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## New Zealand's Litigation-Related Name Suppression Policies: A Workable Model for the United States

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NEW ZEALAND’S LITIGATION-RELATED NAME SUPPRESSION POLICIES:  
A WORKABLE MODEL FOR THE UNITED STATES

*Candice Lazar*<sup>1</sup>

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## I. INTRODUCTION

It is said that fame impacts all areas of one's life. This holds true with legal proceedings as well. American courts allow for trials of celebrities such as O.J. Simpson, Claus von Bulow, and Phil Spector to be public. The irony is that these trials often make the defendants more famous and, in the process, profitable. Consider the 2011 trial of Casey Anthony. After Anthony was acquitted for the murder of her young daughter, rumors quickly swirled that she had been offered a book contract.<sup>2</sup> Had Anthony not become a public figure during her legal ordeal, she would not have had such a contract. Further, she could have returned to living a relatively normal life after being acquitted. In cases like this, pseudonymity, or name suppression, would serve to prevent defendants from profiting — or suffering — from their notoriety.

While litigation-related name suppression is relatively uncommon in the United States, it plays a larger role in the legal systems of other countries. New Zealand arguably has one of the most liberal litigation-related name suppression policies in the Western world. Suppression allows for parties to take part in legal proceedings while avoiding having their names become part of the public record. Compared to its allies England and Australia, New Zealand is far more lenient in allowing for name suppression for plaintiffs, defendants, and victims.<sup>3</sup> Although permanent suppression is somewhat unusual,<sup>4</sup> temporary suppression is granted on a regular basis, more so than in these ally countries and more so than in the United States.<sup>5</sup>

Yet changes to New Zealand's longstanding name suppression policy are afoot. In October 2011, the Criminal Procedure

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<sup>2</sup> John Hudson, *Casey Anthony Signs a Book Deal at her Peril*, THE ATLANTIC WIRE (July 18, 2011), <http://www.theatlanticwire.com/business/2011/07/casey-anthony-signs-book-deal-her-peril/40108/>.

<sup>3</sup> Simon Power, *Government Makes Name Suppression Harder to Get*, BEEHIVE.GOV.NZ (Oct. 5, 2010), <http://www.beehive.govt.nz/release/government-makes-name-suppression-harder-get>.

<sup>4</sup> See *T v The Queen* [2010] NZCA 438 (CA).

<sup>5</sup> See, e.g., *C v Dir. of Human Rights Proceedings* (unreported) High Court, Auckland, CIV-2010-404-001662, 6 September 2010, Venning J (N.Z.); *LNC v SX* (2008) 24/08 HRRT 1/08.

Act 2011 was enacted.<sup>6</sup> This legislation amends many of New Zealand's standard legal procedures; one such change is that it makes name suppression less readily available while still being objective and humane.<sup>7</sup> Parts of the Act, including the portions dealing with name suppression, were implemented in 2012; the Act in its entirety will be in place by the end of 2013.<sup>8</sup>

In this article, I will briefly explore the differences in the previous legislation and the new revisions, as well as the latter's impact. I will also examine the history, values, and rationale behind New Zealand's name suppression policy. In doing so, I conclude that New Zealand's method appropriately balances privacy concerns and open justice. The United States should adopt, or at least move towards, a similar model for its own legal system.

## II. NEW ZEALAND'S NAME SUPPRESSION: A UNIQUE APPROACH FROM INFORMAL BEGINNINGS

New Zealand has no formal constitution.<sup>9</sup> Instead, the rights of the people derive from sources such as legislation, custom, and parliamentary procedure.<sup>10</sup> One of this democracy's most vital documents is the New Zealand Bill of Rights.<sup>11</sup>

Nothing in Bill of Rights addresses name suppression directly. The most relevant part, section 14, provides that "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."<sup>12</sup> The term "freedom to seek" suggests that one can permissibly search for information of any sort, including names of parties connected to legal proceedings that may have initially been

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<sup>6</sup> Ministry of Justice, *Summary of Changes in Criminal Procedure*, <http://justice.govt.nz/courts/modernising-courts/new-criminal-procedure/summary-of-changes> (last visited Dec. 20, 2012) (summarizing the changes the new legislature will implement).

<sup>7</sup> Criminal Procedure Act 2011 (N.Z.) (Sections 200–208 address name suppression).

<sup>8</sup> Ministry of Justice, *supra* note 6.

<sup>9</sup> 2 MEDIA, ADVERTISING, AND ENTERTAINMENT LAW THROUGHOUT THE WORLD §27:2 (Andrew B. Ulmer ed., 2011).

<sup>10</sup> *Id.*

<sup>11</sup> New Zealand Bill of Rights Act 1990.

<sup>12</sup> *Id.* § 14.

withheld by courts. Section 14 is often cited in media law cases in which the identities of the parties are sought.<sup>13</sup> However, the freedom provided by this section is tempered by section 5, Justified Limitations, which subjects all of the Bill's rights and liberties to "reasonable limits."<sup>14</sup>

New Zealand's Privacy Act also does not directly address name suppression. Principle 11 within the Act places limits on the disclosure of information, but does not mention the disclosure of information in the context of legal proceedings.<sup>15</sup> Whether Principle 11's silence on a topic should be interpreted as inclusive or exclusive has not been addressed, so there is a legitimate argument that the language of this section is applicable to litigation settings.

Conversely, the Immigration Act explicitly addresses name suppression, albeit briefly.<sup>16</sup> Where the Act defines courts' and tribunals' obligations in regards to classified information, it permits these bodies to forbid publication of witnesses' names or identifying information.<sup>17</sup> The publication of defendants' and plaintiffs' names, however, is not addressed.

More definitive treatment of name suppression can be found in New Zealand's Criminal Justice Act 1985.<sup>18</sup> That legislation gave courts the discretion to suppress the names of plaintiffs, defendants, and anyone else associated with any legal proceedings;<sup>19</sup> the courts also were allowed to determine whether such suppression, when granted, should be temporary or permanent.<sup>20</sup> The Act stated that "[t]he making under this section of an order having effect only for a limited period shall not prevent any court from making under this section any further order having effect either for a limited period or permanently."<sup>21</sup>

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<sup>13</sup> Ulmer, *supra* note 9, at 1.

<sup>14</sup> New Zealand Bill of Rights Act 1990 at § 5.

<sup>15</sup> Privacy Act 1993 (N.Z.) at § 6.

<sup>16</sup> Immigration Act 2009 (N.Z.) at § 259.

<sup>17</sup> *Id.* at § 259(6).

<sup>18</sup> Criminal Justice Act 1985 (N.Z.) §§ 138–141 (repealed 2012).

<sup>19</sup> *Id.* § 140(4).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

The Criminal Justice Act 1985 has been repealed due to the enactment of the Criminal Procedure Act 2011,<sup>22</sup> and while name suppression is addressed in the new legislation,<sup>23</sup> modifications have been made. Name suppression was an aspect of law that faced major revisions, and those revisions were among the first to take effect.<sup>24</sup> The impact is that suppression will be granted less liberally than it was in the past. Instead of providing “broad discretion for granting of suppression,”<sup>25</sup> as the law previously did, the new legislation uses open justice as the starting point for any consideration of suppression.<sup>26</sup>

Nine sections of the new act address various rules relating to name suppression,<sup>27</sup> and one section specifically provides grounds for which it may be granted for defendants.<sup>28</sup> Under the new act, name suppression will be granted only in cases where publication would probably:

- (a) cause extreme hardship to the person charged with, or convicted of, or acquitted of the offence, or any person connected with that person; or
- (b) cast suspicion on another person that may cause undue hardship to that person; or
- (c) cause undue hardship to any victim of the offence; or
- (d) create a real risk of prejudice to a fair trial; or
- (e) endanger the safety of any person; or
- (f) lead to the identification of another person whose name is suppressed by order or by law; or
- (g) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
- (h) prejudice the security or defence of New Zealand.<sup>29</sup>

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<sup>22</sup> Criminal Procedure Act 2011 (N.Z.).

<sup>23</sup> *Id.* §§ 200–208.

<sup>24</sup> Ministry of Justice, *supra* note 6.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Criminal Procedure Act 2011 (N.Z.) §§ 200–208.

<sup>28</sup> *Id.* § 200.

<sup>29</sup> *Id.*

These provisions continue to allow decision-makers to exercise a certain amount of flexibility when analyzing suppression requests, so long as courts provide their reasons for granting, lifting, or changing an order for suppression.<sup>30</sup> They allow for courts to decide whether something causes undue hardship, whether something is unfairly prejudicial, and so forth. In addition, the legislation allows a defendant to argue that he or she meets one of these conditions.<sup>31</sup> If the court agrees, it can choose to make an interim suppression order;<sup>32</sup> however, it can also lift an order—even a permanent one—at any time.<sup>33</sup> In balancing all of the factors and differences, the 2011 rule is more stringent than the 1985 rule. The older act did not contain any of the mandates that the new one does.<sup>34</sup>

### III. A LIBERAL AND BETTER APPROACH

New Zealand's rationale for name suppression is straightforward: certain types of allegations, even if later disproved or dismissed, can permanently harm a person's reputation and livelihood.<sup>35</sup> Indeed, this harm may be the sort of "extreme hardship"<sup>36</sup> that the new act looks to avoid placing on accused parties. And yet freedom of speech and transparency of the court system are vital components of a modern democracy as well.<sup>37</sup> How to balance these public policy interests is an ongoing concern<sup>38</sup> for which temporary suppression seemingly provides a compromise. It protects a defendant's identity while a case is in progress, but if the

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<sup>30</sup> *Id.* § 207.

<sup>31</sup> *Id.* § 200(4).

<sup>32</sup> Criminal Procedure Act 2011 (N.Z.) at § 200(5).

<sup>33</sup> *Id.* § 208.

<sup>34</sup> Criminal Justice Act 1985 (N.Z.) does not specify reasons for suppression; *but cf.* Criminal Procedure Act 2011 (N.Z.) § 200, which provides specific circumstances that warrant suppression.

<sup>35</sup> M. Bismark & R. Paterson, *Medical Malpractice: Naming, Blaming and Shaming?*, 25 MED. & L. 115, 115 (2006).

<sup>36</sup> Criminal Justice Act 2011 § 200(2).

<sup>37</sup> Bismark & Paterson, *supra* note 35, at 115.

<sup>38</sup> *Id.*

person is convicted, his or her name becomes part of the public record.

The starting point for any suppression inquiry is the prima facie assumption that publication is permissible and that the openness of the legal system is highly desired.<sup>39</sup> Courts weigh several factors in determining whether to override this assumption. These include the following:

- The final disposition of a case. Suppression is more likely to be granted for acquittals than for convictions.<sup>40</sup>
- The seriousness of the offense. The greater the gravity of the crime, the higher the likelihood of publication.<sup>41</sup>
- The likelihood of a convicted criminal's rehabilitation.<sup>42</sup>
- The extent of public interest in the requestor's character. Such an interest has been demonstrated in cases involving sex offense, drug use, and dishonesty.<sup>43</sup>
- The requestor's personal circumstances. Any damage that publication would cause must be more serious than the standard degree of embarrassment or distress.<sup>44</sup>

These factors are measured and weighed on a case-by-case basis.<sup>45</sup> Certain types of cases invite suppression inquiries more frequently than do other types. Requests often arise in cases relating to medical malpractice, sex crimes, and child protection. More often than not, courts will grant temporary name suppression at minimum if requested by a party in one of these types of cases, at least while an outcome is pending.<sup>46</sup>

While New Zealand regularly grants temporary name suppression requests, it does not do so thoughtlessly, because such

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<sup>39</sup> *Lewis v Wilson & Horton Ltd.* [2000] 3 NZLR 546 (CA) at para 41.

<sup>40</sup> *Id.* para 42.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Lewis v Wilson & Horton Ltd.* [2000] 3 NZLR 546 (CA) at para 42.

<sup>45</sup> See Criminal Procedure Act 2011 (N.Z.) § 200 (listing the factors for courts to consider when ordering suppression).

<sup>46</sup> *E.g.*, Bismark & Paterson, *supra* note 35 (discussing the case of Dr. I).



grants can be lifted or modified. Further, grants of permanent suppression are rarer events. In *T v The Queen*,<sup>47</sup> the Court of Appeal noted the infrequency of such an occurrence.<sup>48</sup> “We would not normally extend name suppression just because of acquittal,”<sup>49</sup> it said. “But there are features to this case that are somewhat unique . . . In these somewhat unusual circumstances . . . permanent name suppression is justified.”<sup>50</sup>

A. *Doctors Protect Their Patients; The Legal System Protects Doctors*

One of, if not the, most common contexts in which name suppression requests are made and granted is that of medical malpractice. This is largely due to New Zealand’s concerns about the ways that reputation can affect one’s livelihood.<sup>51</sup> Medical malpractice litigation has been virtually nonexistent in New Zealand for nearly forty years; instead, patients may apply for compensation through a no-fault government program.<sup>52</sup> All cases are initially heard by the Medical Practitioners Disciplinary Tribunal (“MPDT”);<sup>53</sup> appeals go to the court system.<sup>54</sup>

Regardless of the venue, identifying a doctor who is under investigation can pose a serious risk to the doctor’s professional reputation, so much so that hearings used to be privately held.<sup>55</sup> However, the public viewed this policy as doctors being too lenient to their own kind.<sup>56</sup> Indeed, it is debatable as to which should take precedence: a doctor’s privacy interests and fear of harm to his career, or the public’s desire to know if a serious injury was caused by the doctor in question. The Health and Disability Commissioner typically makes this determination on an ad hoc basis and rules on

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<sup>47</sup> *T v The Queen* [2010] NZCA 438 (CA).

<sup>48</sup> *Id.* at paras 46, 48.

<sup>49</sup> *Id.* at para 46.

<sup>50</sup> *Id.* at paras 46, 48.

<sup>51</sup> See Bismark & Paterson, *supra* note 35, at 115.

<sup>52</sup> *Id.* at 117.

<sup>53</sup> *Id.* at 120.

<sup>54</sup> See, e.g., *id.* at 122.

<sup>55</sup> Bismark & Paterson, *supra* note 35, at 120.

<sup>56</sup> *Id.*

name suppression accordingly.<sup>57</sup> An inquiry begins with the presumption that publication is permissible:

[t]he question is whether in the circumstances of the particular case and on the evidence before the Tribunal, it is desirable that publication should be prohibited, in the sense that the considerations of openness in the proceedings before the Tribunal, the right of the media to report the result, freedom of speech and the impact of section 14 of the New Zealand Bill of Rights Act 1990 are outweighed in the particular case.<sup>58</sup>

When the circumstances of a case are tested against this framework, a defendant doctor more often than not “wins” suppression,<sup>59</sup> at least for the short term. More than fifty percent of requests for temporary or permanent name suppression are granted; however, only one third of the applications for private hearings are approved.<sup>60</sup> This suggests that courts initially prefer to keep proceedings public, before deciding that the parties to a case meet the criteria for name suppression. Keeping proceedings public is intended to help maintain the integrity of the disciplinary system and the public’s confidence in it.<sup>61</sup>

Concern for protecting doctors’ livelihoods appears to be the main reason for the high number of suppression requests that are granted. The fact that cases are first heard by a tribunal may also be a factor;<sup>62</sup> courts are publicly funded, which may contribute to people’s perception of having a right to know parties’ names in court

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<sup>57</sup> See generally *id.* (explaining how name suppression works in the context of the medical disciplinary system and providing the procedural history of one case as an illustration).

<sup>58</sup> *C v Dir. of Human Rights Proceedings* (unreported) High Court, Auckland, CIV-2010-404-001662, 6 September 2010, Venning J at para 70 (N.Z.).

<sup>59</sup> Bismark & Paterson, *supra* note 35, at 121.

<sup>60</sup> *Id.*

<sup>61</sup> Joanna Manning, *Review: Health Care Law, Part 1 - Common Law Developments* 2004 NZ L. REV. 181, 199–200 (2004).

<sup>62</sup> *Id.* at 204.

proceedings.<sup>63</sup> In contrast, tribunals are more private. Further, one may suppose that their decisions are more likely to be challenged. The legal community does not want to casually publish the names of doctors against whom allegations have gone unproven.<sup>64</sup>

Ironically, however, publication is actually more desirable in this venue than in court because a disciplinary hearing may be the only opportunity for a medical complaint to be heard.<sup>65</sup> If a complaint never makes it beyond this stage, then the public may never know why certain physicians were reprimanded. This is a disservice to a doctor's patients, who may want to change health care providers in the wake of such a reprimand.

Regardless of whether the type of proceeding is a factor, the body of medical cases dealing with name suppression is diverse. For example, in *C v Director of Human Rights Proceedings*,<sup>66</sup> a physician, C, was charged with interfering with a patient's privacy.<sup>67</sup> A married couple, both of whom were patients of C, was separated when the husband gave C some confidential papers detailing his concern for his estranged wife's mental health.<sup>68</sup> The wife repeatedly asked C for access to the papers, and he refused, citing confidentiality and privilege.<sup>69</sup> New Zealand's Privacy Commissioner determined that C's denial of the wife's access to the papers constituted a violation of Principle 6 of the Privacy Act.<sup>70</sup> The medical tribunal ultimately awarded the wife damages and declined to suppress C's name,<sup>71</sup> stating that its decision was a message to doctors that they were not immune to the Privacy Act 1993.<sup>72</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 202.

<sup>65</sup> *Id.* at 206.

<sup>66</sup> *C v Dir. of Human Rights Proceedings* (unreported) High Court, Auckland, CIV-2010-404-001662, 6 September 2010, Venning J (N.Z.).

<sup>67</sup> *Id.* at para 19.

<sup>68</sup> *Id.* at para 7.

<sup>69</sup> *Id.* at paras 11, 13.

<sup>70</sup> *Id.* at para 22.

<sup>71</sup> *C v Dir. of Human Rights Proceedings* (unreported) High Court, Auckland, CIV-2010-404-001662, 6 September 2010, Venning J at paras 32, 35.

<sup>72</sup> *Id.* at para 29 (referencing Privacy Act 1993 (N.Z.)).

On appeal, the High Court noted that publication could have devastating effects on both C's practice and his patients.<sup>73</sup> The court further reasoned that the opinion itself would adequately serve as a lesson to physicians and that publication of C's name added no benefit to the decision.<sup>74</sup> It reduced the damages award and reversed the refusal of suppression, instead granting C permanent name suppression.<sup>75</sup>

Name suppression has also been granted even when a doctor's actions have grave physical consequences. The article *Naming, Blaming and Shaming?*<sup>76</sup> provides an illustration. Dr. I's patient visited her office twice in two days, and called on the third day.<sup>77</sup> The doctor misdiagnosed her patient with pleurisy and prescribed painkillers, sedatives, and anti-emetics.<sup>78</sup> The patient died at her home on the third evening from undetected pneumonia.<sup>79</sup> The commissioner determined that Dr. I breached the patient's right to receive treatment with reasonable care.<sup>80</sup>

Arguing that her reputation would be damaged even if she were acquitted of the charges, Dr. I applied for interim name suppression while the tribunal conducted its disciplinary proceedings.<sup>81</sup> The tribunal initially declined to grant Dr. I's request, but the decision was overturned on appeal.<sup>82</sup> The tribunal then found the doctor guilty of professional misconduct, and her name remained suppressed while she appealed.<sup>83</sup> The appellate court determined that Dr. I's actions in this instance did not constitute professional

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<sup>73</sup> *Id.* at para 80.

<sup>74</sup> *Id.* at para 78.

<sup>75</sup> *Id.* at para 89.

<sup>76</sup> Bismark & Paterson, *supra* note 35.

<sup>77</sup> *Id.* at 116.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 119.

<sup>81</sup> Bismark & Paterson, *supra* note 35, at 122.

<sup>82</sup> *Id.* In upholding suppression of Dr. I's name, the judge noted that the doctor's international reputation and her distinctive name—which was shared by her children—were factors in his decision. *Id.*

<sup>83</sup> *Id.* at 124.

misconduct and reversed the tribunal's decision.<sup>84</sup> Dr. I ultimately received permanent name suppression.<sup>85</sup>

An acquittal, however, does not guarantee suppression. Courts have discretion to decline to suppress party names in spite of an acquittal. The court in *Harman v MPDT*<sup>86</sup> allowed for publication of acquitted defendant Harman's name, noting that doctors should not receive preferential treatment simply because of their reputations.<sup>87</sup> The court stated that "public interest requires identification . . . . There also has to be public confidence in the processes by which discipline is imposed . . . in the past disciplinary proceedings [could] be over-protective of members of the profession."<sup>88</sup>

*B. Name Suppression Is Frequently Granted in Sex Crimes Cases, But Victims Increasingly Want to be Heard*

In sex crimes cases, New Zealand courts generally give great deference to the victims and tend to do what victims request in terms of name suppression. This policy is wise for two reasons. First, it allows for victims to feel some sense of control over their situation. Second, knowing that their names can be published can serve as a deterrent to potential perpetrators.

The Criminal Procedure Act 2011 specifies that the purpose for broad name suppression in sex crimes cases is to protect plaintiffs.<sup>89</sup> Many people may find it understandable that the legal system wants to protect victims from the embarrassment or self-consciousness that publication of their names may create. However, victims themselves occasionally disagree with this policy, because they would like for others to know what happened to them and who caused them harm. Though the Criminal Justice Act 1985 made suppression of victims' names automatic,<sup>90</sup> victims would sometimes

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Harman v. MPDT* (DC Auckland, NP No 4275/00, 3 May 2002, para 13) (citing in Manning, *supra* note 61, at 200).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Criminal Procedure Act 2011 (N.Z.) §§ 201, 203.

<sup>90</sup> Criminal Justice Act 1985 (N.Z.) § 139.

approach the media requesting publication of their names.<sup>91</sup> The Act was amended in 2002 to allow for victims aged 16 years or older to request non-suppression of their names.<sup>92</sup>

Similarly, in incest cases, victims may request publication of perpetrators' names.<sup>93</sup> However, courts do not always wait to be asked before they decide *sua sponte* to publish names, even when they don't know if there are familial relations between the parties.<sup>94</sup> Thus, though victims can request publication and courts have freedom to raise the issue on their own, it appears that defendants in these cases have little influence on whether their names are published.

The same can also be said about defendants in other types of sex crimes cases. In *Jackson v The Queen*,<sup>95</sup> the plaintiff had been protected by interim name suppression before his trial began.<sup>96</sup> He had been charged with engaging in unlawful sexual conduct with an 11-year-old girl.<sup>97</sup> The court opined that the public interest in the plaintiff's identity was very strong due to delays in the commencement of his trial,<sup>98</sup> and it ultimately chose to publish his name.<sup>99</sup>

Other cases demonstrate the opposite result. In *T v The Queen*,<sup>100</sup> the plaintiff was charged with sexually exploiting a mentally impaired woman. T was initially charged with rape, but the charge was reduced to exploitation, of which T was eventually acquitted.<sup>101</sup> The court determined that the unusual circumstances of the case and the defendant's acquittal warranted permanent name

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<sup>91</sup> John Burrows, *Review: Media Law*, 2004 NZ L. REV. 787, 795 (2004).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Criminal Justice Act 1985 (N.Z.) § 139(1)(b) (Section 139 of the Act is entirely about name suppression in sexual offense cases. The statute is silent on the topic of the relationship between the parties.).

<sup>95</sup> *Jackson v The Queen* [2010] NZCA 506 (CA).

<sup>96</sup> *Id.* at para 17.

<sup>97</sup> *Id.* at para 3.

<sup>98</sup> *Id.* at para 19.

<sup>99</sup> *Id.* at paras 1, 22.

<sup>100</sup> *T v The Queen* [2010] NZCA 438 (CA).

<sup>101</sup> *Id.*

suppression.<sup>102</sup> In many sex crimes cases, however, the victim will play a role in the determination of whether a perpetrator's name is made public.

*C. Suppression Provides Anonymity for Children – and Reluctant Parents*

Another category of cases in which name suppression is common is that of cases involving children. The reasoning is simple; children are innocent and vulnerable, and courts want to protect their well-being. This approach demonstrates a long-term consideration for children's livelihoods. It can also serve to provide privacy to involved parties during difficult times—for example, parents engaged in divorce proceedings.

Yet suppression in these types of cases is not always welcomed by the parties. In *LNC v SX*,<sup>103</sup> the plaintiff took one of his children to see a doctor at the District Health Board. The doctor wrote and disseminated to several parties a letter suggesting that LNC was a danger to his child.<sup>104</sup> The plaintiff was engaged in legal proceedings against his estranged wife, and the letter was detrimental to his case.<sup>105</sup> He complained to the Privacy Commissioner about the doctor.<sup>106</sup>

LNC had some misgivings about New Zealand's family court system and wanted open justice during the course of his proceedings.<sup>107</sup> He never agreed that his own name or the names of any others involved should be suppressed; conversely, he suggested that he wanted to actively seek publicity for his action against the doctor that was pending hearing by the tribunal.<sup>108</sup> However, the tribunal found it important for the plaintiff's child's name to be suppressed.<sup>109</sup> To maintain the child's anonymity, the tribunal

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<sup>102</sup> *Id.* at 48.

<sup>103</sup> *LNC v SX* (2008) 24/08 HRRT 1/08.

<sup>104</sup> *Id.* at para 2(c).

<sup>105</sup> *Id.* at para 2(d).

<sup>106</sup> *Id.* at para 2(e).

<sup>107</sup> *Id.* at para 3.

<sup>108</sup> *Id.*

<sup>109</sup> *LNC v SX* (2008) 24/08 HRRT 1/08 at para 19.

reasoned that both parents' names would need to remain unpublished as well, at least temporarily.<sup>110</sup>

#### IV. THOUGH NAME SUPPRESSION IS LIBERALLY GRANTED, IT CAN BE DENIED OR REVERSED

It appears that New Zealand's legal system grants name suppression liberally. However, it does not always do so. Issues of practicality often control; if, for example, a victim is going to testify, then suppression may be pointless.<sup>111</sup> For example, in *Re Victim X*,<sup>112</sup> a judge overturned his own earlier grant of suppression. He considered the public's high level of interest in the case and the fact that publication might encourage other witnesses to identify themselves.<sup>113</sup> He also noted that the victim would be giving evidence.<sup>114</sup> The sum of these elements led the court to decide that the need for open justice outweighed the victim's desire for privacy.<sup>115</sup>

The reason for which a party desires privacy is a frequent and critical issue in many suppression decisions. Personal circumstances are not always compelling in persuading a court to grant suppression. In *Jackson v the Queen*,<sup>116</sup> the plaintiff was a sex offender. He requested name suppression due to the potential embarrassment of his prominent family, the possible negative effects of the news on his grandmother's ailing health, and the detrimental impact it would have on a business deal in which he was engaged.<sup>117</sup> The court determined that none of these reasons would suffice and accordingly allowed for publication of his name.<sup>118</sup>

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<sup>110</sup> *Id.* at paras 20, 22(a).

<sup>111</sup> Burrows, *supra* note 91, at 796 (discussing *Re Victim X* [2003] 3 NZLR 220 (CA), in which the judge had planned to suppress the victim's name until he learned that the victim would be appearing as a witness).

<sup>112</sup> *Re Victim X* [2003] 3 NZLR 220 (CA) is discussed in Burrows, *supra* note 91, at 796.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *See id.* at 797.

<sup>116</sup> *Jackson v The Queen* [2010] NZCA 506 (CA).

<sup>117</sup> *Id.* at para 5.

<sup>118</sup> *Id.* at para 6.



The defendant in *The Queen v Yang*<sup>119</sup> was charged with corruption and bribery. She was granted temporary name suppression and went on to request permanent suppression. She pointed out the practical effect of extending her temporary grant; because she had not been identified to the public up until that point, a permanent grant would be successful in achieving its purpose.<sup>120</sup> The defendant also argued that she planned to deed her business, a sole proprietorship, to her son, who was unaware of her legal transgression.<sup>121</sup> She further contended that she had not been convicted.<sup>122</sup> The case against her was weak, and the witness on which the prosecution relied at trial was in jail.<sup>123</sup>

The court was unconvinced. It noted that “the balance must come down *clearly* in favour of suppression” if suppression is to be granted or upheld on a permanent basis.<sup>124</sup> The defendant failed to meet this threshold,<sup>125</sup> partly because nothing was unusual enough about her case to distinguish it from other cases in which suppression had been denied.<sup>126</sup> While the argument about the unreliable witness had some weight, the court stated that “where there is smoke there is usually fire.”<sup>127</sup> In response to the defendant’s novel argument about the utility of continued suppression, the court replied that the temporary grant was inconsequential because such grants are regularly provided to ensure that defendants receive a fair trial.<sup>128</sup> They have no impact on any prospective grants or orders.<sup>129</sup>

Just as personal circumstances are unimportant to courts, so are personal characteristics. The plaintiff in *Lewis v Wilson & Horton*

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<sup>119</sup> *The Queen v Yang* (unreported) High Court, Auckland, CRI-2008-004-017744, 21 June 2010, Duffy J (N.Z.).

<sup>120</sup> *Id.* at para 3(a).

<sup>121</sup> *Id.* at para 3(c).

<sup>122</sup> *Id.* at para 3(e).

<sup>123</sup> *Id.* at para 3(f).

<sup>124</sup> *The Queen v Yang* (unreported) High Court, Auckland, CRI-2008-004-017744, 21 June 2010, Duffy J at para 2 (N.Z.) (quoting *Lewis v Wilson & Horton Ltd.* [2000] 3 NZLR 546 (CA)) (emphasis added).

<sup>125</sup> *Id.* at para 5.

<sup>126</sup> *Id.* at para 4(b).

<sup>127</sup> *Id.* at para 10.

<sup>128</sup> *Id.* at para 6.

<sup>129</sup> *Id.*

*Ltd.*<sup>130</sup> was a successful businessman, philanthropist, and community leader who had no criminal record.<sup>131</sup> However, the court was unimpressed, stating that “successful and prominent members of the community should [not] be in a privileged position.”<sup>132</sup> Lewis did not receive the name suppression he sought.<sup>133</sup>

#### V. NAME SUPPRESSION: A NOVELTY IN THE U.S. LEGAL SYSTEM

Name suppression, or pseudonymity as it is frequently called in the United States,<sup>134</sup> is far less prevalent in this country than in New Zealand. As one American court noted, “The question [of pseudonymity] happily is one that is not too often raised . . . relatively few cases . . . have wrestled with the problem.”<sup>135</sup> The Federal Rules of Civil Procedure dictate that “an action must be prosecuted in the name of the real party in interest,”<sup>136</sup> barring exceptions for executors, administrators, guardians, and the like.<sup>137</sup> However, the rule is rarely invoked as governing authority,<sup>138</sup> and beyond this, no black letter law controls.<sup>139</sup>

The Supreme Court of the United States has never expressly permitted name suppression; however, the implicit allowance of such was demonstrated by allowing for the plaintiff in *Roe v. Wade* to remain anonymous.<sup>140</sup> As evidenced by a search of American case

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<sup>130</sup> *Burrows*, *supra* note 91, at 231 (discussing *Lewis v Wilson & Horton Ltd.* [2000] 3 NZLR 546 (CA)).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *See id.* at 232 (discussing *Lewis v Wilson & Horton Ltd.* [2000] 3 NZLR 546 (CA)).

<sup>134</sup> *E.g.*, *Doe v. Del Rio*, 241 F.R.D. 154 (S.D.N.Y. 2006); *Doe v. Shakur* 164 F.R.D. 359 (S.D.N.Y. 1996) (using terms such as “pseudonym,” “pseudonomously,” and “pseudonymity.”)

<sup>135</sup> *James v. Jacobson*, 6 F.3d 233, 238 (4th DCA 1993).

<sup>136</sup> Fed R. Civ. P. 17(a)(1).

<sup>137</sup> *Id.*

<sup>138</sup> Fed R. Civ. P. 17 is mentioned in cases such as *Del Rio*, 241 F.R.D. at 155. However, courts do not cite the rule as a controlling factor in their decisions.

<sup>139</sup> 59 AM. JUR. 2D *Parties* § 18 (2011) provides factors for courts to consider in making pseudonymity decisions. No statutory basis is given.

<sup>140</sup> Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. KAN. L. REV. 195, 212–13 (2004).

law for lawsuits brought under pseudonyms, it appears that pseudonymity is favored less than open justice.<sup>141</sup> Indeed, the standard of review for the denial of a request for pseudonymity is abuse of discretion.<sup>142</sup> A decision will be overturned only if a court has made an egregious error in allowing for publication of a party's name.<sup>143</sup>

Pseudonymity in the United States is based on public policy, common law, and the Constitution.<sup>144</sup> The right to know party identities is a logical outgrowth of the public's right of access to judicial proceedings and records.<sup>145</sup> This right is supported by the First Amendment of the Constitution.<sup>146</sup> Lawsuits are public proceedings, and the public has an interest in knowing the facts of cases, including litigants' names.<sup>147</sup>

No law directly prohibits a litigant from attaining pseudonymity in a legal proceeding. Indeed, neither the Federal Rules themselves nor the Advisory Committee Notes for the rules contain anything that expresses an intent to limit the ability to proceed anonymously.<sup>148</sup> Instead, different federal and state courts have adopted various balancing tests to determine whether an individual should be allowed to proceed with his case anonymously.<sup>149</sup>

A. *American Pseudonymity Tests Illustrate a Variety of Approaches*

While New Zealand's name suppression cases occasionally have surprising outcomes, the statutory scheme generally provides

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<sup>141</sup> In cases where pseudonymity is granted, such as *Del Rio*, 241 F.R.D. 154 and *Jacobson*, 6 F.3d 233, courts often attach stipulations or conditions to the grants.

<sup>142</sup> E.g., *Unwitting Victim v. CS*, 47 P.3d 392 (Kan. 2002).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 400.

<sup>145</sup> *Id.*

<sup>146</sup> *Del Rio*, 241 F.R.D. at 156.

<sup>147</sup> *See id.*

<sup>148</sup> *Doe v. Provident Life and Acc. Ins. Co.*, 176 F.R.D. 464, 466 (E.D. Pa. 1997).

<sup>149</sup> For example, the court in *Does I Through XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000) used a different balancing test than the court in *Shakur*, 164 F.R.D. 359.

for some predictability. However, the United States has no statutory approach. Pseudonymity grants must be decided on a case-by-case basis, and different jurisdictions take different approaches.

Academia has influenced law in this regard. Professor Joan Steinman's research led her to develop a nine-factor balancing test ("the Steinman factors")<sup>150</sup> which was later adopted by the Eastern District of Pennsylvania.<sup>151</sup> The Steinman factors that favor anonymity include: (1) the extent to which the litigant's identity has been kept confidential; (2) the basis for the request; (3) the magnitude of the public interest in maintaining the litigant's confidentiality; (4) whether the litigant would still pursue legal action at the expense of being publicly identified; and (5) whether the plaintiff is seeking to sue pseudonymously.<sup>152</sup> Conversely, elements weighing against such grants include a high level of interest in access to the litigant's identity, as well as whether the motion for pseudonymity is illegitimately motivated.<sup>153</sup>

The Steinman factors do not constitute the only test; other courts have developed their own balancing tests. For example, the Ninth Circuit considers only three issues: (1) whether identification creates a risk of retaliatory harm; (2) whether the preservation of privacy is a necessity because the subject matter is "of a sensitive and highly personal nature;" and (3) whether the party seeking anonymity would face legal prosecution if his or her identity were revealed.<sup>154</sup> The Southern District of New York contemplates the same factors, but also considers whether the plaintiff is challenging governmental activity and whether the defendant would be prejudiced by such a grant.<sup>155</sup>

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<sup>150</sup> Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1 (1985).

<sup>151</sup> See, e.g., *Provident Life*, 176 F.R.D. 464.

<sup>152</sup> Steinman, *supra* note 150, at 38–41.

<sup>153</sup> *Id.* at 41.

<sup>154</sup> *Advanced Textile Corp.*, 214 F.3d at 1068.

<sup>155</sup> *Shakur*, 164 F.R.D. at 360–61.

B. *America's Body of Pseudonymity Cases Echoes That of New Zealand*

Though America has less pseudonymity case law than New Zealand does, some patterns do emerge. A recurrent theme in the United States is the "sensitive and highly personal nature" required by the Ninth Circuit.<sup>156</sup> Consequently, pseudonymity requests are often made in the context of cases relating to sexuality, birth control and abortion, and welfare rights.<sup>157</sup> Mental illness is also a frequently-named reason for such requests.<sup>158</sup>

For example, in the often-cited mental illness case of *Doe v. Provident Life and Accident Ins. Co.*, the plaintiff suffered from a variety of emotional disorders.<sup>159</sup> Despite receiving treatment, he left his job and filed a claim with his insurance company for disability benefits.<sup>160</sup> He sued the insurer when it denied his claim, requesting pseudonymity in the course of the proceeding.<sup>161</sup>

In that case, the United States District Court for the Eastern District of Pennsylvania noted that the Third Circuit did not have a standard by which to gauge the plaintiff's request for anonymity, so it chose to apply the Steinman factors.<sup>162</sup> It granted the request largely due to a public policy concern about chilling access to courts for those who have mental illnesses.<sup>163</sup> The court noted that pseudonymity would not impact the public's ability to follow the case, because the trial itself would not be closed.<sup>164</sup> It also noted the possible detrimental societal effects of denying the plaintiff's request, such as the avoidance of litigation by others with mental illnesses due to fear of being stigmatized.<sup>165</sup>

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<sup>156</sup> *E.g., id.* at 361; *Unwitting Victim*, 47 P.3d at 397 (quoting *Coe v. U.S. Dist. Court for Dist. of Colo.*, 676 F.2d 411 (10th Cir. 1982)).

<sup>157</sup> *E.g., Unwitting Victim*, 47 P.3d 392.

<sup>158</sup> *E.g., Provident Life*, 176 F.R.D. 464.

<sup>159</sup> *Id.* at 465. (WestlawNext shows 30 citing references for this case.)

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 466.

<sup>162</sup> *Id.* at 467-469 (citing factors from Steinman, *supra* note 150).

<sup>163</sup> *Provident Life*, 176 F.R.D. at 468.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

Conversely, the *Doe v. Heil*<sup>166</sup> court considered the plaintiff's personal plight rather than public policy. In that case, a convicted sex offender claimed that he was being denied sex offender treatment—a prerequisite for parole—and thus being denied due process.<sup>167</sup> The plaintiff requested pseudonymity because he was a member of the general prison population, and had seen other sex offenders in that population severely beaten.<sup>168</sup> He further argued that such a beating would be extraordinarily harmful to him because he suffered from congestive heart failure and depended on a pace maker.<sup>169</sup> The court found that the preference for disclosure could be overcome by demonstrating that the harm faced by an openly-identified plaintiff would be greater than the harm of concealing his identity.<sup>170</sup> Applying this rule, it decided to grant the plaintiff's motion, subject to the condition that defense counsel must be given his name and the opportunity to respond with a counter-motion.<sup>171</sup>

Other cases exist in which pseudonymity is granted, but these grants are sometimes subject to restrictions. In *James v. Jacobson*,<sup>172</sup> the plaintiffs accused the defendant doctor, a fertility specialist, of insemination a woman with his own sperm instead of that of her husband. Prior to filing their lawsuit, the plaintiffs obtained an ex parte order allowing them to use pseudonyms.<sup>173</sup> The defendant moved to revise the order, complaining that it was unfair.<sup>174</sup>

In making its determination, the Fourth Circuit examined commonly-assessed factors such as privacy, retaliation, and fairness.<sup>175</sup> It also considered the couple's offer to remain pseudonymous in name only—they had agreed to publicity in reference to their location, professions, and other identifying features.<sup>176</sup> Indeed,

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<sup>166</sup> *Doe v. Heil*, No. 08-cv-02342, 2008 WL 4889550, at \*1 (D. Colo. Nov. 13, 2008).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at \*2.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at \*3 (citing *Doe v. City of Chicago*, 360 F.3d 667 (7th Cir.2004)).

<sup>171</sup> *Heil*, 2008 WL 4889550 at \*4.

<sup>172</sup> 6 F.3d 233.

<sup>173</sup> *Id.* at 235.

<sup>174</sup> *Id.* at 236.

<sup>175</sup> *Id.* at 238.

<sup>176</sup> *Id.* at 241.

the couple had asked the court for anonymity only to protect their children, and suggested a jury instruction emphasizing that fact.<sup>177</sup> These offers from the plaintiffs, as well as expert testimony about the children's susceptibility to psychological harm, led the court to endorse this approach.<sup>178</sup>

## VI. THE AMERICAN SYSTEM CAN BE TOO RESTRICTIVE

In America's quest for openness, the country is ultimately restrictive—perhaps too restrictive—when it comes to protecting the interests of its litigants. For every case in the United States in which some degree of pseudonymity is granted, a case exists with the opposite result. American courts have failed to provide anonymity for parties even when the decisions of previous cases suggest that protection would be warranted. This fact truly demonstrates the differences between various circuits and the courts within those circuits. With little case law to refer to, courts exhibit less consistency than if they were bound to follow certain precedents, in contrast to the predictability offered by New Zealand's statutory scheme.

The lack of a systemic approach in the United States has created an uncertainty that may actually discourage parties from seeking justice. In *Doe v. Del Rio*,<sup>179</sup> the married plaintiffs claimed that several police officers assaulted the husband and that an officer sexually assaulted the wife. The court quickly found that the husband did not have a strong argument for anonymity in his own right, but only to protect his wife.<sup>180</sup> The wife had requested to proceed anonymously due to the social stigma attached to sexual assault, as well as the psychological injury that would occur if she were to be publicly identified.<sup>181</sup> The court considered the personal nature of the subject matter of the case as well as potential injury to the victim if she were to be publicly named in the lawsuit.<sup>182</sup> It reasoned that the allegations here were indistinguishable from those

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<sup>177</sup> *Jacobson*, 6 F.3d at 241.

<sup>178</sup> *Id.* at 242.

<sup>179</sup> *Del Rio*, 241 F.R.D.154.

<sup>180</sup> *Id.* at 159.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 159–61.

in many other cases in which victims' names were public.<sup>183</sup> Moreover, it determined that any negative emotional impact on the wife would likely be due to the litigation itself, rather than her public identification.<sup>184</sup> The plaintiffs' request for pseudonymity was ultimately denied.<sup>185</sup>

Similarly, and arguably even more surprising, was the result in a case in which the court dismissed the complaint without allowing leave to amend.<sup>186</sup> The plaintiff had filed his lawsuit as "Unwitting Victim," alleging that the defendant had knowingly infected him with herpes.<sup>187</sup> Citing the stigma associated with sexually transmitted diseases, the plaintiff claimed that being forced to identify himself would be an extraordinary emotional burden.<sup>188</sup> The Supreme Court of Kansas applied the Steinman factors<sup>189</sup> and determined that the circumstances were insufficient to warrant pseudonymity.<sup>190</sup> While certain factors favored the plaintiff, the most critical element was that he would face no greater social stigma than would the defendant.<sup>191</sup> To allow the plaintiff to proceed anonymously while naming the defendant would be unfair.<sup>192</sup> The court went on to dismiss the lawsuit altogether due to procedural missteps, rather than allowing the plaintiff to refile with his given name.<sup>193</sup>

Courts have also denied broader pseudonymity attempts from legislatures. A number of states enacted "rape shield" laws which punished the media for publication of an alleged rape victim's

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<sup>183</sup> *Id.* at 160.

<sup>184</sup> *Del Rio*, 241 F.R.D. at 161.

<sup>185</sup> *Id.* at 162.

<sup>186</sup> *Unwitting Victim*, P.3d at 402.

<sup>187</sup> *Id.* at 395. The plaintiff also accused the defendant of appropriating funds without permission and making him fear he had contracted AIDS. The plaintiff further requested the return of the engagement ring he gave defendant or financial damages.  
*Id.*

<sup>188</sup> *Id.* at 396.

<sup>189</sup> Steinman, *supra* note 150, at 38–41.

<sup>190</sup> *Unwitting Victim*, P.3d at 400–401.

<sup>191</sup> *Id.* at 401.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 402.



name.<sup>194</sup> When the statutes were deemed unconstitutional, some of the states tried instead to statutorily prevent the government from disclosure of an alleged victim's identifying information.<sup>195</sup> These statutes were also ruled unconstitutional on First Amendment grounds.<sup>196</sup>

These outcomes may appear surprising, if not outright unjust. Rape victims have been denied statutory protection at a time when they likely feel very vulnerable. Unwitting Victim was denied the opportunity to proceed with his case even using his given name. This was a purely discretionary choice of the court, as the Supreme Court of Kansas noted.<sup>197</sup> Decisions like these show that United States' desire for overall openness can result in individuals being treated unjustly.

#### VII. NEW ZEALAND V. AMERICA: A COMPARISON OF NAME SUPPRESSION POLICIES

Generally, New Zealand's approach to name suppression is specific and rules-based, while the American approach is more ad hoc. While there are basic similarities in the countries' pseudonymity policies, the outcomes of name suppression requests are less predictable in the United States than in New Zealand.

The foundations of suppression are similar between the two countries. New Zealand's foundation is, largely, its Bill of Rights,<sup>198</sup> while the foundation for the United States is the Constitution.<sup>199</sup> In addition, both countries—though there is no single test used by American courts—use balancing tests to determine whether name suppression should be granted in a given case. Beyond these parallels, however, the countries' approaches diverge.

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<sup>194</sup> Daniel M. Murdock, *A Compelling State Interest: Constructing a Statutory Framework for Protecting the Identity of Rape Victims*, 58 ALA L. REV. 1177, 1178 (2007).

<sup>195</sup> *Id.* at 1180.

<sup>196</sup> *Id.* at 1180–81.

<sup>197</sup> *Unwitting Victim*, 47 P.3d at 402.

<sup>198</sup> New Zealand Bill of Rights Act 1990 at § 14.

<sup>199</sup> *Unwitting Victim*, 47 P.3d at 400.

As noted, one major difference in the countries' policies lies in the uniformity and predictability of their results. New Zealand's national, uniform balancing test for name suppression arguably leads to foreseeable results, at least most of the time. Conversely, the variety of balancing tests in the United States often leads to unpredictable results.

Indeed, some of New Zealand's critical balancing factors are not accounted for in any way by American courts. For example, the more likely it is for a defendant to be acquitted in New Zealand, the more likely it is that the defendant's motion for name suppression will be granted.<sup>200</sup> However, likelihood of acquittal does not appear to be a factor in American cases.<sup>201</sup> The same can be said about interest in the requestor's character and the likeliness of a convict's rehabilitation. These factors are an important part of the name suppression equation in New Zealand,<sup>202</sup> but are not mentioned in the American pseudonymity opinions.<sup>203</sup>

Conversely, one of New Zealand's factors, the gravity of the offense, often is a factor in American pseudonymity decisions, albeit in a different way. In New Zealand, the likelihood of publication increases with the gravity of the offense.<sup>204</sup> Yet in the United States, the seriousness of the offense is usually only assessed within the same type of case.<sup>205</sup> For example, the *Doe v. Del Rio* court acknowledged that "there is no such thing as a 'mere' or 'minor' forcible indignity";<sup>206</sup> however, "there are degrees of abuse . . ."<sup>207</sup> The court there determined that, where a couple accused a police officer of sexual misconduct, the case was unexceptional in comparison to other cases with similar facts.<sup>208</sup> It did not look at the gravity of the alleged actions as compared to other allegations across the spectrum

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<sup>200</sup> *Lewis v Wilson & Horton Ltd.* [2000] 3 NZLR 546 (CA) at para 42.

<sup>201</sup> None of the American cases referenced herein specified that likelihood of acquittal was a determining factor.

<sup>202</sup> *Lewis v Wilson & Horton Ltd.* [2000] 3 NZLR 546 (CA) at para 42.

<sup>203</sup> None of the U.S. pseudonymity cases referenced herein addressed these factors.

<sup>204</sup> *Lewis v Wilson & Horton Ltd.* [2000] 3 NZLR 546 (CA) at para 42.

<sup>205</sup> *E.g., Del Rio*, 241 F.R.D. 154.

<sup>206</sup> *Id.* at 160.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

of legal cases. Rather, it compared that set of facts to other sets of facts in sexual assault cases.<sup>209</sup>

Courts in the United States view personal circumstances in a similar manner—they look at cases within the context of other cases of the same type. Any harm caused by the publication of one's name needs to be greater than the usual degree of embarrassment or distress.<sup>210</sup> This was part of the rationale for the *Del Rio*<sup>211</sup> court's denial of the plaintiffs' anonymity request. The court pointed out that the cases cited by the plaintiffs "provide[d] no support for a right to avoid public knowledge of possibly embarrassing facts . . . ." <sup>212</sup> It noted that loss-of-consortium claims often involve similar fact patterns to the one at hand, and that plaintiffs in those cases regularly file suit in their own names.<sup>213</sup> This demonstrates that the court again viewed the consequences as compared with what it deemed similar cases, as opposed to cases generally.

#### A. Public Policy Is a Compelling Factor in the United States

One larger-scale factor that plays a key role in American grants of pseudonymity is public policy vis-à-vis fairness and equality.<sup>214</sup> The plaintiff in *Provident Life* sued his insurance company after he left his job due to mental health problems.<sup>215</sup> In granting the plaintiff's motion, the court stated that society should not want to discourage the mentally ill from seeking justice or exercising their rights.<sup>216</sup>

One might expect this same sort of rationale to appear in *Del Rio*,<sup>217</sup> because society should have an interest in protecting its citizens from violent crimes in which they are taken advantage of sexually by police officers. Yet the court in that case never addressed

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<sup>209</sup> *Id.*

<sup>210</sup> *See Del Rio*, 241 F.R.D. at 162.

<sup>211</sup> *Del Rio*, 241 F.R.D. 154.

<sup>212</sup> *Id.* at 160–61.

<sup>213</sup> *Id.* at 161.

<sup>214</sup> *See generally Provident Life*, 176 F.R.D. 464 (addressing the desire for mentally ill people as a class to have equal access to the justice system).

<sup>215</sup> *Id.* at 465.

<sup>216</sup> *Id.* at 468.

<sup>217</sup> *Del Rio*, 241 F.R.D. 154.

this policy issue. Perhaps this is due to the fact that an alleged rape necessarily entails accusing another person of a crime; maybe the court felt that the other party deserved privacy and the assumption of innocence until proven guilty.

At the same time, the absence of fault carries little weight in the American legal system. One might expect Americans to be generally more sympathetic towards those we find not to be at fault in a given situation, but that conclusion appears to be incorrect. For example, the plaintiffs' motion in *James v. Jacobson*<sup>218</sup> was ultimately granted, but under a stringent set of conditions. This was in spite of the fact that the movants had no ability to prevent the doctor's transgressions. The defendant physician had already been criminally convicted of fraud for using his own sperm to impregnate some of his patients.<sup>219</sup> But this mattered little; the court remanded and suggested that plaintiffs' motion for pseudonymity be granted solely to protect the identities of their children.<sup>220</sup> For the motion to meet the court's approval, the plaintiffs had to stipulate to allow for all other aspects of cross-examination.<sup>221</sup>

New Zealand's treatment of public policy and fault contrasts greatly with America's. Decisions there are either statutory<sup>222</sup> or based on individual circumstances.<sup>223</sup> Outside of the medical system, a public policy concern for equality and fairness generally does not appear to be an overriding factor.<sup>224</sup> Fault, however, appears to be a larger consideration, and blameworthiness can be a factor in deciding to publish names. In *The Queen v Yang*, the court noted that "[t]he public are entitled to know with whom they are dealing, including whether someone has faced a criminal charge . . . ."<sup>225</sup>

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<sup>218</sup> *Jacobson*, 6 F.3d 233.

<sup>219</sup> *Id.* at 235.

<sup>220</sup> *Id.* at 241.

<sup>221</sup> *Id.* at 242.

<sup>222</sup> As specified by the Criminal Justice Act 1985 and the Criminal Procedure Act 2011.

<sup>223</sup> *E.g.*, *T v The Queen* [2010] NZCA 438 (CA).

<sup>224</sup> *See, e.g.*, *Jackson v The Queen*, [2010] NZCA 506 (CA) (making no mention of fairness or equality); *but see T v The Queen* [2010] NZCA 438 (CA) (contemplating what is fair to the plaintiff).

<sup>225</sup> *The Queen v Yang* (unreported) High Court, Auckland, CRI-2008-004-017744, 21 June 2010, Duffy J, at para 4(e) (N.Z.).

B. *A Seeming Lack of Uniformity Leads to Varied Results*

While name suppression decisions in New Zealand exhibit a level of uniformity, the same cannot be said for the United States. The differences in the balancing tests between countries—and even among the individual United States—invite the conclusion that some of the cases may have had different results if they were to be heard in alternative jurisdictions. This is due to the fact that the tests are subjective rather than objective. The Steinman factors use such language as “undesirability”<sup>226</sup> and “magnitude,”<sup>227</sup> which are flexible terms that demand interpretation. The *Doe v. Del Rio* court, in discussing its factors, noted “the breadth of discretion to be exercised.”<sup>228</sup> Moreover, none of the tests cite a “reasonable person” standard.<sup>229</sup>

New Zealand’s *C v Director of Human Rights Proceedings*<sup>230</sup> may have turned out differently were it tried in the United States. In that case, the physician had initially been reprimanded by the lower court for causing his patient to feel “anger, humiliation and betrayal”<sup>231</sup> when he would not let her see the information he had about her. Only on appeal was the defendant granted name suppression.<sup>232</sup> Conversely, it is difficult to imagine this case getting past the trial stage in the United States based on the merits alone. Confidentiality is a basic ethical duty owed by doctors to their clients.<sup>233</sup> It is specifically mentioned in various iterations of the Hippocratic Oath that is sworn by doctors in the practice of ethical

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<sup>226</sup> Steinman, *supra* note 150, at 40.

<sup>227</sup> *Id.* at 38.

<sup>228</sup> *Del Rio*, 241 F.R.D. at 157, n.4.

<sup>229</sup> No American case referenced herein made mention of such a standard.

<sup>230</sup> *C v Dir. of Human Rights Proceedings* (unreported) High Court, Auckland, CIV-2010-404-001662, 6 September 2010, Venning J (N.Z.).

<sup>231</sup> *Id.* at para 31(a).

<sup>232</sup> *Id.* at paras 89, 90.

<sup>233</sup> *E.g.*, American Medical Association, *Declaration of Professional Responsibility*, available at <http://www.ama-assn.org/resources/doc/ethics/decoprofessional.pdf> (last accessed Dec. 21, 2012).

medicine.<sup>234</sup> Hence, this case probably would never make it to trial in the United States, much less the appeal stage.

Similarly, *James v. Jacobson*,<sup>235</sup> in which an American court granted limited pseudonymity to protect the plaintiffs' children, presents a likely contrast in the two countries' name suppression policies. A New Zealand court may have ordered name suppression during that proceeding, as the American court did. Yet the reasoning would probably be different. In the United States, the court suggested granting the motion only to protect the couple's children.<sup>236</sup> In New Zealand, a court would likely have acknowledged this important rationale, and may also have decided that the couple deserved full suppression due to the merits of the case. New Zealand courts have granted suppression in cases they deem unusual in nature,<sup>237</sup> and this case—with its doctor who purposely impregnated his patients with his own sperm—would likely have been considered unusual.

Further, the sympathy the New Zealand lower court exhibited toward the patient in *C v Director of Human Rights Proceedings*,<sup>238</sup> where the doctor did not show his patient confidential notes, also suggests that some of the American cases would be decided differently if they had been tried in New Zealand. For example, the plaintiff in *Unwitting Victim*<sup>239</sup> was denied his motion for pseudonymity in part because the court determined that his embarrassment was no greater than that the defendant would face.<sup>240</sup> In New Zealand, not only might the plaintiff have been granted suppression, but the defendant might have as well, if the court considered the circumstances unusual enough to warrant it.<sup>241</sup>

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<sup>234</sup> E.g., Raphael Hulkower, Commentary, *The History of the Hippocratic Oath: Outdated, Inauthentic, and Yet Still Relevant*, *EINSTEIN J. BIOLOGY & MED.* 41 (2010).

<sup>235</sup> *Jacobson*, 6 F.3d 233.

<sup>236</sup> *Id.* at 242.

<sup>237</sup> E.g., *T v The Queen* [2010] NZCA 438 (CA).

<sup>238</sup> *C v Dir. of Human Rights Proceedings* (unreported) High Court, Auckland, CIV-2010-404-001662, 6 September 2010, Venning J (N.Z.).

<sup>239</sup> *Unwitting Victim*, 47 P.3d 392.

<sup>240</sup> *Id.* at 401.

<sup>241</sup> See *T v The Queen* [2010] NZCA 438 (CA) (explaining that the circumstances of the case were unusual enough to warrant suppression of the defendant's name).

C. *Open Justice and Privacy Can Coexist*

Privacy is not always required for justice to be served. Whether privacy is more important than—or even has an impact on—open justice is decided on an ad hoc basis. But if the cited cases are indicative of a larger trend, the United States has demonstrated an inclination toward open justice. This contrasts with New Zealand's more centrist approach which looks to balance both values.

Privacy and open justice do not have to be oppositional concepts. *James v. Jacobson*<sup>242</sup> shows that privacy and open justice can coexist—not only in a court system, but in a single case. There, the plaintiffs initially learned about fraud-related criminal charges against the defendant via media reports.<sup>243</sup> After seeing news coverage about their physician, the plaintiffs decided to have their children genetically tested; the results revealed that the doctor was virtually certain to be the children's father.<sup>244</sup> The media's willingness to name names, and the law's tolerance for it, was what allowed the couple to seek justice.

In addition to the media, both the court and the plaintiffs in *Jacobson* also appeared to have favored open justice; pseudonymity was suggested only to protect the identity of the couple's children.<sup>245</sup> The court was very clear on this point, and the couple willingly agreed. This case demonstrates that it is possible to both protect the identities of the innocent and allow for the public to stay informed. More creative outcomes like this would show that American courts are truly trying to come to a correct decision in pseudonymity cases.

D. *Publicity, While Not Controlling, Can Have Undesirable Results*

However, a preference for broad, open justice may violate the adage “innocent until proven guilty.” The United Nations' Universal

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<sup>242</sup> *Jacobson*, 6 F.3d 233.

<sup>243</sup> *Id.* at 235.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 242.

Declaration of Human Rights<sup>246</sup> has adopted this tenet, declaring that everyone charged with a penal offense shall be considered innocent until proven otherwise in a public trial.<sup>247</sup> The declaration does not apply to civil cases, but a U.N. directive still carries great weight for its member countries.<sup>248</sup> The denial of a pseudonymity request can impact whether someone is truly treated as innocent until he is proven guilty; while he may be treated as innocent in a court of law, the court of public opinion is not always so accommodating. This can be particularly true for parties who are famous.

The results of fame can be unpleasant in a legal proceeding for both the involved party and for the public. Yet to allow for that circumstance to be controlling would be an affront to the justice system. While New Zealand more liberally allows for suppression when one's livelihood is at stake, it does not do so merely because a party's fame makes being named at trial more burdensome.<sup>249</sup> In this regard, the United States and New Zealand are aligned.

New Zealanders are concerned about the impact of lawsuits on professionals' livelihoods,<sup>250</sup> as is demonstrated by the country's medical decisions.<sup>251</sup> However, similarly to America, fame is not a critical factor in deciding whether one's livelihood will be affected by the publicity of a public trial. In *Re Victim X*,<sup>252</sup> the well-known son of a prominent businessman was kidnapped. The court expressed sympathy for the family's situation yet lifted the temporary suppression order after deciding that the situation was not extraordinary enough to displace the default notion of open justice.<sup>253</sup> In alignment with this principle, New Zealand's new legislation

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<sup>246</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>247</sup> *Id.* at Art. 11.

<sup>248</sup> UN Charter art. 4, para. 1 says that members need to be "able and willing to carry out [their] obligations," which implicitly suggests that members should generally abide by the "innocent until proven guilty" tenet no matter the type of case.

<sup>249</sup> Criminal Procedure Act 2011 (N.Z.) § 200 ("The fact that a defendant is well known does not, of itself, mean that publication of his or her name will result in extreme hardship . . .")

<sup>250</sup> *E.g.*, Bismark & Paterson, *supra* note 35, at 123.

<sup>251</sup> *See generally id.* (illustrating one example).

<sup>252</sup> *Re Victim X* [2003] 3 NZLR 220 (CA).

<sup>253</sup> *Id.* at para 54.



specifically states “[t]he fact that a defendant is well known does not, of itself, mean that publication of his or her name will result in extreme hardship . . . .”<sup>254</sup>

And so it is with the United States, as evidenced by the aforementioned story of Casey Anthony. A defendant’s profiting or suffering are not concerns of the legal system. Moreover, the American courts are not concerned with granting pseudonymity when it has not been requested. Because Anthony never requested pseudonymity, the court would have needed to decide *sua sponte* if any of the parties’ or participants’ names should have been suppressed.

This sort of action has been taken in New Zealand, as *LNC v. SX*<sup>255</sup> demonstrates. There, a father wanted his name to be public, but the New Zealand tribunal decided to suppress, even though it was contrary to his wishes.<sup>256</sup> Yet it is difficult to imagine a court ordering pseudonymity *sua sponte* in the United States; none of the American cases researched for this article mentioned such grants.<sup>257</sup> Perhaps the likelihood of such an occurrence would increase if the United States handled certain types of cases systemically, in the manner that New Zealand does with its medical cases. Of course, the fact that this does not occur regularly makes it difficult to conjecture.

## VIII. CONCLUSION

In *The Queen v Yang*, the defendant claimed that permanent name suppression would continue to serve the purpose of temporary suppression, as evidenced by the fact that no one yet knew she had committed a crime.<sup>258</sup> This reasoning is logically sound and probably

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<sup>254</sup> Criminal Procedure Act 2011 § 200. While extreme hardship is not required for a court to determine that name suppression is appropriate, it is a compelling factor in making such a decision.

<sup>255</sup> *LNC v SX* (2008) 24/08 HRRT 1/08.

<sup>256</sup> *Id.*

<sup>257</sup> Each of the American cases cited herein was brought at the request of one of the parties.

<sup>258</sup> *The Queen v Yang* (unreported) High Court, Auckland, CRI-2008-004-017744, 21 June 2010, Duffy J, at para 3(a) (N.Z.).

applies to most permanent suppression requests. Yet in other cases, parties have not argued this point.<sup>259</sup>

Perhaps this is due to the fact that continued anonymity is not reason enough for courts to grant name suppression. Though the tests vary and the outcomes of cases can be surprising, name suppression comes down to one thing: justice. Suppression should be granted when justice requires a party's identity to be withheld, whether it is because an accusation may permanently damage the party's livelihood,<sup>260</sup> or because a unique health condition makes the party more susceptible than most to injury.<sup>261</sup>

New Zealand's current name suppression policies may seem overly liberal, and at the same time, the United States' policies may seem overly rigid. But the new act in New Zealand is primed to create the proper balance between privacy, fairness, and open justice by balancing factors such as reputation, prejudice, and the public good.<sup>262</sup> It is poised to be more objective and predictable than the previous act, while still being humane, with a focus on hardship to individuals.<sup>263</sup> The United States would do well to see how the new act impacts New Zealand's legal system and learn from it. A more predictable and fair U.S. approach to pseudonymity would not only create greater efficiency within our legal system, but it may also help promote justice in instances when it would not otherwise be sought.

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<sup>259</sup> *The Queen v Yang* is the only case referenced herein in which a party requested name suppression on this basis.

<sup>260</sup> *E.g.*, Bismark & Paterson, *supra* note 35 (discussing the case of Dr I.).

<sup>261</sup> *E.g.*, Heil, 2008 WL 4889550.

<sup>262</sup> Criminal Procedure Act 2011 (N.Z.) §§ 200, 201, 203, 205.

<sup>263</sup> *Id.* § 200(2).