

Protecting Victims' Privacy Rights: The Use of Pseudonyms in Criminal Cases¹

By Terry Campos, J.D.

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Some victims may welcome being publically identified as a part of criminal proceedings, but for those victims who may want or need to protect their privacy, the use of pseudonyms can be a powerful tool.² The availability of such a tool is important because the loss of privacy can have serious consequences for victims. Unwanted publicity can subject victims to public scorn and harassment and to other forms of revictimization at the hands of the justice system—often referred to as “secondary trauma” or “secondary victimization.”³ Compelling disclosure of a victim’s identity may also

¹ This *Victim Law Article* discusses the use of pseudonyms to protect a victim’s identity in criminal proceedings. For more information about the use of pseudonyms by victims in civil proceedings, see *Protecting Victims’ Privacy Rights: The Use of Pseudonyms in Civil Law Suits*, NCVLI Violence Against Women Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), July 2011, available at <http://law.lclark.edu/live/files/11778-protecting-victims-privacy-rights-the-use-of>. For more information or to submit a request for technical assistance regarding these or other strategies to protect victim privacy, please visit NCVLI’s website, www.ncvli.org.

² Depending upon the nature of the crime charged and the size of the community in which the crime occurred, the victim may be readily identifiable even when referred to only by initials. For example, with intra-familial or other crimes that require or imply a particular relationship between the defendant and the victim—such as domestic violence or incest—knowledge of the defendant’s name and the victim’s initials may be enough to identify the victim. For this reason, it is a best practice to request that the victim proceed by pseudonym. In cases where the victim and defendant are members of the same family, it may be necessary to ask the court to also permit the defendant and other family members to be identified by pseudonym. See *Commonwealth v. Hartnett*, 892 N.E.2d 805, 808 (Mass. App. Ct. 2008) (explaining that “we employ a pseudonym for the victim. To further insulate his identity, pseudonyms also have been assigned to the family members discussed in this opinion.”). Also, although motions to seal and for protective orders may serve as alternative procedures to help protect victim privacy, these procedures—alone—do not provide the same level of protection for the victim. For example, seals can be lifted and in some jurisdictions they are routinely lifted at the end of the case.

³ People are “harmed in a significant, cognizable way when their personal information is distributed against their will.” Ann Bartow, *A Feeling of Unease About Privacy Law*, 155 U. Pa. L. Rev. PENumbra 52, 61 (2007) (critiquing a recent article on privacy and arguing that it fails to adequately label and categorize the very real harms of privacy invasions). See also generally, *Polyvictims: Victims’ Rights Enforcement as a Tool to Mitigate “Secondary Victimization” in the Criminal Justice*

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Message from the Director

by Meg Garvin, M.A., J.D.

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Meg Garvin, Executive Director, NCVLI

In the aftermath of a crime recognizing and respecting a survivor's agency and autonomy is critical both for the individual and for the proper functioning of our justice system. Agency defined broadly encompasses an individual's capacity to make choices among options, and in its purest form, includes being the architect of one's options. Among the most fundamental components of agency is the ability to tell one's story in the time, place, and manner of one's choosing. To achieve this requires recognizing and respecting a victim's right to privacy. In fact, for survivors "privacy is like oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot." Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty*

Years of Rape Law Reform, 38 Suffolk U.L. Rev. 467, 473 (2005). This *Newsletter* focuses on the importance of privacy and provides legal tactics and strategies to fight for a victim's right to privacy.

In "*Protecting Victims' Privacy Rights: The Use of Pseudonyms in Criminal Cases*," Terry Campos provides the legal support for victims (adult and child-victims) who wish to proceed by pseudonym in a criminal case to be able to do so from the earliest system encounters (e.g., police reports and indictments), and continuing on through every stage of the process. In "*Protecting Victims' Privacy Rights: Addressing the Unauthorized Release of Victim Information in Federal Criminal Cases*," Sarah LeClair picks up the story providing the legal foundation for how to reclaim privacy after an initial invasion so that any harm can be minimized.

We continue the theme in our standard features where we highlight the work happening in the field every day. In our *Case Spotlight* we focus on *Paroline v. United States*, in which "Amy" is seeking restitution from the perpetrator who was convicted of possessing images of her childhood assaults. Not only is the case an example of the use of a pseudonym in the criminal case but Amy's fight for her rights up to the United States Supreme Court is an example of victim agency in action. In *The Trenches* highlights key victim rights' cases from the year, including privacy cases, so that practitioners are up-to-speed on how courts are analyzing these issues. Throughout the *Newsletter* we provide practice tips to help advocates in the trenches and in *New Resources* we spotlight our newest online resources for practitioners, including our *Victims' Rights Enforcement Toolkit* which includes sample pleadings, checklists, and more to aid your practice on behalf of victims.

We hope that this edition provides you needed tools to aid the fight for victim privacy so that victims can once again own their stories.

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weaken confidence in the criminal justice system as a means to protect and serve the public. Thus, allowing victims to proceed by pseudonym in criminal proceedings not only helps prevent "secondary victimization," but also assists with the proper functioning of the system.

I. Use of Pseudonyms in Criminal Cases: Why It Matters

"In the aftermath of crime, participation in the criminal justice system can be beneficial for crime victims."⁴ But for some victims,

System, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), March 2013, at 1 & 4 n.6, available at <http://law.lclark.edu/live/files/13798-polyvictims-victims-rights-enforcement-as-a-tool> (describing some of the deleterious effects of secondary victimization on victims and the proper administration of justice); Suzanne M. Leone, *Protecting Rape Victims' Identities: Balance Between the Right to Privacy and the First Amendment*, 27 New Eng. L. Rev. 883, 909-10 (1993) (A victim's right to control information about him or herself "constitutes a central part of the right to shape the 'self' that any individual presents to the world. It is breached most seriously when intimate facts about one's personal identity are made public against one's will . . . in defiance of one's most conscientious efforts to share those facts only with close relatives or friends.") (quoting Laurence H. Tribe, *American Constitutional Law* § 12-14, at 650 (1st ed. 1978)); *Commonwealth ex rel. Platt v. Platt*, 404 A.2d 410, 429 (Pa. Super. Ct. 1979) ("The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, and behavior and opinions are to be shared with or withheld from others.") (internal citation omitted).

⁴ Nat'l Crime Victim Law Inst., *supra* note 3, at 1 & 4 n.6 (explaining that "[f]or those victims, participation in the justice system may assist with the healing process, empower them, and provide them with greater safety and protection, public validation of the harm caused by the offenders, and financial compensation through restitution" and citing sources). See also Margaret E. Bell et al., *Battered Women's Perceptions of Civil and Criminal Court Helpfulness: The Role of Court Outcomes and Process*, 17 Violence Against Women 71, 72 (2011) (noting that some studies "have in fact found that positive experiences in the justice system are associated with less physical and psycho-

interactions with justice system personnel and processes can cause secondary victimization, which has been associated with increased posttraumatic stress symptoms and other physical and mental distress."⁵ One source of such harms can be the unwanted publicity and loss of control experienced when victims' identities are revealed as part of the criminal justice process without their consent.⁶ The use of pseudonyms by victims may reduce the risk of this revictimization at the hands of the justice system.

The consequences associated with a crime victim's loss of anonymity in justice proceedings may be particularly severe now that public access to criminal proceedings has been radically transformed by widespread use of the Internet. As more jurisdictions make public records available online, the reality of court records existing in "practical obscurity," available only to those individuals willing and able to seek them out at the local courthouse, is becoming a thing of the past.⁷ Today, anyone can retrieve a variety of records simply by typing a name into a search engine, and the existence of e-mail, social networking websites like Facebook and Twitter, as well as blogs, means this information can then be shared with thousands all over the world in an instant. Even accidental disclosure of information can become permanent in the public sphere once it enters the Internet.⁸

logical distress and better posttraumatic adjustment").

⁵ Nat'l Crime Victim Law Inst., *supra* note 3, at 1 & 4 nn.5-8 (citing sources).

⁶ See Leone, *supra* note 3, at 909-10.

⁷ Elbert Lin, *Prioritizing Privacy: A Constitutional Response to the Internet*, 17 Berkeley Tech. L.J. 1085, 1100 (2002) ("Previously, the physical restraints of time and space prevented gross violations of informational privacy. For instance, paper records are often filed in numerous locations, are easy to misplace or permanently destroy, and require a great deal of effort to gather and sort.").

⁸ See Kellie Wingate Campbell, *Victim Confidentiality Laws Promote Safety and Dignity*, 69 J. Mo. B. 76, 82 (2013) ("The permanency of information posted to the Internet either legitimately or maliciously makes it even more important to safeguard confidential victim information. . . .").

Practice Pointers

1. Make sure that any request to proceed by pseudonym is styled broadly, asking the court to employ measures to avoid the use of the victim's name in all documents, including the indictment, and during all court proceedings. Also, request that the court order be broad enough in its language to govern the conduct of all criminal justice parties and participants—including law enforcement, prosecution, defense, the court, and all of their agents.
2. Ask the court for a protective order in addition to proceeding by pseudonym. A protective order can forbid criminal justice participants, including defendant, from releasing the victim's name to others through non-judicial means such as online social media platforms (e.g. Facebook).
3. If the victim's name was disclosed in trial proceedings, move the appellate court to use a pseudonym when referring to the victim to minimize any additional harm.
4. A number of jurisdictions expressly provide for the right of victims of sexual assault and child victims to proceed by pseudonym. But do not be dissuaded from filing a motion to proceed by pseudonym if the victim does not have an express right; instead, argued that other rights support the victim proceeding by pseudonym, including the rights to: privacy; protection; access to the courts; be treated with fairness, dignity, and respect; and be free from intimidation, harassment, or abuse in the criminal justice process.

When the criminal justice system compels the unnecessary disclosure of victims' private information, the effects are not limited to the victims—public trust in the system may be diminished.⁹ And because unwanted publicity can have a chilling effect on victims' willingness to report crimes or participate in the system, system-sanctioned invasions of victims' privacy also undermine the basic administration of justice.¹⁰

II. The Use of Pseudonyms is a Constitutionally Permissible and Reasonable Way to Protect Victims' Privacy Rights and Interests

A. Victims' rights support proceeding by pseudonym.

A number of jurisdictions expressly provide for the right of victims of sexual assault and child victims to proceed by pseudonym.¹¹ But even

⁹ See generally Daniel J. Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 San Diego L. Rev. 745, 763 (2007) ("Privacy . . . is not the trumpeting of the individual against society's interests, but the protection of the individual based on society's own norms and values."); Craig M. Bradley & Joseph L. Hoffmann, *Public Perception, Justice, and the "Search for Truth" in Criminal Cases*, 69 S. Cal. L. Rev. 1267, 1271-73 (1996) (discussing the purpose of criminal trials as "express[ing] our society's deepest shared notions of institutional justice and fair play" and concluding that "[t]he American public has lost trust in the criminal justice system in part because it sometimes disagrees with the system's basic definitions of 'justice' and 'fairness'").

¹⁰ See Brett Jarad Berlin, Comment, *Revealing the Constitutional Infirmities of the "Crime Victims Protection Act," Florida's New Privacy Statute for Sexual Assault Victims*, 23 Fla. St. U. L. Rev. 513, 520 (1995) ("[S]tudies indicate that rape victims allege they would be far more willing and likely to come forward, report the crime, and assist the authorities as necessary, if statutorily enforced anonymity were available or dependable."); Campbell, *supra* note 8, at 82 ("There is no question that many victims of crime do not come forward due to fear of exposure.").

¹¹ See, e.g., Cal. Penal Code § 293.5(a) ("the court, at the request of the alleged victim, may order the identity of the alleged victim in all records and during all proceedings to be either Jane Doe or John Doe, if

Case Spotlight

Victim Voice Before the United States Supreme Court

In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012), *cert. granted in part*, 81 USLW 3711, 3714 (U.S. June 27, 2013) (No. 12-8561). A long continuing case that NCVLI has been involved with since 2009 is pending before the U.S. Supreme Court. In the case defendant was convicted of possessing images of Amy's childhood rape and the Court is reviewing defendant's appeal of a Fifth Circuit Court of Appeals decision ordering defendant to pay restitution to "Amy" (the victim in the case). The U.S. Supreme Court granted review on this limited question: "What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259 [the federal statute governing child pornography]?" NCVLI and co-amici (Arizona Voice for Crime Victims, Child Justice, Inc., National Center for Victims of Crime, National Organization of Victim Assistance, and Maryland Crime Victims' Resource Center, Inc.) argued that the victim is entitled to full restitution without a specific showing of causation related to a possessor. In addition, the students in the Lewis & Clark Law School Crime Victim Litigation Clinic assisted with an amicus brief jointly submitted by the Domestic Violence Legal Empowerment and Appeals Project, Legal Momentum, the National Coalition Against Domestic Violence, Professor Margaret Drew, and Professor Leigh Goodmark, presenting the Court with arguments regarding how the case will impact future interpretation of the Violence Against Women Act. The case will be heard by the Supreme Court on January 22, 2014, and will be the first case in which the United States Supreme Court will hear a victim directly on her victims' rights.

the court finds that such an order is reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution or the defense."); Conn. Gen. Stat. § 54-86e ("The name and address of the victim of a sexual assault . . . and such other identifying information pertaining to such victim as determined by the court, shall be confidential and shall be disclosed only upon order of the Superior Court . . . [.]"); Fla. Stat. § 92.56(3) ("The state may use a pseudonym instead of the victim's name to designate the victim of [sexual battery] or [lewdness; indecent exposure], or of child abuse, aggravated child abuse, or sexual performance by a child . . . or any crime involving the production, possession, or promotion of child pornography . . . in all court records and records of court proceedings, both civil and criminal."); Nev. Rev. Stat. § 200.3772(1) ("A victim of a sexual offense . . . may choose a pseudonym to be used instead of the victim's name on all files, records and documents pertaining to the sexual offense . . . including, without limitation, criminal intelligence and investigative reports, court records and media releases."); Tex. Code Crim. Proc. Ann. art. 57B.02(b) ("A victim may choose a pseudonym to be used instead of the victim's name to designate the victim in all public files and records concerning the offense, including police summary reports, press releases, and records of

without a statute providing an express right, all victims have other rights that support proceeding by pseudonym, including the rights to: privacy; protection; access to the courts; be treated with fairness, dignity, and respect; and be free from intimidation, harassment, or abuse in the criminal justice process.¹²

A victim's right to privacy is a constitutionally protected interest under the federal Constitution and, in many jurisdictions, is also protected by statute or state constitutional provision.¹³ The

judicial proceedings.").

¹² For an overview of common victims' rights, see *Fundamentals of Victims' Rights: A Summary of 12 Common Victims' Rights*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), November 2011, available at <http://law.lclark.edu/live/files/11823-fundamentals-of-victims-rights-a-summary-of-12>. For more information about a particular jurisdiction's victims' rights laws that may support a victim's request to proceed by pseudonym, please contact NCVLI.

¹³ See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (rec-



Melanie Kebler

Volunteer Spotlights

A Conversation with Melanie Kebler and Laura Shoaps



Laura Shoaps

Melanie Kebler is a former prosecutor who has served as a pro bono attorney at NCVLI, providing outstanding support in the full range of our legal work, from amicus briefs and legal technical assistance to direct representation of victims. Melanie has recently been hired as a staff attorney representing victims through one of our partner organizations, the Oregon Crime Victims Law Center (OCVLC). Melanie is truly passionate about enforcing and advancing victims' rights in Oregon and we look forward to continuing to partner with her in these efforts.

Laura Shoaps is NCVLI's Fall 2013 Law Student Extern. Laura came to NCVLI after a summer as an intern with the Global Freedom Center and immediately became an invaluable member of our team, assisting with everything from legal technical assistance to the development of "Know your Rights" video tutorials for NCVLI's website. We will be sad to see Laura go at the end of the term but wish her well and look forward to working together in the future.

What do you do when you're not at NCVLI?

Melanie: I like to get outdoors and try to stay active. I enjoy rock climbing and also play on an indoor soccer team. I also enjoy video games and board games, and like to get together with friends often to play.

Laura: When I'm not in class at Lewis & Clark Law School, I enjoy practicing yoga, hiking, and journaling. I've also gotten very into running since moving to Portland, and I am training for my third half marathon.

How did you get involved with NCVLI and victims' rights?

Melanie: When I was a law student in my third year at Lewis & Clark Law School, I took the Crime Victim Litigation Clinic class—a partnership between NCVLI and Lewis & Clark. I found it very interesting and enjoyed working on actual NCVLI projects. Later, when I became a prosecutor after passing the bar, victims' rights were part of my job and I contacted NCVLI often with questions or issues.

Laura: I learned about NCVLI while writing a paper on human trafficking. I met with Meg Garvin to learn more about victims' rights for my paper, and I realized how connected my interest in human rights was with victims' rights. Fortunately, I was able to make time this semester to intern with NCVLI and deepen my understanding of victims' rights.

What is something that stands out in your work with NCVLI?

Melanie: I really enjoyed a chance to work with a pro bono client through NCVLI this [past] summer in a stalking order case. The current status of legal aid programs in Oregon is such that the need is far greater than the supply of free legal representation that people really need, especially when it comes to victimization and protective orders. So, organizations like NCVLI that work to help victims get con-

nected with pro bono lawyers are invaluable. I've also enjoyed helping research legal issues to aid NCVLI with briefs and memos. Promoting and educating on victims' rights in all avenues, including at trial and in appeals, is also very important.

Laura: One of my favorite projects while working with NCVLI was creating tools to increase awareness about common victims' rights. I learned a great deal about the rights afforded to victims and how these rights interact with the way that some victims process trauma. I enjoyed helping to make victims' rights accessible so that victims can understand what rights they have and how they can assert them.

What do you see as the future of victims' rights/justice for victims?

Melanie: Victims' rights have come so far, yet we still have a long way to go. I think the work NCVLI has done with the military has been amazing and I see that as a new area in which victims' rights are going to be greatly advanced in the next few years. In other arenas, I think we will continue to see more victims with attorneys and more attorneys willing and able to take on victims' rights issues. In addition, I think there is a growing emphasis in the prosecutorial community on learning about victims' rights, supporting victims throughout the criminal case, and working together with victims' attorneys to achieve just outcomes. All of these things mean a bright future for victims' rights.

Laura: Victims' rights have gained much deserved traction over the years, but there is still a long way to go. I am hopeful about the role that's carved out for victims within the criminal justice system, and the institutional support networks available to victims. I am optimistic about the future of victims' rights, and I believe increased awareness is crucial to ensuring that the victims' rights that exist on the books are consistently effectuated in practice.

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right to protection relates to the victim's right to safety from the accused or those acting on behalf of the accused. On the federal level, the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, provides crime victims with "[t]he right to be reasonably protected from the accused."¹⁴ At least nine states also provide victims with a broad constitutional right to protection,¹⁵ and several

other states provide victims with constitutional and statutory rights to be free from intimidation, harassment, or abuse.¹⁶

Despite these rights, there are hurdles to proceeding by pseudonym in the criminal case. Foremost among these are the public's and media's First Amendment right of access to court proceedings, and the defendants' constitutional rights to a public trial and to prepare a defense.¹⁷

ognizing that "a right of personal privacy . . . does exist under the Constitution"); *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (noting cases finding protected privacy interests include an "individual interest in avoiding disclosure of personal matters"); 18 U.S.C. § 3771(a)(8) ("A crime victim has . . . [t]he right to be treated with fairness and with respect for the victim's dignity and privacy."). Many state constitutions also guarantee the right to privacy. See Nat'l Crime Victim Law Inst., *supra* note 1, at 2 n.10 (listing 22 state constitutional provisions).

¹⁴ 18 U.S.C. § 3771(a)(1).

¹⁵ See, e.g., Alaska Const. art. 2, § 24; Conn. Const. art. 1, § 8(b)(3); Ill. Const. art. 1, § 8.1(a)(7); Mich. Const. art. I, § 24(1); Mo. Const. art. I, § 32(1)(6); N.M. Const. art. II, § 24(A)(3); Ohio Const. art. I, §

10a; S.C. Const. art. I, § 24(a)(6); Wis. Const. art. I, § 9(m).

¹⁶ See, e.g., Ariz. Const. art. 2, § 2.1(A)(1); Okla. Const. art. II, § 34; Tenn. Const. art. I, § 35(2).

¹⁷ One source of a defendant's right to prepare a defense is found in the Sixth Amendment. See *Brown v. Berghuis*, 638 F. Supp. 2d 795, 817 (E.D. Mich. 2009) ("Although the Constitution does not explicitly provide a criminal defendant with the right to 'present a defense,' the Sixth Amendment provides a defendant with the right to . . . confront the witnesses against him[.]"); *Sheppard v. Rees*, 909 F.2d 1234, 1236 (9th Cir. 1989) ("The Sixth Amendment guarantees a criminal defendant a fundamental right to be clearly informed of the nature and cause of the

When a court considers the propriety of a victim proceeding by pseudonym, it must weigh the victims' rights with these other rights.¹⁸

B. Victims use of pseudonyms does not create a per se violation of the public's or media's right of access or the defendant's right to a public trial.

The media and public have a presumptive right of access to court proceedings and records under the First and Fourteenth Amendments to the Constitution and state law,¹⁹ and the Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial."²⁰

charges in order to permit adequate preparation of a defense.").

¹⁸ See, e.g., *United States v. Madoff*, 626 F. Supp. 2d 420, 426 (S.D.N.Y. 2009) (stating that common law and constitutional rights of access must be balanced against the victims' privacy interests under the CVRA); see generally Judicial Conference Committee, *Report on Privacy and Public Access to Electronic Case Files* ("[P]ublic access rights are not absolute, and courts balance access and privacy interests in making decisions about the public disclosure and dissemination of case files."); *People v. Adams*, A117927, 2009 WL 808305, at *2 (Cal. Ct. App. Mar. 30, 2009) ("[A] court, at the victim's request, may order the victim be identified as Jane or John Doe, 'if the court finds that such an order is reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution or the defense.'").

¹⁹ See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-605 (1982); see also *Coopersmith v. Gold*, 594 N.Y.S.2d 521, 526 (N.Y. App. Div. 1992) (noting the news media and the public have a presumptive right under Article 1, Section 8 of the New York State Constitution to access judicial proceedings); *Kearns-Tribune Corp., Publisher of Salt Lake Tribune v. Lewis*, 685 P.2d 515, 521 (Utah 1984) (holding "that the people have a state constitutional right of public access to criminal trials and preliminary hearings[.]"); *Cohen v. Everett City Council*, 535 P.2d 801, 803 (Wash. 1975) (concluding that Article 1, Section 10 of the Washington State Constitution, "which mandates that 'Justice in all cases shall be administered openly . . . [.]'" entitles the public and the press to the open administration of justice).

²⁰ U.S. Const. amend. VI. The United States Supreme Court has held that a defendant's Sixth Amendment right to public trial is to be analyzed using First

None of these rights are absolute, however, and a court may properly conclude that victims' interests in the non-disclosure of their identifying information weigh more heavily in a given case.²¹ For instance, in *United States v. Troup*, the United States District Court for the Northern District of Indiana ordered that the child-victims be referred to only by pseudonyms in all court filings and during all trial stages, including voir dire.²² As the court explained:

It is easy to see how the disclosure of a child's name as the victim of a sex offense can be 'detrimental to the child[.]' . . . The factual

Amendment jurisprudence. *Waller v. Georgia*, 467 U.S. 39, 47 (1984).

²¹ See, e.g., *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981) ("The equation linking the public's right to attend trials and the public's right to know the identity of the parties is not perfectly symmetrical. The public right to scrutinize governmental functioning . . . is not so completely impaired by a grant of anonymity to a party as it is by closure of the trial itself. Party anonymity does not obstruct the public's view of the issues joined or the court's performance in resolving them. The assurance of fairness preserved by public presence at a trial is not lost when one party's cause is pursued under a fictitious name."); *Madoff*, 626 F. Supp. 2d at 426 (finding that victims' privacy interests outweigh common law and constitutional rights of access where victims expressed wish to not have identities disclosed); *Cape Publications v. City of Louisville*, 147 S.W.3d 731, 736 (Ky. Ct. App. 2003) (upholding policy of redacting identifying information of sexual assault victims from publicly available incident reports upon finding that, *inter alia*, the public's interest in disclosure did not outweigh "the privacy interests of victims of sexual offenses, particularly when those privacy interests are coupled with a compelling public interest in insuring the physical safety of the victims and encouraging them to report sexual offenses without fear of exposure"); *State v. Densmore*, 624 A.2d 1138, 1143 (Vt. 1993) (noting that "the privacy interests of innocent third parties [including crime victims] may well present a compelling interest sufficient to outweigh a qualified First Amendment Right of access under certain circumstances.").

²² 3:12-CR-36 JD, 2012 WL 3818242 (N.D. Ind. Aug. 31, 2012).

nature of this case makes it likely, even probable, that the children involved will be subject to harassment by their peers if their names are publicly associated with the case, and the government has introduced evidence showing that such reprehensible behavior has already occurred.²³

C. Use of pseudonyms by victims does not create a per se violation of the defendant's right to prepare a defense.

Ensuring victim anonymity requires that all documents,²⁴ including police reports and the indictment,²⁵ identify the victim only by pseudonym.²⁶ Although there is no general

²³ *Id.* at *3; see also *Wilnink v. Kanawha Cnty. Bd. of Educ.*, No. 2:03-cv-179, 2006 WL 456021, at *3 (S.D. W. Va. Feb. 23, 2006) (finding that the victims' privacy interests outweighed the public's right of access: "The redacted names and identifying information here serve no useful public or investigative purpose. The events described in the documents represent some of the most painful chapters in the lives of the individuals whose information has been redacted. As a result, the competing interest of keeping this information private significantly outweighs the public's common law right of access."). Although many of the court opinions finding victims' privacy interests to be of sufficient weight to justify implementing procedures to protect those interests involve sexual assaults or child victims, the privacy right is not limited to certain crimes or a particular class of victims.

²⁴ See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (holding that a state cannot sanction media for the accurate publication of a rape victim's name obtained from judicial records that are open to public inspection and reasoning that if there are privacy interests to be protected in judicial proceedings, states must respond by means that avoid public documentation or other exposure of private information).

²⁵ For the purposes of this *Article*, the term "indictment" is used to denote all types of charging instruments, including an information and bill of particulars.

²⁶ A victim's right to privacy should not be limited to the charging, trial, and post-trial stages of a criminal case, it should also extend to the investigatory stage

constitutional requirement that the name of the victim be present in an indictment,²⁷ defendants may challenge this practice as violating their right to prepare a defense on the basis that the use of pseudonyms violates their rights to be informed of the nature of the charges against them and to confront the witnesses against them.²⁸

Courts have generally found indictments that do not identify the victim by name to be constitutionally sufficient in cases where defendant knows the victim.²⁹ This is significant because in most incidents of violent crime, defendants know

as well. Victims may invoke their rights—including those of privacy and protection—in requesting that law enforcement use a pseudonym or initials instead of the victim's name in all reports related to the crime.

²⁷ See *United States v. Powell*, 1 F. Supp. 2d 1419, 1424 (N.D. Ala. 1998) (reasoning that there is no requirement that the names of victims be disclosed in the indictment); *State v. Day*, 529 A.2d 887, 888-89 (N.H. 1987) (finding that the omission of the victim's name from the indictment did not "per se, render the indictment constitutionally insufficient"). Similarly, there is no absolute right to have a jury hear a victim-witness's true name. *People v. Ramirez*, 55 Cal. App. 4th 47, 55-56 (Cal. Ct. App. 1997).

²⁸ U.S. Const. amend. VI. ("[T]he accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . [and] to be confronted with the witnesses against him[.]").

²⁹ See, e.g., *State v. McKoy*, 675 S.E.2d 406, 411 (N.C. Ct. App. 2009) (concluding that defendant had sufficient notice to prepare his defense where state used "RTB" in the indictment instead of the victim's full name because defendant knew the identity of the victim); *State v. Johnson*, No. 80435, 2002 WL 31839432, at *11 (Ohio Ct. App. Dec. 19, 2002) (finding "that where a criminal defendant has actual knowledge of the identity of the victim, an indictment is not constitutionally defective for identifying that victim in a manner that would protect that victim's identity [such as using Jane Doe.]"); *State v. Day*, 529 A.2d 887, 888-89 (N.H. 1987) (finding that the omission of victim's name from indictment did not "per se, render the indictment constitutionally insufficient" where the omission did not "hobble the defendant's preparation of his defense" because he knew the victim's identity).

the identity of the victim.³⁰ Even where the victim's identity is unknown to the defendant, the right of confrontation is a trial right and not implicated or properly raised at the pretrial charging stage.³¹ To the extent that a trial court deems defendant's knowledge of a victim's true identity as necessary for effective cross-examination at trial, a protective order that provides the necessary information to defense counsel to prepare a defense while protecting the victim's privacy should be requested, preventing counsel from sharing the victim's identity with defendant or anyone else not necessary to the preparation of a constitutionally adequate defense.³²

Further, indictments have historically been considered constitutionally sound if they contain the elements of the offenses charged and fairly inform defendants of the charges they must defend against.³³ The level of

specificity required to inform a defendant of the charges will vary based on the nature and circumstances of the crime charged,³⁴ however, as long as the indictment provides sufficient alternative information identifying the charged crime it satisfies constitutional requirements.³⁵ Thus, where an indictment contains other information—such as time, place and specific facts to provide defendants with notice of the charge against which they must defend—a pseudonym may substitute for the victim's true

no longer a vital function of an indictment as defendants have the entire criminal case record as a bar to a second prosecution. *See, e.g., State v. Frauenberger*, 297 P.3d 257, 262 (Idaho Ct. App. 2013) (finding that the use of a pseudonym in the indictment and the victim's initials in the jury instructions was not fundamental error and did not leave defendant subject to double jeopardy concerns); *State v. Fennelly*, 461 A.2d 1090, 1095-96 (N.H. 1983) (finding indictments and trial record could serve as a bar to subsequent prosecution).

³⁴ *See United States v. Tomasetta*, 429 F.2d 978, 979 (1st Cir. 1970) (“[W]hat is a fair description of a crime for purposes of permitting an adequate defense necessarily varies with the nature of the offense and the peculiarities of defending against the kind of charge involved.”); *People v. Morris*, 461 N.E.2d 1256, 1259 (N.Y. 1984) (“The determination of whether sufficient specificity to adequately prepare a defense has been provided to a defendant by the indictment and the bill of particulars must be made on an ad hoc basis by considering all relevant circumstances.”).

³⁵ *See State v. McKoy*, 675 S.E.2d 406, 409-10 (N.C. App. 2009) (finding that “[w]here the statutes defining second-degree rape and second-degree sexual offense require the offenses to be against ‘another person,’ the indictments charging these offenses do not need to state the victim’s full given name . . . in order to accomplish the common sense understanding that initials represent a person.”); *People v. Kossman*, 46 A.D.3d 1104, 1105 (N.Y. App. Div. 2007) (holding that a victim’s name need not be included in the indictment so long as sufficient information is included to enable the defendant to formulate a defense and to protect against double jeopardy); *State v. Nussbaum*, 491 P.2d 1013, 1017 (Or. 1971) (internal citations omitted) (“[W]hile it is deemed desirable to state the name of the victim when known, an indictment is sufficient although it states that the name of the victim is unknown[.]”).

³⁰ Erika Harrell, U.S. Dept. of Justice, Bureau of Justice Statistics, Special Report NCJ 239424, *Violent Victimization Committed by Strangers, 1993-2010* (2012) (“In 2010, strangers committed about 38% of nonfatal violent crimes, including rape/sexual assault, robbery, aggravated assault, and simple assault. . . . From 1993 to 2008, among homicides reported to the FBI for which the victim-offender relationship was known, between 21% and 27% of homicides were committed by strangers and between 73% and 79% were committed by offenders known to the victims.”).

³¹ *See Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (“The opinions of this Court show that the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination.”); *United States v. White*, 116 F.3d 903, 918 (D.C. Cir. 1997) (“The constitutional right to cross examine has never been held to encompass a right to pretrial disclosure of prosecution witnesses.”).

³² *See United States v. Celis*, 608 F.3d 818, 834 (D.C. Cir. 2010) (finding that the trial court’s protective order allowing government witnesses to testify under pseudonyms and limiting disclosure of their true identities, did not impermissibly intrude upon defendants’ confrontation rights).

³³ *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007). In addition, although the indictment has traditionally been required to provide a bar to future prosecutions for the same offense, *id.*, courts have acknowledged that protecting against double jeopardy is

name.³⁶

³⁶ See, e.g., *Kossman*, 46 A.D.3d at 1105 (upholding a conviction where the indictment, although not naming the victim, sufficiently identified the lone victim by including her birth date and the date and locale of the incident); *People v. Stanley*, 23 A.D.3d 683, 684 (N.Y. App. Div. 2005) (finding that the indictment charging defendant with attempted murder was sufficient without naming the victim as it set forth the exact time and place of the crime, as well as the conduct of which defendant was accused); *but see Sellers v. State*, 587 S.E.2d 276 (Ga. Ct. App. 2003) (holding that identifying the child-victim by initials was improper since it did not put defendant on notice against whom defendant allegedly committed the crime of child molestation); *State v. Clowes*, 18 P.3d 596, 599 (Wash. Ct. App. 2001) (concluding that the charging instrument lacked the essential elements where there was no reference to the identity of the victim or to the underlying domestic violence crime); *Miller v. State*, 18 So. 3d 898, 908 (Miss. Ct. App. 2009) (noting that a victim's name must be included where it is an essential element of the offense).

Nevertheless, some jurisdictions may require that where defendant objects pretrial, the indictment must be perfect in form, which may require including the full name of the victim if known to the government. See *Dennard v. State*, 534 S.E.2d 182, 185 (Ga. Ct. App. 2000) (“Where an accused raises the issue by the timely filing of a special demurrer, he is entitled to an indictment perfect in form and substance.”); *Sellers*, 587 S.E.2d at 278 (noting that whether defendant has actual knowledge of the victim's true name “plays no part in a pre-trial special demurrer analysis.”). But requiring a victim's name in the indictment does not foreclose the victim from using a pseudonym at trial. *Sellers*, 587 S.E.2d at 278 (reiterating that requiring a perfect indictment does not equate to requiring a victim to use his or her true name at trial: “Had this case proceeded to trial and verdict under the current indictments, we do not believe that reversal would be necessary due to the failure to name the intended victim, since it is apparent that [defendant] understands the nature of the charges against him based on information gleaned from sources other than the indictment itself. However, because we are reviewing the indictment on interlocutory appeal, before any trial, we must apply the rule that a defendant who has timely filed a special demurrer is entitled to an indictment perfect in form and in substance.”). In these jurisdictions, protecting a victim's privacy may be accomplished by moving the court to seal the indictment and then moving for redaction of the name and substitution of the redacted document in court records after trial.



NCVLI's Victim Law Library

The Victim Law Library is a one-of-a-kind online resource offering a wide variety of educational materials addressing critical issues in victim law. Visit www.ncvli.org and click on “Professional Resources” to access articles, newsletters, national surveys, videos, state laws, and other resources related to victim law. We are constantly adding to the library—check back for new additions!

III. Conclusion

Using pseudonyms in the place of victims' real names throughout the criminal justice process is a constitutionally permissible and reasonable way to protect victims' privacy rights and interests while maintaining fairness and constitutionally open court proceedings.

In the Trenches

1.

ALASKA.

In a case in which defendant was charged with first degree sexual assault, the state moved for a protective order asking the court to prevent defendant from introducing evidence of the victim's prior sexual conduct unless defendant complied with the statutory requirement of providing notice five days prior to trial that he intends to introduce such evidence. In the trial court, defendant successfully challenged this rule as violative of his privilege against self-incrimination as interpreted by Alaska law (which is broader than the federal counterpart). The state sought leave to file an interlocutory appeal before the state court of appeals, arguing that victims need and deserve to know—before trial and before they decide to testify—whether they will be confronted with this highly personal evidence on the stand, and that the five-day rule was intended to protect sexual-assault victims from a midtrial ambush with this type of evidence. NCVLI provided research and written resources to support the state's arguments. The court of appeals granted the state's petition to file an interlocutory appeal, and set a briefing schedule for the parties. The case is pending.

3.

ARIZONA.

A deputy county attorney from Arizona sought assistance concerning a DNA testing issue. The defense contended that the minor son—a toddler—of a deceased gunshot victim is not the son of the deceased victim. (Currently, the girlfriend of the deceased victim is considered a legal "victim" under Arizona law based on the status of the toddler, who was born after the boyfriend died.) The trial court granted defendant's request for an order directing the toddler to submit a buccal swab of DNA to determine paternity in advance of an evidentiary hearing to establish victim status. The state sought appellate review via special action. NCVLI provided research support to the state and the victim's counsel. On August 29, 2013 the court of appeals granted the state's request for relief, concluding that the trial court erred in ordering the DNA test. In reaching its ruling, the court noted that defendant has no constitutional right to pretrial discovery. The court observed that the mother had asserted the child's paternity at the first opportunity—days after the shooting—and that this is not a case where the child's paternity is an element of the offense. The court left open the possibility that "inquiry into victim status may be appropriate in an unusual case"; but even in such a case the defense must present "something more than speculation or claims that the putative parents were unmarried and not living together" to trigger such an inquiry.

2.

CALIFORNIA.

The victims' counsel sought research, analysis, and strategic assistance with regard to remedies for violation of the victim's rights to confer, to notice, and to be heard about a plea deal in a child-molestation case. The prosecutor failed to inform the victim's family about plea negotiations or the nature of the plea. As a result, the victim and family did not appear at the plea hearing, during which defendant pled no contest, the court indicated that it would accept the no-imprisonment deal, and the court released defendant on his own recognizance pending sentencing. NCVLI assisted counsel with legal research and analysis to support the victims' motion for the court to withdraw its acceptance of the plea and vacate the plea. On October 7, 2013, the court ruled that the victims have standing to seek relief, that the victims' rights were violated, and the court withdrew its indicated sentence of probation and set it for sentencing. Defendant now faces anywhere from probation to 10 years prison; and the court will hear from the victims and their counsel prior to making the sentencing decision.

4.

ARIZONA.

In a child sex-abuse case in which the victim was molested by her step-father beginning at age 11, and disclosed at age 16, Arizona Voice for Victims (AVCV) contacted NCVLI regarding the defendant's (step-father's) motion to strip the mother of the victim of her status as a legal victim for purposes of asserting the right to refuse an interview because her child (the primary victim) had turned 18 years-old. The trial court ruled against AVCV and NCVLI provided technical assistance with the petition for review by the state appellate court. The case is pending.

A map of the United States with three callout boxes. Box 5 points to Minnesota, box 6 points to Wisconsin, and box 7 points to Maryland. Arrows connect the boxes in a sequence from 5 to 6 to 7.

5. MINNESOTA.

An attorney in Minnesota sought emergency assistance in a case in which the defense had sought the medical and counseling records of a minor victim and the court had ordered the prosecution to secure the records. NCVLI provided immediate strategic advice as well as pre-existing research on the limited scope of prosecutorial obligation and the right of discovery in criminal cases, and encouraged the attorney to have the mother rescind any waivers she may have executed, and to move the court to reconsider its order as it improperly required "the government to act as a private investigator and valet for the defendant." The matter is pending.

6. WISCONSIN.

A victim's attorney sought help in fighting a defense request to search the victim's hard drive which is in the custody of the local police. Defendant had requested that certain terms, which are very broad, be searched. Police had indicated that they would not perform the search because it was too burdensome, but instead may turn over the entire hard drive to defendant. Victim counsel sought to challenge defendant's request, but was advised by the court to "work through the prosecutor's office" instead. The prosecutor then challenged the defense request, and requested that all pleadings related to the request be sealed. The court ruled that defendant was not entitled to the hard drive on the computer, and defendant filed a motion to reconsider, which was also denied. Defendant then agreed to enter a plea and at the plea hearing the judge indicated that he had erred in directing the victim and her attorney to "work through the prosecutor's office" and instead recognized the right of the victim to file motions to protect her privacy rights.

7. MARYLAND.

Maryland Crime Victims Resource Center (MDCVRC) asked for assistance in a case where a young man was shot in the arm causing permanent injury that resulted in the loss of his job. The state and defendant entered into a plea agreement that did not include restitution and the plea was accepted by the court. During sentencing, the victim asked the court to order restitution for the medical bills and loss of income; the court denied the motion. MDCVRC appealed. On appeal, defendant argues that ordering restitution would breach his plea agreement and violate his due process and double jeopardy rights. NCVLI provided research in support of the victim's brief. The case is pending.

Protecting Victims' Privacy Rights: Addressing the Unauthorized Release of Victim Information in Federal Criminal Cases¹

By Sarah LeClair, J.D.

Compelling disclosure of a victim's identity as part of a criminal case subjects victims to the risk of revictimization at the hands of the justice system—often referred to as “secondary trauma” or “secondary victimization”²—and may also weaken confidence in the criminal justice system as a means to protect and serve the public.³ With the advent of electronic filing and online access to court documents, a simple Google search of a victim's name can reveal highly personal details of victimization described in court opinions, pleadings, and other court documents thereby exponentially increasing the potential harm to the victim. Thus, it should be standard practice for courts, prosecutors, and other system participants to ask crime victims for their preference regarding anonymity; and if the victims so choose, their privacy should be protected through the use of pseudonyms in the place of their names and redaction of identifying information in all records associated with the criminal proceedings.⁴

¹ Although some state authorities are referenced in this *Victim Law Article*, an analysis of this topic in the context of state proceedings is outside the scope of this *Article*. To submit a technical assistance request to NCVLI seeking help in preventing or addressing unauthorized releases of victim information in either state or federal proceedings, please visit https://law.lclark.edu/centers/national_crime_victim_law_institute/professional_resources/technical_assistance/.

² Research has demonstrated that people are “harmed in a significant, cognizable way when their personal information is distributed against their will.” Ann Bartow, *A Feeling of Unease About Privacy Law*, 155 U. Pa. L. Rev. PENnumbra 52, 61 (2007) (critiquing a recent article on privacy and arguing that it fails to adequately label and categorize the very real harms of privacy invasions). See also generally, *Polyvictims: Victims' Rights Enforcement as a Tool to Mitigate “Secondary Victimization” in the Criminal Justice System*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), March 2013, at 1 & 4 n.6, available at <http://law.lclark.edu/live/files/13798-polyvictims-victims-rights-enforcement-as-a-tool> (describing some of the deleterious effects of secondary victimization on victims and the proper administration of justice); Suzanne M. Leone, *Protecting Rape Victims' Identities: Balance Between the Right to Privacy and the First Amendment*, 27 New Eng. L. Rev. 883, 909-10 (1993) (quoting Laurence H. Tribe, *American Constitutional Law* § 12-14, at 650 (1st ed. 1978)) (a victim's right to control information about him or herself “constitutes a central part of the right to shape the ‘self’ that any individual presents to the world. It is breached most seriously when intimate facts about one's personal identity are made public against one's will . . . in defiance of one's most conscientious efforts to share those facts only with close relatives or friends.”); *Commonwealth ex rel. Platt v. Platt*, 404 A.2d 410, 429 (Pa. Super. Ct. 1979) (internal citation omitted) (“The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, and behavior and opinions are to be shared with or withheld from others.”).

³ See *Protecting Victims' Privacy Rights: The Use of Pseudonyms in Criminal Cases*, NCVLI Newsletter of Crime Victim Law, 16th Ed. (Nat'l Crime Victim Law Inst., Portland, Or.), Dec. 2013, at 4 n.9 (citing authorities, including: Daniel J. Solove, “I've Got Nothing to Hide” and Other Misunderstandings of Privacy, 44 San Diego L. Rev. 745, 763 (2007) (“Privacy . . . is not the trumpeting of the individual against society's interests, but the protection of the individual based on society's own norms and values.”)).

⁴ For more information about the use of pseudonyms by victims in criminal proceedings, including an analysis of why the use of pseudonyms does not create a per se violation of the public's or media's right of access or the defendant's right to a public trial or to prepare a defense, see Nat'l Crime Victim Law Inst., *The Use of Pseudonyms in Criminal Cases*, *supra* note 3. As described in that *Victim Law Article*, “[d]epending upon the nature of the crime charged and the size of the community in which the crime occurred, the victim may be readily identifiable even when referred to only by initials, therefore the use of pseudonyms is preferable.” *Id.* at 1 & 3 n.3. For information about the use of pseudonyms by victims in civil proceedings, see *Protecting Victims' Privacy Rights: The Use of Pseudonyms in Civil Law Suits*, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), July 2011, available at <http://law.lclark.edu/live/files/11778-protecting-victims-privacy-rights-the-use-of>.

Intersections with Polyvictimization: Practice Tip

Polyvictims—those who have experienced multiple victimizations of different types—are likely to have increased contacts with the justice system, generating more opportunities to experience system-based victimization. Regardless of whether pseudonyms were used by victims in a prior case relating to a different victimization—and perhaps particularly if they were not used—using pseudonyms in the current criminal case may help prevent the prior victimization from improperly becoming a part of the discourse of the case.

If a victim discloses a prior victimization that resulted in a criminal prosecution—and the victim's name and other identifying information was made part of the record of that case—victim counsel may want to move to substitute a redacted version of any public records associated with the prior case that contain such victim information. Such a request to the court should be accompanied by Internet take-down letters sent to any public and private databases and other service providers that link the information to remove the links altogether or replace the documents with redacted versions.

If redaction hasn't or won't occur, victims may seek protective orders requiring parties and all other system participants to refrain from referring to the victims by name or including other identifying information in court documents and other records. Such an order should include a prohibition on the parties and other system participants to refrain from referring to the prior victimization in the present case unless pre-determined by the court to be relevant.

Unfortunately, too few victims or their advocates know that victims' rights support a request for these protections. Even when victims or their advocates know to claim such protections, victims' rights to be notified of and participate in criminal proceedings are routinely denied, making it difficult for many victims to have the notice and opportunity necessary to assert their desire to proceed by pseudonym and to otherwise protect their privacy. And even when victims are able to timely request such protections they are routinely denied—most often because prosecutors or courts are insufficiently familiar with privacy law—thereby violating the victims' rights and making them vulnerable to harassment, intimidation, and other repercussions.

Importantly when opinions or other court documents contain the victim's name or other identifying information and either have or have not been made a part of the public record, all is not lost. Victims have remedies to reclaim their privacy and minimize or prevent harm associated with ongoing disclosure. Among these remedies are: a prompt request made to the court to substitute the pleading, record, or court opinion with a redacted version omitting the victim's name and other identifying information; if the document has made it online, substitution and redaction should be accompanied by a letter request—known as an Internet take-down letter—to public and private online databases and other service providers to remove links to the document or to substitute a link to a redacted version; and if the criminal proceedings are ongoing—whether by initial prosecution, appellate review, or post-conviction processes—a request to the court to issue a protective order requiring parties and other system participants to refer to the victim only by pseudonym and omit other identifying information from court documents. Finally, victims may seek to seal pleadings, records, and other court documents. Together, these remedies can be effective, albeit imperfect, tools in addressing unauthorized releases of victim information as part of criminal proceedings.

Crime Victim Litigation Clinic at Lewis & Clark Law School

NCVLI is committed to educating the legal profession on victim law. One of the places where that education begins is the Crime Victim Litigation Clinic at Lewis & Clark Law School in Portland, Oregon. In the Clinic, which is directed by Clinical Professor of Law Meg Garvin, NCVLI's legal staff works with law students to research and



From Left to Right: Monica Bustos, Brad Kraus, Caitlin Egeck, Simon Lee, Marisa Peterson.

write legal arguments to support crime victim attorneys and advocates nationwide and also to support NCVLI's amicus curiae efforts. During the Fall 2013 term, five law students participated in the Clinic. They worked on projects covering a wide range of legal issues, including: whether violations of a victim's rights to be notified of, and present and heard at sentencing provide authority for the court to vacate a sentence under California law; whether the federal Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, is applicable in immigration removal proceedings; and whether, under Oregon law, victim information can be redacted from documents produced in response to discovery requests during probation violation hearings. In addition they helped on two of NCVLI's amicus briefs: the first was filed in the Arizona Court of Appeals arguing that a corporation qualifies for victims' rights under Arizona law; the second was filed with the United States Supreme Court arguing that in cases involving possession of child rape images (a.k.a. child pornography) victims are entitled to full restitution from every convicted possessor.

I. Seeking Redaction and Substitution

Redaction is defined as “[t]he careful editing (of a document), esp. to remove confidential references or offensive material.” Black’s Law Dictionary 1281 (7th ed. 1999). Substitution is defined for legal purposes as “[t]he process by which one person or thing takes the place of another person or thing.” *Id.* at 1444. When a victim’s name or other identifying information is disclosed in court documents—such as the indictment, pleadings, exhibits filed in support of pleadings, or court orders and opinions—victim counsel can move the court to redact those documents and substitute redacted versions as the official ones. Although there are no specific statutory provisions providing explicit authority for redaction and substitution, a motion seeking these remedies may properly be supported by victims’ right to access the courts, and by their rights to privacy, protection, and to be treated with fairness, dignity, and respect.

All individuals, including crime victims, have a fundamental right to access the courts. *See, e.g.,*

13th Annual Crime Victim Law Conference



Mark your calendars for NCVLI's 13th Annual Crime Victim Law Conference, to be held June 20-21, 2014 at Lewis & Clark College in Portland, Oregon. NCVLI's Conference is the only conference in the country focused on rights enforcement. Join us for this invaluable opportunity to learn the practical skills necessary to serve victims and to participate in key conversations that will shape the future of victims' rights.

More information available at www.ncvli.org.

Chappell v. Rich, 340 F.3d 1279, 1282 (11th Cir. 2003) ("Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment."); *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (noting that access to courts is a fundamental right). This right must be enforced in a way that is "more than merely formal; it must also be adequate, effective, and meaningful." *Chappell*, 340 F.3d at 1282 (citations omitted). Respecting a victim's choice to maintain privacy in connection with criminal proceedings may reduce the risk of secondary victimization, which in turn helps ensure the meaningful exercise of the victim's other rights, including the right to access justice.

Critical to ensuring meaningful victim participation, the federal Constitution and common law guarantee crime victims the right to privacy in matters of a personal nature.⁵ See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (recognizing that "a right of personal privacy . . . does exist under the Constitution"); *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (noting cases finding protected privacy interests include an "individual interest in avoiding disclosure of personal matters"); see generally Former Judicial Conference Privacy Policy (2006), *Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files*, available at <http://www.uscourts.gov/RulesAndPolicies/JudiciaryPrivacyPolicy/FormerJudicialConferencePrivacyPolicy2006.aspx> ("The authority to protect personal privacy and other legitimate interests in nondisclosure is based, like public access rights, in common law and constitutional principles."). This right is often termed the right to "informational privacy." *Bloch v. Ribar*, 156 F.3d 673, 683-84 (6th Cir. 1998). In addition, federal statutes, including the Crime Victims' Rights Act (CVRA), 18 U.S.C. §3771, explicitly recognize victims' privacy and protection rights as well as their right to be treated with fairness and dignity. 18 U.S.C. §3771(a)(1) and (8) (providing that crime victims have "[t]he right to be reasonably protected from the accused" and "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy.").⁶

⁵ Many state constitutions also guarantee the right to privacy. See Nat'l Crime Victim Law Inst., *Use of Pseudonyms in Civil Law Suits*, *supra* note 4, at 2 n.10 (listing 22 state constitutional provisions).

⁶ Similarly, the Child Victims' and Child Witnesses' Rights Act provides for informational privacy and protection-based rights for child victims and witnesses. See 18 U.S.C. § 3509(d)(2) (providing child-victims and witnesses with a number of privacy-related rights, including the requirement that "[a]ll papers to be filed in court that disclose the name or any other information concerning a child shall be filed under seal without necessity of obtaining a court order. The person who makes the filing shall submit to the clerk of the court – (A) the complete paper to be kept under seal; and (B) the paper with the portions of it that disclose the name or other information concerning a child redacted, to be placed in the public record.").

Courts have relied on a number of these rights when omitting victims' names from court documents and ordering the use of redaction and substitution. This is true even during appellate review processes when the victim's name had been used during earlier proceedings. *See, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 527 n.2 (1989) (internal citation omitted) (explaining that “[i]n filing this lawsuit, appellee used her full name in the caption of the case. On appeal, the Florida District Court of Appeal *sua sponte* revised the caption, stating that it would refer to the appellee by her initials, ‘in order to preserve [her] privacy interests.’ Respecting those interests, we, too, refer to appellee by her initials, both in the caption and in our discussion.”); *Barbe v. McBride*, 521 F.3d 443, 445 n.1 (4th Cir. 2008) (noting that “[a]lthough [the victim] has been referred to in some of the underlying proceedings and submissions by her full name, we prefer to protect her anonymity, as best we can, by using only her initials”); *Outar v. Khahaifa*, No. 10-CV-3956 (MKB)(JO), 2012 WL 6698710 (E.D.N.Y. Sept. 25, 2012) (recognizing that courts have an obligation under the CVRA to ensure the victim's right to be treated with respect for her dignity and privacy and therefore referring to the victim by initials instead of her full name in habeas corpus proceeding); *Gueits v. Kirkpatrick*, 618 F. Supp. 2d 193, 199 n.1 (E.D.N.Y. 2009) (finding that it was appropriate to redact any identifying information regarding the victim in defendant's habeas petition, and noting that “[t]he Victim's name is known to the parties and appears on the record. Nevertheless, out of respect for her dignity and privacy, *see* 18 U.S.C. § 3771(a)(8), [the court] will not use her name in [its Report and Recommendation].”).

Redaction and substitution can be powerful remedies to aid victims in protecting and reclaiming their privacy rights, however, they are not the only tools available to victims. Sealing, protective orders, and Internet take-down letters are additional tools that may assist victims in protecting and advancing their rights.

II. Sealing, Protective Orders, and Internet Take-Down Letters May Also Provide Valuable Assistance to Victims in Protecting Private Information

In addition to seeking redaction and substitution, victims who wish to protect their privacy in the context of criminal proceedings may request that the court seal documents and issue protective orders. To address court documents that are available online, victims may also send letter requests to private and public online databases that provide links to the documents at issue.

A. Sealing.

Victims may request that the court seal any records that contain identifying information. Importantly, this remedy alone is not likely sufficient to protect victims' privacy as seals may be lifted—and in some jurisdictions are routinely lifted—at the conclusion of the case. Consequently, in the absence of other protections, the victim's identity can be widely disseminated once the seal is lifted. *See United States v. Darcy*, No. 1:09CR12, 2009 WL 1470495, at *1 (W.D.N.C. May 26, 2009) (internal citation omitted) (determining that the government's request to seal the records in the criminal case, which mentioned the victim by name, would be “ineffectual inasmuch as such seal would be automatically lifted – as it is in every case – at the conclusion of this criminal action, thereby publicly disclosing the name of the victim[,]” and holding instead, that the only adequate means of protecting the victim's identity would be through the use of a pseudonym). Because sealing may provide only temporary privacy protections in many cases, such a request should be accompanied by requests for redaction, substitution, and protective orders.

B. Protective orders.

If the criminal proceedings are ongoing—through continued prosecution or subsequent appellate or post-conviction processes—the victim may request that the court enter a protective order. This request should be made in addition to a request for redaction and substitution. Examples of protective order terms that may be beneficial to victims whose private information has been released include: requiring

all parties and other system participants going forward to refer to the victim by pseudonym only and to redact any identifying information in court documents; and prohibiting defendant from disclosing the victim's name or identifying information except as constitutionally necessary to prepare a defense.

Courts have held that victims' rights—including to access the courts, to privacy and protection, and to be treated with fairness, dignity, and respect—support such protective orders. *See, e.g., United States v. Graham*, No. 12-CR-311, 2013 U.S. Dist. LEXIS 2992 (W.D.N.Y. Jan. 8, 2013) (granting the government's request for a protective order preventing the use and disclosure of the full names of both the minor and adult sex trafficking victims pursuant to Section 3509(d) and the victims' CVRA rights to protection and to be treated with fairness and respect for their dignity and privacy); *United States v. Patkar*, Cr. No. 06-00250 JMS, 2008 WL 233062, at *5 (D. Haw. Jan. 28, 2008) (rejecting an attempt by the Associated Press to dissolve a Stipulation and Order entered between the government and defendant that protected discovery materials related to the underlying extortion of the victim from public disclosure, and explaining that the right of crime victims "to be treated with fairness and respect for [their] dignity and privacy," provided in the CVRA was good cause for its issuance and that Congress' determination was that failure to do so "works a clearly defined and serious injury to the victim."); *United States v. Kelly*, No. 07-CR-374, 2008 WL 5068820, at *2 (E.D.N.Y. July 10, 2008) (granting the government's request for a protective order allowing the adult and child victim-witnesses to testify without using their full names, to redact their birth certificates—which would be trial exhibits—and to prohibit the public disclosure of the victim-witnesses' names or identifying information, and agreeing with the government that "[g]iven the potentially explicit nature" of the victim-witnesses' expected testimony, "it is necessary to conceal their identity to protect them from public humiliation and embarrassment."); *United States v. Duncan*, 2008 U.S. Dist. LEXIS 59066 (D. Idaho Aug. 5, 2008), at *13 (relying on § 3509(d) in decision

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to grant protective order providing for the use of initials in place of the child-victim's name as "the well being of the minor victim requires" these protections).

C. Internet take-down letters.

In addition to requesting redaction, substitution, sealing, and a protective order, if a document revealing the victim's name or other identifying information has made it online, victim counsel may also make a direct request to public and private databases and other service providers that link the information—for instance, Pacer, Google, FindLaw, Westlaw, and Lexis—that they remove the document and replace it with the legally accurate redacted version. If the Internet service provider or database is unwilling to remove and replace the information after receiving a cordial letter request, the next step for the victim in terms of potential remedies often involves complex considerations including how the service provider or database received the document and whether sealing or redaction and substitution have been ordered by the court. One remedy may be to seek a court order based on victims' rights requiring the party who submitted the document containing the victim's name or identifying information to make best efforts to persuade the database or service provider to replace it with the redacted version.⁷

III. Conclusion

Whether the criminal proceedings are ongoing, or have long since concluded, redaction and substitution—along with other remedies such as protective orders, sealing, and Internet take-down letters—can be powerful tools for victims seeking to address unauthorized releases of their private information. These tools can be used by victims during all stages of the criminal proceedings to help make meaningful their right to access the justice system without compromising their rights to privacy, protection, and to be treated with fairness, dignity, and respect.

⁷ For assistance in identifying other possible remedies, please contact NCVLI at https://law.lclark.edu/centers/national_crime_victim_law_institute/professional_resources/technical_assistance/.