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PLAINTIFF PSEUDONYMITY AND THE ALIEN TORT CLAIMS ACT: QUESTIONS AND CHALLENGES

by Jed Greer*

I. INTRODUCTION

Since the early 1970s, an increasing number of plaintiffs in U.S. federal civil litigation have attempted to sue anonymously to conceal their identities from the general public or defendants.¹ To be sure, this litigation represents a tiny fraction of all civil actions, since cases where plaintiffs are permitted to proceed with a “Doe” or similar appellation remain rare due to constitutional and public policy reasons. In certain situations, courts, acting in a discretionary capacity, countenance pseudonymous plaintiffs and structure pre-trial and trial processes in order to maintain anonymity through mechanisms such as protective orders. Recently, this has been true for a number of suits involving international human rights brought under the Alien Tort Claims Act (ATCA), which provides that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, com-

* J.D., Yale Law School (2000); Staff Attorney and Associate Director, EarthRights International-Thailand (www.earthrights.org). For various help I thank Professor W. Michael Reisman of Yale Law School, Jennifer Green of the Center for Constitutional Rights, and Tyler Giannini and Yuki Akimoto of EarthRights International. Also, for disclosure purposes, please note that I have worked on *Doe v. Unocal* (discussed later) as both a law student and an attorney.

1. See Francis M. Dougherty, *Annotation, Propriety and Effect of Use of Fictitious Name of Plaintiff in Federal Court*, 97 A.L.R. Fed. 369 *passim* (1998); Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted To Keep Their Identities Confidential?*, 37 Hastings L.J. 1 *passim* (1985).

mitted in violation of the law of nations or a treaty of the United States.”²

This Comment will explore the process and challenges of protecting ATCA plaintiffs through the use of pseudonyms and additional means of maintaining confidentiality. The issues surrounding pseudonymity and confidentiality in ATCA lawsuits are both similar to and different from those in cases brought under other statutes. In all these suits the motive underlying the federal judiciary’s acquiescence to pseudonymity is the same: an unwillingness in some circumstances to compel plaintiffs to surrender substantial privacy or security interests in order to assert their substantive rights and have their claims adjudicated.³ Additionally, in all these suits plaintiffs’ use of pseudonyms and other techniques to maintain confidentiality create tension in a judicial system that emphasizes openness and defendants’ due process rights.⁴

International human rights cases brought anonymously under the ATCA pose particular challenges, however, that neither judges, plaintiffs’ lawyers, nor plaintiffs themselves should underestimate. Plaintiffs in these suits are generally not citizens or residents of the United States, and the distances separating plaintiffs and the court may lead to various logistical difficulties. Moreover, plaintiffs often live in conditions characterized by exceptional volatility and danger, conditions that may be either the source of, or backdrop to, their allegations. While plaintiffs’ interest in confidentiality might be acute, it is virtually impossible for a U.S. court to ensure that sensitive information about plaintiffs, including identities, remain sufficiently protected. The risks to plaintiffs in this regard are especially great during discovery, when defendants must be able to conduct depositions and other evidentiary inquiries needed to prepare their defense adequately.

Little literature exists about the use of pseudonyms in civil lawsuits generally, much less in the ATCA context. Yet insofar as the federal judiciary continues to entertain international human rights cases brought under the ATCA, it will likely have to grapple with the

2. 28 U.S.C. § 1350 (1997). Human rights cases brought under the ATCA with pseudonymous plaintiffs include: *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998); *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *Nat’l Coalition Gov’t of the Union of Burma v. Unocal Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Doe I v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994).

3. Steinman, *supra* note 1, at 33–35.

4. *Id.* at 35.

complex task of balancing plaintiffs' and defendants' rights in pseudonymous litigation. It is therefore important to understand how parties and courts have approached this task, and to consider possible ways upon which it might be improved.

This Comment first reviews the history of, as well as the legal and policy issues concerning, pseudonymous litigation in U.S. federal courts. It then surveys various procedural steps and questions that arise when plaintiffs seek to sue with pseudonyms. The following section gives a brief look at discovery, when the challenges created by pseudonymous plaintiffs become crucially manifest, and discusses how court-structured protective orders can attempt to address those challenges. This leads into an examination of two case studies, based on real, ongoing suits that suggest the range of complications generated when plaintiffs sue anonymously under the ATCA. The final section sums up the analysis of these two case studies and offers concluding thoughts about policy concerns surrounding pseudonymity and protective orders.

II. BACKGROUND LEGAL AND POLICY ISSUES

Although Rule 10 of the Federal Rules of Civil Procedure stipulates that parties' names be included in a civil action's title,⁵ only once, in 1970, has a federal court dismissed a complaint merely because the plaintiff filed anonymously.⁶ At the outset of litigation initiated by anonymous plaintiffs, courts have typically balanced the validity of the interest motivating a plaintiff's desire for anonymity with the defendant's need for immediate disclosure.⁷ Beginning in the early 1970s, more and more plaintiffs began filing anonymously in civil actions over

5. Fed. R. Civ. P. 10(a).

6. *Roe v. New York*, 49 F.R.D. 279 (S.D.N.Y. 1970). This suit was brought anonymously by four boys against a state juvenile correctional institution, where they were being held in custody. The plaintiffs claimed they would suffer embarrassment, harassment, and difficulties in assimilating back into their communities were their identities made public. The judge dismissed these reasons as not "weighty." *Id.* at 281. The judge went further, however, to assert without explanation that "[s]ound public policy would appear to require that a complaint identify by true name at least one plaintiff if the filing is to commence an action. If the complaint fails to identify by true name at least one plaintiff then its filing is not effective to commence an action." *Id.* at 282. Courts may differ in their responses to reasons offered by a plaintiff who requests pseudonymity, but no court other than the one here has interpreted Rule 10 so as to render anonymous filings generally ineffective to commence an action.

7. Dougherty, *supra* note 1, §§ 1a-2a, at 372-75; Steinman, *supra* note 1, at 35.

often contentious public interest issues such as birth control and abortion, welfare reform, government disclosure regulations for controversial political organizations, alleged discrimination based on sexual preference or mental illness, and laws regarding drug use.⁸ In a number of these suits, courts permitted the use of pseudonyms.⁹ Although, ac-

8. Steinman, *supra* note 1, at 43–80. Steinman cites many cases in this regard. *See, e.g.*, *Doe v. Poelker*, 497 F.2d 1063 (8th Cir. 1974), *rev'd per curiam on other grounds*, 432 U.S. 519 (1977) (challenging, anonymously, policies and procedures that limit the availability of nontherapeutic abortions in city hospitals); *Roe v. Ingraham*, 480 F.2d 102 (2d Cir. 1973) (involving patients receiving prescribed controlled substances who challenged, as a violation of the right to privacy, the compulsory disclosure of their names to the state Department of Health); *Campbell v. United States Dep't of Agric.*, 515 F. Supp. 1239 (D.D.C. 1981) (filing suit anonymously to compel promulgation of regulations to allow eligible social security income applicants and recipients to apply for food stamps at their social security offices); *Doe v. Anker*, 451 F. Supp. 241 (S.D.N.Y. 1978) (alleging violation of constitutional and statutory rights due to placement on involuntary health leave and termination of employment upon a finding of unfitness by reason of mental illness in case filed by pseudonymous teacher); *Doe v. Mathews*, 420 F. Supp. 865 (D.N.J. 1976) (challenging law precluding use of appropriations to pay for elective and nontherapeutic abortions in case filed by anonymous plaintiff); *Doe v. Martin*, 404 F. Supp. 753 (D.D.C. 1975) (alleging disclosure requirements of campaign finance reform act would unconstitutionally subject named contributors to harassment in case filed by anonymous plaintiff and Socialist Workers Party); *Doe v. Deschamps*, 64 F.R.D. 652 (D. Mont. 1974) (challenging the constitutionality of state abortion law under pseudonyms in a suit brought by women and doctor plaintiffs); *Doe v. Chafee*, 355 F. Supp. 112 (N.D. Cal. 1973) (challenging the validity of an undesirable discharge from the Navy in a suit brought anonymously by a homosexual individual); *Doe v. Flowers*, 364 F. Supp. 953 (N.D. W. Va. 1973) (challenging state welfare regulation that required unwed mothers to help identify and prosecute putative fathers in class action lawsuit); *Doe v. Hodgson*, 344 F. Supp. 964 (S.D.N.Y. 1972), *aff'd*, 478 F.2d 537 (2d Cir. 1973) (challenging legislation that excluded agricultural workers from certain benefits and protections in case filed by migrant agricultural laborers pseudonymously).

9. Steinman, *supra* note 1, at 43, 53, 55, 58–59, 67–68, 70–71, 78. *See, e.g.*, *Poelker*, 497 F. 2d 1063 (noting that the plaintiff's pseudonym had been used to prevent harassment); *Campbell*, 515 F. Supp. 1239 (permitting Doe plaintiff to proceed anonymously to protect her privacy and prevent possible harassment); *Anker*, 451 F. Supp. 241 (permitting plaintiff to proceed anonymously without comment, but recognizing the potential stigma and adverse future employment effects of being labeled mentally ill); *Mathews*, 420 F. Supp. 865 (allowing plaintiff to sue under a pseudonym without explanation); *Martin*, 404 F. Supp. 753 (allowing plaintiff to proceed anonymously without discussion); *Deschamps*, 64 F.R.D. 652 (allowing woman plaintiff, but not doctor plaintiff, to sue anonymously to protect her personal privacy); *Flowers*, 364 F. Supp. 953 (permitting plaintiff to sue anonymously without discussion); *Hodgson*, 344 F. Supp. 964 (noting that plaintiffs risked possible reprisal if their names were publicly disclosed). Steinman further cites many additional cases where, as in *Anker*, *Mathews*, *Flowers*, and *Martin*, the plaintiffs' use of pseudonyms received little or no

ording to Professor Joan Steinman, it is unusual to find detailed elaboration in the courts' rationale in most decisions from the 1970s, what discussion there was suggested that plaintiffs had a substantial privacy interest or legitimate security concern that merited an exception to the Rule 10 requirement that all parties be identified when a lawsuit commences.¹⁰

By the early 1980s, courts had begun to develop a more explicit and nuanced approach. A 1987 district court opinion captured the essence of this development. Repudiating a defendant who sought dismissal of an anonymous complaint on the basis of the aforementioned 1970 ruling, the court explained:

The decision in . . . 1970 [happened at] a time in which instances of parties suing pseudonymously were rare. Since that time, however, increasing numbers of parties have sought for a variety of reasons to sue anonymously in order to keep their identities confidential, and in fact "a practice

explanation by the court. In the area of abortion, see, for example, *Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979); *Koe v. California*, 573 F.2d 761 (2d Cir. 1978); *Doe v. Busbee*, 471 F. Supp. 1326 (N.D. Ga. 1979); *Poe v. Charlotte Mem'l Hosp. Inc.*, 374 F. Supp. 1302 (W.D.N.C. 1974); *Coe v. Gerstein*, 376 F. Supp. 695 (S.D. Fla. 1973), *aff'd per curiam*, 417 U.S. 279 (1974); *Doe v. Dunbar*, 320 F. Supp. 1297 (D. Colo. 1970); *Doe v. Randall*, 314 F. Supp. 32 (D. Minn. 1970), *aff'd sub nom. Hodgson v. Randall*, 402 U.S. 967 (1971). In the area of mental illness, see, for example, *Woe v. Weinberger*, 562 F.2d 40 (2d Cir. 1977); *Doe v. Lally*, 467 F. Supp. 1339 (D. Md. 1979); *Woe v. Mathews*, 408 F. Supp. 419 (E.D.N.Y. 1976), *aff'd mem. sub nom. Doe v. Hampton*, 566 F.2d 265 (D.C. Cir. 1977).

10. Steinman, *supra* note 1, at 43–45, 50. Steinman notes that the court in *Doe v. Deschamps* provided one of the earliest judicial discussions giving reasons in support of permitting a plaintiff to proceed pseudonomously. *Id.* at 42. In *Deschamps*, the court observed that prior cases had allowed anonymous plaintiffs "where the issues involved are matters of a sensitive and highly personal nature." 64 F.R.D. at 652. The *Deschamps* court added, "[w]e think that as a matter of policy the identity of the parties to a lawsuit should not be concealed except in an unusual case. The intensely personal nature of pregnancy does, we believe, create an unusual case, and in such a case the general policy of full disclosure may well give way to a policy of protecting privacy in a very private matter." *Id.* In other cases plaintiffs' security interest was at stake. See, e.g., *Glover v. Johnson*, 85 F.R.D. 1 (E.D. Mich. 1977) (noting that two plaintiffs petitioned the court to proceed anonymously and filed supporting affidavits in which they alleged fear of retaliation were their identities to become known to defendants); *Hodgson*, 344 F. Supp. 964. See also *Doe v. Rostker*, 89 F.R.D. 158, 161 (N.D. Cal. 1981) (explaining that "[c]ourts have carved out limited exceptions to Rule 10 where the parties have strong interests in proceeding anonymously The common thread running through these cases is the presence of some social stigma or the threat of physical harm to the plaintiffs attaching to disclosure of their identities to the public record.").

has developed permitting individuals to sue under fictitious names” under certain circumstances The decision whether to allow the use of fictitious names based on a need for anonymity in a particular lawsuit is left to the discretion of the trial court. There is, however, no express standard to guide the court in making its decisions.¹¹

To this day no clear guidelines exist for rulings on plaintiff anonymity, whether those determinations concern requests at the outset of litigation or the continuation of anonymity during the pre-trial and trial stages. Over the years, however, district and appellate courts have frequently indicated various factors to be considered. From the plaintiffs’ standpoint, compelling factors include: whether there is a substantial privacy interest in matters that are highly sensitive and personal and where identification may lead to social stigmatization; whether disclosure poses a risk of real danger or physical harm to plaintiffs or non-parties; and whether plaintiffs are forced to admit either that they engaged in, or intended to engage in, illegal activity, thereby risking criminal prosecution.¹²

11. Doe v. Hallock, 119 F.R.D. 640, 642–43 (S.D. Miss. 1987) (quoting 27 Fed. Proc., L. Ed. § 62:96 (1984)). In this case, which involved a sexual discrimination and harassment suit against private parties, the court found that anonymity was not warranted given that the most likely source of further harassment, namely the defendants, was already aware of the plaintiff’s identity.

12. See, e.g., James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993) (recognizing that identification of parties should yield to a sufficiently pressing need for anonymity, such as preservation of privacy in a highly personal matter, or if identification poses a risk of retaliatory physical or mental harm to the requesting party); Doe v. INS, 867 F.2d 285, 286 (6th Cir. 1989) (permitting the petitioner to proceed anonymously to protect his relatives in China from possible reprisals); Doe v. Stegall, 653 F.2d 180, 185–86 (5th Cir. 1981) (allowing plaintiffs to proceed anonymously because they could expect harassment or violent reprisals if their identities were disclosed to their home community); S. Methodist Univ. Ass’n v. Wynne & Jaffe, 599 F.2d 707, 712–13 (5th Cir. 1979) (acknowledging that the normal practice of disclosing parties’ identities may yield “to a policy of protecting privacy in a very private matter” (quoting *Deschamps*, 64 F.R.D. at 653)); Doe v. Beaumont Indep. Sch. Dist., 172 F.R.D. 215, 216 (E.D. Tex. 1997) (repeating that plaintiffs are allowed to sue anonymously to preserve privacy in a matter of a sensitive nature or where identification may lead to possible retaliatory physical or mental harm); Doe v. Shakur, 164 F.R.D. 359, 360–61 (S.D.N.Y. 1996) (citing various factors in determining whether a plaintiff may proceed anonymously, including privacy and security interests, as well as whether the plaintiff would be compelled to admit an intention to engage in illegal conduct, thereby risking criminal prosecution); Doe v. Bell Atl. Bus. Sys. Serv., Inc., 162 F.R.D. 418, 420 (D. Mass. 1995) (recognizing cases that have allowed plaintiffs to proceed anonymously on grounds of social stigmatization, real danger of physical harm, or where the injury litigated against would oc-

Notwithstanding these common considerations, courts have strived to maintain significant discretionary power over pseudonymity requests and have eschewed overly specific or binding criteria.¹³ Plaintiffs' requests and need for the use of pseudonyms are often lodged in fact-sensitive contexts, and always require a balancing of the factors that favor anonymity with other contending interests. Foremost among such interests are those that underlie the Rule 10 disclosure requirement: the public's interest in knowing about events and facts involved in judicial proceedings, including parties' identities, and the defendant's interest in knowing who is suing him or her.¹⁴

A. Pseudonymity and the Public Interest

The first interest concerns what the Fifth Circuit has called "the customary and constitutionally-embedded presumption of openness in judicial proceedings," criminal as well as civil, that applies to

cur as a result of the disclosure of the plaintiff's identity); *Doe v. United Sevs. Life Ins.*, 123 F.R.D. 437, 439 (S.D.N.Y. 1988) (mentioning that plaintiff pseudonymity is acceptable where issues in a case present risk of social stigma); *Campbell*, 515 F. Supp. at 1245 (permitting plaintiff to conceal her identity to protect sensitive personal information and to shield her from feared abuse and harassment from neighbors, the media, and the public); *Rostker*, 89 F.R.D. at 162 (asserting that plaintiff pseudonymity is allowed where 1) there is social stigma or 2) the threat of physical harm to the plaintiffs attaches to the disclosure of their identities in the public record); *Roe v. Borup*, 500 F. Supp. 127, 129 (E.D. Wis. 1980) (saying that plaintiff pseudonymity is permissible where there is an important privacy interest to be recognized); *Glover v. Johnson*, 85 F.R.D. 1, 2 (E.D. Mich. 1977) (noting that plaintiffs had an alleged fear of retaliation if their participation in the suit became known to defendants); *Deschamps*, 64 F.R.D. 652 (asserting that plaintiffs are allowed to sue anonymously where the issues involve matters of a highly sensitive and personal nature).

13. An early influential ruling in this regard was *Doe v. Stegall*, 653 F.2d at 185. Repudiating a prior Fifth Circuit decision, the *Stegall* court stated that

we think it would be a mistake to distill a rigid, three-step test for the propriety of party anonymity from the fact-sensitive holding in *Southern Methodist University Ass'n*. The opinion never purports to establish the three common factors it isolates as prerequisites for bringing an anonymous suit We advance no hard and fast formula for ascertaining whether a party may sue anonymously.

Id. at 185–86. Before and since *Stegall*, courts have repeatedly asserted their discretionary power to rule on anonymity requests. *See, e.g., James*, 6 F.3d at 238; *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir. 1979); *Beaumont Indep. Sch. Dist.*, 172 F.R.D. at 215–16; *Doe v. Shakur*, 164 F.R.D. at 360; *Bell Atl. Bus. Sys. Serv., Inc.*, 162 F.R.D. at 420; *Hallock*, 119 F.R.D. at 642; *Borup*, 500 F. Supp. at 129.

14. *Hallock*, 119 F.R.D. at 643.

trials and documents such as complaints and pleadings that traditionally have been in the public domain.¹⁵ According to the Supreme Court's landmark ruling in *Richmond Newspapers, Inc. v. Virginia*, the public's right of access to court proceedings is rooted in a "core purpose" of the First Amendment to guarantee freedom of communication about governmental functioning.¹⁶ These policy benefits include contributing to well-informed public opinion, enabling citizen scrutiny of the judiciary, and promoting confidence in the fairness and justice of the court system.¹⁷

Several qualifications about the presumptive openness of judicial proceedings are in order, however, since the Court does not maintain that this right is absolute.¹⁸ As Professor Arthur Miller has noted, there is no public right of access to, for example, grand jury activities, the discovery process or materials obtained therefrom, jury deliberations, or settlement negotiations.¹⁹ In all these situations, Professor Miller asserts, "confidentiality is deemed essential to accomplish fundamental goals of the judicial system that are far more important than the public's need to know every detail of a given case."²⁰

Even the presumptive openness of trials is subject to restriction. Complete or partial closure of courtrooms is permissible if there is a demonstrable need to preserve order, protect parties or witnesses, or maintain the secrecy of certain information.²¹ *In camera* hearings are

15. *Stegall*, 653 F.2d at 186.

16. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575, *passim* (1980).

17. *Id.*

18. *See, e.g.*, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33–34 (1984) (noting that pretrial depositions and interrogatories are not public components of a civil trial and that "judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context").

19. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 429 (1991).

20. Professor Miller stresses, for instance, how confidentiality can enhance the fairness and efficiency of the judicial system as well as protect privacy and property rights. *Id.* at 431, 464–74.

21. *Nieto v. Sullivan*, 879 F.2d 743, 752 (10th Cir. 1989) ("The right to an open trial, however, may give way in certain cases to other rights or interests such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information."); *United States v. Hernandez*, 608 F.2d 741, 747 (9th Cir. 1979) (observing that the right to a public trial does not preclude limited exclusion of spectators when there is a demonstrated need to protect witnesses from threatened harass-

one procedural mechanism used to address such concerns.²² More generally, Justice Brennan noted in his *Richmond* concurrence that protection of First Amendment rights “must be invoked with discrimination and temperance An assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and other interests invaded.”²³ The benefits of a presumptive openness of judicial proceedings are manifest and vital, but it is unreasonable to suppose that they should inevitably outweigh justifications for plaintiff anonymity, especially where people’s lives may be in jeopardy.

B. Pseudonymity and Defendants’ Interests

Also underlying the Rule 10 party disclosure requirement is defendants’ due process right to know against whom they are litigating in order to determine the factual basis of allegations and gather contrary evidence. Given this important consideration, it appears somewhat puzzling that decisions from the 1970s allowing plaintiffs to use pseudonyms provided little explanation of their reasoning or indication of how anonymity might have affected defendants.²⁴ It is possible that anonymity pertained only to the public, but it is unlikely that this was always the case. The Federal Rules require response to a complaint

ment or physical harm); *United States v. Lloyd*, 520 F.2d 1272, 1274 (2d Cir. 1975) (recognizing that the right to a public trial must be balanced against other interests that might justify closing the courtroom to the public, including preservation of order, protection of parties or witnesses, or maintenance of the confidentiality of certain information).

22. *United States v. Anderson*, 509 F.2d 724, 729–30 (9th Cir. 1974) (asserting that a trial judge has discretion to conduct an *in camera* hearing in which only the defense counsel, not the defendant, is admitted, and to place defense counsel under enforceable orders against unwarranted disclosure of information she or he has heard); *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969) (allowing the government to present evidence of a threat to a witness *in camera* and noting that where there is an actual threat to the life of a witness, the right of the defendant to have the witness’s true name, address, and place of employment is not absolute). It bears mentioning that the Fifth Circuit has observed that party anonymity, as a “limited form of closure,” interferes far less than closing a trial with the virtues of open judicial proceedings mentioned above. *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981).

23. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 588 (1980).

24. Steinman lists a number of cases from the 1970s that did not discuss the reasons for granting pseudonymity or explain how to implement this decision. Steinman, *supra* note 1, at 43–44 n.181, 52 n.217. Professor Steinman does note, however, that a few cases from this period did provide some discussion. *See e.g.*, *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. 1974).

within twenty days.²⁵ Presumably, parties confronted with an unknown plaintiff would have taken advantage of Rule 8, which allows general denial of allegations in defense pleadings, as well as motions to dismiss provided for under Rule 12.²⁶

Assuming that in a portion of these suits plaintiffs may have kept their identities from defendants, the question arises whether such anonymity would have unduly impaired defendants' ability to conduct their defense. That this potential problem did not generate more attention seems due to the nature of the issues being litigated.²⁷ The vast majority of these suits involved not factual matters unique to particular plaintiffs, but challenges, sometimes in the form of class actions, to the "constitutional, statutory, or regulatory validity of government activity."²⁸ Because the issues in contention were primarily, if not purely, legal, Professor Steinman suggests, plaintiffs were effectively "fungible with similarly situated individuals," and their identities deemed by the courts to be unessential.²⁹

Several later opinions indicate that defendants who were not apprised of plaintiffs' identities objected that they were unable to verify their adversaries' standing.³⁰ This argument seems generally to have fallen on deaf ears. In a number of cases, courts simply permitted plaintiffs to submit affidavits—either pseudonymous or sealed with the individuals' true names—attesting to their existence, personal stake in the controversy's outcome, and accuracy of the allegations in the complaint.³¹

25. Fed. R. Civ. P. 12(a) ("[U]nless a different time is prescribed in a statute of the United States, a defendant shall serve an answer (A) within 20 days after being served with the summons and complaint.").

26. Fed. R. Civ. P. 8, 12(b).

27. See, e.g., *S. Methodist Univ. Ass'n v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979) (explaining that under special circumstances, such as issues involving matters of a sensitive and highly personal nature, courts have allowed plaintiffs to use fictitious names, but that plaintiffs did not need to reveal facts of a highly personal nature). See also Steinman, *supra* note 1, at 43–80.

28. *S. Methodist Univ. Ass'n*, 599 F.2d at 713.

29. Steinman, *supra* note 1, at 62.

30. See, e.g., *Campbell v. United States Dep't of Agric.*, 515 F. Supp. 1239, 1246 (D.D.C. 1981); *Moe v. Dinkins*, 533 F. Supp. 623, 627 (S.D.N.Y. 1981).

31. *Dinkins*, 533 F. Supp. at 627. For additional cases, see Steinman, *supra* note 1, at 47.

While there were extremely few cases before the mid-1980s that involved anonymous plaintiffs and private, non-governmental defendants, there have since been more such suits, including ones brought under the ATCA.³² This development has in certain instances brought an added measure of scrutiny to plaintiffs' requests for anonymity, which stems from a 1980 appellate opinion that was also one of the earliest rulings to discuss the interests of defendants in the context of pseudonymous litigation.³³ In that decision, a sex discrimination suit against two law firms, the court found plaintiffs' requests for anonymity—based on “embarrassment [and] annoyance” as well as adverse reaction by prospective future employers—to be insufficiently compelling in light of potential reputational and economic harm to identified private party defendants that could result from the “mere filing of a civil action.”³⁴ Private parties, the court reasoned, were more susceptible than governmental bodies to such harm from public accusations alleging violation of federal law.³⁵

32. Such cases involving U.S. nationals include two where the courts allowed plaintiffs to sue anonymously. In *Doe v. United Services Life Insurance*, 123 F.R.D. 437 (S.D.N.Y. 1988), the court permitted the plaintiff to proceed pseudonymously so as to avoid public identification as a homosexual even though the defendant was already aware of the plaintiff's identity. In *James v. Jacobson*, 6 F.3d 233 (4th Cir. 1993), the appeals court vacated the lower court's denial of anonymity to plaintiffs at trial (anonymity had been permitted during pre-trial) and remanded because a) the lower court had misconstrued plaintiffs' effort to protect their children from harm associated with public revelation of distressing circumstances of their birth and b) the defendant, who knew plaintiffs' identities, would not be unfairly prejudiced by being unable to question plaintiffs as witnesses under their true names. In two other cases, the courts refused to allow pseudonymity. In *Doe v. Shakur*, 164 F.R.D. 359 (S.D.N.Y. 1996), a civil suit claiming damages for alleged sexual assault, the court denied the request of a plaintiff who feared public embarrassment and possible reprisal to use a pseudonym. In part, the court assumed that any individual who posed a danger to the plaintiff already knew the plaintiff's identity and that pseudonymity would therefore be without value. The court also reasoned that the defendant was disadvantaged by having been “publicly accused,” while the plaintiff sought to “make her accusations from behind a cloak of anonymity,” and that “[f]airness requires that she be prepared to stand behind her charges publicly.” *Id.* at 361. According to the court, “[w]hether the defendant is a governmental entity or a private defendant is significant because governmental bodies do not share concerns about ‘reputation’ that private individuals have when they are publicly charged with wrongdoing.” *Id.* at 361. See also *S. Methodist Univ. Ass'n*, 599 F.2d 707. In *Doe v. Hallock*, 119 F.R.D. 640 (S.D. Miss. 1987), the court justified its denial of the plaintiff's request of pseudonymity on similar grounds.

33. *S. Methodist Univ. Ass'n*, 599 F.2d 707.

34. *Id.* at 713.

35. *Id.*

Following this ruling, courts have refused to allow anonymity to female plaintiffs who seek to avoid humiliation and embarrassment when they file suit for sexual harassment or assault, unless they can present evidence of a credible retaliatory threat or danger.³⁶ Underpinning the courts' conclusions in these cases is the judgment that the most likely source of reprisal is individuals, namely defendants, already aware of plaintiffs' names. Were there a genuine threat from elsewhere that pseudonymity might forestall, the courts indicate that they would grant plaintiffs' requests.³⁷ However, courts have permitted plaintiffs to use pseudonyms in suits against private defendants, even absent the possibility of physical retaliation, to protect an adult from the "social stigmatization" of homosexuality in one instance, and children from the risk of severe emotional distress in another.³⁸ Despite their different outcomes, however, one characteristic distinguishes these lawsuits against private defendants from at least some of those filed against governmental entities. In all these cases, except those brought under the ATCA, plaintiffs have attempted to conceal their identities only from the general public, not from defendants, from the outset of their suits.

III. THE PROCEDURE OF PLAINTIFF PSEUDONYMITY

The foregoing gives a brief introductory background of the legal and policy considerations surrounding federal litigation with pseudonymous plaintiffs. The question remains, however, as to how plaintiffs who wish to sue anonymously under the ATCA may do so.

36. See, e.g., *Shakur*, 164 F.R.D. at 362 (acknowledging that "[p]laintiff's allegation that she had been subjected to death threats would provide a legitimate basis for allowing her to proceed anonymously," but "[p]laintiff has not . . . provided any details, nor has she explained how or why the use of her real name in court papers would lead to harm, since those who presumably would have any animosity toward her already know her true identity"); *Doe v. Bell Atl. Bus. Sys. Serv., Inc.*, 162 F.R.D. 418, 420–21 (D. Mass. 1995) (having noted that real danger of physical harm has been a legitimate reason for allowing plaintiffs to proceed anonymously, asserting that in this case plaintiff's concern seemed to be embarrassment, which is not in itself grounds for proceeding under a pseudonym); *Hallock*, 119 F.R.D. at 644 (noting that the plaintiff had not "demonstrated that this is an exceptional case in which a compelling need exists to protect an important safety or privacy interest").

37. *Shakur*, 164 F.R.D. at 359.

38. *James v. Reprod. Genetics Ctr.*, 6 F.3d 233 (4th Cir. 1992) (homosexuality); *Doe v. United Servs. Life Ins.*, 123 F.R.D. 437 (S.D.N.Y. 1988) (emotional distress of children).

At filing, plaintiffs should caption their complaint and summons with their pseudonyms, which must of course also be used throughout the body of these documents.³⁹ Concurrently with filing the complaint, plaintiffs should also make an *ex parte* motion asking the court's permission to file anonymously.⁴⁰

To enable the court to balance contending interests, this motion should be supplemented by affidavits indicating the reasons for pseudonymity.⁴¹ Plaintiffs' attorneys should indicate specific threats plaintiffs received and explain the contextual basis of the anonymity request, noting relevant political, military, or other factors that would put plaintiffs in jeopardy were they identified. Information from human rights organizations can also help illuminate the risks that disclosure might entail. As long as they are placed under seal, affidavits from the plaintiffs attesting to their fears are useful. Additional affidavits may later be necessary to establish standing. Finally, although such cases involving pseudonymous litigation is now an accepted practice, they remain exceptional occurrences. A memorandum of law on relevant legal precedent and authorities in support of anonymous filing is therefore advisable.⁴² There is little reason plaintiffs' true names cannot be given to the court, but this must also be done with an affidavit kept under seal.

It is difficult to argue that the public's interest in plaintiffs' true names is significant at this initial stage, or indeed that this interest at any point during litigation is sufficiently strong to override plaintiffs' security concerns, assuming the court deems those concerns legitimate. Such a conclusion, it is fair to say, is applicable to most suits brought under the ATCA where plaintiffs ask for anonymity. No court thus far appears to have questioned the legitimacy of plaintiffs' fears or denied them anonymity from the public.⁴³

39. Much of the process about how to file pseudonymously is described in Steinman, *supra* note 1, at 85–87.

40. This has been done in a number of cases involving anonymous plaintiffs, including at least three brought under the ATCA. *See, e.g.*, *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998); *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *Doe I v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994).

41. Steinman, *supra* note 1, at 85.

42. *Id.* at 86.

43. ATCA cases in which pseudonymous plaintiffs have proceeded include the following: *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1999); *Islamic Salvation Front*, 993 F. Supp. 3; *Nat'l Coalition Gov't of the Union of Burma v. Unocal Inc.*, 176

This result comports with the approach that Professor Steinman has suggested courts follow as a general matter when faced with plaintiffs who sue anonymously. Professor Steinman recommends that courts employ two kinds of balancing tests to weigh the interests of parties and the public. Given that the public's interest in plaintiffs' identities is unlikely to be significant early on in the proceedings, she argues that it is sufficient for plaintiffs to demonstrate merely a "legitimate interest" (for example, fear of reprisal) in pseudonymity at this juncture.⁴⁴ However, as the proceedings advance, she notes that the benefits of public scrutiny may become more important, and courts should accordingly use a more rigorous standard such as "reasonable probability of significant harm to an important interest, if pseudonymity were denied."⁴⁵ Relevant factors to be evaluated include the particularities of plaintiffs' need for pseudonymity, the existence of any ulterior or illegitimate motives, and potential consequences of disclosure, such as injury or, alternatively, plaintiffs' voluntary dismissal of their case.⁴⁶

One issue plaintiffs must address at the outset is whether they wish to request that their identities be withheld from defendants. Professor Steinman offers little guidance with respect to weighing the adverse effects of plaintiff pseudonymity on defendants' interests, except to say that such impacts must be examined on a

F.R.D. 329 (C.D. Cal. 1997); *Unocal Corp.*, 963 F. Supp. 880; *Karadzic*, 866 F. Supp. 734.

44. Steinman, *supra* note 1, at 36.

45. *Id.* at 37 (quotation omitted). Professor Steinman does not identify the precise source of this quoted standard, though in the text and accompanying footnote it appears in contrast with a standard of strict scrutiny and is presumably intended to be a form of intermediate scrutiny. In this analysis, Steinman draws on several cases: *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (ruling that the juror voir dire in a criminal trial must be open unless the closure satisfies a three-part test: the party seeking closure must establish an overriding interest likely to be harmed by open trial, closure must be essential and no broader than necessary to preserve threat interest, and the trial court must articulate the interest and make specific findings to support closure on appeal); *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (asserting, in a challenge to statutory disclosure requirements imposed by federal election law, that "[t]he evidence offered need show only a reasonable probability that the compelled disclosure . . . will subject . . . [people] to threats, harassment, or reprisals from either Government officials or private parties"); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1354 (D.C. Cir. 1985) (hesitating to impose on trial courts a standard of strict scrutiny regarding the issuance of provisional seals for civil trial records).

46. Steinman, *supra* note 1, at 38–41.

case-by-case basis.⁴⁷ For reasons already mentioned, defendants' need for plaintiffs' identities will almost certainly be greater than that of the public. Yet, for a variety of reasons, plaintiffs in ATCA suits may legitimately fear disclosing their names and specific places of residence to defendants. Key questions here concern defendants' actual need for plaintiffs' identities, and at what point in proceedings such need arises. At the outset of litigation and until jurisdiction has been granted, this need is likely unessential.⁴⁸ Of course, recalling pseudonymous litigation case law that involves U.S. nationals only, private defendants facing serious charges may suffer reputational and economic harm from those allegations alone. But it also seems clear from the relevant precedents that plaintiffs' legitimate security interests will outweigh such potential harm.⁴⁹ Once the court grants jurisdiction, however, there remains the serious issue that plaintiffs' anonymity may impede defendants' defense during pre-trial discovery or at later stages of the proceedings.

For instance, people questioned at depositions or on the witness stand at trial are customarily asked their name and place of residence. Obvious problems would arise at both junctures if plaintiffs who testify had been allowed to file anonymously with respect to the defendant as well as the public and wish to continue concealing their identities and locations. In order to facilitate evidentiary investigation or trial presentation, defendants may argue that disclosure of plaintiffs' identifying information is more necessary during discovery or at trial than it had been at the lawsuit's commencement and up through the jurisdictional ruling. In response, plaintiffs' counsel may be obliged to seek an appropriate protective order. The subject of protective orders will be examined later in much more depth, but for present purposes it bears noting that courts have considerable powers to specify the parameters of such devices.⁵⁰ For example, during discovery one option for plaintiffs is to ask the court for an order re-

47. *Id.* at 88.

48. In other words, for purposes of answering a complaint by responding with a general denial and during disputes over jurisdictional issues, defendants' need for identifications of plaintiffs is often not essential.

49. *See, e.g.*, *Doe v. Shakur*, 164 F.R.D. 359, 360-61 (S.D.N.Y. 1996); *Doe v. Hallock*, 119 F.R.D. 640, 642-43 (S.D. Miss. 1987).

50. Fed. R. Civ. P. 26(c) permits a court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." As discussed below, decisions about protective orders mainly arise as the parties move into discovery.

stricting the number of people who have access to their identities or locations. The court could require a defendant not to reveal plaintiffs' identifying information or permit defendants' attorneys, but not defendants, to receive such information. By the same token, plaintiffs should be aware of protective orders' limits, for inadvertent disclosure of confidential information is always possible.⁵¹

Even if plaintiffs reveal their identities to defendants during discovery, plaintiffs' counsel will probably want to take steps to ensure that their clients' identifying information is concealed from the public if deposition transcripts or videotaped depositions are admitted in court.⁵²

51. The subject of protective orders will be discussed *infra* Part IV.A.

52. Given the fact that ATCA plaintiffs reside outside the United States, as well as the difficult circumstances in which they often live, many of these individuals may be unable or unwilling to appear at trial, thus necessitating the use of deposition transcripts or videotapes. This consideration may also apply to non-party witnesses residing in the same areas as plaintiffs. As a result, both plaintiffs' and defendants' counsel should agree upon and be ready for cross-examination of parties or their witnesses to occur at depositions taken during discovery. There have been cases when a party's counsel failed at a deposition to cross-examine a prospective witness who subsequently did not appear at trial, and then objected to the admissibility of that deposition in court on the ground that he or she could not conduct a cross-examination. *See, e.g., Wright Root Beer Co. v. Dr. Pepper Co.*, 414 F.2d 887 (5th Cir. 1969); *Henkel v. XIM Prods., Inc.*, 133 F.R.D. 556 (D. Minn. 1991); *Duttle v. Bandler & Kass*, 127 F.R.D. 46 (S.D.N.Y. 1989). Courts have rejected this argument, asserting that counsel took the risk of forfeiting cross-examination by not doing so at deposition. *Wright Root Beer Co.*, 414 F.2d at 890; *Duttle*, 127 F.R.D. at 48–49.

One function of depositions is to preserve pertinent testimony if a witness is unavailable to testify in person, and there is no distinction in the Federal Rules between discovery depositions and depositions for use at trial. *Henkel*, 133 F.R.D. at 557. Moreover, the Rules stipulate that depositions of a witness may be admitted if that individual is more than 100 miles from the courthouse and cannot or will not appear at trial. Fed. R. Civ. P. 32(a)(3)(B) (“The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds . . . that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition.”).

Although courts may prefer live testimony, they have discretionary power to permit (or preclude) admission of deposition transcripts or videotapes as evidence in lieu of such testimony. *Duttle*, 127 F.R.D. at 49. Absent agreement between both parties as to the admissibility of depositions, courts “weigh the prejudice suffered by the objecting party if the deposition is admitted against that suffered by the party offering the deposition if it is excluded.” *Id.* at 49. As a general rule, in the context of ATCA suits, it may be to the parties' benefit to reach an agreement beforehand about cross-examining deponents. Since the value to plaintiffs' case of depositions by plaintiffs and their witnesses is high, a court would almost certainly admit these into evidence even

Accordingly, either as a stipulation in a protective order or at trial itself, plaintiffs' counsel will want to ask for an *in camera* hearing for that portion of the proceedings in which the testimony of plaintiffs is presented.

However, it is important to stress that court granted anonymity to plaintiffs at the time of a complaint's filing and throughout the pre-trial stage does not necessarily mean that it must (or will) do so at trial if defendants object. In a 1993 domestic malpractice suit, the district court permitted plaintiffs to file pseudonymously and even authorized a detailed protective order to prevent disclosure of plaintiffs' identities.⁵³ But the court denied plaintiffs' request to retain their pseudonyms at trial, agreeing with the defendant that anonymity would indicate to the jury that the court found merit to plaintiffs' claims and would unfairly hinder the defendant from impeaching plaintiffs' credibility as witnesses.⁵⁴ The Fourth Circuit reversed the lower court's ruling, however, asserting that a jury instruction emphasizing the reason for plaintiff anonymity could address the defendant's first concern.⁵⁵ Moreover, the court averred that because the defendant could use other publicly available facts about the plaintiffs to impeach their credibility on the witness stand, anonymity would therefore not be unfairly disadvantageous.⁵⁶

The appellate court went on to state that underlying the trial court's rejection of plaintiffs' request was a belief that "as a general proposition party-anonymity at trial is simply not permissible."⁵⁷ Firmly repudiating the trial court, the Fourth Circuit opinion spelled out the obligation incumbent upon lower courts generally:

if defendants had neglected to cross-examine. Conversely, plaintiffs' counsel has an interest in preparing their clients for the event that defendants do cross-examine at deposition.

53. *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993) (James was a pseudonym).

54. *Id.* at 240–41. The plaintiffs in *James* were the parents of children who were unaware that their legal father was not their biological father. The plaintiffs were suing the biological father, and sought pseudonymity from the public out of concern for potential adverse psychological effects on the children caused by the revelation and publicity about their biological father.

55. *Id.* at 242.

56. *Id.*

57. *Id.* at 239.

The decision whether to permit parties to proceed anonymously at trial is one of many involving management of the trial process that . . . are committed in the first instance to trial court discretion. This implies, among other things, that though the general presumption of openness of judicial proceedings applies to party anonymity as a limited form of closure, it operates only as a presumption and not as an absolute, unreviewable license to deny. The rule is rather that under appropriate circumstances anonymity may, as a matter of discretion, be permitted. This simply recognizes that privacy or confidentiality concerns are sometimes sufficiently critical that parties or witnesses should be allowed this rare dispensation. A necessary corollary is that there is a judicial duty to inquire into the circumstances of particular cases to determine whether the dispensation is warranted.⁵⁸

Although plaintiffs prevailed in this instance, the general point is worth re-stating: from the filing of a complaint through trial, courts maintain discretionary power over decisions about the use of pseudonyms, and plaintiffs cannot assume that because anonymity has been granted at an earlier stage in the process it will necessarily be allowed at a later one.

In sum, during the past three decades, federal courts have demonstrated a willingness to grant plaintiffs exceptions to Rule 10's party disclosure requirement. The evolution of this litigation has involved increased articulation of the factors and countervailing interests to be examined when ruling on anonymity requests, an effort by courts to maintain considerable discretion when responding to such requests, and expansion from governmental to private defendants. Not all the complex issues raised by plaintiff anonymity have been addressed. The aim, rather, has been to establish in general terms that the use of pseudonyms by plaintiffs is a practice that courts have not deemed automatically incompatible with the interests Rule 10 seeks to protect, and that it is an accepted, if exceptional, procedure. That tension between plaintiff anonymity and those interests may sometimes exist cannot be denied. But this seems an unavoidable consequence of the balancing inherent to the practice, the underlying impulse of which is clear: the federal judiciary has been loath to force plaintiffs in all circumstances to sacrifice substantial

58. *Id.* at 238 (internal citation omitted).

privacy or security interests as the price for asserting their substantive rights and having courts adjudicate their claims.⁵⁹

IV. PLAINTIFF PSEUDONYMITY DURING DISCOVERY

There is perhaps no greater judicial challenge surrounding pseudonymity and ATCA suits than how to balance parties' interests fairly during the pre-trial stage of discovery when there are allegations particular to individual plaintiffs. At the filing of a complaint, and while disputes over jurisdiction are resolved, the acuity and urgency of these interests is comparatively less. Although, as the foregoing indicates, there is no stage at which challenging the use of pseudonyms is impossible, it is reasonable to assume that by trial many of the problems and points of disagreement surrounding anonymity will already have been addressed. In between those junctures, however, vexing issues abound and the potential for inadvertent disclosure is at its greatest. This situation is best explored by surveying two recent cases in which the courts and parties are grappling to both protect plaintiffs and ensure fairness to defendants through the procedural device of protective orders.

A. Protective Orders

It is first useful to understand the goals and configuration of this device in the context of the discovery process. Rule 26(b)(1) of the Federal Rules of Civil Procedure grants parties significant opportunity to obtain discoverable materials, whose scope includes:

any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.⁶⁰

According to Professor Miller, the drafters of this rule intended the expansive nature of discovery to assist parties' preparatory activities,

59. Steinman, *supra* note 1, at 33–34.

60. Fed. R. Civ. P. 26(b)(1).

prevent surprises from occurring at trial, and promote effective resolution of cases.⁶¹ The objective was not to enlarge public access to information acquired in discovery.⁶² Indeed, in *Seattle Times Co. v. Rhinehart* the Supreme Court ruled that, unlike judicial records such as complaints or pleadings, “pretrial depositions and interrogatories are not public components of a civil trial Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.”⁶³

In *Seattle Times*, the Court rejected petitioners’ argument that a protective order, provided for in Washington State Rule 26(c), prohibiting dissemination of information acquired through the pre-trial discovery process in civil suits, offended the First Amendment.⁶⁴ Because the scope of discovery was potentially so wide, the Court observed, the process was susceptible to abuses, including undue delay and expense, and violations of party and non-party privacy interests that could chill attempts to seek redress in court.⁶⁵ Consequently, with the aim of lessening procedural gamesmanship and reducing abusive behavior, the court stated that Rule 26(c):

confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.⁶⁶

61. Miller, *supra* note 19, at 447.

62. *Id.* See also *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (“Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.”).

63. *Seattle Times*, 467 U.S. at 33.

64. *Id.* at 33. Washington’s Rule 26(c) is modeled after and is virtually identical to Rule 26(c) in the Federal Rules of Civil Procedure. *Id.* at 29. In this case, petitioner *Seattle Times* was appealing a protective order granted by a Washington state court and affirmed by the Washington Supreme Court that prevented the newspaper from publishing information learned in discovery about a religious organization led by respondent *Rhinehart*. In its decision, the Court declined to apply “heightened First Amendment scrutiny,” instead concluding that “Rule 26(c) furthers a substantial government interest unrelated to the suppression of expression,” namely to prevent abuse of the discovery process. *Id.* at 36, 34.

65. *Seattle Times*, 467 U.S. at 34–35, 37.

66. *Id.* at 36.

The language of Rule 26(c) reflects that latitude. “[F]or good cause shown” it enables a court to “make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”⁶⁷ Though they must exercise discretion in a manner that does not unfairly disadvantage any litigant, courts are empowered to: circumscribe discovery’s scope; set the terms, conditions, and method of discovery, including designation of time and place and persons allowed to participate; require depositions and other documents to be sealed and opened only on the court’s order; and on rare occasions prevent discovery or disclosure from being had.⁶⁸ The drafters of Rule 26(c) were solicitous of businesses that are parties to a lawsuit, for they specifically granted courts the authority to rule that “a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.”⁶⁹ Companies involved in litigation have often taken advantage of this provision to protect their property interests in creative ways that courts have sanctioned and helped to structure.⁷⁰

Protective orders designed to guard non-corporate plaintiffs’ anonymity have also been elaborate. In one instance, the court approved a negotiated agreement between parties that prohibited dis-

67. Fed. R. Civ. P. 26(c). The Rule continues:

including one or more of the following: 1) that the disclosure or discovery not be had; 2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of time and place; 3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; 4) *that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters*; 5) *that discovery be conducted with no one present except the persons designated by the court*; 6) *that a deposition, after being sealed, be opened only by order of the court*; 7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; 8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Fed. R. Civ. P. 26(c) (emphasis added).

68. *Id.*

69. *Id.*

70. Miller, *supra* note 19, at 435. For examples of specially tailored protective orders in this context, see Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2043, at 554–72 (2d ed. 1994).

closure by defendants, their counsel, or representatives of any information that directly or indirectly identified plaintiffs to any person, unless that person first executed a non-disclosure agreement that was enforceable by the contempt sanction.⁷¹ The order required defendants to obtain leave from a magistrate judge, on prior notice to plaintiffs, to contact any person believed to have relevant information about the case, and provided plaintiffs with the opportunity to be heard before leave was granted. Defendants were further obligated to inform plaintiffs' counsel of any individual to whom plaintiffs' identities had been or would be revealed. All papers filed with the court or disseminated to people who had not executed a non-disclosure agreement were required to refer to plaintiffs pseudonymously, and any document that identified plaintiffs had to be filed under seal, with redacted copies placed in public files. Finally, the order stipulated that defendants were to use the pseudonyms in notices and subpoenas to prospective witnesses, and that depositions be conducted using pseudonyms when deponents were unacquainted with the plaintiffs. Reference to plaintiffs by pseudonyms was mandatory in all transcriptions of depositions.⁷²

As this protective order suggests, parties and courts are, in certain circumstances, willing to go to considerable lengths to conceal plaintiffs' identities during discovery. Parties are expected to confer with each other to draw up a mutually acceptable protective order before they commence discovery.⁷³ When they cannot agree and have made their respective arguments before the court, the court must resolve the dispute, balancing one party's need for information against the harm that may occur if the information is disclosed. The following case studies indicate how complex in reality that task can be.

B. Case Study of Algerian Plaintiffs

In this case, pseudonymous Algerian nationals, many of whom are independent political activists and intellectuals, have alleged that a radical Islamic opposition group and its purported leader are responsible for a host of human rights violations committed in the context of an ongoing, brutal armed conflict in Algeria between the government and

71. *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993).

72. *Id.* at 235–36.

73. Fed. R. Civ. P. 26(f).

opposition forces.⁷⁴ Plaintiffs' allegations include crimes against humanity, summary execution, torture, arbitrary detention, hostage-taking, and violence against women. Some plaintiffs continue to reside in Algeria, while others have fled the country. All fear reprisal should their identities be made known. The individual claimed by plaintiffs to be the organization's leader is in the custody of the Immigration and Naturalization Service (INS), seeking political asylum in the United States. Not surprisingly, the organizational defendant defaulted early on, but the individual remains and continues with his defense. Plaintiffs are suing on behalf of themselves and deceased relatives, and are located both in and outside Algeria. All requested and received an *ex parte* order permitting them to file anonymously because they feared retaliation were their identities to become known. All seek punitive and compensatory damages.

The *ex parte* order permitted plaintiffs to conceal their true names from the defendants as well as the public, an allowance that distinguishes this case from those suits in which anonymous U.S. national plaintiffs were suing private parties.⁷⁵ While the defendant's counsel expressed reservations about the validity of this order, counsel does not appear to have opposed it actively.⁷⁶ However, after the court granted the plaintiffs jurisdiction, the defendant's attorneys sought disclosure of plaintiffs' names and addresses for purposes of taking depositions during discovery.⁷⁷

In response, counsel for the plaintiffs did not question the contention that at some point during the pre-trial stage they would be obliged to reveal plaintiffs' identities to enable the defendant to

74. All background and claims are from Amended Complaint, *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998) (No. 96-02792) (filed June 25, 1997).

75. See, e.g., *James*, 6 F.3d 233; *Doe v. Shakur*, 164 F.R.D. 359 (S.D.N.Y. 1996); *Doe v. Bell Atl. Sys. Serv., Inc.*, 162 F.R.D. 418 (D. Mass. 1995); *Doe v. United Servs. Life Ins.*, 123 F.R.D. 437 (S.D.N.Y. 1988); *Doe v. Hallock*, 119 F.R.D. 640 (S.D. Miss. 1987).

76. Defendant Haddam's Reply in Support of Motion for Disclosure of Plaintiffs Names and Addresses and Opposition to Motion for Consecutive Discovery, *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998) (No. 96-02792) (filed Mar. 9, 1998) [hereinafter Defendant's Reply]. Reasons for questioning the *ex parte* order's validity are unclear. It may have been because it was not issued by a judge of the court where the complaint was filed.

77. *Id.* at 2-5; Transcript of Motion Hearing at 13, *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998) (No. 96-02792) (transcribed on Mar. 25, 1998) [hereinafter Transcript].

prepare his defense adequately. Rather, plaintiffs' attorneys strove to indicate when that point should be by dividing the issues of the case into two broad categories.⁷⁸ The first category concerned plaintiffs' allegations that the defendant led an organization that conducted a campaign of atrocities against Algerian civilians. Identities of individual plaintiffs were irrelevant to these allegations, the attorneys asserted. The second category encompassed the specific harms that plaintiffs claimed they suffered because of that campaign. "As to this category," plaintiffs' counsel acknowledged, "it may become necessary for defendant to obtain plaintiffs' identities in order to defend the suit."⁷⁹

On the basis of their categorization, plaintiffs' counsel proposed a consecutively bifurcated discovery schedule. After noting that trial courts have reasonable discretion over the timing and sequence of discovery, the attorneys recommended:

that both parties first take discovery on the first category of issues. Only after this stage of the litigation would it become necessary for plaintiffs to reveal their identities. Defendant's interest will not be harmed by this approach as he will ultimately receive all the information he needs, and plaintiffs will be revealing their identities only at a point in time where it is clear that such revelation is necessary.⁸⁰

Two related concerns underlie plaintiffs' proposal. One was that earlier revelation of plaintiffs' identities could increase the risks that plaintiffs faced during the course of discovery.⁸¹ The second risk was that the defendant might fail to litigate in good faith after plaintiffs had disclosed their identities, thus "expos[ing] themselves to danger needlessly."⁸² In support of this point, plaintiffs' counsel pointed to a prior suit, *Doe v. Karadzic*, brought under the ATCA in which the de-

78. Plaintiffs' Memorandum in Opposition to Defendant Haddam's Motion for Disclosure of Plaintiffs' Names and Addresses and Motion for Consecutive Discovery at 4, *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998) (No. 96-02792) (dated Mar. 3, 1998) [hereinafter Plaintiffs' Memorandum for Consecutive Discovery]; Transcript, *supra* note 77, at 15–16.

79. Plaintiffs' Memorandum for Consecutive Discovery, *supra* note 78, at 4.

80. *Id.* at 5–6.

81. *Id.* at 4.

82. *Id.* at 4; Transcript, *supra* note 77, at 8, 22–23.

fendant, Radovan Karadzic, had defaulted just before the discovery process was to begin.⁸³

Not without foundation, the defendant's counsel took exception to reliance on the *Karadzic* case to make insinuations about their client.⁸⁴ They also objected to plaintiffs' proposal on three grounds. The first was technical: the suggested bifurcated sequencing offended a provision in Rule 26 designed to check the extent to which one party's discovery may delay another's.⁸⁵ The second concerned fairness: plaintiffs' counsel would be able to conduct discovery to support their claims while the defendant would effectively be deprived of defending against such claims.⁸⁶ The third related to convenience: consecutive bifurcation might require two trips to Algeria instead of one.⁸⁷

An examination of the defendant's objections shows that only the third line of reasoning has any possible merit. The first objection overlooks the broad discretion Rule 26(c) as a whole permits courts, "for good cause shown," to specify the terms and conditions of discovery.⁸⁸ With respect to the second objection, plaintiffs' attorneys were not imposing any more constraints on defendant's counsel than they were on themselves. Their suggested categorization delimited the scope of inquiry in each segment of discovery for both parties alike, and nothing in this proposal created an unfair advantage for the plaintiffs. Only the third objection of the defendant's counsel has possible merit. Given plaintiffs' concerns about the security of their lives, however, the additional time and cost of a second trip to Algeria appears relatively minor.

On the other hand, plaintiffs' rationale for consecutive bifurcation of discovery is not entirely persuasive either. In addition to the demurral of the defendant's attorneys, it may be noted that the de-

83. Plaintiffs' Memorandum for Consecutive Discovery, *supra* note 78, at 4; Transcript, *supra* note 77, at 8, 23. In *Doe I v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994), plaintiffs victimized by forces allegedly under the control of Bosnian-Serb leader Radovan Karadzic sought injunctive relief and damages for personal injuries suffered as a result of, *inter alia*, genocidal acts, extrajudicial killings, rapes, and acts of torture.

84. Transcript, *supra* note 77, at 23; Defendant's Reply, *supra* note 76, at 4-5.

85. Defendant's Reply, *supra* note 76, at 2.

86. *Id.*

87. Transcript, *supra* note 77, at 35.

88. Fed. R. Civ. P. 26(c).

defendant in this suit, unlike in *Karadzic*, is in the United States (and trying to remain so) and is subject to the court's sanction power. While there is no gainsaying the risks to plaintiffs from possible inadvertent or deliberate disclosure of their true names to those who would do them harm, it is unclear that delaying identification would significantly reduce those risks. The additional time proposed could even affect plaintiffs in a manner opposite to that envisioned by their attorneys. Conceivably, the parties' investigation in the first phase of plaintiffs' proposed discovery schedule might put plaintiffs' enemies on heightened notice, and thus in a potentially advantageous position to learn plaintiffs' true names were there a second phase. However, there may be circumstances where consecutive bifurcation, as plaintiffs' counsel suggested, might be efficacious. One can imagine its utility were there a reasonable expectation that the social conditions of the location where discovery was to occur might improve in the foreseeable future. Unfortunately, this does not appear to be the case in Algeria.

Moreover, there were alternative approaches to bifurcation, including one suggested by the defendant's counsel: for both parties to pursue discovery in parallel fashion under a mutual "confidentiality order."⁸⁹ Under this order, only the defendant's attorneys and designated experts or consultants, not the defendant, would have access to plaintiffs' identities and locations, which would not be disseminated or revealed in court papers unless the documents were placed under seal.⁹⁰ In addition, plaintiffs' counsel could mark any deposition as confidential.⁹¹ However, the defendant's proposed order went further because it also sought comparable terms of confidentiality for information regarding the defendant that was not public, notably the identities and locations of his relatives and political associates.⁹² One particular concern of the defendant was to conceal telephone records that indicated who he had called in Algeria from the INS detention center.⁹³ Given their client's opposition activities, his attorneys argued, the physical security of those with whom he

89. Defendant's Reply, *supra* note 76, at 1.

90. Confidentiality Order at 3, in Defendant Haddam's Plan for Parallel Discovery, *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998) (No. 96-02792) (dated Apr. 22, 1998) [hereinafter Proposed Confidentiality Order].

91. *Id.*

92. *Id.* at 1-3.

93. Transcript, *supra* note 77, at 39-40.

was connected might be jeopardized were such information made available to anyone other than plaintiffs' counsel and experts or consultants who they retained.⁹⁴

Plaintiffs' attorneys balked at this proposed blanket confidentiality order. One objection lay in the protest that the defendant was endeavoring to "have this court treat him and the plaintiffs on exactly the same footing in this case."⁹⁵ But in granting plaintiff pseudonymity while the defendant's name became, as a matter of public record, widely associated with charges of severe human rights violations, the court had already skewed the playing field. The premise of plaintiffs' argument—that still less equal "footing" was warranted because the defendant was an accused perpetrator, whereas their clients were the "targets" of a viciously violent campaign—seems to ignore the point that, however heinous the allegations of human rights abuses are against the defendant, he has only been charged with, not found liable for, those abuses.

Plaintiffs' attorneys also asserted that there was no demonstration of "good cause" necessitating confidentiality for the defendant, who had little to lose given that he was already publicly identified.⁹⁶ This counter-argument overlooks the defendant's essential concern, which was the safety of family members and associates. That the defendant failed to make a "good cause" showing of persuasive specificity is perhaps a stronger objection. The requirements for defendants in these circumstances should be the same as for plaintiffs, including affidavits from parties, lawyers, and outside experts as well as reports on relevant human rights and political situations. Absent specific threats, the court must make a judgment based on information that is incomplete, but nonetheless may be sufficient to establish a reasonable presumption of danger. In the present case, considering the extremely volatile and violent context of Algerian society and politics, the defendant's role as an opponent of Algeria's government, and the possibility of harm to non-parties connected to the defendant, this presumption seems reasonable.

94. *Id.*

95. Memorandum in Opposition to Defendant's Motion for a Confidentiality Order for All Discovery and Response to Defendant's Motion to Quash Plaintiffs' Third Party Subpoena to the INS at 10, *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998) (No. 96-02792) (dated Apr. 28, 1998) [hereinafter Memorandum in Opposition to Defendant's Motion].

96. *Id.* at 2-5.

Lastly, plaintiffs' counsel objected to the defendant's proposed order on the ground that it unduly infringed on their ability to communicate with their clients.⁹⁷ Further, plaintiffs argued that although protective orders that limit the extent to which counsel may share commercial information with their clients are not uncommon, constraints on communication between parties and their attorneys in other contexts—in order to safeguard witnesses, for instance—are subject to a high standard.⁹⁸ The plaintiffs pointed to a ruling of the U.S. Court of Appeals for the District of Columbia Circuit, which held that these orders are granted only:

when serious harm to a party or to the community cannot be avoided without either forbidding discovery altogether or curtailing communication between one of the litigants and his attorney regarding discovered materials [T]he court must be confident that the potential injury is substantial and cannot be prevented through the use of any device less restrictive of a party's access to his lawyer.⁹⁹

Several factors in this case suggest that the proposed order would not be inappropriate, however. First, the “potential injury” is “substantial.” Second, the court lacks concrete information about threats to physical security—due to the volatility of the situation inside Algeria, the geographic distance, and the variety of people's particular vulnerabilities. This renders the efficacy of “less restrictive” devices uncertain and, as above, may well argue for a presumption favoring more rather than less protection.¹⁰⁰ Third, under the defendant's proposal the constraints on attorney-client communication would apply to both parties and create no unfair advantage for either.

Furthermore, as specified in the order that the court eventually issued, there are means to address plaintiffs' concern about adequate case preparation (a concern that is equally relevant to the de-

97. *Id.* at 6–8.

98. *Id.* at 6. For more information on this subject, see Memorandum in Support of Plaintiffs' Proposed Protective Order: Exhibits in Support Thereof at 9–11, Nat'l Coalition of Gov't of the Union of Burma v. Unocal Inc., 176 F.R.D. 329 (C.D. Cal. 1997) (No. 96-6112-RAP) (dated May 1, 1998) [hereinafter Memorandum in Support of Plaintiffs' Proposed Protective Order].

99. Memorandum in Opposition to Defendant's Motion, *supra* note 95, at 6 (quoting *Doe v. District of Columbia*, 697 F.2d 1115, 1120 (D.C. Cir. 1983)).

100. *Id.*

fendant).¹⁰¹ The court's order incorporated several key suggestions from the defendant's proposal. To begin with, it provided for a parallel, not consecutive, discovery process. It also mandated a designation of confidentiality for all discovery material containing names, addresses, telephone numbers, or "other identifying information" of *both* parties or "of any person associated with them," permitting only parties' counsel and designated colleagues unencumbered access.¹⁰² Wider dissemination or distribution by counsel of any confidential material is proscribed, unless those individuals to whom such material is to be disclosed first sign a "letter of agreement" binding them to respect the terms of the order.¹⁰³ All papers filed with the court containing confidential information are to be kept under seal.¹⁰⁴

However, to allow parties' counsel latitude to challenge the confidentiality of particular information—including enabling them to discuss it with their clients—the order states:

If counsel for any party believes that "good cause," "sufficient certainty of harm" and "absence of a less restrictive alternative" does not exist to justify protection of any information designated as confidential, or that, in order to conduct discovery or prepare the case for trial, there is a need to disclose the information beyond that authorized by this Order, counsel may move to lift or modify the protection afforded by this Order, in which case the party seeking this change in the Order bears the burden of showing why the Order should be changed.¹⁰⁵

Both parties will doubtless wish to take advantage of this provision, and disputes will arise that the court must settle. To the degree that it places similar demands on the defendants' and plaintiffs' attorneys, it will likely take more time and energy than the alternative suggested by the latter. But if the blanket order sacrifices efficiency, it serves to enhance a higher priority of physical security, and does so with appropriate equitability.

101. Confidentiality Order, *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998) (No. 96-02792) (filed Aug. 25, 1998).

102. *Id.* at 1–2.

103. *Id.* at 3–4.

104. *Id.* at 5.

105. *Id.* at 4.

With respect to the issue of plaintiffs' identities, the order strives to balance the demands of plaintiffs and the defendant's attorneys. The defendant's counsel was adamant that they would need plaintiffs' identities for depositions, and at a status conference the court appeared to agree.¹⁰⁶ But the court was apparently willing to delay disclosure for an additional period of time, for the order provides that plaintiffs' true names "need not be disclosed . . . pending further order of this Court," a provision that effectively permits the plaintiffs to remain anonymous until after they have answered interrogatories.¹⁰⁷ In addition, while it seems highly likely that for practical reasons plaintiffs will reveal their identities to defendant's counsel during the deposition phase, the order does contain a provision to give an added measure of self-protection for both parties: "In any deposition taken in this action, any party, plaintiff or defendant, through counsel, may designate any testimony Confidential Material by notifying opposing counsel orally on the record, or later, in writing, designating the page and line numbers of the testimony deemed confidential."¹⁰⁸ This allows the parties discretion to choose what constitutes "identifying information" for purposes of confidentiality during depositions.

Nonetheless, this protective order leaves important and pertinent issues unexplored. Specifically, the limits are unclear as to how many or which individuals parties' counsel may designate to receive plaintiffs' identifying information. The same problem is relevant to the question of which third party witnesses may be permitted to have confidential information about the plaintiffs or the defendant's associates, even if those witnesses sign the "letter of agreement" mandated by the court. Significantly, the efficacy of such a letter over an Algerian citizen in Algeria is dubious, at best. Precautions might be considered to avoid having enemies of either party monitor attorneys' movements as they conduct depositions in Algeria. Restrictions could be necessary on who can act as translators. "Identifying information" might be more thoroughly defined to include, for example, photographs of the plaintiffs' or defendant's associates. Appointment of a "special master" could be useful in helping the court render informed

106. Memorandum in Support of Defendant Haddam's Proposed Confidentiality Order at 2, *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998) (No. 96-02792) (dated July 7, 1998).

107. Proposed Confidentiality Order, *supra* note 90, at 1-2.

108. *Id.* at 2-3.

decisions amidst the parties' various assertions and counter-assertions.

Because such issues were not addressed by the parties or the court, the order offers no response to or guidance about these issues. These unresolved issues present practical challenges whose difficulty will almost certainly render any solution less than completely satisfactory to either party. How a court and parties have endeavored to address many of these challenges in a different case will be examined in the following case study.

C. Case Study of Burmese Plaintiffs

In this case (actually a composite of two nearly identical cases), Burmese¹⁰⁹ nationals are pseudonymously suing a multinational petroleum firm for its alleged complicity in human rights abuses committed by Burma's military government in connection with construction of a gas pipeline that runs through plaintiffs' homeland and into Thailand.¹¹⁰ The allegations include crimes against humanity, forced labor, forced relocation, wrongful death, torture, arbitrary detention, and violence against women.¹¹¹ Burma's government and a state-owned gas company were originally named as defendants, but were later dropped after the court granted them sovereign immunity.¹¹² However, the corporate defendant, which is based in the United States, remained when the court ruled that it had jurisdiction over the suit.¹¹³ The plaintiffs are farmers from Burma who have had to flee their villages in the vicinity of the Thai-Burmese border, and are seeking injunctive relief as well as punitive and compensatory damages. All fear possible retribution from the

109. Please note that the ruling military elite in Burma created the State Law and Order Restoration Council (SLORC) which imposed martial law on Burma and renamed it "Myanmar" on September 18, 1988. This Comment will refer to Myanmar as "Burma" because the relevant case dealing with the Burmese nationals uses the name Burma throughout the court opinions.

110. Plaintiffs' First Amended Complaint for Damages and Injunctive and Declaratory Relief at 3-4, *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (No. 96-6959-RAP) (dated Apr. 4, 1997) [hereinafter Plaintiffs' First Amended Complaint]; *Nat'l Coalition Gov't of the Union of Burma v. Unocal Inc.*, 176 F.R.D. 329, 335-36 (C.D. Cal. 1997).

111. Plaintiffs' First Amended Complaint, *supra* note 110, at 3-4.

112. *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 888 (C.D. Cal. 1997).

113. *Id.* at 889-95.

Burmese government and Thai authorities if their identities are disclosed. Burma's regime is well known for its suppression of dissent in any form, while the Thai government's treatment of Burmese refugees has not been consistently benign.¹¹⁴ Both countries' leaders have been committed to the pipeline project for nearly a decade.¹¹⁵

As in the Algeria case, the plaintiffs filed their complaint anonymously and concurrently sought an *ex parte* order from the court to proceed under pseudonyms, which they received. Also, as in the Algeria case, disputes over an appropriate protective order and disclosure of plaintiffs' identities and locations did not begin until after the jurisdictional ruling. The crux of the matter was not whether plaintiffs would reveal such information to the defendant's counsel for purposes of discovery, because plaintiffs' lawyers from the outset appeared willing to do this at a relatively early phase.¹¹⁶ In contention was the manner in which the defendant's attorneys could use the information during discovery. Plaintiffs' attorneys asserted in a memorandum that "the risks of inadvertent disclosure stem not so much from the relationship between [the defendant's] counsel and their client, but rather from the nature of the investigation [counsel] proposes to conduct."¹¹⁷ Needless to say, plaintiffs' attorneys were concerned that plaintiffs' identities might fall into the hands of the Burmese or Thai governments. Accordingly, they wanted to establish terms under which the defendant's lawyers could employ local investigators, depose plaintiffs and their witnesses, communicate with additional witnesses, and obtain otherwise discoverable material in a way that would not put plaintiffs and their families in jeopardy.

As part of their effort to address these issues, plaintiffs' attorneys said early on they were willing to release plaintiffs' identifying information to the defendant's counsel.¹¹⁸ A definition of "identifying information" was reached at the initial stages as well: true names and current addresses of plaintiffs and their families, photographs or other pictorial likenesses of plaintiffs, and tape recordings

114. See EarthRights Int'l, Total Denial Continues: Earth Rights Abuses Along the Yadana and Yetagun Pipelines in Burma 2-52 (2000).

115. *Id.* at 13-22, 160-67.

116. Memorandum in Support of Plaintiffs' Proposed Protective Order, *supra* note 98, at 5-6.

117. *Id.* at 10.

118. *Id.* at 1-2, 5-6.

of their voices.¹¹⁹ Plaintiffs' attorneys also proposed the appointment of a "special master," provided for in Rule 53 of the Federal Rules of Civil Procedure,¹²⁰ to work within the framework of and help implement a protective order.¹²¹ Special masters are individuals chosen and empowered by a federal court in "exceptional condition[s]" to carry out functions that the court indicates.¹²² These include regulating certain proceedings, requiring the production of evidence and ruling on its admissibility, and procuring as well as examining witnesses under oath. Masters are obligated to submit a report to the court about their activities. The report may contain findings of fact and conclusions of law, with the latter being subject to *de novo* review by a district court upon objection by either party.¹²³ But these enumerated duties are not exhaustive, and Rule 53 has afforded courts considerable latitude to define a master's role. For example, in prior cases courts have authorized masters to oversee discovery, hire experts, conduct informal and *ex parte* hearings, and mediate settlements.¹²⁴

In the present case, plaintiffs' proposal envisioned that a special master would supervise the use of plaintiffs' identifying information by the defendant's counsel during discovery.¹²⁵ The master would approve those individuals the defendant wanted to assist with the process. Furthermore, before they began the portion of discovery in which they sought to use plaintiffs' identifying information in inquiries to third-party witnesses, the defendant's attorneys would have to meet with the master to draw up an investigative plan to minimize potential risks. In assessing and overseeing that plan, the master would consider several factors such as the defendant's need

119. Proposed Stipulation and Protective Order 6 para. 10 (Apr. 13, 1998) (on file with author) (addressing "identifying information").

120. Fed. R. Civ. P. 53.

121. Memorandum in Support of Plaintiffs' Proposed Protective Order, *supra* note 98, at 6.

122. Fed. R. Civ. P. 53(b).

123. Fed. R. Civ. P. 53(c), (e)(1).

124. Margaret G. Farrell, *The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts*, 2 Widener L. Symp. J. 235, 241-42, 252-72 (1997). In this article, Professor Farrell has compiled a long list of cases involving a special master in these and other capacities. In addition, Professor Farrell analyzes several such cases in depth.

125. Memorandum in Support of Plaintiffs' Proposed Protective Order, *supra* note 98, at 6.

for the inquiry, its likelihood of generating admissible evidence, and plaintiffs' security interests.¹²⁶ The procedure allowed for *ex parte* communications between the master and both parties, and indicated that the master could travel to Asia when required, including to accompany defendant's counsel during discovery. Part of the rationale for this proposal was that the role of a master was well suited to provide responsive attention to unanticipated contingencies with respect to both the defendant's needs and plaintiffs' circumstances.¹²⁷

The defendant's attorneys vigorously opposed this proposal. First, they argued it would compel them to "cede control over [their] investigation" to a special master, who would be entitled to make "unreviewable decisions" affecting their right to defend the suit in violation of both Rule 53 and Article III of the Constitution.¹²⁸ They countered that "at most a special master could only issue a report to the Court making recommendations as to reasonable restrictions that might be imposed on [the defendant's] method of investigation."¹²⁹ Second, they protested that the process of ongoing interaction with and supervision by a master would be "so onerous as to obviate any possibility that [the defendant] could conduct an effective investigation."¹³⁰ Finally, they denied that there was any "exceptional condition" necessitating the appointment of a master.¹³¹

A close analysis shows that the first and second objections overstate the plaintiffs' suggestion and understate federal courts' delegatory authority. The proposal did not oblige the defendant to give up all control of the investigation and it required the defendant to work with the master to develop a plan that attempted to balance

126. *Id.* at 6–7.

127. *Id.* at 8.

128. Response of Unocal Corporation, John Imle, & Roger C. Beach to Plaintiffs' Proposed Protective Order Governing the Treatment of Identities of Plaintiffs and Certain Witnesses at 2, *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (No. 96–6959–RAP) [hereinafter Response] (alleging that the plaintiffs were asking that the special master be given "powers that simply are unavailable under the Constitution or the federal rules. Under no circumstance consistent with the Due Process Clause or our adversary system of justice . . . may a special master have the authority to conduct Unocal's investigation on behalf of Unocal. Nor, consistent with Article III, may a special master render binding decisions as to what [the defendant] may do to investigate plaintiffs' claims.").

129. *Id.* at 4.

130. *Id.* at 5.

131. *Id.* (quoting Fed. R. Civ. P. 53(b)).

the interests of both parties. Nor did plaintiffs' counsel stipulate that the master could render an unreviewable decision binding on the defendant. Rather, they acknowledged that "the Court has ultimate authority over the Special Master,"¹³² a relationship Rule 53 makes clear by permitting courts to "specify and limit the master's powers" as well as to designate the scope, manner, and timeframe of a master's duties.¹³³ In fact, the rule for a special master is a reflection of the federal courts' own power to provide themselves with the means to assist and facilitate the execution of their responsibilities.¹³⁴ Nothing in Rule 53, furthermore, prevents the inclusion of a clause in a special master's order of reference that allows for review of that master's rulings upon objection by a party. Indeed, orders of reference in prior cases have contained such a clause.¹³⁵

The constraints imposed by Article III concern a master's capacity to make a determination about the merits of liability in a case without provision for *de novo* review by a district court.¹³⁶ The First Circuit has held that such a determination would violate the Constitution.¹³⁷ But the "fundamental issue of liability" is not the same as the delegation of authority over matters such as pretrial administration and case management.¹³⁸ A common function of special masters is to make recommendations or decisions about discovery issues, and courts are willing to confer wide authority on a special master in this area.¹³⁹ The range of duties the court gave the master in one well known case, *In Re "Agent Orange" Product Liability Litigation*, is illustrative.¹⁴⁰ There the court empowered the master to: rule on all discovery motions;

132. Plaintiffs' Reply to Defendants' Proposed Protective Order at 4, *Doe I v. Unocal Corp.* 963 F. Supp. 880 (C.D. Cal. 1997) (No. 96-6959-RAP) [hereinafter Plaintiffs' Reply].

133. Fed. R. Civ. P. 53(c).

134. Farrell, *supra* note 124, at 246.

135. See, e.g., *In re "Agent Orange" Product Liability Litigation*, 94 F.R.D. 173, 175 (E.D.N.Y. 1982) ("Any action taken or ruling made by the special master shall be subject to review by the court upon application of any party aggrieved by such action or ruling, provided that such application shall be served and filed with the court within 10 days after said action or ruling unless such time shall have been enlarged by the master for good cause.").

136. Farrell, *supra* note 124, at 294.

137. *Id.* at 295 (citing *Stauble v. Warrob, Inc.*, 977 F.2d 690, 695 (1st Cir. 1992)).

138. *Id.* (quoting *Stauble*, 977 F.2d at 695).

139. *Id.* at 256.

140. *In re "Agent Orange"*, 94 F.R.D. at 174.

control scheduling; resolve disputes between the parties over the scope of discovery including questions on attorney work product, expert testimony, and trial preparation materials; issue or modify protective orders relating to discovery; and resolve conflicts regarding interrogatories, depositions, and the production, inspection, and copying of documents.¹⁴¹ Clearly, the master's mandate went far beyond merely drafting and submitting a report to the court. Even if one would not expect that process to be without burdens for the parties, this does not mean *a priori* that it unfairly impeded their investigation during discovery, much less that it was so "onerous" as to obstruct investigation altogether.

Defense counsel's third objection is the denial of any "exceptional conditions" necessitating the appointment of a special master. It is true that the present case does not conform to the pattern of complex litigation—from mass tort claims and product liability suits to antitrust and patent cases—where special masters have typically been appointed.¹⁴² According to Professor Farrell, criteria needed to meet the requirement of exceptionality have included the voluminous quantity of material involved, huge numbers of claims, technical complexity of information, and problematic issues of causation.¹⁴³

Yet it is difficult to deny that this case presents complications that are exceptional in nature, notably severe and unpredictable logistical challenges arising from distance, danger, and variable circumstances. In other contexts, Professor Farrell notes, masters are appointed because they provide various potential advantages from the court's perspective: the ability to devote concentrated time and effort to learning the details of a suit and becoming familiar with litigants and attorneys, relatively flexible schedules that permit travel when necessary, freedom to employ informal processes, and expertise in a relevant field.¹⁴⁴ In sum, masters offer a type of adjudicator who

141. *Id.*

142. Farrell, *supra* note 124, at 248–49.

143. *Id.* at 243–44.

144. *Id.* at 237–38. Professor Farrell does discuss potential problems with the appointment of special masters. *Id.* at 273–84. For example, she notes that masters must be paid by parties and that their costs can be high. On the other hand, she observes that parties and courts often see masters as an efficient and therefore cost effective means of attaining particular goals. *Id.* at 274–75. Furthermore, "although there are no costs imposed on the parties directly when discovery, settlement, matters of account, remedial decrees, and the monitoring of orders are not assigned to a master,

can perform certain tasks in a particularized, nuanced, and responsive fashion that some lawsuits demand for reasons of both efficiency and justice.¹⁴⁵ It is arguable that a case such as this warrants and could benefit considerably from such qualities. Nonetheless, the court ultimately rejected the proposal for a special master without published explanation.

Whether or not the court appointed a master, however, there were additional important discovery issues that divided the parties. One concerned those individuals on the defendant's team who would receive plaintiffs' identifying information. Both parties agreed that this information would be disclosed to a small number of the defendant's attorneys. In turn, the defendant's attorneys proposed that they designate an unspecified number of "qualified" individuals to receive this information.¹⁴⁶ Inclusion in this category was limited to the defendant's employees and experts or consultants who the defendant retained "for purposes of this litigation," provided, *inter alia*, that they were not affiliated with either the Burmese or Thai governments.¹⁴⁷ Additionally, the defendant's counsel proposed that it designate a small number of people to act as investigators. These persons had to meet the requirements of "qualified" individuals, but were to be drawn exclusively from the defendant's workforce.¹⁴⁸ While plaintiffs' attorneys accepted some of these suggestions, they noted that the defense counsel had exempted employees of Burma's state-owned gas company from both categories, which from their standpoint was curious and objectionable. The court had judged the company an arm of Burma's government when it dropped both from the suit on the basis of sovereign immunity, and the company includes high ranking members of the Burmese military in its hierarchy.¹⁴⁹

much higher costs may be incurred by taxpayers when these functions are performed by judges." *Id.* at 275.

145. *Id.* at 241–42, 256–58, 259–60.

146. Proposed Stipulation and Protective Order, *supra* note 119, at 2.

147. *Id.*

148. *Id.* at 4.

149. Plaintiffs' Reply, *supra* note 132, at 6. As was learned after the court issued its protective order, see text accompanying *infra* notes 166–68, the defendant had sought this exception so that it could designate as "qualified" individual employees of the company who had been "seconded" to the defendant's co-venturer to serve as "community liaisons" between that firm and villagers living in the pipeline's construction corridor. Opposition of Defendants Unocal Corporation, John Imle, and Roger C. Beach at

A second issue of contention was to which third party witnesses the defendant's counsel would be permitted to give plaintiffs' identifying information. The defendant's attorneys argued that to test the veracity of plaintiffs' factual allegations they had to be able to give this information (excluding plaintiffs' current location) to relevant witnesses, including members of Burma's military who might have been present during or participated in the alleged abuses.¹⁵⁰ The defendant's counsel also sought to have their investigators visit and interview people from the villages where plaintiffs had formerly resided when the abuses were said to have occurred.¹⁵¹ "[I]n order to place the plaintiffs in context, to learn about their character, and to uncover possible biases and motivations," the defendant's counsel asserted with respect to both sets of witnesses, such investigation was crucial to their defense.¹⁵² To help minimize risks, the defense counsel agreed to visit at least some of the villages without military escort or individuals (including translators) who were current or former officials of Burma's government, again excluding such officials affiliated with the country's state-owned gas company.¹⁵³

Plaintiffs' counsel responded in several ways. They countered the defendant's proposed approach by questioning whether the military officials or villagers interviewed "would later be called as witnesses at trial," and stressed the need to balance the likelihood that their testimony would be offered as evidence against the risks to plaintiffs and third party witnesses.¹⁵⁴ The plaintiff-attorney's concern with incautious or indiscriminate use of plaintiffs' identifying information was valid. But it is a stretch to imply, as plaintiffs' counsel seem to do, that all testimony from these interviews would not be pertinent to the defendant's defense. The difficult task of determining beforehand what relevant evidentiary material might be discov-

5, *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (No. 96-6959-RAP) (filed Aug. 31, 1998) [hereinafter *Opposition*].

150. Unocal Corporation's Memorandum in Support of Proposed Protective Order Governing the Treatment of the Identities of Plaintiffs and Certain Witnesses at 6, *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (Case No. 96-6959-RAP) (dated May 1, 1998) [hereinafter *Unocal Corporation's Memorandum in Support of Proposed Protective Order*].

151. *Id.*

152. *Id.* at 6.

153. *Id.* at 10.

154. Memorandum in Support of Plaintiffs' Proposed Protective Order, *supra* note 98, at 1-2.

ered is not a reason to preclude discovery.¹⁵⁵ Moreover, in cases where political and military conflict may be entwined with alleged violations of law, the defendant has a legitimate interest in unearthing potential ulterior motives. Finally, to address any safety concerns plaintiffs may have, testimony can be offered and admitted as evidence without witnesses appearing at trial under certain conditions.¹⁵⁶

Still, the rationale the defendant's counsel gave for needing to question villagers and soldiers seems more applicable to the former than the latter, for it is reasonable to wonder how likely it is that members of Burma's military will confess to witnessing or participating in the alleged human rights abuses. Thus, plaintiffs' counsel's more pointed protest concerned the defendant's interest in disclosing identifying information to members of Burma's military:

Plaintiffs contend that even in the instances where a plaintiff has identified specific military officials as being the perpetrators of particular acts of violence, it is possible to question the officer without identifying the accuser. For example, [the defendant] could ask if and when the officer was present in the village, whether any villagers were injured and what the circumstances were which caused the injury.¹⁵⁷

On one hand, this argument appears to neglect the need for specificity that would be expected of such testimony. On the other hand, it is important to remember that the soldiers said to have committed the

155. This is an area where supervision and guidance by a special master might have assisted in balancing the parties' contending interests.

156. See, e.g., Fed. R. Civ. P. 32(a)(3)(A) (allowing use of deposition for any purpose at trial if witness is dead); Fed. R. Civ. P. 32(a)(3)(B) (allowing use of deposition for any purpose at trial if witness is at greater distance than 100 miles from place of trial or outside the United States); Fed. R. Evid. 804(b)(1) (deposition testimony admissible if party against whom the testimony is offered previously had the opportunity to develop the testimony). See also *Henkle v. Lindstrom Cleaning & Const. Inc.*, 133 F.R.D. 556, 557 (D. Minn. 1991) (noting that depositions also serve to preserve relevant testimony when the deponent might be unavailable to testify at trial and that neither the Rules of Civil Procedure nor the Rules of Evidence make any distinction between discovery depositions and depositions for use at trial). For a case asserting the value of discovery depositions in a trial, see *Wright Root Beer Co. v. Dr. Pepper Co.*, 414 F.2d 887, 890-91 (5th Cir. 1969) (indicating that it is erroneous to instruct a jury that "discovery" deposition should be given less weight than deposition conducted for use at trial).

157. Plaintiffs' Reply, *supra* note 132, at 7.

violent acts are not on trial. Their ability to identify a given plaintiff may be necessary in some instances to the defendant's case. But in general it is arguably less critical than establishing that certain events occurred at a particular place and time. Where disclosure was deemed imperative, one option might have been to require the defendant's counsel to ask at the outset if the prospective witness recollected the event in question, and what that recollection was, before revealing the plaintiff's identity.¹⁵⁸ This approach would not be effective for investigation in some of the villages, however. Because these villages are so small, even if the defendant's counsel were to refrain from referring to the plaintiffs by name, the inquiry would almost certainly indicate the plaintiffs' identities.¹⁵⁹

Though it largely incorporated the defendant's suggestions, the court's protective order did not fully resolve these disputed issues.¹⁶⁰ With respect to the second issue, the order permitted the defendant's investigators to disclose plaintiffs' identifying information (with the exception of plaintiffs' current addresses) to Burmese military officials.¹⁶¹ It also allowed investigators to visit any location, in or outside Burma and including plaintiffs' current addresses, to conduct identity-specific inquiries about the plaintiffs.¹⁶² There were several constraints stipulated. One prohibited the investigators from travelling in designated areas in Burma with escorts or translators who were current or former employees of Burma's government or the state-owned gas company.¹⁶³ A second was that before releasing identifying information, the investigator had to attempt to ensure (by asking) that the person being interviewed was not a Burmese governmental official.¹⁶⁴ The sufficiency of the latter effort is obviously subject to question.

158. Here too a special master could have played a useful role.

159. Plaintiffs' Reply, *supra* note 132, at 7.

160. See generally Protective Order Governing the Treatment of the Identities of Plaintiffs and Certain Witnesses, *Doe I v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997) (No. 96-6959-RAP) [hereinafter Protective Order].

161. *Id.* at 5.

162. *Id.* at 4-5.

163. *Id.* at 4.

164. *Id.* In addition, the order required all documents filed with the court containing identifying information to be placed under seal. It also required defendant's counsel, "qualified" individuals, investigators, and any person who received identifying information to sign a letter agreeing not to disseminate that information. The efficacy

There was, however, an ambiguity in the order that reflected either the court's lack of attention, the complex nature of the issues, or both. In the section that prevented investigators from using employees of Burma's state-owned gas company as escorts or translators, there was also a provision stating that this company was not considered to be part of the government for the purposes of that section.¹⁶⁵ The court apparently added both changes to the defendant's proposed wording, and the defendant liked neither. From the defendant's perspective, the concern was less the ambiguity than the possibility that it would be unable to designate Burmese "community liaisons" as "qualified" individuals to accompany and translate for investigators.¹⁶⁶

A new round of disputes arose between the parties. Plaintiffs' attorneys attempted to preclude the defendant from using employees of Burma's gas company as "qualified" individuals.¹⁶⁷ They also asked the court to restrict the defendant's investigators from visiting plaintiffs' current addresses.¹⁶⁸ Plaintiffs' counsel argued and offered evidence that the Thai government had a high stake in the pipeline and was cooperating with the Burmese military on the project, and thus that a threat of retaliation existed if the Thai as well as the Burmese authorities learned of plaintiffs' locations.¹⁶⁹ The defendant's attorneys responded that plaintiffs' counsel had failed to demonstrate their claims.¹⁷⁰ It is difficult to imagine how the court examined these assertions and counter-assertions, weighed the merits of each, and made an assessment.¹⁷¹

In any event, although the court denied plaintiffs' requests regarding the "qualified" individuals and the defendant's visits to the camps, it did grant an alternative proposed by plaintiffs' counsel: to

of this measure with respect to some of the potential recipients merits considerable skepticism.

165. *Id.*

166. Opposition, *supra* note 149, at 9. For discussion of the defendant's proposal regarding "qualified" individuals, see *id.* at 42; *supra* notes 147–49 and accompanying text.

167. Opposition, *supra* note 149, at 3.

168. *Id.* at 17.

169. *Id.* at 17–18.

170. *Id.* at 18–20.

171. This is yet another area that a special master might have been especially well suited to help adjudicate.

modify the protective order to allow them to devise and implement a “witness protection” plan.¹⁷² Under this plan, those plaintiffs who wished could be taken to secret locations that would not be revealed to the defendant.¹⁷³ These new locations would situate the plaintiffs in an environment where there were no third parties who might have information relevant to discovery, plaintiffs’ attorneys argued, and the defendant thus had no need for disclosure of the locations. While the plaintiffs’ counsel analogized this plan to witness protection in various criminal cases, a comparison the defendant’s attorneys declared inapposite, the court had a sound basis in the civil judicial context on which to render its decision: the “broad discretion on the trial court [conferred by Rule 26(c)] to decide when a protective order is appropriate and what degree of protection is required.”¹⁷⁴

V. PLAINTIFF PSEUDONYMITY: JUDICIAL PRACTICE AND PUBLIC POLICY

This survey of ATCA suits¹⁷⁵ involving anonymous plaintiffs in a protective order framework warrants a few words of analysis, which in turn opens up more general consideration of policy concerns raised by pseudonymity and protective orders in the context of the U.S. judicial system. The Algerian and Burmese cases seem to mark an extension of the grant of pseudonymity that courts will give from the filing of a complaint up through the jurisdictional ruling. Because plaintiffs sought and were permitted to remain anonymous not only from the public, but also from defendants and their counsel during this period, these suits are distinguishable from those civil cases in which anonymous U.S. national plaintiffs have sued private parties.¹⁷⁶ Presumably, this reflects the courts’ understanding of the severe potential danger to plaintiffs’ security interests in these instances.

172. Personal communication with Tyler Giannini, plaintiffs’ counsel, in Dec. 1998. For obvious reasons, the details of this plan are not publicly available.

173. *Id.*

174. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

175. *See, e.g.*, *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998); *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *Nat’l Coalition Gov’t of the Union of Burma v. Unocal Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997).

176. *See* discussion *supra* Part II.B.

In neither case did the defendants' attorneys show any objection to the assumption that there would be significant restrictions on the degree to which they could communicate and share information with their client (including clients who would likely be reluctant to violate a court's non-disclosure order). In the suit involving Algerian nationals, it was rather the plaintiffs' counsel who protested these restrictions, yet the court agreed to impose them nonetheless.¹⁷⁷ While such limits are not uncommon in cases involving commercial data, they are rare in other litigation contexts. This too is an acknowledgment of the risks involved to plaintiffs' safety and, in the Algerian suit, to that of the defendant and his associates as well.

Still, the Algeria and Burma cases also make clear that, at least with respect to suits where plaintiffs have made individual claims, a defendant's counsel will demand and almost certainly receive conditional disclosure as the proceedings move into discovery. How those conditions are specified in a protective order will doubtless vary according to circumstances. Notwithstanding this variability, however, the situations in Algeria and Burma (and Thailand) are not so different that issues surrounding the protective orders do not overlap. Indeed, it was suggested above that the terms in the order from the suit involving Algerian nationals lacked attention to pertinent considerations addressed in the order regarding the Burmese plaintiffs. One possible explanation for this is the close familiarity that some attorneys for these plaintiffs have with the situation inside Burma and along the Thai-Burmese border—an important advantage that lawyers considering such suits should bear in mind.

Courts too should acknowledge the value of familiarity with local conditions in such complex cases where the stakes are so high. The benefits that appointing a special master might offer in this respect are apparent, for masters are well positioned to carry out their duties in a particularized and responsive fashion that international human rights cases brought under the ATCA appear to demand. In the Burma suit, the defendant's arguments against the appointment of a special master were weak, and the court's unexplained rejection of this suggestion was as unwarranted as it was unfortunate.¹⁷⁸ Courts should be more willing to consider the many merits of using a special master to assist parties during the discovery process in ATCA

177. See Memorandum in Opposition to Defendant's Motion, *supra* note 95.

178. The court's Protective Order, *supra* note 160, included no mention of the subject of a special master.

human rights suits that involve claims and factual matters peculiar to individual plaintiffs.

There must be no illusion about one point, however. While a detailed protective order and a special master may be beneficial, in the U.S. judicial system a defendant's right to pursue discoverable material and prepare a defense may well put in jeopardy the lives of plaintiffs suing under the ATCA. From the outset, plaintiffs' attorneys should make their clients aware of both this potential problem and the limits on a U.S. court's capacity to enforce even those conditions that a given protective order stipulates.

If this appears to be a harsh observation about the U.S. judicial system, the challenge confronting courts in cases such as those involving the Algerian and Burmese plaintiffs must be borne in mind. On both sides of the equation significant policy concerns are integrally connected to decisions made about the law. The emphasis accorded to defendants' due process rights is designed to help preserve the dignity of defendants and, above all, to guarantee to the extent possible against erroneous findings of guilt or liability.¹⁷⁹ William Blackstone said, "[i]t is better that ten guilty persons escape than that one innocent suffer."¹⁸⁰ While defendants in civil actions are not accused of a crime and are thus not threatened with imprisonment, they may be charged with serious civil wrongs such as egregious violations of human rights described in the cases above, and face constraints on their freedom of action (e.g., through injunctions) as well as loss of property.¹⁸¹ Since it is intended to prevent various judicial abuses and improve the quality of court proceedings, the presumptive openness of those proceedings (including parties' identities) likewise aims to ensure that defendants receive a fair and accurate adjudication of claims against them. Additionally, such openness serves to demonstrate the integrity and effectiveness of the judicial system to the general public.¹⁸²

Yet important policy rationales also underlie the federal judiciary's countenancing of plaintiff anonymity. The discretionary practice of permitting plaintiffs to sue pseudonymously emerged and has

179. Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort To Recast the Battle in Criminal Litigation*, 85 *Geo. L.J.* 1691, 1692 (1997).

180. *Id.* at 1691.

181. Steinman, *supra* note 1, at 16.

182. *Id.*

continued because courts recognize the vulnerability of certain claimants—the pregnant, poor, young, and politically or socially marginalized—who are frequently involved in contentious public interest issues.¹⁸³ Without the option of pseudonymity, these individuals and groups would likely be unable or unwilling to seek redress of their grievances, thereby effectively denying them access to the judicial system.¹⁸⁴ The advent of such suits against private, non-governmental defendants intensified the scrutiny given to plaintiff requests for anonymity. It did not, however, lead to a repudiation of the premise that pseudonymity in certain circumstances might be allowed if the alternative was to preclude legitimate claimants from asserting their rights. With respect to ATCA suits, there is no reason to suppose that federal courts' grant of pseudonymity to plaintiffs has not likewise been informed by awareness of these individuals' vulnerability and the assumption that confidentiality is crucial to their capacity to seek redress.

For Professor Arthur Miller, the policy concerns that underlie tension between the interests of litigants and the public with respect to issues of confidentiality are strong arguments that courts must have wide discretion to devise and apply suitable protective orders. “The burden imposed by carefully considering requests for protective orders is justified by the importance of the competing values at stake,” he writes.¹⁸⁵ Thus:

[d]iscretion should be left with the court to evaluate the competing considerations in light of the facts of individual cases. By focusing on the particular circumstances in the cases before them, courts are in the best position to prevent both the overly broad use of protective and sealing orders and the unnecessary denial of confidentiality for information that deserves it, whether or not the information falls within one of the classes for which confidentiality is traditionally sought.¹⁸⁶

A well-crafted protective order can and must ensure that defendants have access to information they need to prepare their de-

183. *Id.* at 43–80.

184. *Id.* at 33–34.

185. Miller, *supra* note 19, at 493.

186. *Id.* at 492 (footnotes omitted). Professor Miller provides a basic outline of his approach to employing protective orders and establishing terms of disclosure within a protective order framework. *Id.* at 490–501.

fense. By the same token, protective orders—of which pseudonymity is sometimes an essential component—help to mitigate the “fear of harm [that] may chill a claimant’s willingness to resort to the courts.”¹⁸⁷

Professor Miller’s perspective is heavily influenced by his sensitivity to the need commercial litigants often have for confidentiality. It bears noting in this regard that he is well aware that protective orders offer no ironclad guarantee that trade or other economic secrets will not be inadvertently revealed during the discovery process. “A business entity caught up in litigation simply must assume the risk of disclosure,” he asserts.¹⁸⁸ Yet “its best—indeed, its only—hope of protecting its property is the court’s willingness to exert its full authority to prevent further dissemination of the information.”¹⁸⁹ The parallel between this predicament and that facing ATCA plaintiffs is too striking to ignore, with the obvious difference being that in commercial cases the stakes involve potential loss of property, while in ATCA suits they concern possible loss of life. The value of confidentiality that a protective order can afford is surely no less great in the latter instances than it is in the former.

If judicial discretion over protective orders serves to ensure that parties’ interests are adequately evaluated, to enhance the effectiveness of case management, and to uphold wider societal values that inhere in these two objectives, it provides another benefit in the context of ATCA suits. It cannot be forgotten that there are attributes that differentiate ATCA suits from those involving pseudonymous plaintiffs and protective orders in the purely domestic sphere: ATCA claimants are non-U.S. nationals, the public interest issues concern international human rights standards, and the source of plaintiffs’ vulnerability lies in the often exceptionally dangerous conditions in which they and their families live. From this angle, courts’ willingness and ability to prescribe terms of confidentiality for plaintiffs suing under the ATCA help to strengthen enforcement of international human rights. As tools that can facilitate adjudication of human rights abuses and contribute to deterring future violations, pseudonymity and protective orders play a worthy role in support of human dignity in the world community.

187. *Id.* at 446.

188. *Id.* at 470.

189. *Id.* at 479.

VI. CONCLUSION

In recent years, federal courts have been permitting non-U.S. nationals to sue anonymously under the ATCA in order to seek redress with respect to violations of international human rights. This Comment has explored the challenges facing pseudonymous plaintiffs and their counsel who sue under the ATCA. In the context of the U.S. judicial system, these challenges stem not so much from the emphasis on openness, but from the appropriately high priority accorded defendants' due process rights. Because the circumstances in which plaintiffs live may be fraught with extreme physical risk, the tension between defendants' rights and plaintiffs' security interests is acute in these suits, especially so during discovery when the risk of inadvertent disclosure is at its greatest. Furthermore, while the federal judiciary has the authority to devise detailed protective orders that strive to address plaintiffs' particular situations, the distances that may separate courts and ATCA plaintiffs impinge on the former's ability to superintend such orders and to ensure the latter's safety. In these respects, international human rights cases brought under the ATCA differ considerably from pseudonymous litigation in which the claims and parties are rooted in the purely U.S. domestic sphere.

Nevertheless, the foregoing is not meant to dissuade plaintiffs or their counsel from bringing ATCA human rights suits, but to raise awareness so that decisions and expectations are better and more realistically informed. Ultimately, it is and must always be the plaintiff's choice whether or not to proceed. For those who are courageous enough to do so, and are able to do so under the ATCA, federal courts' willingness to grant pseudonymity and structure the use of pseudonyms in a protective order framework is both justified and just.