Hofstra Law Review

Volume 48 | Issue 4 Article 5

6-1-2020

# XOXO, Jane Doe: Reevaluating the Sealed Plaintiff Test in Wake of the #MeToo Movement

Leanne C. Bernhard
*Maurice A. Deane School of Law at Hofstra University*

# NOTE

# XOXO, JANE DOE: REEVALUATING THE *SEALED PLAINTIFF* TEST IN WAKE OF THE #METOO MOVEMENT

## I. INTRODUCTION

Emily Doe.[1] Jane 1.[2] Unconscious Intoxicated Woman.[3] These are the names by which the victim of one of the most talked-about sexual assault cases of the present era had been referred.[4] Until now.[5] As of September 2019—four years after being brutally sexually assaulted[6] by Brock Turner—Chanel Miller wants everyone to know her name.[7]

Ms. Miller remained anonymous, by her own choice, throughout the criminal proceedings against her aggressor.[8] She reasoned that by proceeding anonymously, she was not only able to protect her identity, but also to make "a statement."[9] Ms. Miller insisted that her story be told as a representation of *every* woman who has experienced the traumas of sexual assault and not through a lens clouded by her individual qualities.[10] Ms. Miller demonstrated the unfortunate reality that she

1. Eliot C. McLaughlin, *After Years of Anonymity, the Woman Sexually Assaulted by Brock Turner Wants the World to Know Her Name*, CNN, https://www.cnn.com/2019/09/04/us/brock-turner-rape-victim-chanel-miller-book-emily-doe/index.html (last updated Sept. 6, 2019, 2:20 PM).

2. People v. Turner, No. H043709, 2018 Cal. App. Unpub. LEXIS 5406, at *1 n.2 (Cal. Ct. App. Aug. 8, 2018).

3. Lynn Neary, *Victim of Brock Turner Sexual Assault Reveals Her Identity*, NPR (Sept. 4, 2019, 4:44 PM), https://www.npr.org/2019/09/04/757626939/victim-of-brock-turner-sexual-assault-reveals-her-identity.

4. *See Turner*, 2018 Cal. App. Unpub. LEXIS 5406, at *1 n.2; McLaughlin, *supra* note 1.

5. Neary, *supra* note 3.

6. *See* Ray Sanchez, *Stanford Rape Case: Inside the Court Documents*, CNN, https://www.cnn.com/2016/06/10/us/stanford-rape-case-court-documents/index.html (last updated June 11, 2016, 5:00 PM) (explaining how Turner "removed the victim's underwear and digitally penetrated her for about five minutes" while her estimated intoxication level at the time was 0.22 percent).

7. Neary, *supra* note 3.

8. Michelle Garcia, *Brock Turner's Sexual Assault Victim Explains Why She's Remaining Anonymous*, VOX (June 8, 2016, 3:30 PM), https://www.vox.com/2016/6/8/11887500/brock-turner-victim-anonymous.

9. *Id.*

10. *Id.* (quoting Ms. Miller's letter to her assailant: "I don't need labels, categories to prove I am worthy of respect, to prove that I should be listened to.").

could be anyone,[11] as sexual misconduct[12] knows no race, age, gender, or sexual orientation.[13] Ms. Miller continues to acknowledge the symbolism behind her choice to remain anonymous, but now not only has she chosen to reveal her name—the combination of letters that represents her—but also her true, individual identity as an "act of reclamation."[14]

Ms. Miller remains a true pioneer of the #MeToo Movement, having made strides for victims[15] of sexual misconduct years prior to the movement's universalization.[16] The #MeToo Movement, which gained its widespread popularity two years following Turner's trial,[17] is a "viral awareness campaign"[18] dedicated to facilitating a social climate which

---

11. *Id.*

12. *Definitions of Sexual Misconduct, Sexual Consent, and Sexual Harassment*, YALE U., http://catalog.yale.edu/undergraduate-regulations/policies/definitions-sexual-misconduct-consent-harassment (last visited July 10, 2020). "Sexual misconduct" encompasses a wide "range of behaviors including sexual assault, sexual harassment, intimate partner violence, stalking, voyeurism, and any other conduct of a sexual nature that is nonconsensual, or has the purpose or effect of threatening, intimidating, or coercing a person." *Id.* For a discussion of the elasticity of the modern definition of "sexual misconduct," see generally Michelle Cottle, *What Does 'Sexual Misconduct' Actually Mean?*, ATLANTIC (Dec. 20, 2017), https://www.theatlantic.com/politics/archive/2017/12/what-does-sexual-misconduct-actually-mean/548807. The term "sexual misconduct" is used purposely throughout this Note because of its broad scope; the goal is for the proposed solution in this Note to be applied to sexual misconduct as a whole and not exclusively to one specific form of sexual transgression. *See infra* Part IV.A.

13. *See generally Victims of Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/victims-sexual-violence (last visited July 10, 2020) (providing statistics regarding the broad diversity of sexual misconduct victims).

14. *See* Garcia, *supra* note 8; Jennifer Weiner, *'Know My Name,' a Sexual Assault Survivor Tells the World*, N.Y. TIMES (Sept. 24, 2019), https://www.nytimes.com/2019/09/24/books/review/chanel-miller-know-my-name.html.

15. *Key Terms and Phrases*, RAINN, https://www.rainn.org/articles/key-terms-and-phrases (last visited July 10, 2020). The terms "victim" and "survivor" are used interchangeably throughout this Note as individuals who have been targets of sexual misconduct have differing opinions on how they wish to be referred to. *Id.* For a discussion on why the title of "victim" should be reclaimed by those who have endured sexual misconduct, see Danielle Campoamor, *I'm Not a Sexual Assault "Survivor"—I'm a Victim*, HARPER'S BAZAAR (May 21, 2018), https://www.harpersbazaar.com/culture/features/a20138398/stop-using-survivor-to-describe-sexual-assault-victims, and Katie Simon, *I Was Raped. Call Me a Victim, Not a 'Survivor'*, LILY NEWS, https://www.thelily.com/i-was-raped-call-me-a-victim-not-a-survivor (last visited July 10, 2020). For an alternative discussion on why the title of "survivor" is more apropos, see Jon Bird, *People Who've Been Raped Are Survivors Not Just Victims, John Humphrys*, GUARDIAN (Dec. 22, 2014, 10:27 AM), https://www.theguardian.com/commentisfree/2014/dec/22/people-raped-survivors-not-just-victims. *See also* Rahila Gupta, *'Victim' vs 'Survivor': Feminism and Language*, OPENDEMOCRACY (June 16, 2014), https://www.opendemocracy.net/en/5050/victim-vs-survivor-feminism-and-language (parsing through the pros and cons of the titles "survivor" and "victim" from a feminist perspective).

16. *Stanford Sexual Assault: Chanel Miller Reveals Her Identity*, BBC NEWS (Sept. 4, 2019), https://www.bbc.com/news/world-us-canada-49583310.

17. People v. Turner, No. H043709, 2018 Cal. App. Unpub. LEXIS 5406, at *1 (Cal. Ct. App. Aug. 8, 2018).

18. Abby Ohlheiser, *Meet the Woman Who Coined 'Me Too' 10 Years Ago—to Help Women of Color*, CHI. TRIB. (Oct. 19, 2017, 11:55 AM), https://www.chicagotribune.com/lifestyles/ct-me-too-campaign-origins-20171019-story.html.

encourages victims of sexual misconduct to come forward by openly exposing their aggressors.[19]

While a victim of a sex crime has the *right* to preserve her[20] identity in the criminal context through universally-recognized rape shield laws,[21] the victim of a sex-based civil wrongdoing may only *ask* the court to proceed anonymously via motion.[22] Regardless of the fact that anonymity has oft been granted in sexual assault cases,[23] the current multi-factor test employed by the Second Circuit Court of Appeals fails a great deal of survivors of sexual misconduct who request added protection as they stand up to their aggressors.[24]

Pursuant to Federal Rules of Civil Procedure ("FRCP") 10(a), the title of a complaint must contain the names of all parties to the litigation.[25] This rule is consistent with the First Amendment to the United States Constitution, which protects the right of the public to access judicial proceedings.[26] Although naming all parties to a litigation

---

19. *See* Orion Rummler, *Global #MeToo Movement Has Resulted in 7 Convictions, 4 Charges of Influential Figures*, AXIOS, https://www.axios.com/global-metoo-movement-convictions-charges-382ff226-7ad3-4b26-ac89-451788192578.html (last updated Mar. 11, 2020).

20. *See Statistics About Sexual Violence*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf (last visited July 10, 2020) (distinguishing that ninety-one percent of rape and sexual assault victims are female while only nine percent are male); *Victims of Sexual Violence: Statistics*, *supra* note 13. Although men are also frequently victims of sexual misconduct and sex crimes, the vast majority of victims are female; therefore, female pronouns will be utilized throughout the entirety of this Note. *Id.*

21. *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 ("In the past half century, the law in every state has evolved to prevent defendants in sex cases from smearing the reputations of alleged victims.").

22. Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. KAN. L. REV. 195, 195-96 (2004).

23. Chloe Booth, *Good Things Don't Come to Those Forced to Wait: Denial of a Litigant's Request to Proceed Anonymously Can Be Appealed Prior to Final Judgment in the Wake of* Doe v. Village of Deerfield, 58 B.C. L. REV. (ELECTRONIC SUPP.) 205, 212-13 (2017) ("Anonymity is almost always granted in cases that involve sexual assault in order to protect the privacy of the victim.").

24. *See, e.g.*, Doe v. Skyline Autos., Inc., 375 F. Supp. 3d 401, 403 (S.D.N.Y. 2019) (denying plaintiff's motion to proceed anonymously in a sexual misconduct lawsuit against her employer); Order at 2, Doe v. Morgan Stanley & Co., No. 18cv11528 (S.D.N.Y. May 1, 2019), 2019 BL 236786 (S.D.N.Y. June 26, 2019) (denying plaintiff's motion to proceed anonymously in a sexual harassment claim against his employer); Doe v. Fedcap Rehab. Servs., No. 17-CV-8220, 2018 U.S. Dist. LEXIS 71174, at *1, *3 (S.D.N.Y. Apr. 27, 2018) (denying plaintiff's motion to proceed anonymously against employer in a sexual and gender discrimination lawsuit). For further discussion, see Erin Mulvaney & Hassan A. Kanu, *Anonymous Workplace Harassment Suits Double in #MeToo Era*, BLOOMBERG L. (July 29, 2019, 6:30 AM), https://www.bloomberglaw.com.

25. FED. R. CIV. P. 10(a) ("Every 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; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.").

26. *See, e.g.*, Press-Enterprise Co. v. Sup. Court Cal., 478 U.S. 1, 8, 10 (1986); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980). *See also* Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*,

is the general rule,[27] the Supreme Court has implicitly recognized select exceptions to this procedure,[28] permitting some parties to proceed anonymously under a pseudonym.[29] Although the Supreme Court has not yet approved a bright-line test for use in deciding motions to proceed anonymously,[30] all federal appellate courts are in agreement that the interests of each party to the litigation must be balanced with those of the public,[31] as protected by the First Amendment.[32] To balance such countervailing interests, each circuit court that has ruled on a motion to proceed anonymously has developed its own multi-factor analysis.[33]

For an extended period of time, the Second Circuit would simply prohibit or allow a party to proceed anonymously without specifying the considerations that contributed to its decisions.[34] Finally, in the 2008 decision of *Sealed Plaintiff v. Sealed Defendant # 1*, the court articulated a disjunctive,[35] ten-factor[36] analysis for use in deciding motions to

---

37 HASTINGS L.J. 1, 3 (1985) ("In articulating the basis for public access to criminal proceedings, the Supreme Court has focused upon structural constitutional considerations, the common-law tradition of open trials, and the policy grounds for access. As discussed below, these constitutional, historical, and policy considerations also apply to the civil arena.").

27. FED. R. CIV. P. 10(a).

28. Ressler, *supra* note 22, at 212-13 (explaining that despite the continuing tradition of open trials, the Supreme Court has implicitly recognized the legitimacy of permitting certain parties to maintain their anonymity throughout judicial proceedings). *See also* Carole Lucock & Michael Yeo, *Naming Names: The Pseudonym in the Name of the Law*, 3 U. OTTAWA L. & TECH. J. 53, 67 (2006) ("When the court allows the use of a pseudonym to conceal identity, it is making an exception to the general rule that the legal name be known and used openly in legal proceedings.").

29. Ressler, *supra* note 22, at 213 (discussing a trend within the Supreme Court whereby the Court permits plaintiffs to proceed pseudonymously without explicitly addressing the issue). For examples of cases in which the Supreme Court recognized parties' pseudonymous identification, see Roe v. Wade, 410 U.S. 113, 120 n.4, 121 n.5 (1973); Adoptive Couple v. Baby Girl, 570 U.S. 637, 641-42 (2013).

30. Tom Isler, *White Paper: Anonymous Civil Litigants*, REP. COMM. FOR FREEDOM PRESS, https://www.rcfp.org/journals/news-media-and-law-fall-2015/white-paper-anonymous-civil-l (last visited July 10, 2020) (stating that the Supreme Court has yet to address the circumstances in which parties shall be permitted to proceed anonymously).

31. *See* Doe v. Megless, 654 F.3d 404, 408 (3d Cir. 2011) (explaining that although every circuit court of appeals has agreed upon employing a balancing test in deciding motions to proceed anonymously, each court uses a marginally different compilation of factors); Isler, *supra* note 30.

32. Isler, *supra* note 30, at n.22 (quoting Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. Unit A Aug. 1981) ("First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings.")).

33. *See, e.g.*, *Megless*, 654 F.3d at 408-10; Sealed Plaintiff v. Sealed Defendant # 1, 537 F.3d 185, 189-90 (2d Cir. 2008); Doe v. Porter, 370 F.3d 558, 560 (6th Cir. 2004); Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1068-69 (9th Cir. 2000); M.M. v. Zavaras, 139 F.3d 798, 803-04 (10th Cir. 1998); James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993); Doe v. Frank, 951 F.2d 320, 323 (11th Cir. 1992).

34. *Sealed Plaintiff*, 537 F.3d at 189 (citation omitted) ("Indeed, we have approved of litigating under a pseudonym in certain circumstances . . . but we have not yet set forth the standard for permitting a plaintiff to do so.").

35. *Id.* at 190 (citation omitted) ("[T]his factor-driven balancing inquiry requires a district court to exercise its discretion in the course of weighing competing interests . . . .").

36. *See id.* at 189-90 (internal citations and quotations omitted); *infra* text accompanying note 108.

proceed anonymously.[37] Although such a test may have been sufficient in guiding Second Circuit judges over the past decade, the *Sealed Plaintiff* analysis has prevented victims of sexual misconduct from proceeding anonymously against their offenders in wake of the #MeToo Movement.[38]

One danger associated with prohibiting victims of sexual misconduct from proceeding under a pseudonym is adding insult to the preexisting injuries felt by victims.[39] Victims are frequently triggered by references to the events surrounding their experience with misconduct[40] and are likely to be long tarnished by the harm that was inflicted upon them.[41] A court's purpose is to promote justice[42] and to remedy those who have been wronged;[43] instead, the Second Circuit is potentially exacerbating—rather than remedying—the effects of the offenders' transgressions by subjecting victims to public attention and ridicule.[44] The threat of public identification can sometimes even result in victims dropping the claims against their aggressors *in their entirety*.[45] Not only does this starkly contrast with the central purpose of the #MeToo

37. *Id.*

38. *See supra* note 24 and accompanying text.

39. *See, e.g.*, Latif v. Morgan Stanley & Co., No. 18cv11528, 2019 BL 236786, at *2 n.1 (S.D.N.Y. June 26, 2019) (obligating plaintiff to proceed under his given name); Patrick Dorrian, *Gay Muslim Morgan Stanley Worker Claiming Bias Must Reveal Name*, BLOOMBERG L. (May 2, 2019, 1:39 PM), https://news.bloomberglaw.com/daily-labor-report/gay-muslim-morgan-stanley-worker-claiming-bias-must-reveal-name.

40. *The Effects of Sexual Assault*, WASH. COAL. OF SEXUAL ASSAULT PROGRAMS, https://www.wcsap.org/help/about-sexual-assault/effects-sexual-assault (last visited July 10, 2020) (explaining that while not all survivors of sexual assault experience the same symptoms, victims are commonly impacted by feelings of shame, guilt, and denial, and have issues with their senses of trust and safety).

41. *See generally* Alan Mozes, *Sexual Assault Has Long-Term Mental, Physical Impact*, WEBMD (Oct. 3, 2018), https://www.webmd.com/women/news/20181003/sexual-assault-has-long-term-mental-physical-impact#1 (discussing the persistent, long-term impacts of sexual misconduct on survivors).

42. *Competency: Purposes and Responsibilities*, NAT'L ASS'N FOR CT. MGMT., https://nacmcore.org/competency/purposes-and-responsibilities (last visited July 10, 2020) (detailing that one "longstanding and widely accepted" purpose of courts is "[t]o promote justice in individual cases").

43. *See Court Role and Structure*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure (last visited July 10, 2020) ("Courts decide what really happened and what should be done about it. They decide whether a person committed a crime and what the punishment should be. They also provide a peaceful way to decide private disputes that people can't resolve themselves.").

44. *See generally* Jayne S. Ressler, *#WorstPlaintiffEver: Popular Public Shaming and Pseudonymous Plaintiffs*, 84 TENN. L. REV. 779, 801-08 (2017) (discussing how plaintiffs who are denied the opportunity to proceed anonymously may be subject to increased public humiliation and exposure in wake of the modern Age of Information).

45. *See* Lior Jacob Strahilevitz, *Pseudonymous Litigation*, 77 U. CHI. L. REV. 1239, 1247 (2010) (arguing that "the nonavailability of pseudonymity may discourage" parties from bringing lawsuits "in the first place"); *see also* Mulvaney & Kanu, *supra* note 24 (discussing the potential "chilling effect" that "unmask[ing]" victims will have on sexual harassment lawsuits).

Movement,[46] but it also infringes upon the victim's own First Amendment right to petition the government for redress of grievances.[47]

Because of its profound influence on its sister circuits,[48] and because the current test has repeatedly failed survivors of sexual misconduct, this Note proposes that the Second Circuit establish a distinct test for deciding motions to proceed pseudonymously in civil causes of action involving sexual misconduct.[49] In developing a modernized assessment exclusively for use in the subset of so-called "#MeToo cases," victims of sexual misconduct will be better armored to proceed anonymously against their aggressors, avoiding undue stress, humiliation, and exposure.[50]

This Note unpacks both the recent history of the #MeToo Movement[51] as well as the dated and compounded chronicle of the concept of judicial openness.[52] A discussion of the current *Sealed Plaintiff* analysis concludes Part II of this Note.[53] Part III delves into the root of the issue with the current test, first by navigating through the obstruction of victims' access to justice,[54] and next by exploring the aggravating impact of technology on the widespread dissemination of information and the associated impediments for victims unpermitted to proceed pseudonymously.[55] Part III of this Note continues by discussing the direct conflict between the #MeToo Movement and the precedent of judicial openness,[56] and it draws to a close by considering how refusal of anonymity may further exacerbate the unique vulnerability of sexual misconduct survivors.[57] Part IV of this Note introduces a specialized standard under which motions to proceed pseudonymously, made exclusively by victims of sexual misconduct, should be evaluated.[58] This

46. *See* Talia Lakritz, *These 15 Women Opened up About Their Sexual Assault Experiences Thanks to the #MeToo Campaign*, INSIDER (Oct. 1, 2018, 5:21 PM), https://www.insider.com/me-too-hashtag-sexual-harassment-assault-2017-11 ("In Hollywood and around the world, two simple words have given victims of sexual assault and harassment the courage to speak out against their alleged abusers: me too.").

47. U.S. CONST. amend. I.

48. *See* Doe v. Trs. of Dartmouth Coll., No. 18-cv-690-JD, 2018 U.S. Dist. LEXIS 189050, at *9-12 (D.N.H. Nov. 2, 2018); Doe v. Univ. of Notre Dame, No. 3:17CV298-PPS/MGG, 2017 U.S. Dist. LEXIS 223299, at *5 (N.D. Ind. May 8, 2017) (considering the Second Circuit's *Sealed Plaintiff* factors in light of the lack of an articulated, circuit-specific analysis for deciding motions to proceed anonymously).

49. *See infra* Part IV.

50. *See infra* Parts III.B; III.D.

51. *See infra* Part II.A.

52. *See infra* Part II.B.

53. *See infra* Part II.C.

54. *See infra* Part III.A.

55. *See infra* Part III.B.

56. *See infra* Part III.C.

57. *See infra* Part III.D.

58. *See infra* Part IV.A.

Part continues on to battle the counterarguments against the imposition of a more liberalized analysis.[59]

## II. HISTORY AND BACKGROUND

Part II of this Note begins by exploring the origins of the #MeToo Movement[60] and continues by elaborating upon the procedural safeguards challenging the preservation of anonymity in judicial proceedings—most notably, FRCP 10(a).[61] Finally, Part II concludes by dissecting the *Sealed Plaintiff* test.[62]

### *A. #MeToo*

Although the #MeToo Movement as we know it gained international traction just over three years ago, the "Me Too" phenomenon planted its roots over eleven years ago, in 2006, with a woman named Tarana Burke.[63] Ms. Burke, a sexual assault survivor herself,[64] initiated the movement to aid fellow survivors in healing through participation in a self-powered activist group.[65] What began as a modest MySpace page[66] has burgeoned into an integral piece of the modern social climate worldwide.[67]

Famed actress Alyssa Milano is often credited for introducing the "Me Too" concept to the masses via her infamous tweet:

> If you've been sexually harassed or assaulted write "me too" as a reply to this tweet.
> Me too.
> Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."[68]

---

59. *See infra* Part IV.B.
60. *See infra* Part II.A.
61. *See infra* Part II.B.
62. *See infra* Part II.C.
63. *#MeToo: A Timeline of Events*, CHI. TRIB., (Mar. 11, 2020, 10:28 AM), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html.
64. Ohlheiser, *supra* note 18.
65. *About: History and Vision*, ME TOO., https://metoomvmt.org/about (last visited July 10, 2020).
66. Ohlheiser, *supra* note 18.
67. Stephanie Zacharek et al., *Time Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), https://time.com/time-person-of-the-year-2017-silence-breakers (explaining that the #MeToo Movement rapidly spread "from India . . . to the Middle East, Asia and parts in between").
68. Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 4:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en.

The tweet and its rapidly spreading popularity[69] marked the beginning of the "viral awareness campaign"[70] that defines the #MeToo Movement as it is currently understood today.[71] Ms. Milano—similarly to Ms. Burke—articulated that the purpose of "Me Too" is to provide an outlet for victims of sexual misconduct to be heard and to speak their truth.[72] Within the first year of the #MeToo Movement, 19 million tweets donned the hashtag "#MeToo,"[73] and at least 425—but possibly upwards of 800—prominent individuals were publicly accused of sexual misconduct.[74] Clearly, the #MeToo Movement has provoked significant sociocultural change in recent years, but it has also precipitated reform in the legal sphere as well.[75]

Legislation on both state and federal levels has been proposed and passed into law in reaction to the #MeToo Movement.[76] Such legislation has tackled some of the central antagonists of the #MeToo Movement: non-disclosure agreements and mandatory arbitration clauses in employment contracts.[77] The Tax Cuts and Jobs Act of 2017[78]—a

69. *See* L. Camille Hébert, *Is "METOO" Only a Social Movement or a Legal Movement Too?*, 22 EMP. RTS. & EMP. POL'Y J. 321, 322 (2018) ("The hashtag was reportedly shared over 500,000 times on Twitter and 12 million times on Facebook in the first twenty-four hours."); *see also* Paulina Cachero, *19 Million #MeToo Tweets Later: Alyssa Milano and Tarana Burke Reflect on the Year After #MeToo*, YAHOO! LIFE: MAKERS (Oct. 15, 2018, 3:54 PM), https://www.makers.com/blog/alyssa-milano-and-tarana-burke-reflect-on-year-after-me-too ("'[M]e too' has become a battle cry for women and men who have been sexually assaulted, with more than 19 million tweets using #MeToo since [Milano's] initial tweet.").

70. Ohlheiser, *supra* note 18.

71. *See* ME TOO, *supra* note 65 ("[B]ecause of the viral #metoo hashtag, a vital conversation about sexual violence has been thrust into the national dialogue."); *see also* Zacharek et al., *supra* note 67 (describing how Alyssa Milano's tweet propelled the widespread use of the infamous "#MeToo" hashtag).

72. *See* Cachero, *supra* note 69.

73. *Id.*

74. Riley Griffin et al., *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), https://www.bloomberg.com/graphics/2018-me-too-anniversary (clarifying that 429 people is a conservative tally and that some broader data collections estimate over 800 alleged "bad actors").

75. *See* Hébert, *supra* note 69, at 326 ("There are a number of ways in which the 'MeToo' movement might spur changes in the law of sexual harassment and therefore become a legal, as well as a social, movement. Recognition of the high prevalence of sexual harassment in the workplace and the real harms that it causes to its targets has the potential to reshape the ways in which the courts interpret and apply the elements of a sexual harassment claim. And the realization that a large number of women have been targeted and harmed by sexual harassment, but have remained silent for years, may help shape the way in which the courts apply the rules by which employers can be held liable for the sexually harassing conduct to which those women have been subjected.").

76. *Id.* at 333-34.

77. *Id.* ("[W]omen coming forward with stories of sexual harassment have revealed how the use of non-disclosure agreements has sought to prevent them from reporting the sexual harassment to which they have been subjected. In addition, allegations that sexual harassment claims have been shunted to 'secret arbitrations' have raised concerns about the use of mandatory pre-dispute arbitration agreements, which are common in workplaces.").

78. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (to be codified in scattered sections of 26 U.S.C.); Erin Huffer et al., *Effects of the Tax Cuts and Jobs Act on State Individual Income Taxes*, 58 WASH. U. J. L. & POL'Y 205, 205 (2019).

federal law—was recently promulgated, in part, to "discourage" employers from binding their employees to non-disclosure agreements.[79] The Ending Forced Arbitration of Sexual Harassment Act of 2017[80] was also introduced in December 2017;[81] this bill—which, if passed, will prohibit the use of mandatory pre-dispute arbitration agreements in sexual harassment claims[82]—was supported by both the House of Representatives and the Senate.[83]

Furthermore, New York State, located within the jurisdiction of the Second Circuit,[84] has expanded the protections of its sexual harassment statute to encompass both independent contractors[85] and domestic workers.[86] Evidently, the federal government—as well as the New York State government—is not only *capable* of restructuring the law to accommodate the changing societal tides of the #MeToo Movement, but also is assiduously *supported* in such endeavors.[87] Thus, pursuant to the adaptive legal attitude boasted by both the federal legislature and those legislatures local to the Second Circuit,[88] an individualized safeguard to protect the identities of victims of sexual misconduct should pass muster with flying colors.[89]

79. *See* Tax Cuts and Jobs Act of 2017 § 13307, 131 Stat. at 2129 (denying considerable tax deductions for "(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment"); *see also* Hébert, *supra* note 69, at 334 ("Federal legislation relating to non-disclosure agreements with respect to sexual harassment claims has been enacted, although that legislation seeks to discourage, rather than prohibit such agreements.").

80. Ending Forced Arbitration of Sexual Harassment Act of 2017, H.R. 4734, 115th Cong. § 1 (2017).

81. Hébert, *supra* note 69, at 334.

82. H.R. 4734 § 402(a) ("Except as provided in subsection (b)(2) [Collective Bargaining Agreements], and notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a sex discrimination dispute.").

83. Hébert, *supra* note 69, at 334-35 (explaining that upon introduction, the Bill was met with bipartisan support and that the Attorneys General of every state in the Union, the District of Columbia, and the territories and commonwealths of the United States have all signed a letter to Congress endorsing a prohibition of mandatory arbitration clauses in sexual harassment claims).

84. *About the Court*, U.S. CT. APPEALS FOR SECOND CIR., http://www.ca2.uscourts.gov/about_the_court.html (last modified May 21, 2019) (detailing that the Second Circuit encompasses New York, Connecticut, and Vermont).

85. N.Y. EXEC. LAW § 296-d (McKinney 2019); Anna North, *7 Positive Changes that Have Come from the #MeToo Movement*, VOX (Oct. 4, 2019, 7:00 AM), https://www.vox.com/identities/2019/10/4/2085263/me-too-movement-sexual-harassment-law2019.

86. N.Y. EXEC. LAW § 296-b; North, *supra* note 85.

87. Hébert, *supra* note 69, at 334-35; *see* North, *supra* note 85.

88. *See* Hébert, *supra* note 69, at 335 (explaining that the Attorneys General of Connecticut, New York, and Vermont are all supportive of a law proscribing the activation of mandatory arbitration clauses in sexual harassment claims); *see also* North, *supra* note 85 (highlighting the amendatory legislation that has been enacted by way of the #MeToo movement in New York state).

89. *See infra* Part IV.

### B. *Judicial Openness as a Constitutional Right*

Enacted in 1938,[90] FRCP 10(a) is an outmoded rule that infringes upon the modern-day right to privacy enjoyed by litigants who wish to preserve their anonymity in proceeding pseudonymously.[91] FRCP 10(a) provides, in relevant part: "Every 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 . . . ."[92] This rule is justified by, and consistent with, the penumbral First Amendment right of public access to judicial proceedings;[93] however, this right is not absolute,[94] as first articulated by the Supreme Court in its landmark decision of *Richmond Newspapers v. Virginia*.[95] Rather than authorize an unlimited right of public access to *all* governmental proceedings, the Court employed a two-part test to determine which proceedings qualified as necessarily publicly accessible.[96] Applying this standard, the Supreme Court has acknowledged a public right of access to a variety of criminal judicial proceedings, but has never explicitly extended the same right to *civil* judicial proceedings.[97] While numerous federal courts have acknowledged a public right to access civil judicial proceedings and

90. Ressler, *supra* note 22, at 195.

91. *See id.* at 195, 197, 213 ("In this era of widespread electronic dissemination of information, however, Rule 10(a) imposes a cost that could not have been foreseen in 1938 – an invasion of privacy. The burden of this new expense is shared by both plaintiffs and society alike, as a result of a judicial system that often appears to value openness at any price.").

92. FED. R. CIV. P. 10(a).

93. *See* Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. Unit A Aug. 1981) ("First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings.").

94. Eugene Volokh, *First Amendment Right of Access to Judicial Proceedings*, WASH. POST: THE VOLOKH CONSPIRACY (Mar. 18, 2014, 5:32 AM), https://washingtonpost.com/news/Volokh-conspiracy/wp/2014/03/18/first-amendment-right-of-access-to-judicial-proceedings ("[T]he Court has created a First Amendment right of access to *certain* judicial proceedings, especially criminal trials, jury selection in criminal trials, certain preliminary hearings but not grand jury hearings, and possibly also civil trials.") (emphasis added) (internal citations omitted).

95. 448 U.S. 555, 580 (1980); *see* Stephen Wermiel, Richmond Newspapers, Inc. v. Virginia *(1980)*, FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/333/richmond-newspapers-inc-v-virginia (last visited July 10, 2020) (explaining that this was the first decision in which the Supreme Court recognized a public right to access government information).

96. Press-Enterprise Co. v. Sup. Court Cal., 478 U.S. 1, 8 (1986) (citations omitted) (explaining that the two questions the Court must answer in determining whether the public has a constitutional right to access a specific governmental proceeding are (1) "whether the place and process have historically been open to the press and general public," and (2) "whether public access plays a significant positive role in the functioning of the particular process in question"); *see also* Volokh, *supra* note 94.

97. Isler, *supra* note 30, at n.23 ("The *Press-Enterprise* standard was applied by the Supreme Court in criminal cases; the Court has not directly addressed whether the constitutional right applies to civil proceedings."); *see also* Colleen E. Michuda, Comment, *Defendant Doe's Quest for Anonymity: Is the Hurdle Insurmountable?*, 29 LOY. U. CHI. L.J. 141, 144 n.25 (1997) ("[T]he Court has only specifically sanctioned the public's right of access to trials in the context of criminal trials . . . .").

related court documents,[98] federal appellate courts disagree upon the scope and extent of the right.[99]

The Second Circuit has recognized a public right to disclosure of civil judicial proceedings; however, it does not find such a right to be absolutely unexcepted.[100] Instead, precedent in the Second Circuit maintains that public interest may potentially be outweighed by the distinct countervailing interests of litigants in maintaining the privacy of a particular proceeding.[101] This exception also applies to FRCP 10(a) as it so restricts parties who wish to proceed anonymously.[102] Rather than making any blanket declaration concerning the general permissibility of proceeding under a pseudonym, the courts within the Second Circuit engage in a balancing test,[103] analyzing the specific facts of each case at issue,[104] to determine whether the public right to access judicial proceedings is sufficiently durable to withstand the strong counteractive interests of each of the parties in preserving their anonymity.[105]

### C. *The* Sealed Plaintiff *Test*

Born out of the *Sealed Plaintiff v. Sealed Defendant # 1* decision, the balancing test that the Second Circuit currently employs in reviewing motions to proceed anonymously involves a multi-factor analysis in which the judge retains the discretion to weigh the interests of the public against those of each of the parties.[106] These *Sealed Plaintiff* factors were extracted from decisions written by those of the federal appellate jurisdictions which had previously formulated analyses for reviewing motions to proceed pseudonymously.[107] The factors are articulated as follows:

> (1) whether the litigation involves matters that are highly sensitive and [of a] personal nature; (2) whether identification poses a risk of

98. Ressler, *supra* note 22, at 212.

99. *Id.*

100. Sealed Plaintiff v. Sealed Defendant # 1, 537 F.3d 185, 188-89 (2d Cir. 2008).

101. *Id.* at 189.

102. *Id.* at 190-91 (holding that the lower court erred in believing itself "strictly bound" by the provisions of FRCP 10(a) when, in fact, the court should have balanced the interests of the public in disclosing the parties' identities with the privacy interests of the parties themselves).

103. *Id.* at 189.

104. *Id.* at 188-89. Such reasoning is consistent with the Supreme Court's holding in *Nixon v. Warner Communications*, whereby the Court expressed that the right of access should be left to "the sound discretion of the trial court . . . in light of the relevant facts and circumstances of the particular case." 435 U.S. 589, 599 (1978).

105. *Sealed Plaintiff*, 537 F.3d at 189 ("[W]hen 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.").

106. *Id.*

107. *Id.* ("This balancing of interests entails the consideration of several factors that have been identified by our sister Circuits . . . .").

> 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.[108]

This test has aided the courts of the Second Circuit in deciding motions to proceed anonymously for over a decade and counting.[109] Not only does the Second Circuit herein emphasize that no one factor is wholly dispositive,[110] they also highlight the fact that the compilation of the ten named factors is "non-exhaustive."[111] This makes for a rather fluid, fact-sensitive analysis with a great deal of elasticity; however, the Second Circuit, in applying the *Sealed Plaintiff* standard in the modern era, has done so with an iron fist, denying a multitude of plaintiffs' motions to proceed anonymously in causes of action involving allegations of sexual misconduct.[112]

1. *Doe v. Fedcap Rehabilitation Services*

Such rigid denial of anonymity is exemplified in the Southern District of New York's recent rejection of a victim-plaintiff's motion to proceed pseudonymously in *Doe v. Fedcap Rehabilitation Services*.[113] In this case, the plaintiff, a genderqueer individual,[114] brought a claim of

108. *Id.* at 190 (internal quotations and citations omitted).

109. *Id.* at 185. *Sealed Plaintiff* was decided in 2008. *Id.*

110. *Id.* at 190.

111. *Id.* at 189-90 ("We note with approval the following factors, with the caution that this list is non-exhaustive and district courts should take into account other factors relevant to the particular case under consideration . . . .").

112. *See supra* note 24 and accompanying text.

113. No. 17-CV-8220, 2018 U.S. Dist. LEXIS 71174, at *1 (S.D.N.Y. Apr. 27, 2018).

114. *See* Ritch C. Savin-Williams, *A Guide to Genderqueer, Non-Binary, and Genderfluid Identity*, PSYCHOL. TODAY (July 29, 2018), https://www.psychologytoday.com/us/blog/sex-sexuality-and-romance/201807/guide-genderqueer-non-binary-and-genderfluid-identity.

sexual discrimination against their[115] former employer and moved to maintain their anonymity throughout the judicial process by use of the pseudonym "Jaime Doe."[116] Judge J. Paul Oetken, the first openly gay man to be appointed a United States District Court Judge,[117] applied the *Sealed Plaintiff* factors[118] and found against the plaintiff.[119] Despite the fact that the Judge dismissed the importance of the public's interest in the lawsuit,[120] he went on to deny Jaime Doe's motion due to the perceived prejudice that would be felt by the defendant if the plaintiff were to proceed pseudonymously.[121] The plaintiff was then given two weeks to decide whether to proceed under their true identity,[122] which they ultimately decided to do.[123]

2. *Doe v. Skyline Automobiles Inc.*

Another circumstance in which a Second Circuit court denied a victim-plaintiff's request to proceed anonymously arose in the case of *Doe v. Skyline Automobiles Inc.*[124] In this case, the plaintiff brought claims against her previous employer for sexual harassment, abuse, and discrimination.[125] While the claims alleged against the defendant-employer in *Fedcap* were appalling,[126] the claims alleged by the victim-plaintiff in *Skyline Automobiles Inc.* transcend into the realm of callous violence.[127] The victim-plaintiff brought an action against her

---

A gender-queer individual is one who feels as if their gender does not conform with the societal norms associated with their biological sex. *Id.*

115. Sassafras Lowrey, *A Guide to Non-Binary Pronouns and Why They Matter*, HUFFPOST (Nov. 8, 2017, 10:08 AM), https://www.huffpost.com/entry/non-binary-pronouns-why-they-matter_b_5a03107be4b0230facb8419a. Genderqueer individuals choose from a variety of different pronouns, one such pronoun being "they." *Id.* The court references the plaintiff using "they" in *Fedcap Rehab. Servs.*, 2018 U.S. Dist. LEXIS 71174, at *1.

116. *Fedcap Rehab. Servs.*, 2018 U.S. Dist. LEXIS 71174, at *1-2.

117. Arthur S. Leonard, *Gay Judge Nixes Anonymity for Genderqueer Plaintiff*, GAYCITYNEWS.COM (May 10, 2018), https://www.gaycitynews.nyc/stories/2018/10/w30246-gay-judge-nixes-anonymity-genderqueer-plaintiff-2018-05-10.html.

118. *Fedcap Rehab. Servs.*, 2018 U.S. Dist. LEXIS 71174, at *2-4.

119. *Id.* at *9.

120. *Id.* at *6 ("[T]his is not the type of case in which the public interest would be especially harmed if Plaintiff proceeded pseudonymously.").

121. *Id.* at *8-9.

122. *Id.* at *9; Leonard, *supra* note 117.

123. Third Amended Complaint at 1, Newman-Scheel v. Fedcap Rehab. Servs., No. 17-CV-8220, 2018 BL 366771 (S.D.N.Y. Oct. 4, 2018).

124. 375 F. Supp. 3d 401, 401 (S.D.N.Y. 2019).

125. *Id.* at 403.

126. *Fedcap Rehab. Servs.*, 2018 U.S. Dist. LEXIS 71174, at *2 ("Plaintiff alleges that Defendants discriminated against Plaintiff based on Plaintiff's disability (breast cancer, depression, anxiety, and post-traumatic stress disorder), sexual orientation (queer), and gender (gender non-conforming/genderqueer/trans-masculine).").

127. *See Skyline Autos. Inc.*, 375 F. Supp. 3d at 404 (detailing how plaintiff was drugged and raped by her co-worker to the extent that she could not fight him off and eventually passed out during the assault).

employer alleging that she had been drugged and sexually assaulted by a co-worker while unconscious, had been subjected to incessant harassment at the workplace—despite its unwarranted and unwelcomed nature—and had ultimately been wrongfully terminated in retaliation to her complaints.[128]

Undeterred by the disquieting facts of the case, Judge Andrew L. Carter of the Southern District of New York,[129] in applying the *Sealed Plaintiff* factors,[130] did not grant the plaintiff's motion to proceed pseudonymously.[131] However, within the dicta of his decision, Judge Carter straightforwardly acknowledges that the desire to proceed pseudonymously is "understandable" and that the desire "is one that unfortunately prevents many victims of sexual violence from sharing their story and seeking justice for the harms inflicted upon them."[132] Similar sentiments have been shared by other Second Circuit judges who have denied attempts by victims of sexual misconduct to preserve their anonymity.[133] This demonstrates the notion that Second Circuit courts are bound by the harsh confines of the *Sealed Plaintiff* test with very little-to-no personalized wiggle room.[134] While it is ultimately in the hands of each individual judge to analyze and weigh the factors, the manner in which they perform such analyses is constrained by outdated precedent culminated well before the time of the #MeToo Movement—the Second Circuit continues to look through a lens with an outdated prescription.[135] Thus, there is a necessity for a reformulation of the twelve-year-old *Sealed Plaintiff* analysis in light of the recent prevalence of the #MeToo Movement.[136]

## III. THE PROBLEMATIC NATURE OF THE STANDARD CURRENTLY IN PLACE

In Part III, this Note discusses the severity of the problematic implications faced by victim-plaintiffs when forestalled from preserving

128. *Id.*
129. *Id.* at 403.
130. *Id.* at 405.
131. *Id.* at 408.
132. *Id.*
133. *See, e.g.*, Doe v. Gong Xi Fa Cai, Inc., 2019 U.S. Dist. LEXIS 114919, at *6 (S.D.N.Y. July 10, 2019) ("The Court is sympathetic to Plaintiff's request. The desire to shield oneself from the fear of public scrutiny concerning matters of sexual harassment and retaliation is understandable."); Doe v. Fedcap Rehab. Servs., No. 17-CV-8220, 2018 U.S. Dist. LEXIS 71174, at *9 (S.D.N.Y. Apr. 27, 2018) ("[T]he Court certainly believes Plaintiff that public disclosure of their trans-masculinity would be difficult and uncomfortable.").
134. *See infra* Part III.
135. *See infra* Part III.
136. *See infra* Part IV.

their anonymity in judicial proceedings.[137] Section A begins by contemplating the individual Constitutional right of access to justice that is eclipsed by the proscription of plaintiffs' requests to proceed pseudonymously.[138] The following Section proceeds by considering the steady increase in technological advancements within the judiciary and its resulting impact on the speed and spread of information—specifically, the dissemination of a claimant's identity.[139] Beyond this point, Section C examines the direct conflict between the overarching theme motivating the #MeToo Movement and the Second Circuit's rationale in limiting the forward motion of actions brought by anonymous parties.[140] Subsequently, this Part concludes by concentrating on the uniquely intricate disposition of sexual misconduct survivors, which warrants special consideration by the court.[141]

### *A. Obstruction of Victims' Access to Justice*

When victims of sexual misconduct are prohibited to proceed pseudonymously, these victims are at risk of constructively losing their right to seek redress through the judicial system.[142] It is a constitutionally-promised individual right for American citizens to have access to the United States court system in search of reparation and to have all meritorious claims heard by the judiciary.[143] There is no provision nor amendment to the Constitution that explicitly articulates this right;[144] rather, this foundational liberty has been recognized as encompassed within the penumbrae of a multitude of constitutional amendments, and, in some cases, has been acknowledged without reference to any one specific constitutional provision at all.[145]

When viewed through the lens of the First Amendment,[146] the right of access to the jurisprudential system is considered a fundamental constitutional liberty,[147] located within the broader scope of the

137. *See infra* Part III.A–Part III.D.

138. *See infra* Part III.A.

139. *See infra* Part III.B.

140. *See infra* Part III.C.

141. *See infra* Part III.D.

142. Mulvaney & Kanu, *supra* note 24 ("When courts decide to unmask a plaintiff or a company pushes back, the employer could then have greater leverage to force the plaintiff to drop or settle the case . . . .").

143. Steinman, *supra* note 26, at 33-34, 33 n.145.

144. *Id.* at 33 n.145.

145. *See id.* (discussing the scopes of the First, Fifth, and Fourteenth Amendments, each encompassing the right to have claims adjudicated by the court).

146. U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

147. *Fundamental Right: Overview*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/fundamental_right (last visited July 10, 2020) (defining "fundamental right" as one that requires a "high[er] degree of protection from government

individual right to petition.[148] Justice O'Connor, writing for the Supreme Court in *BE&K Construction Co. v. NLRB*,[149] some two hundred years after the First Amendment was ratified, reaffirmed the modern significance of the First Amendment right to petition.[150] The Court recognized the right to petition as inclusive of the right to bring a legal claim in a court of law,[151] further elaborating that "[t]he right to petition is one of the most precious liberties safeguarded by the Bill of Rights."[152] Thus, when one's ability to take legal action against another becomes eclipsed, a constitutionally-protected, and perhaps fundamental, right is implicated.[153]

Accompanying the clear constitutional ramifications associated with denying a party the opportunity to proceed pseudonymously is the devastating effect of discouraging individuals from bringing suit in the first place.[154] This not only negatively impacts those persons who would have brought legal action save the court's prohibition to proceed pseudonymously,[155] but it also negatively impacts the public.[156] When the judicial system prevents an excessive number of vulnerable parties from maintaining their anonymity, it is probable that the general public will begin losing faith in the legal system and, consequently, the amount of people who decide to take legal action will steadily decline.[157]

These are exactly the repercussions threatened when a victim of sexual misconduct is denied the opportunity to maintain her anonymity throughout the judicial proceedings against her aggressor.[158] While these arguments are admittedly not exclusive to victims of sexual misconduct—as all parties who are proscribed from preserving their anonymity experience such a potential impediment on their right to

---

encroachment" than other rights provided for within the Constitution and explaining that such fundamental rights are "specifically identified in the Constitution (especially in the Bill of Rights)").

148. *See* U.S. CONST. amend. I; Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1791-93 (2017) (discussing modern Supreme Court precedent supporting the notion that "lawsuits are petitions that trigger special First Amendment protection in the form of a remedial right"); *see also* Adam Newton, *Right to Sue*, FREEDOM F. INST. (Sept. 16, 2002), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-petition/right-to-sue (explaining that "[t]he right to petition the government for redress of grievances includes a right to file suit in a court of law").

149. 536 U.S. 516 (2002).

150. *Id.* at 517; *Bill of Rights of the United States of America (1791)*, BILL RTS. INST., https://billofrightsinstitute.org/founding-documents/bill-of-rights (last visited July 10, 2020).

151. *See* Newton, *supra* note 148.

152. *BE&K Constr. Co.*, 536 U.S. at 517.

153. *See supra* notes 146-49 and accompanying text.

154. Ressler, *supra* note 44, at 825-26.

155. *Id.* at 825.

156. *Id.*

157. *See id.*

158. Steinman, *supra* note 26, at 33-34 (explaining that the notion of presenting individuals that wish to proceed pseudonymously with an ultimatum of proceeding under their true identities or not proceeding at all interferes with the constitutionally-protected right to access the court system).

access the courts[159]—the sociopolitical climate in which the country currently basks makes the impacts of such denials far more distressing.[160]

### B. *Technological Advancements and Their Impacts on Dissemination of Information*

The advent of electronic filing, coupled with the modern social media boom, has cultivated a world of instantaneous, widespread dissemination of information regarding judicial proceedings[161]—something which was not of particular concern in 2008 when *Sealed Plaintiff* was decided by the Second Circuit.[162] Throughout the country, on both state[163] and federal[164] levels, electronic filing has been steadily ascending to popularity since its inception over twenty years ago.[165] Although the prominence of electronic filing was appreciable in 2008,[166] this technological tool has become increasingly user-friendly throughout the past decade, such that electronic filing and access to court documents has become essentially universal.[167]

As for the social media realm in 2008, Myspace and Facebook were the sole lead innovators,[168] with Twitter only beginning to rise to

159. *See id.* (discussing plaintiffs who wish to proceed anonymously as a whole rather than homing in on victims of sexual misconduct who wish to proceed anonymously).

160. *See supra* Part II.A.

161. *See supra* note 44 and accompanying text; Jodi Kantor, *Lawsuits' Lurid Details Draw an Online Crowd*, N.Y. TIMES, Feb. 23, 2015, at A1 (discussing the increased public exposure of lawsuits since the adaption of electronic filing throughout the judiciary of the U.S.).

162. *See* Kantor, *supra* note 161, at A1 ("'I don't think any of us had any idea what the words "going viral" meant when we rolled [electronic filing] out 10 or 12 years ago,' said James Robertson, a retired federal judge in Washington who helped guide the introduction of the federal electronic filing system."); *see also infra* notes 168-70.

163. *See 2019 State Court E-Filing Program Status List*, NAT'L CTR. FOR ST. CTS.: CT. TECH. BULL. (Aug. 16, 2019), https://courttechbulletin.blogspot.com/2019/08/2019-state-court-e-filing-program.html [hereinafter *2019 State Court E-Filing Program Status List*] (providing a list of the current electronic filing procedures for all fifty states—aside from Oklahoma—and highlighting the strides made since its previous accounting just three years prior in 2016).

164. *See 25 Years Later, PACER, Electronic Filing Continue to Change Courts*, U.S. CTS. (Dec. 9, 2013), https://www.uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-court (discussing the developments in the federal electronic filing system since its inception).

165. *Id.* (noting that the federal electronic filing system was created in the late 1990s).

166. *Id.* (explaining that by 2007, electronic filing was "nearly universal" on the federal level).

167. *Id.* (concluding that the federal electronic filing system has shown "strong and growing user satisfaction" pursuant to 2009 and 2012 surveys and, as of 2013, the central goal of the future was to make electronic filing more "moderniz[ed]" and "user-friendly"). For a review of the universality of electronic filing in the state court system, see *2019 State Court E-Filing Program Status List*, *supra* note 163.

168. Adam Ostrow, *The Top 20 Social Networks of 2008*, MASHABLE (Jan. 23, 2009), https://mashable.com/2009/01/23/most-popular-social-networks-2008; *see also* Gil Press, *Why Facebook Triumphed Over All Other Social Networks*, FORBES (Apr. 8, 2018, 4:11 PM), https://www.forbes.com/sites/gilpress/2018/04/08/why-facebook-triumphed-over-all-other-social-networks/#2ca1e0066e91.

popularity that year,[169] and Instagram, Snapchat, and other popular social media applications of today still years away from fruition.[170] In juxtaposition, there are currently over one-hundred popularized social networking sites and counting,[171] with seventy-nine percent of the United States population being users of such platforms.[172] The exponential growth of social media usership over the past decade since the Second Circuit decided *Sealed Plaintiff* is essential in the consideration of the exposure and circulation of litigants' identities and the associated public shaming that accompanies it.[173]

Public shaming is not a recent phenomenon, but is rather deeply rooted in anthropologic history, dating back to preagricultural times.[174] However, the matter and means of public shaming have greatly evolved throughout the past hundreds of years.[175] From the use of public stocks in colonial America to the adoption of the dunce cap by schools during the Victorian era, shaming remained a viable punishment technique until its steady decline in the twentieth century.[176] Public shame began to rise in popularity again, concurrent with the advent of the Internet, in the late twentieth century.[177] Now, modern public shaming takes its form predominantly through online activity,[178] specifically by way of social

169. Robin Bloor, *The 10 Most Important Technology Developments of 2008*, SEEKING ALPHA (Dec. 31, 2008, 2:55 AM), https://seekingalpha.com/article/112710-the-10-most-important-technology-developments-of-2008; Ostrow, *supra* note 168.

170. *See* Christopher McFadden, *A Chronological History of Social Media*, INTERESTING ENGINEERING (Oct. 16, 2018), https://interestingengineering.com/a-chronological-history-of-social-media (illustrating a timeline of the development and popularization of modern social media).

171. Gagan Mehra, *105 Leading Social Networks Worldwide*, PRAC. ECOMMERCE (Sept. 27, 2017), https://www.practicalecommerce.com/105-leading-social-networks-worldwide (compiling a list of all the leading English-language social networks as of 2017).

172. *Social Media Fact Sheet*, PEW RES. CTR. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/social-media (reporting that only about twenty-six percent of American adults used social media in 2008 while approximately seventy-two percent use social media sites in 2019).

173. *See* Ressler, *supra* note 44, at 801-08 (discussing the irritative effects of social media on public shaming as they relate to parties who wish to remain anonymous). For a discussion regarding the increase in the use of social media for individual newsgathering, see also Peter Suciu, *More Americans Are Getting Their News from Social Media*, FORBES (Oct. 11, 2019, 10:35 AM), https://www.forbes.com/sites/petersuciu/2019/10/11/more-americans-are-getting-their-news-from-social-media/#796d5df3e179.

174. PETER N. STEARNS, SHAME: A BRIEF HISTORY 13-14 (Susan J. Matt & Peter N. Stearns eds., 2017) (explaining that public shaming originated in "the earliest forms of human society"—as early as the hunter-gatherer era).

175. Peter Stearns, *A History of Shaming in America and Its Modern Revival*, BREWMINATE (Nov. 6, 2017), https://brewminate.com/a-history-of-shaming-in-america-and-its-modern-revival.

176. *See id.*; *see also* Eric Grundhauser, *The Dunce Cap Wasn't Always So Stupid*, ATLAS OBSCURA (Sept. 10, 2015), https://www.atlasobscura.com/articles/the-dunce-cap-wasnt-always-so-stupid.

177. Stearns, *supra* note 175; *see also* McFadden, *supra* note 170 (chronicling the rise of social media and explaining that the first email was sent in 1971).

178. Farah Mohammed, *The Danger of Public Shaming in the Internet Age*, JSTOR DAILY (Jan. 25, 2018), https://daily.jstor.org/the-danger-of-public-shaming-in-the-internet-age.

media outlets.[179] The modern #MeToo Movement was born from, and is currently reliant on, the popular use of social media public shaming tactics to expose aggressors of sexual misconduct.[180] Although the vast majority of social media shaming is done unto the assailants, there exists inevitable, marked backlash toward those victims of sexual misconduct brave enough to come forward.[181]

A quintessential example of this resistance comes from the case of Jamie Marchi.[182] Ms. Marchi is a famed voice actress who starred in a variety of animated films,[183] specifically those in the anime genre.[184] As a result of her prominence within the anime community, Ms. Marchi frequently worked closely with Victor Mignogna, another renowned voice actor in the universe of anime film.[185] Eight years after working on a project together, Ms. Marchi publicly accused[186] Mr. Mignogna of engaging in sexual misconduct toward her.[187] While Ms. Marchi was somewhat welcomed by the virtual community when she came forward, she was also met with quite a fiery display of public defiance.[188] The

179. *See* Russell Blackford, *The Shame of Public Shaming*, CONVERSATION (May 3, 2016, 1:08 PM), http://theconversation.com/the-shame-of-public-shaming-57584 (discussing the correlation between the social media boom and the popularization of new methods of shaming); Stearns, *supra* note 175 ("[S]ocial media ha[s] unleashed a torrent of hatred, with fat-shaming and accusations of sexual impropriety, hypocrisy and racism flooding social networks.").

180. Alexandra Schwartz, *#MeToo, #ItWasMe, and the Post-Weinstein Megaphone of Social Media*, NEW YORKER (Oct. 19, 2017), https://www.newyorker.com/culture/cultural-comment/metoo-itwasme-and-the-post-weinstein-megaphone-of-social-media (examining the social media boom that has initiated and grown in conjunction with the widespread public exposure of assailants of sexual misconduct); *see also supra* notes 69-74 and accompanying text.

181. Tim Bower, *The #MeToo Backlash*, HARV. BUS. REV., https://hbr.org/2019/09/the-metoo-backlash (last visited July 10, 2020); Yuki Noguchi, *For Many #MeToo Accusers, Speaking Up Is Just the Beginning*, NPR (Nov. 5, 2019, 7:14 AM), https://www.npr.org/2019/11/05/772223109/for-many-metoo-accusers-speaking-up-is-just-the-beginning; *see infra* notes 182-99 and accompanying text; *see also, e.g.*, Andrew Sullivan, *It's Time to Resist the Excesses of #MeToo*, N.Y. MAG.: INTELLIGENCER (Jan. 12, 2018), http://nymag.com/intelligencer/2018/01/andrew-sullivan-time-to-resist-excesses-of-metoo.html (describing the #MeToo movement as the "act of anonymously disseminating serious allegations about people's sex lives as a means to destroy their careers and livelihoods" and comparing this such activity to the McCarthyism movement of the 1950s).

182. Noguchi, *supra* note 181.

183. *Jamie Marchi*, ANIMENEWSNETWORK, https://www.animenewsnetwork.com/encyclopedia/people.php?id=13966 (last visited July 10, 2020).

184. Noguchi, *supra* note 181.

185. *Vic Mignogna*, IMDB, https://www.imdb.com/name/nm0586003 (last visited July 10, 2020); *see also* Sharon Grigsby, *Anime Voice Actor Vic Mignogna Loses Big as Judge Drops Final Claims That Dallas-Area Studio and Colleagues Defamed Him*, DALL. MORNING NEWS (Oct. 4, 2019, 12:55 PM), https://www.dallasnews.com/opinion/commentary/2019/10/04/anime-voice-actor-vic-mignogna-loses-big-judge-drops-final-claims-dallas-area-studio-colleagues-defamed (implying that Mr. Mignogna is best known for his role in the Dragon Ball films).

186. Noguchi, *supra* note 181 (detailing that Ms. Marchi took to Twitter to tell her #MeToo story).

187. *Id.* (explaining how Mr. Mignogna pulled Ms. Marchi's hair and harassed her, as he did to a multitude of other women).

188. *See, e.g.*, Grigsby, *supra* note 185 (defining "[t]he split in the anime community over who are the villains and who are the victims" as the case developed).

anime community quickly became divided, and those who supported Mr. Mignogna began utilizing derogatory hashtags including, but not limited to, #IStandWithVic and #KickJamieMarchi.[189] Not only was Ms. Marchi publicly shamed for her accusations, but she was also sued by both her aggressor, Mr. Mignogna, as well as one of his supporters.[190] Although all of Mr. Mignogna's seventeen claims against his accusers and his employer have presently been dismissed,[191] Ms. Marchi is now left with the residual financial and emotional aftermath.[192]

In the fiscal sense, in addition to retaining attorneys to defend her in court, Ms. Marchi has lost a staggering amount of work as a result of the proliferation of events following her #MeToo revelation.[193] Ms. Marchi has described the resistant treatment and harassment that she has endured as "unrelenting."[194] The transgressions range from a photo of her home being posted online to her fiancé's children's names being exposed, and even escalate as far as death threats.[195] Regardless of the fact that the legal battle has come to a conclusion, the war waged against Ms. Marchi as a result of the publicization of the sexual misconduct committed unto her is far from over.[196]

An interesting and important point in Ms. Marchi's story is the fact that she never sought to initiate legal action against Mr. Mignogna.[197] Although Ms. Marchi voluntarily thrust herself into the subjection of the public eye through her participation in the #MeToo Movement, the repercussions she faced were unwarranted and unexpected.[198] Unfortunately, resistance against those victims of sexual misconduct brave enough to speak out, akin to that which was targeted at Ms.

---

189. *See id.*; #KickJamieMarchi Hashtag, TWITTER, https://twitter.com/hashtag/kickjamiemarchi?lang=en (last visited July 10, 2020); #IStandWithVic Hashtag, TWITTER, https://twitter.com/search?q=%23istandwithvic&src=typd&lang=en (last visited July 10, 2020).

190. Grigsby, *supra* note 185 (explaining that Mr. Mignogna's legal claims against Ms. Marchi and other women who spoke out against him included defamation, tortious interference, and conspiracy); *see* Noguchi, *supra* note 181 (describing how one of Mr. Magnogna's fans "even raised funds for a defamation suit, going on YouTube to attack Marchi"). For a discussion of why the legal threats of Mr. Mignogna's fans proved unsuccessful, see Meredith Rose, *Anime Trolls Tried to Silence a #MeToo Campaign with Legal Threats—and Got Shut Down Hard*, VERGE (Sept. 18, 2019, 10:52 AM), https://www.theverge.com/2019/9/18/20870541/vic-mignogna-metoo-accusations-defamation-lawsuit-anti-slapp-laws.

191. Grigsby, *supra* note 185.

192. Noguchi, *supra* note 181.

193. *Id.*

194. *Id.*

195. *Id.*

196. Samantha Borek, *Amid Anime's #MeToo Moment, Right-Wing Fans Are Attacking Survivors*, TRUTHOUT (Oct. 9, 2019), https://truthout.org/articles/amid-animes-metoo-moment-right-wing-fans-are-attacking-survivors (highlighting and depicting the continuing public backlash felt by Mr. Mignogna's victims despite the dismissal of his claims against them).

197. Noguchi, *supra* note 181.

198. *Id.* (describing that the most shocking repercussion of speaking out against her aggressor was "the vehement backlash from those who aren't even involved in the case").

Marchi, is not uncommon in wake of the #MeToo Movement.[199] Thus, in the midst of the Information Age, it is necessary to provide victims of sexual assault, who wish to come forward and initiate legal action against their aggressors, with the proper procedural protectorates.[200]

It is all too simple—and all too common[201]—in the world, as it is today, to hide behind a computer screen and use the Internet to destroy a person's life.[202] Unfortunately, the current analysis for determining when a party may proceed pseudonymously does not adequately shield victim-plaintiffs from such persecution; instead, it subjects such vulnerable individuals to endless, damaging online harassment as a result of the exposure of their true identities.[203] One who could have proceeded safely against her aggressor as Jane Doe—shielding herself from the possibility of future harm through personalized harassment—is likely to be given the ultimatum of going forward using her real name or dropping her claim altogether under the *Sealed Plaintiff* analysis.[204] This, in effect, presents an ultimatum of subjection to potential retaliation or surrender of legal action—a wholly inequitable choice for a victim-plaintiff to have to make,[205] and one that is in blunt contradiction to the central purpose of the #MeToo Movement.[206]

### C. *Direct Conflict with the #MeToo Movement*

While the #MeToo Movement is rooted in the idea of victims standing up to their aggressors,[207] the *Sealed Plaintiff* standard continues to shield victims from safely taking legal action against their

199. Nanette Asimov, *#MeToo Movement Spurs #HimToo Backlash: 'People Don't Want to Believe'*, S.F. CHRON. (Oct. 13, 2018, 4:23 PM), https://www.sfchronicle.com/nation/article/MeToo-movement-spurs-HimToo-backlash-People-13304270.php (emphasizing that Christine Blasey Ford, the woman who testified against Supreme Court Justice Brett Kavanagh regarding a past incident of sexual misconduct at his confirmation hearing, was forced to move out of her home as a result of the receival of multiple death threats *prior* to her testifying); *see* Sui-Lee Wee and Li Yuan, *They Said #MeToo. Now They Are Being Sued.*, N.Y. TIMES (Dec. 26, 2019), https://www.nytimes.com/2019/12/26/business/china-sexual-harassment-metoo.html (discussing the worldwide reach of the phenomenon of women speaking out against their aggressors in wake of the #MeToo Movement and, in retaliation, being sued for defamation by their aggressors).

200. *See infra* Part IV.

201. Maeve Duggan, *Online Harassment 2017*, PEW RES. CTR. (July 11, 2017), https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017 ("[N]early one-in-five Americans (18%) have been subjected to particularly severe forms of harassment online, such as physical threats, harassment over a sustained period, sexual harassment or stalking.").

202. *See, e.g.*, Sara Ashley O'Brien, *One Tweet Ruined Her Life*, CNN BUS. (Mar. 16, 2016, 1:43 PM), https://money.cnn.com/2016/03/16/technology/syfy-the-internet-ruined-my-life-gamergate-brianna-wu/index.html.

203. *See supra* notes 198-201 and accompanying text.

204. *See supra* Part III.A; *see infra* Part IV.A.

205. *See supra* Part III.A.

206. *See infra* Part III.C.

207. Lakritz, *supra* note 46; *see supra* notes 73-74 and accompanying text.

assailants.[208] To reiterate, the central purpose of the #MeToo Movement is to foster an informed, socially-aware society in which victims of sexual assault feel sufficiently comfortable to expose and take action against their aggressors.[209] If victims are unable to preserve their anonymity throughout the judicial process, the momentum gained throughout the past few years is at risk of regression.[210] After all, although exposure in the media is the driving force behind the #MeToo Movement,[211] the general sense of closure that arises from successfully bringing legal action against the aggressors of sexual misconduct is also an integral component.[212]

This is problematic in a multitude of ways; to begin, if victims have no choice but to proceed under their true identities, the public shame, which such individuals become subject to effectively "regulate[s] behavior" moreso than more traditional methods.[213] Thus, the public backlash that is likely to accompany an isolated plaintiff as she takes legal action against her leveraged aggressor is capable of spurring a chain reaction.[214] If a victim of sexual misconduct exists in a world in which fellow victims are met with disapproval, this will serve as a natural deterrent from speaking out.[215] And if societal norms are shaped by public shame—as they often are[216]—there creates a high risk of a reversion of public opinion to the way it was prior to the #MeToo

208. *See supra* note 24 and accompanying text.

209. *See supra* Part II.A.

210. *See* Catharine A. MacKinnon, *Where #MeToo Came from, and Where It's Going*, ATLANTIC (Mar. 24, 2019), https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313 (discussing the evolution in sexual harassment law and the associated stigmas).

211. *Id.*

212. Andrew Dalton, *#MeToo Movement Sends Hollywood Figures into Exile, Not Jail*, ASSOCIATED PRESS (Oct. 6, 2018), https://www.apnews.com/f89d2ab1b59c48d4b9c3ae0d7a41d0bc (describing how Melissa Schuman, who was a victim of Nick Carter's alleged misconduct, did not feel a sense of closure due to the fact that the case against her aggressor was rejected because of the expiration of the statute of limitations).

213. Elizabeth L. Rosenblatt, *Fear and Loathing: Shame, Shaming, and Intellectual Property*, 63 DEPAUL L. REV. 1, 3 (2013). "As regulatory mechanisms, shame and shaming have a number of significant benefits, even as compared with formal law: they are more democratizing, more flexible, and sometimes more effective at governing behavior." *Id.* at 31.

214. *See* Ressler, *supra* note 44, at 789-90 (providing an example of the detrimental impact that widespread public shaming can cause); *supra* Part III.B.

215. *See* Ressler, *supra* note 44, at 791.

> To be clear, shaming can still play an important function in demonstrating societal reaction to specific litigation. However, its part should be in the form of a response to an anonymous plaintiff's lawsuit instead of as potential deterrent to a named plaintiff. That way the public would be free to express its views on lawsuits, thereby imparting normative societal values and potentially inspiring change, while simultaneously permitting rightsholders to vindicate their rights.

*Id.*

216. *See id.* at 803 ("[D]ue to groupthink—or 'hive mind' in internet parlance—an insult a single commenter lobs can result in a never-ending cascade of threats, name-calling, ridicule, and vitriolic harassment.").

Movement.[217] This may be explained by the "spiral of silence" phenomenon.[218]

The "spiral of silence" phenomenon is the theory that dissenters to a popular, majority opinion are more likely to suppress their unpopular thoughts for fear of ostracization.[219] Despite predictions that social media platforms would provide a multitude of sufficiently diverse discussion environments such that those with minority views may feel more open to express their thoughts, this has proven *not* to be the case.[220] In fact, if social media users believe their friends and followers disagree with their opinions, they are *less* likely to state their views on the topic.[221] Therefore, if a victim-plaintiff is too fearful of the public exposure that may ensue following the initiation of a lawsuit under her own name—safely assuming that her motion to proceed pseudonymously has been denied—the result will be a significant decline in silence breakers,[222] who would succumb to the spiral of silence, and, implicitly, a reversion to the stigmatization of victims of sexual misconduct.[223]

### *D. Exacerbation of Pre-Existing Harm*

Sexual misconduct does not only harm the victim in the midst of the incident; the experience is shown to have lasting physical, mental, and emotional health impacts on the victim long afterward.[224] With eighty-one percent of women and forty-three percent of men having

---

217. MacKinnon, *supra* note 210 (explaining that "[u]ntil #MeToo, perpetrators could reasonably count on their denials being credited and their accusers being devalued to shield their actions").

218. *Social Media, Groupthink and the Spiral of Silence*, FOX BUS. (Aug. 28, 2014), https://www.foxbusiness.com/features/social-media-groupthink-and-the-spiral-of-silence.

219. *Id.*

220. Keith Hampton et al., *Social Media and the 'Spiral of Silence'*, PEW RES. CTR. (Aug. 26, 2014), https://www.pewresearch.org/internet/2014/08/26/social-media-and-the-spiral-of-silence. In a study conducted by the Pew Research Center, a group of adults were polled about their opinions regarding Edward Snowden's 2013 release of widespread government surveillance of Americans. *Id.* This issue was selected due to the general split in opinion on the topic (for example, another study performed by the Pew Research Center showed that forty-nine percent of people believed the release of information was beneficial to public interest and forty-four percent believed it was harmful to the public). *Id.* The study showed that social media did not provide an alternative outlet for "those who might otherwise remain silent to express their opinions and debate issues." *Id.*

221. *Id.*

222. *See* Zacharek et al., *supra* note 67.

223. *See supra* notes 214-20 and accompanying text.

224. *See Effects of Sexual Violence*, RAINN, https://www.rainn.org/effects-sexual-violence (last visited July 10, 2020) (discussing the most common physical, psychological, and emotional health implications of sexual violence on survivors); Nicole Spector, *The Hidden Health Effects of Sexual Harassment*, NBC: BETTER (Oct. 13, 2017, 11:14 AM), https://www.nbcnews.com/better/health/hidden-health-effects-sexual-harassment-ncna810416 ("[S]exual harassment can wreak havoc on its victims, and can cause not only mental health issues, but physical effects as well.").

experienced some form of sexual harassment throughout their lifetimes, a vast expanse of the American population remains vulnerable to such lasting comorbid effects.[225] Although the consequences of sexual assault are often rather convoluted and difficult to measure,[226] a variety of sources agree that there is a long laundry list of implications that originate from an incidence of sexual misconduct.[227] Such comorbidities range from headaches and nightmares to clinical psychological impacts including, but not limited to, anxiety, depression, and Post-Traumatic Stress Disorder ("PTSD").[228] A recent study examining women who were sexually assaulted in adulthood reports that between seventeen and sixty-five percent of the victims exhibited symptoms of PTSD, while seventy-three to eighty-two percent developed fear and/or anxiety, and another thirteen to fifty-one percent met diagnostic criteria for depression.[229]

While *all* negative ramifications of sexual misconduct are to be taken seriously, PTSD tends to imprint survivors with a unique vulnerability: re-experiencing.[230] Re-experiencing is when an individual feels as if she is reliving the trauma through manifestations such as flashbacks, dreams, or intrusive thoughts.[231] While re-experiencing is a common symptom of PTSD, one need not be diagnosed with PTSD to have bouts of re-experience,[232] as they are often regularly onset by

225. Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018, 7:43 PM), https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment.

226. *Understanding Sexual Assault: Consequences*, INSTITUT NAT'L DE SANTÉ PUBLIQUE QUÉBEC, https://www.inspq.qc.ca/en/sexual-assault/understanding-sexual-assault/consequences (last visited July 10, 2020).

227. *Sexual Harassment*, RAINN, https://www.rainn.org/articles/sexual-harassment (last visited July 10, 2020) [hereinafter *Sexual Harassment*]. *See generally The Effects of Sexual Assault*, *supra* note 40.

228. *Sexual Harassment*, *supra* note 227; *The Effects of Sexual Assault*, *supra* note 40.

229. Rebecca Campbell et al., *An Ecological Model of the Impact of Sexual Assault on Women's Mental Health*, 10 TRAUMA, VIOLENCE, & ABUSE (SPECIAL ISSUE PART I) 225, 225-26 (2009).

230. *Post-Traumatic Stress Disorder*, RAINN, https://www.rainn.org/articles/post-traumatic-stress-disorder (last visited July 10, 2020) [hereinafter *Post-Traumatic Stress Disorder*] (describing that one of the major symptoms of PTSD is re-experiencing); *see also* Rachael Rettner, *6 Ways Sexual Harassment Damages Women's Health*, LIVESCIENCE (Nov. 9, 2011), https://www.livescience.com/16949-sexual-harassment-health-effects.html (highlighting the vulnerability of women following sexual harassment by providing that "women in the military who are sexually harassed are up to four times as likely to develop PTSD as women exposed to a traumatic event in combat").

231. *Post-Traumatic Stress Disorder*, *supra* note 230.

232. Matthew Tull, *Types of Re-Experiences in PTSD*, VERYWELLMIND (Oct. 21, 2019), https://www.verywellmind.com/re-experiencing-2797325. It is important to note that the diagnosis of PTSD requires the presentation of a multitude of symptoms that not all victims of sexual misconduct may present with; however, this does not preclude the victim from validly enduring spells of re-experience. *See id.*; *Battling PTSD Triggers: The Effects of Sexual Assault*, RANCH TENN. (Feb. 26, 2017), https://www.recoveryranch.com/addiction-blog/battling-ptsd-triggers-

particular triggers.[233] Re-experience is almost exclusively prompted through exposure to triggers,[234] allowing for some level of predictability of when the symptom may ensue.[235]

Although the most effective way to cope with triggers is to avoid them completely, sometimes this proves impractical, as in the event of taking legal action against aggressors of sexual misconduct.[236] Because the requisite proceedings of a civil trial involve repeated retellings of the facts of the case at issue, a victim-plaintiff susceptible to re-experience must willingly subject herself to some risk of exposure to triggers when deciding to pursue legal action at the outset.[237] However, by remaining anonymous, the trigger risk to the victim-plaintiff is contained within the four walls of the courtroom.[238] With the already significant amount of damage felt by the victim-plaintiff through the judicial proceedings, a victim-plaintiff should not be subjected to further triggers of re-experience that may result from public exposure.[239]

## IV. AN ALTERNATIVE STANDARD ACCOMMODATING THE MODERN ERA

The solution to the issues presented is a modification of the pre-existing balancing test currently used by the Second Circuit to

---

effects-sexual-assault.

233. Matthew Tull, *How to Identify and Cope with Your PTSD Triggers*, VERYWELLMIND, https://www.verywellmind.com/ptsd-triggers-and-coping-strategies-2797557 (last updated Sept. 3, 2019); *Battling PTSD Triggers: The Effects of Sexual Assault*, *supra* note 232 (defining a PTSD trigger to be "anything that causes a person with post-traumatic stress disorder to experience a flare-up of symptoms").

234. Tull, *supra* note 233. An internal trigger, evident in its name, is one which is felt within the body while an external trigger is one which is experienced or encountered outside the body. *Id.* Examples of internal triggers are feeling vulnerable, feeling anxious, and thinking about past memories. *Id.* Examples of external triggers include exposure to media reminiscent of the trauma, exposure to someone who reminds you of the trauma, and the anniversary of a date. *Id.*

235. *Id.*

236. *See* Michael Kaliszewski, *How to Avoid the Triggers of PTSD*, AM. ADDICTION CTRS. (Feb. 19, 2020), https://americanaddictioncenters.org/how-to-avoid-the-triggers-of-ptsd.

237. *Battling PTSD Triggers: The Effects of Sexual Assault*, *supra* note 232. Hearing words, phrases, or sounds—as well as seeing images—that are reminiscent of the trauma are examples of triggers felt by survivors of sexual assault. *Id.* Such actions are virtually unavoidable in the proceedings surrounding a civil lawsuit. Deborah Smith, *Trauma and State Courts*, TRENDS ST. CTS., https://www.ncsc.org/microsites/trends/home/Monthly-Trends-Articles/2018/Trauma-and-State-Courts.aspx (last visited July 10, 2020) (explaining the exacerbation of trauma through the processes of the judiciary).

238. *See* Ressler, *supra* note 44, at 793-96 (discussing the "public scorn, threats, and ridicule" with which plaintiffs who have proceeded under their real names have been met).

239. *See* Doe v. Del Rio, 241 F.R.D. 154, 161-62 (S.D.N.Y. 2006). In comparing the case at bar in *Del Rio* to a previous case, *Doe v. Smith*, 105 F. Supp. 2d 40 (E.D.N.Y. 1999), the court recognizes that although psychological harm fulfills the type of injury required by the Second Circuit standard, a victim-plaintiff must prove that public exposure leaves her susceptible to psychological harm that is unique to the accompanying court proceedings. *Del Rio*, 241 F.R.D. at 161-62.

decide motions to proceed anonymously.[240] The reformed test will be triggered exclusively in cases involving sexual misconduct and will consider the interests of the victim-plaintiff in light of the exceptional trauma she has faced.[241] Although the longstanding theme of judicial openness theoretically precludes such a liberalized standard, the foundation upon which the premise of judicial openness was built is now rather antiquated.[242] The largest hoop for this alternative standard to clear is the negative implications that the proposed standard may have on the opposing party—an issue that will be rebutted within Section B.[243]

### *A. Proposed Changes to the Current Analysis*

Because the standard for deciding motions to proceed pseudonymously has prevented a great deal of vulnerable victims of sexual misconduct from safely bringing a claim against their assailants,[244] a new standard must be implemented—one which alters the factors to be weighed and shifts the burdens of proof.[245] There are currently ten factors considered by the Second Circuit in deciding motions to proceed anonymously, and the burden of proving such factors is placed solely on the plaintiff.[246] A specialized balancing test, for application *exclusively* in causes of action relating to sexual misconduct, would eliminate the onerous requirement for victim-plaintiffs to persuade the court on such a laundry list of items.[247] Instead, a plaintiff would only be required to prove (1) risk of "retaliatory physical or mental, [which includes emotional, psychological, and social,] harm" and (2) the extent to which her "identity has thus far been kept confidential."[248] If a plaintiff were to prove successful on these ends, the burden would then shift to the defendant to rebut the presumption of anonymity due to either (1) prejudice felt by allowing the plaintiff to

240. *See supra* Part II.C.
241. *See infra* Part IV.A.
242. *See supra* Part III.A–B.
243. *See infra* Part IV.B.
244. *See supra* note 24 and accompanying text.
245. *See supra* Part II.C.
246. *See supra* note 36.
247. *See* Doe v. Smith, No. 19-CV-1121, 2019 U.S. Dist. LEXIS 205707, at *1 (N.D.N.Y. Nov. 27, 2019) (quoting Doe v. Colgate Univ., No. 15-cv-1069, 2016 U.S. Dist. LEXIS 48787, at *2 (N.D.N.Y. Apr. 12, 2016)) (explaining that "[a] party seeking to proceed under pseudonym bears a heavy burden"). For an iteration of the problematic implications of preventing a victim of sexual harassment from proceeding pseudonymously, see *supra* Part III.
248. *See* Sealed Plaintiff v. Sealed Defendant # 1, 537 F.3d 185, 190 (2d Cir. 2008). Note that the language here is mirrored—with slight, yet important, adjustments—from that articulated by the Second Circuit in drafting the *Sealed Plaintiff* factors. *Id.* ("[W]hether identification poses a risk of retaliatory physical or mental harm to the . . . party[, and] . . . whether the plaintiff's identity has thus far been kept confidential . . . .").

proceed anonymously,[249] or (2) the uncompromisable advancement of the public interest in the plaintiff proceeding under her actual identity.[250] This reconfigured test would streamline the requisite information necessary for a victim-plaintiff to successfully fulfill her burden to proceed anonymously, thus effectively making it easier for a victim of sexual misconduct to proceed under a false identity.[251]

Although each instance of sexual misconduct is highly individual and incomparable, when viewed through the lens of the general nature of the transgression, some of the factors considered in the *Sealed Plaintiff* test become trivial as they are so easily satisfied in sexual misconduct lawsuits.[252] Take the first factor, for example: "whether the litigation involves matters that are highly sensitive and [of a] personal nature."[253] This consideration is moot in its application to cases involving sexual misconduct as *all* litigation within this realm should be safely assumed to regard extremely personal and sensitive instances simply just by looking to the nature of the transgression.[254]

Similarly, due to the current sociocultural climate, proof of risk of retaliatory harm in sexual misconduct cases should be fulfilled by victim-plaintiffs with ease.[255] With the addition of the specific considerations to be taken into account when evaluating mental health, coupled with the pre-existing consideration of harm to physical health, the second factor of the *Sealed Plaintiff* test[256] becomes a lighter burden for the plaintiff to fulfill as it so conspicuously defines the wide array of potential injury encompassed by the test.[257] Because the #MeToo

249. Ressler, *supra* note 22, at 247-48 (discussing the harmful implications caused by exposure of the defendant's identity even if a lawsuit does not proceed to trial).

250. *See id.* at 213. Again, note the very close resemblance of the proposed factors to those of modern precedent. *Sealed Plaintiff*, 537 F.3d at 189-90.

251. *See supra* notes 247-48.

252. *See Survivor Stories*, RAINN, https://www.rainn.org/survivor-stories (last visited July 10, 2020) ("No one person's story is alike. No one survivor's experience is the same.").

253. *Sealed Plaintiff*, 537 F.3d at 190.

254. Doe v. Smith, No. 19-CV-1121, 2019 U.S. Dist. LEXIS 205707, at *3 (N.D.N.Y. Nov. 27, 2019). Although courts are currently split on whether allegations of sexual misconduct involve highly personal and sensitive matters, courts within the Second Circuit have answered this query in the affirmative. *See, e.g.*, *id.*; Doe v. Vassar Coll., No. 19-CV-09601, 2019 U.S. Dist. LEXIS 196933, at *4-5 (S.D.N.Y. Nov. 13, 2019) (holding that allegations of sexual harassment and assault are innately highly sensitive and of a personal nature). Other areas of law—The Federal Rules of Evidence, for example—support the notion that sexual offenses are highly sensitive and personal. *See, e.g.*, FED. R. EVID. 412 (limiting the scope of admissible evidence in sexual misconduct lawsuits to serve as a protectorate to the victim).

255. *See supra* Part III.B.

256. *Sealed Plaintiff*, 537 F.3d at 190 ("[W]hether identification poses a risk of retaliatory physical or mental harm to the . . . party [seeking to proceed anonymously] . . . .").

257. *See supra* Part III.B; Part III.D. Although the definition of mental health unquestionably includes social, emotional, and psychological well-being, each specific subcategory presents rather distinguishable issues; this fact may not be clear to the court, so the addition of the definition of mental health—a notoriously complex enigma—would help to ensure clarity. *See* Christopher Lane, *Why Is Mental Health So Difficult to Define?*, PSYCHOL. TODAY (June 5, 2016),

Movement has so eloquently spotlighted the great implications of sexual misconduct, a victim-plaintiff could fulfill this slightly-adjusted factor by pointing to global current events.[258] The same rationale extends to the fourth *Sealed Plaintiff* factor;[259] a victim-plaintiff is particularly vulnerable to the harms of disclosure as a product of her existence in the world today.[260] The consideration of age can only intensify the victim-plaintiff's already substantial vulnerability, as the Second Circuit considers it increasingly necessary to shield the true identities of children involved in sexual misconduct cases.[261]

The next factor to be proven by the victim-plaintiff in the proposed balancing test is the extent to which her identity has remained confidential.[262] This consideration remains unchanged from the court's original articulation in *Sealed Plaintiff*.[263] Although it is important for victims of sexual misconduct to be successful in their claims to proceed pseudonymously, this factor provides an appropriate check on the true motive of the victim-plaintiff in wishing to conceal her identity.[264] If the

---

https://www.psychologytoday.com/us/blog/side-effects/201606/why-is-mental-health-so-difficult-define; *What Is Mental Health?*, MENTALHEALTH.GOV, https://www.mentalhealth.gov/basics/what-is-mental-health (last updated Apr. 5, 2019); *see also* Doe v. Del Rio, 241 F.R.D. 154, 161 (S.D.N.Y. 2006) (elaborating that "psychological harm is a class of injury that could justify pseudonymous litigation").

258. *See, e.g.*, Doe v. Colgate Univ., No. 15-cv-1069, 2016 U.S. Dist. LEXIS 48787, at *6-7 (N.D.N.Y. Apr. 12, 2016). In a recent line of cases heard by courts within the Second Circuit concerning sexual misconduct on college campuses, parties have generally been permitted to proceed pseudonymously due to the significant media attention and scholarly commentary on the subject and, consequently, the public exposure and shame that such parties would garner. *Id.* Due to the widespread popularization of the #MeToo Movement, the same reasoning follows in permitting victim-plaintiffs to proceed anonymously in their legal actions against their aggressors. *See supra* Part III.B; Part III.D.

259. *Sealed Plaintiff*, 537 F.3d at 190 (outlining the fourth factor in the analysis as "[w]hether the plaintiff is particularly vulnerable to the possible harms of disclosure").

260. *See supra* Part III.B; *supra* note 44; *see also Del Rio*, 241 F.R.D. at 159-60.

> Historically, an exaggerated concern for female chastity and a regrettable inclination to blame the victim for sexual assaults, along with society's general respect for sexual privacy, have resulted in an atmosphere in which victims of sexual assault may experience shame or damage to reputation. It would be callous to pretend that this atmosphere has entirely dissipated, or to insist that victims of such assault lack privacy interests because most people today understand that the attacker, not the victim, should be stigmatized and ashamed.

*Del Rio*, 241 F.R.D. at 160. *But cf.* Michuda, *supra* note 97, at 176-79 (proposing a balancing test—*prior to* the Information Era—that gives more weight to the public interest than to the interests of the plaintiff).

261. *See Del Rio*, 241 F.R.D. at 158 ("[C]ourts have been readier to protect the privacy of infant plaintiffs than of adults, whether because children are conceived as more vulnerable or because the child whose privacy is at stake has not chosen for himself or herself to pursue the litigation.").

262. *Sealed Plaintiff*, 537 F.3d at 190.

263. *Id.* ("[W]hether the plaintiff's identity has thus far been kept confidential . . . .").

264. *See* Doe v. Fedcap Rehab. Servs., No. 17-CV-8220, 2018 U.S. Dist. LEXIS 71174, at *6-7 (S.D.N.Y. Apr. 27, 2018) (denying a plaintiff's motion to proceed anonymously due, in part, to the fact that the plaintiff had voluntarily participated in a news story for a "major news outlet" that openly discussed their sexuality—the central concern motivating plaintiff's desire to remain

plaintiff is able to prove that her identity has remained anonymous in all or most instances related to the subject lawsuit, in addition to proving that she is susceptible to harm if her true name is revealed, under the proposed standard, the burden will then shift to the defendant.[265]

### *B. Defendant's Burden of Proof*

Pursuant to the proposed standard, the defendant then has the responsibility of demonstrating that the public interest in the litigation is contingent upon the revelation of the true identity of the plaintiff and/or that the defendant is unfairly prejudiced by the plaintiff's conservation of anonymity.[266] Each of these considerations is taken directly from the *Sealed Plaintiff* factors; the only distinction between the two is the party responsible for proving them.[267]

As for the first burden, the court should extrapolate the rationale applied in the line of cases involving sexual assault on college campuses to this new line of cases involving sexual misconduct in the #MeToo Era.[268] The court in *Doe v. Colgate University*[269] reasoned that parties involved in incidents of sexual abuse on college campuses have regularly been awarded anonymity due to the massive amount of media attention such lawsuits were drawing at the time, resulting in the likelihood of severe reputational harm for all parties involved.[270] Thus, although this line of cases garnered serious public interest, the anonymity of the parties' identities was preserved because their true names were deemed nonessential to the litigation.[271] The same should prove true for sexual misconduct lawsuits brought during the #MeToo Era, as there exists a multitude of similarities between the two lines of cases.[272] Although the legal actions are of important public interest, the

---

anonymous in the first place); *see also* Doe v. Shakur, 164 F.R.D. 359, 362 (S.D.N.Y. 1996) (denying a plaintiff's motion to proceed anonymously due, in part, to the fact that she conceded that the press knew her name, address, and place of employment); *see* Ressler, *supra* note 22, at 249-50 (analyzing the court's consideration of the extent to which a party has remained anonymous in *Shakur*).

265. *See supra* note 264.

266. *See supra* Part IV.A.

267. *See supra* note 36.

268. *See supra* note 258.

269. No. 15-cv-1069, 2016 U.S. Dist. LEXIS 48787, at *1 (N.D.N.Y. Apr. 12, 2016).

270. *Id.* at *6-7.

271. *Id.* at *9 (holding that "forcing Plaintiff to reveal his identity would not advance any aspect of the litigation but instead poses a risk that Plaintiff would be subject to unnecessary ridicule and attention").

272. *Id.* (recognizing a "potential chilling effect" that forcing a victim-plaintiff to reveal her identity would have on "future plaintiffs facing similar situations"). The same chilling effect results from the proscription of anonymity for victim-plaintiffs of sexual misconduct during the #MeToo Movement. *See* Part III.

identities of the plaintiffs remain, for the most part, unimportant.[273] Therefore, the defendant—in proving that the public interest is not being served by the plaintiff proceeding pseudonymously—has a hefty burden to fulfill if this proposed standard is adopted.[274]

The defendant's burden may be easier to meet when it comes to proving that it has been prejudiced by the concealment of the plaintiff's identity.[275] Courts in the Second Circuit recognize the potential disadvantage placed on a defendant when forced to publicly defend itself while the victim-plaintiff is able to "make her accusations from behind a cloak of anonymity,"[276] as evidenced by the *Sealed Plaintiff* factors.[277] Such prejudice is most common and most significant in cases in which the defendant is a corporation,[278] and although the #MeToo Movement has exposed a wide variety of culpable defendants, a great deal of them have been either notable corporations or individuals, making this a rather pertinent inquiry to the proposed standard.[279]

Regardless of the defendant's ability to successfully demonstrate the prejudice felt by the concealment of the plaintiff's identity, a defendant is just as capable of making a motion to proceed pseudonymously as a plaintiff.[280] This means that if a defendant is able to fulfill the standard for proceeding anonymously, it, too, can be shielded from the potential harm, if any, that public exposure may cause.[281] As the standard proposed in this Note has limited applicability to victim-plaintiffs bringing legal claims against their aggressors (for example, it does not apply to defendant-aggressors), either a new standard[282] complementary to that proposed herein should be developed, or the *Sealed Plaintiff* test should be applied.[283] Despite the

273. *See* Ressler, *supra* note 44, at 823 ("[I]n the overwhelming number of cases it is not the plaintiff's name that is relevant to the public, but rather the specifics about the cause of action.").

274. *See supra* notes 269-72.

275. *See generally* Adam A. Milani, *Doe v. Roe: An Argument for Defendant Anonymity When a Pseudonymous Plaintiff Alleges a Stigmatizing Intentional Tort*, 41 WAYNE L. REV. 1659, 1698-706 (1995) (arguing that an alleged act that is the subject of an intentionally tortious lawsuit is more stigmatizing to the alleged perpetrator than to the victim).

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

277. *See supra* note 36.

278. *See* Michuda, *supra* note 97, at 158, 158 n.137.

279. *See* Anna North et al., *262 Celebrities, Politicians, CEOs, and Others Who Have Been Accused of Sexual Misconduct Since April 2017*, VOX, https://www.vox.com/a/sexual-harassment-assault-allegations-list (last updated Jan. 9, 2019).

280. *See* Michuda, *supra* note 97, at 157-59 (discussing prior cases in which the court has granted defendants' requests to proceed pseudonymously). *But cf. id.* at 143 ("[Courts] are especially reluctant to allow defendants to proceed anonymously, usually finding that the public's interest in open proceedings outweighs the defendants' asserted privacy interests.").

281. *See supra* note 280.

282. *See* Michuda, *supra* note 97, at 176-79 (proposing a solution to limited grants of defendant-requested anonymity).

283. *See supra* Part IV (highlighting that this Note does not suggest the *Sealed Plaintiff* standard should be completely invalidated). Rather, this Note calls for a specialized standard to

countervailing interests interfering with the preservation of anonymity by a victim of sexual misconduct,[284] the interests belonging to this special type of plaintiff outweigh any minimal public interest or concern of a defendant due to the modern #MeToo Era in which we exist today.[285]

## V. CONCLUSION

Due to the current sociopolitical climate, developed by way of the #MeToo Movement, more victims of sexual misconduct are standing up to their aggressors.[286] Such an acceleration of sexual misconduct lawsuits has brought with it a steep escalation of plaintiffs wishing to preserve their anonymity by way of moving to proceed pseudonymously.[287] While some laws have adapted to the times, others remain stagnant despite such forward motion of modern culture through the #MeToo Movement.[288] The Second Circuit's current test for deciding motions to proceed pseudonymously[289] has recently spurred the denial of a series of victim-plaintiffs' motions,[290] which has resulted in injustice for those individuals.[291]

To cure the injustices propagated by the *Sealed Plaintiff* standard, this Note proposes the implementation of a modified test exclusively for application in deciding motions by victim-plaintiffs of sexual misconduct to proceed pseudonymously.[292] The proposed standard, although permitting more victim-plaintiffs to proceed under a false identity, does not disclose defendant-aggressors from seeking out anonymity as well.[293] Therefore, it is possible for all parties' identities to remain concealed from the public eye,[294] despite the age-old advocacy of judicial openness.[295] In wake of the #MeToo Era, while there exists a clear public interest in the substantive material encompassed within the judicial proceedings of a victim-plaintiff taking legal action against her

---

supplement that articulated in *Sealed Plaintiff*, exclusively in cases where a victim-plaintiff wishes to maintain her anonymity. *See supra* Part IV.

284. *See supra* Part IV.B.

285. *See supra* Part IV.B.

286. Griffin et al., *supra* note 74.

287. Mulvaney & Kanu, *supra* note 24.

288. *See generally* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229 (2018) (discussing the impact of the #MeToo Movement on the modern state of the law).

289. *See supra* note 36.

290. *See supra* Part II.C.

291. *See supra* Part III.

292. *See supra* Part IV.

293. *See supra* Part IV.B.

294. Doe v. Smith, No. 19-CV-1121, 2019 U.S. Dist. LEXIS 205707, at *1 (N.D.N.Y. Nov. 27, 2019).

295. *See supra* Part II.B.

aggressor, it remains unnecessary for the identity of the plaintiff to be disclosed to the public, as doing so may discourage victims from bringing action in the future.[296] For this reason, the proposed, less-stringent standard should be implemented in the Second Circuit in order to prevent a dangerous regression to a time prior to #MeToo: a time of victim blaming, shaming, disbelief, and disrespect.[297]

*Leanne C. Bernhard**

296. *See supra* Part III.A.

297. *See supra* Part III.C.

* J.D. Candidate, 2021, Maurice A. Deane School of Law at Hofstra University; B.A., Psychology, 2018, Binghamton University. I would first like to thank my parents, Maurice & Desiree Bernhard, sister, Natalie Bernhard, and grandmother, Florence Gerardi, for their endless and unwavering love and support throughout life and law school. I would also like to thank my best friends for always motivating and being there for me 24/7. I would like to thank my wonderful faculty advisor, Professor Jennifer Gundlach, not only for her assistance in the writing of this Note, but also for her mentorship throughout my law school career. Additionally, I would be remiss if I didn't thank my biggest cheerleader and Notes Editor, Brittany Cangelosi, for her unconditional support and guidance. Finally, I would like to thank all of Volume 48 and Volume 49, with special gratitude to Managing Editors, Amy ElSayed, Madelyn Nicolini, Sabrina Salama, Robert Levinson, and Delores Chichi; Articles Editor, Matthew Hauszpigel; Research Editor, Jacob Manzoor; and Notes Editor, Kristina Sgambati. I dedicate this Note to all victims and survivors of sexual assault; I am hopeful for a future in which you no longer have to fight to be Jane, John, or Jaime Doe.