

LATE TESTIMONY

Testimony to the Judiciary Committee

Thursday, February 17, 2011

2 pm in Room 309

RE: HB 944: Allows qualifying "Jane Doe"/"John Doe" documents and confidential court records in domestic abuse cases.

Chair Keith-Agaran and members of the committee:

Position: Support with Amendments

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 HB 944 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.

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 "Denial" again 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 by publicity, and future safety and well-being as a private citizen. 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 (not only Family Court as this bill narrows itself to), 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 HB 944 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 lived 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 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 HB 944 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 hope that something good will come out of my own personal emotional fear, suffering and humiliation, 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 HB 944 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.