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The Modern Penny Dreadful: Public Prosecution and the Need for Litigation Privacy in a Digital Age

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"I used to go to trial a lot. . . . You can get more out of a trial and the sadness in it and the poignancy in it than you could ever imagine."
—Murder Mystery Author, Mary Higgins Clark[1]

I. INTRODUCTION

In the last two decades, cyberstalking, cyberbullying, and related crimes have offered new legal remedies for Internet use that causes harm to others.[2] From the first 1990s cyberstalking offense to the revenge porn statutes enacted in over thirty-four states today, the criminal justice system continues to support and expand criminalizing Internet misuse as a form of interpersonal violence and aggression.[3] Constitutional First Amendment and overbreadth claims have not yet posed a significant challenge to this trend.[4] Although expanded

University of Nebraska College of Law Center for Space, Cyber, and Telecommunications Law for an excellent, thought-provoking symposium in March 2017. Finally, thank you to my son, Atticus, for a shared appreciation of the need to promote the human spirit in an increasingly technological world.

1. *Mary Higgins Clark, The Queen of Suspense*, CBS NEWS SUNDAY MORNING (Apr. 2, 2017), http://www.cbsnews.com/news/mary-higgins-clark-the-queen-of-suspense [http://perma.unl.edu/74NJ-SZ7U].
2. For a more in-depth discussion of the cybercrime offenses and their elements, see generally Amy Lai, *Dangerous Proximity: Using High-Tech Evidence in the Criminal Prosecution of Domestic Violence*, 48 CRIM. L. BULL. 548 (2012); Aily Shimizu, *Domestic Violence in the Digital Age: Towards the Creation of a Comprehensive Cyberstalking Statute*, 28 BERKELEY J. GENDER L. & JUST. 116 (2013); and Cassie Cox, Comment, *Protecting Victims of Cyberstalking, Cyberharassment, and Online Impersonation Through Prosecutions and Effective Laws*, 54 JURIMETRICS J. 277 (2014).
3. The State of California adopted the first cyberstalking offense in the United States in 1999. *See* CAL. PENAL CODE § 646.9 (Deering 2017). The federal Violence Against Women Act first criminalized cyberstalking in 2000. *See* 47 U.S.C. § 223 (2012) (entitled "Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications"); CYBER CIVIL RIGHTS INITIATIVE, REVENGE PORN STATISTICS (2014), https://www.cybercivilrights.org/wp-content/uploads/2014/12/RPStatistics.pdf [http://perma.unl.edu/6C7L-JXT8]; Ioana Vasiu & Lucian Vasiu, *Light My Fire: A Roentgenogram of Cyberstalking Cases*, 40 AM. J. TRIAL ADVOC. 41, 53 (2016) ("Though cyberstalking may not necessarily appear to be a violent act, Florida law treats it as such . . . ."). *See generally* Lee C. Durio, Note, *Turn Your Cameras Off in the Bedroom: "Revenge Porn" Is Now a Felony in Louisiana*, 43 S.U. L. REV. 251 (2016); George F. du Pont, Comment, *The Criminalization of True Anonymity in Cyberspace*, 7 MICH. TELECOMM. & TECH. L. REV. 191, 201 (2001).
4. *See, e.g.*, United States v. Matusiewicz, 84 F. Supp. 3d 363 (D. Del. 2015) (holding that the federal cyberstalking statute is not unconstitutionally overbroad); Burroughs v. Corery, 92 F. Supp. 3d 1201 (M.D. Fla. 2015) (holding that the Florida cyberstalking statute is not a facial violation of the First Amendment); People v. Sucic, 928 N.E.2d 1231 (Ill. App. Ct. 2010) (upholding the validity of the state cyberstalking offense against constitutional First Amendment overbreadth challenges). Also note that civil remedies for cybercrime provide parallel protections to criminal charges and are supported by anti-SLAPP (Strategic Lawsuits Against Public Participation) statutory provisions protecting crime victims in

criminalization seeks to enhance justice for crime victims, it may also aggravate invasions of privacy for cybercrime victims through the resulting public record of court proceedings. Without adequate privacy protections, cybercrime victim witnesses in particular may be disincentivized to cooperate while offenders intent on humiliating and intimidating victims are able to use the court as a tool of abuse.

Protected by immunity and strict statutory interpretation of public records laws, government actors take little responsibility for the subsequent release of information about victims of computer crime obtained through official investigation and litigation.[5] The subpoena power of legislators and prosecutors to combat cybercrime and related offenses, such as human trafficking, reach deeply into the private worlds of vulnerable crime victims of all ages.[6] While some victims may consent to such intrusions, particularly when filing parallel civil actions for cyberstalking,[7] others may have their privacy invaded without their consent by both perpetrators and the government through public prosecution. Moreover, injunctive relief is elusive, particularly in Internet-distribution cases, where the risk of distribution of information grows exponentially and internationally even if the primary perpetrator is convicted and incarcerated.[8] If, in the creation of legal sanctions for interpersonal cybercrime, there is little assurance of a personal benefit for most victims of crime, then the benefit to society through prosecutorial deterrence should at least be clear and well-defined, and ensure minimal harm to the victims themselves.

Pseudonym and anonymity policies, developed prior to the Digital Age, are disfavored based on constitutional protections afforded the

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bringing claims. *See, e.g.*, Lemoine v. Wolfe, 812 F.3d 477 (5th Cir. 2016) (discussing a crime victim's defenses to malicious-prosecution tort claims following dismissal of cyberstalking charges regarding posting critical comments about a judge).

5. *E.g.*, Ark. State Police v. Wren, 491 S.W.3d 124 (Ark. 2016) (interpreting state Freedom of Information Act provisions to cover motor vehicle records but not law enforcement accident reports, thus disclosing names and addresses of accident victims and offenders).

6. *See* Senate Permanent Subcomm. v. Ferrer, 199 F. Supp. 3d 125 (D.D.C. 2016) (permitting the Senate Subcommittee's broad, fact-finding investigation into interstate cyberstalking).

7. *See* Doe *ex rel*. Roe v. Backpage.com, LLC, 104 F. Supp. 3d 149 (D. Mass. 2015) (addressing sex-trafficking victims' federal and state civil claims against online-advertisement-forum operators).

8. *See* Arthur Gaus, *Trolling Attacks and the Need for New Approaches to Privacy Torts*, 47 U.S.F. L. REV. 353, 363 (2012) ("Many subjects of trolling attacks find out they have been targeted only once the circulation of the attack reaches a certain level."). *Cf.* Horowitz v. Horowitz, 160 So. 3d 530, 531 (Fla. Dist. Ct. App. 2015) (citing Branson v. Rodriguez-Linares, 143 So. 3d 1070, 1071 (Fla. Dist. Ct. App. 2014)) (providing that a finding of domestic violence cyberstalking supports injunctive relief).

defendant and the ensured integrity of the criminal justice system.[9] Remedies for undue intrusion or negligent storage of evidence by the government during or after litigation may be negligible or involve yet more privacy intrusions through additional litigation.[10] Crime-victims'-rights advocates on the national stage continue to struggle to find acceptable legal remedies for victims of cybercrime in the court system.[11]

Today, individual perpetrators and their accomplices can easily purchase a portable drone with a miniature camera for less than one hundred dollars[12] to spy on the lives of others outside the courtroom

9. *See, e.g.*, Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185 (2d Cir. 2008) (focusing on the public interest in disclosure of information when anonymity is requested); *see also infra* Part III (addressing the need to balance constitutional rights with the needs of crime victims).

10. *See, e.g.*, Kelley v. FBI, 67 F. Supp. 3d 240 (D.D.C. 2014) (addressing government immunity from tortious liability for intrusive investigation and disclosure of the private information of cyberstalking crime victims); *see also* Yount v. Handshoe, 171 So. 3d 381 (La. Ct. App. 2015) (applying anti-SLAPP (Strategic Lawsuit Against Public Participation) protections to permit a father to file suit for defamation, invasion of privacy, and cyberstalking after an Internet blogger repeatedly posted the minor son's pornographic drawing online, a drawing which had been filed with the court in a divorce proceeding).

11. *See Fighting for Victims' Rights in Child Rape Image Cases*, NAT'L CRIME VICTIM L. INST. (Dec. 18, 2013), https://law.lclark.edu/live/news/24416-fighting-for-victims-rights-in-child-rape-image [http://perma.unl.edu/5KQW-YUAZ] (noting the filing of amicus briefs in numerous restitution cases on behalf of online child pornography victims, including *Paroline v. United States*, 134 S. Ct. 1710 (2014), which vacated the $3.4 million award to the child victim); *see also* Janet Lawrence, Comment, *The Peril of* Paroline*: How the Supreme Court Made It More Difficult for Victims of Child Pornography*, 2016 BYU L. REV. 325 (arguing that the legislative intent of the Mandatory Restitution Act was to award victims of child pornography the full amount of their losses in restitution).

12. For example, the SkyRider 3-Axis Gyroscope WiFi Drone is available from J.C. Penney stores for ninety-nine dollars and is marketed as follows: "Get a bird's-eye view and capture unforgettable moments with the 3-axis SkyRider drone that has a built-in camera. Its 300-ft. control range will help you cover the entire event with ease." *SkyRider 3-Axis Gyroscope WiFi Drone*, JCPENNEY, http://www.jcpenney.com/p/skyrider-3-axis-gyroscope-wifi-drone/ppr5007114655?pTmplType_regular&catId_SearchResults&searchTerm_skyrider+3+axis+gyroscope+wifi [http://perma.unl.edu/6VJT-FN75]; *see* A. Michael Froomkin & P. Zak Colangelo, *Self-Defense Against Robots and Drones*, 48 CONN. L. REV. 1 (2015) (addressing restrictions on the right to self-help in preventing intrusion on seclusion by drones and robots). *But see* Michael Berry, *The Drones Are Coming . . . and for Now We Should Get Out of Their Way*, 36 PA. LAW. 50 (2014) (arguing that existing tort claims are sufficient to address invasions of privacy by drones). State criminal statutory reform is beginning to address these privacy concerns. *See, e.g.*, KAN. STAT. ANN. § 60-31a02(c) (2016) (redefining "harassment" in the Protection from Stalking Act to include "any course of conduct carried out through the use of an unmanned aerial system over or near any dwelling, occupied vehicle or other place where one may reasonably expect to be safe from uninvited intrusion or surveillance"). Subsection (e) of the statute defines "unmanned aerial system" as "a powered, aerial vehicle that: (1) Does not carry a human operator; (2) uses

or quietly turn on their cellphones to record testimony and images of victim witnesses inside the courtroom. They can threaten victims repeatedly online with words and images from anywhere across the globe, sometimes turning a major profit from the abuse through extortion or even advertising.[13] And yet, in addition to such violations, cybercrime victims bear substantial personal-safety risks in relying on the court system for assistance. Courts today are more public than ever, some experimenting with live streaming their proceedings[14] or permitting public live blogging during trial.[15] It is imperative that the judicial system remain steadfast in its obligation to protect vulnerable categories of crime victims in a Digital Age while ensuring access to justice for defendants and witnesses alike.[16]

II. CYBERCRIME AND THE SOCIAL IMPACT OF LOSS OF PRIVACY

Cybercrime offenses address Internet-based conduct presumed to be harmful to individuals. What is less clear is the legislative and judicial perception of the risk of harm to society in general from online intrusions on privacy or the dissemination of greater amounts of information through the Internet. Morbid fascination with court dramas and true crime remains pervasive in modern entertainment, with little consideration by the judiciary of its impact on the willingness of actual crime victims to cooperate with the justice system. The courts

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aerodynamic forces to provide vehicle lift; (3) may fly autonomously or be piloted remotely; (4) may be expendable or recoverable; and (5) may carry a lethal or nonlethal payload." § 60-31a02(e).

13. *See* Katherine Quarmby, *How the Law Is Standing Up to Cyberstalking*, NEWSWEEK (Aug. 13, 2014), http://www.newsweek.com/2014/08/22/how-law-standing-cyberstalking-264251.html [http://perma.unl.edu/JBW5-VELQ] (describing disturbing incidents, such as an autistic child being tortured on video ranked by consumers as "the funniest video" on Google in Italy for a period of time).

14. *See* COURTROOM VIEW NETWORK, http://cvn.com [http://perma.unl.edu/Q648-YZ68] (providing recordings and live streaming of American trial proceedings); *see also Appellate Court Oral Argument Audio*, ILL. CTS., http://www.state.il.us/court/Media/Appellate/default.asp [http://perma.unl.edu/4HHU-V5QA] (providing video and audio recordings of Illinois Court of Appeals oral arguments); *Supreme Court Oral Argument Audio & Video—2017*, ILL. CTS., http://state.il.us/court/Media/On_Demand.asp [http://perma.unl.edu/2L7T-LB4X] (providing video and audio recordings of Illinois Supreme Court oral arguments).

15. *See* Debra Cassens Weiss, *Judge Explains Why He Allowed a Reporter to Live Blog Federal Criminal Trial*, ABA J. (Jan. 16, 2009), http://www.abajournal.com/news/article/bloggers_cover_us_trials_of_accused_terrorists_cheney_aide_and_iowa_landlor [http://perma.unl.edu/9H2W-AZ3W] (describing state and federal cases permitting journalists to live blog and simultaneously receive comments from the public during their descriptions of the trial).

16. *See also* Julie Sobowale, *Law Firms Must Manage Cybersecurity Risks*, ABA J., Mar. 2017, at 34, 43 ("We have the ethical obligation of protecting and safeguarding client data. People expect lawyers to know better." (quoting law firm partner Mark McCreary)).

express little concern regarding the impact of unsavory information and images on the public at large. As the U.S. Supreme Court concluded in 2011 in *Brown v. Entertainment Merchants Ass'n*, the social impact of a digital or information age remains uncertain, particularly when it involves fictitious content:

> In the 1800's, dime novels depicting crime and "penny dreadfuls" (named for their price and content) were blamed in some quarters for juvenile delinquency. When motion pictures came along, they became the villains instead . . . . For a time, our Court did permit broad censorship of movies because of their capacity to be "used for evil," but we eventually reversed course. Radio dramas were next, and then came comic books. Many in the late 1940's and early 1950's blamed comic books for fostering a "preoccupation with violence and horror" among the young, leading to a rising juvenile crime rate. But efforts to convince Congress to restrict comic books failed. And, of course, after comic books came television and music lyrics.[17]

The Internet permits rapid, wide dissemination of information about both fictitious and actual events. Rather than restrict the medium of distribution due to its reach, speed, and potentially greater impact, the courts have instead focused on the content of information sent online and the intent of the sender. Following the Court's rationale in *Brown*, the evolutionary march of technology—including exposure to mass information—has a negligible, or at least unknown, influence on the general well-being of society. Victims of crime may disagree.

For example, the Court has held that state restrictions on virtual child pornography may violate the First Amendment, while pornography involving real children constitutes a criminal offense not subject to the protection of free speech.[18] Given that content-based restrictions on speech are narrow exceptions under the First Amendment,[19] the likelihood that persons who consider themselves to be cybercrime victims will be treated as such by the courts is rendered more remote. Such restrictions include permitting content-based restrictions "only for a few historic categories of speech, including incitement, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent."[20]

17. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 797 (2011) (citations omitted).
18. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), *superseded by statute*, Pub. L. No. 108-21, 117 Stat. 650, *as recognized in* United States v. Beaty, No. 1:08-cr-51-SJM, 2009 U.S. Dist. LEXIS 121473 (W.D. Pa. Dec. 31, 2009) (relying on New York v. Ferber, 458 U.S. 747 (1982)).
19. *See* United States v. Alvarez, 567 U.S. 709 (2012); *see also* Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and Categorical First Amendment Speech Exclusion*, 56 WM. & MARY L. REV. 1339 (2015) (arguing the Roberts Court cares about protecting free speech against censorship, but only to the extent speakers will not challenge social or political stability).
20. *Alvarez*, 567 U.S. at 709.

True crime as modern entertainment—in the form of revenge porn websites, reality law-enforcement and court television, some live-streamed court blogs, and artistic or comic digital renderings of litigants and their stories—all bear the familiar voyeuristic and opportunistic tones of the original penny dreadful.[21] "In 19th-century America, cheap pamphlets disseminated all sorts of popular culture to a mass audience, everything from religion and politics to sex and violence. Publishers understood that, like today, sensationalism sells. Murder trials provided sensational content, and especially murder trials where women were the victims or the accused."[22] What protection government is willing to provide to those subject to exposure in the court system is based in part on value judgments of what constitutes real harm worthy of intervention.

The historic concerns that do exist regarding risks of public exposure for litigants, witnesses, and jurors have related to interference with the administration of justice and public safety,[23] and eventually financial risks associated with harm to reputation. For example, the Fifth Circuit Court of Appeals in *United States v. Brown* justified the empaneling of an anonymous jury and continued maintenance of anonymity after the trial's conclusion: "Very real threats were posed by excessive media coverage, by the trial participants' eagerness to manipulate the News Media, and by the risk of jury harassment and taint. The judge was empowered and entitled to counteract each of these threats in order to assure a fair trial."[24] In contrast, as stated above, the Court seems dubious of the negative impact on society of information itself, whether some find it to be graphic, violent, or deeply disturbing.[25]

As the debate continues to fester over the social relevance of a clear loss of personal privacy in the Digital Age, expanding social-science

21. For an interesting analysis of penny dreadfuls and Nineteenth Century sensationalist entertainment wallowing in flesh and blood, see Michael Ariens, *The Invention of Murder: How the Victorians Revelled in Death and Detection and Created Modern Crime*, 61 FED. LAW. 104 (2014) (book review) (describing author Judith Flanders' depiction of "[p]ennybloods [which] were later called penny-dreadfuls, and were abhorred by the middle class, which found other ways to embrace the same violence, as by attending murder trials or reading fiction written to their tastes"); and Ian Ward, *Things Little Girls Have No Business to Know Anything About: The Crimes of Aurora Floyd*, 22 COLUM. J. GENDER & L. 430 (2011).

22. MURDER AND WOMEN IN 19TH-CENTURY AMERICA: TRIAL ACCOUNTS IN THE YALE LAW LIBRARY: AN EXHIBITION CURATED BY EMMA MOLINA WIDENER & MICHAEL WIDENER 4 (2015), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1012&context=AMtrials.

23. *See* Pennekamp v. Florida, 328 U.S. 331, 346 (1946).

24. United States v. Brown, 250 F.3d 907, 922 (5th Cir. 2001).

25. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011) (holding that state restrictions on the sale of violent video games to minors violated the First Amendment upon lack of a sufficient nexus to any harm to youth).

research provides a degree of insight. Some logically argue that if nearly everyone in society willingly uses the Internet as a public tool for information searches and sharing of sensitive material, then efforts to obtain greater privacy protections under the law are a lost cause.[26] Others suggest that global research demonstrating society's continued interest in retaining and restoring privacy rights is already having an impact on commercial and governmental entities.[27] Questions remain whether individuals in society are becoming acclimated to greater transparency and loss of privacy, and whether loss of privacy persistently inflicts personal harms which we are only beginning to understand. At present, social-science research indicates the latter, which bodes well for privacy rights legal advocates.

Research indicates that a perception of social stigma influences behavior significantly, requiring, for example, assurances of privacy and confidentiality for many young adults who seek mental health services.[28] The strength of crime victim services, including those within the criminal justice system, is highly dependent on the victim's level of trust that those services maintain confidentiality and support the vic-

26. *E.g.*, Jacob Morgan, *Privacy Is Completely and Utterly Dead, and We Killed It*, FORBES (Aug. 19, 2014), https://www.forbes.com/sites/jacobmorgan/2014/08/19/privacy-is-completely-and-utterly-dead-and-we-killed-it/#27ec95f431a7 [http://perma.unl.edu/CM3G-RJFH] ("I think we've clearly reached a point in today's world where privacy is pretty much a lost cause.").

27. *See, e.g.*, Lieutenant Commander Joseph Romero, National Archives and Record Administration v. Favish*: Protecting Against the Prying Eye, the Disbelievers, and the Curious*, 50 NAVAL L. REV. 70, 99–100 (2004) (arguing that new technology "pander[s] to our voyeuristic tendencies," but that Congress has responded by strengthening privacy protections in the Freedom of Information Act (FOIA)); Jennifer L. Bauer, Abstract, *Big Data, Big Money, Big Shadows* (May 28, 2016) (unpublished manuscript), http://ssrn.com/abstract=2804760 [http://perma.unl.edu/4WYC-KLKK] (recommending a shift from regulating the point of data collection to the points of continued data use by commercial and governmental entities to increase self-protection of personal data); Julie Brill, Comm'r, Fed. Trade Comm'n, Keynote Address at the Carnegie Mellon University Data Privacy Day: It's Getting Real: Privacy, Security, and Fairness in the Internet of Things (Jan. 28, 2015), https://www.ftc.gov/system/files/documents/public_statements/621381/150128dataprivacyday.pdf [http://perma.unl.edu/X2DW-QZSP] ("In order to fully reap the benefits of the Internet of Things and Big Data, both must be imbued with tested principles of privacy."); Jason Murdock, *From Orwell to Snowden: Is Privacy Dead in the Digital Era of Mass Surveillance?*, INT'L BUS. TIMES (April 19, 2016), http://www.ibtimes.co.uk/orwell-snowden-privacy-dead-digital-era-mass-surveillance-1555651 [http://perma.unl.edu/4K39-2J8F] (providing global survey results which identify privacy protections as the foremost concern of Internet users, resulting in new cybersecurity applications for users).

28. *See* Donna Holland & Heidi Wheeler, *College Student Stress and Mental Health: Examination of Stigmatic Views on Mental Health Counseling*, 30 MICH. SOC. REV. 16, 36 (2016); Marrisa Y. Mar et al., *Exploring e-Mental Health Preferences of Generation Y*, 32 J. TECH. IN HUM. SERVS. 312 (2014).

tim's own interests.[29] Recent efforts to pierce the confidentiality of mental health services have been met with resistance, such as lack of state cooperation regarding federal online registries of persons with a history of mental illness related to restrictions on gun ownership.[30] The renewed stigma surrounding mental illness and access to weapons bears a tenuous link to disputed research regarding the link between mental illness and key causes of mass violence, as well as the privacy interests of gun-rights advocates.[31]

Lack of privacy generates both legal and social concerns in structured settings such as prisons,[32] mental health facilities,[33] or post-disaster relief.[34] Research in these settings demonstrates the shared human value of dignity and the essential nature of privacy to achieve healing and a sense of well-being, particularly after a personal loss or threat. Post-disaster victims, for example, may be thrust into the public eye, with some fearing to leave their homes or hospital rooms.

> As social workers, we had conflicted feelings about the role that the media plays following a disaster. We were able to recognise [sic] that it was a significant means of communication for communities and, for some victims, it could be an important avenue through which to tell their story. For some, this con-

29. *See* Catherine E. Burnette, *From the Ground Up: Indigenous Women's After Violence Experiences with the Formal Service System in the United States*, 45 BRIT. J. SOC. WORK 1526 (2015) (addressing indigenous women as crime victims who are often distrustful of both law enforcement and mental health providers based on past negative experiences).

30. *See, e.g.*, *Mental Health Reporting*, LAW CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/gun-laws/policy-areas/background-checks/mental-health-reporting [http://perma.unl.edu/KLA7-QZAK] (decrying state failures to provide information on persons with mental illness in the National Instant Criminal Background Check System (NICS)). The federal Gun Control Act of 1968 prohibits persons adjudicated as "mentally defective" or having been committed to a mental institution from possessing a firearm. 18 U.S.C. § 922(d)(4), (g)(4) (2009).

31. Jennifer Mathis, *Mental Health Privacy*, 41 HUM. RTS. 10 (2016) ("Diminishing individuals' ability to keep this [mental health] information private would do little to protect the safety of others and would perpetuate prejudice and deter individuals from seeking help.").

32. *See* Jennifer M. Reingle Gonzalez & Nadine M. Connell, *Mental Health of Prisoners: Identifying Barriers to Mental Health Treatment and Medication Continuity*, 104 AM. J. PUB. HEALTH 2328, 2329 (2014) (identifying crowded conditions and lack of privacy as risk factors for self-harm in prison).

33. *See* Joseph O'Reilly & Bruce Sales, *Privacy for the Institutionalized Mentally Ill: Are Court-Ordered Standards Effective?*, 11 LAW & HUM. BEHAV. 41, 42 (1987) ("Empirically, privacy has been shown to be essential to the therapeutic program of a mental health facility . . . ."); Carolyn Popham & Martin Orrell, *What Matters for People with Dementia in Care Homes?*, 16 AGING & MENTAL HEALTH 181, 183, 185 (2012) (determining through research that residents with dementia continued to care about privacy, personalization of space, and dignity).

34. *E.g.*, Leah Du Plooy et al., *"Black Saturday" and Its Aftermath: Reflecting on Postdisaster Social Work Interventions in an Australian Trauma Hospital*, 67 AUSTL. SOC. WORK 274 (2014).

> tributed to their healing. However, for others the excessive coverage and requests to recount their stories seemed to be retraumatising [sic].[35]

For post-disaster victims, litigation to recover damages or cooperate with criminal prosecution would again expose them to the risk of potentially unwanted media and public attention.

The same argument generally holds for most victims of crime, who may have difficulty moving on when the risk of disclosure of sensitive information through the public record continues perpetually on the Internet. Unique to cybercrime litigation, however, is the necessity to admit into evidence a pattern of repeated online harassment in order to prove the difficult subjective and objective mens rea elements of knowingly causing fear in the victim.[36] For many offenders and victims in domestic violence relationships, their past lives are put on trial in even more detail to prove the legal elements, which is much more intrusive than disclosure of a single act such as theft.[37] If the growing criminalization of harassment and cybercrime recognizes the privacy harms to the individual, then the court system should take special notice of the availability of measures to protect the continued privacy interests of litigants and victim witnesses.

III. BALANCING CONSTITUTIONAL RIGHTS OF TRANSPARENCY WITH THE NEED FOR ANONYMITY IN THE COURTROOM

The protective measures in the court system that aid cybercrime and other crime victims to achieve privacy and safety frequently inspire constitutional challenges. Although trial courts have discretion to alter the conditions of the courtroom, they may not create conditions that infringe on the fundamental rights of the defendant and the public. "Close judicial scrutiny" is required, and "[c]ourts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience."[38] Adjusting court procedure and policy, including public access to records, in

35. *Id.* at 278 (addressing social work case study research in working with burn victims from the 2009 Australian bushfire tragedy).

36. *E.g.*, Baird v. Baird, 322 P.3d 728 (Utah 2014) (defining the objective rather than subjective standard required to prove the element of "emotional distress" in a case involving an adult son filing a stalking injunction against his mother); *see* UTAH CODE ANN. § 76–5–106.5(2) (West 2017) ("A person is guilty of stalking who intentionally or knowingly engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause *a reasonable person:* (a) to fear for the person's own safety or the safety of a third person; or (b) to suffer other emotional distress." (emphasis added)).

37. *See generally* Lai, *supra* note 2 (discussing various academic views on the advantages and disadvantages of admitting extensive sensitive evidence to prove cyberstalking in domestic violence cases).

38. Estelle v. Williams, 425 U.S. 501, 504 (1976).

order to protect the interests of crime victims invokes core constitutional considerations related to the rights of defendants and the integrity of the court system.

The defendant's due process right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment to the U.S. Constitution.[39] Although not explicitly enumerated, the Fourteenth Amendment guarantees a presumption of innocence in order to ensure a fair trial.[40] The defendant's right to a public trial[41] and the public's related right of access to criminal proceedings[42] are also guaranteed. However, as stated in *Waller v. Georgia*, the right of access "may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information."[43] Nevertheless, the general presumption is that criminal court proceedings must be public unless the interests of the defendant and the public are substantially outweighed by other overriding interests.[44]

Media access to public proceedings and subsequent reporting also invoke freedom of speech and freedom of the press considerations at all stages of the proceedings.[45] As stated by the U.S. Supreme Court in 1946 regarding the rights of journalists to report on pending trials: "[W]e think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of jus-

39. *See generally id.* at 503 (addressing the impact that presenting a defendant in prison attire to the jury has on the right to a fair trial); Drope v. Missouri, 420 U.S. 162, 172 (1975) (addressing a defendant's need for competency to ensure a right to a fair trial).

40. *Estelle*, 425 U.S. at 503.

41. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

42. Presley v. Georgia, 558 U.S. 209, 212–13 (2010) (holding that the right to a public trial includes public access to voir dire of prospective jurors); Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596, 602 (1982) (holding that a mandatory rule which closed the courtroom in all sexual abuse cases during the testimony of a minor victim witness violated the First Amendment); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) ("[T]he First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors . . . .").

43. Waller v. Georgia, 467 U.S. 39, 45 (1984).

44. CRIMINAL JUSTICE STANDARDS, STANDARD 8-5.2(a) (AM. BAR ASS'N 2013) ("[I]n any criminal matter, the public presumptively should have access to all judicial proceedings, related documents and exhibits, and any record made thereof not otherwise required to remain confidential. A court may impose reasonable time, place and manner limitations on public access.").

45. *See* Press-Enterprise Co. v. Superior Court of Cal., 478 U.S. 1 (1986) (addressing public access to preliminary hearings); Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501 (1984) (addressing public access to voir dire).

tice."[46] Here, the Court was concerned primarily with the fairness of the proceedings rather than the reputations of the court personnel and thus asserted that rights of public comment were even greater once the proceeding had terminated.[47] Pursuant to the First Amendment to the U.S. Constitution, as applied to the states through the Fourteenth Amendment Due Process Clause, Justice Douglas in *Craig v. Harney* upheld the journalistic freedom to comment on a pending case unless it creates a clear and present danger to the administration of justice.[48] *Craig* involved a newspaper editorial critical of a judge's rulings and qualifications, which resulted in the imprisonment of the reporter for contempt.[49]

Gag orders on parties, witnesses, and attorneys are also subject to First Amendment scrutiny, but not to an equal degree. For example, local rules prohibiting extrajudicial statements by attorneys associated with pending trials receive less scrutiny than prior restraints on the media.[50] Generally, however, a court may impose a prior restraint on the extrajudicial speech of trial participants only if it is narrowly tailored to prohibit speech that is substantially likely to materially prejudice a proceeding and provides the least restrictive means to avoid such prejudice.[51]

The American Bar Association Criminal Justice Section adopted standards in 2013 entitled "Fair Trial and Public Discourse," which include recommended restrictions on the extrajudicial statements of attorneys.[52] Standard 8-2.1 states, in part, that a criminal attorney should not make a public extrajudicial statement "if the lawyer knows or reasonably should know that it will have a substantial likelihood of: . . . unnecessarily heightening public condemnation of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation, or of a witness or victim . . . ."[53] The Criminal Justice Section specifically mentioned the need for special consideration of the privacy of vulnerable persons, including "juvenile offenders or other protected categories of offenders, victims or witnesses."[54]

46. Pennekamp v. Florida, 328 U.S. 331, 347 (1946) (reversing a holding of contempt against a journalist critical of Miami criminal investigations and prosecutions in rape cases, including the use of political cartoons).
47. *See id.* at 346.
48. Craig v. Harney, 331 U.S. 367, 372 (1947).
49. *Craig*, 331 U.S. 367.
50. *In re* Goode, 821 F.3d 553, 559 (5th Cir. 2016) (relying in part on Gentile v. State Bar of Nev., 501 U.S. 1030, 1074 (1991)).
51. *Id.* at 562 (holding that a local court rule in Louisiana prohibiting extrajudicial statements by attorneys in a pending case violated the First Amendment).
52. CRIMINAL JUSTICE STANDARDS, STANDARD 8-2.1 (AM. BAR ASS'N 2013).
53. CRIMINAL JUSTICE STANDARDS, STANDARD 8-2.1(a)(ii) (AM. BAR ASS'N 2013).
54. CRIMINAL JUSTICE STANDARDS, STANDARD 8-2.1(d) (AM. BAR ASS'N 2013). Nevertheless, Standard 8-2.2 provides somewhat conflicting public policies regarding the treatment of victim witnesses. This standard provides that a prosecutor

Nevertheless, the Section also put forth a standard supporting liberal dissemination of information once that information has been made public: "Protecting the fairness of a criminal trial is by itself an insufficient basis for rules or judicial orders prohibiting members of the public from disseminating or otherwise making available by means of public communication any information in their possession relating to a criminal matter."[55]

Prior restraints on speech are not unconstitutional per se but do hold a "heavy presumption" against constitutional validity.[56] For example, in a child-protection case, the Court of Appeals of Nebraska held that a judicial restriction on parental disclosure of a minor's medical records was not justified.[57] In contrast, in *Fairley v. Andrews*, threatening speech was not constitutionally protected by the First Amendment.[58] The plaintiffs in *Fairley* presented evidence that some of their coworkers in Chicago's Cook County Jail had engaged in threats and hostile conduct to deter other guards from testifying regarding inmate abuse by guards.[59] The Seventh Circuit Court of Appeals held that the First Amendment does not protect such threats and conduct when they are "designed to discourage future speech."[60] Interests frequently conflict surrounding the constitutional rights of defendants, witnesses, and the public when attempting to protect the privacy of persons in the courtroom, and the balance of interests may be determined by the types of protections available.

Several procedural tools are available to the court to protect the identity, and therefore the privacy and safety, of persons required to attend court hearings. Empaneling anonymous juries, for example, by use of numbers rather than names is an option. Another is to provide pseudonyms to litigants and witnesses, such as initials or Jane or John Doe fictitious names. Both measures have longstanding prece-

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should avoid making public statements which include the following information about victims and other witnesses: "the identity, race, ethnicity, creed, religion, or sexual orientation, expected testimony, criminal record, character, reputation, or credibility of prospective witnesses." CRIMINAL JUSTICE STANDARDS, STANDARD 8-2.2(a)(vii) (AM. BAR ASS'N 2013). This portion is followed by subsection (b), which states that providing information on "the identity of the victim, when the release of that information is not otherwise prohibited by law or would not be harmful to the victim" is not ordinarily a violation of Standard 8-2.2. CRIMINAL JUSTICE STANDARDS, Standard 8-2.2(b) (AM. BAR ASS'N 2013).

55. CRIMINAL JUSTICE STANDARDS, STANDARD 8-5.1(a) (AM. BAR ASS'N 2013).
56. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975).
57. *In re* T.T., 18 Neb. App. 176, 779 N.W.2d 602 (2009) (addressing the records of a minor who had been left at the hospital under Nebraska's Safe Haven Law).
58. *See, e.g.*, Fairley v. Andrews, 578 F.3d 518, 525 (7th Cir. 2009) (holding that the First Amendment protects against threats of punishment designed to prevent future speech).
59. *Id.* at 518.
60. *Id.* at 525.

dent in both state and federal courts supporting their use. In a Digital Age, such measures that hide identity in court records are particularly helpful to persons afraid of the loss of privacy through redisclosure of sensitive case information online. Unless the case involves jury tampering, jurors do not share the same concerns as cybercrime victims who may have been directly targeted by the defendant. Jurors are merely participating in the court proceedings. Nonetheless, it is instructive to consider the development of the court's willingness to empanel anonymous juries based on some shared concerns such as appreciation for the social stigma and loss of privacy that could result if the proceedings are redistributed on the Internet.

A. Anonymous Juries

If the court finds a special risk is present, an anonymous jury may be impaneled.[61] In making this determination in federal court, the trial court is granted deference on appeal subject to an abuse of discretion standard because it "require[s] a trial court to make a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceedings."[62] The anonymity protection of jurors may persist beyond the termination of proceedings, for example, if the court is convinced of an ongoing risk of harassment and intimidation.[63]

Due process challenges invariably arise,[64] with some arguing that jury anonymity taints the presumption of innocence during trial as well as the effective use of peremptory challenges during voir dire.[65]

61. *See, e.g.*, United States v. Warman, 578 F.3d 320, 343 (6th Cir. 2009) (permitting an anonymous jury in a drug conspiracy prosecution under 28 U.S.C. § 1863(b)(7) in the interests of justice for the purpose of preventing intimidation and other potential interference with the jury); State v. Bowles, 530 N.W.2d 521, 530–31 (Minn. 1995) (holding that an anonymous jury may be impaneled when "there is strong reason to believe that the jury needs protection from external threats to its members' safety or impartiality"); State v. Sandoval, 280 Neb. 309, 327, 788 N.W.2d 172, 196 (2010) (identifying anonymity or the identification of jurors by numbers as a drastic measure to be avoided unless "there is a strong reason to believe the jury needs protection").

62. United States v. Shryock, 342 F.3d 948, 970–71 (9th Cir. 2003) (quoting United States v. Childress, 58 F.3d 693, 702–03 (D.C. Cir. 1995) (per curiam)).

63. United States v. Brown, 250 F.3d 907, 921–22 (5th Cir. 2001) (denying a motion to reveal anonymous jurors' names, addresses, and answers to a confidential juror questionnaire).

64. U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .").

65. *E.g.*, Allen v. United States, 829 F.3d 965, 967 (8th Cir. 2016), *petition for cert. filed*, No. 16-8229 (U.S. Mar. 1, 2017) (Westlaw, U.S. Sup. Ct. Dockets) (addressing defendant's argument that an anonymous juror "led the jury to believe [defendant] was dangerous"); Commonwealth v. Anguilo, 615 N.E.2d 155, 169 (Mass. 1993) (noting the state and federal reluctance to permit anonymous juries in capital cases).

Transparent voir dire is seen as an additional component of the right to a fair trial: "Openness is fostered by the public knowledge of who is on the impaneled jury. Armed with such knowledge, the public can confirm the impartiality of the jury, which acts as an additional check upon the prosecutorial and judicial process."[66]

The Ninth Circuit Court of Appeals in *United States v. Fernandez* held that the empaneling of an anonymous jury would be upheld only upon consideration of the following: "where (1) there is a strong reason for concluding that it is necessary to enable the jury to perform its factfinding function, or to ensure juror protection; and (2) reasonable safeguards are adopted by the trial court to minimize any risk of infringement upon the fundamental rights of the accused."[67] The *Fernandez* prosecution related to alleged racketeering by the Eme or Mexican Mafia.[68] Particular concerns with organized crime have filtered into judicial decision-making relating not only to anonymity of jurors but to the anonymity and protection of witnesses and parties. As a result, *Fernandez* laid out more specific non-exclusive factors to balance in these cases:

> (1) the defendants' involvement with organized crime;
> (2) the defendants' participation in a group with the capacity to harm jurors;
> (3) the defendants' past attempts to interfere with the judicial process or witnesses;
> (4) the potential that the defendants will suffer lengthy incarceration if convicted; and
> (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.[69]

According to the Eighth Circuit Court of Appeals, by 1995 "every court that has considered the issue has concluded that in appropriate circumstances the empanelment of an anonymous jury does not infringe on the right to an impartial jury."[70] Indeed, few state and federal courts have ruled otherwise since.[71]

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66. Commonwealth v. Long, 922 A.2d 892, 904 (Pa. 2007).
67. United States. v. Fernandez, 388 F.3d 1199, 1244 (9th Cir. 2004) (following *Shryock*, 342 F.3d at 971, and United States v. DeLuca, 137 F.3d 24, 31 (1st Cir. 1998)).
68. *Id.*
69. *Id.* at 1244 (citations omitted).
70. United States v. Darden, 70 F.3d 1507, 1532 (8th Cir. 1995) (providing a thorough overview of the approaches of federal courts of appeals to empaneling an anonymous jury).
71. *See, e.g.*, United States v. Calabrese, 515 F. Supp. 2d 880 (N.D. Ill. 2007) (denying newspaper access to the names of anonymously empaneled jurors); United States v. Honken, 378 F. Supp. 2d 880 (N.D. Iowa 2004) (granting a motion for an anonymous jury in a capital drug trafficking case); Commonwealth v. Long, 922 A.2d 892 (Pa. 2007) (favoring the disclosure of jurors' names, but not addresses, in addressing newspapers' and television stations' access to jurors identities during deliberations). *But see* State *ex rel.* Beacon Journal Publ'g Co. v. Bond, 781 N.E.2d 180 (Ohio 2002) (holding that a trial court erred in denying a newspaper request for juror names, addresses, and questionnaire responses during a capital

In March 2017, the U.S. Supreme Court received a petition for review of *Allen v. United States*, an Eighth Circuit Court of Appeals decision finding no ineffective assistance of counsel for failure to object to the use of numbers rather than names of jurors.[72] The defendant was convicted of the capital crime of armed bank robbery causing the death of a security guard.[73] Applying the highly deferential *Strickland* standard, the court held that case law was not sufficiently settled on the issue of empaneling an anonymous jury to deem counsel's choice deficient or prejudicial.[74] That is, "[t]he failure of counsel to anticipate a rule of law that has yet to be articulated does not render counsel's performance professionally unreasonable."[75]

The essential role of the jury in court proceedings requires heightened protections to ensure safety and an absence of jury tampering throughout the trial. However, the risk factors of intimidation and harassment both during and after trial are no less real for many victims of crime, particularly cybercrime victims who face stalking behaviors. In addition, the risks of long-term trauma for jurors would presumably be far less than that experienced by litigants and key witnesses who were personally associated with the criminal offense. Courts should not forget that the right to a fair trial is also dependent on the willingness of witnesses to cooperate and testify.

B. Jane Doe Motions and Disclosure of Litigant and Witness Identities

For centuries the courts have procedurally protected jurors against intimidation and coercion, but the same is not true for parties and witnesses. "For important reasons, jurors consider evidence and deliver verdicts in courtrooms open to the public, but have historically deliberated in private and received a measure of confidentiality once their work is done."[76] In contrast, the use of fictitious names for liti-

murder trial, which were presumptively subject to disclosure under the First Amendment).

72. Allen v. United States, 829 F.3d 965, 967 (8th Cir. 2016), *petition for cert. filed*, No. 16-8229 (U.S. Mar. 1, 2017) (Westlaw, U.S. Sup. Ct. Dockets). Counsel were provided with names and addresses of venire men before jury selection, but during voir dire and trial only numbers were used so that counsel did not know which names related to which numbers. *Id.* at 966.

73. *Id.*

74. *Id.* (applying Strickland v. Washington, 466 U.S. 668, 689 (1984)).

75. *Id.* at 967 (citations omitted).

76. United States v. Jenkins, No. 12-15-GFVT, 2012 WL 5868907, at *3 (E.D. Ky. Nov. 20, 2012) (citation omitted) ("If during that sacred time jurors must worry that the fair and impartial decision they make in the jury room will lead to harassment and molestation from the parties, the attorneys, or others when they leave it, a major blow is dealt to the administration of justice.").

gants in order to preserve their anonymity is generally disfavored.[77] The right to public access to the courts and the defendant's right to confrontation support the disclosure of litigants' names.[78] To grant anonymity to litigants, the court must find that the harm to the movant from disclosure of identity outweighs the harm from concealment of names and other identifiers.[79]

Greater willingness to protect the identities of certain categories of persons is clear in the judicial record, strongly influenced by cultural perceptions of vulnerability and harm. For example, very young children have been granted fictitious names in court documents to preserve their anonymity.[80] While victims of sex offenses have often been granted anonymity,[81] the Seventh Circuit Court of Appeals declined to expand these categories to include sexual harassment of adults, even in a case involving a police stalker who broke into the victim's home and sexually assaulted her.[82] The court argued that "sexual harassment cases are not brought anonymously even when the facts are gamier than they are here. The plaintiff is not a minor, [or] a rape or torture victim . . . ."[83]

In the context of cybercrime, the provision of anonymity for victims of revenge porn in state and federal appellate opinions demonstrates an incipient measure of inconsistency. The umbrella term "revenge porn" encompasses a variety of crimes among state jurisdictions, often having in common an element of dissemination of nude or sexual imagery without consent. For example, in Vermont, for the offense of Disclosure of Sexually Explicit Images Without Consent, a person commits a felony, facing up to two years in prison, if he or she:

> knowingly discloses a visual image of an identifiable person who is nude or who is engaged in sexual conduct, without his or her consent, with the intent to harm, harass, intimidate, threaten, or coerce the person depicted, and the disclosure would cause a reasonable person to suffer harm. A person may be identifiable from the image itself or information offered in connection with the

77. *See* Doe v. City of Chicago, 360 F.3d 667 (7th Cir. 2004); *cf.* Cheyenne Newspapers Inc. v. First Judicial Dist. Court, 358 P.3d 493 (Wyo. 2015) (holding that the trial court improperly withheld the names of juvenile witnesses during a murder trial in violation of the First Amendment).

78. *E.g.*, Doe v. Megless, 654 F.3d 404, 408 (3d Cir. 2011).

79. Doe v. City of Chicago, 360 F.3d at 669; *see also* Doe v. Roe, 599 N.Y.2d 350 (N.Y. App. Div. 1993) (addressing civil litigation with both parties in Doe status involving inadvertent disclosure of HIV status).

80. *E.g.*, Doe v. Porter, 370 F.3d 558, 561 (6th Cir. 2004).

81. *E.g.*, People v. Desisto, No. B262564, 2016 WL 5224371 (Cal. Ct. App. Oct. 6, 2016) (upholding a conviction for sexual penetration by foreign object, as well as unauthorized invasion of privacy for taking cell phone images of the adult victim, identified as Jane Doe).

82. Doe v. City of Chicago, 360 F.3d at 667.

83. *Id.* at 669 (citation omitted).

> image. Consent to recording of the visual image does not, by itself, constitute consent for disclosure of the image.[84]

More case law is needed to identify a clear trend in the use of Jane Doe identification in revenge porn litigation. For now, it appears the exercise of judicial discretion in granting or denying a request for anonymity does not exhibit a clear set of determining factors.

In recent cases, both civil and criminal courts have granted protective anonymity to the person unlawfully depicted in the image.[85] But both civil and criminal courts have also proceeded in revenge porn-related cases without providing any degree of anonymity.[86] How strongly these witnesses and litigants fought for continued privacy is unclear, but it would be important to the administration of justice if crime victims understood that they had the option and legal support to seek greater privacy through Jane Doe status.

Of course, even if clear factors for considering anonymity requests were present, judicial discretion in determining the need for protecting victim privacy inevitably requires the difficult task of assessing the degree of potential harm to the particular individual. Appellate judges evaluating legal sufficiency in revenge porn cases, with civil claims such as defamation or intrusion on seclusion, face similar challenges. As one court explained, "[we] must distinguish between shades and degrees of emotions, such as between disappointment and severe disappointment, between embarrassment and wounded pride, [and] between anger and indignation."[87] How courts evaluate and value the privacy of victims of cybercrime may be largely dependent on the skill of attorneys in demonstrating victim impact, particularly in the unfa-

84. VT. STAT. ANN. tit. 13, § 2606(1) (2017). Note that the statutory scheme for this revenge porn offense includes higher offenses and complex definitions of elements not included here.

85. *E.g.*, Crapps v. State, 180 So. 3d 1125 (Fla. Dist. Ct. App. 2015) (prosecuting defendant for unauthorized computer use for secretly posting nude images on the victim's Instagram account, identifying the victim only as the "ex-girlfriend"); *In re* Grossman, 538 B.R. 34 (Bankr. E.D. Cal. 2015) (addressing whether a liability judgment for disseminating a sexual video was dischargeable in bankruptcy, identifying the victim by initials only); GoDaddy.com, LLC v. Toups, 429 S.W.3d 752 (Tex. App. 2014) (addressing a motion to dismiss a class action against revenge porn websites, removing the names of the persons depicted and identifying them only as plaintiffs).

86. *E.g.*, *In re* White, 551 B.R. 814 (Bankr. S.D. Ohio 2016) (holding that a named victim of a revenge porn website could recover her judgment for $100,000 in punitive damages within the defendant's bankruptcy proceedings); People v. Barber, 992 N.Y.S. 2d 159 (N.Y. Crim. Ct. 2014) (holding that nudity alone does not satisfy the "prurient interest" element of the charge of Public Display of Offensive Sexual Material with respect to a named crime victim witness in the first criminal prosecution of revenge porn in New York).

87. Patel v. Hussain, 485 S.W.3d 153, 178 (Tex. App. 2016) (addressing claims that a former boyfriend posted secretly recorded sexual videos of his girlfriend on the Internet). Here, the plaintiff is identified by name in the opinion. Whether she sought and was denied anonymity was not at issue.

miliar territory of protecting the privacy of adult victims of cybercrime.

While a disfavored practice, adoption of fictitious names and use of initials for litigants or vulnerable witnesses do have a long common law history. Moreover, they do not bear the indicia of unreliability accompanying an anonymous tip[88] because the litigants are generally available for cross-examination in court. In a review of every case in the American federal and state appellate record in which a litigant was called Jane Doe, it is striking that the use of the pseudonym has exponentially increased in recent decades. This review revealed more than ten thousand Jane Doe litigants throughout American legal history, but only eighty-nine prior to 1960.[89] This does not include the few who may have been named Jane Roe or Jane Moe by the court. Similar to John Doe arrest warrants,[90] occasionally the name Jane Doe was used as a placeholder until the true name of the litigant was known.[91] But in the earliest case law it was often simply a replacement for the female litigant's first name, as her true last name appeared after Jane Doe, and she was easily identifiable by her status.[92] Courts gradually began to use the pseudonym to show sensitivity to litigants and witnesses in the twentieth century when their true iden-

88. *See* Alabama v. White, 496 U.S. 325, 329 (1990) (explaining "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity" sufficient to support reasonable suspicion to stop a person).

89. These statistics are based on research by the author using the Westlaw database to search all state and federal cases.

90. *See, e.g.*, Commonwealth v. McNabb, 91 Pa. Super. 582, 584 (1927) ("John Doe solicited and procured a large gathering of people to be at said club for the purpose of witnessing an immoral show, participated in by women and girls from Philadelphia, Pa., said women and girls then and there being scantily attired, and dancing suggestive dances."); State v. Burdick, 395 S.W.3d 120 (Tenn. 2012) (upholding the validity of a John Doe warrant listing only the suspect's genetic DNA code).

91. *E.g.*, Martin v. The Bud, 172 F.2d 295 (9th Cir. 1949) (unknown and never determined identity); Thompson v. Alford, 66 P. 983 (Cal. 1901) (first case to discuss the use of Jane Doe as a pseudonym.); People v. Davis, 31 P. 1109 (Cal. 1893) (providing the earliest published appellate case using the name Jane Doe, who was an unknown crime victim of a pickpocket spotted by eyewitnesses).

92. *E.g.*, Wilson v. Robinson, 275 U.S. 526 (1927) (providing the first Supreme Court case to use the pseudonym Jane Doe, regarding a litigant and associates with the same last name, as noted in Wilson v. Robinson, 16 F.2d 431 (9th Cir. 1926)); Silverstone v. Harn, 120 P. 109, 110 (Wash. 1912) (listing respondents as "John P. Lynn and Jane Doe Lynn, his wife").

tity was unnecessary to the proceedings[93] or if disclosure would risk their safety.[94]

Today, anonymity of litigants and witnesses raises vigorous First Amendment[95] and due process challenges on behalf of both defendants and plaintiffs. For example, one federal court gave special protection to the marketplace of anonymous speech online, including the importance of remaining anonymous as a witness and litigant to preserve that right:

> The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights. Therefore, discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts.[96]

Even greater protections of anonymous speech and identity in court are granted to persons who are not parties but merely witnesses, including those posting offensive material online.[97] Hopefully, this is an indication that judges could become more sensitive to the concerns of witnesses, particularly crime victim witnesses, who would not report the offense or cooperate with a criminal investigation or prosecution if the courtroom experience were too unsafe or unduly invasive.

Unfortunately, this understanding is still not shared by all. In 2015, the Supreme Court of Wyoming in *Cheyenne Newspapers Inc. v. First Judicial District Court* held that the following trial court order infringed on the public's First Amendment rights: "No one may . . . release the name of a juvenile witness during the trial."[98] The court applied a three-part test to balance: "(1) the nature and extent of the news coverage in question; (2) whether measures other than a prior

93. *See, e.g.,* Wilkerson v. Wilkerson, 84 P. 784, 785 (Cal. Dist. Ct. App. 1906) (declining to name a known woman who engaged in adultery with the defendant in a divorce action); Buxton v. Ulmann, 156 A.2d 508, 514–15 (Conn. 1959) ("Because of the intimate and distressing details alleged in these complaints, it is understandable that the parties who are allegedly medical patients would wish to be anonymous."); *In re* Adoption of Doe, 42 Haw. 267 (1958) (protecting the identity of the minor child); People v. Porter, 189 N.Y.S. 664 (Ct. Gen. Sess. 1921) (declining to name the woman with whom a police officer was found in bed).

94. *See* Swanne Soon Young Pang v. United States, 209 F.2d 245 (9th Cir. 1953) (protecting a sex-trafficking victim); United States v. Ghiorsi, 31 F.2d 440 (N.D. Cal. 1929) (protecting an eyewitness in a Prohibition-related prosecution).

95. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

96. Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001).

97. *Id.* at 1095 ("[N]on-party disclosure is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker.").

98. Cheyenne Newspapers Inc. v. First Judicial Dist. Court, 358 P.3d 493, 495 (Wyo. 2015) (addressing a minor defendant charged as an adult with one count of murder and twelve counts of aggravated assault).

restraint on publication exist that would likely mitigate the effects of unrestricted publicity of the juvenile's names; and (3) the likely effectiveness of a prior restraint to prevent the threatened danger."[99] Ultimately the court was persuaded that anonymity would be fruitless because the juvenile witnesses had already received direct threats prior to testifying.[100] Its analysis of the second factor is most disappointing. The court held that the following optional alternatives were sufficient to protect the youth, obviating the need for the prior restraint on speech: court warnings to the audience that intimidation of a witness is a criminal offense and the publicly available services of law enforcement.[101]

The Federal District Court for the Eastern District of California, in contrast, also provided a three-part test for whether to grant a plaintiff's motion for Doe anonymity.[102] This test included different factors focused more on the safety of the movant: "(1) the severity of the threatened harm, (2) the reasonableness of the anonymous party's fears, and (3) the anonymous party's vulnerability to such retaliation."[103] Generally, the court applied the simple balancing test mentioned in several other cases above, addressing whether the plaintiff's interest in anonymity outweighs the defendant and public's interest in disclosure of identity.[104] However, the three-part test was added in cases where risk of retaliation for litigating the case was involved.[105]

In 2016, the Eastern District of Missouri also demonstrated greater sympathy for persons facing invasions of privacy through the litigation process even though the case involved a lesser safety risk than *Cheyenne*. In this case, the data breach involved a cheaters dating website and not a threat of violence or retaliation.[106] The District Court granted the motion for pseudonyms for the forty-two plaintiffs whose names, email addresses, credit card information, and sexual preferences and habits were inadvertently disclosed.[107] After noting that the U.S. Supreme Court has not set a defined test for Doe motions, it enumerated various types of cases nationally that have permitted fictitious names for litigants and witnesses, such as rape

99. *Id.* at 497 (citation omitted).

100. *Id.* at 497–98.

101. *Id.* at 498.

102. Doe v. D.M. Camp & Sons, 624 F. Supp. 2d 1153, 1157 (E.D. Cal. 2008) (involving plaintiffs who were seasonal agricultural workers in a class action lawsuit against several corporate vineyards).

103. *Id.*

104. *Id.*

105. *Id.*

106. *In re* Ashley Madison Customer Data Sec. Breach Litig., No. 2669, 2016 WL 1366616 (E.D. Mo. Apr. 6, 2016).

107. *Id.* at *4.

victims, child abuse victims, persons with sexually transmitted diseases, and those facing physical danger.[108]

In short, the court summarized that "[t]he common thread running through these cases is the presence of some social stigma or the threat of physical harm to the plaintiffs attaching to disclosure of their identities to the public record."[109] With a compelling and particularly modern argument, opposing counsel asserted that the facts disclosed in the breach no longer bear any particular social stigma.[110] Nonetheless, the court held that the collection of disclosures, including financial information, "rises above the level of mere embarrassment or harm to reputation."[111]

If indeed social stigma regarding previously sensitive matters has diminished in our Digital Age, such as perceptions and judgments regarding sexual behavior, the threat of physical harm and retaliation remains for litigants and witnesses. It is also arguably premature for the courts to believe that young persons do not feel social stigma simply because they consent to share information in the hopes they will be safe and respected. The current social-science research for both college-age and older persons demonstrates that personal privacy is not only important, but essential, to well-being.[112]

IV. LIMITATIONS ON THE RIGHT OF PUBLIC ACCESS TO COURT PROCEEDINGS

In addition to specific measures to hide the identity of jurors, parties, and witnesses, many courts have adopted rules that prevent the personal recording of proceedings by members of the public. A more extreme approach is to deny persons access into the courtroom during

108. *Id.* at *2–3.

109. *Id.* at *3 (quoting Doe v. Blue Cross & Blue Shield of R.I., 794 F. Supp. 72, 74 (D.R.I. 1992)).

110. *Id.* (first citing Doe I v. Individuals, 561 F. Supp. 2d 249, 257 (D. Conn. 2008) (denying anonymity to defendant in libel case despite risk of ridicule and job loss); then citing Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992) (denying anonymity to plaintiff in a discrimination suit despite having to publicly admit alcoholism); then citing Doe v. Megless, 654 F.3d 404 (3d Cir. 2011) (denying a request for anonymity for a person with alcoholism due to lack of social stigma); then citing K.W. v. Holzapple, 299 F.R.D. 438, 442 (M.D. Pa. 2014) (denying a request for anonymity for fraternity members caught in a police house raid with contraband despite their entreaty that a public trial would hurt their future employment); then citing Paton v. Entercom Kan. City, LLC, No. 13-2186-KHV, 2013 WL 3524157, at *3 (D. Kan. July 11, 2013) (denying anonymity despite allegations of damage to personal and profession reputation); and then citing Liberty Media Holdings, LLC v. Swarm Sharing Hash File, 821 F. Supp. 2d 444, 453 (D. Mass. 2011) (denying anonymity despite potential embarrassment of being associated with viewing hardcore pornography)).

111. *Id.* at *4.

112. *See* Popham & Orrell, *supra* note 33.

proceedings. As with the constitutional challenges related to anonymity, physical exclusion also raises substantial competing First Amendment challenges. It is an age, however, wherein the Internet permits everyone to act in the fashion of a journalist, recording, commenting, communicating, and sharing information in real time to the world. A practical strategy for the court to curb and control potentially harmful or obstructive voices that infringe on the right to a fair trial is to simply not let those members present in the courtroom film, write about, or speak about the proceedings while they occur or simply exclude them from the proceedings altogether.

A. Bans on Recording Devices in Court

In contrast to limited pilot programs across the United States permitting livestreaming of court proceedings,[113] more courts have established rules specific to their jurisdictions that limit opportunities for the public to record the proceedings via video, audio, and photography.[114] Resulting constitutional challenges based on an alleged infringement on the right to a public trial have generally failed.[115] Nevertheless, the U.S. Supreme Court in 1965 foretold of an expansion of court access by the media if new technology did not disturb the proceedings:

> Nor can the courts be said to discriminate where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press. When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.[116]

113. In 2010, after decades of federal law restricting photography and video in the federal court system, a three-year pilot program explored the use of video recording and public posting of federal court proceedings in select jurisdictions. In March 2016, the Judicial Conference received the evaluation of the program and determined not to alter its previous policies, although it permitted the Ninth Circuit Court of Appeals to continue the program for more long-term data on its efficacy. *See History of Cameras in Courts*, U.S. CTS., http://www.uscourts.gov/about-federal-courts/cameras-courts/history-cameras-courts [https://perma.unl.edu/FS3X-DUB3].

114. *See id*. (providing a chronological history of the use of technology in federal courts).

115. *See* Estes v. Texas, 381 U.S. 532, 540 (1965) (disavowing a First Amendment right for the media to use electronic equipment in the courtroom, where the primary focus must remain on the proper administration of justice); *see also* Va. Broad. Corp. v. Commonwealth, 749 S.E.2d 313 (Va. 2013) (applying section 19.2-226 of the Virginia Code to exclude television cameras in the courtroom). The Virginia statute states that in criminal cases "the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated." VA. CODE ANN. § 19.2-266 (1992).

116. *Estes*, 381 U.S. at 540.

Such limitations on simultaneous recording and dissemination would allow the courts to control more easily restrictions on disclosure of evidence that may be subject to confidentiality during and after trial, including redacted trial transcripts and the sequestration of witnesses. Unrelated to privacy, prevention of jury misconduct[117] and minimization of any in-court noise distractions from electronic devices[118] are also frequently documented concerns. Early forms of electronic-device restriction in state courts tend to provide a permissive rule relying heavily on judicial discretion. For example, Massachusetts courts are governed by the following rule:

> To protect the safety and security of those who appear in court, and to minimize potential distractions to court proceedings, cellular telephones and other personal electronic devices (PED) may be prohibited from courthouses. Personal electronic devices are defined as laptop or notebook computers, computer tablets, smartphones, Bluetooth and other similar devices.[119]

In contrast, the North Dakota Supreme Court has issued a mandatory rule, also addressing both confidentiality and distraction:

> **Limitation on Electronic Recording.** No camera, sound or video recorder, or other device may be used to photograph, record, broadcast, store, or transmit a proceeding of the court without prior permission from the court. Unless the court permits otherwise, any electronic device in the courtroom must be turned off or muted, and any authorized use of a device must be as minimally disruptive as possible. A juror may not possess any wireless communication device during deliberations.[120]

The above rule would appropriately encompass concerns related to jury misconduct and tampering both during trial and during deliberations. However, it may not comfort those crime victims and other vulnerable witnesses who know how easy it is to use a device while it appears to be turned off, especially in a crowded courtroom. Cybercrime victims would know this better than most. At a local level, gang activity was reported as a key motivation[121] for a 2013 adoption of a cell phone ban in Cook County, Illinois, which prohibited not only use,

117. *Cf.* United States v. Feng Ling Liu, 69 F. Supp. 3d 374 (S.D.N.Y. 2014) (holding that, although juror's use of social media during trial was improper, it did not cause prejudicial error).

118. *See* McKay v. Federspiel, No. 14-CV-10252, 2014 WL 7013574 (E.D. Mich. Dec. 11, 2014) (addressing a constitutional challenge to an Electronics Ban Order implemented for the purpose of preventing jurors from conducting online research, photographing witnesses, and causing distractions).

119. *Restrictions on the Possession of Cellular Telephones and Personal Electronic Devices*, MASS. CT. SYS., http://www.mass.gov/courts/court-info/trial-court/exec-office/ocm/banned-electronic-devices.html [http://perma.unl.edu/XN9R-TSTP].

120. N.D. SUP. CT. R. 10.1(d).

121. John Kass, *Judge Did Right Thing by Banning Cellphones in Courtrooms,* CHI. TRIB. (Apr. 25, 2013), http://articles.chicagotribune.com/2013-04-25/news/ct-met-kass-0425-20130425_1_dart-evans-preckwinkles [http://perma.unl.edu/8HJS-BLTK] (addressing the problem of "gangs using technology as muscle").

but possession, of cell phones in courtrooms by members of the public.[122]

> The ban was imposed in response to reports that persons were misusing cell phones by photographing witnesses and jurors in courtrooms where criminal cases are heard and in public areas of the courthouse, texting testimony to witnesses outside the courtroom who were waiting to testify, as well as live streaming court proceedings.[123]

The federal courts have remained cautious of recording devices as well. The *Federal Rules of Criminal Procedure* Rule 53 states: "Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom." This follows the recommendations of the 1996 Judicial Conference of the United States after an extensive study by the Federal Judicial Center which expressed concern for "the intimidating effect of cameras on some witnesses and jurors."[124] Subsequent guidelines and court-adopted rules have crafted narrow exceptions. For example, the United States District Court for the Western District of Wisconsin provides:

> Pursuant to policy established by the Judicial Conference of the United States Courts, the following is the current policy for cameras in trial courts:
>
> A judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such other proceedings, only:
>
> 1) for the presentation of evidence;
>
> 2) for the perpetuation of the record of the proceedings;
>
> 3) for security purposes;
>
> 4) for other purposes of judicial administration;
>
> 5) for the photographing, recording, or broadcasting of appellate arguments; or
>
> 6) in accordance with pilot programs approved by the Judicial Conference.
>
> When broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is permitted, a judge should ensure that it is done in a manner that will:
>
> 1) be consistent with the rights of the parties,
>
> 2) not unduly distract participants in the proceeding, and

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122. *Cell Phone and Electronic Communication Device Ban*, CIR. CT. OF COOK COUNTY, http://www.cookcountycourt.org/HOME/CellPhoneElectronicDeviceBan.aspx [http://perma.unl.edu/3NQT-YXMR].

123. *Id.* (select "Why is a ban necessary?").

124. *See* Hollingsworth v. Perry, 558 U.S. 183, 193 (2010) ("While the policy conclusions of the Judicial Conference may not be binding on the lower courts, they are 'at the very least entitled to respectful consideration.'" (quoting *In re* Sony BMG Music Entm't, 564 F.3d 1, 6 (1st Cir. 2009)); *see, e.g.*, United States v. Shelnutt, No. 4:09-CR-14, 2009 WL 3681827 (M.D. Ga. Nov. 2, 2009) (denying, subject to Rule 53 of the *Federal Rules of Criminal Procedure*, a journalist's request to live tweet the proceedings from the courtroom to the newspaper's Twitter page).

3) not otherwise interfere with the administration of justice.[125]

Factors such as intimidation of witnesses logically support restrictions on the right of public access to court proceedings and related media rights under the First Amendment. Yet public access to high-profile or sensitive proceedings is arguably more warranted because of heightened public interest and the need for the public to ensure the proceedings are just. What defines the media is beyond the scope of this discussion, as is the line between the democratic ideals of a free press and the role of media in entertainment. Since the earliest public trials, members of society have had the opportunity to observe and describe court proceedings for the purpose of entertainment and profit.

In the nineteenth century, not only were penny dreadfuls and Charles Dickens serializations available to tell the distressing and shocking stories of the times, but court pamphlets summarizing and relaying full typewritten trial transcripts of selected cases were made publicly available for sale.[126] Strangely, the academic digital repository making these scanned archived images available to the public has revived the tortured souls described within them. Selections for transcription tended to favor murder, assault, rape, and grand larceny.[127] Modern audiences are not so different in their cultural fascination with the tragedies of the criminal justice system. Modern courts, however, remain unconcerned with this societal interest but may be demonstrating more concern for the impact of disclosure and exploitation on victims on crime, particularly in a Digital Age.

B. Closing the Courtroom[128]

The severe measure of closing the courtroom to the public to protect the privacy and safety interests of litigants and witnesses also invokes significant constitutional debate. Absent a statutory mandate,[129] there is no general right to privacy which overrides the quali-

125. *Electronics and Cameras in the Courtroom*, U.S. DISTRICT CT. FOR WESTERN DISTRICT WIS., http://www.wiwd.uscourts.gov/electronic-and-cameras-courtroom [http://perma.unl.edu/L2BX-4SYY].

126. *The Crime of New York Digitization Project 1850–1950*, LLOYD SEALY LIBR., https://www.lib.jjay.cuny.edu/crimeinny/trials/list_transcripts.php [http://perma.unl.edu/ZFW3-278K].

127. *Id.*

128. Discussion of courtroom accommodations, such as closed-circuit television for young children, is not addressed here because it does not impact the accessibility of court proceedings on the Internet. A member of the public or media could record or live blog closed-circuit testimony in the same manner as live testimony, causing the same privacy concerns.

129. *E.g.*, N.C. GEN. STAT. § 48-2-203 (2017) (providing that adoption proceedings shall be held in closed court).

fied right to a public and open proceeding.[130] The right to public access to court proceedings is not unlimited,[131] as demonstrated by the court's authority to wholly remove a person from the courtroom. A witness, for example, may be removed from the courtroom for sequestration to avoid conforming testimony.[132] Any person who is disruptive may be ordered removed.[133] A party or key witness may consent to be absent from the courtroom as a matter of trial strategy.[134]

More pertinent when discussing the impact of public litigation on crime victims, a court may remove persons from the courtroom to protect witnesses from harassment or intimidation. For example, in 2014 the North Carolina Court of Appeals in *State v. Godley* applied factors set out in *Waller*, discussed in Part III, in upholding the trial court's exclusion of members of the public in a child sexual abuse prosecution during the testimony of the thirteen-year-old victim witness.[135] The court summarized the *Waller* factors in a four-part test:

> (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect this interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure.[136]

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130. *See* Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596, 607–09 (1982) (holding that a mandatory rule closing the courtroom in all sexual abuse cases during the testimony of a minor victim witness violates the First Amendment); France v. France, 705 S.E.2d 399, 408 (N.C. Ct. App. 2011) (concerning a child-custody proceeding and asserting that no case supports "the closing of an entire proceeding merely because some evidence relating to a minor child would be admitted").

131. *See* United States v. Thompson, 713 F.3d 388, 394 (8th Cir. 2013) ("The Sixth Amendment right to public access is, however, not absolute.").

132. *See, e.g.*, N.C.R. EVID. 615 ("At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause, or (4) a person whose presence is determined by the court to be in the interest of justice.").

133. *See, e.g.*, N.C. GEN. STAT. § 15A-1033–34 (1977) (permitting judicial removal of defendants and any other person from the courtroom for disrupting orderly proceedings).

134. *E.g.*, Wilder v. United States, 806 F.3d 653 (1st Cir. 2015) (holding that defendant's absence during voir dire did not infringe on his Fifth or Sixth Amendment rights and caused him no prejudice).

135. State v. Godley, 760 S.E.2d 285, 288–89 (N.C. Ct. App. 2014) (addressing defendant's Sixth Amendment right to a public trial); *see supra* text accompanying note 43 (addressing the *Waller* factors).

136. *Godley*, 760 S.E.2d at 288 (quoting State v. Rollins, 729 S.E.2d 73, 77 (N.C. Ct. App. 2012)).

When closing the courtroom, in addition to focusing on the sexual nature of the offense and the adolescence of the minor victim, the trial court in *Godley* made the following findings on the record:

> [T]he right side of the Courtroom [is] occupied . . . with people charged with various misdemeanors and felonies and possibly their witnesses . . . and one reporter with the local newspaper who the Court did not recognize, and various attorneys of those persons, seated against the right wall of the Courtroom within the Bar.[137]

The North Carolina trial court also found that video feed or other technology had never been available in that county to provide a less restrictive alternative to closure of the courtroom.[138]

In 2014, the Wyoming Supreme Court addressed multiple challenges to privacy measures designed to protect the parties' privacy.[139] It held that the First Amendment right of access to public records, including judicial records, required that a record must still be made even if a courtroom is ordered closed and the records sealed.[140] It also held that a redacted case file and docket sheet must be maintained by the court clerks even if the legislature authorized anonymity of defendants and victim witnesses.[141] Finally, if the presiding judge orders the courtroom closed during the trial, which was the case in this child-sexual abuse prosecution, the Wyoming Supreme Court held that a public hearing must be provided to allow the public to contest the order.[142]

Thus, while balancing similar interests to those enumerated by the North Carolina Court of Appeals in *Godley*, in Wyoming the emphasis on First Amendment public right of access to the judicial system is made far more concrete. The Associated Press lauded the Wyoming decision, particularly for its requirement of a public opportunity to contest a closed courtroom.[143] Some aspects of this approach are concerning, but these concerns are merely speculative until enough courts in Wyoming sufficiently implement the new requirement. Victims of crime already identified as fearful or reluctant to participate in a public trial may find such public hearings on courtroom closures intimidating. Judges may also decline to hold the hearings or encourage

137. *Id.* at 289 (alteration in original).
138. *Id.* at 290.
139. Circuit Court of Eighth Judicial Dist. v. Lee Newspapers, 332 P.3d 523 (Wyo. 2014).
140. *Id.* at 531.
141. *Id.* at 533.
142. *Id.* at 534 ("If the circuit court believes there is a compelling interest in further limiting the information available to the public, it must first hold a hearing at which members of the public have been given the opportunity to refute any allegations that the case must be closed.").
143. *Wyo. Supreme Court Rules for Media in Records Case*, ASSOCIATED PRESS (Aug. 12, 2014), https://www.ap.org/ap-in-the-news/2014/wyo.-supreme-court-rules-for-media-in-records-case [http://perma.unl.edu/5D7M-SU67].

counsel to avoid filing motions for closure if the hearings slow down the judicial process. Another possibility is that in most cases, except for already high-profile cases, no members of the public or media will appear to contest the motion for closure and they will provide the mere appearance of fairness without real debate.

With the current technology available to the public, however, only a single member of the public could be present to observe court proceedings and still disseminate a personal copy of the proceedings online for all to see. This practical reality suggests that a recording ban is more important to the longstanding privacy of litigants and witnesses today than closure of the courtroom.

V. PUBLIC RECORDS AND PRIVACY-RELATED EXEMPTIONS

While recording-device bans preclude creation of an alternative public record and a means of ongoing harassment, trial transcripts remain subject to public scrutiny as public records. Statutory public records and open-meetings laws, termed "Sunshine Laws" for their effect of shining a light on government action, require disclosure of government information when requested by the public.[144] Statutory exemptions are narrowly construed but are increasing in number and emphasis to protect persons on the basis of safety.[145]

The primary difference between public records laws and the measures discussed above regarding anonymity and altering access to the trial itself is that access to public court records persists long after the court proceedings have ended. Nevertheless, as a creature of statute, if a carefully drawn state or federal exemption is adopted by the legislature to public records or Freedom of Information Act laws, then protection from disclosure is also assured long after the trial is complete. That approach may not prevent complete disclosure in an age when a single release of information can spread instantly; but it would significantly reduce the chances of ongoing disclosure and retraumatization throughout the remainder of a cybercrime victim's life.[146] Another advantage to formulating public records exemptions on behalf of crime victims is that the mandated narrow construction, discussed below, reduces judicial discretion in application.[147]

144. *See* U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991) (explaining that the federal FOIA was enacted to "pierce the veil of administrative secrecy").

145. *E.g.*, People for the Ethical Treatment of Animals, Inc. v. Freedom of Info. Comm'n, 139 A.3d 585 (Conn. 2016) (granting deference to the safety considerations of the state Freedom of Information Commission, which withheld the identities of university health-system employees who violated animal-research protocols).

146. Burnette, *supra* note 29, at 1536 (noting the need to build greater trust in the legal system among crime victims who have experienced multiple traumas).

147. *E.g.*, The Tennessean v. Metro. Gov't of Nashville, 485 S.W.3d 857 (Tenn. 2016) (strictly construing the applicable public records exemption when denying news-

Once government information, including judicial records, is made public, news media and others may redisclose the information. New technology may facilitate public access to past records beyond what we can imagine today. As a longstanding policy, to the dismay of some, disclosing the identity of crime victims by the public media is generally up to the discretion of the media source. For example, the Associated Press Stylebook recently added individual mental illness as a category in which reporters should exercise caution and restraint when reporting.[148] Such efforts accompany other public policy recommendations among journalists such as restrictions on revealing the identity of rape victims or juvenile arrestees.[149]

The content of appellate opinions has displayed increasing judicial willingness to describe graphically violent or intrusive information in detail. This could again impact the well-being of crime victims once the litigation is complete. For example, in 1932 the Supreme Court of Oregon discussed the facts of a rape prosecution, but then exercised considerate discretion as follows: "We omit further details of this shameless assault until we reach the point where the girl screamed and Donaldson put his hand over her mouth and commanded her to keep her mouth shut."[150] In stark contrast are some of the opinions today involving sexually violent crimes against women and children with detailed descriptions of each act perpetrated, unlike the more matter-of-fact, succinct descriptions of facts in murder or robbery cases.[151] Most efforts to restrict the content of public judicial records will occur at the trial-court level.

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paper defendants' access to the criminal investigative case file in a sexual assault prosecution when the prosecution was ongoing); *see also* Daniel A. Horwitz, *Closing the Crime Victims Coverage Gap: Protecting Victims' Private Records from Public Disclosure Following* The Tennessean v. Metro, 11 TENN. J.L. & POL'Y 129 (2016) (analyzing the "coverage gap" left by the *Tennessean* court's decision).

148. Press Release, Associated Press, Entry on Mental Illness Is Added to AP Stylebook (Mar. 7, 2013), https://www.ap.org/press-releases/2013/entry-on-mental-illness-is-added-to-ap-stylebook [http://perma.unl.edu/FG96-WJEJ]. Recommendations included, in part: "Do not describe an individual as mentally ill unless it is clearly pertinent to a story and the diagnosis is properly sourced. . . . Do not assume that mental illness is a factor in a violent crime, and verify statements to that effect." *Id.*

149. *But see* Michael Gartner, Panel Discussion Commentary*, The Privacy Rights of Rape Victims in the Media and the Law*, 61 FORDHAM L. REV. 1133, 1135 (arguing, as the President of NBC News, that naming the alleged victim in the William Kennedy Smith rape case was the "right decision" pursuant to the duty of a free press).

150. State v. Olsen, 7 P.2d 792, 793 (Or. 1932).

151. The author recognizes an absence of empirical research to support this subjective assertion but stands by over twenty years of experience in legally researching the field.

Despite the general rule that public records are to be made available to the public or disclosed upon request,[152] numerous exemptions have been adopted by state and federal legislatures, including those with respect to court proceedings. Court clerks complying with public records requests would need to carefully redact matters covered by exemptions and other confidentiality laws.[153]

Recent amendments to the Connecticut Freedom of Information Act demonstrate a common structure and policy for such exemptions, including the following provisions which could encompass evidence in court proceedings:

> *Nothing in the Freedom of Information Act shall be construed to require disclosure of:*
> (1) Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure;
> (2) Personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy;
> (3) Records of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of said records would not be in the public interest because it would result in the disclosure of
> (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known,
> (B) the identity of minor witnesses,
> (C) signed statements of witnesses,
> (D) information to be used in a prospective law enforcement action if prejudicial to such action,
> (E) investigatory techniques not otherwise known to the general public,
> (F) arrest records of a juvenile, which shall also include any investigatory files, concerning the arrest of such juvenile, compiled for law enforcement purposes,
> (G) the name and address of the victim of a sexual assault . . . , voyeurism . . . , or injury or risk of injury, or impairing of morals . . . , or of an attempt thereof, or

152. *See, e.g.*, Freedom of Information Act, CONN. GEN. STAT. ANN. § 1-210(a) (West 2017) ("Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records . . . .").

153. *See, e.g.*, Ky. New Era, Inc. v. City of Hopkinsville, 415 S.W.3d 76 (Ky. 2013) (upholding police department redaction from arrest citations and police incident reports of information such as social security and driver's license numbers, home addresses, and telephone numbers of victim witnesses and defendants but not wholesale redaction of general demographic information or total exemption of juvenile records); Blethen Me. Newspapers, Inc. v. State, 871 A.2d 523 (Me. 2005) (redacting the names of witnesses, except for the deceased priests alleged to have been child molesters, noting that the passage of time diminishes the person's privacy interest).

> (H) uncorroborated allegations subject to destruction . . . .[154]

Some crime victims receive greater protections than others, although many exemptions to state public records laws provide broad, permissive language related to crime victims generally. The Connecticut public records statute above demonstrates a preference for victims of violence, voyeurism, and sexual assault, as well as minor witnesses and juvenile defendants.

In the context of records produced for and during court proceedings, the U.S. Supreme Court in *National Archives & Records Administration v. Favish* has addressed special protections with respect to the federal Freedom of Information Act (FOIA).[155] In *Favish*, the Court upheld FOIA's restriction on public access to death-scene photographs taken by law enforcement and admitted into evidence as an exemption based on the personal privacy interests of the surviving family members.[156] The Court reasoned that "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."[157] In addition, law enforcement records contain information about persons who may or may not be essential to the prosecution:

> There is special reason . . . to give protection to this intimate personal data, to which the public does not have a general right of access in the ordinary course. In this class of cases where the subject of the documents "is a private citizen," "the privacy interest . . . is at its apex."[158]

Factors to address the broad statutory language of this FOIA provision, which protects against "unwarranted invasions of personal privacy," include recognition of law, research, and cultural history.[159]

However, the Court then proceeded to recognize the abhorrent practical implications of releasing crime scene investigative materials:

> We are advised by the Government that child molesters, rapists, murderers, and other violent criminals often make FOIA requests for autopsies, photographs, and records of their deceased victims. Our holding ensures that the privacy interests of surviving family members would allow the Government to deny these gruesome requests in appropriate cases. We find it inconceivable that Congress could have intended a definition of "personal privacy" so narrow

154. § 1-210(b).
155. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004) (applying 5 U.S.C. § 552 (2002)).
156. *Id.* at 165. The applicable provision of FOIA excuses from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." § 552(b)(7)(C).
157. *Favish*, 541 U.S. at 168.
158. *Id.* at 166 (second alteration in original) (first citing U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989); and then quoting *id.* at 780).
159. *Id.* at 169.

> that it would allow convicted felons to obtain these materials without limitations at the expense of surviving family members' personal privacy.[160]

This is precisely the problem for crime victims in a Digital Age. Even if a neutral reporter obtained and redisclosed the information, the child molester, rapist, murderer, or cyberstalker could access and continually redistribute the victim's information online. More recently, following the Newtown elementary school massacre and the subsequent spate of requests for public information of the evidence, the State of Connecticut enacted more stringent public records exemptions.[161] Similar to the federal law in *Favish*, Connecticut's Freedom of Information Act restricts access to photographs and video recordings of homicide crime scenes, as well as access to 9-1-1 tapes.[162]

Beyond public records exemptions, other statutory measures may, of course, preclude public access to otherwise public judicial records. Sealing records of criminal proceedings resulting in dismissal or a *nolle prosequi* judgment, for example, were upheld by the Supreme Judicial Court of Massachusetts.[163] The court crafted a more permissive standard for sealing records for the purpose of assisting "criminal defendants to reintegrate into society and obtain gainful employment, particularly in an age of rapid informational access through the internet and other new technologies."[164] No other court decision has so succinctly addressed the risks of the Internet to crime victims or acknowledged their substantial privacy concerns following litigation. The Supreme Judicial Court of Massachusetts acknowledged the compromise of sealing records following a public trial when the public and the media had full access during the proceedings.[165] This approach relies on a short public attention span. If the court tacitly permitted the public to record testimony and images of evidence at trial, such recordings could emerge online in the future regardless of the sealing of records.

Court personnel ordinarily would be tasked with understanding how to secure confidential information and protect against inadver-

160. *Id.* at 170.

161. *See Dispute Over Newtown 911 Tapes Tests New Conn. Law*, ASSOCIATED PRESS (Sept. 25, 2013), https://www.ap.org/ap-in-the-news/2013/dispute-over-newtown-911-tapes-tests-new-conn-law [http://perma.unl.edu/7CFX-UP69].

162. Freedom of Information Act, CONN. GEN. STAT. ANN. § 1-210(b)(27) (West 2017) (noting that the FOIA does not require disclosure of photographs and videos "to the extent that such record could reasonably be expected to constitute an unwarranted invasion of the personal privacy of the victim or the victim's surviving family members").

163. Commonwealth v. Pon, 14 N.E.3d 182 (Mass. 2014).

164. *Id.* at 186; *see also id.* at 196 ("[T]he sealing of a small subset of criminal records after the cases have closed does not truly impede the functioning of [public access to court proceedings].").

165. *Id.* at 182.

tent disclosure.[166] Recognition of public records laws and their exceptions is essential but more challenging in a Digital Age.[167] Despite exemptions and exceptions limiting public records access, data breaches of court records risk disclosure of vast amounts of personal information, and the incidents of massive data breaches across the world are on the rise.[168] For example, in 2016, a Superior Court transitioning between software systems for its courthouse computers inadvertently made vast amounts of protected information public, including the birth date, social security number, home address, and driver's license number of all defendants in the system.[169] The opposite result is possible as well, where a court may find that a categorical withholding of records may constitute an excessive interpretation of a public records exemption.[170] Despite their practical challenges in implementation, public records exceptions provide the courts with more

166. NEBRASKA SUPREME COURT PERS. POLICIES & PROCEDURES MANUAL, RULE 51 (NEB. SUPREME COURT 2017) https://supremecourt.nebraska.gov/personnel-and-miscellaneous-rules/nebraska-supreme-court-personnel-policies-and-procedures-manual/51 [http://perma.unl.edu/J4FT-8SAM] ("The employees of the Nebraska Court System must be concerned with the area of confidentiality because of the nature of some of the information handled by the judicial system. Some of the information in the courts is public information and it is the duty of many employees to help provide this kind of information to those requesting it. Employees are also exposed to some information that must be held in the strictest of confidence and must never be released unless it is absolutely certain that it is appropriate. There are several sections of the state and federal law which refer to various types of confidentiality and penalties involved for not adhering to those policies. With the supervisor's guidance, all confidential information should be kept in a secure place not readily accessible by other persons.").

167. For example, Standard 8-4.1(b) of the ABA Criminal Justice Section, Conduct of Judges and Court Personnel in Criminal Cases, states:

> Court personnel, including judges and law clerks, should not disclose, cause to be disclosed, or condone or authorize the disclosure of information, images, or documents relating to a criminal matter that are not part of the public court record. This Standard should not be construed as prohibiting court personnel from releasing or authorizing the release of a record or document that the court is required to release under state open records laws or the federal Freedom of Information Act, upon receipt of a proper request.

CRIMINAL JUSTICE STANDARDS, STANDARD 8-4.1(b) (AM. BAR ASS'N 2013); *see also* Jennifer A. Brobst, *Reverse Sunshine in the Digital Wild Frontier: Protecting Individual Privacy Against Public Records Requests for Government Databases*, 42 N. KY. L. REV. 197 (2015) (analyzing the "Reverse Sunshine" effect in which the lives of individuals are made more transparent than government actions through public records requests).

168. *See generally* Colin J.A. Oldberg, Note, *Organizational Doxing: Disaster on the Doorstep*, 15 COLO. TECH. L.J. 181 (2016).

169. Monica Vaughn, *Courthouse Data Breach Exposes Personal Information*, APPEAL DEMOCRACT.COM (June 13, 2016), http://www.appeal-democrat.com/news/courthouse-data-breach-exposes-personal-information/article_80a08626-31fa-11e6-b227-c75f0f72438a.html [http://perma.unl.edu/CY47-4CDZ].

170. *E.g.*, Citizens for Responsibility & Ethics in Wash. v. U.S. Dept. of Justice, 746 F.3d 1082 (D.C. Cir. 2014) (finding that the Department of Justice could not with-

guidance from the legislature on the weight to be provided to the privacy of crime victims than that provided by the grant of judicial discretion to award Jane Doe status or to clear a courtroom.

VI. NOT SO PRIVATE RIGHTS OF ACTION

If the protective measures described above are not successful, a cybercrime victim may have some limited private rights of action. As discussed in section III.B., because cyberstalking and cyberbullying involve online speech and expression, even if, or especially because, they are anonymous, the victim-plaintiff may have insurmountable legal challenges in bringing a claim. Several possible civil actions are briefly addressed below.[171]

A. Statutory Remedies

The U.S. Supreme Court has made clear that the First Amendment protects redisclosure of the identities of crime victims present in public records, absent narrowly tailored statutory restrictions.[172] In *Florida Star v. B.J.F.*, Justice Marshall wrote for the majority, holding that a Florida statute prohibiting newspapers from publishing the names of rape victims in criminal trials violated the First Amendment right to free speech and freedom of the press.[173] Although the trial court and appellate court used the victim's initials rather than her name, the investigative report by the Sheriff had identified her full name.[174] The majority determined that the statute was underinclusive with respect to the state's purported interest in protecting the victim's privacy.[175] The statute only restricted the mass media from disseminating the victim's identity. Thus, the Court noted that:

> An individual who maliciously spreads word of the identity of a rape victim is thus not covered, despite the fact that the communication of such information

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hold all law enforcement-related records in the public corruption prosecution of Jack Abramoff and others).

171. Although the vast majority of civil cases are settled and most criminal cases are pled out, the safe exchange of discovery is often reliant on the discretion of the attorneys.

172. *See generally* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) (holding the press cannot be sanctioned for redisclosure of information in already-disclosed public court documents); Cheyenne Newspapers Inc. v. First Judicial Dist. Court, 358 P.3d 493 (Wyo. 2015).

173. 491 U.S. 524 (1989) (analyzing FLA. STAT. ANN. § 794.03).

174. *Id.* at 527; *see also id.* at 526 n.1 ("No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084." (quoting FLA. STAT. ANN. § 794.03 (West 1987))).

175. *Id.* at 540.

> to persons who live near, or work with, the victim may have consequences as devastating as the exposure of her name to large numbers of strangers.[176]

If this language was meant to encourage state legislatures to craft broader but more effective statutory remedies for redisclosure of crime victim evidence, it has not yet borne fruit.

B. Defamation

Plaintiffs who attempt to sue those who post defamatory remarks online are faced with additional barriers if the poster made comments anonymously. Because the freedom of anonymous speech is well established,[177] efforts to unveil the poster during discovery in order to prove the elements of libel have proven difficult.[178] For example, in California, proof of false facts in the posting must appear on its face before disclosure of the defendant's identity is permitted, while opinion also remains a defense: "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[179]

A victim of cyberstalking and revenge porn will not be able to avail herself of a defamation cause of action when harassed with the truth or with what may be deemed a legitimate opinion about her character.[180] Nor should she have to rely solely on rehabilitating her reputation online if she is a stalking victim. In short, the Court relegates her nonlegal options to suffering in silence, entering the marketplace of public comment to defend herself—risking greater loss of privacy—or self-help.[181]

C. Invasion of Privacy

Invasion-of-privacy claims are notoriously difficult to pursue.[182] For example, the South Carolina Supreme Court held that a newspa-

176. *Id.*

177. *See generally* Reno v. ACLU, 521 U.S. 844 (1997) (defining Internet speech as protected under the First Amendment and anonymous Internet speech as akin to a pamphleteer or eighteenth-century town crier).

178. *E.g.*, Doe 2 v. Superior Court, 206 Cal. Rptr. 3d 60 (Cal. Ct. App. 2016) (denying an anti-SLAPP motion against the plaintiff who had received an anonymous whistle-blower email via a gmail account).

179. *Id.* at 69 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974)).

180. *See also* Shimizu, *supra* note 2, at 131–34 (addressing anonymous speech and other First Amendment protected speech made by offenders in cybercrime cases).

181. *Cf.* Dana Littlefield, *Rape Victim Did Her Own Detective Work to Find Her Assailants*, L.A. TIMES (Jan. 30, 2017), http://www.latimes.com/local/lanow/la-me-rape-victim-20170129-story.html [http://perma.unl.edu/AW3U-B7DZ] (describing a young-adult survivor who was determined to find her unknown offenders and conducted her own Internet investigation which lead to successful felony sex offense prosecutions).

182. The Colorado Supreme Court has held that false-light invasion-of-privacy claims, which arise when publicity places a person in a false light before the public, are

per could not be held liable for publishing a truthful article on a prisoner-rape case.[183] In South Carolina, an invasion-of-privacy claim fails when it is a matter of "legitimate public or general interest."[184] Here, the rape victim unwillingly had become an actor in a matter of public interest and therefore could not claim the article was an invasion of privacy.[185] Lawsuits against Internet providers or website owners for unlawful postings on their sites continue to meet resistance under the federal Communications Decency Act.[186]

D. Employee Harassment

In cyberstalking and cyberbullying cases emerging from the workplace, if an employer policy prevents a victim employee from engaging in defensive email exchanges or other forms of communication to forestall the abuse, the employee may have little recourse other than traditional discrimination actions. The U.S. Supreme Court has held that the First Amendment does not protect statements made as part of one's job.[187] "Whistle-blower protection statutes or labor law might provide a remedy (particularly if an employee is punished for reporting illegal acts), but the Constitution does not."[188] Tort remedies for employment-based sexual harassment may also be an option, such as intentional infliction of emotional distress.[189]

Scholar Aily Shimizu makes an astute observation when proposing reforms to cyberstalking legislation, which is that legal analysis of Internet crime has attempted to "seek[ ] a familiar analogy for the unfamiliar."[190] This problematic and inadequate approach is demonstrated by the concerns expressed herein regarding access to public court records in digital formats, as well as the paucity of private

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no longer recognized, as they were duplicative of defamation claims. Denver Publ'g Co. v. Bueno, 54 P.3d 893, 894 (Colo. 2002).

183. Doe v. Berkeley Publishers, 496 S.E.2d 636 (S.C. 1998).

184. *Id.* at 636.

185. *Id.* at 637.

186. *See, e.g.*, Huon v. Denton, 841 F.3d 733 (7th Cir. 2016) (regarding an acquittee who filed tort claims for defamation, intentional infliction of emotional distress, and false light against a website operator who hosted an article discussing the acquittee's rape trial and the allegations against him); *see also* Katherine Rushton, *Facebook in the Dock: Web Giant Refuses to Take Down Child Abuse Images—Then Reports BBC Journalist to Police for Sending Them the Pictures*, DAILY MAIL (Mar. 7, 2017), http://www.dailymail.co.uk/news/article-4288880/Facebook-tackled-failure-remove-sexualised-pictures-children.html (reporting on Facebook's refusal to remove sexualized images of children).

187. Garcetti v. Ceballos, 547 U.S. 410, 426 (2006) (holding that the Constitution does not restrict an employer's ability to manage the workplace, including matters affecting speech).

188. Fairley v. Andrews, 578 F.3d 518, 523 (7th Cir. 2009).

189. *See generally* L. Camille Hébert, *Conceptualizing Sexual Harassment in the Workplace as a Dignitary Tort*, 75 OHIO ST. L.J. 1345 (2014).

190. Shimizu, *supra* note 2, at 137.

rights of action should the criminal litigation result in greater harmful exposure for the cybercrime victim. The world has not evolved; it has changed, demanding new remedies to new problems.

VII. CONCLUSION

In order to sufficiently protect cybercrime victims from additional devastating losses of privacy during and after litigation, courts must acknowledge the risk of harm as real, albeit new to both individuals and society. Legislatures have begun to take positive steps by amending public records laws to specifically include exemptions for crime victim privacy interests.[191] Courts, in turn, can more effectively implement these laws and related policies by requiring recognition of the harms of disclosure in a Digital Age in the form of a clear factor for consideration when addressing litigant or witness anonymity or when restricting public recording of court proceedings.

Granted, the legal privacy protections available for cybercrime victims are only as effective as the witness's own willingness to make use of them. As stated by the Fifth Circuit Court of Appeals regarding the protection of jury anonymity: "If jurors voluntarily waive their anonymity and consent to interviews on matters other than jury deliberations, so be it. They need not become unwilling pawns in the frenzied media battle over these cases."[192] Not all cybercrime victims may want or seek privacy protections such as Jane Doe status, sealed records, or redaction of evidentiary transcriptions. However, for those who do, such remedies, appropriately adapted to a Digital Age, should be promoted and available in state and federal courts.

Any "frenzied media battle" demonstrates both a heightened public interest in litigation as well as a potentially heightened interest by litigants to obtain protection from the fray. The U.S. Supreme Court continues to rigorously uphold constitutional protections of the right to a fair and public trial, including access to public court records. Nearly thirty years ago, the Court expressed a content-based preference for ensuring public access to violent-crime litigation and cases involving salacious or particularly disturbing matters. The Court asserted that "[c]riminal acts, especially certain violent crimes, provoke public concern, outrage, and hostility. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emo-

191. *See* Comm'r of Pub. Safety v. Freedom of Info. Comm'n, 93 A.3d 1142, 1166 (Conn. 2014) ("Given the continuing vigorous legislative debate on open government matters both in 1994 and today, we deem balancing the various interests and articulating a coherent policy on this matter to be a uniquely legislative function.").

192. United States v. Brown, 250 F.3d 907, 921 (5th Cir. 2001).

tions."[193] No mention is made of the hardship to crime victims, but the Court has on occasion expressed sympathy for the onus placed on victim witnesses in litigation.[194] State courts are more explicitly recognizing the negative impact on the privacy of litigants and witnesses today.[195]

In an age with new cybercrimes and new risks to privacy, a rebalancing of interests is needed. That is, the courts should protect the right to public access to the degree that they maintain the right to a fair trial but not to the degree that such access brings to life the modern, but still lurid, penny dreadful without sufficient justification.[196] Crime victims would be more likely to report crime and cooperate with the criminal justice system to punish their offenders if they had greater privacy protections. If the legal system does not adequately protect them but instead only enhances the gravamen of the harm of the original offense by exposing their victimization online, then the administration of justice cannot be fully achieved. Despite the power of subpoena and contempt orders, victims of crime can and do refuse to cooperate when they feel it is in their best interests.[197] The legislature and judiciary may best intervene to protect the growing privacy interests of litigants and witnesses in public prosecutions in a Digital Age by adapting mechanisms to manage the courtroom experience and its permanent record. In doing so, they will also enhance the administration of justice through expanded cooperation in seeking justice.

193. Press-Enter. Co. v. Superior Court of Cal., 478 U.S. 1, 13 (1986) (quoting Press-Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 509 (1984)).

194. *Cf.* Fla. Star v. B.J.F., 491 U.S. 524, 540 (1989) (sympathizing with a rape victim's need for privacy in litigation, despite holding a state statute designed to provide such protection in violation of the First Amendment).

195. *See, e.g.*, State v. Godley, 760 S.E.2d 285, 288–89 (N.C. Ct. App. 2014); *supra* text accompanying note 135.

196. *See* Harbert Davenport, *Roy Bean: Law West of the Pecos*, 22 TEX. L. REV. 118, 118 (1943) (book review) ("It is the true tale of a typical Western 'bad man' as he was, and not as the 'penny dreadfuls' believed him to be.").

197. BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2015 (2016), https://www.bjs.gov/content/pub/pdf/cv15_sum.pdf [http://perma.unl.edu/G5LN-AUWP] ("In 2015, less than half (47%) of violent victimizations and more than half (55%) of serious violent victimizations were reported to police. A greater percentage of robberies and aggravated assaults (62% each) were reported than simple assaults (42%) and rape or sexual assaults (32%).").