



Office of the Public Defender State of Hawaii

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



February 17, 2011, 2:00 p.m.

RE: H.B. 944, HD1: Relating To Family Courts

Chair Keith-Agaran and Members of the Committee:

The Office of the Public Defender opposes this measure.

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

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

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

We oppose the passage of H.B. No. 944, H.D. 1. Thank you for the opportunity to be heard on this matter.



Committee: Committee on Judiciary
Hearing Date/Time: Thursday, February 17, 2011, 2:00 p.m.
Place: Conference Room 325
Re: Testimony of the ACLU of Hawaii in Opposition to H.B. 944, HD1,
Relating to Family Courts

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

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in opposition to H.B. 944, Relating to Family Courts.

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

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

Although the Hawaii Supreme Court has never ruled on the applicability of the balancing test in family court proceedings (*see Campbell, supra*), our state family courts *already* have the authority to apply an appropriate balancing test to determine whether and when to seal portions of family court proceedings and records. Accordingly, the proposed bill is unnecessary. Moreover, it cannot be disputed that any bill that required “Doe” identification and sealing in alleged domestic violence cases would be facially unconstitutional. *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 608 (1978) (striking as unconstitutional a

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Chair Keith-Agaran and Members Thereof
February 17, 2011
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Massachusetts statute that required judges, at trials for specified sexual offenses involving victims under age of 18, to exclude press and general public from courtroom).

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

Thank you for this opportunity to testify.

Sincerely,
Laurie Temple
Staff Attorney
ACLU of Hawaii

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To: The Honorable Gilbert S.C. Keith-Agaran, Chair
HOUSE COMMITTEE ON JUDICIARY

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

Re: HB944 - SUPPORT

Hearing Date: 02-17-11, 2:00PM in conference room 325

The Hawai'i State Coalition Against Domestic Violence (HSCADV) is a statewide coalition of domestic violence programs and shelters. HSCADV and its member agencies advocate for policies and services to end domestic violence in Hawai'i. On behalf of our member agencies, we thank you for the opportunity to testify in support of HB944.

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

HB944 allows qualifying "Jane Doe"/"John Doe" documents and confidential court records in domestic abuse cases. We support the intent of HB944 and its attempt to protect survivors who may be vulnerable to exposure, embarrassment or danger due to court proceedings.

Thank you for your consideration.



**UNIVERSITY OF MARYLAND
SCHOOL OF LAW**

WRITTEN TESTIMONY OF DANIELLE KEATS CITRON,
Professor of Law, University of Maryland School of Law,
Affiliate Fellow of Yale Information Society Project,
Affiliate Fellow of Stanford Center on Internet and Society

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

Hearing on House Bill 944, “Jane and John Doe Filings; Domestic Abuse”

Before the Senate, Twenty-Sixth Legislature, 2011, State of Hawaii.

CYBER HARASSMENT

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

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

CURRENT REALITIES

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

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

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

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

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

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

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

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

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

THREATS TO PRIVACY

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

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

H.B. NO. 944

House Bill 944 aims to protect the privacy of cyber harassment victims so that they can bring lawsuits against their attackers. It allows victims who have already received an order of protection, temporary restraining order, or protective order against the perpetrator to sue as Jane or John Does in cases involving domestic abuse. The law itself is quite narrow, only providing these protections to cyber harassment victims who have already been recognized by a court as deserving of a protective order in the context of a domestic violence matter. Although I believe that the proposed legislation should be expanded to include other victims of cyber harassment, the bill serves a crucial role in permitting victims to bring law's coercive and moral power to bear against cyber harassers. Because the bill allows courts to weigh the victim's interest in privacy against the public's interest in disclosure, it both protects privacy and transparency.

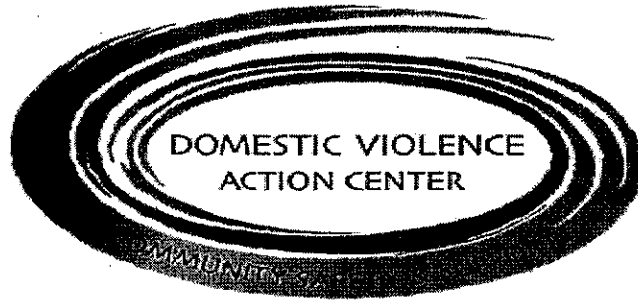
⁷ Azy Barak, *Sexual Harassment on the Internet*, 23 SOC. SCI. COMPUTER REV. 77 (2005).

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

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

CONCLUSION

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



February 16, 2011

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

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

Ref: H.B. 944 Support
Hearing Date: February 17, 2011, 2:00pm, Conf. Rm #325

Please accept this testimony in support of H.B. 944. Privacy and safety are key for victims of intimate partner violence. Seeking assistance from community agencies is a big step. Seeking remedy in court is very frightening. Exploitation and harassment of victims by their abusers is not uncommon and very often, immobilizes victims.

The passage of this Bill will provide an option to victims who fear exposure, embarrassment or danger. It is a very daunting notion to bring one's private life into the purview of public discourse and scrutiny.

Whenever we can pave the way for victims to find resolution, make a successful escape or allow her to regain her dignity, it is our view that should be done.

Thank you for giving H.B. 944 your full consideration.

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JUDtestimony

From: Dara Carlin, M.A. [breaking-the-silence@hotmail.com]
Sent: Tuesday, February 15, 2011 8:37 AM
To: JUDtestimony
Subject: HB944 HD1 to be heard Thursday, 02/17/11, at 2:00pm in Room 325

TO: Representative Keith-Agaran, Chair
Representative Rhoads, Vice Chair
Judiciary Committee Members

FROM: Dara Carlin, M.A.
Domestic Violence Survivor Advocate
881 Akiu Place
Kailua, HI 96734

DATE: 02/17/11

RE: SUPPORT for HB944 HD1

Good Afternoon Representatives. I would just like to offer my voice of SUPPORT for HB944 HD1. Thank you!

Respectfully,

Dara Carlin, M.A.
Domestic Violence Survivor Advocate