



**Office of the Public Defender
State of Hawaii**



**Timothy Ho, Chief Deputy Public Defender
Testimony of the Office of the Public Defender,
State of Hawaii to the Senate Committee on Judiciary and Labor**

March 29, 2011, 3:30 p.m.

RE: S.B. 946, H.D. 1 (Proposed): Relating to the Courts

Chair Keith-Agaran and Members of the Committee:

The Office of the Public Defender opposes this measure.

This measure would in certain circumstances, permit "John" or "Jane Doe" filings in the district court of petitions, complaints, motions or other documents in cases of alleged domestic abuse. We believe this measure violates the rights of a criminal defendant under the Sixth and Fourteenth Amendment of the United States Constitution. We also believe that reference to the complaining witness as "Jane Doe" before a jury is highly prejudicial, and also denies the accused a right to a fair trial.

The Sixth Amendment guarantees the accused the right to be informed of the nature and cause of the accusation, to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense. Jane and John Doe filings will render an investigation into the complainant's background and previously filed accusations nearly impossible, denying him the right to adequately prepare to meet his accuser at trial. The defendant's ability to confront his or her accuser will be severely hampered.

The reference to the complainant as John or Jane Doe in a jury trial will lead a jury to unfairly conclude that the reason the complainant's name was not revealed was due to the dangerousness of the defendant. This is the kind of prejudice that no limiting instruction can cure. A jury must be able to judge the credibility of all witnesses based on the evidence before them. A Jane Doe filing adversely affects the credibility of the defendant without any corroboration.

We oppose the proposed HD 1 version of S.B. 946. A similar measure, H.B. 944, was deferred by the House Judiciary Committee. Thank you for the opportunity to be heard on this matter.



HAWAII DISABILITY RIGHTS CENTER

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THE HOUSE OF REPRESENTATIVES THE TWENTY-SIXTH LEGISLATURE REGULAR SESSION OF 2011

Committee on Judiciary Testimony in Support of S.B. 946 SD1, Proposed HD1 Relating to The Judiciary

**Tuesday, March 29, 2011, 3:30 P.M.
Conference Room 325**

Chair Keith-Agaran and Members of the Committee:

I am Louis Erteschik, Staff Attorney at the Hawaii Disability Rights Center, and am testifying in support of this bill.

The purpose of the bill is to codify into statute the ability of the Court in an appropriate situation to allow a complaint, motion or document to be filed identifying a party as "John Doe" or "Jane Doe" in order to protect their right of privacy. We support that and speak to the issue from the perspective of representing litigants in court cases who are individuals with disabilities. These individuals have rights under both federal and State law to have information regarding their disability protected and kept private.

This may be particularly so in the case of individuals who may suffer from a mental illness or substance abuse. They fear repercussions that may occur from having to disclose these conditions in a public record which, as a result of modern technology, is then literally available for "all the world" to see.

While we have had some success in cases convincing the Court to exercise discretion and allow a party to proceed via initials, we believe it is good public policy to codify this provision into the statutes. This would ensure greater uniformity in the protection of

these individuals. It would also eliminate the ability of an attorney on the other side to object to the use of initials or a "doe" filing as a means of coercing the party into a settlement or a withdrawal of the underlying claim . This provision would ensure that the integrity of the judicial process is not compromised in such a fashion.

Having stated our support for the Proposed HD1, we do note that we have supported the Senate version of this measure throughout the session as well. For that reason, we would urge the Committee to incorporate the language of the Proposed HD1 into the bill, as opposed to replacing the current contents therewith.

Thank you for the opportunity to testify in support of this measure.

HAWAII STATE COALITION AGAINST DOMESTIC VIOLENCE

To: The Honorable Clayton Hee
SENATE COMMITTEE ON JUDICIARY AND LABOR

From: Veronika Geronimo, Executive Director
Hawaii State Coalition Against Domestic Violence

Re: SB946

Hearing Date: March 29, 3:30 pm, Room 325

The Hawai'i State Coalition Against Domestic Violence (HSCADV) is a statewide coalition of domestic violence programs and shelters. HSCADV and its member agencies advocate for policies and services to end domestic violence in Hawai'i. On behalf of our member agencies, we thank you for the opportunity to testify in support of SB946.

The legal system is a very unfamiliar and intimidating arena for many domestic violence survivors and has the potential to re-traumatize and endanger the survivor. Engaging with the criminal justice system, including filing petitions, complaints, motions or temporary restraining orders, can be very dangerous for domestic violence survivors. Batterers often see the survivor as being directly responsible for their incarceration and may seek retaliation if released. Therefore, it is critical to protect the survivor's privacy within court filings in cases of domestic abuse.

SB946 Permits a court to allow a petition, complaint, motion, or other document to be filed by the plaintiff identifying the parties as "jane doe" or "john doe"; permits a court to use a multi-factor balancing test when determining if an anonymous filing is appropriate. Permits a court to allow a petitioner to be listed as "jane doe" or "john doe" within court filings when petitioning for a temporary restraining order or an injunction from further harassment; provided that the court determines it would be necessary to protect the privacy of the petitioner. Also permits courts to seal court records associated with the "jane doe" or "john doe" filing under certain circumstances.

We respectfully urge you to support SB946 and protect survivors who may be vulnerable to exposure, embarrassment or danger due to court filings.

Thank you for your consideration.

For more information contact: Veronika Geronimo, phone: 832-9316 ext. 104,
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March 28, 2011

The Honorable Gilbert S.C.Keith-Agaran
Chairman, House Judiciary Committee

The Honorable Karl Rhodes
Vice Chair, House Judiciary Committee

Re: Senate Bill 946 SD1 HD1

Chairman Keith-Agaran, Vice Chair Rhodes and Members of the Committee:

Senate Bill 946 SD1 HD1 ("SB 946") would, in certain circumstances, allow victims of harassment to sue as "Jane Does" or "John Does" instead of revealing their identities to the public. I write in support of this measure. As a law professor focusing on the impact of cyberspace and social networking on various legal regimes, including privacy and free speech, and on various minority groups, including the gay and lesbian community, it is an honor to be permitted to offer my perspective on the need for this legislation.

The Problem of Cyber Harassment

One of the great benefits of SB 946 is that it should protect victims of cyber harassment as well as face-to-face harassment. This is a necessary step, as modern cybertechnologies and social networking tools have increasingly become channels of harassment for minority, weak and hidden populations. Cyber harassment can be devastating to victims of all ages and can include (1) people sending so-called "Flame Mail" to a group to humiliate a victim; (2) electronic hate mail based on a victim's actual or perceived race, ethnicity, religion, gender, sexual orientation, socioeconomic class, and so on; (3) taking a victim's screen name and sending an embarrassing message under that name; (4) anonymous derogatory posts on blogs or social networking sites; (5) online polling pages to rate victims as "ugliest," "biggest dyke," or "most fem faggot;" (6) posting private material about a victim, such as outing a person's sexual identity to employers, friends or families; (7) taking pictures of a victim in a gym or locker room in a state of undress and posting the picture to a social networking site; (8) directly sending intimidating or threatening text messages or emails ("cyberstalking"); or (9) excluding victims from online communication with the group.¹ Cyber harassment can even take on darker tones, where, for example, tormentors doctor photographs to portray their victims being raped or murdered.²

Gay and Lesbian Victims

Women may be the most common victims of cyber harassment by sheer numbers, but domestic violence and online harassment victimize gay men and lesbians at an alarming rate. LGBT youths are routinely and mercilessly subjected to face-to-face and online harassment for real or perceived homosexuality. Ryan Halligan, for example, was so tormented by a number of his peers who spread rumors of Ryan's interest in men that Ryan

¹See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61 (2009); Ari Ezra Waldman, *Hostile Educational Environments* (forthcoming 2011). See also Warren J. Blumenfeld & R.M. Cooper, *LGBT and Allied Youth Responses to Cyberbullying: Policy Implications*, 31 INT'L J. CRITICAL PEDAGOGY 114, 115 (2010).

²*Id.*

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committed suicide.³ Gay and lesbian adults are no less frequent victims. The website Encyclopedia Dramatica, a satirical open wiki where anyone can post anything, includes virulent and homophobic taunts and direct threats of assault against many of the gay men with pages devoted to them. On one notable occasion, a poster accused a gay man of having an incestuous relationship and a bestial relationship at the same time.⁴

While we may hear more about domestic violence in heterosexual households, the unfortunate phenomenon is as frequent in the gay community and it is in the straight community. The Gay Men's Domestic Violence Project has conducted studies and estimates that more than 25 percent of gay men experience domestic violence, whether in the form of direct physical battery or verbal and emotional abuse.⁵ If the group were expanded to include victims of cyber harassment as part of their domestic harassment, the number would almost certainly be larger. And, the pressures that prevent these gay victims from coming forward are even more pronounced than those that keep women silent. Gay men and women who are victims of domestic violence have three additional factors keeping them from coming forward. First, their relationships are not recognized by society at large and, therefore, state programs aimed at protecting domestic violence victims are often not available to them. Second, the community at large tends to disbelieve stories of gay domestic violence. Whether that is because of homophobia, anti-gay prejudice or the good faith, yet erroneous, belief that domestic violence does not exist in the LGBT community is irrelevant. If the people capable of helping do not believe the victims, the victims have no incentive to come forward. Third, gay men and women risk being outed to their employers and families if they come forward with their stories of domestic violence. And, since 39 states and the federal government permit employers to fire employees simply for being gay, the threat of revealing their sexual orientation significantly depresses reporting gay domestic violence.

The Importance of SB 946

If these victims could be afforded the umbrella of anonymity through SB 946, they could seek redress and not have to worry about retribution in their personal and professional lives. With Hawaii at the forefront of gay rights with recently passed civil union legislation, gay citizens of Hawaii will increasingly emerge from the shadows of society and with that may come an increasing need to support gay victims of domestic violence. SB 946 is also a narrowly tailored reform that serves a salient function – it allows victims of harassment, including cyber harassment, to seek protection from their tormenters under the umbrella of Hawaii law, but also protects the dual interests in privacy and transparency by allowing courts to engage in a balancing test between these competing values.

Response to Critics

The arguments against SB 946 are three-fold, but each is unconvincing. First, the Hawaii Office of the Public Defender opposes the bill on the grounds that the measure “violates the rights of a criminal defendant under the Sixth and Fourteenth Amendment” to the Federal Constitution. The Sixth Amendment guarantees to the accused the right to be informed of the nature and cause accusations against him, to call witnesses in his favor, to have the assistance of counsel and to confront his accuser. By filing complaints under pseudonyms, the argument goes, defendants can neither investigate a plaintiff's background nor research whether his or her accuser has filed these claims before. This means that a defendant would be unable to adequately prepare a defense and, therefore, would be unable to confront his accuser. That argument goes too far. “John Doe” and “Jane Doe” filings do not prevent defendants from investigating and preparing defenses. It is a fallacy to suggest that such complaints are clouded in mystery until the moment trial begins and the plaintiff is sitting in his or her chair. Filings with pseudonyms shield identification and private information from the public, not the parties involved in the case.

³ Ryan's Story, www.ryanpatrickhalligan.org.

⁴ Chris Croker, Encyclopedia Dramatic, at http://encyclopedia.dramatica.com/Chris_crocker.

⁵ Gay Men's Domestic Violence Project, <http://gmdvp.org/>.

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Second, others have testified that complaints with “John Does” and “Jane Does” lead juries to erroneously assume that pseudonyms were used because the defendant is dangerous. There is some evidence to support this, based on various studies done in the late 1990s. If jurors assume that the defendant is dangerous from the get-go, their credibility judgments would be impaired without evidence. This is an overreaction. While some evidence suggests that pseudonym filings make fact-finders wonder what would cause the plaintiff to hide his or her identity, judges can head this off at the pass by issuing clear jury instructions that the “John Doe” or “Jane Doe” filing means nothing with respect to the credibility of the defendant or his witnesses. Jurors are surprisingly smart when it comes to compartmentalizing inadmissible nonsense when given clear instructions from a judge.

Third, the American Civil Liberties Union of Hawaii opposes the bill because courts are presumptively open to the public and only showings of “strong countervailing reasons” could overcome the public’s interest in access. Open access to the courts is indeed an important value, but it is not absolute. Even if we require “strong countervailing reasons” to insert some measure of anonymity into the process, those reasons exist. Domestic abuse is a grave problem, both in straight and gay relationships, and coming forward knowing that you will be identified as a victim of domestic violence is emotionally daunting and physically dangerous. Professor Danielle Keats Citron has already testified as to the importance of SB 946 for female victims of cyberharassment. My testimony adds to Professor Citron’s analysis, but with respect to gay victims of domestic violence and cyberharassment – a problem that will become increasingly obvious as gay couples continue to come out of the margins of legal society and assert their rights.

Conclusion

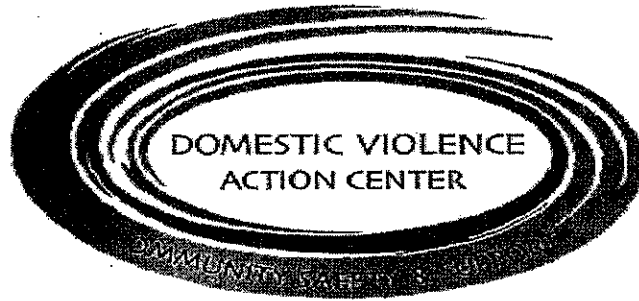
SB 946 merits passage by your committee and the full Hawaii State Legislature and should be signed into law as soon as possible. The bill will help victims of domestic violence come out of the shadows and assert their legal rights, thus deterring future harassment. And, the law will not substantially or materially damage our national commitment to open access to courts.

I thank the Committee for its time and for the honor of testifying on this important matter.

Respectfully submitted by,

/s/ Ari E. Waldman

Ari E. Waldman



March 28, 2011

FROM: Nanci Kreidman, M.A.
Domestic Violence Action Center

TO: Representative Gilbert S.C. Keith-Agaran, Chair
Representative Karl Rhoads, Vice Chair
Members of the Committee

RE: SB 946, SD 1 Support Intent of Bill
Hearing Date: Tuesday, March 29, 2011, 3:30pm, Conf. Rm #325

Aloha and good morning. It would be in the interests of justice that funds be contributed to the Judiciary for disbursement to legal service providers. The work done collectively by our community's organizations increasing access to justice is crucial.

The particular mechanism proposed in S.B. 946, SD 1 may not be a workable approach. The ability of the Judiciary to develop procedures and institute a Fund for this purpose may not be feasible and there does not appear to be direction as to how the funds would be disbursed.

We appreciate the opportunity to enter into discussion about innovations for the support of our legal services programs. But reserve complete support on this Bill.

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Committee: Committee on Judiciary
aring Date/Time: Tuesday, March 29, 2011, 3:30 p.m.
Place: Conference Room 325
Re: Testimony of the ACLU of Hawaii in Opposition to S.B. 946, SD1, proposed HD1, Relating to the Judiciary

Dear Chair Keith-Agaran and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to S.B. 946, SD1, proposed HD1.

The state family courts already have the necessary discretion to allow parties to proceed under pseudonym and to seal portions of records when appropriate. S.B. 946, SD1, proposed HD1 is not required to protect the victims of alleged abuse.

As a preliminary matter, it is well-settled that courts are presumptively open to the public. *See Gannet Pacific Corp. v. Richardson*, 29 Haw. 224, 233, 580 P.2d 49, 56 (1978). While the right to public access is not absolute, it may only be overcome by a showing of "strong countervailing reasons" that outweigh the public's interest in access. *In re Estate of Campbell*, 106 Haw. 453, 465, 106 P.3d 1096, 1108 (2005). The Hawaii Supreme Court has already held, outside of the family court context, that a party must "demonstrate that strong countervailing reasons weigh against the public's presumptive right of general access to judicial proceedings and records." *Id.* The determination of whether and to what extent access is permitted "is one best left to the sound discretion of the trial court, a discretion to be exercised in the light of the relevant facts and circumstances of the particular case." *Honolulu Advertiser, Inc. v. Takao*, 59 Haw. 237, 239, 580 P.2d 58, 61 (1978) (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 297 (1978)).

Although the Hawaii Supreme Court has never ruled on the applicability of the balancing test in family court proceedings (*see Campbell, supra*), our state family courts *already* have the authority to apply an appropriate balancing test to determine whether and when to seal portions of family court proceedings and records. Accordingly, the proposed bill is unnecessary. Moreover, it cannot be disputed that any bill that required "Doe" identification and sealing in alleged domestic violence cases would be facially unconstitutional. *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 608 (1978) (striking as unconstitutional a Massachusetts statute that required judges, at trials for specified sexual offenses involving victims under age of 18, to exclude press and general public from courtroom).

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Chair Keith-Agaran and Members of the Committee on Judiciary

March 29, 2011

Page 2 of 2

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years.

Thank you for this opportunity to testify.

Sincerely,
Laurie Temple
Staff Attorney
ACLU of Hawaii

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WRITTEN TESTIMONY OF DANIELLE KEATS CITRON & FRANK PASQUALE

**Danielle Keats Citron, Professor of Law, University of Maryland School of Law,
Affiliate Fellow of Yale Information Society Project,
Affiliate Fellow of Stanford Center on Internet and Society**

**Frank A. Pasquale, Schering-Plough Professor in Health Care Regulation and Enforcement,
Seton Hall Law School
Visiting Fellow, Princeton University Center for Information Technology Policy**

“Cyber Harassment, Privacy, and Jane/John Doe Subpoenas”

Hearing on Senate Bill 946 SD1 HD1, “Jane and John Doe Filings; Domestic Abuse”

Before the House Judiciary Committee, Twenty-Sixth Legislature, 2011, State of Hawaii.

CYBER HARASSMENT

Cyber harassment is a serious and widespread problem. It routinely involves threats of rape and other forms of sexual violence. It includes the posting of revealing photographs of victims or doctored pictures portraying victims being raped and strangled. The harassment often exposes victims' sensitive personal information, such as Social Security numbers and medical information. It commonly involves the impersonation of victims: Perpetrators post victims' telephone numbers, home addresses, and purported interest in anonymous sex or rape fantasies.¹

Such harassment has a profound effect on targeted individuals. It discourages them from writing and earning a living online. Targeted individuals shut down their blogs and websites.² It interferes with their professional lives. It raises their vulnerability to offline violence and has led to physical attacks at the hands of third parties inspired by online postings. The harassment causes considerable emotional distress.³ Some targeted individuals have committed suicide.⁴

CURRENT REALITIES

While cyber attackers target men, more often their victims are female. The nonprofit organization *Working to Halt Online Abuse* reports that from 2000 to 2008, 72.5% of the 2,519 individuals reporting cyber harassment were female.⁵ Just over half of the victims had a relationship with their attackers.

For instance, in December 2009, a California man, Jebidiah James Stipe, impersonated his ex-girlfriend in a Craigslist advertisement, posting her home address and interest in a "real aggressive man with no concerns for women well being."⁶ The advertisement sought "humiliation, physical abuse, and sexual abuse." Stipe told investigators that he posted the advertisement because he was upset with his ex-girlfriend for "remaining in a relationship with her current boyfriend." Another man, Ty McDowell, responded to the posting: He forced his way into the woman's home, tied her hands behind her back, blindfolded her, and raped her. McDowell's lawyer explained that his client believed he was playing out the woman's lurid sexual fantasy. Stipe previously posted similar online advertisements with his ex-wife as the target.

¹ For detailed explanation of the phenomenon of cyber harassment, see Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009) and Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009).

² A 2005 Pew Internet and American Life Project study attributed a 11 percent decline in women's use of chat rooms due to menacing comments. *Female Bloggers Face Harassment*, WOMEN IN HIGHER EDUC., June 2007, at 5.

³ Ellen Nakashima, *Sexual Threats Stifle Some Female Bloggers*, WASH. POST, Apr. 30, 2007, at A1.

⁴ B.J. Lee, *When Words Kill: Suicide Spurs Bid to Regulate the Net in South Korea*, NEWSWEEK.COM, Oct. 15, 2008.

⁵ WORKING TO HALT ONLINE ABUSE, CYBERSTALKING COMPARISON STATISTICS 2000-2008.

⁶ William Browning, *Suspect Solicited Ex's Rape, Affidavit Says*, WYOMING BILLINGS GAZETTE, Feb. 5, 2010. For the rape victim's interview on Oprah, see <http://www.everythingoprah.com/2010/09/craigslist-rape-victim-sarah-shares-horrific-story-on-the-oprah-winfrey-show.html>.

Although cyber harassment's scope is difficult to estimate, one study suggests that approximately 40 percent of female Internet users have experienced cyber harassment.⁷ The U.S. Department of Justice has explained that any statistical evidence surrounding cyber harassment is likely to underestimate the phenomenon as women tend to underreport it due to feelings of shame and embarrassment.⁸

THREATS TO PRIVACY

Cyber harassment invades victims' privacy by exposing their sensitive personal information, revealing photographs, and the like. Because search engines reproduce information cached online, time's passage cannot alleviate their reputational, emotional, and physical damage. Unlike newspapers, which were once only easily accessible in libraries after their publication, search engines now index all content on the web, and can produce it instantaneously. Victims must live with digital privacy invasions that are deeply humiliating, reputation-harming, and potentially dangerous as demonstrated by the Craigslist rape, as well as searchable and accessible from anywhere, and by anyone, in the world. Often, the information is taken out of context, producing a distorted and damaging view of the person.⁹

While lawsuits can serve to redress victims for these harms, they also can compound the severity of these privacy problems. Law often permits victims to sue perpetrators for intentional infliction of emotional distress, invasion of privacy, and defamation. But victims must bring such civil lawsuits in their own names. As a result, the complaints, which are available to the press and interested individuals, further publicize the cyber harassment, exacerbating the privacy harms suffered by victims. In turn, victims may refrain from pursuing their harassers in court *not* because they lack legitimate claims but because they fear exposing themselves to further privacy invasions.

S.B. No. 946 SD1 HD1 (SB 946)

Senate Bill 946 aims to protect the privacy of cyber harassment victims so that they can bring lawsuits against their attackers. It allows victims who have already received an order of protection, temporary restraining order, or protective order against the perpetrator to sue as Jane or John Does in cases involving domestic abuse. The law itself is quite narrow, only providing these protections to cyber harassment victims who have already been recognized by a court as deserving of a protective order in the context of a domestic violence matter. Although I believe that the proposed legislation should be expanded to include other victims of cyber harassment, the bill serves a crucial role in permitting victims to bring law's coercive and moral power to bear against cyber harassers. Because the bill allows courts to weigh the victim's interest in privacy against the public's interest in disclosure, it both protects privacy and transparency.

⁷ Azy Barak, *Sexual Harassment on the Internet*, 23 SOC. SCI. COMPUTER REV. 77 (2005).

⁸ ATT'Y GEN. TO VICE PRESIDENT, CYBERSTALKING: A NEW CHALLENGE FOR LAW ENFORCEMENT AND INDUSTRY (1999).

⁹ For a detailed explanation of the way digital environment exacerbates privacy problems, see Danielle Keats Citron, *Mainstreaming Privacy Torts*, 99 Cal. L. Rev. (forthcoming 2011) and DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* (2007).

CONCLUSION

Cyber harassment is a serious problem that causes serious harm to victims and their families. This bill would help victims bring lawsuits that would deter and remedy cyber harassment without unnecessarily sacrificing transparency.

Testimony to the House Judiciary Committee
Honorable Chair Keith-Agaran, Vice-Chair Rhoades and Members
Tuesday, March 29, 2011
3:30 p.m.
Conference Room 325
Hawaii State Capitol

RE: SB 946 SD1 HD1 RELATING TO COURTS

Position: Strong Support

Cyber harassment of women and other minority populations (e.g., LGBT) exemplifies the 21st century behavior that is harmful to women and minorities; and it continues to be disappointingly trivialized (Citron, 2009). Until the 1970s, no term even existed for sexual harassment in the workplace and domestic violence in the home, and women were expected to manage these harms in isolation and without the support of law enforcement and the judicial system (Citron, 2009).

I am submitting my testimony in support of SB 946 SD1 HD1 (SB946) because I was the victim of domestic violence in the late 90s. Through threats of violence and under duress when I attempted to leave this abusive relationship in 1999, my son's father procured sexually explicit photographs of me long before digital cameras and user generated content technology on the internet was available to the average consumer.

Over a decade later, I became the target of cyber harassment by my son's father who made repeated internet publications of me in a state of undress and of a sexual nature; alongside extremely offensive racist and sexual comments that identified me by my true full name and place of employment. This vindictive behavior was done in retaliation after I testified against him in an abuse proceeding brought by another woman, and requested a child support re-evaluation for the child we share in 2008.

I first learned of the photographs and published comments in 2008, after I began receiving anonymous email contact at a social networking site, on my personal work email, and telephone calls made to me by several male strangers. The First Circuit Family Court issued a Protective Order against my son's father (Defendant) that remains in effect for several years and ordered that the Defendant return any photographs of me to my attorneys. This matter has still not been resolved, and weeks after the Family Court issued the Protective Order, a fourth posting was made.

I attempted to file a Jane Doe Complaint in the First Circuit Court, State of Hawaii, to compel the cessation of the harassing and intrusive conduct because I felt that these callous, cruel, and calculated attacks upon my privacy, reputation, and character caused me to fear that this harassment -not even considered criminal under current state Hawaii law (e.g., postings on 3rd party websites and online impersonation vs. direct communication) -would ever cease. Moreover, the targeted nature of these attacks -and

in particular, the inclusion of my full name, business, and contact information -made me fear for my own physical safety and those of my minor children from the general public. Upon filing my motion to proceed anonymously as a Jane Doe, the Judge in this case DENIED me the opportunity to proceed and did not issue any further explanation of his order. This prevented me the opportunity to seek an appeal (e.g., no written opinion for an Appeals Court to examine), so I filed a Motion for Clarification, Reconsideration, and a Hearing. After filing this Motion, the same Judge held on to my Motion for Reconsideration for five (5) months and then "hand delivered" it back to my attorney with no stamp, but a non-verbal gesture of "Denied" for the second (2nd) time, and no opportunity to plead my case before him.

To date, my efforts to file as a Jane Doe has personally cost me over \$40,000, and despite being a victim of highly embarrassing invasion of privacy and harassment stemming from domestic violence, the Judge's decision has made it impossible for me to seek meaningful redress in the courts. Consequently, I fear the harms that I have already suffered will be magnified not only by publicity, but my personal safety and well-being as a private citizen will be jeopardized. As the 11th Circuit Court of Appeals recently decided upon Jane Doe cases it stated, "the district court failed to give due consideration to the concerns the Plaintiffs raised about being forced to maintain the suits in their own names. Justice should not carry such a high price and accordingly, we vacate the district court's order."

The use of "Doe Plaintiffs" to protect the legitimate privacy rights has been recognized as an appropriate practice in circumstances when a plaintiff would be further stigmatized by disclosing his or her name in court documents. In determining whether a plaintiff should be able to proceed anonymously, courts balance "the plaintiff's interest in anonymity....against both the public interest in disclosure and any prejudice to the defendant." *Sealed Plaintiff v. Sealed Defendant*, 537 F. 3d 185, 189 (2nd Cir. 2008) (adopting the Ninth Circuit's formulation as described in *Does v. Advanced Textile Corp*, 214 F. 3d 1058m 1068 (9th Cir 2000), and holding that the district court abused its discretion in refusing to allow sexual assault plaintiff to proceed anonymously). In balancing these interests, courts have employed a number of non-exclusive factors such as whether the case involves matters that are highly sensitive and of personal nature.

The right to privacy is also recognized in our Hawaii Constitution. See Haw. Const. art. I, §§ 6-7. Among the privacy interests protected by our Constitution is informational privacy: the right to keep confidential information that is "highly personal and intimate."

I am asking for your support of SB946 because our state Constitution protects this privacy right, and the First Circuit Court, State of Hawaii, refused to weigh any of the factors or engage in any type of balancing of harms.

The trivialization of online harassment and privacy violations will continue given the nature of the internet, absence of public policy on state and federal levels, and marginalizes victims' experiences of mental and emotional distress and humiliation. Missouri teenager Megan Meier, committed suicide in October 2006, when a prank was

played by her 47 year old neighbor. Last fall, Rutgers student Tyler Clemente, committed suicide when his sexual encounter with another male was live streamed without his consent or knowledge.

As Professor Citron wrote in her journal article *Law's Expressive Value in Combating Cyber Gender Harassment*, "law creates a public set of meanings and shared understandings between the state and the public. It clarifies, and draws attention to, the behavior it prohibits....law educates the public about what is socially harmful." (Citron, 2009). In an increasingly digital world, a person's privacy and reputation become vulnerable to anonymous participants, and cyber harassment will continue to increase with greater frequency and norms -particularly against women, children, and other minorities.

Not only is it important to address cyber harassment as a crime while protecting online First Amendment right to free speech, the harms and apparent suicide of victims makes this a serious threat to public safety (Jameson, 2008). It is important that law enforcement have the tools (e.g., state law and technological tools to unmask online offenders) which makes cyber harassment a crime, but also require the court system to adopt a multi-factor test to balance privacy vs. access in every case where (a) a party wants anonymity; (b) the party moves for anonymity. The amendments required in SB 946 SD1 HD1 would include a list of factors that the courts must consider, and to codify the key cases in this area from other jurisdictions.

Sadly, the Judge in my case refused to rely on persuasive precedent from courts in other jurisdictions that have previously dealt with similar cases, and denied me the opportunity to seek redress without exacerbating the very harms I was seeking redress for. To date, the perpetrator has suffered no criminal charges and I am not willing to move forward with this case under my true name due to the reasons mentioned.

Thank you for allowing me to submit this testimony. I share this story with the genuine hope that something good will come out of my own personal story of humiliation, emotional and mental suffering, and that no other person will have to experience the same isolation and lack of law enforcement and judicial support that is the essence behind SB 946 SD1 HD1 legislation.

Respectfully Submitted,
Pseudonym Jane Doe

References

Citron, Danielle Keats (2009), *Law's expressive value in combating cyber gender harassment*, *Michigan Law Review*, Vol. 108: 373, 373-416.

Jameson, Sarah (2008). *Cyber harassment: Striking a balance between free speech and privacy*, *Commonlaw Conspectus*, Vol. 17, 231-266.