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Comments

Defendant Doe's Quest for Anonymity: Is the Hurdle Insurmountable?

I. INTRODUCTION

On November 14, 1996, people around the country mourned the death of Chicago's champion of social justice, Joseph Cardinal Bernardin.¹ Although Cardinal Bernardin died a hero, it was only a few years earlier that he had been falsely accused of sexually abusing a Cincinnati high school student while serving as Cincinnati's archbishop.² The accuser ultimately dropped the charges, resulting in the complete vindication of Cardinal Bernardin.³ However, this vindication was not without the hardship of the malicious accusations and the accompanying attacks from the press.⁴

Should Cardinal Bernardin, and anyone else falsely accused of sexual abuse, be allowed to shield themselves from the hurtful and damaging scrutiny resulting from such accusations? Some commentators argue that even if the charges ultimately prove baseless, the allegations alone cause irreparable harm to the accused's reputation and career.⁵ Thus, some defendants in such cases suggest that they should be allowed to proceed anonymously in order to protect themselves against irreparable damage to their reputations or careers.⁶

1. See *Death Comes to the Cardinal*, CHI. TRIB., Nov. 15, 1996, § 1, at 30.

2. See Colman McCarthy, *The Bishops Don't Have a Prayer*, WASH. POST, Nov. 20, 1993, at A23. On November 12, 1993, Stephen Cook filed a ten million dollar suit against Cardinal Bernardin, alleging that Bernardin had abused him while he was a teenager nearly twenty years earlier. See *id.*

3. See Paul Galloway, *Cardinal Mourns Death of His Former Accuser*, CHI. TRIB., Sept. 23, 1995, § 1, at 5. Cook withdrew his allegations in March of 1994, admitting that they had no factual basis. See *id.*

4. See *Memories May Be Recovered; Good Names Can't*, NEWSDAY, Mar. 2, 1994, at 48, available in LEXIS, News Library, Newdy File (noting that although Cardinal Bernardin claimed that he was "vindicated" by the withdrawal of the charges, the "damage to his reputation has been done and the psychic hurt cannot be erased").

5. See *id.* "That sort of accusation is as dangerous as a loaded gun. Unleashing it in public is as irrevocable as firing a bullet." *Id.*

6. See *infra* Part III.B (discussing cases where defendants have advanced these arguments).

Thirty years ago, "anonymous litigation" was virtually an unknown term.⁷ However, once the Supreme Court gave its implicit sanction of the use of pseudonyms in the early 1970s,⁸ an onslaught of anonymous litigation began.⁹ Although the use of pseudonyms has grown significantly in the past quarter century, its use is most frequently sought by plaintiffs, not defendants.¹⁰ Plaintiffs have sought anonymity in cases where the issues involved were private, stigmatizing, or so socially unpopular that the litigants feared retaliation were their true identities to become known.¹¹

Juxtaposed against the growing desire for anonymity is the Anglo-American tradition of public access to judicial proceedings.¹² The common law recognizes a "presumption of openness" with regard to both criminal and civil proceedings,¹³ as well as to public records and documents.¹⁴ Thus, courts often are reluctant to permit pseudonymous parties unless they are convinced that a substantial privacy interest outweighs the presumption of openness.¹⁵ Not only

7. Adam A. Milani, *Doe v. Roe: An Argument for Defendant Anonymity When a Pseudonymous Plaintiff Alleges a Stigmatizing Intentional Tort*, 41 WAYNE L. REV. 1659, 1660-61 (1995).

8. *See, e.g.*, *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).

9. *See* Milani, *supra* note 7, at 1662. The aftermath of *Roe v. Wade* and *Doe v. Bolton* consisted of a "virtual explosion" in the number and types of actions brought by anonymous plaintiffs. *Id.* The onslaught of cases succeeding *Roe v. Wade* and *Doe v. Bolton* consisted of both cases challenging the constitutionality of federal and state practices, and cases involving common law tort actions between private parties. *See id.* at 1662-63.

10. *See id.* at 1664. Despite the growing number of cases in which plaintiffs seek anonymity, few cases discuss the circumstances under which the courts should allow anonymity. *See id.* Even fewer cases have discussed when, if ever, defendants should be allowed to proceed anonymously upon their own requests. *See id.* *See infra* Parts III and V (discussing the factors and considerations the court must weigh in determining when a defendant should be granted anonymity).

11. *See generally* Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1 (1985) (discussing a variety of situations in which plaintiffs have been allowed to proceed anonymously). *See infra* Part II.D (discussing plaintiff anonymity).

12. *See* Steinman, *supra* note 11, at 1-3 (discussing the tension between the expansion of public access to judicial proceedings and the growing frequency of anonymous litigation).

13. *See* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980). *See infra* Part II.A (describing in more detail the common law right of access to trials and other judicial proceedings).

14. *See* *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). *See infra* Part II.A (describing in more detail the common law emphasis on the public's right of access to public records and documents).

15. *See infra* Parts II.D and III.B (discussing how most courts adopt a balancing test when weighing a party's privacy interests against the constitutionally protected

are courts reluctant to permit plaintiffs to proceed anonymously, but they also are especially reluctant to allow defendants to proceed anonymously, usually finding that the public's interest in open proceedings outweighs the defendants' asserted privacy interests.¹⁶

This Comment will address the fate of defendant-requested anonymity in light of the growing practice of allowing plaintiff anonymity, the common law presumption of openness, and the three most recent state court decisions refusing to permit defendants to proceed anonymously. The Comment begins by addressing the common law tradition of openness in judicial proceedings and documents.¹⁷ It then considers how this tradition of openness has conflicted with society's desire to "privatize" litigation by keeping parties anonymous throughout the course of the proceedings.¹⁸ The Comment then describes the typical categories of cases in which plaintiffs have been allowed to proceed anonymously, addressing the reasons and analyses that underlie the courts' conclusions.¹⁹ The Comment then discusses defendant anonymity, analyzing prior cases allowing defendant anonymity, in contrast to the three most recent state cases directly disallowing defendant-requested anonymity.²⁰ The Comment analyzes the fate of defendant anonymity, suggesting a proposal for courts to balance defendants' requests for anonymity against the public's interest in disclosure, and ultimately, concluding that defendants face an uphill battle in their requests for anonymity.²¹

II. BACKGROUND

A. *The Common Law Presumption of Openness in American Litigation*

Firmly embedded in the American judicial system is a presumption of openness in judicial proceedings.²² This presumption of openness

presumption of openness). *See generally* Steinman, *supra* note 11, at 1-23 (discussing the historical tradition of openness in judicial proceedings and how the courts have dealt with the tension between pseudonymous litigation and the presumption of openness).

16. *See infra* Part III.B.

17. *See infra* Part II.A.

18. *See infra* Part II.B.

19. *See infra* Parts II.B, II.C, and II.D.

20. *See infra* Part III.

21. *See infra* Parts IV, V, and VI.

22. *See* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 556 (1980) (noting that criminal trials in both England and the United States have been presumptively open).

is rooted in both the English Common Law²³ and the Constitution.²⁴ The United States Supreme Court has held that trials are public events where both private persons and the media have a right to be present.²⁵ Openness in judicial proceedings promotes public scrutiny of the judicial process, improves the quality of testimony, encourages public respect for the judicial system, and provides therapeutic value to the community.²⁶ This right of access gives the public access to judicial proceedings, such as trials, and to public records and documents.²⁷ Courts have held that this right of access includes the right to know the identities of the parties involved in the litigation.²⁸ Once information appears within the public record, the First and the Fourteenth²⁹

23. See *Doe v. Diocese Corp.*, 647 A.2d 1067, 1070 (Conn. Super. Ct. 1994). “[O]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access . . . appears to have been the rule in England from time immemorial . . .” *Id.* (quoting E. JENKS, *THE BOOK OF ENGLISH LAW* 73-74 (6th ed. 1967)).

24. The Supreme Court has stressed that the First Amendment protections of freedom of speech and press protect the public’s right to attend trials, and prohibit the government from limiting the information to which the public should have access. See *Richmond Newspapers*, 448 U.S. at 576; see also U.S. CONST. amend I.

25. See *Craig v. Harney*, 331 U.S. 367, 374 (1947). The Court stated, “What transpires in the court room is public property . . . There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.” *Id.*

Although the Court has only specifically sanctioned the public’s right of access to trials in the context of criminal trials, the Court has indicated in dicta that the presumption of openness extends to civil cases as well. See *Richmond Newspapers*, 448 U.S. at 569, 580 n.17. The *Richmond Newspapers* Court indicated in a footnote that both criminal and civil trials have historically been presumptively open. See *id.*; see also *Milani*, *supra* note 7, at 1665-77 (discussing the Court’s decisions regarding public access to both criminal and civil trials). This presumption of openness in civil cases is predicated on the First Amendment. See *Richmond Newspapers*, 448 U.S. at 575-76; see also *Diocese Corp.*, 647 A.2d at 1070 (stating that “[t]he operation of the courts is certainly an aspect of the functioning of government so that public access to court proceedings should be protected on First Amendment grounds”); *Steinman*, *supra* note 11, at 3 (arguing that because the First Amendment applies in all litigation, a right of access predicated upon the First Amendment has implications in both civil and criminal arenas).

26. See *Steinman*, *supra* note 11, at 13-15.

27. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). However, this right of access is not absolute; courts are permitted to deny access where files might become “vehicle[s] for improper purposes.” *Id.* at 598. The Court stated that the decision regarding access is one best left to the trial court’s discretion and dependent upon the facts and circumstances of each particular case. See *id.* at 599.

28. See, e.g., *Doe v. Rostker*, 89 F.R.D. 158, 162 (N.D. Cal. 1981); *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. 1974).

29. Section 1 of the Fourteenth Amendment reads in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

Amendments assure that the press and public have access to the information.³⁰

B. *The Rise of Anonymous Litigation*

Prior to 1973, pseudonymous parties were virtually absent from American litigation.³¹ However, with the Supreme Court's implicit sanction of the use of pseudonyms in both *Roe v. Wade*³² and *Doe v. Bolton*,³³ an onslaught of pseudonymous litigation began.³⁴ Originally, the cases allowing pseudonymous parties involved persons who challenged the validity of state or federal laws.³⁵ However, as the number of cases featuring pseudonymous parties increased, so did the variety of cases.³⁶ To date, the courts have extended the grant of

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

30. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975). The Court recognized that the First and Fourteenth Amendments protect the press from liability for publication of material found within the public record. *See id.* at 496. The Court noted that if privacy interests were involved in judicial proceedings, then the states must respond so as to avoid the public documentation of this private information. *See id.* The Court stated that the states' "political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish." *Id.*

31. *See Milani, supra* note 7, at 1660. Prior to 1969, only one Supreme Court case, three court of appeals decisions, and one district court decision featured an anonymous party as the sole or lead plaintiff. *See id.*

32. 410 U.S. 113 (1973). In this case, plaintiff challenged the constitutionality of a Texas abortion law. *See id.* at 113. The Court sanctioned the use of "Jane Roe" as a pseudonym by stating that no question existed as to her status as a real person with standing, despite the presence of the pseudonym. *See id.* at 124.

33. 410 U.S. 179 (1973) (challenging a state abortion law).

34. *See Milani, supra* note 7, at 1662. Subsequent to the *Wade* decision, both the number and the types of cases involving anonymous parties increased. *See id.* Figures from 1994 indicate that eighteen federal court of appeals decisions, thirty-three district court decisions, and fifty-seven state appellate court decisions featured anonymous plaintiffs during that year. *See id.*

35. *See id.* at 1661; *see, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (challenging a Texas abortion law); *Poe v. Ullman*, 367 U.S. 497 (1961) (challenging a Connecticut contraception statute).

36. *See Milani, supra* note 7, at 1662-63. The majority of cases emerging in recent years which feature anonymous parties are common law tort actions between private parties. *See id.* These tort actions have the following two characteristics in common: (1) the plaintiffs fear that potential social stigmas would attach to them were their identities to become known and (2) the defendants in the cases are accused of committing some kind of personal, intentional tort against the plaintiffs. *See id.* at 1663.

All the cases where anonymity has been involved require a departure from the usual policy of disclosure in the complaint in order to protect plaintiffs from a threatened harm, or to prevent publicity of an area of the "utmost intimacy." *See Wendy M. Rosenberger, Anonymity in Civil Litigation: The "Doe" Plaintiff*, 57 NOTRE DAME L. REV., 580, 580 (1982).

anonymity to parties in cases involving abortion rights,³⁷ homosexuality,³⁸ sexual harassment or abuse,³⁹ transsexuality,⁴⁰ mental illness,⁴¹ welfare rights,⁴² drug testing,⁴³ HIV status,⁴⁴ medical mistreatment,⁴⁵ challenges to governmental action,⁴⁶ and cases where plaintiffs feared retaliation if their personal beliefs were to become known.⁴⁷ The rise in pseudonymous litigation parallels a rise in both the number of matters considered to be private, and the judicial recognition of the so-called "right to privacy."⁴⁸

37. *See, e.g.*, *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Ceci*, 517 F.2d 1203 (7th Cir. 1975); *Doe v. Mundy*, 514 F.2d 1179 (7th Cir. 1975); *Doe v. Hale Hosp.*, 500 F.2d 144 (1st Cir. 1974); *Doe v. Deschamps*, 64 F.R.D. 652 (D. Mont. 1974).

38. *See, e.g.*, *Doe v. Department of Transp. Fed. Aviation Admin.*, 412 F.2d 674 (8th Cir. 1969); *Doe v. United Serv. Life Ins. Co.*, 123 F.R.D. 437 (S.D.N.Y. 1988); *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976); *Doe v. Chafee*, 355 F. Supp. 112 (N.D. Cal. 1973).

39. *See, e.g.*, *Roe v. Borup*, 500 F. Supp. 127 (E.D. Wis. 1980); *Doe v. Union Pac. R.R.*, 914 S.W.2d 312 (Ark. 1996); *Doe v. Diocese Corp.*, 647 A.2d 1067 (Conn. Super. Ct. 1994).

40. *See, e.g.*, *Doe v. Blue Cross & Blue Shield*, 794 F. Supp. 72 (D.R.I. 1992); *Doe v. McConn*, 489 F. Supp. 76 (S.D. Tex. 1980).

41. *See, e.g.*, *Doe v. Gallinot*, 657 F.2d 1017 (9th Cir. 1981); *Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979); *Doe v. Harris*, 495 F. Supp. 1161 (S.D.N.Y. 1980); *Doe v. N.Y. Univ.*, 442 F. Supp. 522 (S.D.N.Y. 1978).

42. *See, e.g.*, *Doe v. Carleson*, 356 F. Supp. 753 (N.D. Cal. 1973); *Doe v. Gillman*, 347 F. Supp. 482 (N.D. Iowa 1972); *Doe v. Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972); *Doe v. Swank*, 332 F. Supp. 61 (N.D. Ill.), *aff'd sub nom. Weaver v. Doe*, 404 U.S. 987 (1971); *Doe v. Hursh*, 337 F. Supp. 614 (D. Minn. 1970); *Doe v. Shapiro*, 302 F. Supp. 761 (D. Conn. 1969).

43. *See Roe v. Cheyenne Mountain Conference Resort, Inc.*, No. 96-1086, 1997 WL 536061 (10th Cir. Sept. 2, 1997).

44. *See, e.g.*, *Doe v. Shady Grove Adventist Hosp.*, 598 A.2d 507 (Md. Ct. Spec. App. 1991); *Doe v. Tris Comprehensive Mental Health, Inc.*, 690 A.2d 160 (N.J. Super. Ct. 1996).

45. *See Doe v. Conn. Dep't of Health*, No. CV970569472, 1997 WL 491602 (Conn. Super. Ct. Aug. 6, 1997); *Doe v. Finch*, No. 64131-5, 1997 WL 473966 (Wash. Aug. 21, 1997).

46. *See Roe v. Office of Adult Probation*, No. 96-9157, 1997 WL 546244 (2d Cir. Sept. 8, 1997) (challenging the application of the state sex offender notification policy).

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

48. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 488 (1975) (recognizing that this century has experienced a "strong tide" in favor of an individual's right to privacy). *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

The right of privacy arose as a result of a combination of increasing governmental intrusion into private matters along with a growing willingness on the part of litigants to protect their specific privacy interests. *See Eugene R. Fidell, The Strange Case of John Doe: Getting Anonymity in Federal Court*, NAT'L L.J., Mar. 5, 1984, at 20. The right to privacy protects the "personal intimacies of the home, the family, marriage,

C. *The Legal Basis for Anonymity*

1. The Federal Rules

Although the rise in pseudonymous litigation indicates that courts will, in certain circumstances, permit parties to proceed anonymously, the judicial authority for this procedure is not explicitly clear under the Federal Rules.⁴⁹ The only mention made within the Federal Rules of Civil Procedure pertaining to the names of the parties is in reference to pleadings. In federal court, complaints are required to include the names of all parties.⁵⁰ This rule is consistent with the American tradition of open judicial proceedings⁵¹ and serves both to apprise the parties of the names of their opponents and to protect the public's interest in knowing the facts of the proceedings.⁵²

Some courts have adopted a strict interpretation of Rule 10(a), requiring that the complaint specifically name the parties before the court will recognize the commencement of the action.⁵³ Thus, when

motherhood, procreation, and child rearing." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973).

49. See *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir. 1979).

50. See FED. R. CIV. P. 10(a). Rule 10(a) provides:

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

Id.

An exception to this rule is permitted where the true name of the defendant is unknown by the plaintiff at the time of filing. In that instance, the plaintiff is permitted to use a pseudonym in place of the defendant's name until his true name is discovered. See Joseph E. Edwards, L.L.B., Annotation, *Propriety and Effect of Use of Fictitious Name of Party in Complaint in Federal District Court*, 8 A.L.R. FED. 675, § 4[c] (1996).

Rule 10(a) is consistent with the American tradition of open judicial proceedings. See Rosenberger, *supra* note 36, at 584. Rule 10(a) serves to apprise the parties of the names of their adversaries. See *id.*

51. See Rosenberger, *supra* note 36, at 584. "[F]iling a complaint under one's true name is not only a procedural formality, but is also an acknowledgment of the openness of the American judicial process. Any departure from this practice of full disclosure must overcome the strong presumption against shielding identity from opposing parties and the public." *Id.*

52. See, e.g., *Doe v. Shakur*, 164 F.R.D. 359, 360 (S.D.N.Y. 1996); *Free Mkt. Compensation v. Commodity Exch., Inc.*, 98 F.R.D. 311, 312 (S.D.N.Y. 1983); *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. 1974).

53. See, e.g., *Doe v. United States Dep't of Justice*, 93 F.R.D. 483 (D. Colo. 1982); *Roe v. New York*, 49 F.R.D. 279 (S.D.N.Y. 1970). For example, in *Roe*, the court refused to permit the plaintiffs, four boys, ages fourteen to sixteen, to proceed anonymously in their action against a New York state training school for failure to provide them with adequate rehabilitative treatment. See *Roe*, 49 F.R.D. at 280. They

parties seek anonymity, they are in a procedural dilemma—if they follow Rule 10(a), they automatically reveal their identities; if they do not, they risk dismissal of their case. Therefore, some courts have developed procedural mechanisms to allow parties to commence an action without breaking the procedural rules.⁵⁴ For example, a plaintiff seeking to proceed anonymously could proceed in one of the following ways: 1) file a complaint featuring his true name, along with a motion for a protective order,⁵⁵ or for leave to amend to shield his identity; 2) file a complaint under a pseudonym, but attach his true name in an affidavit; or 3) file a complaint under a pseudonym, but sign his true name, verifying the complaint.⁵⁶ Some courts will grant plaintiffs limited permission to commence the suit under a pseudonym, but they request further memoranda demonstrating the need for anonymity before issuing a more permanent protective order.⁵⁷ However, a court still may dismiss a case or order the complaint amended, if the court finds the plaintiff's reasons for requesting anonymity insubstantial.⁵⁸

sought anonymity in the action for fear that revelation of their commitment to state training schools would subject them to ridicule, harassment, embarrassment, and other problems when reintegrating into the community. *See id.* at 280. The court found that the complaint contained a “defect of substance” because it failed to identify the names of the parties, and was therefore ineffective to commence the action. *Id.* at 282.

“[T]he plaintiff who employs a pseudonym gambles on how the court will interpret Rule 10(a), and risks dismissal without even the opportunity to demonstrate why he must conceal his identity.” Rosenberger, *supra* note 36, at 582.

54. *See, e.g., Roe*, 49 F.R.D. at 281; *Buxton v. Ullman*, 156 A.2d 508, 514-15 (Conn. 1959). The proper procedure for obtaining the court's approval of an anonymity request rests in the particular court's construction of Rule 10(a). *See Rosenberger, supra* note 36, at 580.

55. The authority for the court to grant protective orders falls under Rule 26(c), pertaining to discovery. This rule permits the court to issue a protective order in certain circumstances to protect a party from “annoyance, embarrassment, oppression, or undue burden or expense.” FED. R. CIV. P. 26(c).

56. *See Roe*, 49 F.R.D. at 281-82. Another court recommended that the proper procedure for proceeding under a pseudonym would be to inform the court of the party's desire to proceed anonymously, establish the fact that the parties and issues are real, despite the use of the pseudonyms, and secure the court's permission. *See Buxton*, 156 A.2d at 515. *See also Doe v. Hallock*, 119 F.R.D. 640, 645 (S.D. Miss. 1987) (noting that the proper procedure for commencing an action pseudonymously would be to first seek the court's permission or to move for a protective order upon the filing of the complaint).

57. *See Rosenberger, supra* note 36, at 582. *See also Gomez v. Buckeye Sugars*, 60 F.R.D. 106 (N.D. Ohio 1973) (allowing the use of pseudonyms only until the court determined whether or not the defendants were joint employers of the plaintiffs for purposes of the action); *Doe v. Diocese Corp.*, 647 A.2d 1067, 1072 (Conn. Super. Ct. 1994) (permitting the use of pseudonyms for the plaintiffs until the time of jury selection when the decision would be subject to review).

58. *See Hallock*, 119 F.R.D. at 644-45. In *Hallock*, the plaintiff brought the action

2. State Rules

Almost every state code of civil procedure follows the federal rule and requires that complaints include the names of all the parties to the action.⁵⁹ However, many states have gone beyond the federal rule, recognizing certain substantive statutory exceptions to the general rule of disclosure. For example, some states allow anonymity of confidential proceedings in cases involving juveniles,⁶⁰ sexual molestation,⁶¹ sexually transmitted diseases,⁶² and matrimonial suits.⁶³ Illinois, in contrast to most states, has carved out a specific exception to the general rule within its pleading statute, allowing parties to plead under fictitious names for "good cause shown."⁶⁴

as Jane Doe, failing to disclose her true identity in the complaint or in any attachments thereto. *See id.* at 641-42. The court ultimately rejected her original complaint. *See id.* at 645. The court then granted the plaintiff's request to amend the complaint to substitute her true name for that of Jane Doe. *See id.*

59. *See, e.g.*, ALA. SUP. CT. C.P.R. 10(a); ARK. CT. C.P.R. 10(a); CAL. CIV. PROC. CODE § 422.40 (West 1995); COLO. CT. C.P.R. 10(a); DEL. SUPER. CT. C.P.R. 10(a); GA. CODE ANN. § 9-11-10(a) (1996); HAW. C.P.R. 10(a); IND. C.P.R. 10(a); KAN. CIV. PROC. CODE ANN. § 60-210(a) (West 1994); LA. CODE CIV. PROC. ANN. art. 853 (West 1995); MO. ANN. STAT. § 509.020 (West 1994); MONT. R.C.P. 10(a); OKLA. STAT. ANN. tit. 12, § 2010A (West 1994); OR. C.P.R. 10(a); S.D. CODIFIED LAWS § 15-6-10(a) (Michie 1994); N.C. R.C.P. 10(a); W. VA. C.P.R. 10(a); WIS. STAT. ANN. § 802.04(1) (West 1996).

60. *See, e.g.*, WIS. STAT. § 48.78 (1994); Miss. Code Ann. § 43-21-251 (1994) (allowing for confidentiality of juvenile court records); Miss. Code Ann. § 93-17-25 (1994) (providing for confidential adoption proceedings).

61. *See, e.g.*, N.J. STAT. ANN. § 2A:61B-1 (West 1995). This statute does not allow the names, addresses, and identities of victims or defendants to appear on the complaint, and instead, it provides for fictitious names or initials to appear. Note that the New Jersey Court of Appeals recently ruled that the statute is intended to protect the victims of sexual molestation, and does not provide the defendant in such cases with the option of proceeding anonymously upon his own motion. *See T.S.R. v. J.C.*, 671 A.2d 1068, 1071 (N.J. Super. Ct. App. Div. 1996).

62. *See, e.g.*, FLA. STAT. ANN. § 384.282 (West 1995) (providing for pseudonyms to be substituted for the true names of the parties, with only the actual names being revealed to the court *in camera*, with the court's instruction to seal the names from further revelation).

63. *See, e.g.*, N.Y. DOM. REL. LAW § 235(1) (McKinney 1995) (providing that matrimonial suits be sealed).

64. 735 ILL. COMP. STAT. ANN. 5/2-401(e) (West 1996). Section 5/2-401(c) provides: "A party shall set forth in the body of his or her pleading the names of all parties for and against whom relief is sought thereby." *Id.* 5/2-401(c).

Section 5/2-401(e) provides: "Upon application and for good cause shown the parties may appear under fictitious names." *Id.* 5/2-401(e). Although subsection (e) was enacted in 1987, only one case to date, *Doe v. Doe*, 668 N.E.2d 1160 (Ill. App. Ct.), *appeal denied*, 675 N.E.2d 632 (Ill. 1996) (This case will be referred to as *Doe v. Doe* due to the numerous cases which include Doe as a party to the litigation), has attempted to interpret the statute to determine what qualifies as "good cause shown." *See infra* notes 179-98 and accompanying text (discussing *Doe v. Doe*).

3. The Lack of Clear Guidelines

Despite the growing number of anonymous cases and the lack of clear statutory authority for granting anonymity, no clear guidelines have emerged from the courts to aid in the determination of whether to grant anonymity.⁶⁵ Some courts discuss the competing policy considerations surrounding the grant of anonymity, but they fail to articulate clear standards for determining when anonymity requests should be granted.⁶⁶ Other cases fail to identify any reasoning with regard to the granting of anonymity.⁶⁷ In many of these cases, this failure is due to the fact that many courts' justifications for granting anonymity are hidden in unpublished orders of the trial courts.⁶⁸

Determining when to grant defendant-requested anonymity is particularly ambiguous because the cases that do address anonymity do so in the context of plaintiff-requested anonymity.⁶⁹ Instances of defendant anonymity are rare except in two areas of the law: 1) suits involving both anonymous plaintiffs and defendants, such as divorce or child custody cases;⁷⁰ and 2) suits where plaintiffs designate the defendant by a pseudonym because the defendant's true identity was unknown at the time the suit was filed.⁷¹ Although some courts have allowed defendants to proceed anonymously,⁷² the three most recent cases directly addressing the propriety of the defendant-requested anonymity have disallowed it.⁷³

65. See Milani, *supra* note 7, at 1677.

66. See Rosenberger, *supra* note 36, at 580. See *infra* Part II.D. (describing the various standards and tests utilized by the courts in determining when, if ever, to grant anonymity requests).

67. See *infra* notes 123-35 and accompanying text.

68. See Robert G. Bagnall et al., *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 548 (1984) (citing Fidell, *supra* note 48, at 20). Many cases involve little or no discussion of why anonymity was allowed. See *infra* notes 123-35 and accompanying text.

69. See Bagnall, *supra* note 68, at 552.

70. See *id.*

71. See *id.*; see also Steinman, *supra* note 11, at 18 (noting that both English and American common law permitted the use of the pseudonym "John Doe" to designate a defendant in a pleading until his real name became known, or to designate a plaintiff in the action of ejectment).

72. See Bagnall, *supra* note 68, at 552. See also Steinman, *supra* note 11, at 18. Note the distinction between defendant-requested anonymity and anonymous defendants. Some defendants are anonymous merely because their identity is not known, or because the revelation of their identity would also reveal the plaintiff's identity where the plaintiff had requested anonymity.

73. See *infra* Part III.B (discussing more completely *Doe v. Diocese Corp.*, 647 A.2d 1067 (Conn. Super. Ct. 1994); *T.S.R. v. J.C.*, 671 A.2d 1068 (N.J. Super. Ct. App. Div. 1996); and *Doe v. Doe*, 668 N.E.2d 1160 (Ill. App. Ct.), *appeal denied*, 675 N.E.2d 632

*D. The Modern Courts' Approach to Plaintiffs' Anonymity Requests:
The Balancing Test*

Considering the lack of clear statutory or judicial guidelines for determining when to grant a party's anonymity request, courts are left looking to each other for guidance on how to approach the issue. Currently, most courts, in determining whether to grant a party's anonymity request, utilize a balancing test, weighing the party's privacy interests against the constitutionally embedded presumption of openness in judicial proceedings.⁷⁴ These courts recognize that, although Rule 10(a) normally requires that the names of all the parties appear in the complaint, this policy of disclosure may yield to protect "privacy in a very private matter."⁷⁵ Although the majority of courts use a balancing test when determining whether to grant a plaintiff's request for anonymity, the same balancing test has resulted in varying outcomes when put into practice.⁷⁶ Thus, courts faced with similar fact patterns have reached different results regarding the anonymity question.⁷⁷

1. Factors Courts Consider in Granting Anonymity

Courts often consider the following factors when considering whether or not to grant the plaintiffs' requests for anonymity: (1) whether the plaintiffs are forced to divulge "personal information of the utmost intimacy;" (2) whether the plaintiffs have to admit to the violation of state or other governmental regulations, or wish to engage in prohibited conduct; (3) whether the plaintiffs are challenging the constitutional, statutory, or regulatory validity of governmental action; and (4) whether granting the plaintiffs anonymity would result in substantial unfairness to the defendant.⁷⁸ For example, in *Southern*

(Ill. 1996) along with a number of cases allowing defendant anonymity).

74. See, e.g., *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992); *Coe v. United States Dist. Court*, 676 F.2d 411, 414 (10th Cir. 1982); *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981); *Southern Methodist Univ. Ass'n v. Wynne & Jaffe*, 599 F.2d 707, 712 (5th Cir. 1979); *Free Mkt. Compensation v. Commodity Exch., Inc.*, 98 F.R.D. 311, 312-13 (S.D.N.Y. 1983); *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. 1974).

75. *Southern Methodist Univ.*, 599 F.2d at 713 (quoting *Deschamps*, 64 F.R.D. at 653).

76. See *infra* notes 90-115 and accompanying text.

77. See *id.*

78. See *Southern Methodist Univ.*, 599 F.2d at 712-13. In summarizing these factors for consideration, the *Southern Methodist Univ.* court attempted to compile characteristics common to cases where plaintiffs had previously been granted anonymity. See *id.* Similar factors have been considered by other courts when granting plaintiffs anonymity. See, e.g., *James v. Jacobson*, 6 F.3d 233 (4th Cir. 1993). The

Methodist University Ass'n v. Wynne & Jaffe, the Fifth Circuit Court of Appeal considered these factors in refusing to allow four female plaintiffs to proceed anonymously in their Title VII action against two Dallas law firms for sex discrimination in hiring summer law clerks.⁷⁹ The plaintiffs feared that the revelation of their true names would subject them to “embarrassment, annoyance, and economic loss.”⁸⁰ Ultimately, the court refused to allow the plaintiffs to proceed anonymously, failing to find either a congressional grant warranting anonymity or a sufficient privacy interest.⁸¹

Approximately ten years after the court’s decision in *Southern Methodist University*, the Fifth Circuit, in *Doe v. Stegall*,⁸² refined its analysis of the anonymity question, finding that the characteristics articulated in *Southern Methodist University* were not to be construed as a rigid test for granting anonymity, but were merely factors to be weighed in a balancing test.⁸³ In *Stegall*, a mother and her two children sought to proceed under fictitious names in their action challenging the constitutionality of prayer and Bible exercises in Mississippi public schools.⁸⁴ They sought to keep their identities concealed for fear of harassment and violent reprisals against them due

Jacobson court identified the following factors as ones for consideration in the anonymity determination:

[W]hether 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 personal nature; whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties; the ages of the persons whose privacy interests are sought to be protected; whether the action is against a governmental or private party; and, relatedly, the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.

Id. at 238.

79. See *Southern Methodist Univ.*, 599 F.2d at 712-13. The action was brought by the Southern Methodist University (SMU) Association of Women Law Students and four female lawyers. See *id.* at 708-09.

80. *Id.* at 709. The plaintiffs also asserted that if their identities became known, they would be assigned “less desirable matters” by their firms, their firms would lose business, and other professionals subjected to the same kind of discrimination would be hampered in their efforts to bring their cases for fear that they would also be subject to the same kind of harassment, embarrassment or economic loss that faced these plaintiffs. See *id.* at 711.

81. See *id.* at 713.

82. 653 F.2d 180 (5th Cir. 1981).

83. See *id.* at 185-86. The court stated that it “would be a mistake to distill a rigid, three-step test for the propriety of party anonymity from the fact-sensitive holding in *Southern Methodist [University]* The opinion never purports to establish the three common factors as a prerequisites to bringing an anonymous suit.” *Id.* at 185.

84. See *id.* at 181.

to their unpopular religious beliefs.⁸⁵ The Fifth Circuit ultimately granted the plaintiffs' anonymity status,⁸⁶ placing emphasis on the following factors: (1) that the plaintiffs were challenging a governmental activity; (2) that the case involved the plaintiffs' religious beliefs, a fundamentally private matter; (3) that the plaintiffs could expect extensive harassment and violent reprisals were their identities to become known;⁸⁷ and (4) that the plaintiffs' status as children made them especially vulnerable.⁸⁸ Ultimately, the court considered all of these factors in its "matrix of considerations," ruling that the Does' privacy interests outweighed the "almost universal" practice of disclosure.⁸⁹

2. Differing Results from the Balancing Process

a. Fear of Embarrassment

Although most courts agree that a balancing process is necessary to weigh the public's interest in open judicial proceedings against the plaintiff's privacy interests, courts disagree as to what qualifies as substantial privacy interests warranting anonymity.⁹⁰ For example, some courts deem personal embarrassment or humiliation insufficient to warrant anonymous status in litigations.⁹¹ In *Doe v.*

85. *See id.* at 182.

86. The district court in *Stegall* had found that it lacked jurisdiction over the suit. *See id.* at 181.

87. The plaintiffs submitted several exhibits illustrating how they would be subject to retaliatory harassment or violence were their identities to become known. *See id.* at 182 n.6.

88. *See id.* at 186.

89. *Id.* "We emphasize the special status and vulnerability of the child-litigants, the showing of possible threatened harm and serious social ostracization based upon militant religious attitudes, and the fundamental privateness of the religious beliefs, all of which are at the core of this suit to vindicate establishment clause rights." *Id.* The court also noted that it proposed "no hard and fast formula" for determining when a party should be allowed to proceed anonymously. *Id.*

90. *See infra* notes 91-115 and accompanying text.

91. *See Free Mkt. Compensation v. Commodity Exch., Inc.*, 98 F.R.D. 311, 313 (S.D.N.Y. 1983). In *Free Mkt. Compensation*, the plaintiffs sought to amend their complaint to add an anonymous plaintiff, arguing that his identity had to remain confidential to enable him to continue to supply confidential information, and to ensure that he would avoid economic harm, embarrassment, and humiliation in the community. *See id.* at 312. The court failed to find that these considerations were sufficient to warrant a granting of anonymity. *See id.* at 313. The court also stressed the practical problems that pseudonymous litigation creates, including hindering the defendants in their discovery requests and in establishing their defenses, and fixing res judicata effects. *See id.* at 312. *See also Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992) (holding that the embarrassment a plaintiff might suffer from the revelation of his alcoholism was insufficient to warrant a granting of anonymity).

Shakur,⁹² a federal district court in New York refused to allow the plaintiff, a victim of sexual assault, to proceed anonymously, holding that the potential embarrassment and humiliation caused by revealing the plaintiff's name did not outweigh the public's right to know all the facts of the case, including the identity of the parties.⁹³ Additionally, in a fairness calculation similar to that adopted by the court in *Southern Methodist University*, the *Shakur* court concluded that the plaintiff should be required to stand behind her charges publicly, rather than hide behind a "cloak of anonymity."⁹⁴

Similarly, a district court in Colorado found that potential embarrassment of a public official was not enough to warrant granting anonymity.⁹⁵ In *Doe v. United States Department of Justice*, the court refused to allow a Colorado state judge to proceed anonymously in his action to discover information gathered about him by the Drug Enforcement Administration.⁹⁶ In this case, the plaintiff-judge feared that revelation of his true identity would embarrass him, undermine his privacy rights, and cast suspicion upon his office.⁹⁷ The court conducted a balancing test and ultimately denied the plaintiff's request for a protective order shielding his identity, stating that the public had a special interest in knowing the conduct of its public officials.⁹⁸

In contrast to the courts in both *Shakur* and *Doe v. United States Department of Justice*, a district court in Wisconsin found that embarrassment of being accused of sexual abuse was enough to warrant anonymity.⁹⁹ In *Roe v. Borup*, the court permitted parents accused of sexual abuse to proceed anonymously where they feared "personal and social harassment and embarrassment" were their true identities to become known.¹⁰⁰ The court granted the plaintiffs' request for anonymity in their section 1983 action against the

92. 164 F.R.D. 359 (S.D.N.Y. 1996).

93. *See id.* at 360.

94. *Id.* at 361. "Shakur has been publicly accused. If plaintiff were permitted to prosecute this case anonymously, Shakur would be placed at a serious disadvantage, for he would be required to defend himself publicly while plaintiff could make her accusations from behind a cloak of anonymity." *Id.*

95. *See Doe v. United States Dep't of Justice*, 93 F.R.D. 483, 484 (D. Colo. 1982).

96. *See id.*

97. *See id.* The plaintiff argued that his duty as a judge included promoting "public confidence in the integrity of the judicial system," and that this duty might be compromised if his identity was revealed. *Id.*

98. *See id.* The court stressed the fact that lawsuits are "public events" where the public has an interest in knowing all the facts, including the identity of the parties. *Id.*

99. *See Roe v. Borup*, 500 F. Supp. 127, 130 (E.D. Wis. 1980).

100. *Id.*

Department of Health and Social Services.¹⁰¹ The court stressed that the Department's "allegedly false charges of sexual abuse" constituted a sensitive issue warranting anonymity.¹⁰² The court found that the plaintiffs had established "an important privacy interest" sufficient to warrant the granting of anonymity.¹⁰³

b. Fear of Retaliation

Courts are also in disagreement as to whether fear of retaliation or reprisal is sufficient to warrant a grant of anonymity.¹⁰⁴ In *Gomez v. Buckeye Sugars*,¹⁰⁵ a federal district court in Ohio found that fear of retaliation from one's employer prompted the need for anonymity.¹⁰⁶ In *Gomez*, the court permitted the use of pseudonyms where the plaintiffs feared possible reprisals from their employers for alleging violations of the Fair Labor Standards Act.¹⁰⁷ The Fifth Circuit Court of Appeals also permitted plaintiffs to proceed anonymously in *Doe v. Stegall*,¹⁰⁸ where the plaintiffs feared reprisal due to their unpopular religious beliefs.¹⁰⁹

In contrast, however, the Fifth Circuit found that fear of retaliation from one's employer was not sufficient to permit the plaintiffs to proceed anonymously.¹¹⁰ In *Southern Methodist University*, the court refused to allow the female plaintiffs to appear anonymously in their action for employment discrimination even though the female plaintiffs asserted that they would suffer reprisals from their employers.¹¹¹

101. *See id.*

102. *Id.*

103. *Id.* at 130. The court also noted that the parents had already suffered psychological harm due to the defendant's actions. *See id.*

104. *See infra* notes 105-115 and accompanying text.

105. 60 F.R.D. 106 (N.D. Ohio 1973).

106. *See id.* at 107.

107. *See id.* The court permitted the use of pseudonyms only until the court resolved the issue of whether the defendants were joint employers of the plaintiffs for purposes of the lawsuit. *See id.*

108. 653 F.2d 180 (5th Cir. 1981). *See supra* notes 82-89 and accompanying text (discussing *Stegall*).

109. *See Stegall*, 653 F.2d at 186. The court noted that "religion is perhaps the quintessentially private matter Evidence on the record indicates that the Does may expect extensive harassment and perhaps even violent reprisals if their identities are disclosed to a Rankin County community hostile to the viewpoint reflected in the plaintiffs' complaint." *Id.*

110. *See Southern Methodist Univ. Ass'n v. Wynne & Jaffe*, 599 F.2d 707, 711 (5th Cir. 1979). *See also supra* notes 78-81 and accompanying text (discussing *Southern Methodist Univ.*).

111. *See Southern Methodist Univ.*, 599 F.2d at 711. The women feared that they might be assigned "less desirable" work by their employers and that their firms might lose business if their identities became known. *Id.*

Similarly, a federal district court in California held that the plaintiffs' fears of reprisal due to their unpopular beliefs concerning the draft and war did not constitute a protectable privacy interest warranting anonymity.¹¹² In *Doe v. Rostker*, the plaintiffs sought to bring an action against the Selective Service for possession of unlawful information in violation of the Privacy Act.¹¹³ The plaintiffs sought anonymity for fear of retaliatory conduct that could have jeopardized their efforts to obtain conscientious objector status in the future.¹¹⁴ The court ultimately rejected the plaintiffs' request, finding their fears of retaliation "speculative and prospective."¹¹⁵

c. Substantial Privacy Interest

Although personal embarrassment, economic loss, or fear of retaliation, may be insufficient to outweigh the judicially embedded presumption of openness in the balancing test, a substantial privacy interest will tilt the scale in favor of anonymity.¹¹⁶ In many cases, anonymity will be granted if the plaintiff can demonstrate an overwhelming need for confidentiality and can illustrate that this right to privacy outweighs both the public's interest in knowing the identity of the litigants and any potential unfairness to the defendant.¹¹⁷ Examples of substantial privacy interests include matters that are of "a sensitive and highly personal nature," such as birth control, abortion, illegitimacy, and homosexuality.¹¹⁸ Other factors that may tilt the scale in favor of anonymity include the following: (1) the possibility of retaliatory physical or mental harm to the moving party; (2) the age of the moving party; (3) the risk of unfairness to the defendant; and (4) whether the opposing party is a private person or a governmental entity.¹¹⁹

112. *See Doe v. Rostker*, 89 F.R.D. 158, 161 (N.D. Cal. 1981).

113. *See id.* at 159.

114. *See id.* at 162.

115. *Id.*

116. *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. 1974). *See supra* Part II.B (citing cases where anonymity has been granted).

117. *See Anonymity of Parties*, 3 FED. LIT. 68, May 1994, at 69, available in WESTLAW, Fedlit database. "It will be important for the moving party to show that the reason for anonymity is to preserve privacy in a matter that is sensitive and highly personal, not merely to avoid the annoyance or criticism that may result from having one's identity made known." *Id.*

118. *Deschamps*, 64 F.R.D. at 652.

119. *See Anonymity of Parties*, *supra* note 117, at 69.

III. DISCUSSION

Despite the growing trend in plaintiff anonymity and the increasing number of cases addressing whether anonymity is warranted, few cases to date have directly addressed the propriety of defendant-requested anonymity.¹²⁰ Although the three most recent cases directly addressing the propriety of defendant-requested anonymity ultimately denied it,¹²¹ earlier cases illustrate that defendants have been allowed to proceed anonymously in certain circumstances.¹²²

A. *Prior Cases Allowing Defendant-Requested Anonymity*

Although the three most recent cases squarely addressing the propriety of defendant-requested anonymity refused to allow it, prior cases illustrate that defendants have been granted anonymous status in the past.¹²³ Many of these cases feature both pseudonymous plaintiffs and pseudonymous defendants¹²⁴ and involve situations in which both parties would be subject to "social stigmatization" if their true identities were revealed.¹²⁵ Some cases involve sexual abuse,¹²⁶ transmission of sexual diseases,¹²⁷ abortion,¹²⁸ surrogate mothers,¹²⁹ an attorney's coercing a client into having sexual relations with him,¹³⁰ and the unauthorized dissemination of information regarding a person's HIV status.¹³¹ Although defendants have been granted anonymity in many

120. See *infra* notes 121-198 and accompanying text.

121. See *Doe v. Diocese Corp.*, 647 A.2d 1067 (Conn. Super. Ct. 1994); *T.S.R. v. J.C.*, 671 A.2d 1068 (N.J. Super. Ct. App. Div. 1996); *Doe v. Doe*, 668 N.E.2d 1160 (Ill. App. Ct.), *appeal denied*, 675 N.E.2d 632 (Ill. 1996). See *infra* notes 151-98 and accompanying text (discussing these three cases and the courts' reasonings with regard to defendant-requested anonymity).

122. See *infra* notes 123-150 and accompanying text.

123. See *Milani*, *supra* note 7, at 1698-1705. Because many of the cases featuring anonymous defendants mention anonymity only in a footnote, or not at all, it is difficult to discern whether it was the plaintiff or the defendant who requested anonymous status. Additionally, the cases provide little guidance as to why anonymity was granted.

124. See *Bagnall*, *supra* note 68, at 552.

125. *Milani*, *supra* note 7, at 1702.

126. See, e.g., *Roe v. Doe*, 28 F.3d 404 (4th Cir. 1994); *Doe v. Doe*, No. C-920809, 1994 WL 79555 (Ohio Ct. App. Mar. 16, 1994), *rev'd*, *Doe v. Doe*, 639 N.E.2d 432 (Ohio 1994); *Doe v. Doe*, 878 P.2d 1161 (Utah Ct. App. 1994); *Doe v. Roe*, 596 N.Y.S.2d 620 (App. Div. 1993).

127. See, e.g., *Doe v. Roe*, 841 F. Supp. 444 (D.D.C. 1994); *Doe v. Roe*, 598 N.Y.S.2d 678 (J. Ct. 1993); *Doe v. Roe*, 267 Cal. Rptr. 564 (Ct. App. 1990).

128. See *Doe v. Roe*, 551 N.Y.S.2d 75 (App. Div. 1990).

129. See *Doe v. Doe*, 421 S.E.2d 913 (Va. Ct. App. 1992).

130. See *Doe v. Roe*, 958 F.2d 763 (7th Cir. 1992).

131. See *Doe v. Roe*, 599 N.Y.S.2d 350 (App. Div. 1993); *Doe v. Roe*, 444 N.W.2d 437 (Wis. Ct. App. 1989).

cases, the courts' permission of the use of pseudonyms is usually implicit, as courts mention the use of pseudonyms only in passing,¹³² in a footnote,¹³³ or not at all.¹³⁴ As a result, little guidance exists for future courts and litigants regarding what qualifies as a sufficient reason for granting anonymity.¹³⁵

The cases featuring anonymous defendants that contain some discussion of the propriety of the defendant's request for anonymity¹³⁶ are cases involving either a defendant corporation¹³⁷ or a juvenile defendant.¹³⁸ For example, in *Doe v. A Corp.*,¹³⁹ the Fifth Circuit Court of Appeals noted in a footnote that the district court had granted the defendant corporation's motion to proceed anonymously in order to prevent the disclosure of confidential information concerning the corporation.¹⁴⁰ In *A Corp.*, the plaintiff, a former in-house counsel to

132. See, e.g., *Suppressed v. Suppressed*, 565 N.E.2d 101, 102 (Ill. App. Ct. 1990) (mentioning that the caption appeared as it did due to the trial court's granting of the defendant's motion seeking to impound the court record and to have both parties in the case proceed anonymously). *Suppressed* involved allegations by a woman plaintiff claiming that her attorney in her divorce action had "psychologically coerced" her into having sexual relations with him, in violation of his fiduciary duty. *Id.*

133. See *Prudential Ins. Co. v. Doe*, 76 F.3d 206, 207 n.2 (8th Cir. 1996) (mentioning in a footnote that the "Doe" names were pseudonyms); *Doe v. Roe*, 841 F. Supp. 444, 446 n.4 (D.D.C. 1994) (noting in a footnote that the complaint and other documents containing confidential material had been sealed to protect the privacy of the parties); *Doe v. Roe*, 267 Cal. Rptr. 564, 565 n.1 (Cal. Ct. App. 1990) (noting in a footnote: "By stipulation of the parties and order of this court the parties have been designated by fictitious names to protect their privacy."); *Doe v. Roe*, 400 N.Y.S.2d 668, 671 n.1 (Sup. Ct. 1977) (mentioning in a footnote that the file had been sealed and pseudonyms had been used in the title and in other documents).

134. See, e.g., *Doe v. Roe*, 958 F.2d 763 (7th Cir. 1992) (involving claims of improper sexual inducement by a divorce attorney with no mention in the opinion of the use of pseudonyms); *Doe v. Roe*, 345 N.Y.S.2d 560 (Sup. Ct. 1973) (involving the unauthorized release of confidential information with no mention of the use of pseudonyms); *Doe v. Roe*, 598 N.Y.S.2d 678 (J. Ct. 1993) (involving sexually transmitted diseases with no mention of the use of pseudonyms).

135. See *supra* notes 123-34 and accompanying text (featuring anonymous parties, but failing to articulate any reason for the pseudonyms).

136. Even these discussions are brief and do not discuss the standards or factors that courts should consider in ruling upon these anonymity requests. See *infra* notes 138-50 and accompanying text.

137. See Steinman, *supra* note 11, at 81 (noting that defendant corporations often request pseudonym status in order to protect confidential information from being revealed). See *infra* notes 139-42 and accompanying text (discussing *Doe v. A Corp.*).

138. See Steinman, *supra* note 11, at 63 (noting that juveniles make up one of the categories of cases in which parties request pseudonyms, and that the pseudonymous party is usually the defendant, rather than the plaintiff).

139. 709 F.2d 1043 (5th Cir. 1983).

140. See *id.* at 1045 n.1. The court stated:

To prevent identification of the company and the possible disclosure of confidential information concerning its affairs, the district court granted the

"A Corp.," brought an action against the corporation for benefits allegedly due to him pursuant to the company's pension and life insurance plans.¹⁴¹ Defendant "A Corp" then moved to seal the record and require the suit to be continued anonymously.¹⁴²

The few other examples where the court has given some justification for the use of pseudonyms for defendants involve criminal cases,¹⁴³ most of which concern juvenile offenders.¹⁴⁴ For example, in *United States v. Doe*,¹⁴⁵ the Ninth Circuit Court of Appeals sanctioned the district court's granting of the defendant's motion to protect his identity because the defendant was a government witness, serving a long prison sentence.¹⁴⁶ The court recognized that the use of the pseudonym could protect the defendant from potential bodily harm if other inmates were to discover his cooperation with the government.¹⁴⁷ In another case captioned "*United States v. Doe*,"¹⁴⁸ the Sixth Circuit Court of Appeals sanctioned the use of a pseudonym for the defendant-appellant who had moved pursuant to the Federal Youth Corrections Act to have his record of conviction expunged.¹⁴⁹ The court noted that the use of the pseudonym was approved to prevent unnecessary dissemination of information regarding the juvenile's conviction that had been set aside.¹⁵⁰

defendant corporation's motion to seal the record; require the suit to be prosecuted without revealing the name of either the lawyer or the corporation; and enjoin Doe and his co-counsel from pursuing any actions arising out of the facts on which his suits were based, communicating with other persons to induce them to bring a similar action, and disclosing or using any information Doe gained during his employment by the corporation.

Id.

141. *See id.* at 1044-45.

142. *See id.* at 1045.

143. *See infra* notes 145-50 and accompanying text.

144. Protecting the confidentiality of juvenile offenders serves a two-fold purpose: (1) to avoid stigmatizing the juvenile, and (2) to encourage rehabilitation. *See Steinman, supra* note 11, at 64.

145. 655 F.2d 920 (9th Cir. 1980).

146. *See id.* at 922 n.1. The original opinion did not contain pseudonyms. Once the decision was made to publish the opinion, however, the defendant moved for anonymity to protect his identity. *See id.*

147. *See id.* The court, in a detailed footnote, identified the situations warranting the granting of anonymity, concluding that pseudonyms were often utilized to protect the party from "harassment, injury, ridicule or personal embarrassment . . ." *Id.* The court then concluded that the defendant had presented the "unusual case" warranting anonymity. *Id.*

148. *United States v. Doe*, 556 F.2d 391 (6th Cir. 1977).

149. *See id.* at 393. The court recognized the use of the pseudonym at the end of the opinion. *See id.*

150. *See id.*; *see also United States v. Indian Boy X*, 565 F.2d 585, 587 n.4 (9th Cir.

B. Defendants' Pleas for Secrecy Stifled

In recent years, three state courts have directly addressed the propriety of granting defendants anonymity. All three courts followed a balancing test and ultimately denied the defendants' requests.

1. *Doe v. Diocese Corp.*

In one of the first cases to directly address the propriety of a defendant's request for anonymity, a Connecticut state court denied anonymity to a clergyman accused of sexual abuse.¹⁵¹ In *Doe v. Diocese Corp.*, both the plaintiff and the defendants moved for protective orders to shield their identities in the case.¹⁵² The plaintiff, claiming to have been the victim of sexual abuse by a clergyman,¹⁵³ requested anonymity, fearing shame and humiliation from public exposure of his abuse.¹⁵⁴ The defendant clerical institutions sought anonymity on behalf of both the institutions and the clergyman accused of the abuse,¹⁵⁵ arguing that the unproven and serious allegations of sexual abuse would undermine the public trust necessary for the proper operation of their schools, social service programs, and fundraising activities.¹⁵⁶

The Connecticut Superior Court addressed each of the parties' requests for anonymity separately, noting that the granting of anonymity to one party did not necessarily warrant the granting of anonymity to the other party.¹⁵⁷ The court then adopted a balancing

1977) (permitting the use of the pseudonym in an effort to "protect the identity of the appellant in the spirit of the Juvenile Delinquency Act").

151. See *Doe v. Diocese Corp.*, 647 A.2d 1067, 1075 (Conn. Super. Ct. 1994).

152. See *id.* at 1070. Each party requested to proceed anonymously, at least until the time of jury selection, when the trial judge would reassess the propriety of continuing the use of pseudonyms. See *id.*

153. See *id.* at 1068. This alleged sexual abuse first occurred when the plaintiff was twelve and continued for a period of twelve years. See *id.* The plaintiff claimed that in addition to the "hundreds" of acts of abuse, the clergyman also supplied him with alcohol and marijuana during his high school years. *Id.*

154. See *id.* at 1069. The plaintiff testified to paying for his own therapy in an effort to keep his employer from learning of his prior sexual abuse and his drug and alcohol abuse as a minor. See *id.* In addition, the plaintiff's therapist testified that public revelation of the plaintiff's identity "would result in the plaintiff having to spend a tremendous amount of time in overcoming his feelings of shame and humiliation as opposed to seeing himself rather as a person who has been hurt by a perpetrator." *Id.*

155. See *id.* The institution sought to be identified as the "W church corporation." *Id.* Anonymity was requested for the clergyman in order to shield the identity of the institution for which he worked. See *id.*

156. See *id.*

157. See *id.* at 1073. The court noted that a "quid pro quo" analysis was not appropriate when trying to weigh a party's request for anonymity against the public's

test, reviewing each case for anonymity in light of the public's interest in open court proceedings.¹⁵⁸

Although the court granted the plaintiff's request for anonymity,¹⁵⁹ the court ultimately denied the defendants' request, stressing the public's overriding interest in the operation of a large religious organization.¹⁶⁰ Although the court placed primary emphasis on the public's right to know, its analysis was similar to the analysis conducted in conjunction with the plaintiff's request.¹⁶¹ First, the court noted that an institution, unlike a private person, cannot claim harm to a substantial privacy interest.¹⁶² Second, the court advanced a "slippery-slope" argument, noting that any charitable or religious institution brought into court could request anonymity based upon potential harm to its activities.¹⁶³ Third, the court noted that the church failed to provide adequate proof of the potential damage that could result from the disclosure of its name.¹⁶⁴

interest in open access to the courts. *Id.*

158. *See id.* at 1070. The court did note, however, that the right to know the identity of the parties is not "perfectly symmetrical" with the right to attend trials. *Id.* at 1071 (quoting *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981)). "[P]seudonym status neither obstructs nor interferes with the public's view of the 'issues joined or the court's performance in resolving them.'" *Id.* (quoting *Stegall*, 653 F.2d at 185). However, the court recognized that the request to proceed under a pseudonym did implicate "important rights that the public has to full access to information about court proceedings." *Id.*

159. *See id.* at 1072. The court granted the plaintiff anonymity in light of the intimate and personal nature of his past sexual abuse, the fact that the abusive relationship involved the illegal use of drugs and alcohol, and the fact that the plaintiff expressed real concern for the potential shame and humiliation that would result from public exposure. *See id.* at 1074.

160. *See id.* at 1074. "It seems to the court that the public has an interest in the functioning and operation of large religious or charitable institutions whose activities in some cases, such as here, affect the lives of thousands of people." *Id.* The *Diocese Corp.* court analogized the situation of the religious institution's request for anonymity to the request mounted by a state judge in *Doe v. United States Department of Justice*, 93 F.R.D. 483 (D. Colo. 1982). *See id.* In *United States Department of Justice*, the court denied the judge's request, noting that "the public interest in the conduct of its business by public officials is of paramount importance." *United States Dep't of Justice*, 93 F.R.D. at 484.

161. *See Diocese Corp.*, 647 A.2d at 1073-74 (discussing the factors involved in the court's decision to refuse the defendants pseudonym status). *See supra* notes 78-119 and accompanying text (detailing the factors for the courts' consideration in a plaintiff anonymity analysis).

162. *See Diocese Corp.*, 647 A.2d at 1073.

163. *See id.* at 1074. The court expressed the following concerns: "Should the protection be granted to cases where sexual or racial discrimination is alleged? Should the decision turn on the amount of charitable activity engaged in by the defendant institution; is a storefront church entitled to less protection than a larger religious institution?" *Id.*

164. *See id.* The court noted that the potential harm alleged by the defendants was

2. *T.S.R. v. J.C.*

Similar to the Connecticut court in *Diocese Corp.*, a New Jersey state court also refused to allow a minister to proceed anonymously in a case involving allegations of sexual abuse.¹⁶⁵ In *T.S.R. v. J.C.*, two plaintiffs brought an action for sexual abuse against their former minister, J.C., whom they claimed had sexually abused them from 1979 through 1982.¹⁶⁶ The defendant, J.C., moved the court to shield his identity, arguing that the case would release to the public meritless and baseless allegations that might damage his life, reputation, and family.¹⁶⁷ J.C. also claimed that the plaintiffs were improperly using the threat of public disclosure as an incentive to induce settlement.¹⁶⁸

At issue in the case was a New Jersey statute providing that the names and identities of both the victim and defendant in sexual abuse cases be kept confidential.¹⁶⁹ The court ultimately looked to the “true legislative intent” behind the statute to determine that the statute was primarily concerned with protecting the victim’s rights rather than those of the defendant sexual abuser.¹⁷⁰

Thus, despite the existence of a state statute explicitly providing for plaintiff and defendant anonymity, the court still refused to grant the defendant anonymity status.¹⁷¹ In its decision, the Superior Court of New Jersey placed much emphasis on the presumption of openness in judicial proceedings.¹⁷² In addition, the court reasoned that because

speculative as to both its nature and its extent. *See id.* Numerous allegations similar to those mounted against this church and diocese had been made in many states and communities, causing the harm that might result from the disclosure of this church’s name to be speculative. *See id.* Although the court ultimately refused to issue a protective order to the defendants, the court noted that the issue of a defendant institution requesting anonymity remained “unsettled,” due to the absence of cases addressing the propriety of defendants’ requests. *Id.* at 1075.

165. *See T.S.R. v. J.C.*, 671 A.2d 1068, 1076 (N.J. Super. Ct. App. Div. 1996).

166. *Id.* at 1070. The plaintiffs initiated their action under a New Jersey sexual molestation statute against the minister, J.C., and the church officials and hierarchy supervising J.C. *See id.* They claimed that they had been abused while they were between the ages of eleven and thirteen. *See id.*

167. *See id.* at 1074. Defendant J.C. requested an order that would require that the complaints be either dismissed or sealed, prohibit the plaintiffs from filing any other documents revealing his identity, and impose sanctions upon the plaintiffs. *See id.* at 1070.

168. *See id.* at 1074.

169. *See id.* at 1071.

170. *Id.* at 1071-72.

171. *See id.* at 1076.

172. *See id.* at 1072-75. The court noted that only juvenile proceedings and other “rare” cases warrant the withholding of the litigants’ identities. *Id.* at 1073. The court

J.C., a minister with a sense of responsibility to the public, had been accused of criminal activity, the public had a substantial interest in knowing his identity.¹⁷³ The court also considered a number of other policy factors that weighed against granting the defendant anonymity.¹⁷⁴ Like the *Diocese Corp.* court, the *T.S.R.* court relied on a "slippery-slope" argument, noting that the granting of a protective order in that instance would have comported with allowing all defendants accused of sexual abuse the right to proceed anonymously.¹⁷⁵ Additionally, the court noted that withholding the defendant's name actually might work to his detriment, overly persuading the jury of his guilt merely by virtue of shielding his name.¹⁷⁶ If the allegations mounted against J.C. ultimately proved meritless, the public nature of the records and proceedings would help contribute to his exoneration.¹⁷⁷ Finally, the court noted that revelation of the true names would ensure that no other individual or entity would be falsely accused of the allegations.¹⁷⁸

stressed the values of open proceedings, including the fact that they sharpen public scrutiny of the judicial process, increase confidence on the part of the public in the operation of the judiciary, enhance the value of judicial proceedings, and provide for informed discussion of judicial operations. *See id.* at 1074 (quoting Steinman, *supra* note 11, at 36).

173. *See id.* at 1074. Persons with responsibilities to the public, such as doctors and lawyers, have a "reduced expectation of privacy as to some matters because the public has a legitimate interest in their activities." *Id.* (quoting Steinman, *supra* note 11, at 84). The public has a great interest in knowing who has acted in a criminal manner, or who has violated professional ethics. *See id.* (citing Steinman, *supra* note 11, at 85).

174. *See id.* at 1075. In addition to policy considerations warranting against a grant of anonymity, the court also considered the fact that the church had already disseminated information to members of the congregation discussing the allegations, thus undermining the need for confidentiality from other members of the public. *See id.* at 1072.

175. *See id.* at 1074.

If, as J.C. suggests, these mere accusations are tantamount to an irreparable injury sufficient to outweigh the public's interest in open proceedings, then he is really asking us to effectively grant all defendants accused of sexual abuse in civil cases the right to defend anonymously, a result which hardly comports with a philosophy granting anonymity only in rare circumstances.

Id.

176. *See id.* at 1075. The court stated, "[the] [d]efendant might well be . . . perceived as a wrongdoer by the very fact of anonymity alone." *Id.* (quoting *A.B.C. v. XYZ Corp.*, 660 A.2d 1199, 1204 (N.J. Super. Ct. App. Div. 1995)).

177. *See id.*

178. *See id.* "[D]isclosure eliminates the danger that individuals or entities not connected with the litigation might be wrongfully perceived as involved and damaged by insinuation." *Id.*

3. *Doe v. Doe*

Another public figure was refused anonymity in a sexual molestation case when the Illinois Appellate Court ruled that a defendant-attorney accused of sexual molestation did not demonstrate a privacy interest sufficient to justify shielding his identity from public scrutiny.¹⁷⁹ In *Doe v. Doe*, the plaintiff, niece of the defendant, brought an action that accused the defendant of sexually molesting her from 1987 through 1993 while she was a minor.¹⁸⁰ The defendant requested an order prohibiting the plaintiff from disclosing his name in the pleadings, relying on section 2-401(e) of the Illinois Code¹⁸¹ that provides parties with the option of appearing under fictitious names for "good cause shown."¹⁸² The defendant argued that the plaintiff was improperly using the threat of disclosure as inducement to settle, and that revelation of his true identity would result in embarrassment, humiliation, and harm to his reputation and family.¹⁸³

Because neither the legislative history nor case law defined what constituted "good cause" as required by section 2-401(e),¹⁸⁴ the court looked to case law from both Illinois and other state and federal courts to determine whether the defendant should have been allowed to proceed anonymously.¹⁸⁵ The court ultimately adopted a balancing test similar to that used in other jurisdictions to evaluate the propriety of the defendant's request.¹⁸⁶

179. *See Doe v. Doe*, 668 N.E.2d 1160, 1168 (Ill. App. Ct.), *appeal denied*, 675 N.E.2d 632 (Ill. 1996). The Illinois Supreme Court refused to hear John Doe's appeal, letting the decision of the appellate court stand. *See Doe v. Doe*, 675 N.E.2d 632 (Ill. 1996).

180. *See Doe v. Doe*, 668 N.E.2d at 1162.

181. *See* 735 ILL. COMP. STAT. 5/2-401(e) (West 1992). *See supra* note 64 (providing the text of section 5/2-401(e)).

182. *Doe v. Doe*, 668 N.E.2d at 1162. Although the plaintiff initially filed the complaint under fictitious names at the defendant's request, she later moved to have the pleadings bear her correct name. *See id.*

183. *See id.* John Doe's motion alleged that "disclosing John Doe's true name or identity would cause defendant embarrassment, humiliation and detriment to his reputation in the community and profession" and "would cause severe and permanent damage to defendant's wife and . . . children." *Id.* (quoting defendant's *ex parte* emergency motion requesting an order prohibiting the plaintiff from disclosing the defendant's name in any pleadings filed).

184. *See id.* at 1164, 1167. The court noted that since the provision's passage in 1987, no Illinois case had interpreted section 2-401(e). *See id.* at 1164. Additionally, the legislative history surrounding House Bill 474, in which subsection (e) was proposed, did not mention the meaning of "good cause." *See id.* at 1167.

185. *See infra* notes 187-190 and accompanying text.

186. *See Doe v. Doe*, 668 N.E.2d at 1167.

Illinois case law revealed that although some courts have allowed anonymous parties in the past, many failed to explicitly explain their rationale in permitting the use of pseudonyms.¹⁸⁷ The court then looked to the federal system, recognizing that anonymity has been granted by the federal courts in circumstances involving substantial privacy interests.¹⁸⁸ The court ultimately relied on both *Diocese Corp.* and *T.S.R.*, adopting much of the New Jersey court's reasoning in *T.S.R.*¹⁸⁹ Following *T.S.R.*, the *Doe v. Doe* court failed to find that Doe had illustrated the "good cause" or any kind of protectable privacy interest, sufficient to justify him proceeding under a fictitious name.¹⁹⁰

Similar to the *T.S.R.* court, the *Doe v. Doe* court advanced a "slippery slope" argument, noting that, because any professional named in a civil suit could assert harm to reputation, the defendant had failed to distinguish himself from any other individual sued for

187. See *id.* at 1164. The court looked to the court's opinion in *Doe v. Lutz*, where the only mention of the use of the pseudonym was in a footnote to the caption, which stated: "'Throughout this opinion, we use for plaintiffs' actual names the pseudonyms under which these cases were filed Plaintiffs . . . requested anonymity based upon a concern for 'Richard's' present mental condition. We have opted to honor that request.'" *Id.* (quoting *Doe v. Lutz*, 668 N.E.2d 564, 564 n.1 (Ill. App. Ct.), *appeal denied*, 671 N.E.2d 729 (Ill. 1996)).

The court then looked to the brief justification for the use of pseudonyms found in *Suppressed v. Suppressed*, where the court stated:

Prior to the filing of plaintiff's complaint, defendants filed a suit in chancery to obtain an order requiring that the complaint in this case be filed without revealing the names of the parties and that the court record be impounded. Such an order was obtained *ex parte* For this reason the case has proceeded under the above caption rather than the actual names of the parties.

Id. (quoting *Suppressed v. Suppressed*, 565 N.E.2d 101, 102 (Ill. App. Ct. 1990)).

188. See *id.* at 1164-65. The court noted that federal courts grant anonymity only in "exceptional" cases where the presumption of openness in judicial proceedings is outweighed by a substantial privacy interest. *Id.* at 1165. The court noted that anonymity had been granted in situations involving abortion, homosexuality, mental illness, transsexuality, and religion, but not in situations where only embarrassment or economic well-being were at stake. See *id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973); *Coe v. United States Dist. Court*, 676 F.2d 411 (10th Cir. 1992); *Doe v. Frank*, 951 F.2d 320 (11th Cir. 1982); *Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981); *Southern Methodist Univ. Ass'n. v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979); *Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979); *Doe v. McConn*, 489 F. Supp. 76 (S.D. Tex. 1980); *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976)).

189. See *id.* at 1165-67. The court noted that Doe's arguments were "virtually identical" to those presented by the minister in *T.S.R. v. J.C.*, 671 A.2d 1068, 1072-75 (N.J. Super. Ct. App. Div. 1996). *Id.* at 1167.

190. *Id.* The court held that the "damage caused by these allegations to defendant's reputation, personally or professionally" could not amount to a "protectable privacy interest." *Id.*

damages.¹⁹¹ Additionally, the court noted that the interests of victims of sexual abuse differ substantially from those of the abuser.¹⁹² The court stressed that the public's need to know who has been accused of sexual abuse is greater than the need to know who has been a victim of sexual abuse.¹⁹³

The court in *Doe v. Doe* also noted that because the defendant in the case was a prominent Chicago attorney, other practical concerns might arise if the defendant were allowed to proceed anonymously.¹⁹⁴ First, the court noted that shielding the defendant's identity would make it difficult for the trial judge and other members of the court to determine whether or not to recuse him or herself.¹⁹⁵ Additionally, if the allegations proved true, the defendant then would be subject to criminal investigations¹⁹⁶ and disciplinary investigations by the Attorney Registration and Disciplinary Commission.¹⁹⁷ Finally, the court noted that revealing the defendant's identity would assure that no one else would be wrongly perceived as the defendant.¹⁹⁸

IV. ANALYSIS

The uncertain standards guiding plaintiff anonymity, policy considerations favoring open judicial proceedings, and the courts'

191. *See id.*

It seems to this court that any doctor sued for medical malpractice, any lawyer sued for legal malpractice, or any individual sued for sexual molestation can assert that the plaintiff's allegations will cause harm to his reputation, embarrassment and stress among his family members, and damage to his business as a result of the litigation.

Id.

192. *See id.*

193. *See id.*

194. *See id.* at 1168.

195. *See id.* at 1167.

196. *See id.* at 1168. The court noted that the parties were in disagreement as to whether a criminal investigation that had been commenced was still ongoing. *See id.*

197. *See id.*

198. *See id.* The court stated,

[W]ith the parties having already revealed that defendant is plaintiff's uncle by marriage, a lawyer in the Chicago area, and the subject of a past or current criminal investigation, full disclosure of both parties' names eliminates the possibility that some other individual may be wrongly perceived as accused or involved in this litigation.

Id.

Ultimately, the court reversed and remanded the case, thus allowing the plaintiff leave to file an amended complaint, substituting the parties' real names in place of the pseudonyms. *See id.*

most recent decisions refusing to grant defendants anonymity all point to a bleak future for defendant-requested anonymity.

A. Problems Facing Both Plaintiff and Defendant Anonymity

1. Practical Concerns

Multiple practical considerations arise when plaintiffs are granted anonymous status.¹⁹⁹ Courts have been concerned that the presence of a pseudonymous plaintiff will hinder judicial processes such as discovery,²⁰⁰ motion practice,²⁰¹ jury selection,²⁰² execution to enforce money judgments,²⁰³ and fixing *res judicata*.²⁰⁴ In addition, an unidentified plaintiff impedes the defendant's ability to establish his defenses,²⁰⁵ counterclaims,²⁰⁶ and privileges,²⁰⁷ and to impeach the plaintiff's credibility.²⁰⁸ Although many of these practical concerns can be resolved through such methods as disclosure among the parties or identification *in camera* to the court,²⁰⁹ they cannot remedy the fact that the presence of pseudonyms conflicts with the public's constitutionally protected right to know,²¹⁰ and the firmly embedded

199. See *infra* notes 200-08 and accompanying text.

200. See *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir. 1979); *Free Mkt. Compensation v. Commodity Exch., Inc.*, 98 F.R.D. 311, 313 (S.D.N.Y. 1983); *T.S.R. v. J.C.*, 671 A.2d 1068, 1072 (N.J. Super. Ct. App. Div. 1996); *A.B.C. v. XYZ Corp.*, 660 A.2d 1199, 1201 (N.J. Super. Ct. App. Div. 1995).

201. See *T.S.R.*, 671 A.2d at 1073; *A.B.C.*, 660 A.2d at 1199.

202. See *T.S.R.*, 671 A.2d at 1073; *A.B.C.*, 660 A.2d at 1204 (noting that voir dire jury selection would require the revelation of the names in open court).

203. See *T.S.R.*, 671 A.2d at 1073; *A.B.C.*, 660 A.2d at 1201.

204. See *Coe v. United States Dist. Court*, 676 F.2d 411, 415 (10th Cir. 1982); *Lindsey*, 592 F.2d at 1125; *Doe v. Rostker*, 89 F.R.D. 158, 162 (N.D. Cal. 1981); *Roe v. Ingraham*, 364 F. Supp. 536, 541 n.7 (S.D.N.Y. 1973).

205. See *Coe*, 676 F.2d at 415; *Lindsey*, 592 F.2d at 1125; *Free Mkt. Compensation*, 98 F.R.D. at 313.

206. See *Free Mkt. Compensation*, 98 F.R.D. at 313.

207. See *id.*

208. See *James v. Jacobson*, 6 F.3d 233, 241 (4th Cir. 1993).

209. See *Bagnall*, *supra* note 68, at 549 n.221. Amendments to a complaint or protective orders could also serve to eliminate some of the procedural difficulties by revealing to the court and the defendant the identities of the parties, while still shielding them from the public. See *id.* See also *Roe v. New York*, 49 F.R.D. 279, 281 (S.D.N.Y. 1970) (noting that once an action has been commenced by the filing of a complaint with the true identities of the parties revealed, the names of the parties could be protected by an amendment or protective order).

210. See *Free Mkt. Compensation*, 98 F.R.D. at 313. The *Free Mkt. Compensation* court rejected the plaintiff's offer to reveal John Doe's identity *in camera*, noting that it is the public, not the court, which has an interest in the disclosure of the parties' identities. See *id.* "The public's interest in an open judicial process is no more served by an *in camera* disclosure than by the use of the pseudonym itself." *Id.*

practice of disclosing the identities of the parties upon commencement of the lawsuit.²¹¹

2. The Importance of the Public's Right of Access

"Typically, participants in the legal system cannot treat the courtroom as a masquerade ball, lowering their masks and revealing their faces only when it suits them."²¹² Despite the fact that the number of cases in which anonymity has been requested and granted by the court has increased steadily over the past thirty years,²¹³ opposition to pseudonymous litigation remains strong.²¹⁴ Many believe that the whole idea of anonymous litigation squarely conflicts with the constitutionally protected presumption of openness in judicial proceedings.²¹⁵ Some believe that if a plaintiff chooses to bring her action in court, then she consequently forfeits her privacy interests by opting for a public forum.²¹⁶

"Anonymous litigation" is all but an oxymoron in our system, as litigation American-style is a quintessentially public act. For the plaintiff, it reflects a decision to forego private means of dispute resolution . . . in favor of a public, governmental arena. For the defendant, it means disclosure of what had been private grievances—often personal and thoroughly embarrassing—to the glare of public scrutiny. For both sides, the commencement of civil litigation has historically meant the end of privacy.²¹⁷

For example, the trial judge in *Doe v. Bodwin*,²¹⁸ a case involving allegations of sexual abuse committed by a psychologist, refused to

211. See Steinman, *supra* note 11, at 18. See also *supra* notes 22-30 and accompanying text (discussing the presumption of openness in American judicial proceedings).

212. Ken Armstrong & Laurie Cohen, *Abuse Case Puts a Noted Name on Trial*, CHI. TRIB., Aug. 18, 1996, § 1, at 9 (noting that the use of pseudonyms is normally reserved for minors and for adults when the issues litigated involve "highly personal matters").

213. See *supra* notes 31-48 and accompanying text.

214. See generally Steinman, *supra* note 11, at 18-35 (discussing the concerns raised by pseudonymous litigation).

215. See, e.g., *id.* at 18.

216. See, e.g., *Doe v. Shakur*, 164 F.R.D. 359, 361 (S.D.N.Y. 1996). "[P]laintiff has chosen to bring this lawsuit. She has made serious charges and has put her credibility in issue. Fairness requires that she be prepared to stand behind her charges publicly." *Id.* See also Steinman, *supra* note 11, at 33. "Those who oppose pseudonymous litigation argue that a plaintiff, by initiating litigation, automatically waives any right to keep his identity confidential from the public, his adversary, or the court." *Id.* The normal procedure for commencing an action is to identify oneself in front of the court, the adversary, and the public at large. See *id.*

217. Scott L. Winkelman, *Keeping Confidences*, THE RECORDER, Aug. 28, 1995, at 6, available in LEXIS, News Library, Recrdr File.

218. 326 N.W.2d 473 (Mich. Ct. App. 1982).

allow the plaintiff to proceed anonymously,²¹⁹ stating, "I would hate to think that anybody can come into our courts . . . with a hood over their face and make accusations against other people" ²²⁰ Although this trial court's decision was ultimately overturned on appeal as an abuse of discretion,²²¹ other courts have adopted similar reasoning, recognizing that fairness considerations often weigh heavily against granting a party anonymous status.²²²

Even though concerns about privacy have been increasing, the public's right to know usually outweighs these privacy interests.²²³ Courts have held consistently that the identities of the parties are among the facts that the public has a right to know.²²⁴ Additionally, shielding the identities of the litigants from the public's view undermines some of the policy values served by open access to judicial proceedings.²²⁵ Although not all the benefits derived from an open judicial process are harmed by the use of pseudonyms,²²⁶ many of the

219. *See id.* at 475. In *Bodwin*, the plaintiff, who claimed that her psychologist had sexual intercourse with her during therapy, sought anonymity for fear that publicity surrounding her case would jeopardize her emotional stability. *See id.* at 474-75.

220. *Id.* at 476. The trial judge stressed that coming into the courtroom meant coming into a "public theater" where it would be unfair to allow plaintiffs to proceed anonymously. *See id.*

221. *See id.* The court recognized that a proper exercise of discretion might have led to the granting of the plaintiff's motion for a protective order. *See id.*

222. *See Doe v. Shakur*, 164 F.R.D. 359, 361 (S.D.N.Y. 1996) (noting that because the plaintiff had put her credibility in question with her serious allegations, fairness required that she assert her allegations publicly); *see also* Southern Methodist Univ. Ass'n v. Wynne & Jaffe, 599 F.2d 707, 713 (5th Cir. 1979) ("Basic fairness dictates that those among the defendants' accusers who wish to participate in this suit as individual party plaintiffs must do so under their real names.").

223. *See* Joel R. Brandes & Carole L. Weidman, *Privacy: Whose Right Is It Anyway?*, N.Y. L.J., Oct. 24, 1995, at 3. Despite the fact that "sensational reporting" has led to concerns on the part of the "victimized," the public's right to know "ordinarily outweighs the privacy of individuals." *Id.* *See also* Mark Lawson, *The Visible Price of Fame*, INDEPENDENT (London), Mar. 7, 1995, at 17. "For 'anonymity' and 'silence' are dead concepts in our culture, disappearing from the legal system and gone completely from general living." *Id.*

224. *See Shakur*, 164 F.R.D. at 361; *Doe v. Rostker*, 89 F.R.D. 158, 162 (N.D. Cal. 1981); *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. 1974); *see also* Free Mkt. Compensation v. Commodity Exch., Inc., 98 F.R.D. 311, 313 (S.D.N.Y. 1983) (noting that it is the public that has an interest in knowing the identities of the parties rather than the court).

225. *See* Steinman, *supra* note 11, at 18-19.

226. *See Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981).

The equation linking the public's right to attend trials and the public's right to know the identity of the parties is not perfectly symmetrical. The public right to scrutinize governmental functioning (citation omitted) is not so completely impaired by a grant of anonymity to a party as it is by closure of the trial itself. Party anonymity does not obstruct the public's view of the

other benefits of public observation of court proceedings are hindered if the public does not have knowledge of the parties' identities.²²⁷ First, the community is not able to scrutinize the participants' conduct in the litigation in the manner it would were the identities known.²²⁸ Not knowing the identity of the parties also impedes the public's ability to investigate whether bias or corruption played a part in the litigation.²²⁹ Third, the public's confidence in the judicial system,²³⁰ as well as the therapeutic value served by open proceedings, might be compromised by keeping a party's identity secret.²³¹

3. Unclear Guidelines

Due to the hesitancy in granting plaintiffs anonymity²³² and the fact that the decision is left in the trial court's discretion,²³³ no clear rule has developed with regard to requests for anonymity.²³⁴ For example,

issues joined or the court's performance in resolving them.

Id. See also Steinman, *supra* note 11, at 18 (noting that "[t]he public and press are as free to attend, observe, and report the courtroom proceedings in pseudonymous litigation as they are in any other litigation").

227. See Steinman, *supra* note 11, at 16-20. Steinman notes that in addition to contradicting the tradition of identified parties, anonymous litigation undermines many of the values served by open judicial proceedings. See *id.* at 18. Open civil proceedings serve the following purposes: (1) the presence of spectators serves as a safeguard against judicial abuses of power and assures litigants a fair determination of the facts; (2) open proceedings improve the quality of testimony, discouraging perjury, and encouraging witnesses to come forward; (3) open proceedings build confidence and respect in judicial operations; and (4) open proceedings serve a therapeutic value for the community. See *id.* at 16-17.

228. See *id.* If the party is a public figure, the community might be more inclined to scrutinize his or her activities, assuring fairness throughout the proceeding. See *id.* If the names are kept confidential, the public would be unable to conduct this extra scrutiny. See *id.* See also *Doe v. United States Dep't. of Justice*, 93 F.R.D. 483, 484 (D. Colo. 1982) (noting that because Doe was a public figure, the public had a greater interest in knowing about his conduct).

229. See Steinman, *supra* note 11, at 19.

230. See *id.* The fairness of the proceeding may be undermined if the public suspects that the secret identity of the party played a role in the outcome of the case. See *id.*

231. See *id.*

232. Most courts recognize that anonymity should only be granted in rare, unusual, or exceptional cases. See, e.g., *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir. 1979) (recognizing that allowing a plaintiff to proceed anonymously is "an unusual procedure" that should only be utilized to protect an important privacy interest); *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. 1974) ("We think that as a matter of policy the identity of the parties to a lawsuit should not be concealed except in the unusual case.").

233. See *Lindsey*, 592 F.2d at 1125.

234. See *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981) ("We advance no hard and fast formula for ascertaining whether a party may sue anonymously."). See also *supra* notes 78-119 and accompanying text (discussing the various factors courts consider in

*Doe v. Diocese Corp.*²³⁵ held that the stigma attached to being the victim of sexual abuse was sufficient to warrant anonymous status,²³⁶ whereas *Doe v. Shakur*²³⁷ held that it was not.²³⁸ *Gomez v. Buckeye Sugars*²³⁹ held that fear of reprisals from employers for bringing a controversial lawsuit was enough to warrant anonymity,²⁴⁰ whereas *Southern Methodist University Ass'n v. Wynne & Jaffe*²⁴¹ held that it was not.²⁴² Some courts identify factors that should be weighed in the balancing test for determining the appropriateness of anonymity, but they do not identify which factors are the most important considerations or how the actual balancing test should take place.²⁴³ The most solid advice a future court could take from past anonymity cases is to utilize a balancing test, weighing all the varying considerations of the cases, and applying its "informed discretion" to reach a conclusion.²⁴⁴

B. Arguments for Defendant Anonymity

The future of defendant anonymity remains less clear than the future of plaintiff anonymity, due to the scant number of cases discussing the propriety of defendant anonymity and the fact that the recent trend of cases refuses to allow anonymity to public figures.²⁴⁵ However, none of the cases discussing either defendant or plaintiff anonymity has directly stated that the privilege of proceeding anonymously is to be afforded only to plaintiffs. The extensive number of cases featuring anonymous plaintiffs and defendants indicates that courts have been quite willing to grant defendants anonymous status in the past.²⁴⁶

weighing anonymity requests).

235. 647 A.2d 1067 (Conn. Super. Ct. 1994). See *supra* notes 151-64 and accompanying text (discussing *Diocese Corp.*).

236. See *Diocese Corp.*, 647 A.2d at 1072.

237. 164 F.R.D. 359 (S.D.N.Y. 1996).

238. See *id.* at 362.

239. 60 F.R.D. 106 (N.D. Ohio 1973).

240. See *id.* at 107.

241. 599 F.2d 707 (5th Cir. 1979). See *supra* notes 78-81 and accompanying text (discussing *Southern Methodist University*).

242. See *id.* at 713; see also *Doe v. Hallock*, 119 F.R.D. 640, 641-42, 645 (S.D. Miss. 1987) (refusing to allow an employee to proceed anonymously in her Title VII action against her employer for sexual harassment and discrimination).

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

244. *James v. Jacobson*, 6 F.3d 233, 242 (4th Cir. 1993).

245. See *supra* Part III (discussing the three most recent decisions regarding defendant anonymity, and prior case law illustrating situations where it has been granted, either implicitly or explicitly by the courts).

246. See *supra* notes 123-150 and accompanying text. Note that because little discussion is given as to the propriety of the courts' permission of the use of

Both *Diocese Corp.* and *Doe v. Doe* indicate that plaintiffs' and defendants' requests for anonymity are to be evaluated separately.²⁴⁷ Both cases held that the fact that the plaintiff has or has not been granted anonymity does not figure into the calculus where the defendant's request is concerned.²⁴⁸ Additionally, *Diocese Corp.*, *T.S.R. v. J.C.*, and *Doe v. Doe* all adopted a balancing test similar to that utilized by courts considering plaintiffs' requests for anonymity, weighing the defendants' interests in privacy against the public's right of access.²⁴⁹

Another factor in favor of defendant anonymity is the fact that fairness to the defendant has been a major consideration in many courts' decisions regarding plaintiff anonymity.²⁵⁰ Courts are not only concerned that the defendant's efforts would be hampered by shielding the identity of the plaintiff,²⁵¹ but they also are concerned that the defendant might suffer a disadvantage by having to defend against his claims publicly, while the plaintiff can hide behind a "cloak of anonymity."²⁵² Some courts fear that the mere presence of a

pseudonyms in these instances, these cases give little guidance to courts assessing defendant anonymity.

247. See *Doe v. Diocese Corp.*, 647 A.2d 1067, 1073 (Conn. Super. Ct. 1994).

Parties cannot agree between themselves as to whether one or both should have pseudonym status, and the fact that pseudonym status has been given to one party, does not mean that the other party is entitled to identical treatment. The court must make its determination by weighing the request for anonymity of each party separately against the public interest in open access to the courts.

Id. See also *Doe v. Doe*, 668 N.E.2d 1160, 1167 (Ill. App. Ct.), *appeal denied*, 675 N.E.2d 632 (Ill. 1996).

248. See *Diocese Corp.*, 647 A.2d at 1073 (noting that a "quid pro quo" analysis was not proper where each party's request must undergo a balancing test against the public's interest in access); *Doe v. Doe*, 668 N.E.2d at 1167.

249. See *Diocese Corp.*, 647 A.2d at 1072 (adopting a balancing test and relying on the standards set forth in plaintiff anonymity cases, including *Southern Methodist University Ass'n v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979), *Doe v. Hallock*, 119 F.R.D. 640 (S.D. Miss. 1987), and *Doe v. Rostker*, 89 F.R.D. 158 (N.D. Cal. 1981)); *T.S.R. v. J.C.*, 671 A.2d 1068, 1073 (N.J. Super. Ct. App. Div. 1996) (adopting a balancing test for defendant anonymity and relying on the precedent set for plaintiff anonymity in *Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981), *Doe v. Frank*, 951 F.2d 320 (11th Cir. 1992), and *A.B.C. v. XYZ Corp.*, 660 A.2d 1199 (N.J. Super. Ct. App. Div. 1995)); *Doe v. Doe*, 668 N.E.2d at 1165-67 (adopting a balancing test and relying on the courts' decisions in *Diocese Corp.*, 647 A.2d 1067, *T.S.R. v. J.C.*, 671 A.2d 1068 (N.J. Super. Ct. App. Div. 1996), and other plaintiff anonymity cases such as *Coe v. United States District Court*, 676 F.2d 411 (10th Cir. 1982)).

250. See *supra* note 78 and accompanying text.

251. See *supra* notes 200-208 and accompanying text (discussing the practical problems resulting from anonymous litigation, including an inability to complete discovery, establish defenses, or plead *res judicata*).

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

pseudonym might unfairly lend credence to the plaintiff's claims against the defendant.²⁵³ Thus, many courts follow the reasoning first set forth in *Southern Methodist University*, holding that basic fairness considerations dictate that plaintiffs making serious allegations against defendants must do so publicly.²⁵⁴ Courts have recognized that the defendant has a strong interest in knowing the identity of his accuser.²⁵⁵

Some argue that, in light of the courts' recognition that defendants often face serious accusations that could result in serious harm to their reputations and careers, defendants should be given the opportunity to remain anonymous.²⁵⁶ The stigmatization that could result from an accusation such as sexual abuse, might be so great that anonymity is warranted to protect the defendant's privacy interest until the allegations can be adjudicated in court.²⁵⁷ Even if the accusation is later withdrawn, or the defendant is exonerated, the emotional or psychological damage has already been done.²⁵⁸ One commentator has

253. See *A.B.C.*, 660 A.2d at 1204; see also *James v. Jacobson*, 6 F.3d 233, 240 (4th Cir. 1993) (noting that the district court stressed the fact that the jury might infer from the use of the pseudonyms that the plaintiff's claims against the defendant had merit).

254. See *Southern Methodist Univ.*, 599 F.2d at 713 ("[T]he mere filing of a civil action against other private parties may cause damage to their good names and reputation and may also result in economic harm. Basic fairness dictates that those among the defendants' accusers who wish to participate in this suit as individual party plaintiffs must do so under their real names."); *Hallock*, 119 F.R.D. at 644; *Free Mkt. Compensation v. Commodity Exch., Inc.*, 98 F.R.D. 311, 313 (S.D.N.Y. 1983).

255. See, e.g., *Doe v. Rostker*, 89 F.R.D. 158, 162 (N.D. Cal. 1981).

256. See generally *Milani*, *supra* note 7, at 1698-1707 (arguing that defendants accused of a stigmatizing intentional tort have a privacy interest sufficient to warrant a granting of anonymity).

257. See *id.* at 1698; see also *Roe v. Doe*, 28 F.3d 404, 409 (4th Cir. 1994) (K.K. Hall, J. concurring) (recognizing that corroboration of the plaintiff's claims of sexual abuse is necessary "in light of the stigma associated with even the accusation that an adult has sexually abused a child . . ."); *Roe v. Borup*, 500 F. Supp. 127, 130 (E.D. Wis. 1980) (allowing parents accused of sexual abuse to proceed anonymously in their action against the Department of Social Services due to the "personal and social harassment and embarrassment" that might result if their identities became known); *Armstrong & Cohen*, *supra* note 212, § 1, at 32 (noting that the defendant's attorney in *Doe v. Doe* had argued that the public accusation alone could destroy the defendant's reputation and hurt his family, resulting in social stigma, and that no valid purpose could be served by publicizing the allegations before they were deemed valid).

258. See *Memories May Be Recovered; Good Names Can't*, *supra* note 4, at 48. In reference to the false allegations against Joseph Cardinal Bernardin, the authors noted, "[T]he damage to his reputation has been done and the psychic hurt cannot be erased." *Id.*; see also *Bagnall*, *supra* note 68, at 556 (stressing the irreversibility of disclosure, arguing that "once the cat is out of the bag, it cannot be put back in").

In a letter written by a St. Louis Archdiocese priest recently accused of sexual abuse, the priest wrote:

suggested that, “[i]f the alleged act is so stigmatizing that a plaintiff/victim’s privacy interest requires the use of a pseudonym, is not being accused of committing that act even more stigmatizing to the alleged perpetrator?”²⁵⁹ Thus, fairness might require that a defendant should be allowed to proceed under a pseudonym in instances where the plaintiff has been allowed to do so.

C. Arguments Against Defendant Anonymity

Despite the arguments in favor of defendant anonymity, defendants might still face an almost insurmountable battle in their efforts to keep their identities confidential. First, defendants do not have the same concerns that face plaintiffs who wish to remain anonymous.²⁶⁰ Anonymous litigation initially sprung from a need on the part of plaintiffs to enable them to have their rights adjudicated in court, while still preserving their privacy interests.²⁶¹ Anonymous litigation encourages litigants, who might otherwise be deterred from exercising their right to sue for fear that they might be stigmatized or humiliated, to bring their cases to court.²⁶² Defendants cannot seek anonymous litigation for this reason because they are not exercising their right to sue, but are being sued.

Although all three cases directly addressing defendant-requested anonymity, *Diocese Corp., T.S.R.*, and *Doe v. Doe*, conducted a

I was deeply wounded, shocked and stunned when I learned last week that an anonymous lawsuit had been filed against me. Yes, the accuser is hiding behind the protective cloak of anonymity. The coward didn't even have the guts to put his own name on the lawsuit; but he made sure mine was displayed for everyone to see.

Letter from St. Louis priest to various members of the St. Louis Catholic community 1 (Sept. 19, 1996) (on file with the author). Note that this allegation was later withdrawn.

259. Milani, *supra* note 7, at 1698.

260. See *Doe v. Deschamps*, 64 F.R.D. 652, 653 n.1 (D. Mont. 1974) (“The problem of anonymous plaintiffs involves considerations entirely different from those involving ‘John Doe’ defendants.”).

261. See Steinman, *supra* note 11, at 33. Plaintiffs should not have to choose between asserting their substantive rights in court or forfeiting their privacy interests. See *id.*

262. For example, homosexuals might be deterred from challenging discrimination for fear that public knowledge of their homosexuality would lead to social stigmatization. See Bagnall, *supra* note 68, at 547. Thus, anonymity is necessary to allow them to “break out of a vicious cycle in which they do not protest legally cognizable injuries for fear of only making things worse and in which the failure to protest in turn leaves intact a system of extensive discrimination.” *Id.* See also *Bossier City Med. Suite, Inc. v. City of Bossier*, 483 F. Supp. 633, 644 (W.D. La. 1980) (noting “the chilling effect of publicly airing so private a matter as the decision to terminate a pregnancy may well preclude a pregnant woman from seeking vindication of her constitutional rights in Federal court”).

balancing test similar to that utilized by courts weighing plaintiffs' requests for anonymity, these three courts placed more emphasis on the public's right of access where defendant anonymity was at stake.²⁶³ All three courts stressed the public's overriding interest in knowing the activities of public figures,²⁶⁴ or the identities of those accused of wrongdoing.²⁶⁵ Because all three of the cases involved public figures, whether it was a minister or an attorney, about whom the public had a special interest in knowing, the courts ultimately found that the public's interest outweighed the defendants' privacy interests.²⁶⁶ Such public figures also might be the ones most likely to request anonymity to protect their reputations from public scrutiny.

Additionally, the only privacy interests the defendants could assert in *Doe v. Diocese Corp., T.S.R.*, or *Doe v. Doe* was harm to their reputations and personal embarrassment, both of which have been consistently rejected by the courts as not being sufficient privacy interests.²⁶⁷ Even courts that have recognized "fairness to the defendant" as a factor in their anonymity analyses did not suggest that both the plaintiffs and the defendants in the case should be allowed to proceed anonymously.²⁶⁸ Rather, stressing the public's interest in knowing all the facts, the courts refused to grant the plaintiffs' requests for anonymity and ordered both parties to proceed under their true names.²⁶⁹

263. See *supra* Part III.B.

264. See *Doe v. Diocese Corp.*, 647 A.2d 1067, 1074 (Conn. Super. Ct. 1994) (noting that the public has a special interest in the operation of large religious or charitable organizations); *T.S.R. v. J.C.*, 671 A.2d 1068, 1074 (N.J. Super. Ct. App. Div. 1996) (noting that public figures have a reduced expectation of privacy by virtue of their societal roles). Other cases also have noted that the public has a greater interest in knowing the activities of public figures. See *Coe v. United States Dist. Court*, 676 F.2d 411, 418 (10th Cir. 1982) (refusing to allow a doctor under investigation by the Colorado State Board of Medical Examiners to shield his identity because of the public's interest in knowing the facts of the proceedings of the Board); *Doe v. United States Dep't of Justice*, 93 F.R.D. 483, 484 (D. Colo. 1982) (denying anonymity to a state judge, arguing that the public had a great interest in the "conduct of its business by public officials").

265. See *Doe v. Doe*, 668 N.E.2d 1160, 1167 (Ill. App. Ct.) (recognizing that the public has a greater interest in knowing who has been accused of sexual abuse than in knowing who has been a victim), *appeal denied*, 675 N.E.2d 632 (Ill. 1996); *T.S.R.*, 671 A.2d at 1074 (noting that there is a greater public interest in knowing who may be a threat to the community, and in knowing who has been accused of criminal conduct).

266. See *supra* Part III.B.

267. See *supra* notes 91-98 and accompanying text.

268. *Southern Methodist Univ. Ass'n v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979); *Doe v. Shakur*, 164 F.R.D. 359, 361 (S.D.N.Y. 1996).

269. See *Southern Methodist Univ.*, 599 F.2d at 713.

Finally, policy considerations dictate against granting defendants anonymity. Both *T.S.R.* and *Doe v. Doe* advanced a “slippery-slope” argument against granting defendants anonymity, indicating that if embarrassment or harm to reputation or career was sufficient to warrant anonymity, almost any defendant could invoke such a privilege.²⁷⁰ Additionally, if the harm for which the defendant is accused is so substantial and stigmatizing, then the identity of the defendant would serve to prevent someone else from suffering the stigmatizing effects of being suspected of being the accused.²⁷¹ Finally, the adversary system is designed to adjudicate disputes with an ultimate determination of who is at fault and whether the claims are warranted.²⁷² The court in *T.S.R.* correctly noted that the design of the judicial system is such that a defendant who is accused of wrongdoing will be exonerated if he is found not guilty or not liable of whatever crime or tort of which he was accused.²⁷³ If a defendant receives publicity as a result of the accusation, he most likely will also receive publicity for his exoneration.²⁷⁴

V. PROPOSAL

Defendant-requested anonymity is a difficult issue to resolve, given the competing interests surrounding anonymous litigation in general.²⁷⁵ Anonymity serves as a “shield,” protecting the privacy interests of the vulnerable, while permitting them to have their disputes

270. See *T.S.R.*, 671 A.2d at 1074 (holding that the defendant had failed to demonstrate a protectable privacy interest because granting him anonymous status would comport with granting all defendants accused of sexual abuse the right to proceed anonymously); *Doe v. Doe*, 668 N.E.2d at 1167 (refusing to grant the defendant anonymity status, reasoning that anyone accused of malpractice or sexual molestation could assert harm to reputation, embarrassment, and harm to business as a result of the allegations).

271. See *Doe v. Doe*, 668 N.E.2d at 1167; *T.S.R.*, 671 A.2d at 1075; *A.B.C. v. XYZ Corp.*, 660 A.2d 1199, 1204 (N.J. Super. Ct. App. Div. 1995).

272. See Paul L. Haines, *Restraining the Overly Zealous Advocate: Time for Judicial Intervention*, 65 IND. L.J. 445, 447 (1990) (noting that the adversary system serves as a method of adjudicating disputes in an effort to “discern truth and justice”).

273. See *T.S.R.*, 671 A.2d at 1075. (“If the allegations are baseless, public records and public proceedings are, in part, designed to lead to public exoneration”).

274. See *Armstrong & Cohen*, *supra* note 212, at 9 (noting that both the allegations of sexual abuse against Cardinal Bernardin, as well as their ultimate withdrawal, were covered extensively by the press). By letting the facts and identities of the litigation be known, “people will be convicted or vindicated in the broad light of day.” *Id.* (quoting James Serritella, the attorney who defended Cardinal Bernardin against accusations of sexual abuse).

275. See *supra* Part IV.A.

settled in court.²⁷⁶ However, anonymity also might serve as a “sword,” providing the “manipulative” with a tool to abuse the legal system.²⁷⁷ Additionally, as the courts’ recognition of privacy interests is expanding,²⁷⁸ so is the public’s interest in knowing the facts of judicial proceedings.²⁷⁹ Even though the use of pseudonyms in litigation has been growing over the past thirty years, courts are still unclear as to what qualifies as a “substantial privacy interest” warranting granting the plaintiff anonymity,²⁸⁰ much less what qualifies as a sufficient interest to warrant granting the defendant anonymity.²⁸¹

The best approach to analyzing questions of defendant anonymity is to adopt a balancing test, weighing the defendant’s privacy interest against the constitutionally protected right of access to judicial proceedings.²⁸² This balancing test should be modeled on the

276. Shannon P. Duffy, *Defense Says ‘Doe’ Lied About Herpes; Seeking End To Anonymity*, LEGAL INTELLIGENCER, Feb. 14, 1996, at 1, available in LEXIS, News Library, Lglint File (arguing that “[a]nonymity . . . is a ‘necessary shield’ to protect the ‘truly vulnerable and innocent’”); see also *supra* notes 260-62 and accompanying text (arguing that litigants might not otherwise bring their actions to court for fear that revelation of their true identities would result in stigmatization or embarrassment).

277. Duffy, *supra* note 276, at 1 (“[F]or the manipulative and deceitful, anonymity can act as a sword, allowing those who would abuse our legal system to level the most outrageous claims with impunity while cloaking their case with the undeserved air of legitimacy”). See also *Doe v. Shakur*, 164 F.R.D. 359, 361 (S.D.N.Y. 1996) (noting that fairness considerations dictate that a plaintiff who makes serious allegations against a defendant should have to proceed with her identity known).

A pseudonymous plaintiff also might use the threat of disclosure as an improper inducement to coerce the defendant into settlement. See William S. Kleinman, *Who Is Suing You?: John Doe Plaintiffs in the Federal Courts*, 61 TEX. L. REV. 554-55 (1982) (noting that “the worthy defendant may avoid the courtroom and settle the suit merely to avoid damage to his reputation”). See also *Doe v. Doe*, 668 N.E.2d 1160, 1162 (Ill. App. Ct.) (noting that John Doe in *Doe v. Doe* had claimed that the plaintiff was using the threat of publicity as an inducement to settle), *appeal denied*, 675 N.E.2d 632 (Ill. 1996).

278. See *supra* note 48 and accompanying text.

279. See Brandes & Weidman, *supra* note 223, at 3 (noting that “high-profile cases” are leading to “sensational reporting,” triggering new interest in how much the public truly has a right to know). The authors conclude that “[w]hen all is said and done, the public’s right to know ordinarily outweighs the privacy of individuals.” *Id.*

280. See *supra* notes 90-119 and accompanying text (noting the various standards and balancing tests utilized by the courts in determining whether or not to grant plaintiffs anonymous status).

281. Because most cases featuring anonymous defendants contain little or no discussion as to the propriety of the use of the pseudonyms, the courts are left with little guidance as to what might justify defendant anonymity. See *supra* notes 121-50 and accompanying text.

282. See *supra* notes 74-119 and accompanying text (discussing the balancing test adopted by courts when analyzing plaintiff anonymity). See *supra* Part III.B (discussing the balancing test used in *Diocese Corp., T.S.R.*, and *Doe v. Doe*).

balancing tests conducted by prior courts analyzing both cases of plaintiff and defendant anonymity. Because open judicial proceedings promote responsible behavior in the courtroom,²⁸³ and because defendants do not share the same concerns as plaintiffs,²⁸⁴ the courts should weigh the public's right of access more heavily than they do with regard to plaintiff anonymity.²⁸⁵ Thus, as *Doe v. Diocese Corp.*, *T.S.R. v. J.C.*, and *Doe v. Doe* illustrate, if the defendant's only privacy interest is the fear of stigmatization or humiliation resulting from the allegations, the courts should find that the public's right to know prevails in the balancing test.²⁸⁶

Although defendants may have their own concerns, differing from those of plaintiffs, that they believe justify anonymity, they, unlike plaintiffs, have extra protections inherent in the judicial system.²⁸⁷ For

283. See Kleinman, *supra* note 277, at 554.

Like the ante in a poker game, forcing the plaintiff to stake his fear of embarrassment or retaliation against the defendant's good name guarantees that only serious players use the finite number of seats at the table. When the plaintiff puts his name on the pleadings, he assures the court that there is substance to his claim and thus provides the defendant with an important measure of protection against potentially damaging frivolous suits.

Id.

See *supra* notes 223-31 and accompanying text (noting some other values served by open proceedings where all parties are identified).

284. See *supra* notes 261-62 and accompanying text (demonstrating how special protections are sometimes afforded to plaintiffs in order to encourage them and enable them to exercise their right to sue).

285. See *Doe v. Diocese Corp.*, 647 A.2d 1067, 1074 (Conn. Super. Ct. 1994) (noting that one of the "key reasons" for not allowing anonymity to defendants was the importance of the public interest); *Doe v. Doe*, 668 N.E.2d 1160, 1167 (Ill. App. Ct.) (stressing the public's interest in knowing the identities of those accused of sexual abuse), *appeal denied*, 675 N.E.2d 632 (Ill. 1996); *T.S.R. v. J.C.*, 671 A.2d 1068, 1074-75 (N.J. Super. Ct. App. Div. 1996) (stressing the values of open judicial proceedings).

286. See *supra* Part III.B (discussing *Diocese Corp.*, *T.S.R.*, and *Doe v. Doe*). But see Milani, *supra* note 7, at 1698 (arguing that the risk to the names and reputations of defendants accused of "stigmatizing intentional torts" does qualify as a sufficient privacy interest warranting the use of pseudonyms). Note that Milani's proposal was written before the decisions in *T.S.R.* and *Doe v. Doe* were decided. Thus, Milani only looked to *Diocese Corp.* and distinguished it because the court stressed that institutions could not demonstrate personal privacy interests sufficient to warrant anonymity. See Milani, *supra* note 7, at 1705. Milani suggested that *individual defendants* could demonstrate a sufficient privacy interest enough to warrant anonymity. See *id.* (emphasis added).

Additionally, Milani also suggested that whether the plaintiff has been granted anonymity should be a factor weighing in favor of granting the defendant anonymity. See *id.* However, both *Diocese Corp.* and *Doe v. Doe* suggest that a "quid pro quo analysis" is not appropriate where a balancing test is concerned. See *Diocese Corp.*, 647 A.2d at 1073; *Doe v. Doe*, 668 N.E.2d at 1166.

287. See *supra* notes 273-274 and accompanying text.

example, if defendants are concerned that allegations against them will result in negative publicity, then they are just as likely to receive positive publicity if they are exonerated.²⁸⁸ Additionally, given that the defendants who are most likely to request anonymity are often public figures, the public has an even greater interest in knowing the allegations against them.²⁸⁹

If, however, defendants are able to demonstrate a privacy interest that is substantial, the court should grant them anonymity.²⁹⁰ Just as in plaintiff anonymity questions, the district court should be given discretion to determine whether the defendant has established a sufficiently protectable privacy interest.²⁹¹

VI. CONCLUSION

The future of defendant-requested anonymity remains unclear in light of the three most recent state court decisions denying defendants' requests to proceed under pseudonyms. However, prior case law illustrates that defendants have been granted anonymous status in the past. When analyzing questions of defendant anonymity, courts most likely will adopt the same kind of balancing test that is often used to determine plaintiff anonymity, weighing the public's interest in open judicial proceedings against the individual defendant's privacy rights. If the defendant can demonstrate a substantial privacy interest, the court may find that he has demonstrated a sufficient need to proceed anonymously. However, if the defendant can only assert harm to his reputation or career caused by the allegation of wrongdoing, then the court most likely will hold that the public's interest in knowing all of the facts of the case outweighs the defendant's privacy interest. Although the hurdle is not insurmountable, defendants may face a

288. The press coverage of Cardinal Bernardin and the retracted allegations of sexual abuse offer an example of how publicity also might assist in the exoneration of defendants who are improperly accused. See *Armstrong & Cohen*, *supra* note 212, § 1, at 9. But see *supra* notes 256-259 and accompanying text (arguing that the damage caused by disclosure is irreparable, despite the exoneration).

289. See *supra* notes 264-266 and accompanying text (discussing how the public has a greater interest in knowing the affairs of public figures).

290. Because the Supreme Court has not ruled upon an anonymity question, and because the most recent defendant anonymity cases come from just three states, no set authority has been established with regard to defendant-requested anonymity. *Diocese Corp.*, *T.S.R.*, and *Doe v. Doe* all involved "public figures," which was a significant factor in the balancing process ultimately tipping the scale in favor of public access. *Diocese Corp.* 647 A.2d at 1074; *T.S.R.*, 671 A.2d at 1074; *Doe v. Doe*, 668 N.E.2d at 1167. However, if a defendant were to raise another kind of privacy concern, a court might be more willing to grant anonymity.

291. See *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir. 1979).

tougher hurdle than plaintiffs in convincing the courts to allow them to proceed anonymously.

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