

**PRIVACY PLEASE . . .**  
**PROTECTING THE PSEUDONYMOUS PLAINTIFF**

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**I. INTRODUCTION**

Privacy interests can be characterized as one's right to be left alone.<sup>1</sup> Individuals maintain certain privacy interests in their everyday lives, including the safeguard against arbitrary invasions of privacy by the government under the Fourth Amendment;<sup>2</sup> the protection of matters of family life concerning familial relationships, procreation, and marriage;<sup>3</sup> and the concealment of health information.<sup>4</sup> In the digital age, data privacy concerns highlight the need to protect consumer data.<sup>5</sup> Privacy interests also extend to the litigation process because courts have the ability to grant anonymity to parties.<sup>6</sup>

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<sup>1</sup> *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J. dissenting); see also *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (noting that privacy is protected from government intrusion); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (recognizing the right of the individual to be free from unwarranted government intrusion).

<sup>2</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018).

<sup>3</sup> *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015).

<sup>4</sup> Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1320d-6.

<sup>5</sup> Commission Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 2.

<sup>6</sup> See FED. R. CIV. P. 10(a) (stating that the title of a complaint must name all the parties but may refer to other parties generally after naming the first party).

Survivors of sexual assault and abuse need, and should have a right to, certain heightened privacy rights to file civil suits under a pseudonym and remain anonymous throughout the litigation process. Certain societal stigmas are inherent to these proceedings, and survivors may have intense feelings of shame and humiliation that contribute to their desire to remain anonymous.<sup>7</sup> Anonymity is an important component of the decision-making process for victims to bring suits due to the traumatic experience they endured and the intimate details that ultimately are revealed during the litigation process.<sup>8</sup> In sexual assault or abuse cases, federal courts have applied a balancing test in various ways to consider whether a plaintiff's interest in anonymity outweighs the larger societal interest in public access to judicial proceedings.<sup>9</sup>

This Comment will discuss how public access to judicial proceedings, as a product of increased technological advancement in the electronic storing of court records, should be implemented in the various similar circuit balancing tests. Current circuit courts' balancing tests consider factors that weigh in favor of anonymity such as the extent to which the litigant's identity has been kept confidential, the magnitude of public interest in maintaining the litigant's confidentiality, and the motives of the litigant to sue pseudonymously, among others.<sup>10</sup> Factors in favor of anonymity are weighed against additional factors favoring openness in proceedings such as the public's interest in access to the litigant's identity, whether there is a strong interest in the litigant's identity because of the litigation's subject matter or the litigant is a public figure, among others.<sup>11</sup>

The weight traditionally given to the preference for judicial proceedings conducted in public must now be recalibrated to account for the reality that personal data is very effectively and extensively disseminated on the internet. Greater deference should be given to the plaintiff's desire to remain anonymous and

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<sup>7</sup> Greg Gutzler, Justin Hawal, & Lisa Haba, *Preserving Client Anonymity in Sex Abuse and Sex Trafficking Cases*, N.Y. L. J. (July 21, 2020), <https://www.law.com/newyorklawjournal/2020/07/21/preserving-client-anonymity-in-sex-abuse-and-sex-trafficking-cases/>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *infra* Part II; see also *Doe v. Megless*, 654 F.3d 404, 409 (3d Cir. 2011).

<sup>11</sup> See *infra* Part II; see also *Megless*, 654 F.3d at 409.

their fear of public exposure. As the Eleventh Circuit explained in *Roe v. Aware Woman Center for Choice*,<sup>12</sup> “[t]he ultimate test for permitting a plaintiff to proceed anonymously is whether the plaintiff has a *substantial privacy right* which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings.”<sup>13</sup> Given the nature of technological advancements and the availability of online court proceeding documents, there is a substantial privacy right to allow plaintiffs to choose to proceed anonymously to protect their reputation and identity.

Part II of this Comment briefly describes the established safeguards for defendants that prevent total anonymity in judicial proceedings involving sexual assault and abuse, and the current balancing tests utilized by courts to determine whether a plaintiff may proceed under a pseudonym in those cases. Part II then introduces the larger privacy concerns in modern judicial proceedings for plaintiffs and defendants. In light of technological advancements in the dissemination of information, Part III proposes two alterations to the current circuit court balancing tests that will help better assess the respective weights of the privacy interests of sexual assault and abuse survivors and the traditional concern with openness in judicial proceedings.

## II. JUDICIAL PROCEEDINGS

### A. *Modern Privacy Law*

Today, both common law and statutory privacy law produce little or no recourse against the dissemination of private information.<sup>14</sup> Although privacy is not explicitly mentioned in the Constitution,<sup>15</sup> the Supreme Court determined that it is an unenumerated right under the Fourteenth Amendment’s substantive due process clause.<sup>16</sup> The seminal case that outlined

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<sup>12</sup> *Roe v. Aware Woman Ctr. for Choice*, 253 F.3d 678 (11th Cir. 2001).

<sup>13</sup> *Id.* at 685 (emphasis added) (quoting *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992)).

<sup>14</sup> Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. KAN. L. REV. 195, 196–97 (2004).

<sup>15</sup> *Id.* at 207.

<sup>16</sup> *See id.* (“the idea that a right to privacy exists in the Constitution has been developed in a series of cases over the past fifty years that turn on the concept of

the right to privacy is *Griswold v. Connecticut*,<sup>17</sup> in which the Supreme Court held that a challenged state law providing punishment for the use of contraceptives was unconstitutional.<sup>18</sup> The Court found that the right to privacy was implicated since the law affected individual, private choices in the course of a private relationship, namely marriage.<sup>19</sup>

Several cases followed *Griswold* and continued to shape and solidify the constitutional analysis of privacy.<sup>20</sup> Specifically, the Supreme Court in *Whalen v. Roe*<sup>21</sup> stated that the previously explored notion of privacy could be broken down into two different interests, namely “the individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions.”<sup>22</sup> But, beyond the decision in *Whalen*, the Court has done little to further define and develop the right to informational privacy.<sup>23</sup> Privacy as an area of the law is largely undefined. Much of the current fear surrounding privacy relates to the access of personal information on the internet by the government and other entities such as large social media companies.<sup>24</sup> Although there are privacy rights that originate from substantive due process in the Constitution, our laws largely lack provisions and statutory authorization for privacy protections.<sup>25</sup>

The right to privacy under the federal Constitution also encompasses an individual’s interest in the nondisclosure of personal information that relates to crimes of sexual assault or abuse.<sup>26</sup> In addition to the right of nondisclosure of personal information, there is a right to the “non-disclosure of identifying

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‘substantive due process’”).

<sup>17</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>18</sup> *Id.* at 485–86.

<sup>19</sup> *Id.*

<sup>20</sup> Ressler, *supra* note 14, at 208.

<sup>21</sup> *Whalen v. Roe*, 429 U.S. 589 (1977).

<sup>22</sup> *Id.* at 599–00.

<sup>23</sup> Ressler, *supra* note 14, at 209.

<sup>24</sup> Ressler, *supra* note 14, at 204.

<sup>25</sup> Ressler, *supra* note 14, at 196–97.

<sup>26</sup> Meg Garvin, Alison Wilkinson, & Sarah LeClair, *Protecting Victims’ Privacy Rights: The Use of Pseudonyms in Civil Law Suits*, NAT’L CRIME VICTIM L. INST. 1, 2 (2011), <https://evawintl.org/wp-content/uploads/NCVLI-protecting-victims-privacy-rights-the-use-of.pdf>.

information when disclosure of private facts is [ultimately] necessary, such as in the prosecution of a civil suit.”<sup>27</sup> Survivors of crimes of sexual assault or abuse must consider these privacy interests when they elect to bring a civil suit.<sup>28</sup>

There is a growing conflict between the loss of personal privacy and traditional court procedures that favor judicial openness and are inherently hesitant to accommodate plaintiff-requested use of pseudonyms.<sup>29</sup> The Supreme Court has implied the presumption of public access to court proceedings for civil actions.<sup>30</sup> Transparency is essential to ensure that our judicial system is functioning properly.<sup>31</sup> In fact, the public’s interest in transparent court proceedings dates back to the time of early English jurists Blackstone and Hale, who both argued that openness was integral to the proper functioning of a trial.<sup>32</sup> Openness helps to ensure that our system of justice functions fairly and is publicly accountable.<sup>33</sup> Furthermore, open access to the judicial system aids the public to measure and evaluate both governmental and private power.<sup>34</sup> Thus, open court proceedings allow for public oversight of, as well as public access to, judicial proceedings.

The Supreme Court has recognized the historical significance and long-term practice “of trials being presumptively open.”<sup>35</sup> Modern trends, however, diverge from this practice, due in part to the proliferation of electronic court records, which can easily be collected from virtually any location.<sup>36</sup> The introduction of electronic filing and the systemic use of the internet by the federal

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* at 2–3.

<sup>30</sup> *Id.* at 2.

<sup>31</sup> David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 839 (2017).

<sup>32</sup> 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, 443 (2013).

<sup>33</sup> Ardia, *supra* note 31, 839–40.

<sup>34</sup> Ardia, *supra* note 31, 839–40.

<sup>35</sup> Edwards, *supra* note 32, 443 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980)).

<sup>36</sup> *See* Ressler, *supra* note 14, at 198–99.

courts has dramatically altered modern litigation.<sup>37</sup> Complaints, answers, motions, and briefs are all filed and stored electronically nowadays, which means anyone with an internet connection can access them.<sup>38</sup> The “expansion of electronic case management was intended to ‘improve access to court dockets and case files for judges, court employees, litigants, and the public by allowing remote, instantaneous, and simultaneous around-the-clock electronic access to records, resulting in fast and reliable service.’”<sup>39</sup> Courts have been reluctant, however, to permit plaintiffs to opt to use pseudonyms pursuant to the presumption of judicial openness, which limits access to judicial relief and forces plaintiffs to choose between either abandoning their claims or protecting their privacy.<sup>40</sup>

Notions of privacy in the courtroom for survivors of sexual assault and abuse are just one arena of worry. Social media has become a place of dissemination of stories of sexual assault and victimization of survivors.<sup>41</sup> Survivors often find themselves the targets of character assassination while being overlooked by the criminal justice system.<sup>42</sup> The documentary entitled *Audrie and Daisy* portrays the stories of sexual assault survivors Audrie Pott and Daisy Coleman, two young women who suffered horrifying trauma from the subsequent broadcast of images and videos of their assaults across the internet.<sup>43</sup> In both of their cases, “social media helped amplify victim-shaming and entrench the victim in a state of public suffering.”<sup>44</sup> Survivors of sexual assault and abuse are often met with relentless cyberbullying while their voices are

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<sup>37</sup> Ressler, *supra* note 14, at 202.

<sup>38</sup> Ressler, *supra* note 14, at 199.

<sup>39</sup> Ressler, *supra* note 14, at 202 (quoting LEONADIS R. MEACHAM, DIR. OF THE ADMIN. OFF. OF THE U.S. COURTS, U.S. COURTS—THE FEDERAL JUDICIARY, REPORT TO CONGRESS ON THE OPTIMAL UTILIZATION OF JUDICIAL RESOURCES 10 (Feb. 2001), <http://www.uscourts.gov/optimal2001.pdf>).

<sup>40</sup> Ressler, *supra* note 14, at 205.

<sup>41</sup> K. Sujata, *Sexual Assault in the Age of Social Media*, HUFFPOST (Sept. 30, 2017) [https://www.huffpost.com/entry/sexual-assault-in-the-age\\_b\\_12249292](https://www.huffpost.com/entry/sexual-assault-in-the-age_b_12249292) (explaining how cyberbullying was involved in Audrie Pott’s suicide after she was sexually assaulted).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*; see also John Bacon, *Sex assault, Cyberbullying Preceded Calif. Girl’s Suicide*, USA TODAY (Jan. 16, 2014) <https://www.usatoday.com/story/news/nation/2014/01/16/girl-assaulted-suicide/4504359/>.

refuted and justice is disregarded.<sup>45</sup> Thus, the widespread dissemination of information online via social media has made it more difficult to protect survivors of sexual assault and abuse and highlights the importance of protecting privacy in court proceedings.

*B. Federal Rule of Civil Procedure 10(a) and The First Amendment*

The Federal Rules of Civil Procedure were enacted to govern civil proceedings in United States' federal courts and generally require the naming of all parties in every pleading.<sup>46</sup> Federal Rule of Civil Procedure 10(a) states in relevant part that “[e]very pleading must have a caption with the court’s name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties.”<sup>47</sup> In substance, Rule 10(a) supports the principle that judicial proceedings should be conducted in public.<sup>48</sup> This form of judicial transparency reflects not only that the public has a right to know who uses their courts, but also that defendants have a right to know who their accusers are.<sup>49</sup> In exceptional circumstances, however, courts have allowed a party to proceed in their suit anonymously in cases involving abortion,<sup>50</sup> birth control, mental illness, homosexuality, and others.<sup>51</sup> The plaintiff must prove more than mere embarrassment or economic harm, and “must show both (1) a fear of severe harm, and (2) that the fear of severe harm is reasonable.”<sup>52</sup>

Under the First Amendment of the United States Constitution, commentators have assumed that there is a right of public access to judicial proceedings.<sup>53</sup> The true aim of the First

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<sup>45</sup> Sujata, *supra* note 41.

<sup>46</sup> FED. R. CIV. P. 1.

<sup>47</sup> FED. R. CIV. P. 10(a).

<sup>48</sup> Doe v. Megless, 654 F.3d 404, 408 (3d Cir. 2011).

<sup>49</sup> *Id.*

<sup>50</sup> *See* Roe v. Wade, 410 U.S. 113, 120 n.4 (1973).

<sup>51</sup> *Megless*, 654 F.3d at 408.

<sup>52</sup> *Id.*

<sup>53</sup> Ardia, *supra* note 31, at 840; *see also* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7–8 (1986) (providing the Supreme Court’s only statement on whether there is a constitutional right of access to civil proceedings or to court records, which

Amendment right is the ability of the public to know issues on trial and “the court’s performance in resolving them.”<sup>54</sup> The United States Supreme Court has not explicitly held that there is a constitutional right of public access to court proceedings, but the Court has indicated that such a right exists.<sup>55</sup> In fact, the Supreme Court has only explicitly held that the First Amendment right of public access applies to criminal trials and criminal trial-like proceedings.<sup>56</sup> The Court has never addressed “whether there is a constitutional right of access to civil proceedings or to court records.”<sup>57</sup> A presumption of openness is not absolute, however, because in certain instances parties may seek to proceed anonymously.<sup>58</sup>

### *C. Open Proceedings*

The basis for open proceedings has four elements.

First, open proceedings help ensure fairness in proceedings and discourage “perjury, the misconduct of participants, and decisions based on secret bias or partiality.” Second, open proceedings [support] administrative convenience. Third, the public has a legitimate interest in knowing “which disputes involving which parties are before the federal courts that are supported with tax payments and that exist ultimately to serve the American public.” Fourth, courts express concerns with “basic fairness” if plaintiffs are permitted to proceed by pseudonym but defendants are not.<sup>59</sup>

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provided a confusing doctrinal map).

<sup>54</sup> *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981).

<sup>55</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) (“Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.”).

<sup>56</sup> *Ardia*, *supra* note 31, at 851.

<sup>57</sup> *Ardia*, *supra* note 31, at 840.

<sup>58</sup> *Ardia*, *supra* note 31, at 910–12.

<sup>59</sup> *Garvin*, *supra* note 26, at 2 (footnotes omitted).

Parties who proceed with pseudonyms do not violate a right of openness, as 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.”<sup>60</sup> When a party proceeds anonymously, the court proceedings nevertheless remain open and the press retains access to report on all courtroom occurrences and decisions.<sup>61</sup> Therefore, because a pseudonym does not actually close off a court, pseudonymous proceedings should not be presumptively avoided because of the tradition of open courts.<sup>62</sup> Furthermore, any administrative convenience from Federal Rule of Civil Procedure 10(a) has been contested as an overstatement of the Rule’s importance for plaintiffs.<sup>63</sup> Professor Carol M. Rice of the University of Alabama School of Law has argued that Rule 10(a)’s pleading requirements are not designed to preserve open courts, rather “Rule 10(a) simply seeks to distinguish the more formal caption in the complaint from all others, which for economy need not list every party . . . Rule 10(a) does not necessarily dictate the substance of the name designation.”<sup>64</sup>

When granting anonymity to a plaintiff, courts must also evaluate if the decision would be fair to the defendant.<sup>65</sup> The defendant’s interest is categorized by whether the plaintiff’s anonymity will prejudice the defendant’s case by threatening access to necessary information for the defense, and whether the plaintiff’s anonymity is fair to the defendant, who is required to defend themselves publicly while the plaintiff is not.<sup>66</sup> Prejudice to the defendant will likely depend on whether the plaintiff’s personal credibility plays a role in establishing the weight of the evidence.<sup>67</sup> Issues that are questions of law with undisputed facts will cause little, if any, prejudice to the defendant.<sup>68</sup> Nonetheless, there are instances where the defendant is aware of the plaintiff’s

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<sup>60</sup> *Stegall*, 653 F.2d at 185.

<sup>61</sup> Edwards, *supra* note 32 at 443.

<sup>62</sup> Edwards, *supra* note 32 at 443.

<sup>63</sup> Edwards, *supra* note 32 at 444.

<sup>64</sup> Edwards, *supra* note 32, at 444.

<sup>65</sup> Edwards, *supra* note 32, at 448.

<sup>66</sup> Edwards, *supra* note 32, at 448.

<sup>67</sup> Edwards, *supra* note 32, at 448.

<sup>68</sup> Edwards, *supra* note 32, at 448.

identity, but the public is not aware.<sup>69</sup> In those instances, the defendant's interest in fairness is lessened because they have access to necessary information for their case through the use of depositions, discovery, and other components of the litigation process.<sup>70</sup>

#### D. *Balancing Tests*

Plaintiffs have the opportunity in certain civil proceedings to request suit under a pseudonym. When a litigant can sufficiently establish that they have a reasonable fear of severe harm from litigating without a pseudonym, the district court must balance the plaintiff's interest and fear against the public's interest in an open litigation process.<sup>71</sup> Circuit courts apply slightly different factors in their respective balancing tests; however, each circuit has agreed that its list of factors is not exhaustive.<sup>72</sup> Considering that the list of factors is not comprehensive, trial courts are required to contemplate other factors as well that are implicated by the particular facts of the case.<sup>73</sup>

The Third Circuit has endorsed a balancing test that sets forth six non-exhaustive factors to be weighed in favor of a plaintiff proceeding anonymously:

- (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

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<sup>69</sup> Edwards, *supra* note 32, at 448.

<sup>70</sup> Edwards, *supra* note 32, at 448.

<sup>71</sup> Doe v. Megless, 654 F.3d 404, 408 (3d Cir. 2011) (quoting Doe v. Borough of Morrisville 130 F.R.D. 612, 614 (E.D.Pa. 1990) ("Examples of areas where courts have allowed pseudonyms include cases involving 'abortion, birth control, transsexuality, mental illness, welfare rights of illegitimate children, AIDS, and homosexuality.'")).

<sup>72</sup> *Id.* at 409.

<sup>73</sup> *Id.*

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.<sup>74</sup>

These six factors are to be weighed against three additional factors that disfavor anonymity and instead favor the traditional rule of openness, including: (1) the public's interest in access to the identities of the litigants; (2) whether there is a strong interest in knowing a litigant's identity because of the litigation's subject matter, the status of the litigant as a public figure, or for other related reasons; and (3) whether the opposition to the use of a pseudonym by counsel, the public, or the press is illegitimately motivated.<sup>75</sup>

Other circuits have established their own multi-factor balancing tests to determine if it is appropriate for a plaintiff to move forward with their suit under a pseudonym. The Eleventh Circuit explained that the "ultimate test for permitting a plaintiff to proceed anonymously is whether the plaintiff has a substantial privacy right which outweighs the 'customary and constitutionally-embedded presumption of openness in judicial proceedings.'"<sup>76</sup> The Tenth Circuit "weigh[s] the plaintiff's claimed right to privacy against the countervailing public interest in [open proceedings]."<sup>77</sup> The Fifth Circuit similarly looks to "the balance pitting privacy concerns against the presumption of openness of judicial proceedings."<sup>78</sup> The Ninth Circuit has held that "a party may preserve his or her anonymity in judicial proceedings in special circumstances when the party's need for anonymity outweighs [1] prejudice to the opposing party and [2] the public's interest in knowing the party's identity."<sup>79</sup>

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<sup>74</sup> Doe v. Provident Life and Accident Ins. Co., 176 F.R.D. 464, 467–68 (E.D. Pa. 1997).

<sup>75</sup> *Id.* at 468.

<sup>76</sup> Doe v. Frank, 951 F.2d 320, 323 (11th Cir. 1992) (quoting Doe v. Stegall, 653 F.2d 180, 186 (5th Cir. Unit A Aug. 1981)).

<sup>77</sup> M.M. v. Zavaras, 139 F.3d 798, 803 (10th Cir. 1998).

<sup>78</sup> *Stegall*, 653 F.2d at 186.

<sup>79</sup> Does I Thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1068 (9th Cir.

The Second Circuit has held that “when determining whether a plaintiff may be allowed to maintain an action under a pseudonym, the plaintiff’s interest in anonymity must be balanced against both the public interest in disclosure and any prejudice to the defendant.”<sup>80</sup> The Second Circuit has a more exhaustive test with ten factors:

(1) whether the litigation involves matters that are highly sensitive and of a personal nature, (2) whether identification poses a risk of retaliatory physical or mental harm to the party seeking to proceed anonymously or even more critically, to innocent non-parties, (3) whether identification presents other harms and the likely severity of those harms, including whether the injury litigated against would be incurred as a result of the disclosure of the plaintiff’s identity, (4) whether the plaintiff is particularly vulnerable to the possible harms of disclosure, particularly in light of his age (5) whether the suit is challenging the actions of the government or that of private parties, (6) whether the defendant is prejudiced by allowing the plaintiff to press his claims anonymously, whether the nature of that prejudice (if any) differs at any particular stage of the litigation, and whether any prejudice can be mitigated by the district court, (7) whether the plaintiff’s identity has thus far been kept confidential, (8) whether the public’s interest in the litigation is furthered by requiring the plaintiff to disclose his identity, (9) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigants’ identities, and (10) whether there are any alternative mechanisms for protecting the confidentiality of the plaintiff.<sup>81</sup>

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<sup>80</sup> *Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185, 189 (2d Cir. 2008).

<sup>81</sup> *Id.* at 190 (internal quotations and citations omitted).

An application of the Third Circuit's balancing test is shown in the case *Doe v. Old Forge Borough*.<sup>82</sup> In this case, the plaintiff brought a complaint against her former employer, the Old Forge Police Department, as well as Old Forge Borough, and other individual defendants she worked with for claims of childhood sexual abuse, vicarious liability, assault, battery, negligent infliction of emotional distress, and a violation of the Child Abuse Victims' Rights Act.<sup>83</sup> The defendants argued that the court should have ordered the plaintiff to file an amended complaint setting forth the names of all the parties because the interest of privacy did not justify the suit being brought under a pseudonym.<sup>84</sup> The court found that under the factors from *Doe v. Megless*, which constitute the balancing test utilized by the Third Circuit, the plaintiff could not continue the civil action under a pseudonym.<sup>85</sup>

First, the court noted that the plaintiff had not kept her identity in strict confidence.<sup>86</sup> The plaintiff had argued that most of her friends and colleagues did not know about her past sexual abuse.<sup>87</sup> The court took this information to indicate that *other* friends and family members were therefore already aware of the abuse.<sup>88</sup> Given the plaintiff's allegations, the court felt she would be required to stand behind her claim publicly and therefore had not kept her identity confidential.<sup>89</sup>

The court found that the plaintiff did not provide a compelling argument to support that disclosure of her identity was feared or sought to be avoided.<sup>90</sup> The plaintiff contended that she wished to remain anonymous to avoid harm to her professional reputation, to encourage other victims who were minors to come forward with their claims, and to prevent a negative social stigma.<sup>91</sup>

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<sup>82</sup> *Doe v. Old Forge Borough*, 2015 U.S. Dist. LEXIS 85902 (M.D.PA July 1, 2015).

<sup>83</sup> *Id.* at \* 2-4.

<sup>84</sup> *Id.* at \*40.

<sup>85</sup> *Id.* at \*42.

<sup>86</sup> *Id.* at \*43.

<sup>87</sup> *Id.* at \*42.

<sup>88</sup> *Doe v. Old Forge Borough*, 2015 U.S. Dist. LEXIS 85902, at \*42-43 (M.D.PA July 1, 2015) (emphasis added).

<sup>89</sup> *Id.* at \*43.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

The court found that the plaintiff's reasoning was not enough to support anonymity because these motives did not create a sufficiently pervasive harm.<sup>92</sup>

The plaintiff also failed to sufficiently allege that she had a reasonable fear of severe harm from litigating without a pseudonym.<sup>93</sup> The plaintiff was a legal minor at the time of the assaults, but the court found that because she filed her claim when she was twenty-three years old, she was an adult who was better equipped to handle the reactions of those around her and any possible publicity.<sup>94</sup> Her age was therefore a fact that reduced the chance of her suffering severe emotional harm.<sup>95</sup>

Furthermore, the court found strong interests in publicity and in access to the identity of the litigant which outweighed the interest in maintaining the plaintiff's anonymity.<sup>96</sup> The court stated that because the plaintiff decided to bring a civil suit for monetary damages, she had created an issue of public entity liability, and therefore made her case an issue of substantial public interest.<sup>97</sup> The court found that because the "individual perpetrators of the sexual acts against her have all been convicted of crimes and have served, or continue to serve, prison sentences. Plaintiff's suit now goes beyond looking to punish the individuals."<sup>98</sup>

The court did not support the plaintiff's assertion that the defendants' request for the party name aimed to revictimize her.<sup>99</sup> As a result of the foregoing considerations, the court found that the action did not constitute an "exceptional" case where the plaintiff should be allowed to proceed anonymously.<sup>100</sup> The court noted that the plaintiff did not show she would suffer substantial harm that might sufficiently outweigh the public interest in open

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at \*43-44.

<sup>94</sup> Doe v. Old Forge Borough, 2015 U.S. Dist. LEXIS 85902, at \*44 (M.D.PA July 1, 2015).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at \*45.

<sup>98</sup> *Id.*

<sup>99</sup> Doe v. Old Forge Borough, 2015 U.S. Dist. LEXIS 85902, at \*45 (M.D.PA July 1, 2015).

<sup>100</sup> *Id.* at \*45-46.

proceedings or that the disclosure of her name would cause her irreparable harm.<sup>101</sup>

The application of the Third Circuit factors in *Doe v. Old Forge Borough* highlights the inherent inequalities and issues of the current balancing test. The court first noted that the plaintiff did not keep her identity in strict confidence, because she shared her sexual abuse with close friends and family members.<sup>102</sup> Confiding about a personal story of trauma with a close circle of individuals does not warrant a court's discretion that the individual would have to stand behind her claim publicly and share her identity.

Furthermore, the plaintiff contended that she wished to pursue a pseudonym to avoid harm to her professional reputation, to encourage other victims to come forward, and to prevent a negative social stigma surrounding claims of sexual abuse.<sup>103</sup> The plaintiff's fears and reasoning are characteristic of most victims of sexual assault and abuse who turn to the litigation process for aid.<sup>104</sup> Deciding that the plaintiff would not suffer from sufficiently pervasive harm from disclosure of her identity negates the realities of victim-shaming and character assassination that victims of sexual assault and abuse face on social media in the modern digital age.<sup>105</sup>

The court also erroneously held that the plaintiff's age, a mere twenty-three years old, put her in a position as an adult to better handle the public reaction to her case.<sup>106</sup> Age, and certainly an age as young as twenty-three, does not make an individual immune to the severe emotional harm resulting from her name being publicly connected to a sexual assault case.

The court further punished the plaintiff for bringing a civil action for monetary damages and equated her basic right to pursue a suit with a desire to make her case an issue of substantial public interest.<sup>107</sup> The plaintiff was entitled to bring her suit in the

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<sup>101</sup> *Id.* at \*46.

<sup>102</sup> *Id.* at \*43.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *See* Sujata, *supra* note 41.

<sup>106</sup> *Old Forge Borough*, 2015 U.S. Dist. LEXIS 85902, at \*44.

<sup>107</sup> *Id.*

selected forum, and if the court felt otherwise the claim should have been dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.<sup>108</sup> It is unjust to punish a plaintiff by unwantedly revealing her identity for exercising her right to justice.

### III. PROPOSED BALANCING TEST

The current circuit court balancing tests include many factors that are not exhaustive, and that are subject to district court discretion with respect to the application of factors. Individual survivors of sexual assault and abuse may experience a range of emotional and physical effects based on their experience.<sup>109</sup> The stigma and public shame that can surround plaintiffs who allege this type of action is paramount.<sup>110</sup> There is a divide between the rights of a victim of a sex crime in the criminal context, who has the right to preserve her identity through rape shield laws, and a victim in the civil context who must overcome the presumption of openness to protect her own identity.<sup>111</sup>

In the 1980s, lawmakers recognized that victims of sex crimes “experienced humiliation and embarrassment when they reported” these crimes, and therefore cases were underreported.<sup>112</sup> Rape shield laws were enacted to prevent victims from experiencing the public shame that followed a report of the incident in a criminal proceeding.<sup>113</sup> Under Federal Rule of Evidence 412, certain evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: “(1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim’s sexual predisposition.”<sup>114</sup> These laws must be altered to give victims of

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<sup>108</sup> FED. R. CIV. P. 12(b)(6).

<sup>109</sup> *The Effects of Sexual Assault*, WASH. COAL. OF SEXUAL ASSAULT PROGRAMS, <https://www.wcsap.org/help/about-sexual-assault/effects-sexual-assault> (last visited March 20, 2022).

<sup>110</sup> *Id.*

<sup>111</sup> *Rape Shield Laws: Protecting Sex-Crime Victims*, NOLO (Nov. 8, 2013), <https://www.nolo.com/legal-encyclopedia/rape-shield-laws-protecting-sex-crime-victims.html> [hereinafter *Rape Shield Laws*].

<sup>112</sup> *Rape Shield Laws*, *supra* note 111.

<sup>113</sup> *Rape Shield Laws*, *supra* note 111.

<sup>114</sup> FED. R. EVID. 412(a).

sexual abuse and assault in civil proceedings the presumption of anonymity if they so choose to accept it.

The Third Circuit's balancing test considers both the level of public interest in access to the identities of litigants and that public access is a basic principle of openness in judicial proceedings.<sup>115</sup> This Comment proposes two alterations to the current Third Circuit balancing test that will help to effectively balance the interests of survivors of sexual assault and abuse with the notion of openness toward judicial proceedings, given the reality of technological advancement in the dissemination of information. The factor that reviews the magnitude of public interest in maintaining the confidentiality of the litigant's identity should heavily weigh in favor of protecting the identities of survivors of sexual assault and abuse. Furthermore, the factors that consider public access and openness to judicial proceedings should consider the repercussions of electronic access to court records, specifically to survivors of sexual abuse and the stigma surrounding these proceedings.

#### A. *Public Interest*

The third factor that the Third Circuit considers in support of a plaintiff's anonymity is "the magnitude of the public interest in maintaining the confidentiality of the litigant's identity."<sup>116</sup> Public interest in maintaining the confidentiality of a litigant's identity should be given greater weight in favor of protecting the identities of survivors of sexual assault and abuse. The following Third Circuit cases are examples in which the court's analysis gave sufficient weight to the effect on the plaintiff (a survivor of sexual assault or abuse) of the publication of their name in connection to the action that they were bringing forward.

In *Doe v. Evans*,<sup>117</sup> Mary Doe brought a civil rights claim arising from separate incidents of alleged sexual assault by a state trooper.<sup>118</sup> The plaintiff brought a motion to proceed under a pseudonym and for a protective order that prevented the parties

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<sup>115</sup> *Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011).

<sup>116</sup> *Id.* at 409.

<sup>117</sup> *Doe v. Evans*, 202 F.R.D. 173 (E.D.Pa. 2001).

<sup>118</sup> *Id.* at 175.

from referencing her true name during depositions or otherwise disclosing her identity.<sup>119</sup> The court set the standard that the public's right of access should prevail unless the party that requested anonymity was able to demonstrate that his or her own interest in privacy justified the use of a pseudonym.<sup>120</sup>

The court ultimately found that the factors led to the conclusion that the plaintiff's use of a pseudonym was justified.<sup>121</sup> The court noted that: the "plaintiff's fear of increased embarrassment, humiliation, and emotional distress should her friends and business associates learn of these events [was] well-founded;" the public had "an interest in protecting the identities of sexual assault victims so that other victims" would feel more comfortable coming forward to pursue suit to vindicate their rights; and although the public had an interest in the issues that the complaint raised, protecting the plaintiff's identity would "not impede the public's ability to follow the proceedings."<sup>122</sup>

The court in *Doe v. Evans* noted that the standard should favor the public's right of access *unless* the party that requested anonymity was able to demonstrate their interest in privacy justifies the use of a pseudonym.<sup>123</sup> That standard, however, puts a heavy burden on the plaintiff who is required to justify their desire to use a pseudonym, while dealing with litigation that involves a matter that is likely sensitive and personal. The design of the balancing test leaves the judge with significant discretion to decide if a plaintiff has satisfied their burden.

The rationale behind the court's decision to keep the plaintiff's name anonymous, namely the plaintiff's fear of increased embarrassment and emotional distress should others learn of these events, the protection of victims of sexual assault to encourage other victims to come forward and pursue litigation, and the lack of impediment that anonymity would give the public's ability to follow the proceedings,<sup>124</sup> all constitute representative elements that are characteristic of claims of sexual assault and

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 176.

<sup>122</sup> *Id.*

<sup>123</sup> *Doe v. Evans*, 202 F.R.D. 173, 175 (E.D.Pa. 2001) (emphasis added).

<sup>124</sup> *Id.*

abuse.<sup>125</sup> This line of reasoning supports a stronger consideration of the public interest factor in the balancing test and should be the precursor for plaintiffs who are seeking to sue under a pseudonym, not the justification to get around a barrier to pursue a suit anonymously.

In *Doe v. Trishul Consultancy, LLC*,<sup>126</sup> Jane Doe alleged discrimination, retaliation, assault, and battery against her former employer for repeated sexual assault, harassment, and threats from her supervisor.<sup>127</sup> The plaintiff moved to proceed under a pseudonym upon filing her initial complaint.<sup>128</sup> The court found that the plaintiff should be allowed to proceed under a pseudonym.<sup>129</sup> The plaintiff had shown that her fear of increased embarrassment, humiliation, and emotional distress should her friends and business associates learn of these events was well-founded.<sup>130</sup> Furthermore, the court considered that, under the third factor, “there is a recognized public interest in ensuring that victims of sexual assault” are able to bring their claims forward without “fear of public humiliation.”<sup>131</sup> Courts should accordingly incentivize plaintiffs to litigate their claims “without threat of revictimization.”<sup>132</sup>

The court in *Doe v. Trishul Consultancy, LLC* articulated this notion best when it stated: “[t]here is a recognized public interest in ensuring that victims of sexual assault can vindicate their claims and that the fear of public humiliation does not discourage these plaintiffs.”<sup>133</sup> The public shame, emotional and mental health ramifications, and overall humiliation that many victims experience are incredibly unfair outcomes of what they have endured. The justice system, however, could help to ease plaintiffs’ burdens by allowing them to remain anonymous, if they

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<sup>125</sup> *Id.*

<sup>126</sup> *Doe v. Trishul Consultancy, LLC*, No. 18-16468 (FLW)(ZNQ), 2019 U.S. Dist. LEXIS 169051 (D.N.J. Sept. 30, 2019).

<sup>127</sup> *Id.* at \*4.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at \*17–18.

<sup>130</sup> *Id.* at \*13.

<sup>131</sup> *Doe v. Trishul Consultancy, LLC*, 2019 U.S. Dist. LEXIS 169051, at \*14 (D.N.J. Sept. 30, 2019).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

so choose, in their pursuit of justice. The balancing test defined by the Second Circuit has a factor valuing whether the litigation involves matters that are “highly sensitive and [of a] personal nature.”<sup>134</sup> This concept should be further incorporated into the public interest factor to weigh in favor of protecting the identities of survivors of sexual assault and abuse.

In *Doe v. Rutgers*,<sup>135</sup> Jane Doe alleged that her dissertation adviser sexually assaulted her and coerced her into a sexual relationship.<sup>136</sup> The court found that under the Third Circuit’s balancing test, as articulated in *Doe v. Megless*, the plaintiff successfully overcame the presumption that she should proceed under her real name.<sup>137</sup> The plaintiff demonstrated that there was a “well-founded” concern that she w[ould] experience severe emotional distress” if her name was publicly released due to the severe “psychological distress” she suffered from her assault and resulting mental health issues.<sup>138</sup> The court found that the public interest was served in protecting the plaintiff’s confidentiality to ensure that she could vindicate her claim without fear of public humiliation and the risk of stigmatization for her mental illness.<sup>139</sup> The court noted, however, as to the second factor, the bases upon which the plaintiff feared disclosure of her identity, other district courts have concluded otherwise that while “victims of sexual harassment and assault often face ridicule and further harassment when they file lawsuits, these concerns . . . are not sufficient to outweigh the public’s right to access court proceedings.”<sup>140</sup>

### B. *Public Access*

Courts must balance the traditional concern of ensuring public access to judicial proceedings with factors that favor victim anonymity. In weighing these concerns, courts should consider the significant long-term repercussions and stigma that survivors of sexual assault and abuse may be subjected to as a result of ease

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<sup>134</sup> Sealed Plaintiff v. Sealed Defendant #1, 537 F.3d 185, 190 (2d Cir. 2008).

<sup>135</sup> *Doe v. Rutgers*, 2019 U.S. Dist. LEXIS 75139 (D.N.J. 2019).

<sup>136</sup> *Id.* at \*2.

<sup>137</sup> *Id.* at \*4.

<sup>138</sup> *Id.* at \*8.

<sup>139</sup> *Id.* at \*9–10.

<sup>140</sup> *Id.* at \*8.

of access to electronic court records in the age of the internet. The authors of the Federal Rules of Civil Procedure 10(a) were not faced with the same challenges to notions of judicial openness that we experience today.<sup>141</sup>

Judicial openness fails to account for the additional threats that modern technology presents to victims' interests in anonymity, threats that can cause harms that our privacy laws are unable to remedy.<sup>142</sup> Current court procedures are not suited to respond to the impact of the internet and social media on the privacy interests of sexual assault and abuse victims in litigation.<sup>143</sup> The traditional concern with open proceedings does not account for the fact that “[l]awsuit papers are generally public, but before the advent of the electronic filing, most of them remained stuffed inside folders and filing cabinets at courthouses.”<sup>144</sup>

The court in *Doe v. Evans* articulated the basis for a laudable model that takes these concerns into account: “although the public certainly has an interest in the *issues* [that a sexual assault or abuse complaint raises], protecting [a plaintiff’s] identity will not impede the public’s ability to follow the proceedings[.]”<sup>145</sup> Respect for judicial openness is not lost when the plaintiff utilizes a pseudonym; rather, concerned members of the public can still follow reports of pending litigation in the media, even without specific identifying information for the plaintiff, while the plaintiff is protected from unwanted public scrutiny. Federal Rule of Civil Procedure 10(a) and the First Amendment can be applied in a manner that provides more plaintiff privacy protection. Judicial proceedings are more accessible than ever before because of the electronic court filing system, and this format results in increased vulnerability for plaintiffs.<sup>146</sup>

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<sup>141</sup> Fed. R. Civ. P. 10(a).

<sup>142</sup> Jayne S. Ressler, *#Worstplaintiffever: Popular Public Shaming and Pseudonymous Plaintiffs*, 84 TENN. L. REV. 779, 784 (2017).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 785.

<sup>145</sup> *Doe v. Evans*, 202 F.R.D. 173, 176 (E.D.Pa. 2001) (emphasis in original).

<sup>146</sup> Ressler, *supra* note 142, at 199.

In *Doe v. Court of Common Pleas*,<sup>147</sup> the plaintiff, a parole officer, filed a complaint alleging that a Pennsylvania state judge offered her a parole officer position in his court in exchange for an ongoing sexual relationship.<sup>148</sup> Plaintiff sought “leave to proceed under a pseudonym, arguing that disclosure of her true identity would expose her and her family to unwanted media attention.”<sup>149</sup> The plaintiff asserted that there were “no countervailing societal interests at play in this case which would favor disclosure of her identity.”<sup>150</sup> The court denied the plaintiff’s motion to proceed under a pseudonym.<sup>151</sup>

Applying the factors from the Third Circuit’s balancing test, the court concluded that the plaintiff’s privacy concerns were “reasonable” but “not sufficient to outweigh” the right of public to access judicial proceedings.<sup>152</sup> The court specifically noted that it was “sympathetic to the plaintiff’s concerns, and underst[ood] that, unfortunately, victims of sexual harassment and assault often face ridicule and further harassment when they file lawsuits or otherwise publicly disclose their allegations, especially in the internet age.”<sup>153</sup> But the court also gave deference to the fact that cases dealing with sexual harassment and assault arise on a regular basis.<sup>154</sup> It articulated that “[f]inding that these types of allegations are a valid reason to permit a plaintiff to proceed with a pseudonym would open up the court to requests for anonymity each time a plaintiff makes allegations of sexual harassment or assault.”<sup>155</sup>

The court also gave weight to the fact that the plaintiff, “Jane Doe,” “[was] not the only party exposed to public humiliation” in the case.<sup>156</sup> The plaintiff proceeding anonymously in their pursuit

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<sup>147</sup> *Doe v. Court of Common Pleas*, 2017 U.S. Dist. LEXIS 182273 (W.D.Pa. Nov. 3, 2017).

<sup>148</sup> *Id.* at \*1.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at \*2.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at \*5.

<sup>153</sup> *Doe v. Court of Common Pleas*, 2017 U.S. Dist. LEXIS 182273 at \*5 (W.D.Pa. Nov. 3, 2017).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at \*6.

of justice might cause damage to the defendant's name and reputation.<sup>157</sup> Therefore, the court reasoned that "fairness" generally dictates that plaintiffs who publicly accuse defendants in civil suits should sue under their real names.<sup>158</sup> The court disagreed with the plaintiff that there were "no countervailing public interests favoring transparency."<sup>159</sup> Conversely, it found that the plaintiff's claim presented "issues of paramount public interest relating to the conduct of judicial officers."<sup>160</sup> The importance of these public interests mitigated "in favor of full disclosure and transparency."<sup>161</sup> Taking all factors into consideration, the court found that the plaintiff did not overcome the "strong presumption against allowing parties to use a pseudonym."<sup>162</sup>

The court in *Doe v. Court of Common Pleas* erred when it suggested that the frequency of sexual assault and harassment cases meant that publicity in such cases would not be something from which plaintiffs would need to be protected.<sup>163</sup> Victim-shaming and character assassination do not decrease simply because more individuals are bringing forth cases.<sup>164</sup> They still suffer in their own unique ways, and the desire for anonymity will remain strong for certain individuals.<sup>165</sup>

The introduction of the electronic filing system for court records and the systematic use of the internet by the federal courts has dramatically altered modern litigation and has put those who seek redress through the courts in a difficult position. Those seeking such redress must choose between their individual privacy and their right to seek justice unless courts will offer them the protection of proceedings via a pseudonym. The aim of public access to judicial proceedings is the right of citizens to know who is using their courts. But an established constitutional right to

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<sup>157</sup> *Id.*

<sup>158</sup> *Doe v. Court of Common Pleas*, 2017 U.S. Dist. LEXIS 182273 at \*7 (W.D.Pa. Nov. 3, 2017).

<sup>159</sup> *Id.* at \*8.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *See id.* at \*5.

<sup>164</sup> *See generally* Ressler, *supra* note 142.

<sup>165</sup> *Id.*

privacy is also undermined when parties' names are published on the internet through electronic court documents. Modern courts must adapt and consider the implications of technology for plaintiffs in sexual assault, abuse, and harassment cases who wish to maintain their privacy while also pursuing their claims in court.

### C. *Contemporary Application*

In March 2021, two anonymous plaintiffs filed sexual assault complaints in Harris County District Court against Deshaun Watson, the current starting quarterback for the Houston Texans.<sup>166</sup> Both plaintiffs were massage therapists who worked with Watson after he contacted them through Instagram.<sup>167</sup> Within a month of filing these initial complaints, twenty-two civil suits were filed against Watson by female massage therapists and trainers for assault and harassment claims.<sup>168</sup> The claims alleged that Watson exposed himself to them during treatment and "pressured them into unwanted sexual conduct or inappropriate situations."<sup>169</sup> Watson's legal team requested that the court order the women to reveal their identities, arguing that he did not have "a fair opportunity to address the claims."<sup>170</sup> Furthermore, the motion detailed that Watson was "unable to responsibly defend himself in the face of overwhelming national media coverage."<sup>171</sup>

The women's attorney offered to disclose the names to Watson and his team, but nevertheless, two Houston judges ordered thirteen of the twenty-two women who filed lawsuits against Watson to reveal their identities.<sup>172</sup> The attorney responded in a

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<sup>166</sup> Lauren Berg, *NFL's Deshaun Watson Accused of Sex Assault by 2 Women*, LAW360 (Mar. 17, 2021), <https://plus.lexis.com/api/permalink/3d654ba4-bd43-4b5b-ad43-0975b3b08179/?context=1530671>.

<sup>167</sup> *Id.*

<sup>168</sup> Zachary Zagger, *Texans QB Seeks Court Order to ID Sex Assault Accusers*, LAW360 (Apr. 8, 2021), <https://plus.lexis.com/api/permalink/4ab60118-4158-4ad2-9415-ea7ebe7d159d/?context=1530671>.

<sup>169</sup> *Id.*; see also Plaintiff's Original Petition, *Doe v. Watson*, No. 2021-16301, 2021 WL 1116655 (Tex. Dist. Ct. Mar. 22, 2021); Plaintiff's Original Petition, *Doe v. Watson*, No. 2021-15938, 2021 WL 1116656, Tex. Dist. Ct. Mar. 18, 2021).

<sup>170</sup> Zagger, *supra* note 168.

<sup>171</sup> Zagger, *supra* note 168.

<sup>172</sup> Zachary Zagger, *Most Texans QB Accusers Ordered to ID Themselves*, LAW360 (Apr. 9, 2021), <https://plus.lexis.com/api/permalink/44a48d8f-1a69-4b72-b2a7-f34fb618346c/?context=1530671>.

statement, “[b]e careful what you ask for. . . . Identifying these women at this point adds even more credibility to the allegations being made.”<sup>173</sup> One of the women, however, dropped her case instead of revealing her identity due to privacy concerns.<sup>174</sup> Even with the security of other women with the same claims, privacy concerns still exist for the women who brought these lawsuits. All the identified women “have faced vicious harassment on social media” because of their claims.<sup>175</sup>

#### IV. CONCLUSION

The current framework of a balancing test as well as the factors utilized by the circuit courts to determine whether a plaintiff in a civil suit can pursue their claim under the protection of a pseudonym do not adequately account for increased challenges to a litigant’s privacy interests created by technological advances. Nor does the current framework account for the specific fears and implications for victims of sexual assault and abuse. The circuit courts’ current balancing tests must be re-envisioned to analyze the “public interest in open proceedings” factor in light of the electronic dissemination of court documents and analyze how those public documents may harm victims through their widespread accessibility. Two specific alterations must be made to the factors in the current balancing test used by the Third Circuit. First, courts should give additional weight to the factor of public interest in maintaining the confidentiality of the litigant’s identity in cases involving litigants who are survivors of sexual abuse and assault. Second, the factor favoring public access to, and openness in, judicial proceedings should consider the repercussions of electronic access to court records, specifically toward survivors of sexual abuse given the stigma around these proceedings. These proposed changes will provide survivors of sexual assault and abuse greater protections in the courtroom, and in the modern world, to defend their anonymity.

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<sup>173</sup> *Id.*

<sup>174</sup> Ryan Boysen, *Deshaun Watson Accuser Drops Suit, Citing Privacy*, LAW360 (Apr. 15, 2021), <https://plus.lexis.com/api/permalink/505a002b-d52a-4385-b750-239bd1247329/?context=1530671>.

<sup>175</sup> *Id.*