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Anonymity in Civil Litigation: The Doe Plaintiff

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Anonymity in Civil Litigation: The "Doe" Plaintiff

In recent years, an increasing number of case captions feature "Roe" and "Doe" plaintiffs. Although the most prominent of these cases involve abortion, birth control, or other controversial and sensitive issues, plaintiffs have maintained anonymity in a wide variety of other contexts. All of these cases share a need to forego the usual procedure of disclosing identity in the complaint to protect plaintiffs from a threatened harm or prevent public intrusion into an area of utmost intimacy.

The Supreme Court of the United States, though tacitly approving anonymous plaintiff practice,[1] has yet to decide a case where the right to proceed anonymously is at issue.[2] Lower courts have discussed competing policy considerations, but have not established standards for determining when plaintiffs may use pseudonyms. This note examines Doe plaintiff practice and the policy considerations that courts must balance when plaintiffs seek anonymity. Part I treats the mechanics of Doe plaintiff practice; Part II discusses the policy of full disclosure; Part III examines circumstances warranting anonymity; and Part IV integrates competing policy interests to provide courts with specific analytical guidelines for determining when to permit plaintiffs to use fictitious names.

I. The Mechanics of Doe Plaintiff Practice

Federal Rule of Civil Procedure 10(a) provides that "[i]n the complaint the title of the action shall include the names of all the parties." Although this rule appears to prohibit Doe plaintiff practice, courts have nonetheless permitted pseudonyms in limited circumstances. The proper procedure for obtaining such court approval depends largely on the particular court's construction of Rule 10(a).

Strict judicial construction of Rule 10(a) is illustrated in *Roe v. New York*,[3] where the district court ruled "that if a complaint does not identify any plaintiff in the title or otherwise, then its filing is

1 The Supreme Court implicitly recognized Doe plaintiffs in Poe v. Ullman, 367 U.S. 497 (1961); Roe v. Wade, 410 U.S. 113 (1973); and Doe v. Bolton, 410 U.S. 179 (1973).

2 Doe v. Stegall, 653 F.2d 180, 189 (5th Cir. 1981). (Gee, J., dissenting).

3 49 F.R.D. 279 (S.D.N.Y. 1970).

ineffective to commence an action."[4] Plaintiffs R. Roe, M. Moe, S. Soe, and J. Joe filed a complaint seeking an injunction and money damages after receiving inadequate care in state training schools. When the defendants moved to dismiss, plaintiffs' counsel offered to divulge the plaintiffs' true names under protective provisions. Plaintiffs also submitted affidavits revealing their true names. Despite this limited disclosure of identity, the court dismissed the plaintiffs' complaint on the ground that they had not commenced an action. The court reasoned that "[i]f no action had been commenced by the filing of this complaint, then the subsequent disclosure of the true names of plaintiffs did not change the situation."[5]

Not all decisions share *Roe v. New York's* mechanical construction of Rule 10(a). Liberally interpreting Rule 10(a), many courts recognize the commencement of an action when plaintiffs file anonymously.[6] Emphasizing that fictitious names present "real and specific aggrieved individuals,"[7] these courts allow anonymous plaintiffs who demonstrate a particular need to conceal their identity.

Courts permit Doe plaintiff practice by issuing a protective order. Federal Rule of Civil Procedure 26(c) gives the trial court discretion over litigants' requests for protection from annoyance, embarrassment, or oppression in the discovery process,[8] and this dis-

4 *Id.* at 281.

5 *Id.* at 282.

6 *See* Roe v. Borup, 500 F. Supp. 127 (E.D. Wis. 1980). In *Borup*, the court rejected the "highly mechanical interpretation of the Federal Rules of Civil Procedure . . . [that] would have the court elevate form over substance, without any reason for doing so." *Id.* at 129. Further rejection of the Roe v. New York formalistic interpretation was contained in Doe v. Deschamps, 64 F.R.D. 652, 653 (D. Mont. 1974), which noted that since Roe v. New York, "a host of cases have been prosecuted under fictitious names. Sometimes the fact of the fictitious name is noted and other times it is not, but it is clear that a practice has developed permitting individuals to sue under fictitious names where the issues involved are matters of a sensitive and highly personal nature."

7 Roe v. Ingraham, 364 F. Supp. 536, 541 n.7 (S.D.N.Y. 1973). The requirement that the pseudonyms represent real and specific aggrieved individuals reflects concerns of justiciability. To have standing, the plaintiff "must allege some threatened or actual injury resulting from the putatively illegal action." Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). The court also should acquire a sufficient basis to continually ensure that the case has not become moot.

8 Federal Rule of Civil Procedure 26(c) provides:

> **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .

cretion includes the authority to protect plaintiff anonymity.[9] After filing under a pseudonym, a plaintiff may request a protective order to maintain anonymity throughout the litigation. Often courts grant limited permission to initiate the suit anonymously, and then consider the merits of the anonymity claim presented in submitted memoranda before granting a more permanent protective order.[10]

Although more liberal courts have recognized plaintiffs who file anonymously, the plaintiff who employs a pseudonym gambles on how the court will interpret Rule 10(a), and risks dismissal without even the opportunity to demonstrate why he must conceal his identity. *Roe v. New York* suggests three alternatives that allow plaintiffs desiring anonymity to avoid the risk of dismissal:

(1) filing a complaint under the plaintiff's true name, and then requesting a protective order or leave to amend the complaint to shield the plaintiff's identity;

(2) using pseudonyms in the complaint but setting forth the plaintiff's true name in an attached letter; or

(3) using a fictitious name in the complaint but verifying the complaint by signing the plaintiff's true name.[11] These alternatives avoid a purely procedural bar to proceeding anonymously, and allow the court to consider whether the circumstances warrant the use of fictitious names.

Beyond the procedural hurdles to protecting identity, plaintiffs face a difficult burden of substantively justifying their anonymity. Courts grant permission to proceed anonymously only in rare instances, and Rule 10(a) continues to dictate a general practice that plaintiffs sue by their true names.

II. Policy of Full Disclosure

Anonymous plaintiff practice goes contrary to the basic princi-

9 Although the federal rule does not explicitly authorize plaintiff anonymity, courts have extended the rule and exercise broad discretion to shield plaintiffs' identities. *See* Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981).

10 For example, in Gomez v. Buckeye Sugars, 60 F.R.D. 106 (N.D. Ohio 1973), the district court allowed the plaintiffs to proceed tentatively under pseudonyms. It then required the parties to submit memoranda addressing whether a permanent protective order should be granted. Similarly, in Roe v. Borup, 500 F. Supp. 127 (E.D. Wis. 1980), the court permitted the plaintiffs to use pseudonyms for ten days after filing, and then fully considered the plaintiffs' request to maintain anonymity throughout the litigation.

11 *See* Roe v. New York, 49 F.R.D. 279, 281 (S.D.N.Y. 1970). Plaintiffs using the third alternative should provide a reason for the procedure, or the court may substitute the plaintiff's real name for the fictitious name in the case caption. *See, e.g.*, Male v. Crossroads Assocs., 320 F. Supp. 141, 143 (S.D.N.Y. 1970).

ple that one who commences a lawsuit avouches the cause before the court and the public. Fundamental fairness dictates that when a plaintiff sues a defendant by name, and thereby identifies the defendant to the public, the plaintiff should likewise reveal his or her own identity.[12] Even when the defendant is not a private party, but rather the government, "there is something to be said . . . for the notion that one who strikes the king should do so unmasked or not at all."[13]

Both the defendant and the public have definite interests in knowing the plaintiff's identity. The defendant needs to know the plaintiff's identity to fully use the discovery process and establish appropriate defenses. Plaintiff pseudonyms can effectively preclude defendants' access to vital information and unfairly insulate plaintiffs' claims from valid defenses.[14] In addition, proceeding anonymously creates a possible inability to determine the res judicata effect of judgment.[15]

Besides the defendant's interest in knowing the opposing litigant's identity, the public has a "legitimate interest in knowing all the facts and events surrounding court proceedings."[16] The Supreme Court in *Richmond Newspapers, Inc. v. Virginia*,[17] though specifically holding that the first amendment guarantees public access to *criminal* trials,[18] noted that "historically both civil and criminal trials have been presumptively open."[19] Because of the presumption of openness, any attempt to restrict public scrutiny of judicial proceedings implicates the first amendment guarantee of access to trial.[20]

Use of fictitious names does not bar the public from attending trials, but does bar public dissemination of information. This bar contravenes the Supreme Court's declaration that "[a] trial is a public event. What transpires in the court room is public property. . . . There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before

12 Southern Methodist Univ. Ass'n v. Wynne & Jaffe, 599 F.2d 707, 713 (5th Cir. 1979).

13 Doe v. Stegall, 653 F.2d 180, 189 (5th Cir. 1981) (Gee, J., dissenting).

14 This consequence may be avoided if the court discloses the plaintiff's true name to the defendant, and merely bars public disclosure of the plaintiff's identity. *See, e.g.*, Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981).

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

16 Doe v. Rostker, 89 F.R.D. 158, 160 (N.D. Cal. 1981).

17 448 U.S. 555 (1980).

18 *Id.* at 580.

19 *Id.* at n.17.

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

it."[21] Rule 10(a), requiring plaintiffs to sue by their true names, reflects the presumption of public access to information arising from a trial. Filing a complaint under one's true name is not only a procedural formality, but is also an acknowledgement of the openness of the American judicial process. Any departure from this practice of full disclosure must overcome the strong presumption against shielding identity from opposing parties and the public.

III. Circumstances Warranting Anonymity

Notwithstanding the strong presumption of judicial openness, particular cases have presented circumstances warranting plaintiff anonymity. These cases may be divided into two groups: (1) cases where concealed identity is necessary to protect the plaintiff from a threatened harm; and (2) cases where concealed identity is necessary to protect the plaintiff's privacy in matters of utmost intimacy.

A. *Threatened Harm*

One of the strongest justifications for proceeding anonymously arises when disclosure of identity would cause the harm that the plaintiff's action seeks to prevent. *Roe v. Ingraham*[22] presented such a situation. Plaintiffs in *Ingraham* were doctors who prescribed and their patients who received medication that the New York State Controlled Substances Act[23] classified as "Schedule II drugs."[24] The Act required prescribing physicians to file with the state a copy of an official New York State prescription form that included the patient's name and address. Plaintiffs, filing under pseudonyms, alleged that the Act "by requiring disclosure of the identity of certain patients . . . invades the patient's right of privacy and confidentiality."[25] The district court allowed the patients to proceed anonymously, observing that "if plaintiffs are required to reveal their identity prior to the adjudication on the merits of their privacy claim, they will already have sustained the injury which by this litigation they seek to

21 Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492-93 (1975), *quoting* Craig v. Harney, 331 U.S. 367, 374 (1947).

22 364 F. Supp. 536 (S.D.N.Y. 1973).

23 N.Y. PUB. HEALTH LAW § 3300 (McKinney Supp. 1972).

24 Schedule II drugs are defined as "those substances which have a high potential for abuse, but also have an accepted or restricted medical use. Abuse of a Schedule II substance may lead to severe physiological dependence." 364 F. Supp. at 538, *quoting* INTERIM REPORT OF THE TEMPORARY STATE COMMISSION TO EVALUATE THE DRUG LAWS at 13.

25 *Id.* at 540.

avoid."[26]

The federal district court for the Northern District of California, in *Doe v. Rostker*,[27] set limits to the *Ingraham* rationale for shielding identity. The plaintiffs in *Rostker* were nineteen-year-old males who were required to register with the Selective Service. Filing as Doe, Roe, and Moe, the plaintiffs alleged that the mandatory registration violated their right of privacy. The plaintiffs echoed the *Ingraham* argument in contending that "compelled disclosure of their identities would vitiate the interests they seek to protect."[28] The court rejected this argument and dismissed the complaint with leave to amend by stating the parties' true names.

The court in *Rostker* distinguished *Ingraham* by reasoning that identification in *Ingraham*, revealing use of controlled substances, would bear "an element of stigmatization" not found in *Rostker*.[29] Furthermore, the court emphasized a more fundamental shortcoming in the asserted justification for anonymity in *Rostker*: the threatened injury to the plaintiffs was neither substantial nor certain. The court observed:

> Plaintiffs argue they should be allowed to proceed anonymously because they fear retaliatory conduct or other reprisals which may jeopardize their attempts to obtain conscientious objector status in the future. This feared retaliation is both speculative and prospective. . . . The court fails to see what real injury would inure to plaintiffs by proceeding under their own names.[30]

The court in *Rostker* refused to permit anonymity essentially because the plaintiffs failed to show imminent retaliatory conduct or injury. Where plaintiffs have successfully shown actual threatened harm, courts have demonstrated greater receptiveness to requests to maintain anonymity. Actual threatened harm that warrants anonymity may be physical, social, or economic.[31]

Doe v. Lally[32] graphically illustrates the need for anonymity

26 *Id.* at 541 n.7.

27 89 F.R.D. 158 (N.D. Cal. 1981).

28 *Id.* at 161.

29 *Id.* at 162.

30 *Id.*

31 *See, e.g.*, Doe v. Lally, 467 F. Supp. 1339 (D. Md. 1979) (threatened physical harm); Glover v. Johnson, 85 F.R.D. 1 (E.D. Mich. 1977) (threatened physical harm); Doe v. Hodgson, 344 F. Supp. 964 (S.D.N.Y. 1972) (threatened economic harm); Gomez v. Buckeye Sugars, 60 F.R.D. 106 (N.D. Ohio 1973) (threatened economic harm); Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981) (threatened social and physical harm).

32 467 F. Supp. 1339 (D. Md. 1979).

when physical harm is threatened. The plaintiff, confined to a state diagnostic center, sought injunctive and declaratory relief after he was homosexually raped.[33] The district court recognized rape victims' fear of reprisal and the stigma attaching to a known rape victim that "serves to single out an inmate as an easy mark, thereby increasing the likelihood of further sexual assaults."[34] This harm likely to result upon disclosure of the plaintiff's identity warrant the plaintiff's use of a pseudonym.

Threatened harms short of the physical harm in *Lally* may nevertheless be substantial enough to justify plaintiff anonymity. In *Doe v. Stegall*,[35] plaintiffs challenging the constitutionality of prayer and Bible reading in Mississippi public schools feared social harassment and violence should their names be publicly disclosed. To support their fears, the plaintiffs presented documentary exhibits demonstrating hostile community sentiment toward their suit. The United States Court of Appeals for the Fifth Circuit allowed the plaintiffs to sue anonymously, but emphasized that in granting the plaintiffs' request, it had not merely considered the threatened social harm.

> The threat of hostile public reaction to a lawsuit, standing alone, will only with great rarity warrant public anonymity. But the threats of violence generated by this case, in conjunction with the other factors weighing in favor of maintaining the Does' anonymity, tip the balance against the customary practice of judicial openness.[36]

Besides physical and social harm, threatened employer reprisal or economic harm may warrant plaintiff anonymity. In *Gomez v. Buckeye Sugars*,[37] migrant farmworkers sued their employers for failing to comply with the Fair Labor Standards Act and other federal statutes. Plaintiffs filed under the fictitious names of Juan Gomez and Richardo Lopez "in order to safeguard against any possible reprisals by their employers that might result from the filing of this lawsuit,"[38] and sought a protective order to conceal their true names. The defendants argued that such a protective order was unnecessary since persons alleging violations of the Fair Labor Standards Act are

33 The plaintiff alleged that the rape was a direct result of prison officials' failure to maintain proper security and control in the institution.

34 467 F. Supp. at 1348-49. Because of fear of reprisal, few inmates report homosexual assaults. *Id.* at 1349.

35 653 F.2d 180 (5th Cir. 1981).

36 *Id.* at 186. The "other factors" weighing in favor of anonymity included the plaintiffs' privacy interest in their religious beliefs. *See* text accompanying note 74 *infra*.

37 60 F.R.D. 106 (N.D. Ohio 1973).

38 *Id.* at 106.

protected against employer reprisals.[39] The court nonetheless issued the protective order, observing that "[t]he method proposed by the plaintiffs affords them a higher degree of security than does the statutory provision."[40]

The *Gomez* court's willingness to allow plaintiffs seeking protection from employer reprisal to maintain anonymity is sharply contrasted in *Southern Methodist University Ass'n v. Wynne & Jaffe*.[41] The SMU Association of Women Law Students and four female lawyers brought Title VII sex discrimination suits against two Dallas law firms, alleging that the firms' hiring practices discriminated against women. The four lawyers requested a protective order to proceed anonymously, fearing economic and social harm should their participation in the suit become known. In sealed affidavits, the lawyers stated that they would "be eased out" or "assigned less desirable matters" if their names were publicly disclosed.[42] One lawyer asserted "that her firm would likely lose business should her identity become known."[43] The court denied the protective order, and stated that the lawyers "face no greater threat of warranted retaliation than the typical plaintiff alleging Title VII violations."[44]

The Fifth Circuit in *SMU* narrowly limited justifications for proceeding anonymously, and identified factors common to cases permitting plaintiff anonymity that were not present in the *SMU* case.

> [T]he cases affording plaintiffs anonymity all share several characteristics missing here. The plaintiffs in those actions, at the least, divulged personal information of the utmost intimacy; many also had to admit that they either had violated state laws or government regulations or wished to engage in prohibited conduct. . . . Furthermore, all of the plaintiffs previously allowed in other cases to proceed anonymously were challenging the constitutional, statutory or regulatory validity of government activity.[45]

Not all cases allowing plaintiff anonymity share the "common"

39 29 U.S.C. § 215(a)(3) (1976) makes it unlawful:
> to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or cause to be instituted any proceeding under or related to this chapter [Fair Labor Standards Act of 1938], or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

40 60 F.R.D. at 107.

41 599 F.2d 707 (5th Cir. 1979).

42 *Id.* at 711.

43 *Id.*

44 *Id.* at 713.

45 *Id.*

characteristics listed in *SMU*.[46] For example, in *Gomez v. Buckeye Sugars*, plaintiffs did not divulge intimate or personal information, did not admit engaging in illegal conduct, and did not challenge government activity. The *SMU* court did not need to articulate missing characteristics to disallow plaintiff pseudonyms, for the court essentially held that the gravity of the threatened harm simply was insufficient to justify shielding identity. No court has yet set forth criteria explaining when threatened harm becomes grave enough to warrant anonymity, and the determination of whether to allow plaintiff pseudonyms continues to be an ad hoc process.[47]

B. *Matters of Utmost Intimacy*

The court in *SMU* recognized that many actions successfully maintained by Doe plaintiffs involve "personal information of the utmost intimacy."[48] When the nature of a lawsuit forces a plaintiff to disclose highly personal information, the implicated right to privacy[49] may justify shielding identity. The right to privacy, guaranteed by emanations from the Bill of Rights,[50] "encompasses and protects the personal intimacies of the home, the family, marriage,

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46 Discussing the *SMU* analysis, the court in Doe v. Stegall, stated, "[W]e think it would be a mistake to distill a rigid, three-step test for the propriety of party anonymity from the fact-sensitive holding in *Southern Methodist University Ass'n*. The opinion never purports to establish the three common factors it isolates as prerequisites to bringing an anonymous suit." 653 F.2d 180, 185 (5th Cir. 1981).

47 Although each court must exercise discretion, the lack of uniform standards in evaluating requests for anonymity offers little predictability and notice to prospective Doe plaintiffs.

48 599 F.2d at 713.

49 The right to privacy was first suggested in Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Although the Constitution does not expressly provide for a right of privacy, the Supreme Court has based the right of privacy upon various guarantees of the Bill of Rights. In Roe v. Wade, 410 U.S. 113, 152 (1973), the Court explained:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968), *Katz v. United States*, 389 U.S. 347, 350 (1967), *Boyd v. United States*, 116 U.S. 616 (1886), see *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. at 484-485; in the Ninth Amendment, *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

50 In Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (Connecticut law forbidding use of contraceptives held unconstitutional), Justice Douglas explained that "specific guarantees

motherhood, procreation, and child rearing."[51] Courts balance the plaintiff's privacy interest against the consequences to the defendant and to the public resulting from plaintiff anonymity. Plaintiffs do not have an absolute right to use pseudonyms, but cases that expose the plaintiff's personal intimacies strongly justify anonymity.

The Supreme Court has stated that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[52] In accordance with this fundamental privacy interest, plaintiffs who bring cases involving pregnancy and childbearing are commonly permitted to employ pseudonyms. The Supreme Court has never discussed the merits of plaintiff anonymity, but has tacitly acknowledged the propriety of Doe plaintiffs when unmarried and pregnant women anonymously challenged criminal abortion statutes in *Roe v. Wade*[53] and *Doe v. Bolton*.[54] The Court's most explicit approval of plaintiff anonymity is contained in *Poe v. Ullman*,[55] where the Court merely noted that the Connecticut court had approved plaintiff pseudonyms in the special circumstances.[56]

The Connecticut Supreme Court of Errors more fully discussed the special circumstances in *Ullman* when it ruled on the case.[57] One Dr. Buxton and five of his patients, Jane Doe, Paul and Pauline Poe, and Harold and Hanna Hoe, challenged the constitutionality of Connecticut's statutory ban on contraceptives. Dr. Buxton prescribed contraceptives to the female plaintiffs, for whom pregnancy would seriously endanger health. The Connecticut court allowed the patients to maintain anonymity, observing that "[b]ecause of the intimate and distressing details alleged in these complaints, it is understandable that the parties who are allegedly medical patients would

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in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy."

51 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973).

52 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (Massachusetts statute prohibiting distribution of contraceptives to unmarried persons held unconstitutional).

53 410 U.S. 113 (1973). The plaintiff's alias affidavit filed with the district court satisfied the Supreme Court that the plaintiff was not fictitious. *Id.* at 124. Except for acknowledging that the plaintiff was a real person, the Court did not discuss plaintiff anonymity.

54 410 U.S. 179 (1973). The Court noted that, as established in *Roe v. Wade*, "despite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state." *Id.* at 187.

55 367 U.S. 497 (1961).

56 *Id.* at 498 n.1.

57 Buxton v. Ullman, 156 A.2d 508 (Conn. 1959).

wish to be anonymous."[58]

Doe v. Deschamps[59] similarly discussed anonymity for matters of utmost intimacy. Plaintiffs Jane Doe and John Moe, a pregnant woman and her doctor, challenged the constitutionality of Montana's abortion statute. Because the complaint contained detailed information about the woman's personal life, the district court allowed the woman to use a pseudonym. The court explained, "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. The intensely personal nature of pregnancy does, we believe, create such an unusual case."[60] However, unlike its revelation of the woman's private life, the complaint merely exposed the doctor's professional or economic life. Because the doctor did not present a similarly compelling personal privacy interest, the court required the doctor to proceed under his true name.[61]

Besides pregnancy and childbirth, circumstances involving sexual conduct and family relations have also warranted plaintiff anonymity. In *Roe v. Borup*,[62] a minor child and her parents sought damages after the state temporarily removed the child from the parents' custody. The removal action was founded on allegations that the parents had sexually abused the child, and the district court regarded it "beyond argument" that the matters involved were highly sensitive.[63] Particularly because public revelation of the allegations of sexual abuse would subject the plaintiffs to substantial social harassment and embarrassment, plaintiff pseudonyms were found to be appropriate.

Courts have also acknowledged homosexuality and transsexuality to be matters of the utmost intimacy. In *Doe v. Commonwealth's Attorney*,[64] the Virginia district court allowed homosexuals challenging the constitutionality of Virginia's sodomy statute to use pseudonyms. Similarly, in *Doe v. McConn*,[65] anonymous transsexuals challenged a Houston city ordinance which prohibited transvestites from appearing publicly in women's clothing.[66] The district court

58 *Id.* at 514-15.
59 64 F.R.D. 652 (D. Mont. 1974).
60 *Id.* at 653.
61 *Id.*
62 500 F. Supp. 127 (E.D. Wis. 1980).
63 *Id.* at 130.
64 403 F. Supp. 1199 (E.D. Va. 1975).
65 489 F. Supp. 76 (S.D. Tex. 1980).
66 Section 28-42.4 of the Code of Ordinances of the City of Houston provides, "It shall be unlawful for any person to appear on any public street, sidewalk, alley, or other public thor-

stated that the plaintiffs, "in various stages of sexual transition, are suing under fictitious names to insulate themselves from possible harassment, to protect their privacy, and to protect themselves from prosecution resulting from this action."[67]

The need for anonymity in both *Commonwealth's Attorney* and *McConn* was especially pronounced since disclosure of identity might subject plaintiffs to public harassment or criminal prosecution. By contrast, in *Lindsey v. Dayton-Hudson Corp.*,[68] where the plaintiff had already been tried and acquitted on criminal charges of offering to engage in an act of lewdness,[69] the Tenth Circuit stated that the plaintiff "had already suffered the worst of the publicity,"[70] and denied permission to use a pseudonym in the subsequent civil action. *Lindsey* indicates that when matters of personal privacy have already been publicly divulged in other contexts, the asserted privacy interest yields to the presumption of judicial openness.

Courts have recognized compelling privacy interests in non-sexual contexts, including cases involving mental illness[71] and abandoned or illegitimate children.[72] An example of a judicially recognized privacy interest far removed from matters of sexual intimacy was presented in *Doe v. Stegall*,[73] where plaintiffs challenged the constitutionality of prayer and Bible reading in public schools. Besides acknowledging threatened social harassment and violence, the

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oughfare dressed with the designed intent to disguise his or her true sex as that of the opposite sex." *Id.* at 79.

67 *Id.* at 77.

68 592 F.2d 1118 (10th Cir. 1979).

69 Lindsey had allegedly attempted to persuade a Target store employee to engage in a homosexual act. *Id.* at 1120.

70 *Id.* at 1125.

71 *See, e.g.*, Doe v. Gallinot, 486 F. Supp. 983 (C.D. Cal. 1979) (plaintiff who had been involuntarily committed to state hospital challenging civil commitment statute); Doe v. Harris, 495 F. Supp. 1161 (S.D.N.Y. 1980) (plaintiff who had been hospitalized for paranoid schizophrenia applying for disability benefits); Doe v. Colautti, 592 F.2d 704 (3rd Cir. 1979) (plaintiff who had been hospitalized in a private psychiatric institution challenging medical assistance statute); and Doe v. N.Y. Univ., 442 F. Supp. 522 (S.D.N.Y. 1978) (plaintiff who left medical school because of a mental disability seeking readmission to medical school).

72 *See, e.g.*, Doe v. Carleson, 356 F. Supp. 753 (N.D. Cal. 1973) (state welfare recipient challenging statute requiring recipients' cooperation in prosecuting spouses for non-support of children); Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y. 1972) (mothers of needy and illegitimate children challenging statute requiring mothers' cooperation in identifying the father); Doe v. Hursh, 337 F. Supp. 614 (D. Minn. 1970) (applicants for Aid to Families with Dependent Children challenging rule denying benefits until a parent has been continuously absent from home for 90 days); and Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969) (mothers of illegitimate children challenging regulation providing for termination of welfare payments on mother's failure to identify the father).

73 653 F.2d 180 (5th Cir. 1981).

Fifth Circuit recognized a privacy interest in personal religious beliefs, stating that "religion is perhaps the quintessentially private matter."[74] The court considered this privacy interest as one factor in a balancing process which led the court to protect plaintiff anonymity. The court reasoned:

> We advance no hard and fast formula for ascertaining whether a party may sue anonymously. The decision requires a balancing of considerations calling for maintenance of a party's privacy against the customary and constitutionally-embedded presumption of openness in judicial proceedings. We emphasize the special status and vulnerability of the child-litigants, the showing of possible threatened harm and serious social ostracization based upon militant religious attitudes, and fundamental privateness of the religious beliefs, all of which are at the core of this suit to vindicate establishment clause rights. We conclude that the almost universal practice of disclosure must give way in this case to the privacy interests at stake.[75]

IV. A Suggested Approach

The *Stegall* court's balancing test is the most definitive standard to date for determining whether plaintiffs may proceed anonymously. However, Judge Gee, dissenting in *Stegall*, argued that this balancing process provides little guidance for future decisions concerning Doe plaintiff practice. Judge Gee writes:

> The majority tells our courts below little more than that, in future, we will decide the matter when it gets to us. Nothing objective is offered, "no hard and fast formula." But it is just such formulas, or at least a sketching of their outlines, that we sit to provide.[76]

Although there is no hard and fast rule that could apply to every case, certain guidelines may provide an analytical framework for determining when to allow plaintiff anonymity. Courts should evaluate both the particular justifications for shielding the plaintiff's identity and the countervailing interests in disclosure to make a principled determination of whether a pseudonym is appropriate.

A. *Justifications for Shielding Identity*

A court faced with a plaintiff's request to maintain anonymity should initially determine whether the pseudonym serves to protect

74 *Id.* at 186.
75 *Id.*
76 *Id.* at 188 (Gee, J., dissenting).

the plaintiff from a threatened harm or to prevent public disclosure of intimate information. Either purpose may warrant the use of pseudonyms, and cases substantially presenting both justifications particularly merit plaintiff anonymity.

1. Evaluating Threatened Harm

In evaluating whether the threatened harm warrants shielding the plaintiff's identity, courts should consider three factors: (1) the nature and gravity of the threatened harm; (2) the probability that the threatened harm will actually occur; and (3) the nexus between shielding identity and avoiding the harm.

Different kinds of harm should receive varying consideration in evaluating justifications for anonymity. Threatened physical harm presents the strongest justification for proceeding anonymously. When disclosure of identity would endanger the plaintiff's personal safety or physical well-being, courts should customarily permit plaintiff pseudonyms.

Threatened social and economic harm, as opposed to threatened physical harm, present less persuasive justifications for using pseudonyms and require a closer examination of the gravity of the potential harm. The gravity of the threatened harm may vary greatly from case to case. Certainly, harm as severe as losing one's job or suffering oppressive social ostracism should receive considerable weight in allowing plaintiffs to maintain anonymity. Because litigants commonly risk financial setbacks and social disapproval, however, courts should not permit a plaintiff to thwart the policy of judicial openness merely because the suit may bring financial loss or social embarrassment.

No matter how severe the harm which a plaintiff claims will result from public disclosure of identity, the court must also evaluate the probability that the harm will actually occur. If the harm is merely imagined or speculative, the court should deny permission to proceed anonymously.[77] Plaintiffs should present affidavits or other evidence to demonstrate a probability of harm. Unless the court is convinced that harm is actually threatened, it should not protect the plaintiff's anonymity.

Shielding the plaintiff's identity would be meaningless unless the measure successfully prevents the threatened harm. Plaintiffs must, therefore, demonstrate a substantial nexus between maintaining ano-

77 *See, e.g.*, Doe v. Rostker, 89 F.R.D. 158 (N.D. Cal. 1981), and text accompanying note 30 *supra*.

nymity and avoiding the harm. Where the harm will likely occur despite the pseudonym, or where the plaintiff has already suffered the harm,[78] the court should not approve the unusual procedure of employing fictitious names.

2. Evaluating Matters of Utmost Intimacy

Though evaluating threatened harm is necessarily subjective, determining when an asserted privacy interest justifies shielding identity is even less amenable to a rigid formula. In evaluating the plaintiff's privacy interest, courts should ask: (1) whether the plaintiff's personal life is brought into the suit; (2) whether the matter is one of utmost intimacy; and, (3) whether a pseudonym would effectively prevent public access to the intimate information. Affirmative answers to all three questions present strong justification for proceeding anonymously.

A threshold determination is whether each plaintiff seeking anonymity brings his or her personal life into the lawsuit. When the action involves not the plaintiff's, but rather someone else's, personal life, the court should not shield the plaintiff's identity.[79]

Once determining that the suit involves matters broadly within the plaintiff's personal life, the court must determine whether these matters are of utmost intimacy. The plaintiff must demonstrate that the asserted privacy interest falls within a realm of personal privacy that the public and the judicial process have little reason to enter. This realm of privacy includes "personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing."[80] There is no absolute formula that delineates "personal intimacies." Courts should maintain flexibility to recognize privacy interests in one's body, emotions, needs, feelings, beliefs, and integral human relationships.

If the matter presented is indeed of the utmost intimacy, the plaintiff must demonstrate that proceeding anonymously would effectively block public access to the intimate information. If the information has already been subjected to public scrutiny, either through pretrial publicity or a prior judicial proceeding,[81] little justification

78 *See, e.g.*, Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118 (10th Cir. 1979), where the plaintiff had already suffered the publicity of a criminal trial.

79 For example, in Doe v. Deschamps, 64 F.R.D. 652 (D. Mont. 1974), the court refused to permit the doctor to proceed anonymously when the suit involved only his patient's personal life. *See* text accompanying note 61 *supra*.

80 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973).

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

remains for shielding identity. Similarly, if in spite of the pseudonym, the public would still gain access to the information through other means, the presumption of judicial openness should override the plaintiff's privacy interest.

B. *Countervailing Concerns*

The interest in disclosing the plaintiff's true identity is not merely a statement of general policy, but rather entails specific concerns that vary with the facts of each case. The court should evaluate the consequences of shielding the plaintiff's identity and the need for disclosure as they relate particularly to justiciability, discovery, the enforceability of relief, and the public interest in knowing the plaintiff's identity.

1. Justiciability

Plaintiff anonymity affects two important aspects of justiciability: standing and mootness. The court must initially find that the plaintiff has standing to bring the suit. Specifically, the court must ascertain that the fictitious name represents a real person who was in fact injured by the law or conduct at issue. Courts that require the plaintiff to file a sealed alias affidavit receive assurance that the plaintiff is a real person.[82] Courts might also require the plaintiff to reveal his or her true name *in camera*. A judge's active participation in the pretrial process may lead to further confirmation that the plaintiff has standing to bring the suit. The court should require the continuing existence of real parties with standing as a condition to maintaining anonymity.

Besides ensuring that the plaintiff has standing, the court must continually ensure that the case has not become moot. For example, a court hearing a case brought by an inmate must confirm that the plaintiff remains confined at the time of trial.[83] The court must ob-

82 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 124 (1973).

83 Release from confinement or transfer to another institution does not moot claims for money damages, however. Doe v. Lally, 467 F. Supp. 1339, 1343 (D. Md. 1979). A prisoner's transfer or release also does not moot claims for injunctive relief if the alleged deprivation is capable of repetition yet evading review. In *Lally*, for example, the plaintiff was homosexually raped while confined to a temporary prison facility and was transferred to another institution by the time of trial. Because the plaintiff was no longer subject to the alleged deprivation, the defendant argued that the plaintiff's suit for declaratory and injunctive relief was moot. The Court ruled that the case was not moot. It stated that "[u]nless courts adopt a liberal attitude towards mootness aspects of civil rights claims brought in connection with alleged deprivations occurring at temporary prison facilities, such claims will continue to recur and escape adjudication." *Id.* at 1342-43.

tain sufficient facts, through sealed affidavits or *in camera* revelation of the plaintiff's true name, to monitor mootness throughout the litigation.

2. Discovery

Courts should not allow plaintiff pseudonyms to preclude defendants' full use of the discovery process. Where the pseudonym becomes an offensive means to thwart the opposing litigant's defenses, rather than a protective measure, courts should require the plaintiff to reveal his or her true name to the defendant. This limited disclosure still protects the plaintiff from outside harm and public invasion of personal privacy while maintaining fairness in the litigation.[84]

3. Enforceability of Relief

When an anonymous plaintiff seeks specific relief, any remedy ordered by the court may require the court, and sometimes also the defendant, to know the plaintiff's true name. In such cases, the court should require limited disclosure of the plaintiff's identity. A plaintiff seeking anonymity must realize that such limited disclosure is necessary if the desired remedy is to be effective.

4. Public Interest in Knowing the Plaintiff's Identity

The public interest in knowing the facts surrounding a trial is relatively constant. The public enjoys a historical presumption of full access to judicial proceedings and information.[85] However, the public interest in knowing a particular plaintiff's identity varies from case to case. For example, the public may have little interest in knowing the identity of a private plaintiff challenging action directed only at the plaintiff.[86] Conversely, where the plaintiff raises issues which affect the public at large, the public may have a heightened interest in knowing the plaintiff's identity. Especially where the plaintiff is a public official and owes the public a special fiduciary duty, the court should not allow a plaintiff's pseudonym to block public scrutiny.

84 *See, e.g.*, Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981) (plaintiffs agreed to disclose their true names to the court and to the defendant).

85 *See* text accompanying note 19 *supra*.

86 *See, e.g.*, Roe v. Borup, 500 F. Supp. 127 (E.D. Wis. 1980) (parents sought damages after the state temporarily removed their child from parental custody).

V. Conclusion

Courts should allow plaintiffs who file anonymously to present justifications for their use of pseudonyms, and should not mechanically interpret Rule 10(a) to dismiss anonymous complaints. Although a plaintiff never has the *right* to use a pseudonym, a plaintiff may justify the privilege of anonymity by demonstrating threatened harm or a substantial privacy interest. After the plaintiff presents justifications for concealing identity, the court must determine what measure of concealment is appropriate. Courts should consider alternatives to total concealment, such as *in camera* revelation of the plaintiff's true name, whenever concerns of justiciability, discovery, or enforceability of relief are implicated.

The ultimate determination of whether to shield the plaintiff's identity remains within the court's discretion. However, the suggested analytical guidelines facilitate a reasoned determination of when circumstances warrant plaintiff anonymity. Concealing the plaintiff's identity should remain a highly unusual procedure, and only exceptional circumstances should prompt courts to shield the Doe plaintiff.

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