to litigate anonymously to protect them from intimidation or harassment”); *Roe v. Wade*, 410 U.S. 113, 124 (1973) (“Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person.”).

198. See *Doe v. Megless*, 132 S. Ct. 1543 (2012) (denying petition for a writ of certiorari), *petition for cert. filed*, 2011 WL 5909906 (U.S. Nov. 22, 2011) (No. 11-643) (stating the question as “[w]hether this Court should provide much-needed guidance to lower courts by announcing specific factors that must be given special weight when a party wishes to litigate using a fictitious name?”); see also *Doe v. Kamehameha Schools*, 563 U.S. 988 (2011) (denying petition for writ of certiorari).

199. See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 506 (M.D. Pa. 2007) (“[t]he Third Circuit of Appeals has not articulated a standard to weight litigants’ efforts to proceed anonymously”); *Qualls v. Rumsfeld*, 228 F.R.D. 8, (D.D.C. 2005) (“Whether a Judge may ever set aside the straightforward language of Federal Rule 10(a) and Local Civil Rules 5(e)(1) and 11.1 to allow parties to proceed under pseudonyms remains an open question in this circuit”).

200. In one of the few cases since 2004 involving plaintiff pseudonymity in a district court within the First Circuit, the plaintiff had ingested a prescription drug that she claimed caused her to suffer a severe manic episode that resulted in her involuntary admission to a mental institution. *Doe v. Solvay Pharmaceuticals*, 350 F. Supp. 2d 257 (D. Me. 2004). The plaintiff filed a motion under seal to file pseudonymously. *Id.* The district court found it understandable that the plaintiff considered the information in this lawsuit “highly confidential, private and sensitive and does not wish the information as to her identity to be available to the public.” *Id.* at 274 n. 1. The district court even recited the facts in the case in such a way to avoid breaching the plaintiff’s privacy while providing an explanation for its decision to grant summary judgment in favor of the defendant pharmaceutical company. *Id.* at 257.

201. See, e.g., *James v. Jacobson*, 6 F.3d 233, 238–39 (4th Cir. 1993). In *James*, the Fourth Circuit held that district courts should consider the following when determining if a plaintiff will be granted the “rare dispensation” of proceeding anonymously: (1) whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personally nature; (2) whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties; (3) the ages of the persons whose privacy interests are sought to be protected; (4) whether the action is against a governmental or private party; and, relatedly, (5) the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously. *Id.*

anonymous plaintiffs standards set forth in 1981 in *Doe v. Stegall* remain in place in the Fifth Circuit.²⁰² In evaluating the plaintiff's request to proceed anonymously in *Citizens for a Strong Ohio v. Marsh*, the Sixth Circuit in 2005 relied on the four-part test enunciated the year before in *Doe v. Porter*.²⁰³ Also in 2005 the Seventh Circuit, in *Doe v. Elmbrook School District*, relied on guidance regarding this issue set forth in 2004's *Doe v. City of Chicago*.²⁰⁴ When evaluating potential anonymous plaintiffs, the Ninth Circuit continues to adhere to the standards set forth in 2000 in *Does I Thru XXII v. Advanced Textile Corp.*²⁰⁵ The Tenth Circuit follows a three-factor test from 2000.²⁰⁶

Furthermore, there is no indication that these circuit court standards are routinely followed by lower federal courts. Indeed, various lower federal courts have devised and examined a myriad of factors in determining whether to permit a plaintiff to proceed pseudonymously.²⁰⁷ As one federal court diplomatically put it, “[a]

202. See *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981).

203. *Citizens for a Strong Ohio v. Marsh*, 123 Fed. App'x 630, 636 (6th Cir. 2005) (“When determining whether such an exception is justified, a court may consider, among others, the following factors: (1) whether the plaintiffs seeking anonymity are suing to challenge governmental activity; (2) whether prosecution of the suit will compel the plaintiffs to disclose information of the utmost intimacy; (3) whether the litigation compels plaintiffs to disclose an intention to violate the law, thereby risking criminal prosecution; and (4) whether the plaintiffs are children. It is also relevant to consider whether the defendants are being forced to proceed with insufficient information to present their arguments against the plaintiff's case”) (citing *Doe v. Porter*, 370 F.3d 558, 560–61 (6th Cir. 2004)).

204. *Doe 3 v. Elmbrook Sch. Dist.*, 658 F.3d 710, 721–22 (7th Cir. 2005) (“[t]he 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 [party requesting anonymity] . . . exceeds the likely harm from concealment”) (citing *Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004)).

205. See *Doe v. Ayers*, 789 F.3d 944, 945 (9th Cir. 2015) (in determining whether to allow pseudonymity, “the Court must balance the following factors: (1) the severity of the threatened harm, (2) the reasonableness of the anonymous party's fears, (3) the anonymous party's vulnerability to such retaliation”) (citing *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000)).

206. See, e.g., *Raiser v. Church of Jesus Christ of Latter-Day Saints*, 182 Fed. App'x. 810, 811 (10th Cir. 2006) (“[I]n certain ‘exceptional circumstances’ the need for anonymity outweighs the presumption in favor of open court proceedings. Exceptional circumstances exist if the case involves matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of [] identity.”) (citing *Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000) (quotations omitted)).

207. These factors include, *inter alia*, (1) whether the litigation involves matters that are highly sensitive and of a personal nature or involve the utmost intimacy; (2) whether plaintiff identification poses a risk of retaliatory physical or mental harm to

review of the case law indicates that courts which have addressed this issue have formulated various standards, albeit dissimilar . . . to determine whether a party should be permitted to proceed in pseudonym.”²⁰⁸

In addition to the lack of uniformity of these standards, there is a lack of predictability and consistency in their application, if at all, within the same circuit. For example, in 2010, a plaintiff in the Eastern District of Pennsylvania moved to sue anonymously various public officials and local government entities for disseminating email and flyers that allegedly characterized him as dangerous and potentially mentally unstable.²⁰⁹ The District Court noted that the Third Circuit “has not addressed the standard for granting anonymity.”²¹⁰ Thus the court examined nine factors, primarily from prior Eastern District of Pennsylvania cases, in deciding whether to permit the plaintiff to proceed anonymously.²¹¹ In denying the

plaintiff or to innocent non-parties; (3) whether the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity; (4) whether the plaintiff is particularly vulnerable to the possible harms of disclosure, particularly in light of her age; (5) whether the suit is challenging the actions of the government; (6) whether the defendant would be prejudiced by allowing the plaintiff to proceed anonymously; (7) whether the plaintiff's identity has thus far been kept confidential; (8) whether the public's interest in the litigation is furthered by requiring the plaintiff to disclose her identity; (9) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the plaintiff's identity; (10) whether there are any alternative mechanisms for protecting the confidentiality of the plaintiff; (11) whether the plaintiff will refuse to pursue the case at the price of being publicly identified; (12) whether the plaintiff risks prosecution for admitting to engage in illegal activity; (13) whether and to what degree the plaintiff will suffer economic harm her identity is known. *See Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190 (2d Cir. 2008) (internal quotations and citations omitted); *see also Filing Pseudonymously Federal*, WITHOUT MY CONSENT.ORG, <http://withoutmyconsent.org/50state/filing-pseudonymously/federal>.

208. *See generally Doe v. Provident Life & Acc. Ins.*, 176 F.R.D. 464, 466 (E.D. Pa. 1997).

209. *See generally Doe v. Megless*, 654 F.3d 404 (3d Cir. 2011).

210. *See generally Doe v. Megless*, No. 10–1008, 2010 WL 3076246, at *2 n. 1 (E.D. Pa. Aug. 5, 2010).

211. *Id.* (“A district court considers a number of non-exclusive factors when deciding whether to grant a party anonymity. Factors in favor of anonymity include: (1) the extent litigant has kept his identity confidential; (2) the reason for anonymity; (3) if there is public interest in favor of anonymity; (4) if the case is fact sensitive or purely of a legal nature; (5) whether the litigant will pursue his claim if he cannot proceed anonymously; and (6) if the party opposing anonymity has illegitimate ulterior motives. Factors against anonymity include: (1) the general level of public interest in the case; (2) if there is a higher level of public interest in the trial because of the subject matter involved or the public status of a litigant; and (3) if the party seeking anonymity has an ulterior motive.”) (internal citations omitted).

plaintiff's motion, the court concluded that "[a]fter weighing the factors, . . . [the p]laintiff has not proven his private interest in anonymity outweighs the public's interest in open judicial proceeding."²¹²

On appeal, the Third Circuit explained that "[w]hile we have affirmed district courts' decisions on motions to proceed anonymously, we have never set out a test for courts to apply Courts within our circuit have been balancing . . . competing interests for the last fifteen years without our guidance."²¹³ Noting that the district courts within the circuit had primarily applied the test set forth by the Eastern District of Pennsylvania in *Doe v. Provident Life*,²¹⁴ the Court then formally endorsed it.²¹⁵ After analyzing each factor, the Third Circuit affirmed the district court's denial of the plaintiff's motion to proceed pseudonymously.²¹⁶

Three years later, a plaintiff sued the New Jersey Department of Corrections in the District of New Jersey, alleging mistreatment at the hands of various correctional officers and inmates.²¹⁷ The opinion addressing the substance of the plaintiff's complaint starts simply with the phrase "Plaintiff, Chris Doe," followed by a footnote that states, "[i]n the caption and his Complaint, Plaintiff is referred to by the fictional name of Chris Doe."²¹⁸ Despite the Third Circuit's official endorsement of *Provident's* nine-factor test to be used in determining whether a plaintiff may proceed under a pseudonym, the District of New Jersey permitted the case to go forward with the fictional name of the plaintiff as "Chris Doe," simply ignoring the Third Circuit's test.

Likewise, in 2008, the Second Circuit "set forth the standard governing the use of pseudonyms in civil litigation in our Circuit"²¹⁹—what was then an issue of first impression for that Court.²²⁰ The Second Circuit adopted the Ninth's Circuit's balancing test, weighing the plaintiff's need for anonymity against both the prejudice to the opposing party and the public's interest in knowing

212. *Id.* at *5.

213. *Doe v. Megless*, 654 F.3d 404, 408–09 (3d Cir. 2011).

214. *Doe v. Provident Life & Acc. Ins. Co.*, 176 F.R.D. 464 (E.D. Pa. 1997).

215. *Doe v. Megless*, 654 F.3d 404, 410 (3d Cir. 2011).

216. *Id.* at 411.

217. *Doe v. New Jersey Dep't of Corr.*, No. CIV.A. 14-5284 FLW, 2015 WL 3448233, at *1 (D.N.J. May 29, 2015).

218. *Id.*

219. *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008).

220. *Id.* at 188.

the party's identity.²²¹ In so doing, the Court "noted with approval" ten enumerated factors "identified by our sister Circuits and the district courts in this Circuit," while cautioning that the list is not exclusive.²²² The Second Circuit vacated the lower court's decision in that particular case, as the lower court "did not apply the correct legal standard to determine whether plaintiff's application to proceed under a pseudonym" since it "did not balance plaintiff's interest in proceeding anonymously against the interests of defendants and the public."²²³ The Second Circuit instructed that "a district court is not required to list each of the factors or use any particular formulation *as long as it is clear that the court balanced the interests at stake in reaching its conclusion.*"²²⁴ Notwithstanding the Second Circuit's mandate, district courts in the Eastern and Southern Districts of New York, as well as the District of Connecticut, recently permitted plaintiffs to proceed pseudonymously without even addressing the issue.²²⁵

In addition to varied and inconsistent evaluative standards, the procedures regarding the process by which a plaintiff can proceed pseudonymously are *ad hoc*, at best. In the Ninth Circuit, for example, a plaintiff may file a suit under a pseudonym, and then file a cross-motion for leave to proceed under that pseudonym in response to a motion to dismiss.²²⁶ In the District of Columbia Circuit, rightsholders may ask the Chief Judge, *ex parte*, for leave to file a complaint omitting the plaintiff's real name and full address.²²⁷ Leave is generally granted if the rightsholder makes a colorable argument in support of the request.²²⁸ If the Chief Judge grants leave to file, the plaintiff may then file a pseudonymous complaint, and the case will be assigned to a judge just like any ordinary

221. *Id.* at 189.

222. *Id.* at 189–90.

223. *Id.* at 191.

224. *Id.* at 193 n. 4 (emphasis added).

225. See *e.g.*, *Doe v. Torrington Bd. of Educ.*, No. 3:15-cv-00452, 2016 WL 1257819 (D. Conn. Mar. 30, 2016); *Doe v. New York*, 97 F. Supp. 3d 5 (E.D.N.Y. 2015); *Doe v. Delta Airlines, Inc.*, 129 F. Supp. 3d 23 (S.D.N.Y. 2015); *Doe v. Deer Mountain Day Camp, Inc.*, 682 F. Supp. 2d 324 (S.D.N.Y. 2010).

226. *Doe v. Amazon.com, Inc.*, NO. C11-1709MJP, 2011 WL 13073281 (W.D. Wash. Dec. 23, 2011).

227. See *e.g.*, *id.*; *Qualls v. Rumsfeld*, 228 F.R.D. 8 (D.C. Cir. 2005) ("[w]hether a Judge may ever set aside the straightforward language of Federal Rule 10(a) and Local Civil Rules 5(e)(1) and 11.1 to allow parties to proceed under pseudonyms remains an open question in this circuit").

228. *Qualls*, 228 F.R.D. at 10.

case.²²⁹ The Chief Judge's leave to file is given only "at this time" and does not guarantee that a plaintiff may proceed pseudonymously throughout the case; rather, the leave is an indication that the plaintiff's request is not frivolous and gets the case moving quickly, leaving the issue open to full, adverse litigation at a later date.²³⁰

2. State Cases

State case law concerning pseudonymous plaintiffs is wide-ranging. Many state courts defer for guidance on this matter to federal courts.²³¹ Others permit plaintiffs to proceed pseudonymously without addressing the issue,²³² or by simply noting that the plaintiff is using a pseudonym.²³³ Courts in certain states, such as California, explicitly permit the use of pseudonyms, with one even acknowledging the danger that the internet poses to certain plaintiffs.²³⁴ When state courts deny a plaintiff's request to proceed using a pseudonym, they often cite the need for "open judicial proceedings."²³⁵

229. *Id.*

230. *Id.*; see generally *Doe v. District of Columbia*, 216 F.R.D. 5, 6 n.1 (D.D.C. 2003) ("Plaintiffs are proceeding pseudonymously, per order of the court, Chief Judge Hogan"); *Oah v. Tabor*, No. 90-1023, 1991 WL 120087, at *1 n. 1 (D.D.C. June 18, 1991).

231. See e.g., *Doe v. Weiss*, 2010 Ark. LEXIS 176, *3-5 (2010); *Unwitting Victim v. C.S.*, 47 P.3d 392, 400-01 (Kan. 2002); *Doe v. Burkland*, 808 A.2d 1090, 1096-97 (R.I. 2002); *Doe v. Bruner*, No. CA2011-07-013, 2012 WL 626202 (Ohio Ct. App. 2012); *Doe v. Town of Plainfield*, 860 N.E.2d 1204, 1208-09 (Ind. Ct. App. 2007); *Doe v. Heitler*, 26 P.3d 539, 541-42 (Colo. App. 2001); *Doe v. Shady Grove Adventist Hosp.*, 598 A.2d 507, 513-14 (Md. Ct. Spec. App. 1991); *Doe v. Bodwin*, 326 N.W.2d 473, 475 (Mich. Ct. App. 1982); *Roe v. Gen. Hosp. Corp.*, No. CIV.A. 11-991-BLS1, 2011 WL 2342737, at *1 (Mass. Super. May 19, 2011).

232. See e.g., *Doe v. Haw*, No. CV OC 0205441D, 2003 WL 21015134 (Idaho Feb. 3, 2003); *Doe v. Mo. Dept. of Soc. Servs.*, 280 S.W.3d 110 (Mo. Ct. App. 2009); *Doe v. Medford Sch. Dist.*, 221 P.3d 787 (Or. Ct. App. 2009); *Doe v. Walsh*, 2007 WL 2734289, Civil Action No. 07-2052A (Mass. Super. Sept. 20, 2007).

233. See e.g., *Doe v. Arkansas Dept. of Human Services*, 182 S.W.3d 107, 108 (Ark. 2004) ("Jane Doe and Jane Roe are pseudonyms"); *Doe v. Wyo. Valley Heath Care Sys., Inc.*, 987 A.2d 758, 761 n. 1 (Pa. Super Ct. 2009) ("Appellee uses the pseudonym 'Jane Doe' to protect her identity"); *Doe v. Arpaio*, 150 P.3d 1258, 1259 n.1 (Ariz. Ct. App. 2007) ("[t]he trial court allowed plaintiff Jane Doe to proceed pseudonymously. We continue that usage").

234. See *Starbucks Corp. v. Superior Court*, 86 Cal. Rptr. 3d 482, 495 n.7 (Cal. Ct. App. 2008) ("The judicial use of 'Doe plaintiffs' to protect legitimate privacy rights has gained wide currency, particularly given the rapidity and ubiquity of disclosures over the World Wide Web").

235. See *infra* Part III B.; see also, e.g., *A.A. v. Gramiccioni*, 122 A.3d 353, 357-58 (N.J. Super. Ct. App. Div. 2015) ("Absent a statute or court rule mandating

Even in states where a statute provides for broader plaintiff anonymity than the four usual categories (minors, sexual abuse, domestic relations, or sensitive medical issues),²³⁶ there is typically a dearth of cases in which courts have directly addressed the issue. For example, although the Illinois legislature passed 735 ILCS 5/2-401(e) in 1987, which permits the parties to sue under a pseudonym for “good cause,”²³⁷ an appellate court in that state recently noted that “[t]here are very few Illinois cases addressing the question of good cause under section 2–401(e).”²³⁸

Like the federal courts, many states are inconsistent and *ad hoc* with their practices concerning pseudonymous plaintiffs. For example, in Connecticut, the Superior Court recently permitted plaintiffs in two cases involving sexual abuse to proceed anonymously,²³⁹ while in another similar sexual abuse case the same court denied the plaintiff’s request to use a pseudonym.²⁴⁰

anonymity in court proceedings, a litigant must show good cause to proceed anonymously or by pseudonym Once the litigant shows such compelling circumstances, the court must weigh the litigant’s privacy interest against constitutional and public interest in open judicial proceedings”); *Doe v. Archdiocese of Atlanta*, 761 S.E.2d 864, 869–70 (Ga. App. 2014) (“a trial court may, in extraordinary cases, [permit a plaintiff to proceed using a pseudonym]. In so doing, the ultimate test is whether the plaintiff has a “substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings.”) (citing *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992)); *Bransten v. State*, 969 N.Y.S.2d 402, 414–15 (Sup. Ct. 2013), *aff’d*, 985 N.Y.S.2d 60 (2014) (“[T]he ‘use of a pseudonym must be reserved for cases in which the matter alleged implicates a privacy right so substantial as to outweigh the customary and constitutionally embedded presumption of openness in judicial proceedings’”) (citing McKinney’s CPLR § 1024, Practice Commentaries, by Vincent C. Alexander) (citing “*J. Doe No. 1*” v. CBS Broadcasting Inc., 24 A.D.3d 215 (N.Y. App. Div. 2005)).

236. See *supra* Part II B.

237. 735 ILL. COMP. STAT. ANN. 5/2-401 (2016).

238. *Doe v. Nw. Mem’l Hosp.*, 19 N.E.3d 178, 192 (Ill. App. 2014); see also *Doe v. Town of Plainfield*, 860 N.E.2d 1204, 1206–07 (Ind. Ct. App. 2007) (“Although anonyms have appeared in Indiana state cases, there is no reported Indiana decision where the use of an anonym has been challenged. Hence, we have no specific criteria to apply”).

239. See *Doe v. Firn*, No. CV065001087S, 2006 WL 2847885, at *1 (Conn. Super. Ct. Sept. 22, 2006); *Doe v. Curtis*, No. CV095028697, 2010 WL 936781, at *1 (Conn. Super. Ct. Feb. 10, 2010).

240. *Doe v. St. John*, No. CV055000443S, 2006 WL 1149224 (Conn. Super. Ct. Apr. 13, 2006). Compare *Doe v. Martin*, No. CV044001231, 2004 WL 2669274, at *1 (Conn. Super. Ct. Nov. 1, 2004) (denying adult victim of sexual abuse the right to sue pseudonymously), with *Doe v. McNamara*, No. CV095022796S, 2009 WL 1334992, at *1 (Conn. Super. Ct. Apr. 20, 2009) (permitting adult victim of sexual abuse the right to sue pseudonymously).

III. IMPEDIMENTS TO THE USE OF PSEUDONYMOUS PLAINTIFFS

A. *Legislators' and the Judiciary's Lack of Understanding of Technology, the Internet, and Social Media.*

Many lawmakers are not well-versed in the workings of technology, the internet, and social media. Supreme Court Justice Elena Kagan admitted that she and her fellow justices “have a way to go” to understand technology such as Facebook, Twitter and even email.²⁴¹ She stated that “[t]he justices are not necessarily the most technologically sophisticated people . . . [t]he court hasn’t really ‘gotten to’ email.”²⁴² Justice Kagan revealed that “communication among the justices is the same as when she clerked for the late Thurgood Marshall in 1987: “Justice[s] write memos printed out on paper that looks like it came from the 19th century The memos are then walked around the building by someone called a ‘chambers aide.’”²⁴³ In 2011 Justice Roberts stated that he did not have a Facebook account, nor did any of his colleagues on the bench.²⁴⁴ Justice Breyer, however, did have a Twitter account, which he said he did not know how to deactivate.²⁴⁵ Justice Breyer said “I wouldn’t want followers on the Tweeter [sic].”²⁴⁶

While overseeing Roger Clemens’ trial in 2012, the United States District of Columbia judge in the case told a juror “I’m an old guy. I don’t know how Twitter works.”²⁴⁷ He then asked the juror to explain it to him.²⁴⁸ In September, 2015, a state judge in

241. Michelle R. Smith, *Justice Kagan Reveals That The Supreme Court Is Totally Technologically Challenged*, BUSINESSINSIDER.COM (Aug. 20, 2013, 6:43 PM), <http://www.businessinsider.com/justice-kagan-reveals-that-the-supreme-court-is-totally-technologically-challenged-2013-8>.

242. *Id.* Justice Kagan also stated that Facebook and Twitter “are a challenge for us.” Will Oremus, *Elena Kagan Admits Supreme Court Justices Haven’t Quite Figured Out Email Yet*, SLATE.COM (Aug. 20 2013, 3:33 PM), http://www.slate.com/blogs/future_tense/2013/08/20/elena_kagan_supreme_court_justices_haven_t_gotten_to_email_use_paper_memos.html.

243. Smith, *supra*, note 241.

244. Maryam K. Ansari, *Justice Roberts Speaks at 4th Circuit Court of Appeals Conference*, FINDLAW: 4TH CIRCUIT NEWS & INFORMATION BLOG (Jun. 30, 2011), http://blogs.findlaw.com/fourth_circuit/2011/06/justice-roberts-speaks-at-4th-circuit-court-of-appeals-conference.html.

245. *Id.*

246. *Id.*

247. Richard Dunham, *Clemens Judge: ‘I Don’t Know How Twitter Works’*, HOUSTON CHRONICLE: BLOG (Apr. 17, 2012), <http://blog.chron.com/clemens/2012/04/technologically-challenged-clemens-judge-asks-juror-how-twitter-works>.

248. *Id.*

Minneapolis caused a trial verdict to be vacated and a new trial ordered when he posted on Facebook details about a trial over which he was presiding.²⁴⁹ He wrote “I just love doing the stress of jury trials In a Felony trial now State prosecuting pimp. Cases are always difficult because the women (as in this case also) will not cooperate. We will see what the 12 citizens in the jury box will do.”²⁵⁰ The Minnesota Board of Judicial Standards publicly reprimanded the judge for the post.²⁵¹ The judge explained that although he had been on Facebook for two years, he was unaware of its privacy settings and did not realize that his post could be read beyond his friends and family.²⁵²

In 2009, Michigan Congressman Pete Hoekstra tweeted that he “just landed in Bagdad,” information that was not supposed to be public.²⁵³ In 2011, Ohio Congressman William Batchelder had his twitter account hacked. In response, the Congressman stated “Well, I won’t do any more of this ... Twittering? We’ll avoid that at all cost. I didn’t know I had such a device.”²⁵⁴ One legal blogger opined that “[t]he biggest social medial issue is getting judges to understand social media.”²⁵⁵

B. A Misplaced Understanding of Open Judicial Proceedings.

Courts have been reluctant to permit plaintiffs to sue under pseudonyms, stating that to do so hampers the societal interest in open judicial proceedings.²⁵⁶ They presume, often without explanation, that pseudonymous plaintiffs and open judicial proceedings are by definition mutually exclusive.²⁵⁷ These courts

249. Associated Press, *Senior Judge Reprimanded by Judicial Board for Posting about Cases on Facebook*, STAR TRIBUNE (Nov. 20, 2015), <http://www.startribune.com/judge-reprimanded-for-facebook-posts-about-cases/352218191>.

250. *Id.*

251. *Id.*

252. *Id.*

253. Faith Eischen, *Politicians & Social Media: The Good, The Bad, The Ugly*, INDEPENDENT VOTER PROJECT (Jun. 29, 2012), <http://ivn.us/2012/06/29/politicians-social-media-the-good-the-bad-the-ugly>.

254. *Id.*

255. *The Biggest Social Media Legal Issue is Getting Judges to Understand Social Media*, SOME LAW THOUGHTS (May 8, 2012, 1:19 PM), <https://somelaw.wordpress.com/2012/05/08/the-biggest-social-media-legal-issue-is-getting-judges-to-understand-social-media>.

256. See Isler, *supra*, note 195.

257. *Id.*

also implicitly assume that open judicial proceedings are a *per se* good, without exception or qualification.²⁵⁸

However, there appears to be no agreement on what constitutes open judicial proceedings.²⁵⁹ Most courts have accepted, without investigation, the notion that open judicial proceedings refers to a prohibition against secrecy in the judicial process. The United States Supreme Court has noted that “[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern.”²⁶⁰ That Court opined that open court proceedings assure that proceedings are conducted fairly and discourage perjury, misconduct by participants, and biased decision making.²⁶¹ The Court proclaimed that openness promotes public understanding, confidence, and acceptance of judicial processes and results, while secrecy encourages misunderstanding, distrust, and disrespect for the courts.²⁶² The importance of openness in judicial proceedings can be seen in several state constitutions, which include specific reference to such access.²⁶³ Opponents of plaintiff pseudonymity argue that the practice contravenes the importance of open judicial proceedings.²⁶⁴

Although many state constitutions include a provision that “all courts shall be open,”²⁶⁵ much research on this provision indicates

258. *Id.*

259. “[With respect to] the open courts clause[,] [t]he courts are in total disarray over how to interpret it.” Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1282 (1995); see generally Thomas R. Phillips, *The Constitutional Right to A Remedy*, 78 N.Y.U.L. REV. 1309 (2003).

260. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

261. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

262. *Id.* at 569–70.

263. See e.g., ARIZ. CONST. art. II, § 11 (“[j]ustice in all cases shall be administered openly”); CAL. CONST. art. I, § 3 (“the meetings of public bodies . . . shall be open to public scrutiny”); OR. CONST. art. I, § 10 (“[n]o court shall be secret, but justice shall be administered, openly and without purchase”); WASH. CONST. art. I, § 10 (“[j]ustice in all cases shall be administered openly, and without unnecessary delay”). For a comprehensive list of state constitutions’ open courts clauses, see *Judicial Administration State Link*, NATIONAL CENTER FOR STATE COURTS, <http://www.ncsc.org/Topics/Judicial-Officers/Judicial-Administration/State-Links.aspx?cat=Constitutional%20Access%20to%20Justice%20Provisions> (last visited September 2, 2017).

264. Research turned up nothing that provides that “open” mandates full disclosure of a party’s full name.

265. See ALA. CONST. art. I, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; KY. CONST. § 14; LA. CONST. art. 1, § 22; MISS. CONST. art. III, § 24; NEB. CONST. art. I, § 13; OHIO CONST. art. I, § 15; PA. CONST. art. I, § 11; S.C. CONST. art. I, § 9; TENN. CONST. art. I, § 19; TEX. CONST. art. I, § 13; UTAH

that it is tied to the concept of “a right to a remedy,” not public access to courtrooms.²⁶⁶ Furthermore, “courts have never undertaken the task of discovering from where the provision came, or attempted to discern its original intent.”²⁶⁷ Some scholars go so far as to opine that this language was added as a carryover from language contained in the Magna Carta, without any real intent and purpose.²⁶⁸

One scholar has surmised that “[t]he provision’s key phrases, promoting openness in judicial proceedings and ensuring every person ‘remedy by due course of law,’ disclose its true meaning as a guarantee of freedom of the judiciary from corrupt influence and improper meddling.”²⁶⁹ He opined that “[b]elieving in the necessity of an independent judiciary, the earliest state constitutions incorporated this provision to ensure that justice would not be compromised as it had been in the past.”²⁷⁰ Another scholar concluded that:

the early purpose of the open courts provision was to ensure that all persons would have access to justice through the courts. . . . [T]he various states’ interpretations of the provision are inconsistent and . . . the jurisprudential significance of the provision varies dramatically from state to state. In some states, it is second only to the due process clause in importance; while in other states, it is little more than an interesting historical relic.²⁷¹

COSNT. art. I, § 11; VT. CONST. ch. 1, art. 4; WYO. CONST. art. 1, § 8, *all available at* <http://www.ncsc.org/Topics/Judicial-Officers/Judicial-Administration/State-Links.aspx?cat=Constitutional%20Access%20to%20Justice%20Provisions>.

266. See, e.g., Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS U. L. REV. 1005, 1006 n.5 (2001); William C. Koch, Jr., *Reopening Tennessee’s Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 419 (1997); David Schuman, *Oregon’s Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 42 (1986).

267. Hoffman, *supra* note 259, at 1282.

268. See Hoffman, *supra* note 259, at 1284; Hoffman, *supra* note 266, at 1006; Schuman, *supra* note 266, at 39.

269. Hoffman, *supra* note 259, at 1288.

270. *Id.* at 1318.

271. Koch, Jr., *supra* note 266, at 341.

Thus, a fair interpretation of the clause is that it does not refer to third parties' rights to enter the courtroom.²⁷² For example, although article I, § 13 of the Texas Constitution states that "[a]ll courts shall be open,"²⁷³ the Supreme Court of Texas has noted that that section "includes at least three separate constitutional guarantees: (1) courts must actually be operating and available; (2) the Legislature cannot impede access to the courts through unreasonable financial barriers; and (3) meaningful remedies must be afforded."²⁷⁴ Yet another theory is that the clause is one that refers to the right to a remedy.²⁷⁵

272. See e.g., *State v. Porter Superior Court*, 412 N.E.2d 748, 751 (Ind. 1980); *Dodd v. Reese*, 24 N.E.2d 995 (Ind. 1940); ("[T]he requirement of Art. I, § 12, that the courts be open may refer to being open to the injured for legal redress . . . , and not to openness in the sense of being open to observation by the public and press.") (citing *Gallup v. Schmidt*, 56 N.E. 443 (Ind. 1900)); *Goodrum v. Asplundth Tree Expert Co.*, 824 S.W.2d 6, 9 (Mo. 1992) ("Art. I §14 does not create rights, but is meant to protect the enforcement of rights already acknowledged by law. The right of access means simply the right to pursue in the courts the causes of action substantive law recognizes.") (quoting *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 510 (Mo. 1991)); *Meech v. Hillhaven W., Inc.*, 776 P. 2d 488 (Mont. 1989) ("[Article of Constitution governing access to court and guaranteeing remedy] guarantees only right of access to courts to seek remedy recognized by common-law or statutory authority"); *Mehdipour v. Wise*, 65 P.3d 271, 275 (Okla. 2003) ("It is always important to recognize that the right to reasonable access to the courts is not the same thing as having a right to appear personally in court to participate in a lawsuit which has been filed there."); *Kyllo v. Panzer*, 535 N.W.2d 896, 901 (S.D. 2012) ("[We have] interpreted the open courts provision as a guarantee that for such wrongs as are recognized by the laws of the land the courts shall be open and afford a remedy.") (quoting *Simons v. Kidd*, 38 N.W.2d 883, 886 (S.D. 1949)) (internal citations omitted); *Puttuck v. Gendron*, 199 P.3d 971, 978 (Utah App. 2008) ("[T]he open courts provision was intended to place 'a limitation upon the [l]egislature to prevent that branch of the state government from closing the doors of the courts against any person who has a legal right which is enforceable in accordance with some known remedy.'" (quoting *Brown v. Wightman*, 151 P. 366, 366-67 (Utah 1915)); see also Louis F. Hubener, *Rights of Privacy in Open Courts – Do They Exist?* 2 EMERGING ISSUES ST. CONST. L. 189, 192 (1989) ("These provisions originated, however, as guarantees of legal remedies, not to ensure that courts would be open for spectators"). But see *KFGO Radio Inc., v. Rothe*, 298 N.W.2d. 505, 511 (N.D. 1980) ("[T]he provision in Article I, §22 of the Constitution of North Dakota which states that 'all courts shall be open' stands for the proposition that officers of the courts, along with jurors, witnesses, litigants, and the general public have the right of admission to court proceedings.").

273. TEX. CONST. art. I, § 13.

274. *Trinity River Auth. v. URS Consultants*, 889 S.W.2d 259, 261 (Tex. 1994) (citing *Tex. Ass'n of Business v. Tex. Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993)).

275. See *Schuman*, *supra* note 266, at 35–36.

Given the uncertainty regarding the meaning of the open court ideal, and the Supreme Court's implicit acceptance of the practice of pseudonymous plaintiffs, my assertion is straightforward: the notion of open courts should not be an impediment to the use of pseudonyms by certain rightsholders. Using a pseudonym does not impact societal access to the workings of the judiciary. The public does not know the identity of most plaintiffs in class action lawsuits, yet these cases have provided invaluable information regarding various legal issues. Indeed, in the overwhelming number of cases it is not the plaintiff's name that is relevant to the public,²⁷⁶ but rather the specifics about the cause of action. I suggest that in most cases there is no material difference to the public if the plaintiff is revealed to be Bob and not John. The important public aspect of most cases concerns the issues involved, not the specific party raising the issues. "Case law indicates that any risk . . . of allowing a plaintiff to proceed anonymously is minimized when the 'issues raised are purely legal and do not depend on identifying the specific parties.'"²⁷⁷ The public has little legitimate interest in knowing the identity of a party suing it if that party's identity has little or no bearing on the case itself.²⁷⁸ Indeed, one court noted that "[i]f a plaintiff is granted leave to proceed using a fictitious name, the public is not denied its right to attend the proceedings or inspect the orders or opinions of the court on the underlying constitutional issue."²⁷⁹

276. The plaintiff's identity, however, might be particularly important to the defendant. I propose a solution to this dichotomy of interests in my recommendations, Part IV *infra*.

277. *Doe 1 v. Merten*, 219 F.R.D. 387, 394 n. 22 (E.D. Va. 2004) (citing *Doe v. Alaska*, No. 96-35873, 1997 WL 547941, at *1 (9th Cir. 1997)); *see also Doe v. Pittsylvania Cty.*, 844 F. Supp. 2d 724, 731 (W.D. Va. 2012). *But see Doe v. Spearmint Rhino*, No. CV 08-4038 ABC, 2009 WL 250054, *3 (C.D. Cal. 2009) ("Identifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is using their courts.") (citing *United States v. Stoterau*, 524 F.3d 988, 1012 (9th Cir. 2008)).

278. *See, e.g., Freedom From Religion Found. v. New Kensington-Arnold Sch. Dist.*, No. 2:12-cv-1319, 2012 WL 6629643, *3 (W.D. Pa. 2012) (stating in a case in which the plaintiffs sought a declaration that a monument of the Ten Commandments at the local high school was unconstitutional that "the issue in this case does not turn on the identity of the [p]laintiffs").

279. *Doe v. Pittsylvania Cty.*, 844 F. Supp. 2d 724, 728 (citing *Doe v. Barrow Co.*, 219 F.R.D. 189, 193 (N.D. Ga. 2003)).

C. *A Misplaced Aversion to the Concept of Anonymity.*

Those who eschew the concept of anonymity need only be reminded of its importance in United States legal history. “Between 1789 and 1809, six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published anonymous political writings or used pen names.”²⁸⁰ The Federalist Papers and their rebuttal were authored under a pseudonym.²⁸¹ In 1995, the Supreme Court recognized that “[a]nonymity is a shield from the tyranny of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation . . . at the hand of an intolerant society.”²⁸² Indeed, the Supreme Court has held that anonymous speech is afforded the same Constitutional first amendment rights as speech of which the author is known.²⁸³ Applying to postings on the internet the Supreme Court’s support of the role that anonymity plays in protecting one’s rights, the Ninth Circuit stated, “[a]s with other forms of expression, the ability to speak anonymously on the Internet promotes the robust exchange of ideas and allows individuals to express themselves freely without ‘fear of economic or official retaliation . . . [or] concern about social ostracism.’”²⁸⁴ Several district courts have observed that “[t]he free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously.”²⁸⁵ State courts have also highlighted the importance of anonymous internet speech.²⁸⁶

280. SOLOVE, *supra* note 24, at 139–40.

281. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 343 n.6 (1995); *Primary Documents in American History: The Federalist Papers*, WEB GUIDES, <https://www.loc.gov/rr/program/bib/ourdocs/federalist.html> (last visited Sept. 3, 2017).

282. *McIntyre*, 514 U.S. at 343.

283. *Id.*

284. *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (quoting *McIntyre*, 514 U.S. at 348).

285. *In re Rule 45 Subpoena Issued to Cablevision Sys. Corp. Regarding IP Address 69.120.35.31*, No. 08MC347 ARR MDG, 2010 WL 1686811, at *2 (E.D.N.Y. 2010) (quoting *Doe v. 2TheMart.Com Inc.* 140 F.Supp. 2d 1088, 1093 (W.D. Wash. 2001)).

286. See, e.g., *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc.*, No. 0425 MARCH TERM 2004, 2006 WL 37020, at *3 (Pa. C. P. 2006).

D. Ignorance of the Costs of Denying Certain Plaintiffs the Right to Proceed Using a Pseudonym.

1. Lack of Participation in the Judicial Process

Danielle Citron has contended that cyber harassment can raise the price too high for vulnerable groups to remain online.²⁸⁷ These costs can include, *inter alia*, physical threats, employment-interfering posts, and invasion of privacy.²⁸⁸ The result, according to Citron, is that vulnerable people are forced offline, “preventing them from enjoying the economic and social opportunities that social networking sites, blogs, . . . and other platforms provide.”²⁸⁹ Citron opined that silencing these bloggers impoverishes societal dialogue as a whole.²⁹⁰ She warned that cyber harassment “depriv[es] vulnerable individuals of their equal right to participate in social, economic, and political life.”²⁹¹

A recent example of Citron’s assertion involves Chelsea Cain, the author of a female heroine based comic series for Marvel. Cain quit Twitter after receiving a surge of misogynistic tweets. She stated, “I left Twitter because of the ordinary daily abuse that I decided I didn’t want to live with anymore. . . . That’s the power we have, right? . . . If a stranger yells at you on the street? You walk away.”²⁹²

In contrast, “walking away” from bringing a lawsuit as a result of being denied the ability to do so pseudonymously results in a *loss* of power both to vulnerable rightsholders and to the public. On a foundational level, some rightsholders will lose their access to justice due to their determination that the cost of participation in the system—the risk and ramifications of public shaming—is too high. This is a harm even if their claims are not meritorious because these rightsholders will feel disenfranchised from the judicial process. Other rightsholders dissuaded from bringing their lawsuits will lose the opportunity to receive a settlement or litigated-for judgment. The public loses as well when certain rightsholders do not proceed with their actions. Societal faith in the judicial system can be lost

287. Citron, *supra* note 141, at 68–69.

288. *Id.* at 69.

289. *Id.* at 68–69.

290. *Id.* at 85.

291. *Id.* at 89.

292. Ryan Grenoble, *Feminist Comic Book Author Quits Twitter Amid Storm Of Abusive Tweets*, HUFFINGTON POST (Oct. 28, 2016, 03:12 PM), http://www.huffingtonpost.com/entry/chelsea-cain-mockingbird-feminist-comics-twitter_us_58136044e4b0990edc307fc1 [<https://perma.cc/V8LA-HLMJ>].

because potential defendants will continue to act improperly since the threat of a lawsuit, normally a deterrent to bad behavior, will be absent.

2. Loss Of Valuable Precedent

In instances where rightsholders choose to refrain from commencing litigation rather than risk being publicly shamed, valuable precedent is potentially lost. Take, for example, the shootings at Sandy Hook Elementary. As I noted earlier, a lawyer sued the Connecticut Department of Education on behalf of a first-grader who suffered emotional trauma as a result of the incident.²⁹³ However, because of harsh backlash on social media, he was forced to withdraw the case.²⁹⁴ The public shaming in that case resulted in a loss of what could have been invaluable precedent—precedent that could have changed the legal landscape involving school shootings. In other words, had the lawsuit gone forward, we might have had a better understanding of the legal issues regarding school safety and gun violence in Connecticut.

In similar litigation that did go forward, valuable precedent was created. Several families of those injured and killed in the Columbine school shooting sued the gunmen's parents and those who supplied the teens with the weapons they used to commit the massacre.²⁹⁵ Although the lawsuits settled before verdict, the amounts are indicative of the role the court considers parental and third-party responsibility plays in such tragedies.²⁹⁶ In the wake of the killings at Virginia Tech, parents of two of the deceased students sued the University, alleging that the University was negligent for failing to warn students of the presence of a gunman on campus.²⁹⁷

293. See discussion *supra* Part I.B.

294. *Id.*

295. Michael Janofsky, *\$2.53 Million Deal Ends Some Columbine Lawsuits*, N.Y. TIMES (Apr. 20, 2001), <http://www.nytimes.com/2001/04/20/us/2.53-million-deal-ends-some-columbine-lawsuits.html>.

296. *Id.* Much legal scholarship has focused on the lack of precedential value when a lawsuit results in settlement. See, e.g., Owen Fiss & Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-party Involvement in Settlements?* 75 NOTRE DAME L. REV. 221, (1999). This is beyond the scope of this paper.

297. See *Peterson v. Thyden*, No. CL 2009–5670, 2009 WL 1026043 (Va. Cir. Ct. April 16, 2009); see also Steve Szkotak, *Jury Finds Virginia Tech Liable in Campus Shooting*, THE CHRISTIAN SCI. MONITOR (March 14, 2012), <http://www.csmonitor.com/USA/Latest-News-Wires/2012/0314/Jury-finds-Virginia-Tech-liable-in-campus-shooting>.

After trial, the jury awarded each of the two plaintiffs \$4,000,000.²⁹⁸ The case made its way up to the Supreme Court of Virginia, where the lower court's findings were reversed. The Court held that "the facts in this case do not give rise to a duty for the Commonwealth to warn students of the potential for third party criminal acts."²⁹⁹ In less than three years since that decision was published, courts in Virginia utilized its precedent in deciding six cases in that state.³⁰⁰

More recently, in 2012, high school student T.J. Lane entered the Chardon High School cafeteria in Ohio with a .22 caliber semi-automatic handgun and shot six students.³⁰¹ Relatives of some of the students who were killed sued, *inter alia*, the school board, the school district, and several school employees, alleging, *inter alia*, wrongful death and recklessness.³⁰² The defendants moved for judgment on the pleadings, alleging that they were immune because they were acting in their official capacity as employees of a political subdivision.³⁰³ The trial court disagreed, denying the defendants' motion, and the Court of Appeals of Ohio affirmed the trial court's ruling.³⁰⁴ While that precedent has to date not been utilized (and hopefully will never need to be), the litigation in that case let to a better understanding of the responsibility of certain parties in Ohio regarding school safety.³⁰⁵ The importance of the precedential value of these cases cannot be overstated as they contribute to our collective jurisprudence regarding school shootings and gun safety.

IV. RECOMMENDATIONS

Given that the Supreme Court has tacitly approved the use of pseudonymous plaintiffs,³⁰⁶ I recommend that the Court exercise its supervisory authority over the federal courts³⁰⁷ and promulgate

298. Peterson v. Thyden, No. CL09-5525, 2012 WL 2022237 (Va. Cir. Ct. Mar. 14, 2012); *see also* Szkotak, *supra* note 271.

299. Commonwealth v. Peterson, 749 S.E.2d 307, 311 (Va. 2013).

300. A search on Westlaw's Keycite feature yielded six Virginia cases citing to Peterson (Sept. 7, 2017).

301. *See* Crime Sider Staff, *T.J. Lane, Chardon High School Shooting Suspect, Pleads Guilty to Aggravated Murder Charges*, CBS NEWS (Feb. 26, 2013), <http://www.cbsnews.com/news/tj-lane-chardon-high-school-shooting-suspect-pleads-guilty-to-aggravated-murder-charges/>.

302. Parmertor v. Chardon Local Schs., 47 N.E.3d 942, 945 (Ct. App. Ohio 2016).

303. *Id.* at 946.

304. *Id.* at 952-54.

305. *Id.*

306. *See supra* Part II.B.1.

307. *See* Dickerson v. United States, 530 U.S. 428, 437 (2000).

rules of civil procedure establishing standards and procedures for rightsholders seeking to proceed pseudonymously. While the specifics of these procedures are beyond the scope of this paper, I advance that it is imperative that the potential for public shaming as a result of bringing a lawsuit—and the deterrent effect that such shaming can have—be a central consideration when evaluating whether to permit a rightsholder to litigate pseudonymously.³⁰⁸ Under my proposal, the rightsholder would have to demonstrate that (i) circumstances exist such that proceeding under a pseudonym is necessary to avoid the “likelihood of susceptibility to public shaming” as a result of bringing the lawsuit; and (ii) the rightsholder would be reasonably deterred from proceeding, out of concern for the public shaming. The burden would then shift to the defendant to show how permitting the rightsholder to proceed under a pseudonym would be prejudicial to the defense of the case. The plaintiff’s anonymity would extend only to court filings and any other documents that would be released to the public.³⁰⁹ In other words, the defendant would have the same information about the plaintiff had the plaintiff filed the case under her own name. The public would also be welcome to protest the plaintiff’s anonymity, demonstrating why the plaintiff’s specific identity would be necessary for a public understanding of the legal issues involved in the case.

The court would be free to modify this ruling at any point in the proceeding should the circumstances change. The defendant would be permitted to file motions stating objections to the plaintiff’s use of a pseudonym as the case progresses, and the court could even review the issue *sua sponte*. However, once the rightsholder demonstrated a likelihood of public shaming as a result of bringing the action—shaming that would reasonably deter her from going forward—the criteria for re-evaluation would be limited to (i) whether the public’s lack of knowledge of the plaintiff’s identity impairs the defendant’s ability to defend the case, or (ii) whether the public’s lack of knowledge of the plaintiff’s identity impairs the public’s ability to understand the legal issues in the case. If it is shown that there is no longer a threat to the plaintiff of being publicly shamed, or any such threat should not reasonably deter the plaintiff from proceeding, then anonymity would no longer be required. Protections against the

308. I urge the Judicial Conference to propose uniform rules for the Supreme Court to adopt regarding standards for proceeding pseudonymously. The particulars, however, are beyond the scope of this paper.

309. Documents that could become public could be redacted to remove reference to the specific identity of the plaintiff without losing the nature of their content.

defendant's release of the plaintiff's identity should be contained in a court order against disclosure. This order would in essence be no different than the sorts of protective orders that courts routinely issue during the course of litigation.

A proposed order could be fashioned as follows:

ORDER

Upon consideration of plaintiff's Motion for Permission to Proceed in Pseudonym and for Protective Order, and defendant's response thereto, it is hereby **ORDERED** that said Motion is **GRANTED. IT IS FURTHER ORDERED** that:

1. Plaintiff is allowed to proceed in pseudonym and the docket shall continue to reflect plaintiff's name as Jane Doe.
2. Plaintiff will be referred to as Jane Doe in all depositions, pleadings and other documents related to this litigation, and the plaintiff shall be allowed to endorse documents related to this litigation using the pseudonym, Jane Doe.
3. The identity of Jane Doe and her address shall be available to the attorneys of record and in-house counsel for the defendants, who shall not disclose or permit disclosure thereof, except to the following persons:
 - a) Their law partners, associates and persons employed in the law offices of such attorneys, and other in-house counsel;
 - b) The employees of defendant who have knowledge of the facts alleged in the Amended Complaint;
 - c) *Bona fide* outside experts and their employees, not on the staff of any party, consulted by such attorneys in the prosecution or defense of the claims herein;
 - d) A person whose deposition is to be taken in this action, but only to the extent necessary for the deposition; and
 - e) Any person who potentially possesses information that is relevant to plaintiff's claims or defendant's defense.
4. Each person to whom the identity of Jane Doe is to be disclosed pursuant to this Order, shall agree in advance:
 - a) That he or she will not disclose the identity of Jane Doe to any person not entitled to know her identity under this Order; and
 - b) That he or she will not use the identity of Jane Doe except in connection with the prosecution or defense of the claims herein.
5. In the event defendant believes it is necessary in the defense of the claims herein for it to disclose the identity of Jane Doe to

persons other than those specified in this Order, defendant shall communicate with plaintiff's counsel and if agreement cannot be reached in writing, the matter shall be determined by the Court.

6. Attendance at any part of any deposition of which the identity of Jane Doe is disclosed shall be limited to those to whom disclosure of such information can be made pursuant to this Order, and only after they have complied with the terms of this Order.

7. In all proceedings held before this Court, including trial, all counsel, witnesses and court personnel present shall refer to plaintiff by her pseudonym, Jane Doe.

8. In all proceedings held before this Court, including trial, plaintiff's photograph shall not be taken by members of the media and plaintiff's picture shall not be drawn by the courtroom artists.

9. The terms of this Order shall remain in effect until further Order of this Court.

AND IT IS SO ORDERED.³¹⁰

Using the Jessica Ahlquist case³¹¹ as an example, the process would work as follows:

Ahlquist would draft and file her complaint against the school district, keeping all of the original facts but substituting "Jane Doe" for her name as the plaintiff. She would then move the court for permission to proceed under the pseudonym. Ahlquist would have to demonstrate that she reasonably would be deterred from going forward with her lawsuit if the court were to deny her motion. In so doing she could point to previous examples of instances where atheists bringing actions under the Equal Protection Clause were publicly shamed. Ahlquist could emphasize any noteworthy vulnerabilities particular to her—her age, for example.

In order to successfully object to Ahlquist's use of a pseudonym, the defendant would be required to explain why its defense would be jeopardized by permitting Ahlquist to be anonymous. First, the court would determine whether Ahlquist's allegation that she would be deterred from proceeding if denied the ability to do so anonymously was reasonable. Next, the court would establish if the defendant would be unable to mount a complete defense to Ahlquist's allegations if she were permitted to proceed anonymously (but known to the defendant). Assuming that the court determined that Ahlquist could go forward using the pseudonym, the case would

310. See, e.g., *Doe v. Provident Life & Acc. Ins.*, 176 F.R.D. 464, 470–71 (E.D. Pa. 1997).

311. See discussion *infra* Part I.C.

remain docketed with the plaintiff's name as "Jane Doe." The public would have full access to "Jane Doe's" complaint. It would be free to petition the court for release of Jane Doe's true name. In order to be successful, the public would need to convince the court that there was something about the plaintiff's specific identity that was necessary for an understanding and assessment of the legal issues involved in the case. If the case remained docketed as "Jane Doe," the public would still be free to voice its criticism of the plaintiff's Equal Protection claim. However, rather than attack Ahlquist personally—as happened in her case—the public would express its disdain for her position as a plaintiff.

Using plaintiff pseudonymity to combat public shaming is not without its flaws. From the parties' perspective, proceeding anonymously could inadvertently create a "Streisand effect," drawing unwanted attention to the case. There would also be added expenses to the plaintiff related to the motion seeking pseudonymity. From the courts' perspective, the process of assessing a request for plaintiff anonymity would increase the courts' workload and could create further inefficiencies in the already overburdened judicial system. For example, it could be difficult for a court to determine what constitutes a reasonable fear of being publicly shamed that would deter a rightsholder from coming forward. And even after making such a determination, fashioning a suitable protective order in a particular case might be exceptionally challenging. Many cases dealing with anonymous plaintiffs are not appealed, so there likely will not be much precedent to offer guidance. And, while it might be simple to redact the plaintiff's name from relevant documents, redacting identifying information contained therein could be anything but straightforward. Indeed, the process simply might not work. For example, in the case of *Prestigious Pets*,³¹² it would be difficult to shield the plaintiff's identity when the *Yelp* posting is available for public view.

From the perspective of the public, there is a risk that permitting certain plaintiffs to proceed anonymously will erode confidence in the judicial system. Society might be wary of plaintiffs who seek to conceal their identity, believing that their anonymity influenced the decision.³¹³ Furthermore, there could be situations where society would benefit from public shaming as a deterrent to litigation. The *Prestigious Pets*³¹⁴ case might be an example where it would be

312. See discussion *supra* Part IC.

313. See *supra* note 118.

314. See discussion *supra* Part IC.

favorable to deter the company's speech-stifling lawsuit and spare the *Yelp* reviewer the expense of defending herself in costly litigation.

Nonetheless, in the right circumstances, plaintiff pseudonymity could neutralize the dangers of public shaming, while maintaining society's access to the judicial process and ability to express distain for unfavorable lawsuits.

CONCLUSION

Social media and the internet ensure that widespread public shaming is here to stay. While several scholars have written about various remedies for those who have been harmed by such shaming,³¹⁵ my focus is on preventing the shaming before it occurs. Specifically, my concern is with rightsholders whose vulnerability to shaming impacts their ability to seek justice. When a lawsuit is likely to be met with public shaming that reasonably would deter a rightsholder from proceeding, I propose that that rightsholder be permitted to litigate pseudonymously. Under the right circumstances, plaintiff pseudonymity could neutralize the dangers of public shaming, while maintaining society's ability to access the judicial process, enable individual rightsholders to obtain justice, and maintain the law's effectiveness in promoting desired social policy.

315. See, e.g., JON RONSON, *SO YOU'VE BEEN PUBLICLY SHAMED* (2015); Rachel Krishna, *This Woman Killed Herself After Her Leaked Sex Tape Became A Meme*, BUZZFEED (Sept. 15, 2016, 12:09 PM), https://www.buzzfeed.com/krisrach/this-woman-reportedly-killed-herself-after-an-explicit-video?utm_term=.qhe3p1xpra#.lixa8z28wA; Jon Ronson, *When online shaming spirals out of control*, TED TALKS (July 2015), https://www.ted.com/talks/jon_ronson_what_happens_when_online_shaming_spirals_out_of_control/transcript?language=en.