PSEUDONYMOUS LITIGATION IN THE AGE OF GOOGLING

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[Dear colleagues: This is a very rough draft. I hope it helpfully lays out why the issue is important, identifies the key arguments on both sides, and describes what courts have actually been doing. But you'll see that there are many gaps, and in particular I don't have much of a helpful prescription yet. I'd love to hear people's feedback on everything, and especially on the bottom line.

The draft is also quite long, but if you want a reduced version, you can read the Introduction, Part I.A–.F on the presumption against pseudonymity, Parts II.G–H on reputation and deterrent effects (and some of the reasons against pseudonymity), and Part III on partial pseudonymity (pp. 3–23, 39–44, 45–46), a total of about 35 pages.]

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INTRODUCTION

1. One defining question about any system of procedure is: Public or secret? American juvenile justice is secret; criminal justice, public (except grand juries and federal presentence reports). Bar discipline, mostly secret. Internal employer and university disciplinary proceedings, secret. Arbitration, secret. Civil justice, public.

The answer to the public-or-secret question of course affects the level of public supervision of the system, as well as the likely public confidence in the system. But the answer can also sharply affect the shape of litigation within the system: the incentives to bring or not bring various kinds of cases;[1] the incentives to settle (or plea bargain); the likely settlement values;[2] which witnesses testify; and more. Indeed, the implicit threat of publicity is a standard feature of many prefiling negotiations, though one that may need to be kept implicit, to avoid negotiations being treated as criminal extortion.[3]

The follow-up question, of course, is: When a system is generally public, what provisions are there for some degree of secrecy?[4] In particular, within our civil justice system, how do courts decide what can or must be sealed, what can or must be redacted, and when parties can proceed pseudonymously? This too can sharply affect what cases get filed, what cases get dropped, and on what terms cases settle.

Yet the Federal Rules of Civil Procedure, unlike some state court rules,[5] say virtually nothing to answer this question.[6] If there is one overarching goal to this Article, it is to try to push these questions, and especially the one about pseudonymity (on which comparatively little has been written[7]), to their rightful place in our discussions about civil procedure.

2. For many litigants these days, one of the most important questions is: Can I keep my name, and its connection to the case and its facts, off the Internet? And indeed pseudonymity requests appear to have sharply increased in the Internet era.[8]

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[1] *See infra* Part II.H.

[2] *See infra* Part I.E.3.

[3] *See, e.g.*, Flatley v. Mauro, 139 P.3d 2 (Cal. 2006).

[4] And a related question: When a system is generally secret, what provisions are there for public access? This arises especially when a public procedural system seeks to make a decision that turns on a past judgment of a private procedural system—for instance, when people seek the results of juvenile court records for use in adult criminal proceedings (or in civil proceedings), or when an action is brought in the civil justice system to enforce the results of an arbitration. But that is a story for another day.

[5] *See, e.g.*, CAL. R. CT. 2.550–.551. This article is mostly about federal courts, because reviewing just what they do is daunting enough; but I occasionally cite relevant state cases, since many state courts seem to take an approach similar to that of the federal courts. *See, e.g.*, Doe v. Empire Ent., LLC, No. A16-1283, 2017 WL 1832414, *4 (Minn. Ct. App. May 8, 2017).

[6] Rules 5.2 and 10(a) do provide that minors are to be pseudonymized and adults are not, but federal courts have viewed the nonpseudonymity of adult parties as just a presumption that can be rebutted—and the Rules say nothing about the criteria for rebutting it.

[7] For some important articles on the subject over the last 40 years, see David S. Ardia, *Court Transparency and the First Amendment,* 38 CARDOZO L. REV. 835 (2017); Benjamin P. Edwards, *When Fear Rules in Law's Place: Pseudonymous Litigation As a Response to Systematic Intimidation*, 20 VA. J. SOC. POL'Y & L. 437 (2013); Lior J. Strahilevitz, *Pseudonymous Litigation*, 77 U. CHI. L. REV. 1239 (2010); Donald P. Balla, *John Doe Is Alive and Well: Designing Pseudonym Use in American Courts*, 63 ARK. L. REV. 691 (2010); 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, 1712 (1995); Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. KAN. L. REV. 195 (2004); Jayne S. Ressler, *#Worstplaintiffever: Popular Public Shaming and Pseudonymous Plaintiffs*, 84 TENN. L. REV. 779 (2017); Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?,* 37 HASTINGS L. J. 1 (1985).

[8] For an imperfect indicator, note that a Westlaw search for *na("doe v" "roe v")* through District Court decisions reveals 22 cases in

In the past, of course, some litigants wanted to keep their names out of the newspapers, and some still do. But the Internet, and the availability of court records on the Internet, has sharply magnified this concern. Before, a typical employment lawsuit, for instance, would rarely make the papers. But now, Googling a person's name will often find many of the cases in which they've participated, even if those cases haven't made "the news."[9]

And many litigants would love pseudonymity. That's particularly obvious for defendants, most of whom are being sued over alleged misconduct. Say someone sues you for alleged embezzlement, fraud, or sexual assault, or even malpractice or a breach of contract. Wouldn't you rather that your friends, neighbors, and prospective clients and other business partners not know about it? And while some defendants simply want to hide their misdeeds, others are innocent, and don't want to be linked to incorrect accusations—whether temporarily, pending the trial and verdict, or perhaps forever.[10]

Many plaintiffs would want pseudonymity, too; just to offer a few examples,

- Sexual assault plaintiffs may not want to be publicly identified.
- Libel plaintiffs may not want to further publicize the allegedly libelous allegations over which they are suing.[11]
- Employment law plaintiffs who were fired for alleged misconduct but are claiming that this was a pretext may not want a Google search for their names to lead to those allegations (however forcefully denied).
- People suing over politically controversial behavior (e.g., an employee fired for allegedly racist or unpatriotic statements[12]) or using legal theories that some might condemn[13] may not want to be publicly shamed or humiliated.
- Even ordinary employment law or housing law plaintiffs may not want future employers or landlords to reject them as dangerously litigious.[14]

For good reason, most lawsuits are nonetheless litigated in the parties' own names. That is obviously true of adult

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1990, 85 cases in 2005, and 398 cases in 2020, a more than 15-fold increase from 1990 to 2020; in the meantime, the total number of district court cases involving individual plaintiffs available in Westlaw increased only by a factor of less than 5 from 1990 to 2020 (using *na((john jane) +255 v)* as a benchmark, with results of 679 in 1990, 1605 in 2005, and 3134 in 2020).

[9] "Over a century ago, Samuel Warren and Louis Brandeis . . . wrote that 'modern enterprise and invention have, through invasions upon [an individual's] privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.' The modern invention of today includes access to court files by those surfing the Internet." EW v. New York Blood Ctr., 213 F.R.D. 108, 112–13 (E.D.N.Y. 2003); *see also* Gen. Orders of Div. III, Wash. Cts., In re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses, https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III (ordering that all references to child witnesses or victims use "initials or pseudonyms," "In light of the increased availability of court documents through electronic sources").

[10] I am not discussing here the separate question of defendants who are unknown to the plaintiffs (e.g., anonymous online libelers), and who are anonymous because of that.

[11] *See infra* Part II.G.1.e.

[12] *Cf.* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. OF L. & POL. 295 (2012).

[13] *See, e.g.*, Jayne S. Ressler, *#WorstPlaintiffEver: Popular Public Shaming and Pseudonymous Plaintiffs*, 84 TENN. L. REV. 779 (2017).

[14] "At bottom, Plaintiff wants what most employment-discrimination plaintiffs would like: to sue their former employer without future employers knowing about it. But while that desire is understandable, our system of dispute resolution does not allow it." Doe v. Fedcap Rehab. Servs., Inc., No. 17-CV-8220 (JPO), 2018 WL 2021588, *3 (S.D.N.Y. Apr. 27, 2018).

criminal cases, even though nearly all criminal defendants would much prefer pseudonymity.[15] And it's true of civil cases: Our legal system generally calls for public proceedings and publicly filed documents; and the names of the parties are viewed as part of the information that needs to be kept public.[16]

Such openness is viewed as important for letting the public (usually through the media) supervise what happens in courtrooms that are publicly funded and rely on publicly-supported coercive power. Many major stories and some scandals have been broken in part because of the availability of civil court records.[17] And even for the many cases that go largely unnoticed, the possibility of public review helps deter shenanigans.

Yet some litigants are indeed allowed to litigate pseudonymously. Some classes of such litigants are fairly clearly and reasonably defined: Minors (either in juvenile criminal cases or in civil lawsuits) are a classic example.[18] So are litigants who are mounting purely legal challenges to statutes, where their identities are tangential,[19] though such litigants also have to show something potentially embarrassing or private that the litigation would reveal (think *Roe v. Wade*).

But much of the law is unsettled: It is unclear, for instance, whether plaintiffs alleging sexual assault can indeed proceed pseudonymously.[20] It is unclear whether pseudonymity is more justified in lawsuits against governmental defendants or less justified.[21] It is especially unclear when defendants could seek pseudonymity just to prevent possible damage to reputation stemming from the allegations at the heart of the lawsuit (allegations that defendants claim are false); likewise for plaintiffs who are suing over allegedly false allegations, for instance in a libel lawsuit.[22]

And many of the distinctions that the cases do appear to implicitly draw are hard to explain. Imagine, for instance, that Arnold is an adult university student accused of sexually assaulting his classmate Veronica:

1. The criminal prosecution would almost certainly be *People v. Arnold*, not *People v. Doe*, notwithstanding the harm to Arnold's reputation (a harm that would be present even if he's ultimately acquitted or the charges are dropped).

2. The civil lawsuit would often be *Veronica v. Arnold*.

3. But some courts would allow it to be *Doe v. Arnold*, to protect Veronica's privacy.[23]

4. Only a few courts would allow it to be *Doe v. Roe*.[24] Those courts appear to accept the theory that, just as it can be unjustly humiliating for many victims to be publicly identified as such (assuming they are telling the

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[15] Pseudonymous prosecutions of adults are extremely rare, though they do exist. United States v. Doe, 488 F.3d 1154, 1156 n.1 (9th Cir. 2007) (keeping case pseudonymous because the district court had allowed pseudonymity, but not describing the reasons for that or whether they were sufficient); People v. P.V., 64 Misc. 3d 344 (2019) (pseudonymizing published opinion discussing a transgender prostitute's criminal conviction, and concluding that defendant was a victim of sex trafficking). *See also* United States v. Pilcher, 950 F.3d 39, 45 (2d Cir. 2020) (concluding that pseudonymity is generally unavailable as to habeas petitions as well).

[16] *See infra* Part I.C.1.

[17] The Boston Globe's investigation of the Catholic Church's coverup of sexual abuse by priests, dramatized in the film *Spotlight*, is just one especially noted example. *See* Michael Rezendes, *Church Allowed Abuse by Priest for Years*, BOSTON GLOBE, Jan. 6, 2002.

[18] *See infra* Part II.E.

[19] *See infra* Part I.D.

[20] *See infra* Part II.F.4.

[21] *See infra* Part I.G.

[22] *See infra* Part II.G.

[23] *See infra* Part II.F.4.

[24] *See infra* Part I.E.4.

truth that they were indeed victimized), so it can be unjustly humiliating for many of the accused to be publicly identified as such (assuming they are telling the truth that they were not guilty)[25]—but most courts do not.[26]

5. If Arnold sues Veronica for libel, claiming Veronica's accusations were lies, most courts would require it to be *Arnold v. Veronica* or perhaps *Arnold v. Roe*,[27] but not *Doe v. Roe*.[28]

6. But many courts routinely allow the pseudonymous *Doe v. University of Northern South Dakota*, a lawsuit in which Arnold is claiming that the university acted improperly in expelling him for the alleged misconduct—even though there, as in the libel case, Arnold wants pseudonymity to protect his reputation.[29]

Why the differences?

In this Article, I'll try to analyze some of these tensions. In particular, I'll deal with three cross-cutting issues that often arise in these cases:

1. *Pseudonymity creep:* Simply pseudonymizing a party seems easy enough, and seems like only a modest restriction on public access. But of course other information in the case can lead interested researchers to the party's identity. Even if a minor's name is abbreviated L.V., if the case is *Volokh on behalf of L.V. v. Los Angeles Unified School Dist.*, it might not be hard for people to identify L.V. based on her representative's (likely her parent's) name.[30] Likewise, if a Complaint filed by John Doe in a libel case quotes the alleged libel, a quick Google search for the libel could identify its target. If an alleged sexual assault victim sues the attacker, who used to be the victim's spouse or lover, people who know the attacker may easily deduce the identity of the victim.[31]

To make pseudonymity really effective, then, more needs to be done than just pseudonymizing one particular party—such as sealing important material outright, or pseudonymizing the other party as well. But then pseudonymity will also interfere more with public right of access, and may further undermine the interests of the opposing parties.[32]

2. *The ubiquity of the desire for privacy:* I noted above that very many litigants, plaintiffs and defendants, would prefer to keep their names out of the court record and therefore off Google and out of the newspapers. Courts have observed this and often cite this as a reason to reject pseudonymity—if we let this litigant be pseudonymous, we'd in fairness have lot all these other litigants do the same, and then we'd have a very different and much less transparent system of procedure.[33]

3. *The puzzle of dealing with reputational damage:* In particular, a vast range of cases involves material risk of reputational damage to one or both parties—in particular, damage to the ability to earn a living. Courts often remark

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[25] Of course, if the accused *is* guilty, and is lying about the defense, then it may be only fair that the public learns of the guilt. But equally, if the accuser is lying about the claim, then it may be only fair that the public learns about that.

[26] Of course, as a general matter Arnold would need to know Veronica's identity; I focus here on pseudonymity that shields the parties' identity from the general public, and not from other parties or the court. *See, e.g.*, United States v. Microsoft Corp., 56 F.3d 1448, 1463 (D.C. Cir. 1995) ("We are not aware of any case in which a plaintiff was allowed to sue a defendant and still remain anonymous to that defendant. Such proceedings would, as Microsoft argues, seriously implicate due process."); *In re* Sealed Case, 971 F.3d 324, 326 n.1 (D.C. Cir. 2020).

[27] *See, e.g.*, A.B. v. C.D., No. 217CV5840DRHAYS, 2018 WL 1935999 (E.D.N.Y. Apr. 24, 2018); Painter v. Doe, No. 3:15-CV-369-MOC-DCK, 2016 WL 3766466 (W.D.N.C. July 13, 2016).

[28] *See, e.g.*, Roe v. Does 1-11, No. 20-CV-3788-MKB-SJB, 2020 WL 6152174, *3 (E.D.N.Y. Oct. 14, 2020). *But see* Doe v. Does.

[29] *See infra* Part II.G.

[30] *See infra* Part II.E.1.

[31] *See infra* note 207.

[32] *See infra* Part I.C.3.

[33] *See infra* Part I.C.4.

that mere risk of reputational damage (including unjust reputational damage, for instance if the accusations against a defendant ultimately prove to be unfounded) is not enough to justify pseudonymity. But not all cases so hold, in part because the reputational concerns can seem so serious and salient. And the cases that allow pseudonymity to protect privacy rather than to protect reputation sometimes boil down to risk of reputational damage, too (for instance, if a plaintiff seeks pseudonymity to conceal information about a mental illness).

In what follows, I seek to (a) lay out the general legal rules, as reflected in court decisions (which I hope will be useful to judges and lawyers as well as academics) and (b) lay out the main policy arguments cutting in favor of and against pseudonymity. I may also offer (c) some normative suggestions about what should be done. But in general I'm not at all sure what the right answer is on most of those cases. Rather, "I don't have any solution, but I certainly admire the problem,"[34] and I hope to persuade you to admire the problem, too.

I. THE PRESUMPTION AGAINST PSEUDONYMITY

Different circuits have come up with similar but differently worded multi-factor balancing tests for pseudonymity;[35] consider for instance, the Third Circuit test, from *Doe v. Megless*:[36]

> The factors in favor of anonymity include[]: "(1) the extent to which the identity of the litigant has been kept confidential; (2) the bases upon which disclosure is feared or sought to be avoided, and the substantiality of these bases; (3) the magnitude of the public interest in maintaining the confidentiality of the litigant's identity; (4) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant's identities; (5) the undesirability of an outcome adverse to the pseudonymous party and attributable to his refusal to pursue the case at the price of being publicly identified; and (6) whether the party seeking to sue pseudonymously has illegitimate ulterior motives."
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> On the other side of the scale, factors disfavoring anonymity include[]: "(1) the universal level of public interest in access to the identities of litigants; (2) whether, because of the subject matter of this litigation, the status of the litigant as a public figure, or otherwise, there is a particularly strong interest in knowing the litigant's identities, beyond the public's

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[34] ASHLEIGH BRILLIANT, I MAY NOT BE TOTALLY PERFECT, BUT PARTS OF ME ARE EXCELLENT, AND OTHER BRILLIANT THOUGHTS (1979).

[35] Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 189–90 (2d Cir. 2008); Doe v. Megless, 654 F.3d 404, 409 (3d Cir. 2011); James v. Jacobson, 6 F.3d 233, 238 (4th Cir.1993); Doe v. Stegall, 653 F.2d 180, 185–86 (5th Cir. 1981); Doe v. Porter, 370 F.3d 558, 560 (6th Cir. 2004); Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1068 (9th Cir. 2000); Doe v. Frank, 951 F.2d 320, 323 (11th Cir. 1992); In re Sealed Case, 931 F.3d 92, 97 (D.C. Cir. 2019). Some circuits have not articulated specific factors, but have recognized that pseudonymity is an exception and have identified some cases in which the exception is justified. Doe v. Village of Deerfield, 819 F.3d 372, 377 (7th Cir. 2016); M.M. v. Zavaras, 139 F.3d 798, 802–03 (10th Cir. 1998). The First, Eighth, and Federal Circuits have not opined on pseudonymity, though, together with other circuits, they have announced a broad presumption of public access and against sealing. Nat'l Org. For Marriage v. McKee, 649 F.3d 34, 70 (1st Cir. 2011); IDT Corp. v. eBay, 709 F.3d 1220, 1223 (8th Cir. 2013); In re Violation of Rule 28(D), 635 F.3d 1352, 1356 (Fed. Cir. 2011).

I use "pseudonymously" and "anonymously" interchangeably here, as do the cases (which also sometimes use the term "fictitious name"). Likewise, I use pseudonymity to refer interchangeably to litigation (1) as a Doe or Roe or Poe or the archaic Noakes or Stiles (*e.g.*, Noakes v. Syracuse Univ., 369 F. Supp. 3d 397 (N.D.N.Y. 2019)); (2) under initials (even when the initials may hint at who the party is); (3) under a deliberately common name such as John Smith (*e.g.*, Smith v. Unum Life Ins. Co. of Am., 275 So. 3d 757 (Fla. Dist. Ct. App. 2019)); or under any other name selected to conceal the party's identity, whether (4) famous (*e.g.*, Hester Prynne v. Settle, 848 F. App'x 93 (9th Cir. 2021) (pseudonym borrowed from *The Scarlet Letter*, in case where plaintiff was challenging sex offender registry laws)), or (5) arbitrary (*e.g.*, Wilcox v. LaClaire, __ A.3d __, __ n.1 (Del. 2021)). *But see* Doe I v. Burton, 85 F.3d 635 (9th Cir. 1996) ("The plaintiffs in this case previously were denominated 'James Rowe, Jane Rowe and John Doe.' One of the many persons genuinely named 'James Rowe' wrote to the court while the appeal was pending, and said that his reputation was harmed by a newspaper story about the appeal, because careless readers might think erroneously that he is a convicted sex offender. . . . It is preferable for lawyers and courts to avoid harm to the reputations of real persons by using these traditional references for pseudonyms.").

[36] 654 F.3d at 409.

> interest which is normally obtained; and (3) whether the opposition to pseudonym by counsel, the public, or the press is illegitimately motivated."
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> [The] list of factors is not comprehensive, and that trial courts "will always be required to consider those [other] factors which the facts of the particular case implicate."[37]

But it's not clear just what these factors mean, and how they are to be applied. To quote District Judge Matthew Brann (M.D. Pa.),

> [E]ven well-crafted multifactor tests can be difficult to apply, difficult to predict, and invite needless litigation. And the *Megless* factors are not the crown jewels of multifactor tests. To start, they are hopelessly imprecise and redundant. . . . These inquiries [into various factors] meander and criss-cross into each other's paths, to the extent they differ at all. What's more, the test does not provide what weight each enumerated factor should be given, let alone how unenumerated factors should tip the balance. . . . [O]pinions applying *Megless* and similar tests from other circuits frequently read as a rote recitation of factors with a conclusion tacked on the end. This style is not conducive to the reader scrying which factors were determinative in the court's decision. Or, perhaps more troublingly, the court may in fact have treated all the factors as coequal.[38]

Rather than try to track one or another such list of factors, then, I thought I would lay out the general structure of the analysis that I have seen in the cases, with particular attention to how these generalities have been concretely applied (e.g., what counts as a "substantial[]" "bas[i]s" for rejecting disclosure). I turn, at Judge Brann's suggestion, to "the heart of the inquiry: Does the Plaintiff risk severe harm by proceeding under his or her real name? And, if so, is this risk outweighed by a particularly strong public interest in knowing the Plaintiff's identity?"[39] I begin with the presumption against pseudonymity, and the justifications for it, because fully naming the parties is the default.

A. The Federal Rules and the Common Law

Federal Rule of Civil Procedure 10(a) says that "The title of the complaint must name all the parties," and many courts have read this as generally condemning pseudonymity.[40] The same is true of many state law rules,[41] and some are still more explicit.[42] And it is generally well settled that there is a strong presumption against party pseudonymity.[43]

This presumption might be strengthened to the extent that, "because of the subject matter of this litigation, the status of the litigant as a public figure, or otherwise, there is a particularly strong interest in knowing the litigant's identities, beyond the public's interest which is normally obtained."[44] But even ordinary litigation must generally be carried on in the parties' names (as everyday practice indeed reflects), based on "the universal level of public interest in access to the identities of litigants."[45]

B. The First Amendment Right of Access

Besides the limits on sealing that stem from the common-law tradition of open access, the First Amendment is

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[37] *Id.* (some formatting changed, citations omitted).

[38] Doe v. Pa. Dep't of Corrections, No. 19-1584, 2019 WL 5683437, *3 & n.10 (M.D. Pa. Nov. 1, 2019).

[39] *Id.*

[40] *See, e.g.*, Doe v. Frank, 951 F.2d 320, 322 (11th Cir. 1992).

[41] *See, e.g.*, Doe v. Empire Ent., LLC, No. A16-1283, 2017 WL 1832414, *2 (Minn. Ct. App. May 8, 2017).

[42] [Cite.]

[43] *E.g.*, Does I Thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1067–68 (9th Cir. 2000).

[44] *Megless*. On the other hand, some courts view public interest in a lawsuit as cutting *against* naming the parties, because they are concerned that the publicity may increase the intrusion on parties' privacy and damage to their reputation. *See, e.g.*, Doe v. Bd. of Trustees of Univ. of Ill., No. 2:20-cv-02265-CSB-EIL, at 5 (C.D. Ill. Nov. 9, 2020); Doe v. La. State Univ., No. 20-379-BAJ-SDJ, at 4 (M.D. La. June 30, 2020); Doe v. Colgate Univ., No. 515CV1069LEKDEP, 2016 WL 1448829, *2 (N.D.N.Y. Apr. 12, 2016).

[45] *Megless*.

also generally seen as limiting the sealing of court records, including in civil cases.[46] Some courts have taken the view that it limits pseudonymity as well.[47]

C. Value to the Public of Access to Party Names

1. Generally

Public naming of litigants is one aspect of the broader "presumption, long supported by courts, that the public has a common-law right of access to judicial records."[48] "Public access to civil trials . . . provides information leading to a better understanding of the operation of government as well as confidence in and respect for our judicial system."[49] In particular, the right to public access "protects the public's ability to oversee and monitor the workings of the Judicial Branch,"[50] and "promotes the institutional integrity of the Judicial Branch."[51] "'Public confidence [in the judiciary] cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view.'"[52]

This right of access extends to "pretrial court records" as much as to trial proceedings.[53] And the right presumptively forbids redactions as well as outright sealing, though redactions can be justified on a somewhat lesser showing than sealing (since they are sometimes viewed as the least restrictive means of protecting important privacy rights).[54]

Now in principle pseudonymity is less of a burden on public access than is sealing, or even redaction:

> The public right to scrutinize governmental functioning 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 issues joined or the court's performance in resolving them. The assurance of fairness preserved by public presence at a trial is not lost when one party's cause is pursued under a fictitious name.[55]

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[46] *See, e.g.*, Courthouse News Serv. v. Planet, 947 F.3d 581, 589 (9th Cir. 2020). The Supreme Court has expressly held that there is a First Amendment right of access to criminal trials, Richmond Newspapers, 448 U.S. 555, 573 (1980), and courts have concluded that "the justifications for access to the criminal courtroom apply as well to the civil trial," including to court records as well as court hearings. *E.g.*, Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1178 (6th Cir. 1983); Westmoreland v. Columbia Broad. Sys. Inc., 752 F.2d 16, 23 (2d Cir. 1984); Matter of Continental Illinois Securities Litigation, 732 F.2d 1302, 1308 (7th Cir. 1984).

[47] *See, e.g.*, DePuy Synthes Prod., Inc. v. Veterinary Orthopedic Implants, Inc., 990 F.3d 1364 (Fed. Cir. 2021); *In re* Sealed Case, 931 F.3d 92, 96 (D.C. Cir. 2019); United States v. Microsoft Corp., 56 F.3d 1448, 1464 (D.C. Cir. 1995); Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. 1981); Ramsbottom v. Ashton, No. 3:21-CV-00272, 2021 WL 2651188, *2 (M.D. Tenn. June 28, 2021); Doe v. Paychex, Inc., No. 3:17-CV-2031(VAB), 2020 WL 219377, *10 (D. Conn. Jan. 15, 2020); Doe v. Del Rio, 241 F.R.D. 154, 156 (S.D.N.Y. 2006); Doe v. Kidd, 19 Misc. 3d 782 (N.Y. Sup. Ct. 2008).

[48] Eugene S. v. Horizon Blue Cross Blue Shield of N.J., 663 F.3d 1124, 1135 (10th Cir. 2011). "[T]he public[]," it is said, has a "legitimate interest in knowing all of the facts involved, including the identities of the parties." Doe v. Frank, 951 F.2d 320, 322 (11th Cir. 1992); United States v. Microsoft Corp., 56 F.3d 1448, 1463 (D.C. Cir. 1995); In re Sealed Case, 971 F.3d 324, 326 (D.C. Cir. 2020). "The people have a right to know who is using their courts." Doe v. Blue Cross & Blue Shield United of Wis., 112 F.3d 869, 872 (7th Cir. 1997).

[49] Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1071 (3rd Cir. 1984).

[50] Doe v. Public Citizen, 749 F.3d 246, 263 (4th Cir. 2014).

[51] *Id.*

[52] *Id.* (quoting United States v. Cianfrani, 573 F.2d 835, 851 (3d Cir. 1978), and applying its reasoning in a civil case).

[53] Mokhiber v. Davis, 537 A.2d 1100, 1119 (D.C. Cir. 1988); see also Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 124 (2d Cir. 2006) ("there exists a qualified First Amendment right of access to documents submitted to the court in connection with a summary judgment motion"); Republic of Philippines v. Westinghouse Elec. Corp., 139 F.R.D. 50, 56 (D. N.J. 1991) ("[p]ublic access to court records is protected by both the common law and the First Amendment").

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[55] Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. 1981); *see also* Doe v. Pittsylvania County, Va., 844 F. Supp. 2d 724, 728 (W.D. Va. 2012);

Nonetheless, even courts that take this view acknowledge that "there remains a clear and strong First Amendment interest in ensuring that '[w]hat transpires in the courtroom is public property.'"[56] And other courts put it even more strongly:

> [L]awsuits are public events and the public has a legitimate interest in knowing the facts involved in them. Among the facts is the identity of the parties. 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.[57]

"[A]nonymous litigation runs contrary to the rights of the public to have open judicial proceedings and to know who is using court facilities and procedures funded by public taxes."[58] "The Court is a public institution and the public has a right to look over our shoulders and see who is seeking relief in public court."[59]

Those, at least, are the generalities. Let's turn now to how pseudonymity may be concretely harmful, and how open disclosure of party names may be valuable.

2. Pseudonymity interfering with reporting on cases

To begin with, the names of the parties are often key to investigating the case further, for instance to answer:

- Is the case part of a broad pattern of litigation by, say, an ideological advocate, a local businessperson or professional with an economic interest in the cases,[60] or a vexatious litigant[61]?
- Is there evidence that the litigant is untrustworthy, perhaps in past cases, or in past news reports?[62]
- Does the litigant have a possible ulterior motive—whether personal or political—that isn't visible from the

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; Doe v. Tsai, No. 08-1198-DWF/AJB, 2008 WL 11462908, *3 (D. Minn. July 23, 2008); Doe v. Barrow County, 219 F.R.D. 189, 193 (N.D. Ga. 2003) ("Any court orders or opinions concerning the merits of this case will be available for public inspection. In the end, the only thing potentially being shielded from the public is plaintiff's name and any court proceedings or opinions that might be necessary to determine standing."); *see also* Strahilevitz, *supra* note 7, at 1246–47 (arguing that sealing or fuzzing over the facts makes it harder for litigants to understand what exactly is forbidden or permitted by a precedent, while pseudonymity doesn't have that effect). And one could argue that the right of access to court records applies only to the documents actually filed in court; if a party's name isn't filed, then the public would have no more right to see it than it would to see other information that never made its way into filings.

[56] *Stegall*, 653 F.2d at 185; *see also* Doe v. Pub. Citizen, 749 F.3d 246, 273 (4th Cir. 2014).

[57] Doe v. U.S. Dep't of Justice, 93 F.R.D. 483, 484 (D. Colo. 1982); Doe v. Deschamps, 64 F.R.D. 652, 653 (D. Mont. 1974); A.B.C. v. XYZ Corp., 282 N.J. Super. 494 (App. Div. 1995) (the requirement that parties be identified "serves society's interest in having access to the facts of the lawsuit, among which are the actual names of the precise parties involved").

[58] Doe v. Village of Deerfield, 819 F.3d 372, 377 (7th Cir. 2016).

[59] Gibson v. Pfizer, Inc., No. 3:20-cv-03870-WHA (N.D. Cal. Oct. 28, 2020).

[60] Even once the defendant learns the plaintiff's name in this case, the defendant might be unable to easily find past cases that the plaintiff had pseudonymously filed.

[61] *See*, e.g., the Darren Chaker litigation *infra* Part IV; *see also, e.g.*, Doe v. Washington Post Co., No. 12 CIV. 5054 PAE, 2012 WL 3641294, *1 (S.D.N.Y. Aug. 24, 2012) ("The Court cannot but construe the filing of this suit anonymously as an attempt to conceal Fisch's identity as a repeat vexatious filer within this and other districts."), *dismissed sub nom.* Doe v. Republic of Poland, 531 F. App'x 113 (2d Cir. 2013); Hernandez v. Bishara, No. CV 15-8556-RGK (KK), 2016 WL 4534009, *1 (C.D. Cal. Aug. 30, 2016) ("The Court warns Plaintiffs . . . they must comply with the vexatious litigant order issued in [a prior case]. Plaintiffs . . . may not seek to evade the vexatious litigant order by using pseudonyms or aliases. The Clerk of Court has noted the pseudonyms and aliases used in this case.").

[62] Motion for Reconsideration, Doe v. Wang, No. 1:20-cv-02765 (D. Colo. Aug. 27, 2021) (noting, albeit in redacted form, plaintiff's past filings in other cases—filings that might shed light on the case for the benefit of anyone who seeks to write on it); Czodor v. Luo, No. G056955, 2019 WL 4071771, *1 (Cal. Ct. App. Aug. 29, 2019) (case referred to in the *Doe v. Wang* filing, in a way that allows it to be found despite the redactions, noting that the trial court had "found defendant had perpetrated acts of domestic violence on plaintiff, and issued a [domestic violence restraining order] to expire in 2023," finding that "defendant 'was evasive' regarding posting pictures of plaintiff online")

court papers?

- Was the incident that led to the lawsuit covered or investigated in some other context?[63]
- Is there online chatter from possibly knowledgeable people about the underlying incident?
- Is there some reason to think that the judge might be biased in favor of or against the litigant?[64]

Knowing the parties' names can help a reporter or an interested local activist quickly answer those questions, whether by an online search or by asking around—the parties themselves might be willing to talk; but even if they aren't, others who know them might answer questions, or might voluntarily come forward if the party is identified.

And litigation of course deploys the coercive power of the state, even as it also accomplishes private goals. A libel lawsuit, even between two private parties, is aimed at penalizing (and sometimes enjoining) supposedly constitutionally unprotected speech. An employment lawsuit is aimed at implementing a set of legal rules that constrain employers, protect employees, and affect the interests of the public in various ways, direct or indirect. In the words of Justice Holmes, writing about the fair report privilege,

> It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.[65]

Courts have recognized that this rationale applies also to the openness of court records,[66] including to the presumption against pseudonymity.[67] And evaluating the credibility of the parties, whether as to their in-court statements or as to their court filings, will often require knowing their identities.

3. Pseudonymity leading to sealing or heavy redaction

Filed documents will often contain information that make it possible to identify a pseudonymous party. Sometimes it will be as simple as the name of another party—for instance, if a parent is suing on behalf of a child (e.g., "Eugene Volokh suing on behalf of L.V."), people who know the parent can easily find out the child's name. This can lead to motions to pseudonymize the parent as well, which are usually granted.[68]

And sometimes maintaining pseudonymity may require redacting or sealing documents filed in court. This is most clear in libel cases based on material published online (however obscure the publication might be). In many states, libel complaints must set forth the specific libelous words; but even if they can paraphrase or just quote the key words, the full libelous material would need to be precisely quoted, even before trial (for instance, in a motion to dismiss or a

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[63] For instance, if the plaintiff is suing for libel or wrongful firing or wrongful expulsion based on accusations that plaintiff had committed a crime, had as the plaintiff been arrested for the crime? How did the police investigation or criminal prosecution turn out?

[64] Steinman, *supra* note 7, at 19.

[65] Cowley v. Pulsifer, 137 Mass. 392, 394 (1884); *see also* Steinman, *supra* note 7, at 19 ("Intuitively, one feels less able to judge the fairness of judicial proceedings pursued by unknown parties. Even if the record reveals enough about the plaintiff or defendant to allow an apparently adequate appraisal of the proceedings, the record may not quell all suspicions that the secret identity of a party or parties influenced the decision.").

[66] Goesel v. Boley Int'l (H.K.) Ltd., 738 F.3d 831, 833 (7th Cir. 2013); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1069 (3d Cir. 1984); NBC Subsidiary (KNBC-TV) v. Superior Court, 980 P.2d 337, __ n.14 (1999); Hammock by Hammock v. Hoffmann-LaRoche, Inc., 662 A.2d 546, 553 (N.J. 1995).

[67] *Goesel*, 738 F.3d at 833; Qualls v. Rumsfeld, 228 F.R.D. 8, 13 (D.D.C. 2005).

[68] *See infra* Part II.E.1.

motion for summary judgment).[69]

If the material remains available online at the time, then a simple Google search will often uncover the full statement, which would include the party's name. Any attempt to prevent that would require much more massive redaction or sealing of the alleged libel—which may in turn make it much harder to understand the legal issues of the case.[70]

Likewise, certain other facts mentioned in the lawsuit can make it easy to identify a party. Say, for instance, that a lawsuit is a follow-up to an earlier, nonpseudonymous lawsuit, and mentions the circumstances of that lawsuit; a bit of court records research or LEXIS/NEXIS searching through newspaper archives can uncover the plaintiff's name. To give one example, consider *Doe v. Doe*, a 2018 lawsuit in which plaintiff claimed that an enemy of his was trying to deliberately promote past newspaper articles that mentioned plaintiff's name.[71] Those past articles stemmed from an employment discrimination lawsuit that Doe had filed nonanonymously (claiming that the named employer had discriminated against Doe because he was a Muslim). Armed with this information, it was easy for me to find Doe's name; only much heavier redaction of the facts would have prevented that.

Now this phenomenon, which one might call "penetrable pseudonymity," may not be that bad for the pseudonymous party. Often the pseudonymous party's goal is simply to keep cases from coming up on casual Google searches (by prospective employers, prospective romantic partners, friends, neighbors, or classmates). Even if someone—say, a news reporter—uncovers the party's real name, there's a good chance that the name won't be used in the final story.[72]

Indeed, penetrable pseudonymity might be seen as a reasonable compromise: Those who really want to learn the party's name can find it, but it takes a bit of work and possibly expense, just as in the past going to the courthouse to get court records was allowed but involved work and expense.[73] Still, penetrable pseudonymity might not be enough for many litigants, their lawyers, and even judges who take the view that, once they allow a party to proceed pseudonymously, they need to do what it takes to make that pseudonymity effective.[74]

4. Pseudonymity in one case leading to pseudonymity in too many others

Of course, the typical case is unlikely to draw much public attention. Allowing pseudonymity, or even sealing, in just that one case may thus not be seen as taking much away from the public's power to supervise the judicial process.

But courts are of course aware of their obligation to treat like cases alike. If they are to allow pseudonymity for one case, they must be prepared to allow it for others like it. And if the case is seen as run-of-the-mill within its category, then allowing pseudonymity would imply that other cases in the category should be pseudonymized as well.

Courts often deny pseudonymity relying precisely on this concern—"This Court regularly sees similar allegations and Plaintiff has failed to show that his case is unusual."[75] Thus, for instance, in a disability discrimination case:

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[70] Doe v. Does.

[71] Complaint, Doe v. Doe, No. 2:18-cv-02129 (C.D. Ill. May 09, 2018); https://reason.com/volokh/2019/07/05/is-wrongful-search-engine-optimization-a-tort/.

[72] For instance, when I blogged about the *Doe v. Doe* case, I didn't include the plaintiff's name, though I had figured it out.

[73] *See, e.g.*, Roe v. Doe, 2019 WL 1778053, *3 (D.D.C. Apr. 23, 2019) (retroactively pseudonymizing the opinion at Roe v. Doe, 319 F. Supp. 3d 422 (D.D.C. 2018), even though the printed version of the opinion of course still includes the parties' names).

[74] *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, __ (2003) (discussing such "enforcement needs slippery slopes").

[75] Doe v. United States, No. 1:20-cv-01052-NONE-SAB, at 5 (E.D. Cal. Dec. 16, 2020) (said in a case involving a prisoner suing over an alleged assault by prison workers, where the prisoner claimed that publicly identifying him would risk retaliation); *see also* United States v. Stoterau, 524 F.3d 988, 1013 (9th Cir. 2008) ("If the nature of Stoterau's offense alone [child pornography and child sexual abuse] could

> Plaintiff offers no specific information suggesting that disclosure of his identity would expose him to a risk of physical or mental harm, relying instead on vague generalizations about risks that all civil rights plaintiffs bear . . . (explaining that civil rights plaintiffs are "sometimes thought of as troublemakers" . . .). It cannot be, however, that every plaintiff alleging . . . discrimination has the right to litigate . . . pseudonymously. A rule so broad would be inconsistent with both the plain language of Rule 10(a), and the federal courts' general policy favoring disclosure.[76]

Or in a case in which a state judge sued the FBI, claiming that the FBI improperly disclosed certain information about its criminal investigation of him, and where he sought pseudonymity to avoid the reputational damage that would stem from further publicizing the investigation:

> If [the plaintiff's interest in reputation justified pseudonymity], then any defamation plaintiff could successfully move to seal a case and proceed by pseudonym, in order to avoid 'spreading' or 'republishing' the defamatory statement to the public. However, this is not the customary practice."[77]

Or in a case in which a defendant in a sexual abuse case sought pseudonymity, arguing that he was innocent but the mere allegations would ruin his reputation:

> If, as J.C. suggests, these mere accusations are tantamount to an irreparable injury sufficient to outweigh the public's interests 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.[78]

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qualify him for the use of a pseudonym, there would be no principled basis for denying pseudonymity to any defendant convicted of a similar sex offense. Such a significant broadening of the circumstances in which we have permitted pseudonymity is . . . contrary to our requirement that pseudonymity be limited to the 'unusual case.'"); Doe v. U.S. Healthworks Inc., No. CV1505689SJOAFMX, 2016 WL 11745513, *5 (C.D. Cal. Feb. 4, 2016) ("This right [of the people to know who is using their courts] is particularly important in the instant putative [Fair Credit Reporting Act] class action, for if the Court were to permit Plaintiff to proceed under a pseudonym in this case, such a ruling would logically extend to any opportunistic litigant with a criminal background seeking to initiate suit against any number of potential employers regardless of their culpability.").

[76] Smith v. Patel, No. CV 09-04947 DDP (CWx), 2009 WL 3046022, *2 (C.D. Cal. Sept. 18, 2009); Doe v. Suppressed, No. 21 cv 50326 (N.D. Ill. Sept. 3, 2021) ("The Court notes that claims brought under the ADA (which by their nature include personal and medical information) are brought publicly through the federal courts every day."); Doe v. Apstra, Inc., No. 18-cv-04190-WHA, 2018 WL 4028679 (N.D. Cal. Aug. 23, 2018) ("the professional harm plaintiff fears is similar to that faced by many plaintiffs who allege disability discrimination"); *see also* S. Methodist Univ. Ass'n of Women L. Students v. Wynne & Jaffe, 599 F.2d 707, 713 (5th Cir. 1979) (using the same reasoning in an employment discrimination case); Doe v. Moreland, No. CV 18-800 (TJK), 2019 WL 2336435 (D.D.C. Feb. 21, 2019) ("if the Court were to credit the purported risks cited by Plaintiff—like the matters he alleges are of a 'sensitive and personal nature'—doing so would open the door to parties proceeding pseudonymously in an incalculable number of lawsuits in which one party asserts sexual harassment claims against another"); Doe v. Main Line Hospitals, Inc., No. 2:20-cv-02637-KSM, at 10 (E.D. Pa. Sept. 1, 2020) ("[W]e do not discount Doe's very real concerns about reputational harm, both personally or professionally, or her fears of relapse in the event of such backlash. But those types of fears are similar to those of other plaintiffs who have alleged that they were discriminated against because of their histories of substance abuse, and it is clear that several similarly-situated plaintiffs have publicly identified themselves in their own litigations."); Luckett v. Beaudet, 21 F.Supp.2d 1029, 1030 (D. Minn. 1998) ("Plaintiff expresses concern for her children. . . . [P]laintiff's concerns are no different from those which could be asserted in virtually any lawsuit."); A.B.C. v. XYZ Corp., 282 N.J. Super. 494, 504 (App. Div. 1995); Doe v. Bush, No. CIV. SA04CA1186FB, 2005 WL 2708754, *4 (W.D. Tex. Aug. 17, 2005), *report and recommendation adopted sub nom.* Sims v. Bush, No. CIV.SA-04-CA-1186-FB, 2005 WL 3337501 (W.D. Tex. Sept. 6, 2005); Doe v. Univ. of the Incarnate Word, No. SA-19-CV-957-XR, 2019 WL 6727875, *4 (W.D. Tex. Dec. 10, 2019).

[77] Doe v. FBI, 218 F.R.D. 256 (D. Colo. 2003) .

[78] T.S.R. v. J.C., 671 A.2d 1068, 1074 (N.J. Super. App. Div. 1996); *see also* Doe v. Townes, No. 19CV8034ALCOTW, 2020 WL 2395159, *4 (S.D.N.Y. May 12, 2020) ("Allowing Plaintiff to proceed anonymously for these reasons would be to hold that nearly any plaintiff alleging sexual harassment and assault could proceed anonymously. Despite sympathizing with Plaintiff, the Court declines to reach such a blanket holding."); Michael v. Bloomberg L.P., No. 14-CV-2657 TPG, 2015 WL 585592, *3 (S.D.N.Y. Feb. 11, 2015) ("To depart in this case from the general requirement of disclosure would be to hold that nearly any plaintiff bringing a lawsuit against an employer would have a basis to proceed pseudonymously. The court declines to reach such a holding."); Doe v. Doe, 668 N.E.2d 1160, 1167 (Ill. Ct. App. 1996) ("As in

Of course, one possible answer is that we should allow pseudonymity to all these litigants—discrimination plaintiffs, libel and invasion of privacy plaintiffs, sexual abuse defendants, and the like. But so long as our legal system insists on naming parties generally, anyone seeking pseudonymity has to explain how his case is different from everyone else's.

D. Reduced Value to the Public: Purely Legal Challenges

The presumption against pseudonymity may be weakened if, "because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant's identities."[79] This is particularly likely in facial challenges to government actions, where the litigant's identity is generally not important to analyzing the substantive questions (though it might bear on ancillary matters, such as the litigant's standing to bring the challenge).[80]

Many famous Supreme Court cases fit into this mold, though they don't expressly discuss pseudonymity. They also generally involve topics that are seen as private or as risking improper retaliation against plaintiffs (since even in a purely legal challenge, pseudonymity is still an exception rather than the rule, and some positive justification for pseudonymity is required)—abortion in *Roe v. Wade*,[81] signing of an initiative petition in *Doe v. Reed*,[82] sex offender status in *Connecticut Dep't of Public Safety v. Doe*,[83] a highly controversial challenge to football game prayer in *Santa Fe Indep. School Dist. v. Doe*,[84] and the like.

This position is also consistent with the court decisions dealing with libel plaintiffs' subpoenas aimed at identifying anonymous defendants. Courts have generally required such plaintiffs to show some degree of legal validity to their

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T.S.R. v. J.C., it is difficult to see how defendant has set himself apart from any individual who may be named as a defendant in a civil suit for damages. 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. Any such doctor or lawyer can also assert that the plaintiff's act of naming him as a defendant is a bad-faith tactic to induce settlement and reap economic gain at the defendant's expense through baseless allegations. Here, we cannot say that potential damage caused by these allegations to defendant's reputation, personally or professionally, amounts to a protectable privacy interest. Nor has defendant demonstrated a privacy interest through his repeated assertions that plaintiff's allegations, if disclosed, will cause 'severe and imminent harm to [his] family.'"); *cf.* Doe v. Ocean Reef Cmty. Ass'n, No. 19-10138-CIV, 2019 WL 5102450 (S.D. Fla. Oct. 11, 2019) ("The facts alleged here place this case in the same category of the unfortunately numerous cases of sexual harassment that have been filed, litigated, and tried before a jury without the need of anonymity."); Doe v. Main Line Hosps., Inc., No. CV 20-2637, 2020 WL 5210994, at *5 (E.D. Pa. Sept. 1, 2020) ("[W]e do not discount Doe's very real concerns about reputational harm, both personally or professionally [from revelation of her past drug addiction], or her fears of relapse in the event of such backlash. But those types of fears are similar to those of other plaintiffs who have alleged that they were discriminated against because of their histories of substance abuse, and it is clear that several similarly-situated plaintiffs have publicly identified themselves in their own litigation."); Reimann v. Hanley, No. 16 C 50175, 2016 WL 5792679, *5 (N.D. Ill. Oct. 4, 2016) ("[C]ases in which plaintiffs allege that they have been placed at risk of harm due to being branded a 'snitch' are routinely litigated by inmates under their own name. [Citations omitted.] Plaintiff presents no special circumstances that would justify a departure from the general rule that parties litigate under their own names.").

[79] *Megless*.

[80] *See, e.g.*, Publius v. Boyer-Vine, __ (E.D. Cal. 2017); Doe v. Google LLC, No. 5:20-cv-07502-BLF (N.D. Cal. Jan. 26, 2021), *granting* Motion, *id.* (Oct. 26, 2020); Doe v. Barrow County, 219 F.R.D. 189, 193 (N.D. Ga. 2003) ("the only thing potentially being shielded from the public is plaintiff's name and any court proceedings or opinions that might be necessary to determine standing").

[81] *See* Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358, 371 n.2 (3d Cir.) (expressly citing *Roe v. Wade* as "giv[ing] the practice [of pseudonymity] implicit recognition" in *Roe*), *order clarified*, 543 F.3d 178 (3d Cir. 2008)

[82] 561 U.S. 186 (2010).

[83] 538 U.S. 1 (2003).

[84] 530 U.S. 290 (2000).

claims, so that the subpoena isn't used to unmask critics who are actually behaving perfectly legally.[85] At that point, the identity of the defendant is unimportant precisely because the questions (e.g., whether plaintiff's statements are opinion and therefore not actionable) do not turn on any facts that the defendants are asserting. But once a sufficient legal case can be shown, and the matter comes down to a factual dispute (e.g., about whether the defendant spoke with "actual malice," or at least negligently), then the defendant can be identified precisely so that the factual investigation can properly proceed.[86]

E. Fairness to Opponent

1. Generally

Pseudonymity can also create a "risk of unfairness to the opposing party,"[87] even when (as I generally assume in this Article) the defendant knows the plaintiff's identity. This is often articulated in general terms that would apply to most pseudonymity requests (except perhaps those in lawsuits against the government[88]):

> [F]undamental fairness suggests that defendants are prejudiced when required to defend themselves publicly before a jury while plaintiffs make accusations from behind a cloak of anonymity. C.D. actively has pursued this lawsuit—including by recruiting his co-plaintiff. He seeks over $40 million in damages. He makes serious charges and, as a result, has put his credibility in issue. Fairness requires that he be prepared to stand behind his charges publicly.[89]

More specifically, in a case where the plaintiff accused defendant of having distributed revenge porn of plaintiff:

> [Plaintiff] has denied [defendant] Smith the shelter of anonymity—yet it is Smith, and not the plaintiff, who faces disgrace if the complaint's allegations can be substantiated. And if the complaint's allegations are false, then anonymity provides a shield behind which defamatory charges may be launched without shame or liability.[90]

2. Public self-defense

A plaintiff's pseudonymity may also make it hard for the defendant to defend itself in public:

> The defendants . . . have a powerful interest in being able to respond publicly to defend their reputations [against plaintiff's allegations] . . . in . . . situations where the claims in the lawsuit may be of interest to those with whom the defendants have

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[85] Doe v. Cahill; Dendrite; etc.

[86] Cite.

[87] *Sealed Case*.

[88] *See infra* Part I.G.

[89] Rapp v. Fowler, No. 20-CV-9586 (LAK), 2021 WL 1738349 (S.D.N.Y. May 3, 2021) (cleaned up); *see also, e.g.*, Doe v. Skyline Automobiles Inc., 375 F. Supp. 3d 401 (S.D.N.Y. 2019); Doe v. Frank, 951 F.2d 320, 323–24 (11th Cir. 1992); Southern Methodist University Ass'n v. Wynne & Jaffe, 599 F. 2d 707, 712–13 (5th Cir. 1979); Mateer v. Ross, Suchoff, Egert, Hankin, Maidenbaum & Mazel, P.C., No. 96 CIV. 1756 (LAP), 1997 WL 171011, *6 (S.D.N.Y. Apr. 10, 1997); Doe v. Shakur, 164 F.R.D. 359, 361 (__ 1996); Doe v. Townes, No. 19CV8034ALCOTW, 2020 WL 2395159, *6 (S.D.N.Y. May 12, 2020); Doe v. Family Dollar Stores, Inc., No. 1:07-CV-1262-TWT-CCH, 2007 U.S. Dist. LEXIS 105268, at *9 (N.D. Ga. Oct. 17, 2007); Doe v. Heitler, 26 P.3d 539 (Colo. Ct. App. 2001); Doe v. McLellan, No. CV205997GRBAYS, 2020 WL 7321377, *3 (E.D.N.Y. Dec. 10, 2020);); Anonymous v. Simon, No. 13 CIV. 2927 RWS, 2014 WL 819122, *2 (S.D.N.Y. Mar. 3, 2014); Doe *ex rel.* Doe v. Harris, No. 14–cv–00802, 2014 WL 4207599, at *2 (W.D. La. Aug. 25, 2014); Doe v. Baird, No. 1:20-cv-11579-DJC, at 7–8 (D.D.C. July 27, 2020); Bird v. Barr, No. 19-cv-1581, 2019 WL 2870234, at *2 (D.D.C. July 3, 2019); Doe v. Freydin, No. 21 CIV. 8371 (NRB), 2021 WL 4991731, at *3 (S.D.N.Y. Oct. 27, 2021); *In re* U.S. Office of Pers. Mgmt. Data Sec. Breach Litig., No. 17-5217, 2019 WL 2552955, at *28 (D.C. Cir. June 21, 2019) (Williams, J., concurring in part and dissenting in part). *But see* Doe v. Tsai, No. 08-1198-DWF/AJB, 2008 WL 11462908, *3 (D. Minn. July 23, 2008) (rejecting this argument, in case involving parents suing over allegedly false claims of abuse of their children).

[90] Doe v. Smith, 429 F.3d 706, 710 (7th Cir. 2005); *see also* United States v. Microsoft Corp., 56 F.3d 1448, 1457 (D.C. Cir. 1995) ("Anonymity may well confer a kind of immunity which permits a plaintiff to hurl rhetorical weapons that could cause a unique kind of harm not faced in ordinary litigation.").

business or other dealings.

> Part of that defense will ordinarily include direct challenges to the plaintiff's credibility, which may well be affected by the facts plaintiff prefers to keep secret here: his history of mental health problems and his history of substance abuse. Those may be sensitive subjects, but they are at the heart of plaintiff's credibility in making the serious accusations he has made here. He cannot use his privacy interests as a shelter from which he can safely hurl these accusations without subjecting himself to public scrutiny, even if that public scrutiny includes scorn and criticism.[91]

To be sure, a pseudonymity order is not by itself a gag order; in principle, a pseudonymity order only deals with how the parties are to be referred to in court, and not outside it. But a judge who really believes that a party would be harmed by being named, and therefore requires pseudonymity in legal filings, may easily feel that the order would being frustrated if the opposing party is free to publicize the pseudonymous party's actual name. As a result, many pseudonymity orders do include gag orders as well.[92] In one remarkable case, a judge ordered a blog that covers the Mexican drug war not to disclose the name of a plaintiff who was suing it over a post on the blog.[93] In another, a judge ordered a sexual assault plaintiff not to disclose the name of the defendant she was accusing.[94]

More broadly, I expect that few litigants would feel fully comfortable publicly identifying an adversary as to whom the judge had issued a pseudonymity order, even if there was no formal gag order attached. In entering the pseudonymity order, the judge has presumably concluded that identifying the plaintiff would be both harmful and not particularly valuable. It seems likely that the opposing party's publicly identifying the victim, even if not a violation of the letter of the order, would be seen as defying its spirit. And a litigant whose case will be supervised by that judge might be reluctant to engage in anything that can perceived as defiance.

3. Effect on settlement value of case

The settlement value of a case generally turns in large part on the ongoing costs—whether litigation costs, emotional costs, or reputational costs—of the lawsuit to the two parties. All else being equal, if the plaintiff's costs go down, the settlement value of the case is likely to increase. Likewise, if the defendant's costs go down, the settlement value of the case is likely to decrease. (Consider, for instance, the likely effect on the settlement value if the defendant can reduce its litigation costs, perhaps if a defendant gets ideologically minded *pro bono* counsel.)

It follows that, in cases where both sides have reputational or privacy costs stemming from the litigation, giving one party pseudonymity but not the other would decrease the pseudonymous party's costs, and would change the likely settlement value.[95] All else being equal, a *Doe v. Smith* will tend to yield a higher settlement than *Jones v. Smith* or *Doe*

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[91] Doe v. Indiana Black Expo, Inc., 923 F. Supp. 137, 142 (S.D. Ind. 1996) (paragraph break added); Doe v. Purdue Univ., No. 4:18-CV-72-JVB-JEM, 2019 WL 1960261, *4 (N.D. Ind. Apr. 30, 2019).

[92] *See, e.g.*, Doe v. PreCheck Inc., No. CV-21-01129-PHX-DLR, at 1–2 (D. Ariz. Sept. 30, 2021); C.M. v. United States, No. SA-21-CV-00234-JKP, 2021 WL 1822305, *3 (W.D. Tex. Mar. 31, 2021); Doe v. Nygard, No. 1:20-cv-06501-ER, at 6 (S.D.N.Y. Aug. 20, 2020); Doe v. Proskauer Rose LLP, No. 1:17-cv-00901, at 1 (D.D.C. May 7, 2017); Doe v. Gwyn, 3:17-cv-00504, at 3 (E.D. Tenn. Apr. 5, 2018); Does 151–166 v. Ohio State Univ., No. 2:20-cv-03817-MHW-EPD, at 1–3 (S.D. Ohio Aug. 7, 2020); J.A.A. v. St Hans Bros. Indus. L.P., No. 2:20-cv-00156, at 5 (S.D. Tex. June 17, 2020); Hester Prynne v. Northam, No. 1:19-cv-00329-JFA (E.D. Va. Mar. 21, 2019); https://storage.courtlistener.com/recap/gov.uscourts.cand.366632/gov.uscourts.cand.366632.6.0.pdf; ; https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=TyzKJBEt2wdaPeC78/WorA==; https://reason.com/wp-content/uploads/2021/10/DoevAnonymousPseudonymizationOrder.pdf; https://reason.com/volokh/2021/10/11/court-orders-metoo-plaintiff-not-to-mention-defendants-name-in-public/.

[93] https://reason.com/volokh/2021/10/12/media-outlets-forbidden-from-identifying-recently-released-drug-cartel-ex-boss-as-plaintiff-in-privacy-lawsuit/.

[94] https://reason.com/volokh/2021/10/11/court-orders-metoo-plaintiff-not-to-mention-defendants-name-in-public/.

[95] Doe v. Doe, No. 20-CV-5329(KAM)(CLP), 2020 WL 6900002, *3 (E.D.N.Y. Nov. 24, 2020) ("If the defendant [a prominent lawyer and adjunct law professor accused of sexual assault] were named, he would likely feel significant pressure to settle this case regardless of the

v. Roe, which in turn will tend to yield a higher settlement than *Jones v. Roe*.

Courts recognize this, and sometimes give it as a justification against pseudonymity. "[S]ome cases suggest that a court should consider whether allowing a party to proceed under a pseudonym will create an imbalance in settlement negotiating positions."[96]

> Defendants contend that anonymity creates an imbalance when it comes to settlement negotiations: While a publicly accused defendant might be eager to settle in order to get its name out of the public eye, a pseudonymous plaintiff might hold out for a larger settlement because they face no such reputational risk. . . . Allowing Plaintiff to proceed anonymously would put Defendants at a genuine disadvantage [and cause significant prejudice], particularly when it comes to settlement leverage.[97]

Of course, one can also say that the non-pseudonymity default itself causes improper settlement leverage, which pseudonymity might solve. Say, for instance, that David Defendant is in a field where even the accusation (however unfounded) of some misconduct would mean massive financial cost. Paul Plaintiff's threatening to file a *Paul v. David* lawsuit might thus yield an unfairly inflated settlement compared to *Paul v. Doe* (where David could defend himself on the merits, and perhaps win without the allegations being disclosed) or even compared to a fully pseudonymous *Poe v. Doe* (since pseudonymity wouldn't help Paul much).

Conversely, say Polly Plaintiff wants to sue Donna Defendant for discrimination based on Polly's mental illness, but is reasonably fearful that disclosing the mental illness would ruin her future employment prospects. In pre-filing negotiations, Donna (who might not worry too much about publicity related to allegations that she discriminated) may know that Paula dreads the publicity, and may be able to settle the case for a pittance, even if Paula has a solid case on the law. Paula's being able to file a *Poe v. Donna* lawsuit or even a *Poe v. Doe* lawsuit would then yield a likely settlement value that's more in line with the expected value of the case at trial.

It's not clear in general, then, whether non-pseudonymous litigation yields fairer settlement values than pseudonymous litigation. But it seems clear that pseudonymity can change settlement values in many cases, whether for better or fore worse.

4. Mutual pseudonymity as a solution

Of course, the fairness concern could be satisfied by allowing both parties to be pseudonymous. Some courts have indeed taken that view, just as some have cited fairness as a basis for rejecting pseudonymity for either party.[98] "[I]f the

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merits of the plaintiff's allegations.").

[96] Doe v. MacFarland, 117 N.Y.S.3d 476, 497 (Sup. Ct. 2019); Doe v. McLellan, No. CV205997GRBAYS, 2020 WL 7321377, *3 (E.D.N.Y. Dec. 10, 2020).

[97] Doe v. Fedcap Rehab. Servs., Inc., No. 17-CV-8220 (JPO), 2018 WL 2021588, *2–*3 (S.D.N.Y. Apr. 27, 2018); *see also* Doe v. Zinsou, No. 19 CIV. 7025 (ER), 2019 WL 3564582, *7 (S.D.N.Y. Aug. 6, 2019); *cf.* T.S.R. v. J.C., 288 N.J. Super. 48, 58–59 (App. Div. 1996) (noting defendant's argument that "plaintiffs' counsel has suggested that the possibility of public disclosure would provide an incentive to settlement"—something that defendant reasoned as an "improper, bad faith motive[] for [plaintiff's] requesting that this matter proceed publicly"—but ultimately concluding that, given the defendant's having been identified in other sources, pseudonymity wasn't warranted).

[98] *E.g.*, A.B.C. v. XYZ Corp., 282 N.J. Super. 494, 501 (App. Div. 1995) (noting that the state high court had concluded that "a sexual harassment plaintiff" would not be pseudonymized, so "there is no reason in logic or law that a perpetrator [of sexual misconduct, such as exhibitionism,] should be protected, when a victim is not"); Doe v. Doe, No. CV146015861S, 2014 WL 4056717 (Conn. Super. Ct. Ansonia-Milford Dist.); Doe v. Doe, No. 20-CV-5329(KAM)(CLP), 2020 WL 6900002, *3 (E.D.N.Y. Nov. 24, 2020); Doe v. Anonymous #1, No. 520605/2020E (N.Y. Sup. Ct. Kings County Feb. 24, 2021), and Affidavit in Support of Defendants' Motion to Dismiss the Complaint, *id.* (Dec. 21, 2020); Doe v. Tenzin Masselli, No. MMXCV145008325, 2014 WL 6462077, *2 (Conn. Super. Ct. Oct. 15, 2014) (leaving open the door to *Doe v. Roe* lawsuits in some such cases: "If a plaintiff in a civil case such as this one were to fabricate charges of sexual assault, the defendant's reputation might suffer irreparable harm during the proceedings, even if the plaintiff ultimately fails to prove him liable. In such a case the use of a pseudonym by the defendant could prevent the completely unjustified damage to his reputation."); Doe v. Tyler Clementi

plaintiff is allowed to proceed anonymously, . . . it would serve the interests of justice for the defendant to be able to do so as well, so that the parties are on equal footing as they litigate their respective claims and defenses."[99] "If we are to have a policy of protecting the names of individual litigants from public disclosure, there is a very substantial interest in doing so on a basis of equality."[100]

But of course such mutual pseudonymity, while providing more protection to the parties' privacy and reputations, also undermines public access still more. Imagine being a reporter who has to write about a *Doe v. Roe* lawsuit, with no ability to track down people who can offer the story behind the case (except to the extent that the lawyers are willing to provide access to those people)—you could still see the allegations, the parties' arguments, and the court's decisions, but without any ability to independently investigate the facts. And of course if that's accepted as the norm in, say, sexual assault lawsuits (or libel lawsuits over allegations of sexual assault), whole areas of the law could become difficult for the media and the public to monitor, outside the constrained accounts of the facts offered up by judges and lawyers. This may be a reason why such mutual pseudonymity is so rare.[101]

F. Accuracy and Efficiency of Fact-Finding

Pseudonymity can also cause difficulties in the fact-finding process, especially as the case gets closer to trial.

1. Encouraging party honesty in testimony or affidavits

A nonanonymous witness, including a party witness, "may feel more inhibited than a pseudonymous witness from fabricating or embellishing an account."[102] And if the party witness is not telling the truth, "there is certainly a countervailing public interest in knowing the [witness's] identity."[103] It's hard to tell the extent of this tendency, but it probably exists in some measure.

2. Drawing in witnesses

When the Court recognized a public right of access to criminal trials, in *Richmond Newspapers, Inc. v. Virginia*,

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Found., No. 19STCV43398 (L.A. County Super. Ct. filed June 11, 2020) (progressing with the only remaining defendant being pseudonymous, though without an explicit court decision allowing this); Bike v. Sollene, No. CV126027065S, 2012 WL 5476887, *2 (Conn. Super. Ct. Oct. 15, 2012) (discussing some Connecticut cases where pseudonymity was allowed to such defendants); *see also* Milani, *supra* note 7, at 1698–1706 (arguing for such mutual pseudonymity, at least "until judgment is entered" in cases against "defendants accused of stigmatizing intentional torts").

[99] Doe v. Doe, No. 20-CV-5329(KAM)(CLP), 2020 WL 6900002, *4 (E.D.N.Y. Nov. 24, 2020); *see also* Roe v. Doe, No. CV 18-666 (CKK), 2019 WL 1778053 (D.D.C. Apr. 23, 2019) ("Plaintiff's consent to Defendant's request for both parties to proceed under pseudonym addresses several of the Court's qualms: no longer would Plaintiff alone bear the risk of reputational harm if only Defendant were pseudonymized—over her objection.").

[100] Doe v. City of New York, 201 F.R.D. 100, 102 (S.D.N.Y. 2001); *see also* Doe v. Am. Fed. of Gov't Employees, No. 1:20-cv-01558-JDB, at 6 n.2 (D.D.C. June 19, 2020) (suggesting that, given the "risk of unfairness [that] attends letting these serious allegations, which are as yet unproven, attach to Defendant Cox's name while the John Doe #1 is permitted to remain anonymous," the best remedy would be to have mutual pseudonymity).

[101] *See, e.g.*, Doe v. Doe, 189 A.D.3d 406 (N.Y. App. Div. 2020) (allowing pseudonymity for such a plaintiff but rejecting it for the defendant).

[102] Doe v. Delta Airlines Inc., 310 F.R.D. 222, 225 (S.D.N.Y. 2015), *aff'd*, 672 F. App'x 48 (2d Cir. 2016); Roe v. Does 1-11, No. 20-CV-3788-MKB-SJB, 2020 WL 6152174, *3 (E.D.N.Y. Oct. 14, 2020); Lawson v. Rubin, No. 17CV6404BMCSMG, 2019 WL 5291205 (E.D.N.Y. Oct. 18, 2019); Doe v. Zinsou, No. 19 CIV. 7025 (ER), 2019 WL 3564582, *7 (S.D.N.Y. Aug. 6, 2019); San Bernardino County Dep't of Pub. Soc. Servs. v. Superior Court, 232 Cal. App. 3d 188 (1991) ("open proceedings discourage perjury"); *see also* Doe v. McLellan, No. CV205997GRBAYS, 2020 WL 7321377, *3 (E.D.N.Y. Dec. 10, 2020) ("defendants would not be able to fully and adequately cross-examine the plaintiff" because of plaintiff's anonymity).

[103] Roe v. Does 1–11, No. 20-CV-3788-MKB-SJB, at 11 (E.D.N.Y. Oct. 14, 2020).

it noted the possibility that such publicity can cause otherwise unknown witnesses to come forward.[104] Witnesses might likewise come forward in a civil case: "It is conceivable that witnesses, upon the disclosure of Doe's name, will 'step forward [at trial] with valuable information about the events or the credibility of witnesses.'"[105] And if only one side is pseudonymous, "information about only [the other] side may thus come to light."[106] At the same time, such claims are by their nature hypothetical, and some judges view them as too speculative.[107]

3. Avoiding alienating witnesses through gag orders

A party will often need to disclose a pseudonymous adversary's identity in conducting discovery.[108] If you want to ask a witness questions about the plaintiff, you have to mention the plaintiff's name. But if the court really wants to keep the plaintiff's identity secret, then the witness would have to be put under some sort of protective order to remain quiet about that identity as well.[109]

Many people are likely to resist becoming witnesses if that means agreeing to a protective order, at least if they have no personal stake in the matter. Legally enforceable confidentiality obligations are a burden, especially when the obligation relates to an acquaintance. If you learn your colleague Mary Jones has accused your mutual employer of sexual harassment, you may not want to be legally bound to indefinitely keep that secret fact segregated from all the other things you know about Jones, and all the other things you might say about her to coworkers or friends.

We lawyers have to keep such secrets about people as part of our jobs, but we're used to it, and we're handsomely compensated for it. Not so with prospective witnesses, who may already be skittish about the justice system. And having to incur such an unpaid-for obligation may be enough to deter some witnesses from testifying.[110]

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[104] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 596–97, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (Brennan, J., concurring).

[105] Doe v. Delta Airlines, Inc., 310 F.R.D. 222, 225 (S.D.N.Y. 2015), *aff'd*, 672 F. App'x 48 (2d Cir. 2016); *see also* Rapp v. Fowler, No. 20-CV-9586 (LAK), 2021 WL 1738349, *7 (S.D.N.Y. May 3, 2021); Roe v. Does 1-11, No. 20-CV-3788-MKB-SJB, 2020 WL 6152174, *3 (E.D.N.Y. Oct. 14, 2020); Doe v. Del Rio, 241 F.R.D. 154, 159 (S.D.N.Y. 2006); San Bernardino County Dep't of Pub. Soc. Servs. v. Superior Court, 232 Cal. App. 3d 188 (1991); Steinman, *supra* note 7, at 19.

[106] *Id.*

[107] Doe v. Purdue Univ., No. 4:18-CV-72-JVB-JEM, 2019 WL 1960261 (N.D. Ind. Apr. 30, 2019) ("The hypothetical witness suggested by Duerfahrd's argument is unknown to both parties, but knows relevant information as to Plaintiff's specific claims against Duerfahrd, and would come forward on his or her own when Plaintiff's name is released (but not if Duerfahrd's name is the only one released). The scenario appears unlikely, and Duerfahrd offers no argument as to why he would expect such a witness.").

[108] *See* Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118, 1125 (10th Cir. 1979) (noting that pseudonymity "may cause problems to defendants engaging in discovery and establishing their defenses"); Doe v. McLellan, No. CV205997GRBAYS, 2020 WL 7321377, *3 (E.D.N.Y. Dec. 10, 2020) ("Plaintiff's anonymity would make it more difficult to obtain witnesses and witness testimony"); De Angelis v. Nat'l Ent. Grp. LLC, No. 2:17-CV-00924, 2019 WL 1071575, *4 n.1 (S.D. Ohio Mar. 7, 2019).

[109] *See, e.g.*, Rapp v. Fowler, No. 20-CV-9586 (LAK), 2021 WL 1738349, *7 (S.D.N.Y. May 3, 2021) (discussing would-be pseudonymous plaintiff's suggestion that defendant be allowed "to use and disclose [plaintiff]'s name for discovery purposes on the condition that anyone who becomes privy to his identity would be obliged to keep it confidential"); C.S. v. Choice Hotels Int'l, Inc., No. 2:20-CV-635-JES-MRM, 2021 WL 2792166, at *13 (M.D. Fla. June 11, 2021) (approving of such an order), *report & recommendations rejected*, 2021 WL __, at *20 (M.D. Fla. Sept. 14, 2021) (rejecting such an order because "requiring the written agreement of potential witnesses before *any* disclosures can be made would significantly hamper defendants' ability to investigate"); J.C. v. Choice Hotels Int'l, Inc., No. 20-cv-00155-WHO, 2021 WL 1146406, at *6 (N.D. Cal. Mar. 4, 2021) (approving of such an order); Doe v. PreCheck Inc., No. CV-21-01129-PHX-DLR, at 1–2 (D. Ariz. Sept. 30, 2021) (issuing such an order); Doe No. 2. v. Kolko, 242 F.R.D. 193, 199 (E.D.N.Y. 2006) (issuing such an order).

[110] *See, e.g.*, *C.S.*, 2021 WL __, at *19 (noting, as examples, "a situation where an acquaintance or family member of plaintiff would need to sign an agreement prohibiting them from ever revealing information related to plaintiff's identity, thus making it impracticable and likely to deter witnesses," or "a potential witness [being] asked to agree to be bound by a Court order without knowing what information he or she was agreeing to maintain confidential or even whether he or she had knowledge of information that should be maintained as confidential"); Doe v.

This concern has discouraged some courts from allowing pseudonymity. In one of the sexual assault lawsuits against Harvey Weinstein, for instance, the court reasoned:

> The Court cannot accept Plaintiff's "mere speculation" that Weinstein's defense would not be prejudiced by the condition that he "not disclose her name to the public," with no clear definition of what would constitute disclosure to "the public." Plaintiff implicitly concedes that Weinstein might need to disclose her name to at least some third parties, since she appears to suggests that he redact her name from witness depositions.[111]

4. Allowing class members to evaluate class representative

Some courts have rejected pseudonymity for would-be class representative on the grounds that it "may . . . preclude potential class members from properly evaluating the qualifications of the class representative."[112] Others have disagreed.[113]

5. Preventing jury prejudice

Letting a party testify pseudonymously might also prejudice the jury, by "risk[ing] . . . giving [the party's] claim greater stature or dignity,"[114] or by implicitly "tarnish[ing]" a defendant by conveying to the jury "the unsupported contention that the [defendant] will seek to retaliate against [the plaintiff]."[115] And it could also make "witnesses, who know Plaintiff by her true name, . . . come across as less credible if they are struggling to remember to use Plaintiff's pseudonym."[116] Query whether these risks could be minimized through suitable jury instructions.[117]

Weinstein, 484 F. Supp. 3d 90, 96-97 (S.D.N.Y. 2020) (refusing to allow plaintiff to be pseudonymous in part because this would make it harder for defendant to depose witnesses).

[111] *See id.* at __ (citing Michael v. Bloomberg L.P., No. 14-cv-2657, 2015 WL 585592, at *4 (S.D.N.Y. Feb. 11, 2015)).

[112] Michael v. Bloomberg L.P., No. 14-cv-2657, 2015 WL 585592, at *4 (S.D.N.Y. Feb. 11, 2015); *In re* Ashley Madison Customer Data Security Breach Litig., MDL No. 2669, 2016 WL 1366616, at *4 (E.D. Mo. Apr. 6, 2016); Doe v. City of Indianapolis, No. 1:06-cv-865-RLY-WTL, 2006 WL 2289187, at *3 (S.D. Ind. Aug. 7, 2006) ("In addition, Plaintiffs brought this action as a class action. They therefore represent not only themselves, but the thousands of sex offenders subject to the ordinance. The public interest is not in being able to identify any one Plaintiff, but in being able to follow the case to determine how the constitutional issues are resolved."); Sherman v. Trinity Teen Solutions, Inc., No. 20-CV-00215-SWS, 2021 WL 3720131 (Feb. 11, 2021) (likewise); Doe v. U.S. Healthworks Inc., No. CV1505689SJOAFMX, 2016 WL 11745513, *5 (C.D. Cal. Feb. 4, 2016) (likewise).

[113] *But see* Doe v. City of Apple Valley, No. 20-cv-499, at 4 (D. Minn. Mar. 5, 2020) ("[T}he District Court will still hear any motion for class certification in this matter and is more than capable of ensuring the Plaintiffs are fair representatives of the proposed classes"); Roe v. Operation Rescue, 123 F.R.D. 500, 505 (E.D. Pa. 1988) (allowing pseudonymous class representatives); Doe v. Mundy, 514 F.2d 1179, 1182 (7th Cir. 1975) (likewise).

[114] Lawson v. Rubin, No. 17CV6404BMCSMG, 2019 WL 5291205 (E.D.N.Y. Oct. 18, 2019); Doe v. Ayers, 789 F.3d 944, 946 (9th Cir. 2015); James v. Jacobson, 6 F.3d 233, 240–41 (4th Cir. 1993); Doe v. Delta Airlines, Inc., 310 F.R.D. 222, 225 (S.D.N.Y. 2015) ("As many jurors and any reader of New York area newspapers surely would be aware, parties to lawsuits routinely contend, at trial, with disclosure of embarrassing incidents such as public intoxication—indeed, trials commonly bring to light far more prejudicial, damning, and colorful episodes. Were Doe permitted to proceed on a no-name basis, one or more jurors might conclude that she, for unknown reasons, merited extra-solicitous treatment. This might skew the jury's assessment of Doe's credibility and her claims."), *aff'd*, 672 F. App'x 48 (2d Cir. 2016); Doe v. Rose, No. CV-15-07503-MWF-JCX, 2016 WL 9150620 (C.D. Cal. Sept. 22, 2016); Doe v. Cabrera, 307 F.R.D. 1, 10 (D.D.C. 2014) ;EEOC v. Spoa, LLC, 2013 WL 5634337, at *3 (D. Md. Oct. 15, 2013).

[115] Tolton v. Day, No. CV 19-945 (RDM), 2019 WL 4305789 (D.D.C. Sept. 11, 2019); A.B.C. v. XYZ Corp., 282 N.J. Super. 494, 504 (App. Div. 1995) ("Defendant might well be prejudiced in defending against a complaint by being perceived as a wrongdoer by the very fact of anonymity alone.").

[116] Doe v. Elson S Floyd Coll. of Med. at Washington State Univ., No. 2:20-CV-00145-SMJ, 2021 WL 4197366 (E.D. Wash. Mar. 24, 2021).

[117] *See James*, 6 F.3d at 242 (reasoning that they could be).

6. Preventing confusion and lack of witness credibility

Especially in oral testimony, pseudonyms can be confusing to the witnesses and thus to jurors. To quote one such case,

> [E]vidence submitted to the Court highlights the problems pseudonyms may pose at trial and the confusion it will undoubtably produce, despite counsel's best efforts to adequately prepare their respective clients. This was apparent from the parties' depositions: "Moira Hathaway" could not recall her pseudonym's first name, and "Hillary Lawson" could not recall her close friend and co-plaintiff's pseudonym. As one court in this circuit has already recognized, "conduct[ing] a trial in such an atmosphere, all the while using pseudonyms, promises trouble and confusion." In the event a witness inadvertently testified to a plaintiff's real name, the Court would have to immediately excuse the jury in the middle of critical testimony, admonish the witness, and provide a limiting instruction, which may signal to the jury that either the attorney or the witness acted improperly.[118]

Likewise, in a student lawsuit over a medical school's disciplinary actions:

> [Defendant] argues that witnesses, who know Plaintiff by her true name, may come across as less credible if they are struggling to remember to use Plaintiff's pseudonym. Plaintiff retorts that this argument "just does not make sense" because the witnesses are medical professionals—or medical students—who often use the name "Jane Doe" to refer to unidentified female patients. But unlike in the treatment context, these witnesses do know Plaintiff's true name and have used that name in all their previous interactions. The Court agrees that there is a risk of prejudice to Defendant.[119]

7. Protecting parties' abilities to research each other's past cases

If you are sued, one of the first things you might want to do is to look up any other lawsuits the plaintiff had filed, to see if they may reveal some facts that might be relevant to this case. Have they made similar allegations in other cases? Have they made allegations arising out of the same fact pattern, which might bear on the allegations against you? For instance, if the plaintiff claims that your product injured him, might he have sued someone else before over the same injury (e.g., claiming that it was the result of an accident or of medical malpractice)?

Were there some findings in those lawsuits that might have collateral estoppel effects? Did the plaintiff make some statements that could be viewed as judicial admissions,[120] or could in any event undermine the plaintiff's case? Did the plaintiff say something about his domicile, for instance, that might be relevant to whether his citizenship is diverse from yours?[121] Has the plaintiff filed so many losing cases in the past that you might be able to have him declared a frivolous litigant?[122]

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[118] Lawson v. Rubin, No. 17CV6404BMCSMG, 2019 WL 5291205 (E.D.N.Y. Oct. 18, 2019); *see also* Guerrilla Girls, Inc. v. Kaz, 224 F.R.D. 571, 572, 575 (S.D.N.Y. 2004).

[119] Doe v. Elson S Floyd Coll. of Med. at Washington State Univ., No. 2:20-CV-00145-SMJ, 2021 WL 4197366 (E.D. Wash. Mar. 24, 2021).

[120] *Cf.* Ergo Science, Inc. v. Martin, 73 F.3d 595, 598 (5th Cir. 1996) ("The doctrine of judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position taken in the same or some earlier proceeding," when "a court has relied on the position urged").

[121] *See, e.g.*, Ceglia v. Zuckerberg, 772 F. Supp. 2d 453 (W.D.N.Y. 2011) ("Having successfully persuaded a different federal district court that his domicile as of September 2004 was New York, [Facebook founder Mark] Zuckerberg would be judicially estopped from denying otherwise now."); Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 1000 (9th Cir. 2012) ("This is a textbook case for applying judicial estoppel. Monroe's representatives took one position on Monroe's domicile at death for forty years, and then changed their position when it was to their great financial advantage . . . ."); Techno-TM, LLC v. Fireaway, Inc., 928 F. Supp. 2d 694, 698 (S.D.N.Y. 2013) ("The representation to the Washington federal court that they had not yet established a state of permanent residence is in complete conflict with the representation to this court that the Huhses had changed their domicile from Costa Rica to Washington."); Sarauw v. Fawkes, 66 V.I. 253, 268–69 (2017) (citing other such cases).

[122] *Cf.* Part IV, which describes a vexatious litigant's attempt to seal or pseudonymize many of his past cases; *see also* Chaker v. San

Conversely, if you're a plaintiff, you might want to research the defendant: Have there been past verdicts against the defendant in similar past cases? Has the defendant you're suing for malpractice or sexual harassment, for instance, been found liable in similar cases before? You might be able to check the records of the cases to see what relevant facts might have emerged, or consult with other plaintiffs to see if they are at liberty to tell you anything helpful.

But if the plaintiff's or defendant's past cases have been pseudonymous, that information may be largely unavailable (at least until you ask for information about the party's past cases in discovery, and the party accurately answers). "[W]ithout [a party's] identity in the public record, it is difficult to apply legal principles of res judicata and collateral estoppel"[123]—or to apply judicial estoppel, or to similarly check whether the party's past factual assertions and legal positions are consistent with their current ones.[124]

8. Pseudonymity only at early stages of litigation

Note that some courts deal with some of these problems by offering pseudonymity only at the early stages of litigation, on the theory that "the balance between a party's need for anonymity and the interests weighing in favor of open judicial proceedings may change as the litigation progresses."[125] This is particularly so with regard to pseudonymity at trial, which many courts view with skepticism:

> Allowing Plaintiff to proceed via a pseudonym at trial could impermissibly prejudice the jury against Defendant. The risk of harm to Plaintiff is not so severe that it outweighs the prejudice and unfairness to Defendant. The Court therefore will not allow Plaintiff to proceed under a pseudonym should this case reach trial.
>
> But the Court will allow Plaintiff to proceed under a pseudonym at any other pretrial hearings. Because the Court, not the jury, is the factfinder at pretrial hearings, the risk of prejudice is far reduced. . . . The Court determines that the potential harm to Plaintiff outweighs the prejudice to Defendant and the public interest for pretrial hearings.[126]

Likewise, courts might allow pseudonymity while a settlement seems to be looming, but saying "[t]his is subject to

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Diego Superior Ct., No. D075494, 2021 WL 1523009, *3 (Cal. Ct. App. Apr. 19, 2021) (declining to take the litigant's name off the vexatious litigant list, in part based on the court's own search for Chaker's past nonpseudonymous cases, beyond the ones he had disclosed to the court).

[123] Femedeer v. Haun, 227 F.3d 1244, 1246 (10th Cir. 2000); Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118, 1125 (10th Cir. 1979); Roe v. Ingraham, 364 F. Supp. 536, 541 n.7 (S.D.N.Y. 1973); *see also* Doe v. Univ. of Louisville, No. 3:17-CV-00638-RGJ, 2018 WL 3313019, *3 (W.D. Ky. July 5, 2018); Doe v. Kentucky Cmty. & Tech. Coll. Sys., No. CV 20-6-DLB, 2020 WL 495513, *2 (E.D. Ky. Jan. 30, 2020), *reconsideration denied*, No. CV 20-6-DLB, 2020 WL 998809 (E.D. Ky. Mar. 2, 2020); Free Mkt. Comp. v. Commodity Exch., Inc., 98 F.R.D. 311, 313 (S.D.N.Y. 1983); EW v. New York Blood Ctr., 213 F.R.D. 108, 110 (E.D.N.Y. 2003).

[124] *Cf.* Michael v. Bloomberg L.P., 14-cv-2657, 2015 WL 585592, at *4 (S.D.N.Y. Feb. 11, 2015) (rejecting pseudonymity for a proposed class representative, because pseudonymity "may . . . preclude potential class members from properly evaluating the qualifications of the class representative").

[125] Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1069 (9th Cir. 2000); *see also* Steinman, *supra* note 7, at 36.

[126] Doe v. Elson S Floyd Coll. of Med. at Washington State Univ., No. 2:20-CV-00145-SMJ, 2021 WL 4197366 (E.D. Wash. Mar. 24, 2021); *see also, e.g.*, Doe v. MacFarland, 117 N.Y.S.3d 476, 498 (Sup. Ct. 2019) ("For example, if a jury trial is requested, will plaintiff seek to conceal her true identity from the jurors? Will plaintiff seek permission to testify as 'Jane Doe'? If so, the Court will have to consider whether the grant of pseudonymity to plaintiff can be mitigated by an appropriate jury charge or whether allowing plaintiff to do so visits other prejudice to defendant. . . . Those issues await later determination."); Doe v. Rose, No. CV-15-07503-MWF-JCX, 2016 WL 9150620 (C.D. Cal. Sept. 22, 2016) ("while not discounting the public's strong interest in encouraging victims of sexual assault to pursue their rights in court, the Court finds that, for purposes of the trial itself, the balance of the public interest has shifted to favor public access and disclosure"); Doe 1 v. Ogden City School Dist., 120CV00048HCNDAO, 2021 WL 4923728, *3 n.2 (D. Utah Oct. 21, 2021); *see also* S.Y. v. Uomini & Kudai, LLC, No. 2:20-CV-602-JES-MRM, 2021 WL 3054871, *6 (M.D. Fla. June 11, 2021); Al Otro Lado, Inc. v. Nielsen, No. 17-CV-02366-BAS-KSC, 2017 WL 6541446, *8 (S.D. Cal. Dec. 20, 2017). *But see* Doe v. Neverson, 820 F. App'x 984, 987–88 (11th Cir. 2020) (suggesting that pseudonymity could be allow at trial as well).

change if the settlement craters."[127] To be sure, such pseudonymity isn't as valuable to the party as permanent pseudonymity—but it can still be quite valuable, given that 99% of all cases are terminated before trial.[128]

G. Litigation Against the Government

Some cases reason that, when plaintiffs sue the government, there is less risk of unfair injury to the defendant's reputation, and therefore pseudonymity should be more readily allowed. Such lawsuits, the theory goes, "involve no injury to the Government's 'reputation,'" whereas "the 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."[129]

On the other hand, that a lawsuit is against a government entity will often involve a "claim to relief [that] involves the use of public funds, and the public certainly has a valid interest in knowing how state revenues are spent,"[130] and will often involve especially serious charges of misconduct.[131] Other courts reason that the interest in openness "is heightened because Defendants are public officials and government bodies."[132] "The public has a strong interest in knowing the accusations against its tax-funded entities as well as the identities of the individuals making those accusations. . . . The public's interest . . . weighs heavily against anonymity because the defendants are public servants who stand accused of a gross abuse of power."[133]

Thus, though courts often note as a factor in the pseudonymity analysis "whether the action is against a governmental or private party,"[134] it's not clear which way this cuts.[135] Perhaps the better inquiry would be not into whether the defendant is a government entity, but into whether the plaintiff is challenging government action as a matter of law without regard to the factual details related to the plaintiff (see Part I.D above); such a purely legal challenge indeed makes the plaintiff's identity less important.

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[127] SEB Inv. Mgmt. AB v. Symantec Corp., No. C 18-02902 WHA, 2021 WL 3487124, *2 (N.D. Cal. Aug. 9, 2021).

[128]

[129] S. Methodist Univ. Ass'n of Women L. Students v. Wynne & Jaffe, 599 F.2d 707, 713 (5th Cir. 1979); Roe v. Doe, 2019 WL 2058669, at *4 (D.D.C. May 7, 2019) (internal citations and quotations omitted); see Jaffe, 599 F.2d at 713; Doe v. Skyline Automobiles Inc., 375 F. Supp. 3d 401, 406 (S.D.N.Y. 2019); Doe v. Drake Univ., 2017 WL 11404865, at *3 (S.D. Iowa June 13, 2017); Doe v. JBF RAK LLC, 2014 WL 5286512, at *5 (D. Nev. Oct. 15, 2014); Rose v. Beaumont Indep. Sch. Dist., 240 F.R.D. 264, 266–67 (E.D. Tex. 2007); Doe v. Bd. of Trustees of Univ. of Ill., No. 2:20-cv-02265-CSB-EIL, at 4 (C.D. Ill. Nov. 9, 2020). *See also* EW v. New York Blood Ctr., 213 F.R.D. 108, 112 (E.D.N.Y. 2003) (applying this to a nongovernmental blood bank).

[130] M.M. v. Zavars, 139 F.3d 798, 803 (10th Cir. 1998); *cf.* Doe v. Pub. Citizen, 749 F.3d 246, 274 (4th Cir. 2014) ("the public interest in the underlying litigation is especially compelling given that Company Doe sued a federal agency"); Doe v. Megless, 654 F.3d 404, 411 (3d Cir. 2011).

[131]

[132] Doe v. Megless, 654 F.3d 404, 411 (3d Cir. 2011) (internal quotation marks omitted); Doe v. Pub. Citizen, 749 F.3d 246, 274 (4th Cir. 2014) ("As we have explained, the public interest in the underlying litigation is especially compelling given that Company Doe sued a federal agency."); Doe v. Virginia Polytechnic Inst. & State Univ., No. 7:18-CV-00016, 2018 WL 1594805, at *3 (W.D. Va. Apr. 2, 2018) ("To the contrary, courts have recognized that the public's interest is 'heightened' when defendants are public officials or government bodies."); B.L. v. Zong, 2016 WL 11269933, at *13 (M.D. Pa. Aug. 30, 2016); E.A. v. Brann, No. 18-CV-7603 (CM), 2018 U.S. Dist. LEXIS 143208, *10 (S.D.N.Y. Aug. 22, 2018); *see also* Jones v. Clinton, 879 F. Supp. 86 (E.D. Ark. 1995).

[133] Doe v. Cook County, No. 1:20-CV-5832, 2021 WL 2258313, *7 (N.D. Ill. June 3, 2021); F.B. v. East Stroudsburg Univ., No. 3:09-cv-525, 2009 WL 2003363, *3 (M.D. Pa. July 7, 2009); *see also* E.A. v. Brann, No. 18-CV-7603 (CM), 2018 U.S. Dist. LEXIS 143208, *10 (S.D.N.Y. Aug. 22, 2018).

[134] *Sealed Case*.

[135] Doe v. Cook County, No. 1:20-CV-5832, 2021 WL 2258313 (N.D. Ill. June 3, 2021), *7; Doe v. Teti, No. 1:15-MC-01380, 2015 WL 6689862, *3 (D.D.C. Oct. 19, 2015).

II. REBUTTING THE PRESUMPTION OF PSEUDONYMITY

A. Generally

Yet despite all these costs of pseudonymity—to the public, to opposing parties, and potentially to the accuracy and efficiency of fact-finding—pseudonymity is sometimes allowed if there is a "substantial[]"[136] basis (at least unless "the identity of the litigant has" already been revealed[137] or the litigant has sought to publicize the case[138]). The "substantiality" threshold is quite high, because it requires some showing of costs to the would-be pseudonymous litigant beyond that routinely borne by the many litigants who litigate over matters that might intrude on their privacy or reputation.[139] The cases dealing with such substantial basis claims can be helpfully divided into several categories.

B. Reasonable Fear of Physical Harm or Other Extraordinary Retaliation

Courts generally allow pseudonymity if there is "reasonable[]"[140] "fear[]"[141] of "retaliatory physical . . . harm to the requesting party or even more critically, to innocent non-parties,"[142] which may be considered in light of "the anonymous party's vulnerability to such retaliation."[143] Express threats of violence would likely qualify,[144] and lack of such express threats—or at least highly plausible predictions of possible future violence[145]—will usually count against

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[136] *Megless*; *Advanced Textile* (viewed there as an inquiry into "the magnitude of the public interest in maintaining the confidentiality of the litigant's identity" and "the severity of the threatened harm").

[137] Doe v. Megless, 654 F.3d 404, 409 (3d Cir. 2011); Doe v. Drake Univ., No. 416CV00623RGESBJ, 2017 WL 11404865, *4 (S.D. Iowa June 13, 2017); Doe v. Wolf, No. 1:20-cv-03299-DLF (D.D.C. Nov. 12, 2020) (plaintiff in protection program for domestic violence victims, and concerned that her lawsuit against the government, related to the government's treatment of her complaints against her ex-husband, will come to the ex-husband's attention); United States v. Stoterau, 524 F.3d 988, 1013 (9th Cir. 2008).

[138] Doe v. Kidd, 19 Misc. 3d 782, 789 (N.Y. Sup. Ct. 2008); Doe v. Diocese Corp., 43 Conn. Supp. 152, 163 (Super. Ct. 1994); Doe v. Hopkins Sch., No. CV216110316S, 2021 WL 2303079, *7 (Conn. Super. Ct. May 14, 2021).

[139] *See supra* Part I.C.4.

[140] *See, e.g.*, Doe v. Kamehameha Sch./Bernice Pauahi Bishop Est., 596 F.3d 1036, 1045 (9th Cir. 2010) (no reasonable fear stemming from public hostility to challenge to school's Hawaiian-only admission policy); Endangered v. Louisville/Jefferson Cty. Metro Gov't Dep't of Inspections, No. CIV.A. 3:06CV250S, 2007 WL 509695, *2 (W.D. Ky. Feb. 12, 2007).

[141] *Advanced Textile*. *Cf.* Bird v. Barr, No. 19-CV-1581, 2019 WL 2870234, *5 (D.D.C. July 3, 2019) (identities of potential undercover/intelligence workers); Doe v. Cook County, Illinois, No. 1:20-CV-5832, 2021 WL 2258313 (N.D. Ill. June 3, 2021); Cengiz v. Bin Salman, No. 1:20-cv-03009 (D.D.C. Sept. 16, 2021) (granting Motion to Proceed Under Pseudonym, ECF No. 14 (Sept. 14, 2021), which cited fear of violent retaliation against nonparty by the defendant, the Saudi crown prince who had been accused of murdering a prominent critic); Chang v. Republic of South Sudan, No. 21-1821, 2021 WL 2946160, at *3 (D.D.C. July 9, 2021) (citing "that not only have they personally 'been the victims of deliberate attacks orchestrated by the government of South Sudan,' but that South Sudan has carried out 'cross-border harassment, intimidation, and attacks against critics of the government of South Sudan'"); risk of permitting employees of non-governmental organizations to proceed anonymously in view of risk of retaliation by South Sudan government); Las Americas Immigrant Advocacy Center v. Wolf, 2020 WL 7319297, at *2 (D.D.C. Jul 8, 2020) (permitting asylum applicants to proceed anonymously in view of risk of retaliation in Mexico and El Salvador); Kiakombua v. McAleenan, No. 19-cv-1872 (KBJ), 2019 WL 11322784, at *2–3 (D.D.C. July 3, 2019) (permitting asylum applicants to proceed anonymously in view of risk of retaliation in El Salvador and Cuba)."

[142] *Sealed Case*; *Advanced Textile*; *see, e.g.*, Doe v. Neverson, 820 F. App'x 984, 988 (11th Cir. 2020); ECF No. 4, Doe v. Parx Casino, No. 18-5289, at 3 n.1 (E.D. Pa. Jan. 2, 2019); Doe v. Dordoni, No. 1:16-CV-00074-JHM, 2016 WL 4522672, *3 (W.D. Ky. Aug. 29, 2016) (risk of violent reprisal in Saudi Arabia based on Saudi citizen's conversion to Christianity).

[143] *Advanced Textile*.

[144]

[145] *See* United States v. Doe, 655 F.2d 920, 922 n.1 (9th Cir. 1981) (allowing pseudonymity to prison inmate because "he faced a risk of serious bodily harm if his role on behalf of the Government were disclosed to other inmates"); Doe No. 1 v. United States, 143 Fed. Cl. 238, 241 (2019) (allowing pseudonymity to BATF employees because "BATF is a sensitive law enforcement agency and that disclosing the names of BATF employees could endanger them").

pseudonymity.[146]

Courts also generally require that the risk of threatened violence flow from the revelation of the party's name in the litigation, not from other factors (such as the party already being known to the people who might want to attack him).[147] And of course the risk must come from the *public* revelation: If the risk is that, for instance, the defendant will retaliate against the plaintiff, that can't be avoided by pseudonymity, because the defendant would need to know the plaintiff's identity in order to defend the case (unless perhaps the case involves purely legal questions).[148]

On the other hand, sometimes courts are more open to speculation about possible violent retaliation; consider this, for instance, from a case where a student sued his university based on what he said was an unfair investigation of domestic violence claims levied by a classmate:

> The court thinks that Doe's identification may put him at risk for physical or mental harm by persons who know that he has been found responsible for domestic violence against Roe. Moreover, his identification has the potential to lead persons—especially those who are associated with Doe and Roe or know of Doe and Roe—to identify Roe as his accuser and identify other students who were involved in the investigative process. It is also likely that identification of Roe could result in her facing a risk of harm.[149]

As with many such tests that turn on speculation and predictions, much depends on the instincts of each particular judge, and the judge's reactions to the factual allegations.

Comparable "reasonable[] . . . fears" of "extraordinary retaliation," such as "deportation, arrest, and imprisonment" in a foreign country, may also qualify,[150] though perhaps mere deportation might not.[151] So might "harassment or other form of retaliation" of a prisoner by guards.[152]

C. Fear of Mental, Emotional, or Psychological Harm

The cases that say pseudonymity can be justified if naming a party risks physical harm also usually say the same as to "mental harm."[153] And courts sometimes apply that prong of the test. One court, for instance, allowed pseudonymity based on "a letter from a therapist whose 'clinical opinion' is that the plaintiff 'would be mentally and

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[146] United States v. Stoterau, 524 F.3d 988, 1002, 1013–14 (9th Cir. 2008); Roe v. Heil, No. 11-CV-01983-WJM-KLM, 2011 WL 3924962, *3 (D. Colo. Sept. 7, 2011); Does v. Rodriguez, No. CIVA 06CV-00805-LTB, 2007 WL 684114 (D. Colo. Mar. 2, 2007); Reimann v. Hanley, No. 16 C 50175, 2016 WL 5792679, *5 (N.D. Ill. Oct. 4, 2016).

[147] *See, e.g.*, Doe v. City of Chicago, 360 F.3d 667, 669 (7th Cir. 2004) (taking the view that pseudonymity can be proper when naming a plaintiff would make her "a likely target of retaliation by people who would learn her identity only from a judicial opinion or other court filing"); A.N. v. Landry, 338 F.R.D. 347, 356 (M.D. La. 2021) (refusing to allow sex offenders challenging sex offender registration scheme to proceed pseudonymously, because "Plaintiffs' identities and adjudications are already public knowledge. . . . The Court is unconvinced that Plaintiffs' identification in this lawsuit would result in unique harassment or violent reprisals separate from the alleged harassment and violent reprisals resulting from information obtained from the online sex offender registry.").

[148] *See* Does v. Shalushi, No. 10-11837, 2010 WL 3037789, *4 (E.D. Mich. July 30, 2010); Doe v. Freydin, No. 21 CIV. 8371 (NRB), 2021 WL 4991731, *2 (S.D.N.Y. Oct. 27, 2021).

[149] Doe v. Virginia Polytechnic Inst. & State Univ., No. 7:19-CV-00249, 2020 WL 1287960, *4 (W.D. Va. Mar. 18, 2020).

[150] *Advanced Textile*, 214 F.3d at 1071.

[151] E.A. v. Brann, No. 18-CV-7603 (CM), 2018 U.S. Dist. LEXIS 143208, *10 (S.D.N.Y. Aug. 22, 2018) ("Revealing Petitioner's identity might subject him to the harm of deportation—and it is a harm—but this Court has no business interfering with the enforcement of federal law.").

[152] Doe v. Hebbard, No. 21-CV-00039-BAS-AGS, 2021 WL 1195828, *1–*2 (S.D. Cal. Mar. 30, 2021) (risk of retaliation against prisoner).

[153] [Cite.]

emotionally impacted if . . . her information is made public in this case.'"[154] Likewise, another court held:

> Plaintiff allegedly suffers from anxiety and depression and is a survivor of domestic violence, both of which have and will be discussed at length during this action. Plaintiff alleges, for example, that Defendant refused to provide accommodations for her disability and failed to provide Plaintiff any resources for survivors of domestic violence. Additionally, her mental illnesses and status as a survivor of domestic violence make her particularly vulnerable to mental harm through retaliation or other means. Anonymity, then, would serve to preserve Plaintiff's privacy given the highly sensitive and personal nature of her experiences at issue in this matter. . . . Plaintiff has a reasonable fear of harm to which she is particularly vulnerable if she proceeds in this action under her true name.[155]

Courts also do not always require statements from medical professionals.[156] And I've seen one case in which the risk of "mental harm" to a sexual assault *defendant* and his family was found to justify pseudonymity as well, even without medical testimony (together with risk to privacy and reputation):

> Though the court agrees that the defendant has not offered any evidence beyond his own sworn statement that he would suffer mental harm if he were identified, that is only one factor . . ., and the harm to "innocent non-parties" is also considered under that factor. The defendant's former spouse and minor child are innocent third parties who would be vulnerable to mental harm if his name is disclosed. [157]

But these sorts of predictions are naturally harder to make, especially because many public accusations can be highly mentally, emotionally, and psychologically taxing. Any public allegation of, say, rape, embezzlement, fraud, sexual harassment, and the like can risk exposing the defendant to social disgrace, professional disaster, and financial ruin, even if the defendant is innocent. Even ordinary defendants may therefore understandably lose sleep, become depressed, or even contemplate suicide as a result.

Perhaps that itself should be a basis for categorical pseudonymity in a wide range of cases. But so long as the legal system generally calls for openness of party names, arguments for pseudonymity based on mental, emotional, or psychological harm have to be sharply limited.

And indeed courts are indeed often skeptical of such mental harm claims. (Most of the cases in which the claims

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[154] Doe v. Doe, No. 20-CV-5329(KAM)(CLP), 2020 WL 6900002 (E.D.N.Y. Nov. 24, 2020); Doe v. Smith, 105 F. Supp. 2d 40, 43–44 (S.D.N.Y. 1999) ("[P]laintiff offers the opinion of Dr. Richard Kluft, a psychiatric specialist in Dissociative Identity Disorder, from which the plaintiff suffers, that proceeding publicly would 'cause her to decompensate [psychologically] to a point at which she could not . . . pursue the current legal process and would suffer severe risk to her safety and to her survival. . . . [T]he plaintiff has presented particularized and undisputed evidence that proceeding publicly would seriously threaten her mental health, requiring her to choose between dropping her action and placing her life in jeopardy."); Be v. Comcast Corp., No. 20-CV-8571 (JPC), 2021 WL 694556 (S.D.N.Y. Feb. 23, 2021) ("[T]his case entails highly sensitive and personal matters involving Plaintiff's daughter's mental health, which allegedly manifested in several ways, including thoughts of suicide. As for the third factor, Plaintiff argues that public disclosure of her name could exacerbate Plaintiff's daughter's alleged medical conditions, and the Court accepts this as true.").

[155] Doe v. Elson S Floyd Coll. of Med. at Washington State Univ., No. 2:20-CV-00145-SMJ, 2021 WL 4197366 (E.D. Wash. Mar. 24, 2021).

[156] Doe v. Amherst Cent. Sch. Dist., 196 A.D.3d 9 (N.Y. App. Div. 2021) ("[P]laintiff alleged that she was employed by the county in which these allegations [that she had been sexually abused] arose, that her job may be in jeopardy as a result of the allegations, and that she experienced 'emotional distress, suicidal thoughts, depression, anxiety, feelings of worthlessness, and many other psychological damages, painful feelings, emotions, nightmares, flashbacks, as well as physical manifestations of these problems' that would recur if her name was publicized. . . . Although it would have been preferable to have plaintiff's allegations supported by expert medical testimony or opinion, the information that plaintiff provided supports the court's determination."); Doe v. OPO Hotel Mgmt., No. 2020 CA 003630 B, at 7 (D.C. Super. Ct. Oct. 7, 2020) (relying on plaintiff's "alleged history of major depressive disorder and post-traumatic stress order," and concluding there was no need for "an affidavit from an expert").

[157] Doe v. Doe, No. 20-CV-5329(KAM)(CLP), 2020 WL 6900002, *3 (E.D.N.Y. Nov. 24, 2020); *see also* Jennifer A. v. United Healthcare Ins. Co., No. CV 11-1813 DSF PLAX, 2011 WL 3517008, *1 (C.D. Cal. Aug. 9, 2011).

were accepted arise where the plaintiff is suing over sexual victimization[158] or over injury related to preexisting diagnoses of mental illness,[159] bases that are themselves often given as an independent reason for pseudonymity.[160] Only a few cases involved other allegations.[161]) First, courts often do require "medical evidence"[162] evidence of a risk of harm "beyond the foreseeable stress of being a named defendant in a lawsuit)."[163] Thus, in a case where a libel plaintiff (suing over allegations of sexual harassment) sought pseudonymity, the court held:

> [Plaintiff] suggests that he would be subject to "interrogation, criticism, or psychological trauma" if he is forced to proceed under his true name. But his claim of psychological trauma is speculative at best, and his remaining concerns of "interrogation" or "criticism" are simply part of what may (or may not) come with filing a lawsuit. . . . Ultimately, if the Court were to credit the purported risks cited by Plaintiff—like the matters he alleges are of a "sensitive and personal nature"—doing so would open the door to parties proceeding pseudonymously in an incalculable number of lawsuits in which one party asserts sexual harassment claims against another. And that is incompatible with the D.C. Circuit's admonition that a party's use of a pseudonym must be a "rare dispensation" from the usual rule.[164]

Likewise, in denying a pseudonymity request by an alleged rape victim, the court held:

> There is a risk of psychological harm if her identity were revealed, but as stated in her Motion, her psychological distress is rooted in her fear that if her identity were to become known Plaintiff would be associated "with the shame that may women endure after having been victims of sexual harassment and assault." But, the risk of social stigmatization and embarrassment is insufficient to proceed anonymously and "courts have consistently rejected anonymity requests predicated on harm to a party's reputational or economic interests."[165]

And as to a claim that a plaintiff would turn back to drugs if her identity were publicly disclosed, the court reasoned:

> [W]e do not discount Doe's very real concerns about reputational harm, both personally or professionally, or her fears of relapse in the event of such backlash. But those types of fears are similar to those of other plaintiffs who have alleged that they were discriminated against because of their histories of substance abuse, and it is clear that several similarly-situated plaintiffs have publicly identified themselves in their own litigations.[166]

Second, courts sometimes find even medical opinions inadequate to justify pseudonymity, e.g.,

> Mindy Agler, LMHC, who treated Jane Doe on a regular basis for psychological and emotional issues arising from Jane Doe's hostile work environment[,] . . . asserts that Jane Doe "continues to experience heightened anxiety and PTSD symptoms of nightmares, hypervigilance, avoidance, intrusive memories, and strong startle reflex." Agler further asserts that in her

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[158] Doe v. Diocese Corp., 647 A.2d 1067, 1072 (Conn. Super. Ct. 1994); Doe #1 v. Laurel School Dist., No. 09C-06-020 WLW, 2011 WL 7063231, *2 (Del. Super. Ct. Kent County Dec. 19, 2011); Doe No. 2. v. Kolko, 242 F.R.D. 193, 196 (E.D.N.Y. 2006).

[159] Be v. Comcast Corp., No. 20-CV-8571 (JPC), 2021 WL 694556 (S.D.N.Y. Feb. 23, 2021); Jennifer A. v. United Healthcare Ins. Co., No. CV 11-1813 DSF PLAX, 2011 WL 3517008, *1 (C.D. Cal. Aug. 9, 2011)

[160] *See infra* Part II.F.4.

[161] Doe v. Elson S Floyd Coll. of Med. at Washington State Univ., No. 2:20-CV-00145-SMJ, 2021 WL 4197366 (E.D. Wash. Mar. 24, 2021) (uncontroverted allegations of plaintiff's preexisting mental health problems, in lawsuit where plaintiff was alleging improper expulsion based on claims of domestic abuse); Doe v. Doe, No. 20-CV-5329(KAM)(CLP), 2020 WL 6900002, *3 (E.D.N.Y. Nov. 24, 2020) (claims of potential mental harm to defendant's family if defendant's alleged sexual abuse of plaintiff were disclosed).

[162] Roe v. Skillz, Inc., 858 F. App'x 240, 241 (9th Cir. 2021); Doe v. Weinstein, No. 20-cv-6240, 2020 WL 5261243, at *4 (S.D.N.Y. Sept. 3, 2020); Doe v. Freydin, No. 21 CIV. 8371 (NRB), 2021 WL 4991731, *2 (S.D.N.Y. Oct. 27, 2021).

[163] Mirza v. Doe, No. 20-cv-9877(PGG)(SLC), 2021 WL 4596597, *9 (S.D.N.Y. Oct. 6, 2021); *cf.* Sherman v. Trinity Teen Solutions, Inc., No. 20-CV-00215-SWS, 2021 WL 3720131, *2 (Feb. 11, 2021) ("Plaintiff provided no particularized evidence documenting his psychiatric conditions, or proof that embarrassment would cause imminent danger").

[164] Doe v. Moreland, No. CV 18-800 (TJK), 2019 WL 2336435 (D.D.C. Feb. 21, 2019).

[165] Doe v. Townes, No. 19CV8034ALCOTW, 2020 WL 2395159, *4 (S.D.N.Y. May 12, 2020).

[166] Doe v. Main Line Hospitals, Inc., No. 2:20-cv-02637-KSM, at 10 (E.D. Pa. Sept. 1, 2020).

> professional opinion, "forcing Plaintiff to file this lawsuit in her own name and publicly associate herself with the allegations of this lawsuit will have the effect of undoing the progress Plaintiff has made in the course of her therapy" and "will result in Plaintiff's retraumatization." . . .
>
> [But] while the Court is sympathetic to Jane Doe's symptoms and health, Jane Doe voluntarily decided to file her Complaint. Furthermore, she filed her Complaint in federal court which follows Federal Rule of Civil Procedure Rule 10(a) [which generally requires naming parties]. . . .
>
> The facts alleged here place this case in the same category of the unfortunately numerous cases of sexual harassment that have been filed, litigated, and tried before a jury without the need of anonymity.[167]

And this skepticism makes sense. Pseudonymity motions are generally decided based on affidavits, not on evidentiary hearings. Opposing parties often have little incentive to oppose them, or to pay for psychiatrists who would offer an independent evaluation.

The medical evidence will not only be speculative but will often be based on the views of a professional with whom the would-be pseudonymous party has a longstanding relationship, and who may thus feel sympathy and loyalty to the party—or, alternatively, a professional whom the party consulted precisely for the litigation (and perhaps selected with an eye towards getting a favorable recommendation). And the professionals will be making this decision based on conversations with the party, who can easily play up mental distress, for instance discussing stress and lost sleep and thoughts of suicide or of drowning sorrows in alcohol or drugs.

In such situations, even a doctor's "declar[ation] under penalty of perjury"[168] will offer little assurance of reliability or impartiality. The concern isn't that an expert will be outright lying, but rather that in guessing, based on nothing but the party's own self-reporting, the party will tilt in favor of predicting potential mental harm. And while in principle a court could appoint a psychiatric expert to offer an independent evaluation, I haven't seen any courts try to do that, because that too would involve considerable litigation expense and delay—and again likely won't offer more than speculation.

D. Avoiding Self-Incrimination in Facial Challenges to Government Action

Courts sometimes allow pseudonymity to prevent a party from having "to admit [an] intention to engage in illegal conduct, thereby risking criminal prosecution" in order to challenge potential future government action.[169] Modern examples of this are rare, but this appears to generally involve facial challenges in which the plaintiff's identity is in any event less important.[170]

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[167] Doe v. Ocean Reef Cmty. Ass'n, No. 19-10138-CIV, 2019 WL 5102450, *3 (S.D. Fla. Oct. 11, 2019).

[168] Jennifer A. v. United Healthcare Ins. Co., No. CV 11-1813 DSF PLAX, 2011 WL 3517008, *1 (C.D. Cal. Aug. 9, 2011).

[169] *Advanced Textile*;

[170] This formulation first appears in *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981), which in turn cites *S. Methodist Univ. Ass'n of Women L. Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979), which in turn cites cases where the plaintiffs facially challenged abortion laws and limits on welfare payments to illegitimate children.

For one modern exception, see Doe 1 v. Mich. Dep't of Corr., No. 13-14356, 2014 WL 2207136, at *10 (E.D. Mich. 2014) (concluding that discovery in the matter could have revealed the "extraordinary means" which plaintiffs used to protect themselves in prison, thus resulting in potential exposure to punishment from prison authorities). *Cf.* Doe v. Cook County Land Bank Auth., No. 1:20-cv-06329, 2020 WL 11627484, at *3 (N.D. Ill. Nov. 23, 2020) ("Plaintiff's most compelling argument is that he fears retaliation in the form of arrest and prosecution, as well as associated physical or mental harm. His arguments, though, are only speculative—he fails to advance any cogent reason for his fear of arrest or prosecution and how this can be a legitimate basis for anonymity"); Doe v. Dart, No. CIV. A. 08 C 5120, 2009 WL 1138093 (N.D. Ill. Apr. 24, 2009) (pure speculation of risk of retaliatory arrest for "unsuccessfully attempt[ing] to report her [government] supervisors about the[ir] alleged improper use of improper funds").

E. Protecting Minors

1. Pseudonymizing minors and their parents

Courts are especially likely to pseudonymize minors. Federal Rule of Civil Procedure 5.2(a)(3) explicitly requires this as to all matters, whether or not such matters would be seen as private as to adults.[171] Likewise, some cases allow parents who are suing on behalf of their minor children to proceed pseudonymously,[172] reasoning that, "[s]ince a parent must proceed on behalf of a minor child, the protection afforded to the minor would be eviscerated unless the parent was also permitted to proceed using initials."[173] A few courts, however, disagree.[174]

2. Pseudonymizing young adults

In some cases involving alleged sexual assaults of and by college students, courts have been willing to allow pseudonymity because of the students' youth, even though they were not minors.[175] But others suggest a rigid cutoff at

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[171] "Unless the court orders otherwise, in . . . [a] filing with the court that contains . . . the name of an individual known to be a minor, . . . a party or nonparty making the filing may include only . . . (3) the minor's initials." FED. R. CIV. P. 52(a)(3). In this respect, minor's names are treated like social security numbers or financial account numbers. *Id. But see* Lobisch v. United States, No. 1:20-cv-00370-HG-KJM, at 4 (D. Haw. Aug 31, 2020) (rejecting pseudonymity where "both minors' full names and pictures are readily and publicly available on various media outlets that reported on Plaintiffs' filing of this lawsuit").

[172] *E.g.*, L.M. as Next Friend of A .M. v. City of Gardner, No. 19-2425-DDC, 2019 WL 4168805, at (D. Kan. Sept. 3, 2019); S.E.S. v. Galena Unified Sch. Dist. No. 499, No. 18-2042-DDC-GEB, 2018 WL 3389878, at __ (D. Kan. July 12, 2018); Doe B.A. v. USD 102, No. 18-2476-CM, 2019 WL 201741, at *2 (D. Kan. Jan. 15, 2019); Doe A v. Plainfield Comm. Cons. Sch. Dist. 202, No. 1:21-cv-04460 (N.D. Ill. Aug. 25, 2021), *granting* Motion, *id.* (N.D. Ill. Aug. 23, 2021); J.W. v. District of Columbia, 318 F.R.D. 196 (D.D.C. 2016) (lawsuit related to minor's disability); Homesite Ins. Co. v. Cruz, No. 3:20-cv-00905-VLB (D. Conn. July 8, 2020), *granting* Motion (July 1, 2020) (lawsuit related to sexual assault of minor); Marquez v. BHC Streamwood Hospital, Inc., 1:20-cv-04267 (N.D. Ill. Sept. 21, 2020); D.M. v. County of Berks, 929 F. Supp. 2d 390 (E.D. Pa. 2013); P.M. v. Evans–Brant Central Sch. Dist., No. 08–168A, 2008 WL 4379490, at *3 (W.D.N.Y. Sept. 22, 2008); C.M. v. United States, No. SA-21-CV-00234-JKP, 2021 WL 1822305, at *2 (W.D. Tex. Mar. 31, 2021); Danvers v. Loudoun County School Bd., No. 1:21-cv-01028-RDA-JFA, at 4 (E.D. Va. Sept. 8, 2021); ("Doe's parents and next friends similarly seek to use pseudonyms to protect Doe's identity; exposing them would expose her."); *see also* Doe v. Eason, No. CIV.A. 3:98-CV-2454, 1999 WL 33942103 (N.D. Tex. Aug. 4, 1999) (parent suing on her own behalf, but for claims that flowed from her child having been sexually assaulted).

[173] P.M. v. Evans-Brant Cent. Sch. Dist., No. 08 Civ. 168A, 2008 WL 4379490, at *3 (W.D.N.Y. Sept. 22, 2008); *see also* Anonymous v. Anonymous, 158 A.D.2d 296 (N.Y. App. Div. 1990); Doe v. Mechanicsburg Sch. Bd. of Educ., 518 F. Supp. 3d 1024, 1027 (S.D. Ohio 2021); Bd. of Educ. of the Highland Loc. Sch. Dist. v. United States Dep't of Educ., No. 2:16-CV-524, 2016 WL 4269080, *5 (S.D. Ohio Aug. 15, 2016); R.N. by & through R.T. v. Franklin Cmty. Sch. Corp., No. 119CV01922MJDTWP, 2019 WL 4305748, *4 (S.D. Ind. Sept. 11, 2019); Doe v. Elmbrook Sch. Dist., 658 F.3d 710, 722 (7th Cir. 2011); Doe v. Dattco, Inc, Superior Court, judicial district of New Haven at New Haven, Docket No. CV09-4034887 (May 18, 2009, Cosgrove, J.) (also permitting minor plaintiff's mother to use pseudonym); Doe v. Fairfield, No. CV065004042S, 2006 WL 3200433, *3 (Conn. Super. Ct. Oct. 24, 2006); Doe v. Super 8 Motels, Inc., Superior Court, judicial district of New Haven at New Haven, Docket No CV06-5003327 (August 3, 2006, Pittman, J.) [41 Conn. L. Rptr. 784] (also permitting minor plaintiff's mother to use pseudonym); Doe v. Van Wagner, Superior Court, judicial district of New Haven at New Haven, Docket No. CV06-5002411 (April 13, 2006, Pittman, J.) [41 Conn. L. Rptr. 213] (also permitting minor plaintiff's mother to use pseudonym); Doe v. Beilman, Superior Court, judicial district of New Haven at New Haven, Docket No. CV04-4004749 (December 22, 2004, Pittman, J.) (also extending use of pseudonym to plaintiff father); Doe v. East Haven Associates, Superior Court, judicial district of New Haven at New Haven, Docket No. CV04 0490161 (August 4, 2004, Pittman, J.) (same).

[174] Doe v. Tsai, No. 08-1198-DWF/AJB, 2008 WL 11462908, *3 (D. Minn. July 23, 2008) (lawsuit over allegedly false claims of sexual abuse of minor by parents); United Fin. Cas. Co. v. R.A.E., Inc., No. CV 20-2467-KHV, 2020 WL 6117895, at *2 (D. Kan. Oct. 16, 2020). Even child-only pseudonymity does provide some protection for the children: Many people worry most not about the rare determined researcher but about a casual name-Googler, whether a prospective employer or someone else, and shielding the child's name would likely provide a good deal of protection against that.

[175] *See* Doe v. Colgate Univ., No. 515CV1069LEKDEP, 2016 WL 1448829, *3 (N.D.N.Y. Apr. 12, 2016); Doe v. Alger, 317 F.R.D. 37, 40–41 (W.D. Va. 2016); Yacovelli v. Moser, No. 1:02-cv-596, 2004 WL 1144183, *8 (M.D.N.C. May 20, 2014); Roe v. Doe, 319 F. Supp. 3d

the age of majority.[176] Still others suggest the cutoff would be around age 20.[177] And one unhelpfully opines:

> [Plaintiff] was not a minor at the time of the alleged assaults, though she was barely past the age of majority. Of course courts should be careful not to draw a bright line between a plaintiff one day shy of her eighteenth birthday and a plaintiff one day past it. The vulnerabilities faced by minor plaintiffs do not always fall away once they reach the age of eighteen. The proper inquiry, as always, is the totality of the circumstances. However, we are mindful Doe has not presented any argument or evidence that her age raised special concerns in this case. We therefore cannot say the district court abused its discretion in concluding that Doe's age weighed against anonymity.[178]

3. Pseudonymizing adult plaintiffs suing over injuries that occurred when they were minors

Some courts allow adults to proceed pseudonymously when they sue over injuries that occurred when they were minors.[179] Others do not.[180]

4. Pseudonymizing adults in cases not involving minors as parties

But calls for pseudonymizing adult parties extend even beyond cases where adults sue on children's behalf, or based on injuries incurred when they themselves might be children. Child victims of sexual abuse, for instance, might not want that information revealed in any court case—but that includes not just their lawsuits over having been molested, but also the prosecution of a parent or stepparent who molested them, or a divorce case in which this matter arises. Thus, then-Judge Sotomayor excluded from an opinion, "for the sake of the privacy of plaintiff's child," the name of a Fourth Amendment plaintiff who claimed that the government falsely charged him with sexually abusing his daughter (though the court did not decide whether the name should have been excluded entirely from the court record).[181]

And this theory could apply not just to allegations of sexual abuse, but also to situations that adults might have faced with more equanimity, for instance lawsuits over the child's having been physically abused by parents or others,

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422 (D.D.C. 2018) ("In the Court's view, this factor concerns a protected status that is generally reserved to those who have not attained the age of majority. . . . A young person who has attained legal adulthood may have room to grow in maturity, but still he has surpassed the age at which protected status is typically accorded."), *rev'd*, 2019 WL 1778053, *3 (D.D.C. Apr. 23, 2019) ("That leaves the third factor, regarding the parties' ages, where the Court previously ruled against Defendant, despite a potentially 'closer call.' But the fact that the pending motion now seeks to protect the identities of *both* parties, *both* of whom are young, shifts the balance closer to equipoise, if not the movant's favor.").

[176] *E.g.*, Plaintiff v. Wayne State U., No. 2:20-cv-11718-GAD-DRG (E.D. Mich. Jan. 25, 2021).

[177] *E.g.*, Doe v. Virginia Polytechnic Inst. & State Univ., No. 7:18-CV-170, 2018 WL 5929647, *3 (W.D. Va. Nov. 13, 2018) (concluding that the age factor may cut in favor of college students "in the first few years of their schooling," but not when they are "less than a year away from being a college graduate"); Doe v. Virginia Polytechnic Inst. & State Univ., No. 7:19-CV-00249, 2020 WL 1287960, at *4 (W.D. Va. Mar. 18, 2020) ("While Doe and Roe are adults, college students 'may still possess the immaturity of adolescence,' particularly in the first few years of their schooling.");. Doe v. Va. Polytechnic Inst. & State Univ., No. 7:18-cv-320, 2018 WL 5929645, at *3 (W.D. Va. Nov. 13, 2018); Yacovelli v. Moser, No. 1:02-cv-596, 2004 U.S. Dist. LEXIS 9152, at *24 (M.D.N.C. May 20, 2014); M.F. on behalf of R.L. v. Magellan Healthcare Inc., No. 20 CV 3928, 2021 WL 1121042, *1 n.2 (N.D. Ill. Mar. 24, 2021) ("While technically an adult, D.D. is still a teenager.").

[178] Doe v. Sheely, 781 F. App'x 972, 973–74 (11th Cir. 2019).

[179] Doe v. USD No. 237 Smith Ctr. Sch. Dist., No. 16-CV-2801-JWL-TJJ, 2017 WL 3839416, at __ (D. Kan. Sept. 1, 2017); Doe-2 v. Richland County School Dist. 2, No. 3:20-cv-02274-CMC, at 2 (D.S.C. Aug. 3, 2020); Doe v. Streeter, No. 4:20-cv-11609-MFL-APP (E.D. Mich. Nov. 12, 2020) (child porn); Doe v. Fowler, 2018 WL 3428150 (W.D.N.C. __, 2018) (child porn); Doe v. St. John's Episcopal Parish Day School, Inc., 997 F. Supp. 2d 1279, 1290 (M.D. Fla. 2014).

[180] Doe v. Rackliffe, 173 Conn. App. 389, 400 (2017); C.S. v. EmberHope, Inc., No. 19-2612-KHV, 2019 WL 6727102, at (D. Kan. Dec. 11, 2019); Doe v. Tsai, No. 08-1198-DWF/AJB, 2008 WL 11462908, *3 (D. Minn. July 23, 2008); Doe v. Smith, 429 F.3d 706, 710 (7th Cir. 2005); Doe v. St. John, No. CV055000443S, 2006 WL 1149224 (Conn. Super. Ct. Apr. 13, 2006).

[181] Smith v. Edwards, 175 F.3d 99, 100 n.1 (2d Cir. 1999).

or even taunted by classmates.[182] Likewise, in one case, parents sued a doctor who had artificially inseminated the mother with the doctor's own sperm instead of her husband's; the appellate court suggested that, in deciding whether the parents could proceed pseudonymously, the trial judge should weigh "the risk of harm to the children from revelation of the full circumstances of their birth."[183]

5. Pseudonymizing adults in cases unrelated to their children, for fear that identifying the adult will embarrass the child

Indeed, a child could be highly embarrassed (or taunted by classmates) by revelations about their parents, even if the revelations have nothing to do with the child. Consider, for instance, *Doe v. MacFarland*, in which a woman who was around age 50 sued alleging that she was sexually abused by her guidance counselor starting 35 years earlier;[184] the court allowed her to proceed pseudonymously chiefly because of the "potential impact to her children, both of whom attend school in the School District":

> The Court is particularly mindful of the impact of social media and the extent to which children can be readily exposed to taunting and harassing behaviors through such medium. In this Court's view, placing plaintiff into a Hobson's choice of proceeding under a pseudonym or discontinuing her action would negate the intent of the Child Victims Act. Here, issues which are sensitive and intimate have been raised and there is arguably a significant risk of harm to innocent third parties and little chance of prejudice to the only defendant who has opposed the application.[185]

Or consider *Doe v. Doe*, which allowed pseudonymity for a defendant who was accused of sexual assault and of paying for sex, partly because "The defendant's former spouse and minor child are innocent third parties who would be vulnerable to mental harm if his name is disclosed."[186]

Indeed, any publicity related to a parent's alleged misconduct (or even proven misconduct) might deeply embarrass

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[182] *See* Doe v. Mechanicsburg Sch. Bd. of Educ., 518 F. Supp. 3d 1024 (S.D. Ohio 2021) (allowing pseudonymity in such a case, in part on the theory that "Public revelation of Plaintiffs' identities may invite further bullying and harassment and disrupt John Doe's education").

[183] James v. Jacobson, 6 F.3d 233, 241 (4th Cir. 1993) (remanding for the trial judge to do the weighing); *see also id.* at 243 (Williams, J., concurring in part and dissenting in part) concluding that "the risk of substantial harm to these innocent third parties who are minor children so significantly outweighs the minimal risk of prejudice to the defendant . . . that as a matter of law the plaintiffs should be allowed to proceed to trial under the James pseudonyms").

[184] Doe v. MacFarland, 117 N.Y.S.3d 476, 481 (Sup. Ct. 2019).

[185] *Id.* at 498. *See also* Discopolus, LLC v. City of Reno, No. 317CV0574MMDVPC, 2017 WL 10900550, *1 (D. Nev. Nov. 16, 2017) (allowing erotic dancer to proceed pseudonymously in part because "plaintiff JT is the mother of two young children and disclosure of her identity may stigmatize them as well"); Doe v. Yellowbrick Real Est., No. FSTCV205023127S, 2020 WL 6712461, *3 (Conn. Super. Ct. Oct. 20, 2020) (allowing plaintiff to sue under a pseudonym in part because "Plaintiff has submitted affidavits in which she stated that failure to shield her name subject her, and her minor children, to harassment, injury, revictimization, ridicule, stigmatization, ostracization in their immediate community and church, which hold conservative and anachronistic attitudes toward sexual assault. The risk of social stigmatization is greater because her ex-husband is also part of the community and she fears he will learn of the lawsuit and use it against her. Plaintiff states that she is particularly vulnerable as a victim of prior domestic violence and has suffered emotional and psychological trauma relating to the assault and fear that details will become known in her community to the detriment of her and her minor children."); *see also* Doe v. Roman Cath. Archdiocese of New York, 64 Misc. 3d 1220(A), *2 (N.Y. Sup. Ct. 2019) (discussing this argument raised by the plaintiff, but rejecting pseudonymity on other grounds). *But see* Geico Gen. Ins. Co. v. M.O., No. 21-2164-DDC-ADM, 2021 WL 4476783 (D. Kan. Sept. 30, 2021) ("M.O.'s argument essentially asserts in conclusory fashion that her children should be protected from psychological harm because her sex life [and, in particular, her having gotten HPV as a result of having sex in a car] is embarrassing. But the mere fact that a parent's sex life might be embarrassing to the minor children does not present an exceptional case that warrants granting leave to proceed anonymously, particularly when that individual is seeking insurance coverage as a result of his or her sex life."); F.L. v. Doe, 70 Misc. 3d 962, 963 (N.Y. Sup. Ct. 2020) (refusing to allow pseudonymity in legal malpractice claim stemming from divorce case, when the alleged malpractice had to do with division of marital property).

[186] Doe v. Doe, No. 20-CV-5329(KAM)(CLP), 2020 WL 6900002, *3 (E.D.N.Y. Nov. 24, 2020).

the parent's children, lead them to be taunted at school,[187] and risk depression or even suicide. It can even sometimes lead to the risk that they will be attacked because of their association with the parent.[188] Yet allowing pseudonymity in such cases seems likely to sharply undermine the general rule of public access.

F. Privacy as to "Sensitive and Highly Personal" "Stigmatized" Matters

Courts also sometimes allow pseudonymity when necessary to prevent disclosure of people's "sensitive and highly personal" private information[189] that creates a risk of "social stigma."[190] But I stress the "sometimes": The cases are sharply split about what kinds of matters can indeed justify pseudonymity.

1. Abortion

Cases where a party is disclosing having had an abortion are often mentioned as classic instances where pseudonymity is proper.[191] But the actual decisions on the subject are split.[192]

2. Stigmatized sexual minorities

Courts have allowed pseudonymity to avoid outing a party as homosexual[193] or transgender, [194] at least when the

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[187] *See, e.g.*, Brief of Appellants, Doe v. Thompson, No. 13-110318-S, 2014 WL 903846, at 57 (Jan. 22, 2014).

[188] Doe v. Butte County Prob. Dep't, No. 220CV02248TLNDMC, 2020 WL 7239583, *6–*7 (E.D. Cal. Dec. 9, 2020); Doe v. Butte County Prob. Dep't, No. 220CV02248TLNDMC, 2021 WL 50471, *3 (E.D. Cal. Jan. 6, 2021); *cf.* Chang v. Republic of South Sudan, No. 21-1821, 2021 WL 2946160, at *3 (D.D.C. July 9, 2021) (citing risk that "disclosure of plaintiff Nygundeng's personal information might put her three minor children at risk" from the government of South Sudan, though focusing on the personal information and not the plaintiff's name, which was public).

[189] *In re* Sealed Case, 931 F.3d 92, 97 (D.C. Cir. 2019); *Advanced Textile.*

[190] *See* Doe v. Blue Cross & Blue Shield of R.I., 794 F. Supp. 72, 74 (D.R.I. 1992) ("'The common thread running through these cases is the presence of some social stigma or the threat of physical harm to the plaintiffs attaching to disclosure of their identities to the public record.'" (quoting Doe v. Rostker, 89 F.R.D. 158 (N.D. Cal. 1981)).

In some cases, partial redaction of certain information—say, medical details—can adequately accomplish this even without pseudonymity, but when the core of the lawsuit is about some such matter, redaction may make it impossible to understand the facts and the legal arguments. *See* Doe v. Neverson, 820 F. App'x 984, 987–88 (11th Cir. 2020); recent Baptist case.

[191] *E.g.*, Southern Methodist Univ. Ass'n v. Wynne & Jaffe, 599 F.2d 707, 712–13 (5th Cir. 1979); Rankin v. New York Pub. Library, 1999 WL 1084224, at *1 (S.D.N.Y. 1999); W.G.A. v. Priority Pharmacy, Inc., 184 F.R.D. 616, 617 (E.D. Mo. 1999); Luckett v. Beaudet, 21 F.Supp.2d 1029, 1030 (D. Minn. 1998); Heather K. v. City of Mallard, 887 F.Supp. 1249, 1255 (N.D. Iowa 1995); Doe v. Rostker, 89 F.R.D. 158, 161 (N.D. Cal. 1981); Doe v. Deschamps, 64 F.R.D. 652, 653 (D. Mont. 1974).

[192] Allowing pseudonymity: Roe v. Aware Woman Center for Choice, Inc., 253 F.3d 678, 685 (11th Cir. 2001) (claim over defendants' allegedly preventing plaintiff from getting an abortion); June Med. Servs., LLC v. Phillips, No. CV 14-525-JWD-RLB, 2021 WL 292441, *7 (M.D. La. Jan. 28, 2021) (pseudonymity allowed to abortion providers), *aff'd in part, rev'd in part*, No. CV 14-525-JWD-RLB, 2021 WL 2153819 (M.D. La. May 27, 2021); Roe v. Operation Rescue, 123 F.R.D. 500, 505 (E.D. Pa. 1988). Not allowing pseudonymity: M.M. v. Zavaras, 139 F.3d 798 (10th Cir. 1998) (claim against prison for denial of "funds for transportation and medical expenses for abortion services" was not an abuse of discretion); Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1210 (6th Cir. 1981) (concluding that denial of pseudonymity in challenge to abortion ban wasn't an abuse of discretion), *rev'd in part on other grounds*, 462 U.S. 416 (1983); *see also Roe v. Aware Woman Center for Choice*, 253 F.3d at 689–90 (Hill, J., concurring in part and dissenting in part) (arguing against pseudonymity).

[193] Doe v. Commonwealth's Attorney for City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976); Doe v. Univ. of Scranton, No. 3:19-CV-1486, 2020 WL 1244368, at *2 (M.D. Pa. Mar. 16, 2020); Doe v. Catholic Relief Servs., No. 1:20-cv-01815-CCB, at 2 (D. Md. Aug. 10, 2020).

[194] Delaware Valley Aesthetics, PLLC v. Doe 1, No. CV 20-0456, 2021 WL 2681286, *7 (E.D. Pa. June 30, 2021); Doe v. Woodward Properties, Inc., No. 2:20-cv-05090-JMY (E.D. Pa. Oct. 20, 2020) (granting Motion for Order to Proceed Anonymously, *id.*, ECF No. 2 (Oct. 14, 2020)); Doe v. Gardens for Memory Care at Easton, No. 18-4027, ECF Nos. 3-4 (E.D. Pa. 2018); Doe v. Triangle Doughnuts, LLC, No.

party has kept that information confidential.[195] One recent case, though, rejected such a request on the grounds that homosexuality was no longer as socially stigmatized as it once was.[196]

3. Sexual behavior

Some courts have more generally concluded that revelation of parties' sexual behavior could justify pseudonymity, but the cases are mixed. For instance, three courts have concluded that pseudonymity was justified to avoid identifying plaintiff as an erotic dancer,[197] but two other courts disagreed.[198]

One court refused to allow pseudonymity in a case involving BDSM, reasoning that "a voluntary BDSM relationship may reasonably be characterized as 'highly personal,' it is distinguishable from other highly personal matters, e.g., hereditary health issues, in that a voluntary BDSM sexual relationship is a choice."[199] Another refused it as to exhibitionism.[200] But others have allowed it in cases involving pornography use, reasoning that:

> Judges in this District regularly permit defendants to proceed anonymously in cases similar to this one, where the defendant has been accused of illegally downloading adult videos, because of the "highly embarrassing and potentially sensitive and personal nature of such accusations," the risk of misidentification where a defendant is only identified by an IP address, and the fact that "the public's interest is not necessarily furthered by knowledge of the defendant's specific identity."[201]

One court likewise allowed it in a case involving adultery,[202] and another in a case involving adultery together with paying for sex (and allegedly transmitting STDs).[203]

19-5275, ECF No. 23 (E.D. Pa. June 23, 2020); Doe v. Dallas, 16-cv-787- JCJ (E.D. Pa. Mar. 10, 2016) (Dkt. 3); Doe v. Romberger, 16-cv-2337-JP (E.D. Pa. June 27, 2016) (Dkt. 8); Doe v. Dee Packaging Solutions, Inc., No. 20-2467, ECF No. 7 (E.D. Pa. July 23, 2020); Roe v. Tabu Lounge & Sports Bar, No. 20-3688 (E.D. Pa. Sept. 10, 2020), *granting* Motion, *id.* (July 29, 2020); Doe v. Colonial Intermediate Unit 20, et al., No. 20-1215, Dkt. No. 21 (E.D. Pa. August 25, 2020); Doe v. Pa. Dep't of Corrections, No. 19-1584, 2019 WL 5683437, *3 (M.D. Pa. Nov. 1, 2019); Doe v. Blue Cross & Blue Shield, 794 F. Supp. 72 (D.R.I. 1992).

[195] *See* Doe v. Guess, Inc., No. 5:20-cv-04545-JFL, at 5 (Oct. 6, 2020) (denying pseudonymity when plaintiff's sexual orientation was broadly known).

[196] Doe v. Franklin County, No. 2:13-CV-00503, 2013 WL 5311466 (S.D. Ohio Sept. 20, 2013) ("The Court is not convinced that the reasoning from [an earlier case] has the same vitality today that it did 25 years ago. . . . In this case, Plaintiff has not identified any real-world evidence that she would be subjected to significant social stigma or public ridicule if she were required to prosecute this case under her real name and identified as a homosexual.").

[197] Jane Roes 1-2 v. SFBSC Mgmt., LLC, 77 F. Supp. 3d 990, 994 (N.D. Cal. 2015); Doe #1 v. Deja Vu Consulting Inc., No. 3:17-CV-00040, 2017 WL 3837730, *4–*5 (M.D. Tenn. Sept. 1, 2017); Discopolus, LLC v. City of Reno, No. 317CV0574MMDVPC, 2017 WL 10900550, *1 (D. Nev. Nov. 16, 2017). Two of these courts have also noted the risk that erotic dancers, if identified, may be exposed to the risk of stalking and violence from fans. *Jane Roes 1-2*, 77 F. Supp. 3d at 995; *Doe #1*, 2017 WL 3837730, at *4.

[198] 4 Exotic Dancers v. Spearmint Rhino, No. CV 08-4038ABCSSX, 2009 WL 250054, *3 (C.D. Cal. Jan. 29, 2009); De Angelis v. Nat'l Ent. Grp. LLC, No. 2:17-CV-00924, 2019 WL 1071575, *3 (S.D. Ohio Mar. 7, 2019).

[199] Doe v. Rector & Visitors of George Mason Univ., 179 F. Supp. 3d 583, 593 (E.D. Va. 2016); *see also* Doe v. Bd. of Regents of Univ. of New Mexico, No. CIV 20-1207 JB/JHR, 2021 WL 4034136 (D.N.M. Sept. 4, 2021) (pseudonymity not justified by the lawsuit's exposing information about a graduate student's "romantic and sexual relationship" with her doctoral advisor, and about the student's divorce, which was apparently initiated before the relationship, *see* Complaint, *id.* at 5 (Nov. 18, 2020)).

[200] A.B.C. v. XYZ Corp., 282 N.J. Super. 494 (App. Div. 1995).

[201] Malibu Media, LLC v. Doe, No. 15 CIV. 2624 ER, 2015 WL 6116620, *5 (S.D.N.Y. Oct. 16, 2015); Malibu Media, LLC v. John Doe, No. 15 Civ. 1862(RJS), 2015 WL 4271825, at *3 (S.D.N.Y. July 14, 2015); Malibu Media, LLC v. John Does 1–5, No. 12 Civ. 2950(JPO), 2012 WL 2001968, at *1 (S.D.N.Y. June 1, 2012); see also Next Phase Distribution, Inc., 2012 WL 691830, at *1–2. *But see* Liberty Media Holdings, LLC v. Swarm Sharing Hash File, 821 F. Supp.2d 444, 453 (D. Mass. 2011) (no pseudonymity).

[202] *In re* Ashley Madison Customer Data Security Breach Litig., MDL No. 2669, 2016 WL 1366616, at *4 (E.D. Mo. Apr. 6, 2016).

[203] Doe v. Doe, No. 20-CV-5329(KAM)(CLP), 2020 WL 6900002, *3 (E.D.N.Y. Nov. 24, 2020).

What about lawsuits alleging rape, where the defendant agrees that the parties had sex, but asserts it was consensual? (Recall that these could be sexual battery lawsuits, libel lawsuits over allegations of rape, or wrongful termination and wrongful expulsion claims brought by employees or students who had been accused of rape.) Would the accused rapist therefore be entitled to pseudonymity?

There too the information involves sexual behavior on the part of the accused—perfectly legal behavior, according to the accused. And there too the allegation risks great embarrassment (and worse) to the accused. Some courts have allowed the accused to be anonymous, generally in lawsuits against a university, precisely on those grounds, e.g.:

> This case centers on allegations that the Plaintiff engaged in sexual misconduct. The Plaintiff will therefore be required to disclose information of the utmost intimacy about himself and the victim of the alleged misconduct. For this reason, the second factor weighs in favor of proceeding anonymously.[204]

But others have not.[205]

4. Sexual victimization

Many cases allow people who allege they had been sexually assaulted to remain anonymous.[206] Indeed, some allow pseudonymity for the alleged attacker as well as the alleged victim, if the two had been spouses or lovers in the past, because identifying one would also identify the other, at least to people who had known the couple.[207] But again, many other cases hold otherwise, some in highly prominent cases (for instance, against Kevin Spacey, Harvey Weinstein,

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[204] Doe v. Embry-Riddle Aeronautical Univ., No. 6:20-cv-01220-WWB-LRH (M.D. Fla. Aug. 12, 2020); *see also* Doe v. Rector & Visitors of George Mason Univ., 179 F. Supp. 3d 583, 593 (E.D. Va. 2016) ("There can be no doubt that the litigation here focuses on a matter of sensitive and highly personal nature. Plaintiff has been accused of sexual misconduct, the mere accusation of which, if disclosed, can invite harassment and ridicule."); Doe v. Bd. of Trustees of Univ. of Ill., No. 2:20-cv-02265-CSB-EIL, at 4 (C.D. Ill. Nov. 9, 2020); Doe v. La. State Univ., No. 20-379-BAJ-SDJ, at 3 (M.D. La. June 30, 2020); Doe v. Univ. of Miss., No. 18-cv-138, 2018 WL 1703013, *2 (S.D. Miss. Apr. 6, 2018); Doe v. Rollins Coll., No. 6:18-cv-1069-Orl-37LRH, 2018 WL 11275374, *4 (M.D. Fla. Oct. 2, 2018); Doe v. Univ. of S. Ala., No. 17-cv-0394-CG-C, 2017 WL 3974997, at *2 (S.D. Ala. Sept. 8, 2017). *Cf.* Doe v. Virginia Polytechnic Inst. & State Univ., No. 7:19-CV-00249, 2020 WL 1287960, *3 (W.D. Va. Mar. 18, 2020) (applying the same reasoning to allegations of "domestic and dating violence"; "[l]ike sexual misconduct, allegations of domestic violence or abusive dating relationships involve sensitive and highly personal facts that can invite harassment and ridicule").

[205] *See infra* note 261.

[206] Doe v. Lund's Fisheries, Inc., No. CV 20-11306 (NLH/JS), 2020 WL 6749972, *3 (D.N.J. Nov. 17, 2020); Doe v. Evans, 202 F.R.D. 173, 176 (E.D. Pa. 2001); Doe v. Kenyon College, No. 20-cv-4972-MHW-CMV, at 3 (S.D. Ohio Sept. 24, 2020); Doe v. Blue Cross & Blue Shield United of Wisc., 112 F.3d 869, 872 (7th Cir. 1997); Doe v. Eckerson, 5:20-cv-06135-GAF (W.D. Mo. Oct. 8, 2020); Doe v. Trishul Consultancy, LLC, No. CV1816468FLWZNQ, 2019 WL 4750078, *4 (D.N.J. Sept. 30, 2019); Doe v. Streck, 522 F. Supp. 3d 332, 334 (S.D. Ohio 2021); Nationwide Affinity Ins. Co. of Am. v. Brown, No. 2:20-cv-02355-EFM-TJJ, at 2 (D. Kan. Aug. 28, 2020); E.V. v. Robinson, No. 1:16-CV-01419, 2016 WL 11584907, *2 (D.D.C. July 8, 2016); Doe v. Cabrera, 307 F.R.D. 1, 3–4, 6 (D.D.C. 2014) (permitting plaintiff alleging rape to use a pseudonym); Doe v. De Amigos, LLC, No. 11-1755, 2012 WL 13047579, at *2–3 (D.D.C. Apr. 30, 2012); Doe v. OPO Hotel Mgmt., No. 2020 CA 003630 B (D.C. Super. Ct. Oct. 7, 2020); Doe v. Diocese Corp., No. CV93 0704552S, 1994 WL 174693 (Conn. Super. Ct. Apr. 21, 1994).

For cases specifically involving allegations of sexual trafficking, see, e.g., B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-cv-00656-BLF, 2020 WL 4368214, at *10 (N.D. Cal. July 30, 2020); Doe v. Penzato, No. CV10- 5154 MEJ, 2011 WL 1833007, at *3 (N.D. Cal. May 13, 2011); Doe v. Steele, No. 3:20-cv-01818-MMA-MSB, at 5 (S.D. Cal. Nov. 16, 2020). For cases involving allegations of child pornography, see Doe v. Streeter, No. 4:20-cv-11609-MFL-APP (E.D. Mich. Nov. 12, 2020); Doe v. Fowler, 2018 WL 3428150 (W.D.N.C. __, 2018).

[207] Doe v. Kenyon College, No. 2:20-CV-4972, 2020 WL 11885928 (S.D. Ohio Sept. 24, 2020); Doe v. Trustees of Dartmouth Coll., No. 18-CV-040-LM, 2018 WL 2048385, *6 (D.N.H. May 2, 2018); cf. Doe v. Billington.

and Tupac Shakur[208]) but others in much less prominent ones.[209]

Allegations of sexual harassment falling short of sexual assault are generally not seen as sufficient to justify pseudonymity.[210]

5. Non-sexual victimization

Allegations of nonsexual victimization don't generally lead to pseudonymity, though they did in one case,[211] which involved allegations of nonsexual trafficking for forced labor.[212]

6. Communicable disease

Courts are divided on whether to allow pseudonymity where disclosing the party's name might reveal that the

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[208] Rapp v. Fowler, No. 20-CV-9586 (LAK), 2021 WL 1738349 (S.D.N.Y. May 3, 2021);Doe v. Weinstein, 484 F. Supp. 3d 90, 94 (S.D.N.Y. 2020); Doe v. Shakur, 164 F.R.D. 359 (S.D.N.Y. 1996).

[209] Plaintiff B v. Francis, 631 F.3d 1310 (11th Cir. 2011) ("courts have often denied the protection of anonymity in cases where plaintiffs allege sexual assault, even when revealing the plaintiff's identity may cause her to 'suffer some personal embarrassment'"); Doe v. Ocean Reef Cmty. Ass'n, No. 19-10138-CIV, 2019 WL 5102450, *2 (S.D. Fla. Oct. 11, 2019); o F.B. v. East Stroudsburg Univ., No. 3:09-cv-525, 2009 WL 2003363, at *3 (M.D. Pa. July 7, 2009) (reasoning that if courts were to find allegations of sexual assault alone sufficient to support anonymity it "would open up the court to requests for anonymity each time a plaintiff makes allegations of sexual harassment"); Doe v. Cook County, No. 1:20-cv-05832 (N.D. Ill. June 3, 2021) (requiring "risk of serious social stigmatization surpassing a general fear of embarrassment"); Doe v. County of Lehigh, No. 5:20-CV-03089, 2020 WL 7319544 (E.D. Pa. Dec. 11, 2020); Doe v. Gong Xi Fa Cai, Inc., No. 19-cv-; 2678, 2019 WL 3034793, at *1 (S.D.N.Y. July 10, 2019); Doe v. Townes, No. 19-cv-; 8034, 2020 WL 2395159, at *3 (S.D.N.Y. May 12, 2020); Doe v. Skyline Automobiles Inc., 375 F. Supp. 3d 401, 405 (S.D.N.Y. 2019); Doe v. Word of Life Fellowship, Inc., 2011 WL 2968912 (D. Mass. July 18, 2011); MacInnis v. Cigna Grp. Ins.; Co. of Am., 379 F. Supp.2d 89 (D. Mass. 2005); Bell Atlantic Business Systems, Inc., 162 F.R.D. at 421; Doe H. v. Haskell Indian Nations Univ., 266 F. Supp. 3d 1277, 1289 (D. Kan. 2017); Roe v. Does 1-11, No. 20-CV-3788-MKB-SJB, 2020 WL 6152174, *8 (E.D.N.Y. Oct. 14, 2020) ("general trend to disfavor anonymity in sexual assault-related civil cases"); Doe v. Sheely, 781 F. App'x 972, 973–74 (11th Cir. 2019); Doe *ex rel.* Doe v. Harris, No. 14-cv-00802, 2014 WL 4207599, at *2 (W.D. La. Aug. 25, 2014); Luckett v. Beaudet, 21 F. Supp. 2d 1029 (D. Minn. 1998); Doe v. Univ. of R.I., No. CIV.A. 93-0560B, 1993 WL 667341 (D.R.I. Dec. 28, 1993); Doe v. Bruner, No. CA2011-07-013, 2012 WL 626202, *3 (Ohio Ct. App. Feb. 27, 2012) (applying federal law by analogy); Balerna v. Bosco, No. HHDCV176082264S, 2017 WL 6884041, *2 (Conn. Super. Ct. Dec. 6, 2017) (rejecting pseudonymity in non-Title-IX case arising out of alleged sexual assault at college)..

[210] Doe v. Cook County, No. 1:20-CV-5832, 2021 WL 2258313 (N.D. Ill. June 3, 2021); L.A. v. Gary Crossley Ford, Inc., No. 4:20-00620-cv-RK, at 2–3 (W.D. Mo. Oct. 2, 2020); Doe v. Am. Fed. of Gov't Employees, No. 1:20-cv-01558-JDB, at 6 n.2 (D.D.C. June 19, 2020); Roe v. Bernabei & Wachtel PLLC, 85 F. Supp. 3d 89, 96–97 (D.D.C. 2015); Doe v. Moreland, No. CV 18-800 (TJK), 2019 WL 2336435 (D.D.C. Feb. 21, 2019) (claim of allegedly libelous accusations of sexual harassment); Doe v. Freydin, No. 21 CIV. 8371 (NRB), 2021 WL 4991731, *2 (S.D.N.Y. Oct. 27, 2021).

[211] *See, e.g.*, Sherman v. Trinity Teen Solutions, Inc., No. 20-CV-00215-SWS, 2021 WL 3720131, *2 (Feb. 11, 2021).

[212] Doe v. Phillips, No. 2:20-cv-00019-TSK (N.D. W. Va. Mar. 31, 2021), *granting* Request, *id.* (July 10, 2020); Complaint, *id.* (July 9, 2020). *But see* Doe v. Zinsou, No. 19 CIV. 7025 (ER), 2019 WL 3564582, *4 (S.D.N.Y. Aug. 6, 2019) (denying pseudonymity in similar case).

party has been infected with HIV,[213] herpes,[214] or other communicable (and generally sexually transmitted) illnesses.[215]

7. Mental illness or disorder

Courts sometimes find pseudonymity is justified to avoid revealing a party's mental illness or disorder,[216] and sometimes find it isn't.[217]

8. Nonmental, noncommunicable illness or disability

Courts generally appear not to allow pseudonymity to conceal nonmental, noncommunicable illness or

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[213] Pseudonymity allowed: Roe v. City of Milwaukee, 37 F. Supp. 2d 1127, 1129 (E.D. Wis. 1999); W.G.A. v. Priority Pharmacy, Inc., 184 F.R.D. 616 (E.D. Mo. 1999); Doe v. Brennan, No. 19-5885, ECF Nos. 17-18 (E.D. Pa. Apr. 27, 2020); Doe v. Russ, No. 1:20-CV-07769-AT (S.D.N.Y. Oct. 29, 2020), *granting* Motion to Proceed Under Pseudonym, *id.* (S.D.N.Y. Oct. 14, 2020); Doe v. Tris Comprehensive Mental Health, Inc., 298 N.J. Super. 677, 682–83 (Law Div. 1996). Pseudonymity not allowed: Mateer v. Ross, Suchoff, Egert, Hankin, Maidenbaum & Mazel, P.C., No. 96 CIV. 1756 (LAP), 1997 WL 171011, *6 (S.D.N.Y. Apr. 10, 1997); Doe v. Bell Atlantic Bus. Sys. Servs., Inc., 162 F.R.D. 418, 420 (D. Mass. 1995)

[214] Pseudonymity allowed: Order, Doe v. Cochran, No. FSTCV155014849S, entry no. 113.00 (Sept. 28, 2015); Doe v. Weinzweig, 40 N.E.3d 351, 363 (Ill. App. Ct. 2015) (noting that the circuit had allowed pseudonymity but concluding that the question wasn't properly before the court on appeal). Pseudonymity not allowed: Unwitting Victim v. C.S., 47 P.3d 392, 401 (Kan. 2002); Anonymous v. Lerner, 124 A.D.3d 487, 488 (2015); Anonymous v. Simon, No. 13 CIV. 2927 RWS, 2014 WL 819122, *2 (S.D.N.Y. Mar. 3, 2014).

[215] Pseudonymity allowed: EW v. N.Y. Blood Ctr., 213 F.R.D. 108, 112 (E.D.N.Y. 2003) (hepatitis B); Doe v. O'Neill, 1987 WL 859818, at *1 (R.I. Super. Jan. 6, 1987) (chlamydia and gonorrhea). Pseudonymity not allowed: Geico Gen. Ins. Co. v. M.O., No. 21-2164-DDC-ADM, 2021 WL 4476783 (D. Kan. Sept. 30, 2021) (HPV).

[216] Doe v. State Bar of Cal., No. 3:20-cv-06442-LB (N.D. Cal. Sept. 21, 2020), *granting* Motion, *id.* (N.D. Cal. Sept. 14, 2020) (ADHD, generalized anxiety disorder, trichotillomania [compulsive pulling out of hair]); Doe v. Tonti Mgmt. Co., No. 2:20-cv-02466-LMA-MBN (E.D. La. Sept. 11, 2020), *granting* Motion, *id.* (E.D. La. Sept. 9, 2020) ("major depressive disorder, anxiety, and PTSD caused by a sexual assault"); Doe v. Provident Life & Accident Insurance Co., 176 F.R.D. 464, 468–69 (E.D. Pa. 1997) ("general anxiety disorder, dysthymic disorder, adult attention deficit disorder, personality disorder, immature, inadequate, passive aggressiveness, and occupational stress with previous job situation"); Doe v. Standard Ins. Co., No. 1:15-CV-00105-GZS, 2015 WL 5778566, *2 (D. Me. Oct. 2, 2015); Doe v. Hartford Life & Accident Insurance Co., 237 F.R.D. 545, 550 (D.N.J. 2006) ("severe bipolar disorder"); Doe v. Unitedhealthcare Insurance Company, No. 3:20-cv-06574-EMC (N.D. Cal. Sept. 24, 2020), *granting* Plaintiff's Ex Parte Motion for Administrative Relief to Proceed Under Pseudonym, *id.* (Sept. 18, 2020); Doe v. Garland, No. 2:21-cv-00071-LGW-BWC, at 5 (S.D. Ga. July 30, 2021) ("PTSD, Major Depressive Disorder and suicidal ideation or Suicidal Behavior Disorder").

[217] Doe v. Blue Cross & Blue Shield United of Wisconsin, 112 F.3d 869, 872 (7th Cir. 1997) ("obsessive-compulsive disorder," which the court concluded was not sufficiently stigmatized); Doe v. UNUM Life Ins. Co. of Am., 164 F. Supp. 3d 1140 (N.D. Cal. 2016) ("general anxiety disorder"); Doe *ex rel.* Doe v. Harris, No. 14-cv-00802, 2014 WL 4207599, at *2 (W.D. La. Aug. 25, 2014) (disorder that "rendered [plaintiff] perpetually childlike and vulnerable"); Doe v. Indiana Black Expo, Inc., 923 F. Supp. 137, 140 (S.D. Ind.1996) (past psychiatric hospitalization); Doe v. Indiv. Members of Indiana State Bd. of Law Examiners, No. 1:09-cv-00842 (S.D. Ind. Aug. 8, 2009) (anxiety disorder and PTSD); MacInnis v. Cigna Grp. Ins. Co. of Am., 379 F. Supp. 2d 89, 90 (D. Mass. 2005) ("depressive/anxiety disorder"); Doe v. Univ. of Akron, No. 5:15-CV-2309, 2016 WL 4520512, *4 (N.D. Ohio Feb. 3, 2016) ("ADHD, anxiety, depression"); G.E.G. v. Shinseki, No. 1:10–cv–1124, 2012 WL 381589, at *2 n.1 (W.D. Mich. Feb. 6, 2012) ("Attention Deficit Disorder/unspecified learning disorder" and "anxiety disorder"); Doe v. Zuchowski, No. 221CV01519APGEJY, 2021 WL 4066667, at *2 (D. Nev. Sept. 7, 2021) ("stress-induced Tinnitus (non-stop ringing in the ears) for ten (10) months now as well as a total collapse of his mental health induced by the condition"); Doe v. Univ. of the Incarnate Word, No. SA-19-CV-957-XR, 2019 WL 6727875, *3 (W.D. Tex. Dec. 10, 2019) (ADHD); Wescott v. Middlesex Hosp., No. MMXCV186020250, 2018 WL 2292916, *3 (Conn. Super. Ct. May 1, 2018) (bipolar disorder and schizoaffective disorder); *cf.* Alexandra H. v. Oxford Health Ins., Inc., No. 11-cv-23948, 2012 WL 13194938, *1–*3 (S.D. Fla. Feb. 10, 2012) (rejecting pseudonymity when plaintiff was suffering from "anorexia nervosa, obsessive compulsive disorder, severe depression and suicidal ideation," though noting that she "presents a more compelling case for allowing anonymity with her untimely Reply memorandum," albeit a case that the court rejects on procedural grounds: "[t]o grant her Motion . . . would be to reward Plaintiff for unfair briefing practices where [Defendant] is not permitted to respond to new factual and legal assertions").

disability,[218] though at least one court has disagreed.[219]

9. Drug or alcohol abuse or addiction

Courts likewise appear not to generally allow pseudonymity as a means of preventing revelation of a parties history of drug abuse or addiction[220] or alcohol abuse or addiction.[221] In the words of one case,

> [W]e do not discount Doe's very real concerns about reputational harm, both personally or professionally, or her fears of relapse in the event of such backlash. But those types of fears are similar to those of other plaintiffs who have alleged that they were discriminated against because of their histories of substance abuse, and it is clear that several similarly-situated plaintiffs have publicly identified themselves in their own litigations.[222]

At least one case, though, has allowed pseudonymity in such a situation.[223]

10. Religious or political beliefs that might lead to retaliation

An oft-quoted 1981 Fifth Circuit decision allowed pseudonymity for plaintiffs challenging public school prayers, and seemingly suggested that the reason was that plaintiffs' religious beliefs deserved to be kept confidential:

> [T]he Does complain of public manifestations of religious belief; religion is perhaps the quintessentially private matter. Although they do not confess either illegal acts or purposes, the Does have, by filing suit, made revelations about their personal beliefs and practices that are shown to have invited an opprobrium analogous to the infamy associated with criminal behavior.[224]

But it appeared that the court was focusing not on hostility to the religious beliefs as such, but rather hostility to the plaintiffs' attempt to change a particular government policy related to religion:

> 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 plaintiffs' complaint.[225]

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[218] Anonymous v. Medco Health Sols., Inc., 588 F. App'x 34 (2d Cir. 2014) ("Plaintiff claims that 'further disclosure of his [Parkinson's Disease] to the public through this litigation could only exacerbate the harm done by Defendants[.]' He notes that this would 'adversely impact his patient base' as 'he is a specialist who relies largely upon referrals from other physicians.' But this claim is vague and far-fetched. Even if other physicians were to learn of the plaintiff's disease through his name being listed in the case caption, they, more so than others, would be able to understand that his condition has no bearing on his ability to diagnose and treat patients. Indeed, the harm outlined by plaintiff is rather speculative in nature."); Endangered v. Louisville/Jefferson County Metro Government Dept. of Inspections, 3:06-cv-250, 2007 WL 509695, at *1–2 (W.D. Ky. Feb. 12, 2007) (mobility-impairing disabilities); Parlante v. Am. River Coll., No. 2:20-CV-02268-KJM-JDP (PS), 2021 WL 4123807, *1 (E.D. Cal. Sept. 9, 2021) ("more than 50% blind[ness]," Motion, *id.* at 1 (Nov. 13, 2020)).

[219] Heather K. by Anita K. v. City of Mallard, Iowa, 887 F. Supp. 1249, 1256 (N.D. Iowa 1995) ("severe respiratory and cardiac conditions").

[220] D.E. v. John Doe, 834 F.3d 723, 728–29 (6th Cir. 2016); Doe v. Indiana Black Expo, Inc., 923 F. Supp. 137 (S.D. Ind. 1996); Doe v. Heitler, 26 P.3d 539 (Colo. Ct. App. 2001); K.W. v. Holtzapple, 299 F.R.D. 438, 439–40, 442 (M.D. Pa. 2014).

[221] Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992).

[222] Doe v. Main Line Hospitals, Inc., No. 2:20-cv-02637-KSM, at 10 (E.D. Pa. Sept. 1, 2020).

[223] Smith v. United States Off. of Pers. Mgmt., No. 2:13-CV-5235, 2014 WL 12768838 (E.D. Pa. Jan. 21, 2014) (drug and alcohol addiction).

[224] Doe v. Stegall, 653 F.2d 180, 186 (5th Cir. 1981).

[225] *Id.* at __; Doe v. Porter, 370 F.3d 558, 560 (6th Cir. 2004); *see also* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 809 n.1 (5th Cir. 1999) (noting that the judge allowed pseudonymity, in a case involving an Establishment Clause challenge to student-led public school football game prayer), *aff'd as to other matters*, 530 U.S. 290 (2000); Yacovelli v. Moeser, No. 1:02CV596, 2004 WL 1144183, *6–*7 (M.D.N.C. May 20, 2004) (ultimately allowing pseudonymity in challenge to university orientation that requires readings from book about the Koran, even in the absence of threats of violent retaliation). *But see* Doe v. Beaumont Indep. Sch. Dist., 172 F.R.D. 215, 217 (E.D. Tex. 1997) (rejecting pseudonymity in case involving an Establishment Clause challenge to public school district's clergy-in-schools program).

And indeed later cases have uniformly refused to let plaintiffs be pseudonymous simply to avoid revealing their membership in minority religions (such as Judaism and Islam).[226] Indeed, were it otherwise, religious discrimination lawsuits, at least when brought by members of small religious minority groups, could nearly always be litigated pseudonymously. Instead, pseudonymity is generally allowed to people bringing challenges against laws that appear to be highly controversial for reasons related to religion or politics[227]—challenges that are usually also overwhelmingly legal rather than factual, and in which naming the parties is thus seen as less likely to be valuable.[228]

11. Criminal record or behavior

Doe v. Stegall allowed pseudonymity for people challenging public school prayers under the Establishment Clause. The court's rationale focused on the "threats of violence" prompted by the litigation and the plaintiffs also being children.[229] But in the process of describing the hostility the Does were facing, the court noted:

> Although they do not confess either illegal acts or purposes, the Does have, by filing suit, made revelations about their personal beliefs and practices that are shown to have invited an opprobrium analogous to the infamy associated with criminal behavior.[230]

This might make it seem like litigants could generally be pseudonymous if their alleged actions would tend to "invite[] an opprobrium analogous to the infamy associated with criminal behavior"—for instance, if their alleged actions were actual criminal behavior, such as rape or fraud. Yet other than one case that involved a lawsuit over *expunged* convictions,[231] I could find no cases that viewed allegations or acknowledgments of criminal misconduct as themselves sufficient to justify pseudonymity. And several cases expressly rejected such arguments.[232]

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[226] Doe v. Coll. of N.J., No. CV1920674FLWZNQ, 2020 WL 360719, at *3 (D.N.J. Jan. 22, 2020) (rejecting argument that identify Doe would "reveal her status 'as a practicing and traditional Jew,' risking her and her children's safety 'in light of the recent rise of Anti-Semitic violence,'" reasoning that "[t]his Court regularly hears claims by and against Jewish litigants, and Doe had failed to show any evidence that Jewish litigants are put at a greater risk of anti-Semitic discrimination or violence by virtue of using their names in federal court"), *aff'd*, No. CV 19-20674(FLW), 2020 WL 3604094 (D.N.J. July 2, 2020), aff'd, 997 F.3d 489 (3d Cir. 2021); Freedom From Religion Foundation, Inc. v. Emanuel County School System, 109 F. Supp. 3d 1353, 1357 (S. D. Ga. 2015) ("The fact that religion is an intensely private concern does not inevitably require that an Establishment Clause plaintiff be given Doe status . . . no court from this or any other circuit has considered a plaintiff[']s religious beliefs to be a matter of such sensitivity as to automatically entitle the plaintiff to Doe status"); Doe v. Cloninger, No. 3:15-cv-00036 (W.D.N.C. July 17, 2015) (rejecting claim of pseudonymity aimed at avoiding disclosure that plaintiff is a practicing Muslim).

[227] *See, e.g.*, Publius v. Boyer-Vine, 321 F.R.D. 358 (E.D. Cal. 2017) (allowing a pseudonymous blogger who was harshly critical of government officials to challenge a speech restriction pseudonymously); Menders v. Loudoun County, [cite] (allowing a pseudonymous challenge to a school board's policies on teaching views associated with Critical Race Theory); Doe v. Mills,

[228] *See supra* Part I.D.

[229] 653 F.2d 180, 186 (5th Cir. 1981).

[230] *Id.*

[231] Doe v. Ronan, No. 1:09-cv-243, 2009 WL 10679478, *1 (S.D. Ohio June 4, 2009) ("A criminal record is one that carries a very negative connotation in society which can be embarrassing and humiliating if that information becomes public.").

[232] Plaintiff v. Wayne State U., No. 2:20-cv-11718-GAD-DRG (E.D. Mich. Jan. 25, 2021) (actual allegations of criminal behavior not enough to justify pseudonymity); *cf.* A.B.C. v. XYZ Corp., 282 N.J. Super. 494, 503 (App. Div. 1995) ("Plaintiff's arguments that he would risk self-incrimination, that he and his family might be isolated from society and that his employment would be in jeopardy are not only somewhat speculative, but any such ramifications are due to his actions and his election to institute litigation over a perceived wrong."); Doe v. Georgia-Pac., LLC, No. CV125607PSGJCFX, 2012 WL 13223668, *2 (C.D. Cal. Sept. 26, 2012) (reference to criminal record not enough); Doe v. U.S. Healthworks Inc., No. 2:15-CV-05689, 2016 WL 11745513, *5 (C.D. Cal. Feb. 4, 2016) (recently expunged criminal record); Day v. Sebelius, 227 F.R.D. 668, 680 (D. Kan. 2005) (acknowledgement of "illegal immigration status").

12. Membership in religious groups that view certain sexual matters as particularly shameful

In three cases, courts have allowed parties to remain pseudonymous in part because sexual matters involved in the cases would be particularly stigmatized within the parties' religious communities. Most prominently, a recent Eleventh Circuit case so held as to a Muslim woman who alleged that she had been raped:

> "[C]ourts have often denied the protection of anonymity where plaintiffs allege sexual assault, even when revealing the plaintiff's identity may cause her to suffer some personal embarrassment[.]" . . . [But] Ms. Doe does not just allege that the sexual assault allegations in this case might result in "personal embarrassment." Instead, she asserts that because she is from a "devout Muslim family," the "very nature of her allegations would be sufficient to bring harm to [herself] and shame to her family under the cultural/religious traditions that her family practices." She supported this claim with her declaration, in which she attests that she seeks to proceed under a pseudonym in part because she "come[s] from a strict Muslim household where under [their] cultural beliefs and traditions such a sexual assault would have the tendency to bring shame and humiliation upon [her] family." The district court erred by treating Ms. Doe's motion as merely alleging personal embarrassment, without accounting for what she actually alleged or considering our social stigma cases.[233]

A later case took the same view as to a Baptist plaintiff who was alleging sexual assault,[234] as did an earlier case where plaintiff was an erotic dancer who sought pseudonymity in part because "her parents are devoutly religious members of a Christian church."[235]

This seems to me to raise serious Establishment Clause problems, given that many nonreligious people might also feel highly upset by revelation of similar information—whether about having been sexually assaulted or choosing to be erotic dancers. It seems hard to justify preferential treatment for those who are members of a particular religious community. And while in principle courts could diminish this preference for religion by adopting their reasoning to non-religiously-defined cultural groups as well as religious ones,[236] that too strikes me as improper preference: Again, many people even in the mainstream culture view revelation of such matters as highly embarrassing or even humiliating.[237]

G. Reputational Harm / Risk of Economic Retaliation

When we get past privacy and move on to reputational harm—and the economic and professional harm that can stem from reputational harm—the dominant answer is no pseudonymity, except in one important class of cases. I'll begin by laying out a few categories of situations where the risk of reputational harm is especially serious, and then summarize the state of court decisions on the subject.

1. Risks of reputational harm

a. Defendants accused (perhaps wrongly) of serious misconduct

Many defendants could be ruined simply by being publicly accused of certain offenses (rape, sexual harassment,

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[233] Doe v. Neverson, 820 F. App'x 984 (11th Cir. 2020).

[234] Doe v. City of Dalton, No. 4:21-cv-00128-LMM, at 2–3, https://storage.courtlistener.com/recap/gov.uscourts.gand.292043/gov.uscourts.gand.292043.5.0.pdf.

[235] Doe #1 v. Deja Vu Consulting Inc., No. 3:17-CV-00040, 2017 WL 3837730, *5 (M.D. Tenn. Sept. 1, 2017).

[236] Consider *Wolfchild v. United States*, 62 Fed. Cl. 521 (2004), *rev'd on other grounds*, 559 F.3d 1228 (Fed. Cir. 2009), which allowed certain Sioux plaintiffs to proceed pseudonymously, because of a concern that their position in a particular lawsuit would produce retaliation among other tribe members.

[237] Compare *Doe v. Dordoni*, No. 1:16-CV-00074-JHM, 2016 WL 4522672, *3 (W.D. Ky. Aug. 29, 2016), which allowed pseudonymity based on a reasonable fear of physical harm (see *supra* Part II.B), which in that case was the fear of violent reprisal in Saudi Arabia based on a Saudi citizen's conversion from Islam to Christianity. In that case, the court was applying a general rule—risk of physical harm can justify pseudonymity—that applied to people without regard to their religion or culture.

embezzlement, fraud, malpractice, and the like)—or can be materially harmed even by being sued for more minor matters, such as in landlords' unlawful detainer actions against tenants.[238] Even if they know they're innocent, they might agree to settle as a means of avoiding the lawsuit even being filed, thus giving in to a form of legally permissible blackmail ("pay me money or I'll file a lawsuit accusing you of misconduct").

b. Employees and others fearful of getting reputations for litigiousness

Plaintiffs suing ex-employers may worry that suing will make them look litigious, and thus turn off prospective future employers.[239]

Antidiscrimination laws generally forbid employers from retaliating against people who had brought discrimination claims or engaged in whistleblowing, including claims against past employers.[240] But, first, such retaliation is only illegal when done because of certain kinds of claims, and not many other employment claims (such as breach of contract claims). And second, such retaliation tends to be very hard to prove, since an employer has so many possible reasons to reject a prospective employee. As a result, many employers likely think that they won't be caught if they refuse to hire litigious employees—and likely think that, if they hire and later dismiss a litigious employee, the risk of a future lawsuit by the employee is greater than the risk of a lawsuit for retaliatory refusal to hire.[241]

The same of course is possible in other situations. Tenants, for instance, may worry that suing a landlord will lead other landlords to decline to rent to them.[242]

c. Plaintiffs fearful of public hostility stemming from the nature of their claim

[Discuss the #WorstPlaintiffEver arguments.]

d. Parties fearful of revealing disabilities and other conditions that might lead to future discrimination

Plaintiffs filing lawsuits that reveal their disabilities, mental illnesses, and the like might worry that publicizing this information would lead to discrimination by future employers, clients, patients, and the like. In this respect, requests for pseudonymity in such cases might not just be a matter of protecting privacy[243] but also be a matter of protecting reputation and preventing retaliation.

e. Libel plaintiffs fearful of amplifying the allegedly false statements

Plaintiffs suing for libel may understandably worry that suing will just further amplify the libels. People Googling for the plaintiff's name would see the lawsuit, and may easily find the complaint and other filings, which will necessarily repeat the libel in the course of alleging that it is indeed a libel. Likewise, newspaper articles or blog posts may

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[238] *See* Hundtofte v. Encarnación, 330 P.3d 168 (Wash. 2014) ("Encarnación and Farías argued that even though the unlawful detainer action was meritless, they could not obtain sufficient rental housing after prospective landlords learned that they had an unlawful detainer action filed against them.").

[239] *But see* Strahilevitz, *supra* note 7, at 1245 (suggesting, though not specifically within the employment context, that "litigiousness signaling effects are not a strong basis for granting pseudonymity to parties. Though a party might prefer that his litigiousness be kept secret, that party's potential transaction partners will have good reasons for wanting to evaluate the litigiousness of a party before entering into a relationship with him.").

[240] [Cite.] *See also* United States v. Air Indus. Corp., No. 812CV02188JVSRNB, 2016 WL 11515131, *2 (C.D. Cal. Oct. 24, 2016) (citing 31 U.S.C. § 3730(h) as the proper protection against retaliation for False Claims Act whistleblowers, and rejecting pseudonymity on those grounds).

[241] Cite 1950s case about anonymity as being the best protection against employment retaliation.

[242] [Cite, perhaps UD Registry?]

[243] *See supra* Parts II.F.7–II.F.10.

be written about the lawsuit, especially if the plaintiff or defendant is famous.[244]

Perhaps the libel lawsuits will ultimately vindicate such plaintiffs, and give them judgments that they can point to as evidence that the allegations over which they sued were false. But even when libel plaintiffs have strong cases, that might not happen. The lawsuit may be dismissed without a decision about the truth of the allegations (e.g., if a court concludes that the statements were privileged, or were said without "actual malice," without reaching whether they were true). Litigation costs might pressure plaintiffs into accepting a settlement. The defendant might not appear, which will give plaintiffs a default judgment that third parties might not credit as an authoritative decision on the facts. And in any event, there likely wouldn't be a final verdict for years.[245]

f. Other plaintiffs fearful of amplifying allegedly false allegations

The same concern would apply for other lawsuits that aren't framed as libel claims but are still based on false allegations or their consequences—lawsuits over wrongful expulsion from universities, wrongful firings, wrongful discipline of a professional,[246] and the like.

2. How courts deal with these risks

Despite these serious risks, courts generally refuse to allow pseudonymity aimed at avoiding "the annoyance and criticism that may attend any litigation,"[247] including "inability to secure future employment,"[248] "economic harm,"[249]

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[244] *See* Roe v. Does 1–11, No. 20-cv-3788-MKB-SJB, 2020 WL 6152174 (E.D.N.Y. Oct. 14, 2020); Doe v. Billington (Cal. Super. Ct.); Doe v. Does. *Doe v. Megless*, 654 F.3d 404, 410 (3d Cir. 2011), takes the view "to the extent that the [allegedly libelous flyers over which plaintiff was suing] publicly accused him of being a pedophile, litigating publicly will afford Doe the opportunity to clear his name in the community." *See also* Doe v. Valencia Coll., No. 6:15-CV-1800-Orl-40DAB, 2015 WL 13739325, *3 (M.D. Fla. Nov. 2, 2015). But libel litigation often simply amplifies the original accusation, at least until a final judgment in plaintiff's favor; and often there won't be such a final judgment in plaintiff's favor, even if plaintiff is innocent of the charges against him, because the case will be dismissed on grounds of lack of "actual malice" or negligence, or based on some privilege, or simply because plaintiff runs out of money to litigate it. A plaintiff would reasonably much prefer to litigate pseudonymously until judgment (or until the other side stipulates to a retraction), and then publish his name only after such a final decision in his favor.

[245] To be sure, if the original libel were already broadly spread, the plaintiff might feel he has nothing to lose by suing. But often the libels (or especially oral slanders) have reached only a limited audience, especially if they aren't in Google-searchable media, or at least don't appear high up in Google search results. The plaintiff's lawsuit may cause them to be seen by a much broader audience.

[246] Doe v. Dep't of Army, No. 1:21-mc-00114-UNA (D.D.C. Sept. 24, 2021) (allegations of malpractice against a government doctor); Doe v. Garland, No. 21-mc-44, 2021 WL 3622425, at *2 (D.D.C. Apr. 28, 2021); Doe v. Lieberman, No. 1:20-cv-02148, at 5 (D.D.C. Aug. 5, 2020) (allegations of malpractice against a government doctor).

[247] *In re* Sealed Case, 931 F.3d 92, 97 (D.C. Cir. 2019); *Advanced Textile*.

[248] Doe v. Georgia-Pac., LLC, No. CV125607PSGJCFX, 2012 WL 13223668, *2 (C.D. Cal. Sept. 26, 2012); *see also* Doe v. Princeton Univ., No. CV 20-4352 (BRM), 2020 WL 3962268, *3 (D.N.J. July 13, 2020); Doe v. Rider Univ., No. CV 16-4882 (BRM), 2018 WL 3756950, *4 (D.N.J. Aug. 7, 2018).

[249] Doe v. Megless, 654 F.3d 404, 408 (3d Cir. 2011); *see also* Doe v. Connecticut Bar Examining Committee, 263 Conn. 39, 70 (2003); S. Methodist Univ. Ass'n of Women L. Students v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979) (risk of employer retaliation); Free Mkt. Comp. v. Commodity Exch., Inc., 98 F.R.D. 311, 313 (S.D.N.Y. 1983); A.B.C. v. XYZ Corp., 282 N.J. Super. 494, 504 (App. Div. 1995).

"economic or professional concerns,"[250] "reputational harm,"[251] or "blacklisting."[252] And that's true both for plaintiffs[253] and defendants.[254]

As I suggested above, this may stem from the ubiquity of reputational risk in civil litigation (and even more so in criminal litigation). Courts do often say that "we allow parties to use pseudonyms in the 'unusual case' when nondisclosure of the party's identity 'is necessary . . . to protect a person from harassment, injury, ridicule or personal embarrassment.'"[255] But there is nothing "unusual" about embarrassment or risk of harassment, reputational injury, or ridicule stemming from people believing the allegations in a case, or being wary about a person because of those allegations.[256] If reputational damage sufficed to justify pseudonymity, our civil system would become (for better or worse) one in which pseudonymity is the norm.

Yet here too, courts are divided. In one recent sexual assault lawsuit, for instance, the judge let the defendant proceed pseudonymously, reasoning that:

> [T]he court finds that the chance that [plaintiff] would suffer reputational harm is significant. The defendant is a partner of a well-known law firm in New York and an adjunct law school instructor.[257]

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[250] Nat'l Commodity & Barter Ass'n, Nat'l Commodity Exch. v. Gibbs, 886 F.2d 1240, 1245 (10th Cir. 1989); *see also* United States ex rel. Little v. Triumph Gear Sys., Inc., 870 F.3d 1242, 1249 n.10 (10th Cir. 2017); Doe v. Delta Airlines Inc., 672 F. App'x 48, 52 (2d Cir. 2016); Roe v. Skillz, Inc., 858 F. App'x 240, 241 (9th Cir. 2021); Doe v. United Services Life Insurance Co., 123 F.R.D. 437, 439 n.1 (S.D.N.Y. 1988).

[251] Doe v. Bogan, No. CV 1:21-MC-00073, 2021 WL 3855686 (D.D.C. June 8, 2021) (rejecting pseudonymity claim based on "[p]laintiff's concerns that public association with the racial slur—even in the context of a defamation suit—could harm 'his career as a law professor' or be 'embarrassing to have presented to the community at large'"); Doe v. Kansas State Univ., No. 220CV02258HLTTJJ, 2021 WL 84170, *3 (D. Kan. Jan. 11, 2021); Raiser v. Brigham Young University, 127 F. App'x 409, 411 (10th Cir. 2005);

[252] Nyarko v. M&A Projects Restoration Inc., No. 18CV05194FBST, 2021 WL 4755602, *6 (E.D.N.Y. Sept. 13, 2021), *report and recommendation adopted*, No. 1:18-CV-05194-FB-ST, 2021 WL 4472618 (E.D.N.Y. Sept. 30, 2021); Agerbrink v. Model Serv. LLC, 14 Civ. 7841 (JPO) (JCF), 2016 WL 406385, at *9-10 (S.D.N.Y. Feb. 2, 2016); Abdel-Razeq v. Alvarez & Marsal, Inc., No. 14-cv-5601, 2015 WL 7017431, *4 (S.D.N.Y. Nov. 12, 2015).

[253] *See, e.g.*, P.D. & Assocs. v. Richardson, 64 Misc. 3d 763, 767 (N.Y. Sup. Ct. 2019) (libel); Candidate No. 452207 v. CFA Inst., 42 F. Supp. 3d 804, 808 (E.D. Va. 2012) (lawsuit alleging botched investigation of exam cheating); Doe v. Main Line Hospitals, Inc., No. 2:20-cv-02637-KSM, at 10 (E.D. Pa. Sept. 1, 2020) (lawsuit alleging failure to provide substance abuse treatment) ("[W]e do not discount Doe's very real concerns about reputational harm, both personally or professionally, or her fears of relapse in the event of such backlash. But those types of fears are similar to those of other plaintiffs who have alleged that they were discriminated against because of their histories of substance abuse, and it is clear that several similarly-situated plaintiffs have publicly identified themselves in their own litigations.");

[254] T.S.R. v. J.C., 671 A.2d 1068, 1074 (N.J. Super. App. Div. 1996); Doe v. Doe, 668 N.E.2d 1160, 1167 (Ill. Ct. App. 1996).

[255] Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1068 (9th Cir. 2000).

[256] *Does I thru XXIII* itself allowed pseudonymity only because of "extraordinary" risk of retaliation in that case, *id.* at 1071:

> While threats of termination and blacklisting are perhaps typical methods by which employers retaliate against employees who assert their legal rights, the consequences of this ordinary retaliation to plaintiffs are extraordinary. As guest workers in Saipan [in the Northern Mariana Islands], plaintiffs may be deported if they lose their jobs. Moreover, if plaintiffs are fired, blacklisted, or deported, they will be burdened with debts arising from their contracts with the recruiting agencies. Plaintiffs fear accruing debts because they know Chinese citizens who have been threatened with arrest and incarceration because they could not pay their debts to recruiters.

[257] Doe v. Doe, No. 20-CV-5329(KAM)(CLP), 2020 WL 6900002, *3 (E.D.N.Y. Nov. 24, 2020). *But see* Stern v. Stern, 66 N.J. 340, 343 n.1 (1975) (rejecting pseudonymity in a divorce case, where the husband was found guilty of adultery: "While we continue to believe that the use of initials in order to disguise the true identity of litigants serves a legitimate end where the interests of minor children are concerned, as well as upon other miscellaneous but rare occasions, we do not approve a resort to this practice where the effort is to throw the protective cloak of anonymity over a successful and well-known member of the bar, as would appear to have been the case here.").

It's of course likely that an allegation of sexual assault would indeed be ruinous to a partner at a well-known law firm who also teaches at a law school. And it would be ruinous right away, even before any verdict in the case, and even if eventually the defendant is vindicated. But wouldn't it be devastating to a janitor as well?

Likewise, in a lawsuit over an allegedly false credit report—basically, a narrow statutory quasi-libel claim—the court allowed plaintiff to proceed as a Doe, because "Publicly identifying Plaintiff risks impeding her future employment prospects by making the improperly disclosed information public knowledge."[258] Some cases that discuss a party's disability have likewise led to pseudonymization on the theory that they could lead to "severe" "economic and career consequences."[259] Some courts have also allowed pseudonymity for whistleblowers, out of a concern that being known as a whistleblower might create "a reasonably credible threat of some professional harm."[260]

And there is one other large array of cases where pseudonymity requests have often (though not always[261]) been granted: Lawsuits against universities by students who claim they had been wrongly punished based on false accusations and botched investigations, usually related to alleged sexual assault.[262] There the students' concerns are chiefly reputational: "being accused of sexual assault is a serious allegation with which one would naturally not want to be identified publicly."[263]

Yet all these cases don't generally explain why they are departing from the norm applicable in other reputational risk cases (except insofar as some of the university cases suggest that young adults should get special protection beyond what older adults get[264]). Some people are getting this priceless protection, and others are not, with little justification for the different treatment but just because they drew a judge who is more open to pseudonymity or because the judge found their plight to be specially sympathetic.

H. Deterrent to Enforcing Rights

In most cases where denying pseudonymity can harm parties (whether through harming privacy or reputation or

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[258] Doe v. Innovative Enterprises, Inc., No. 4:20-cv-00107-RCY-LRL, at 4 (E.D. Va. Aug. 25, 2020) (allegedly false credit report). *But see* Doe v. Law Offices of Robert A. Schuerger Co., No. CV1713105BRMDEA, 2018 WL 4258155, at *2 (D.N.J. Sept. 6, 2018) (refusing to allow pseudonymity in a similar case).

[259] Doe v. Elson S Floyd Coll. of Med. at Washington State Univ., No. 2:20-CV-00145-SMJ, 2021 WL 4197366 (E.D. Wash. Mar. 24, 2021); *see also* Doe v. Bryson, No. 1:12-cv-10240 (D. Mass. Sept. 10, 2021) (retroactively pseudonymizing case), granting Letter/Request, *id.* (D. Mass. July 14, 2021) (sealed), which seems likely to echo Letter/Request, *id.* (D. Mass. June 4, 2021) (seeking pseudonymization "so that her privacy and reputation online around the medical disability" that formed the basis of the lawsuit "is not readily searchable," and "to prevent the Plaintiff from further employment discrimination which has gravely impacting her securing employment").

[260] SEB Inv. Mgmt. AB v. Symantec Corp., No. C 18-02902 WHA, 2021 WL 3487124, *2 (N.D. Cal. Aug. 9, 2021); [cite D.C. Cir. case].

[261] Doe v. Princeton Univ., No. CV 20-4352 (BRM), 2020 WL 3962268, *3 (D.N.J. July 13, 2020); Doe v. Rider Univ., No. CV 16-4882 (BRM), 2018 WL 3756950, *4 (D.N.J. Aug. 7, 2018); K.W. v. Holtzapple, 299 F.R.D. 438, 442 (M.D. Pa. 2014); Doe v. Rollins Coll., No. 616CV2232ORL37KRS, 2017 WL 11610361 (M.D. Fla. Mar. 22, 2017) (rejecting pseudonymity in such a case); *see also* Balerna v. Bosco, No. HHDCV176082264S, 2017 WL 6884041, *2 (Conn. Super. Ct. Dec. 6, 2017) (rejecting pseudonymity in non-Title-IX case arising out of alleged sexual assault at college).

[262] *E.g.*, Doe v. Rollins Coll., No. 6:18-cv-1069-Orl-37LRH, 2018 WL 11275374, *4 (M.D. Fla. Oct. 2, 2018); Doe v. Kenyon College, No. 2:20-CV-4972, 2020 WL 11885928 (S.D. Ohio Sept. 24, 2020); Doe v. Rector & Visitors of George Mason Univ., 179 F. Supp. 3d 583, 593 (E.D. Va. 2016); Doe v. Trustees of Dartmouth Coll., No. 18-CV-040-LM, 2018 WL 2048385, *5–*6 (D.N.H. May 2, 2018); Doe v. Univ. of St. Thomas, No. 16-cv-1127, 2016 WL 9307609, *2 (D. Minn. May 25, 2016); Doe v. Alger, 317 F.R.D. 37, 42 (W.D. Va. 2016); Doe v. Purdue Univ., 321 F.R.D. 339, 342 (N.D. Ind. 2017); Doe v. Univ. of South, No. 4:09-CV-62, 2011 WL 13187184, at *19 (E.D. Tenn. July 8, 2011); *see also* Doe v. Elson S Floyd Coll. of Med. at Washington State Univ., No. 2:20-CV-00145-SMJ, 2021 WL 4197366, *2 (E.D. Wash. Mar. 24, 2021) (accusations of domestic violence by medical school student).

[263] Doe v. Univ. of South, No. 4:09-CV-62, 2011 WL 13187184, at *19 (E.D. Tenn. July 8, 2011).

[264] *See supra* Part II.E.2.

otherwise), it can also undermine the public policy that the civil causes of action are aimed to serve. Plaintiffs faced with the prospect of these harms, to themselves or their children, might choose not to litigate. They might decline to sue, or might decline to continue with their lawsuits once pseudonymity is denied.[265] Likewise, defendants might settle before complaints are filed, even if they have sound legal or factual defenses.

As a result, the relevant claims and defenses will be underasserted, and the underlying policies will be underenforced. It seems likely, for instance, that many rape victims' reluctance to come forward and identify themselves has emboldened would-be rapists, and left them at liberty to commit future rapes.[266] Likewise, if certain classes of libel victims are known to be reluctant to sue because the libels would then be widely publicized (together with the victim's identity), that might embolden libelers. If certain kinds of employees know that suing over wrongful terminations will cause them to be blacklisted by future employers, that might diminish the deterrent to wrongful termination. The same may be true of people suing over matters related to their mental illnesses.

Sometimes courts allow pseudonymity in part to avoid this deterrent effect.[267] But in most cases they do not allow pseudonymity, even though the deterrent effect is equally present.

I. Injury Litigated Against Would Be Incurred

Courts often note that plaintiffs can proceed pseudonymously if "the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity."[268] This appears to date back to a 1973 case challenging New York policies of recording information about prescription drugs into a centralized database, which plaintiffs believed would compromise their privacy (even though the information was required to be kept confidential).[269] Requiring plaintiffs to litigate under their names would undermine the very confidentiality that they sought to protect.[270]

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[265] [Cite]; *see also* Ressler, *supra* note 7, *Privacy, Plaintiffs, and Pseudonyms*, at 251–53; Strahilevitz, *supra* note 7, at 1244.

[266] Doe v. Lund's Fisheries, Inc., No. CV 20-11306 (NLH/JS), 2020 WL 6749972, *3 (D.N.J. Nov. 17, 2020) (citing this as a reason for pseudonymity in a sexual assault case); Doe v. Oshrin, 299 F.R.D. 100, 104 (D.N.J. 2014) (likewise in a child pornography case); *Advanced Textile*, 214 F.3d at 1073 (likewise in an employee rights case); *see* Doe v. Innovative Enterprises, Inc., No. 4:20-cv-00107-RCY-LRL, at 4 (E.D. Va. Aug. 25, 2020) ("There is a special public interest here in allowing litigants to defend their rights under federal law [which bars consumer reporting agencies from disclosing expunged criminal records] without suffering the same injury as Plaintiff."). *But see* Doe v. Weinstein, 484 F. Supp. 3d 90, 98 (S.D.N.Y. 2020) ("It may be, as plaintiff suggests, that victims of sexual assault will be deterred from seeking relief through civil suits if they are not permitted to proceed under a pseudonym. That would be an unfortunate result. For the reasons discussed above, however, plaintiff and others like her must seek vindication of their rights publicly.") (quoting Doe v. Shakur, 164 F.R.D. 359 (S.D.N.Y. 1996)); Doe v. Megless, 654 F.3d 404, 411 (3d Cir. 2011) ("a plaintiff[']s stubborn refusal to litigate openly by itself cannot outweigh the public's interest in open trials").

[267] *See, e.g.*, Doe v. Provident Life & Accident Insurance Co., 176 F.R.D. 464, 468 (E.D. Pa. 1997) ("A ruling by this Court, denying plaintiff the use of a pseudonym, may deter other people who are suffering from mental illnesses from suing in order to vindicate their rights, merely because they fear that they will be stigmatized in their community if they are forced to bring suit under their true identity. Indeed, unscrupulous insurance companies may be encouraged to deny valid claims with the expectation that these individuals will not pursue their rights in court."); Doe v. Hartford Life & Accident Insurance Co., 237 F.R.D. 545, 550 (D.N.J. 2006).

[268] *Zavaras*, 139 F.3d at 803.

[269] Roe v. Ingraham, 364 F. Supp. 536, 541 n.7 (S.D.N.Y. 1973).

[270] *Cf.* Doe v. City of N.Y., 15 F.3d 264 (2d Cir. 1994) (allowing pseudonymity, without discussion, in lawsuit over unauthorized disclosure of HIV status); Doe v. Civiletti, 635 F.2d 88 (2d Cir. 1980) (likewise, in lawsuit seeking reinstatement to federal witness protection program); Doe v. United States, 210 F. Supp. 3d 1169 (W.D. Mo. 2016) (likewise, in Privacy Act lawsuit claiming the government improperly disclosed certain information); E.B. v. Landry, No. CV 19-862-JWD-SDJ, 2020 WL 5775148 (M.D. La. Sept. 28, 2020) (likewise, in lawsuit challenging Louisiana expungement law); United States Dep't of Justice v. Utah Dep't of Commerce, 2017 WL 963203, at *1 (D. Utah Mar. 10, 2017) (likewise, in lawsuit challenging Utah's Controlled Substance Database procedures); Doe v. Harris, 640 F.3d 972, 974 (9th Cir. 2011) (likewise, in lawsuit challenging plaintiff's inclusion on sex offender registry); Doe I-VIII v. Sturdivant, No. 06-cv-10214, 2006 WL 8432896 (E.D. Mich. Apr. 7, 2006) (likewise, in lawsuit challenging sex offender registry); M.J. v. Jacksonville Housing Auth., 2011 WL

Read broadly, this would authorize pseudonymity in nearly all defamation or disclosure of private facts claims (at least those where the information has not been already widely spread on the Internet[271]). After all, in those cases requiring the plaintiffs to identify themselves will only further exacerbate the injury. And a few cases have taken this view.[272] But the dominant view is contrary, which is why libel and privacy cases are routinely litigated without pseudonyms.[273]

III. PARTIAL PSEUDONYMITY, LIMITED TO COURT OPINIONS (AND PERHAPS DOCKET SHEETS)

So far we have been talking about true pseudonymity of court records. But courts writing opinions can also choose not to mention the names of the parties. This has become the practice in some courts in social security benefits cases,[274] and is done ad hoc in other cases where courts want to shield parties in some measure.[275] Many appellate opinions in which the parties' names are pseudonymized, for instance, indicate the trial court case number, and looking up the trial court records will reveal the parties' names.[276] Indeed, sometimes the full name appears even in the appellate docket—just not in the opinion.[277]

This naturally provides much less privacy to the litigants, especially now that many court dockets, and not just opinions, are available online. At the same time, it likely provides some such protection against the casual Googler. And because the full name remains in the record, where it can be found with just a slight effort, the public retains its right of access (plus the other party can still use the name if necessary). As a result, courts treat this sort of partial pseudonymity as being within their discretion, available regardless of whether full pseudonymity might be, e.g.:

> The district court did not abuse its discretion in denying D.E.'s motion for a protective order, because he did not articulate concerns that outweigh the presumption of openness in judicial proceedings. The prosecution of D.E.'s claims did not require him to disclose information "of the utmost intimacy" or compel him to disclose any intent to violate the law, nor was he a child when he filed this lawsuit. As for potential negative scrutiny from future employers, D.E., as the district court explained,

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4031099 (M.D. Fla. Sept. 12, 2011) (likewise, in lawsuit claiming unlawful disclosure of a juvenile arrest report).

[271] *Cf.* Doe v. FBI, 218 F.R.D. 256, 260 (D. Colo. 2003).

[272] *See* Doe v. O'Neill, No. C.A. W.C. 86-354, 1987 WL 859818 (R.I. Super. Jan. 6, 1987) (privacy, information about curable STDs); *In re* Ashley Madison Customer Data Security Breach Litig., MDL No. 2669, 2016 WL 1366616, at *4 (E.D. Mo. Apr. 6, 2016) (data breach lawsuit against dating service for adulterers); Doe v. Trustees of Dartmouth Coll., No. 18-CV-040-LM, 2018 WL 2048385, *5–*6 (D.N.H. May 2, 2018) (quasi-libel, challenge to Title IX finding of sexual assault); Doe v. Alger, 317 F.R.D. 37, 42 (W.D. Va. 2016) (likewise).

[273] Raiser v. Church of Jesus Christ of Latter-Day Saints, 182 F. App'x 810, 812 n.2 (10th Cir. 2016) ("Raiser argues that this case is distinguishable from his prior proceedings because if we denied his motion to proceed under a pseudonym he would incur the very injury against which he is litigating. We reject this argument. Preventing disclosure of his identity is not the basis of Raiser's lawsuit. Instead, he seeks monetary compensation for a disclosure that has already occurred."); Doe v. Liberty Univ., No. 6:19-CV-00007, 2019 WL 2518148, *3 (W.D. Va. June 18, 2019) ("The 'injury litigated against' is 'the damage to [Plaintiff's] reputation.' This is not the type of retaliatory harm an anonymous lawsuit is meant to prevent." (citation omitted)). In this respect, Judge Sneed's dissent in *United States v. Doe*, 655 F.2d 920, 930 n.1 (9th Cir. 1981), prevailed: "In [most of the cases cited in support of pseudonymity,] the plaintiffs were required to reveal information of an intimate and personal nature in order to vindicate constitutional or statutory rights grounded in the protection of privacy. There is some logic in cooperating to provide anonymity when publicity would inflict the very injury the litigant seeks to avoid by resort to the courts. The practice of providing pseudonyms should be extended to other situations only rarely."

[274] *See infra* note 283.

[275] *See, e.g.*, J.S.B. v. S.R.V., No. 2021-SC-0008-DGE, 2021 WL 4487638, *1 n.1 (Ky. Sept. 30, 2021); United States v. Indian Boy X, 565 F.2d 585, 588 (9th Cir. 1977); United States v. Doe, 655 F.2d 920, 922 n. 1 (9th Cir. 1980); Smith v. Edwards, 175 F.3d 99, 99 n.1 (2d Cir. 1999).

[276] *See, e.g.*, J.A.B. v. J.E.D.B., No. 2020-519, 2021 WL 5002382 (Md. Ct. Spec. App. Apr. 27, 2021), *aff'g* No. 12-C-17-001373 (Md. Cir. Ct. Harford County May 14, 2020).

[277] D.E. v. John Doe I, 834 F.3d 723 (6th Cir. 2016).

> "forfeited his ability to keep secret his actions at the international border . . . when he sued United States Customs and Border Patrol agents" [for their allegedly unconstitutional search that revealed "marijuana and drug paraphernalia"] . . . . For these same reasons, we decline to reconsider our prior order denying D.E.'s motion filed in this court for a protective order. However, in the exercise of our discretion, in this published opinion we refer to D.E. by his initials.[278]

To be sure, it's possible that technological changes will eliminating even this mildly protective effect: Say, for instance, that some site that hosts court opinions and other documents (such as CourtListener, PacerMonitor, or even Google Scholar) takes steps to find the places where the party's full name is present and to link the pseudonymized opinion with the full name. But for now, many a litigant would find pseudonymization in the opinion valuable, even if the name is available in some file (including some online file accessible by the public).

In some of these cases, the court has also pseudonymized the entire docket sheet (whether appellate or trial-level), but not the entries in particular items. This too might make the party's name less visible, while at the same time not requiring the heightened showing needed for total concealment of the party's name (since really interested researchers can find it just by checking a docket).

Nonetheless, even with such intermediate measures, one may wonder: Should there be some clearer guidelines than just the judges' discretion to decide who gets this often-valuable privacy protection and who doesn't?

IV. STATUTORY RULES

The analysis above suggests that some of these matters should be resolved through clear statutory rules, which reflect sharp judgment calls about when pseudonymity is proper. And indeed the legal system often operates this way, e.g., with:

- Juvenile court rules, which call for routine pseudonymization.
- Rule 5.2(a)(3), which requires all minors (parties or otherwise) to be identified by their initials.[279]
- Rule in some states mandating pseudonymity for sex crime victims[280] or revenge porn victims.[281]
- Laws in some states mandating pseudonymity for family law cases.[282]
- Some federal courts' practice of routinely pseudonymizing social security benefits appeals.[283]

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[278] *Id.* at 728–29.

[279] *See also, e.g.*, KAN. S. CT. R. 7.043(b)(1)–(2) (requiring that any minor or "a person whose identity could reveal the name of a minor" be pseudonymized in appellate filings and decisions).

[280] *See, e.g.*, KAN. S. CT. R. 7.043(b)(3).

[281] CAL. CIV. CODE § 1708.85; *see also* CAL. CODE CIV. PROC. § *id.* § 3427.3 (allowing pseudonymity for clients of health care facilities, such as abortion clinics, that have been targeted for interference with access).

[282] *See, e.g.*, DEL. R. S. CT. Rule 7(d).

[283] https://www.uscourts.gov/sites/default/files/18-ap-c-suggestion_cacm_0.pdf. Cite DNJ cases that say, "Petitioner is identified herein only by his first name and the first initial of his surname in order to address certain privacy concerns associated with § 2241 immigration cases." Cite any district court local rules, e.g., N.D. Ill., Internal Op. Proc. 22, https://www.ilnd.uscourts.gov/_assets/_documents/_rules/in-tops03.pdf, "In cases brought for judicial review under the Social Security Act, the Memorandum Opinion and Order shall not identify the non-government party by using his or her full name. The nongovernment party shall be named and referred to by using his or her full first name and the first initial of the last name." https://www.courtlistener.com/docket/5482238/coaty-v-commissioner-social-security-administration/ ORDER: The Court construes plaintiff's Motion for Redaction as a request pursuant to Fed. R. Civ. P. 60(b)(6). Accordingly, Plaintiff's Motion for Redaction 33 is GRANTED. In 2018, the District of Oregon adopted the recommendation of the United States Judicial Conference Committee on Court Administration and Case Management to abbreviate the last names of plaintiffs and their near family members in Social Security Orders and Opinions. Though plaintiff's case predated that policy change, the Court finds that reasons behind the policy support

- Many administrative agencies' practice of pseudonymizing their decisions.[284]

At the same time, a California pseudonymity rule offers a cautionary tale. The California "Safe at Home Confidential Address Program" sets up special forwarding addresses for people who swear that they are "attempting to escape from actual or threatened domestic violence, sexual assault, stalking, human trafficking, or elder or dependent adult abuse," and need to "establish new names or addresses in order to prevent their assailants or probable assailants from finding them" (and possibly provide some corroborating evidence).[285] And a 2019 statute adds to that:

> A protected person who is a party in a civil proceeding may proceed using a pseudonym, either John Doe, Jane Doe, or Doe, for the true name of the protected person and may exclude or redact from all pleadings and documents filed in the action other identifying characteristics of the protected person.[286]

Such litigants must confidentially inform the other parties and the court of their true identity, but the identity may not appear in the court records. No showing is required of any specific reason for pseudonymity, beyond the person's participation in the Safe at Home program.

Enter Darren Chaker, a self-described "avid blogger on record sealing expungement, and First Amendment issues," and also a frequent filer who has been placed on the California vexatious litigant list.[287] Chaker (who has also gone by Darren Del Nero, Darren D'Nero, and David Hunter) has been moving to retroactively reopen the many cases in which he has been involved—ones that appear to have nothing to do with the reported threats that entitled him to Safe at Home treatment—and then to get them sealed or pseudonymized.

And some courts have been willing to go along with his request. Chaker apparently got the San Diego Superior Court to pseudonymize a lawsuit against him by Scott McMillan—as it happens, a lawsuit that indirectly stems in part from an attempt to get McMillan to remove a case mentioning the litigant from a caselaw repository that McMillan operates. He also got the appeal in that case at least temporarily pseudonymized in the docket, "to be considered further by the merits panel."[288] And he persuaded some federal district courts, though they are not bound by § 367.3,[289] to either

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plaintiff's current motion. The Clerk shall enter an Amended Opinion and Judgment in this case.

[284] E.g., EEOC decisions in cases brought against federal employers.

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[286] CAL. CODE CIV. PROC. § 367.3.

[287] See Darren Chaker, https://perma.cc/RF79-64RB.

[288] https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=41&doc_id=2332520&doc_no=D078147&request_token=NiIwLSEmTkw2W1BVSCM9XE1IlFg6UkxbJCBeQz5SQCAgCg%3D%3D

[289] Del Nero v. NCO Financial Sys., Inc., No. 2:06-cv-04823-JDW, at 4 (E.D. Pa. June 10, 2021); Del Nero v. NCO Financial Sys., Inc., No. 2:06-cv-04823-JDW, at 1–2 (E.D. Pa. Aug. 12, 2021); Chaker-Delnero v. Nevada Feder, No. 2:06-cv-00008-JAD-EJY, at 4 (D. Nev. July 28, 2021). *But see* Doe v. Collectco, Inc., No. 2:06-cv-00244-JCM-DJA, at 2 (D. Nev. July 27, 2021) (seeming open to the possibility that § 367.3 might apply to cases involving California substantive law, but not reaching the issue because the case involved only federal law and Nevada law).

retroactively pseudonymize his name in their dockets[290] or to seal them altogether.[291]

Likewise, in a case involving an entirely different litigant, there was at least a tentative decision allowing pseudonymity on the strength of § 367.3, though the court also cited another traditional basis for pseudonymity—plaintiff was alleged to be a sexual assault victim.[292]

On the other hand, in another case involving another litigant, there was at least a tentative decision concluding that § 367.3 wouldn't ordinarily call for retroactive pseudonymization; the court took the view that such requests remain subject to the standard California sealing rules, Cal. R. Ct. 2.550 & 2.551—though "Defendant attests to being a victim of sexual crimes by the Plaintiff; that Plaintiff has threatened to track and kill Defendant; and that the public would have access to sensitive details of actions committed against her as a matter of public record,"

> [T]he primary purpose of the Safe at Home program is to provide a means for the victim to keep a new residence address confidential; and the Defendant has not brought facts to the court's attention that a new residential address used by Defendant has been disclosed in the filings. These facts undermine Defendant's argument that Defendant's interest in safety and confidentiality under the Safe at Home program would be prejudiced if the record is not sealed or redacted, as the information disclosing the Defendant's identity have been public for at least this time, and there is no showing that a new residential address has been disclosed.[293]

The California Court of Appeal in April likewise rejected (without detailed explanation) a § 367.3 motion to pseudonymize the litigation in Chaker v. Superior Court. And the federal district courts in some of Chaker's other cases have rejected pseudonymization:

> Plaintiff fails to explain how redacting information contained within public filings in this case, available throughout this dispute that began in 2006, will protect him from some current or future harm or harassment. Plaintiff has not introduced any additional evidence that he is currently a victim of harassment.[294]

The nature of this particular litigant's case-specific justification for pseudonymization—which federal courts

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[290] *See, e.g.*, *Doe v. Collectco, Inc.*, at 4-5 ("Plaintiff has provided evidence of his participation in the Safe at Home Program, of a threat, and of his connection with a criminal event. And through his motions, Plaintiff seeks to follow the recommendations of the Safe at Home Program, asking—in the alternative to sealing—for the Court to replace his name with 'John Doe' and redact his addresses. The Court finds the Southern District of California's approach to Plaintiffs' similar requests persuasive …."); Doe v. Winn & Sims, No. 06-cv-00599-H-AJB (S.D. Cal. June 28, 2021) ("[S]ufficient cause supports Plaintiff's supplemental request to redact his name from the docket and allow him to proceed under the pseudonym 'John Doe.' The Ninth Circuit allows parties to proceed anonymously when the party's 'need for anonymity' to avoid physical injury outweighs the 'prejudice to the opposing party and the public's interest in knowing the party's identity.' That is the case here. Additionally, redacting Plaintiff's name from the record would not prejudice any party because Plaintiff voluntarily dismissed the action over fifteen years ago. Further, the public's interest in this case primarily centers around the underlying nature of the action, a class action against a debt collection service, not Plaintiff's identity.").

[291] CitiBank NA v. Hunter, No. 2:12-cv-02452 (D. Ariz. motion to seal filed June 1, 2021).

[292] https://trellis.law/ruling/MSC18-00594/B-M-M-VS-CODY-BACA/2020062558ec6f.

[293] Danon v. Johnson, Los Angeles County, https://rulings.law/ruling/18STCV09829/6/24/2021?searchtext=

[294] *See* Chaker-Delnero v. Nevada Federal Credit Union (D. Nev.); Del Nero v. NCO Financial Systems, Inc., decided in June by Judge Joshua Wolson (E.D. Pa.) ("[S]ealing Mr. Del Nero's identity will not shield him from further harassment, and leaving his name on the public docket will not subject him to additional harassment. The people who have targeted Mr. Del Nero know who he is, and their harassment has nothing to do with his involvement in this case. Thus, considering the unique facts of this case, the Court will not permit Mr. Del Nero to use a pseudonym in this matter."); Del Nero v. Allstate Ins. Co., decided in June by Judge Philip Gutierrez (C.D. Cal.) ("The Court has reviewed the record and Plaintiff's address does not appear anywhere. Although the twenty-one-year-old complaint mentions the name of the city that Plaintiff lived in at the time, Plaintiff has not shown that the Safe At Home program protects the name of the city he lived in over twenty years ago."); Del Nero v. Riddle & Assocs., No. CV03-06511 GHK(RZx) (C.D. Cal. Oct. 21, 2021) (also rejecting attempt to file a sealed motion to seal); Chaker v Arrow Fin. Servs., LLC, No. CV04-07050 FMC(FMOx) (C.D. Cal. Oct. 20, 2021) (likewise); Chaker v. First City Bank Credit Union, No. 2:04-cv-02727-GPS-RZ (C.D. Cal. Oct. 20, 2021) (likewise).

require, given that they aren't bound by the automatic pseudonymization required by the California statute—is hard to piece together, since some of his motions to seal and many of the exhibits accompanying them are themselves sealed. The best I could see from the documents that haven't been sealed is that "Plaintiff states that he enrolled in the program because he escaped two near death experiences and received several threats."[295] And these cases help show, I think, the value of having people litigate under their own name, for some of the reasons given in Part I.C.2 (for instance, so reporters and others can determine whether they are vexatious litigants, whether the case is part of a pattern of litigation, whether they are likely untrustworthy, or whether they had actually been successful in past cases, as Chaker had been[296]).

And open court records can help courts and opposing parties as well. For instance, in *Chaker v. Superior Court*, the Court of Appeal apparently searched for past filings by the petitioner to verify certain statements in the petition; that would have been at least much harder if those past filings had been pseudonymized.[297] Likewise, opposing parties may search for past filings by a party and see whether any are related to the current case, and whether such filings make any admissions or arguments that may be relevant to this case.[298]

I'm therefore inclined to say that the Safe at Home program's categorical pseudonymization of all cases in which the protected party appears (perhaps including past cases) is too broad. And it helps show the dangers of some of these categorical pseudonymization rules more broadly.

CONCLUSION

[295] https://storage.courtlistener.com/recap/gov.uscourts.cacd.9406/gov.uscourts.cacd.9406.22.0_1.pdf.

[296] [Cite.]

[297] It's possible for a court to keep its files indexed not just by the party's public identified name, but also by the otherwise sealed actual name, to facilitate such searches by judicial system insiders; but I'm not sure that courts generally do that, and it would be especially difficult if the search requires reviewing files from multiple courts.

[298] *See supra* Part I.F.7.