



LATE TESTIMONY

The Judiciary, State of Hawaii

Testimony to the Senate Committee on Judiciary and Labor

The Honorable Clayton Hee, Chair

The Honorable Maile S.L. Shimabukuro, Vice Chair

Tuesday, March 1, 2011, 9:00 a.m.
State Capitol, Conference Room 016

By

Lori M. Okita

Interim Deputy Chief Court Administrator
First Circuit

WRITTEN COMMENTS ONLY

Bill No. and Title: Senate Bill No. 77, Proposed S.D. 1, Relating to the Courts.

Purpose: Permits a court to allow a petition, complaint, motion, or other document to be filed 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 an alleged victim to be listed as "jane doe" or "john doe" within court filings when petitioning for a temporary restraining order and 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.

Judiciary's Position:

Currently, the courts do, from time to time, exercise its equitable powers to protect persons and entities by "sealing" or making confidential selected files and documents that would otherwise be open to the public. This bill appears to protect victims' identities from public disclosure by codifying the ability of a petitioner/plaintiff to request that a party's identity (i.e., party's name), documents or portions of documents that would identify the party or contain sufficient information to identify the party, be "sealed" from public viewing.

The Judiciary takes no position on the policy issue but respectfully seeks confirmation of its understanding that this bill does not intend to limit the court's authority regarding disclosure of the petitioner/plaintiff's identity to defendant(s)/respondent(s) of a "sealed" action or documents for purposes of proper defense/response. Further, confirmation is respectfully sought to confirm that this bill does not intend to limit access to the "sealed" action or documents by law enforcement or other authorized authority, in the course of conducting official business, for



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purposes of effectuating service, enforcement and/or prosecution, unless otherwise authorized by statutory or rule authority, or as ordered by the courts.

Thank you for the opportunity to testify on this matter.

LATE TESTIMONY



**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 1, 2011, 9:00 a.m.

RE: **S.B. 77**, SD1: Relating to the Courts

Chair Hee 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 SD 1 version of S.B. 77. A similar measure, H.B. 944, was deferred by the House Judiciary Committee. Thank you for the opportunity to be heard on this matter.

LATE TESTIMONY

From: Ann Freed [annfreed@hotmail.com]
Sent: Monday, February 28, 2011 2:08 PM
To: JDLTestimony
Subject: SB 77 Jane Doe Bill
Attachments: Jane Doe Test. SB77; ATT00001..htm

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

From: Ann Freed, Co-Chair of the Hawai'i Women's Coalition

Re: **STRONG SUPPORT FOR SB77 (Jane Doe bill)**

Hearing Date: 03-01-11 9:00AM in conference room 016

Aloha Chair Hee, Vice Chair Shimabukuro and committee members.

We are in strong support of this measure designed to keep victims of domestic violence and/or cyber or other forms of stalking and intimidation safe from being re-victimized in the court system.

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.

SB77 permits a court to allow a petition, complaint, motion, or other document to be filed identifying the parties as "jane doe" or "john doe"; permits a court to allow an alleged victim to be listed as "jane doe" or "john doe" within court filings when petitioning for a temporary restraining order and an injunction from further harassment; provided that the court determines it would be necessary to protect the privacy of the petitioner.

We support the intent of SB77 to protect survivors who may be vulnerable to exposure, embarrassment or danger due to court filings.

Thank you for your consideration.

Ann S. Freed
Co-Chair Hawai'i Women's Coalition

Mililani, Hawai'i
623-5676

From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 28, 2011 2:36 PM
To: JDLTestimony
Cc: theede@hawaii.rr.com
Subject: Testimony for SB77 on 3/1/2011 9:00:00 AM

LATE TESTIMONY

Testimony for JDL 3/1/2011 9:00:00 AM SB77

Conference room: 016
Testifier position: support
Testifier will be present: No
Submitted by: Teri Heede
Organization: Individual
Address:
Phone:
E-mail: theede@hawaii.rr.com
Submitted on: 2/28/2011

Comments:

Aloha Chair & Committee Members!

I write in support of the intent of SB77 and its attempt to protect survivors who may be vulnerable to exposure, embarrassment or danger due to court filings.

Your help in passing this important legislation will prevent further victimization of people who are trying to protect themselves.

Mahalo for your time and consideration!

hscadv
HAWAII STATE COALITION AGAINST DOMESTIC VIOLENCE

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

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

Re: **SB77**

Hearing Date: 03-01-11 9:00AM in conference room 016

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 SB77**.

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.

SB77 permits a court to allow a petition, complaint, motion, or other document to be filed identifying the parties as "jane doe" or "john doe; permits a court to allow an alleged victim to be listed as "jane doe" or "john doe" within court filings when petitioning for a temporary restraining order and an injunction from further harassment; provided that the court determines it would be necessary to protect the privacy of the petitioner. We support the intent of SB77 and its attempt to protect survivors who may be vulnerable to exposure, embarrassment or danger due to court filings.

Thank you for your consideration.

LATE TESTIMONY



Committee: Committee on Judiciary and Labor
aring Date/Time: Tuesday, March 1, 2011, 9:00 a.m.
Place: Conference Room 16
Re: Testimony of the ACLU of Hawaii in Opposition to S.B. 77, SD1, Relating to the Courts

Dear Chair Hee and Members of the Committee on Judiciary and Labor:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in opposition to S.B. 77, SD1.

The state family courts already have the necessary discretion to allow parties to proceed under pseudonym and to seal portions of records when appropriate. The proposed bill 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 Hee and Members of the Committee on Judiciary and Labor

March 1, 2011

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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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UNIVERSITY OF MARYLAND
SCHOOL OF LAW

WRITTEN TESTIMONY OF 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

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

Hearing on Senate Bill 77, “Jane and John Doe Filings; Domestic Abuse”

Before the Senate, 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. 288

Senate Bill 288 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.

LATE TESTIMONY

Testimony to the Senate Judiciary Committee

Tuesday, March 1, 2011

RE: SB 77, Proposed SD1: Permits a court to allow a petition, complaint, motion, or other document to be filed 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.

Chair Senator Hee, Vice-Chair Shimabukuro and members of the committee:

Position: 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 SB77, SD1 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 email communication) - would ever cease. Moreover, the targeted nature of these attacks - and in particular, the inclusion of my full name, business, contact information, and the quasi-familial nature of my case (e.g., the minor child we share in common, the falling out of our relationship, and the abuse I suffered) - made me fear for my own physical safety and those of my family.

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 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 SB 77, SD1, 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. 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 SB 77, SD1 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.